

# SUPREME COURT OF QUEENSLAND

CITATION: *Grace Buncle Pty Ltd v Ralph Lauren No 57 Pty Ltd* [2018] QSC 24

PARTIES: **GRACE BUNCLE PTY LTD ACN 605 600 959 AS TRUSTEE OF THE CINDY FLEMING TRUST**  
(plaintiff)  
v  
**RALPH LAUREN NO 57 PTY LTD ACN 079 745 056 AS TRUSTEE FOR THE JOHN JAMES TRUST**  
(defendant)

FILE NO/S: SC No 4589 of 2016  
SC No 4849 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 23 February 2018

DELIVERED AT: Brisbane

HEARING DATE: 22 August 2017

JUDGE: Bond J

ORDERS: **The orders of the Court are that:**

- 1. Upon the proper construction of the terms of the compromise agreement dated 9 March 2017, the phrases “the Plaintiff’s interest in the relevant property”, “the Plaintiff’s interest in the Property” and “the Plaintiff’s interests in the Properties” should be construed as meaning the plaintiff’s proprietary interests, whether legal or equitable, in the relevant Property.**
- 2. The plaintiff’s application filed 5 July 2017 must be dismissed.**
- 3. The parties will be heard on the question of costs.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where an interim compromise agreement was entered into between litigants – where evidence of steps taken in the litigation admissible as context in aid of construction – where the proper construction of the phrases “the Plaintiff’s interest in the relevant property”, “the Plaintiff’s interest in the Property” and “the Plaintiff’s interests in the Properties” is in dispute – whether the phrases

should be construed as meaning the plaintiff's proprietary interests, whether legal or equitable, in the properties

EQUITY – TRUST AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – MISCELLANEOUS OTHER POWERS, DUTIES AND LIABILITIES – OTHER PARTICULAR CASES – where an agreement was entered into by the plaintiff and the defendant, each in their capacity as trustee – where the agreement delegated a broad discretion to an agent for sale of real property – where the respective trust deeds granted power to the trustees to act as if they were the beneficial owner of the trust property – whether the extent of the contractual delegation of discretion to the agent for sale was authorized by the trust deeds– whether the trustees acted *ultra vires* when they entered into the agreement – whether the agreement is void

*Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 (Cth)*, s 34

*Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 (Cth)*, s 47

*Corporations Act 2001 (Cth)*, s 124

*Commissioner of State Revenue v Danvest Pty Ltd* [2017] VSCA 382, cited

*Commissioner of State Taxation of the State of South Australia v Cyril Henschke Pty Ltd* (2010) 242 CLR 508, cited

*Glover v Willert* (1996) 20 ACSR 182, cited

*Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, applied

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

*Rankine v Rankine* [1998] QSC 48, applied

*Re Triffitt's Settlement* [1958] Ch 852 at 861, followed

*Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, applied

*Trustees of Kean Memorial Trust Fund v A-G (SA)* (2003) 86 SASR 449, cited

*United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673, cited

*Victoria v Tatts Group Limited* (2016) 328 ALR 564, cited

*Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, cited

*Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, cited

COUNSEL: P Hackett for the plaintiff  
D Kelly QC, with S Williams, for the defendant

SOLICITORS: Hawthorn Cuppaidge & Badgery Solicitors for the plaintiff

## Wilson Lawyers for the defendant

**Introduction**

- [1] The plaintiff and the defendant (each in their capacity as a trustee) are parties to proceedings 4589 of 2016 and 4849 of 2016, which are being managed by me on the commercial list. It is convenient to refer to those proceedings as, respectively, the first proceeding and the second proceeding.
- [2] On 9 March 2017, an interlocutory application in each proceeding was listed to be heard by me. Although affidavits and written submissions were filed in readiness for the hearing, argument did not proceed. Instead on that day the parties entered into a compromise agreement, styled “Terms of interim compromise”.
- [3] The compromise agreement was contained in a document bearing the court heading of the first proceeding. A handwritten amendment referred to the court file number of the second proceeding. The document was expressly signed on behalf of all the parties in both proceedings by their respective solicitors.
- [4] The compromise agreement sought to achieve these matters:
  - (a) first, by clause 1, to express agreement for the joint appointment of a named forensic accountant so that that person could –
    - (i) address certain issues raised in a proposed amended statement of claim in the first proceeding and in certain affidavits filed on behalf of the plaintiff in the first proceeding; and
    - (ii) conduct a peer review of an expert opinion expressed in relation to the fair value of certain property referred to in the second proceeding and if necessary, provide an alternate valuation report;
  - (b) second, by clauses 2 to 9, to set out a mechanism by which an independent person, Mr Sheehy, would be appointed to sell certain identified real property referred to (or proposed to be referred to)<sup>1</sup> in the first proceeding and to hold net proceeds of sale on trust pending further order or agreement concerning the distribution of the net proceeds;
  - (c) third, by clauses 10 and 11, to adjourn the applications in the two proceedings to a date to be fixed with costs reserved but with liberty to apply; and
  - (d) finally, by clause 12, to agree on a moratorium on any enforcement proceedings against Mr Conley, a former trustee of the CFT, pending the performance of the terms of the interim compromise.<sup>2</sup>
- [5] As the name suggested, by the agreement the parties sought to compromise some but not all aspects of the disputes between them. By consent, I ordered each application to be adjourned to a date to be fixed.
- [6] The parties have now fallen into dispute about –
  - (a) the validity of the compromise agreement; and

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<sup>1</sup> Some of the real property was only referred to in proposed amendments to the statement of claim in the first proceeding. As will appear, one aspect of the interlocutory application which was adjourned pursuant to the agreement, was the plaintiff’s application for leave to make those amendments.

<sup>2</sup> The explanation for clause 12 was the existence of a number of costs orders made in favour of the defendant against Mr Conley as trustee for the CFT.

(b) the proper construction of the compromise agreement, in relation to the mechanism for sale of real property by Mr Sheehy.

- [7] As to the former issue, by an application filed 4 July 2017 the plaintiff seeks a declaration that the compromise agreement is void as being *ultra vires*. The defendant opposes the declaration and supports the validity of the compromise agreement. The resolution of this issue requires a consideration of the terms of the relevant trust deeds and a determination of whether they authorized the plaintiff to enter into the compromise agreement.
- [8] As to the latter issue, by an application filed 23 June 2017, the defendant seeks a declaration as to the proper construction of one aspect of the compromise agreement. The resolution of this issue requires a consideration of the terms of the compromise agreement in the context within which the agreement was reached.
- [9] I will address the defendant's application first.

### **The proper construction of the compromise agreement**

#### The material which must be considered

- [10] In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, French CJ and Nettle and Gordon JJ wrote (citations omitted):
- [46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
- [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
- [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
- [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
- [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
- [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
- [11] These principles of contractual construction were subsequently approved by the High Court in *Victoria v Tatts Group Limited* (2016) 328 ALR 564 per French CJ and Kiefel, Bell, Keane and Gordon JJ at [51].
- [12] In the present case, the application of those principles means that recourse may be had to:
- (a) the text of the terms, the meaning of which is disputed;

- (b) the internal context within which that text occurred, namely the entire text of the compromise agreement as well as the particular documents referred to in the text of the contract; and
  - (c) because it is common ground that the agreement is relevantly ambiguous, evidence of events, circumstances and things external to the contract which were known to the parties or which assist in identifying the purpose or object of the transaction.
- [13] So far as the last category of evidence is concerned, when the present applications first came on before me for directions, there was a substantial controversy between the parties as to the admissibility of evidence which each had indicated they sought to rely on. I directed that if any party sought to tender, on the question of construction, evidence of events, circumstances and things external to the contractual instrument in aid of its construction, the party seeking to tender the material was required to deliver a spreadsheet to the other party by 11 August 2017, which:
- (a) identified the evidence concerned;
  - (b) identified the basis upon which the tender was justified; and
  - (c) explained how, if that matter were established, it would assist in resolving the disputed question of construction.
- [14] I further directed that, if the tender was said to be justified on the basis that it was evidence of an objective matter known to the parties, the tendering party should identify the objective matter of which it was said to be probative, and how evidence of that matter would assist me in resolving the disputed question of construction. I directed that the party opposing the tender was required to fill out a responsive column in the spreadsheet identifying its position by 18 August 2017.
- [15] By the time of hearing of the applications, the parties had exchanged schedules in response to my directions. The preparation of the schedules narrowed the extent of proposed reliance on extrinsic evidence. The parties agreed that, on the question of construction, the only evidence external to the compromise agreement itself on which they sought to rely was the evidence identified on the face of their respective schedules. They each invited me to admit the evidence concerned, subject to their objections, and to rule on their objections in the course of my reasons for judgment.
- [16] Appendix A to these reasons reproduces the schedule identifying the evidence external to the compromise agreement on which the plaintiff would seek to rely and the objections taken by the defendant.<sup>3</sup> I have added to that schedule a final column which sets out my rulings.
- [17] Appendix B to these reasons reproduces the schedule identifying the evidence external to the compromise agreement on which the defendant would seek to rely and the objections taken by the plaintiff. I have added to that schedule a final column which sets out my rulings.
- [18] In summary, my view is that the nature of the compromise agreement is such that the following aspects of context must be regarded as relevant and admissible, because at least to some extent they shed light on the purpose or object of the agreement:
- (a) the broader context, namely the fact and nature of the dispute in the two proceedings to which the contracting parties were also party, the evidence of which is principally contained in the relevant originating processes, the pleadings and the steps taken in that litigation;

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<sup>3</sup> I have not reproduced the footnotes which were in the original document.

- (b) the immediate context, namely the fact and nature of the disputes in the two interlocutory applications which were dealt with by the compromise agreement, the evidence of which is principally contained in the two applications concerned, the draft statements of claim, and the written submissions which had been exchanged before the agreement was reached; and
- (c) the evidence of the identity of registered proprietors of the land the subject of the sale mechanism set out in the compromise agreement, those facts being known to the parties at the time of entry into the compromise agreement.

[19] I turn first to address the relevant matters which may be identified by reference to that evidence.

The context within which the compromise agreement was reached

[20] The plaintiff commenced the first proceeding by originating application filed on 9 May 2016. The plaintiff contended as follows:

- (a) The plaintiff and defendant are each the current trustees of certain discretionary trusts, namely, in the case of the plaintiff, the Cindy Fleming Trust (**the CFT**), and, in the case of the defendant, the John James Trust (**the JJT**).
- (b) Cindy Fleming (who was a former trustee of the CFT) and the defendant (represented by Mr James, then in a de facto relationship with Ms Fleming) had entered into a partnership to acquire and hold real property with a view to profit. That partnership was referred to as the CFT/JJT Partnership.
- (c) At the date of Ms Fleming's death, partnership property included seven commercial properties of which the plaintiff and the defendant were co-owners in equal shares as tenants in common, namely:
  - (i) two 344 Queen Street properties;
  - (ii) four Brickworks Annex properties;<sup>4</sup> and
  - (iii) the 12 McLachlan St property.
- (d) The plaintiff, having replaced Ms Fleming as trustee of the CFT consequent upon her death, contended that the books and records of the CFT/JJT Partnership did not adequately reflect a proper accounting of what was owed to each partner, and that the defendant was in breach of fiduciary obligations by the making of unsecured loans of partnership funds to itself.
- (e) Messrs Sheehy and Pearce should be appointed as statutory trustees for sale pursuant to s 38 of the *Property Law Act 1974* (Qld) in respect of the seven commercial properties.
- (f) The following ancillary orders should be made:
  - (i) orders conferring specific powers upon the statutory trustees to deal with the properties and ultimately to pay the net proceeds of the sale to the receivers of the partnership;
  - (ii) a declaration as to the dissolution of the partnership or orders for its dissolution;

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<sup>4</sup> These properties comprise four separate lots, but some of the material suggests that they are properly referred to as three properties because they are three retail shops. For present purposes, it is unnecessary to work out which is the true position.

- (iii) the appointment of two other nominated individuals as receivers of the property of the partnership and ancillary orders conferring specific powers on them;
  - (iv) the appointment of the same nominated individuals as special referees to take an account of the partnership and, after doing various tasks, to express the account as a certificate identifying the amounts to be paid to the plaintiff and the defendant; and
  - (v) an order that the receivers or alternatively the statutory trustees, disburse the partnership funds in accordance with the special referees' certificate.
- [21] The proceeding originally came before me on 16 May 2016 for listing on the commercial list and for consideration of the application for appointment of statutory trustees for sale. The defendant opposed the determination of the latter issue because it contended that there were disputed questions of fact which could not conveniently be dealt with on that day. I ordered the matter be placed on the commercial list, that it proceed as if commenced by claim, and set a timetable for pleadings.
- [22] On 31 May 2016, the parties invited me to make a consent order which provided for the appointment of statutory trustees for the sale of the properties. I declined to make the proposed order without receiving further submissions as to whether the jurisdiction conferred by s 38 of the *Property Law Act* permitted the appointment of statutory trustees for sale without at the same time vesting the property in the trustees to hold on the statutory trust for sale (the proposed form of order having made no provision for vesting). No further submissions on that question were received and the proposed order was not made.
- [23] The defendant by its defence in the first proceeding filed 12 July 2016:
- (a) denied the existence of a partnership, contending that references to a partnership in accounts and tax returns were only done for taxation purposes;
  - (b) pleaded the terms of an alleged oral agreement between Ms Fleming and the defendant pursuant to which real property would be, and was, acquired, namely that:
    - (i) Ms Fleming would invest in commercial property to be acquired with Mr James;
    - (ii) Ms Fleming would have no role in the management or day to day business of any property so acquired;
    - (iii) such investments would be made for a fixed term of at least 10 years;
    - (iv) during that investment period Ms Fleming would not be able to withdraw the investment;
    - (v) during that investment period Ms Fleming would have no entitlement to any distribution or return on the amount invested;
    - (vi) any surplus cashflow derived from the investments could be loaned to other group entities (and the converse was true); and
    - (vii) in the event of a sale of any property so acquired upon the expiry of the ten year term, each of the two trusts would have the right to purchase that property from the other;
  - (c) further or alternatively, contended that the alleged "partnership" was not dissolved by the death of Ms Fleming who, if there was a partnership, was a partner only in her capacity as the trustee of the CFT;

- (d) denied the breach of any fiduciary obligations; and
  - (e) contended that a number of allegations of monies said to be owed to Ms Fleming by the partnership were premised upon personal entitlements of Ms Fleming, but that such entitlements or causes of action had been compromised in certain Family Court proceedings between Ms Fleming and Mr James such that the plaintiff was estopped from re-litigating those claims.
- [24] The second proceeding was commenced by the plaintiff by a claim and statement of claim filed on 13 May 2016. The plaintiff contended as follows:
- (a) The defendant is the trustee of 13 unit trusts and trustee of three of the four unit holders in the unit trusts. The remaining unit holder was Ms Fleming as trustee of the CFT and, subsequent to her death on 3 September 2015, now the plaintiff as trustee of the CFT.
  - (b) The 13 unit trusts are registered for GST and taxation purposes as the Centro 3 4 6 Partnership, which owns various real properties.
  - (c) A partnership was formed of persons acting as trustee of the 4 discretionary trusts (and which are the unit holders, by their trustees, described above). The alleged partnership was dissolved upon Ms Fleming's death.
  - (d) On 31 March 2016 the first defendant advised the plaintiff (as trustee) that the units it held in each of the 13 unit trusts had been redeemed. That redemption was invalid, and there were various breaches of duty by the first defendant (as trustee) and the second defendant as its director.
  - (e) There should be relief comprising, inter alia, orders for the due administration of the 13 unit trusts, alternatively for the recovery of money or account of the (disputed) partnership, declaratory relief that the alleged partnership was dissolved upon Ms Fleming's death or that it be dissolved pursuant to s 38 of the *Partnership Act* 1891 (Qld), and for the appointment of receivers to wind up the partnership and as special referees to take account of the partnership.
- [25] The defendant, by its defence in the second proceeding, filed 12 July 2016, inter alia contended as follows:
- (a) the unit holders in the 13 unit trusts were not partners, which proposition in any event was a proposition disavowed by the trust deeds;
  - (b) the plaintiff as trustee was not a partner in the Centro 3 4 6 Partnership;
  - (c) further or alternatively, that if there was a partnership, Ms Fleming was not a partner in her personal capacity (as opposed to her capacity as trustee of the CFT) and her death did not effect a dissolution of the partnership; and the (denied) partnership was for a minimum fixed term, and that term had not expired;
  - (d) the redemption of the plaintiff's unit was valid;
  - (e) the trust deeds conferred a discretionary power on the first defendant (as trustee of the 13 unit trusts) to make loans and, further, that issue was compromised in the proceeding in the Family Court of Australia between Ms Fleming and the second defendant on 11 August 2015, in consequence of which the plaintiff was estopped from re-litigating that claim; and
  - (f) the alleged breach of any fiduciary obligations was denied.

- [26] I have mentioned that on 9 March 2017, an interlocutory application in each proceeding was listed to be heard by me. The parties had been represented by solicitors and counsel. Submissions had been prepared and exchanged.
- [27] In the second proceeding, the plaintiff sought leave to amend the statement of claim to advance amendments identified in a proposed amended statement of claim annexed to a solicitor's affidavit and also sought leave to join an additional party.
- [28] In the first proceeding:
- (a) The plaintiff sought to have determined as a separate question, its application for the appointment of Messrs Sheehy and Pearce as statutory trustees for sale of the properties referred to in [20](c) pursuant to s 38 of the *Property Law Act* and ancillary orders associated with that appointment. It also sought leave to amend the statement of claim to advance the amendments identified in a proposed amended statement of claim annexed to a solicitor's affidavit. It also sought leave to join additional parties.
  - (b) The plaintiff's written submissions supported the application on the basis that the properties the subject of the first proceeding were held in co-ownership and addressed the discretionary considerations in support of the making of such an order.
  - (c) In its written submissions opposing the application the defendant developed its argument that the discretion should be exercised against appointing statutory trustees for sale for the following reasons:
    - (i) the disputed nature and existence of the alleged partnership, including by alleging that even if there had been a partnership, the death of a partner who occupied that role in a trust capacity would not dissolve the partnership but the partnership interest would vest in the new trustee once appointed;
    - (ii) its contentions concerning the "fixed term" period of the investment and its contention that it had preemptive rights in relation to the plaintiff's "stake" in the properties;
    - (iii) its contention as to the existence of adverse financial consequences of the appointment of statutory trustees, both as to the immediate accrual of capital gains tax liability to each of the plaintiff and the defendant upon the vesting of the properties in the statutory trustee (regardless of whether the properties are subsequently sold), and the early termination of the certain interest rate hedging agreements; and
    - (iv) the absence of any prejudice to the plaintiff.
  - (d) The plaintiff's written submissions had anticipated and sought to deal with the issues raised by the defendant. Amongst other things, the plaintiff's submissions contended that:
 

the plaintiff has no objection to the plaintiff acquiring its interest in the CFT/JJT Partnership Properties but the plaintiff wishes to go to the market to ascertain the properties' value (as opposed to relying upon valuations). If orders can be fashioned to appoint Messrs Sheehy and Pearce to sell the CFT/JJT Partnership Properties in a way that does not trigger a CGT event for the defendant (noting the plaintiff as a seller will inevitably incur a CGT liability) the plaintiff does not oppose such a course. That may be achieved by appointing them as court appointed receivers of the properties for the purposes of sale.
  - (e) The defendants and the proposed defendants opposed the application for leave to amend and joinder and were strongly critical of the adequacy of the plaintiff's pleading.

- [29] What is most significant about this aspect of context is that in the first proceeding the plaintiff advanced (or proposed to advance) allegations in relation to the various lots of real property which became the subject of the sale mechanism set out in the compromise agreement. It is appropriate to identify those allegations in a little more detail. And although I have not yet identified the clauses in the compromise agreement, it is appropriate to differentiate between those allegations by reference to the particular subclauses of the compromise agreement.
- [30] Clause 2(a) to 2(c) dealt with the 7 properties which were already the subject of the first proceeding, namely the properties identified at [20](c) above. I observe:
- (a) At the time the compromise agreement was entered into, the registered owners of those properties were the plaintiff and the defendant as tenants in common in equal shares. Accordingly, the plaintiff had the legal proprietary interest in the properties accorded to it by the *Land Title Act* 1994 (Qld).
  - (b) Regard to the plaintiff's pleading also justifies the conclusion that the plaintiff's case encompassed the proposition that its interest in relation to the properties may have been that which the law accords to a partner, because:
    - (i) the plaintiff contended that the properties were the assets of a partnership between Ms Fleming as trustee of the CFT and the defendant as trustee for the JJT, which partnership was known as the CFT/JJT Partnership; and
    - (ii) although the plaintiff alleged the CFT/JJT Partnership had been dissolved, its case encompassed the possibility that the partnership was ongoing.
  - (c) The relief claimed by the plaintiff included that identified at [20](e) and [20](f) above, namely –
    - (i) the appointment of statutory trustees for sale of the properties; and
    - (ii) that the net proceeds for sale would go to the receivers of the alleged partnership and be taken into account by those receivers in working out to whom a payment should go.
- [31] Clause 2(d) dealt with a property which may be referred to as “the Knapp Street property”. It was the subject of proposed amendments in the first proceeding. I observe:
- (a) At the time the compromise agreement was entered into, the registered owners of the Knapp Street property were the plaintiff, the defendant, the proposed fourth defendants and the proposed fifth defendant as tenants in common in the following proportions:
    - (i) the plaintiff 1/6;
    - (ii) the defendant 3/6;
    - (iii) the proposed fourth defendants 1/6; and
    - (iv) the proposed fifth defendant 1/6,
 and, accordingly, the plaintiff had the legal proprietary interest in the Knapp Street property accorded to it by the *Land Title Act*.
  - (b) Regard to the plaintiff's pleading also justifies the conclusion that the plaintiff's case encompassed the proposition that its interest in relation to the property may have been that which the law accords to a partner, because:
    - (i) the plaintiff contended that the Knapp Street property was part of the assets of a partnership known as the Knapp Street Partnership, whose partners

comprised Ms Fleming as trustee of the CFT, the defendant as trustee of the JTT, the proposed fourth defendant and the proposed fifth defendant; and

- (ii) although the plaintiff alleged the Knapp Street Partnership had been dissolved, its case encompassed the possibility that the partnership was ongoing and its interest in relation to the properties was that which the law accords to a partner
  - (c) The relief proposed to be claimed by the plaintiff included –
    - (i) the appointment of statutory trustees for sale of the Knapp Street property; and
    - (ii) that net sale proceeds of sale of the Knapp Street property be paid by the statutory trustees for sale to receivers who would be appointed of the property of the Knapp Street Partnership.
- [32] Clause 2(e) dealt with properties which may be referred to as “the Wickham Street properties”. They were the subject of proposed amendments in the first proceeding. I observe:
- (a) At the time the compromise agreement was entered into, the registered owners of the Wickham Street properties were the defendant and Ralph Lauren 33 Pty Ltd as tenants in common in the shares of 3/10 and 7/10 respectively. Accordingly, the plaintiff did not have any legal proprietary interest in the properties accorded to it by the *Land Title Act*.
  - (b) However, because the plaintiff also proposed to seek an order for the appointment of statutory trustees for sale of the Wickham Street properties, it may be assumed that the plaintiff contended that it should be regarded as a co-owner of the properties because such an order can only be obtained on the application of a co-owner of property held in co-ownership. It was not clear from the proposed pleading how the plaintiff justified the conclusion of co-ownership.
  - (c) Regard to the plaintiff’s pleading also justifies the conclusion that the plaintiff’s case encompassed the proposition that its interest in relation to the properties may have been that which the law accords to a partner, because:
    - (i) the properties were part of the assets of the K Tower Partnership, which the plaintiff proposed to contend that Ms Fleming as trustee of the CFT had been a partner;
    - (ii) although the plaintiff alleged the K Tower Partnership had been dissolved, its case encompassed the possibility that the K Tower Partnership was ongoing and its interest in relation to the properties was that which the law accords to a partner.
- [33] Clause 2(f) dealt with a property which may be referred to as “the Wyandra Street property”. It was the subject of proposed amendments in the first proceeding. I observe:
- (a) At the time the compromise agreement was entered into, the registered owner of the Wyandra Street property was the defendant. Accordingly, the plaintiff did not have any legal proprietary interest in the property accorded to it by the *Land Title Act*.
  - (b) However, because the plaintiff also proposed to seek an order for the appointment of statutory trustees for sale of the Wyandra Street property, it may be assumed that the plaintiff contended that it should be regarded as a co-owner of the property because such an order can only be obtained on the application of a co-owner of property held in co-ownership. It was not clear from the proposed pleading how the plaintiff justified the conclusion of co-ownership.

- (c) The plaintiff criticized the conduct of the defendant and others in relation to the administration of a partnership referred to as the Wyandra Street Partnership, and of which the plaintiff proposed to contend that the CFT/JJT Partnership and others had been partners. The plaintiff alleged that monies were owed to the Wyandra Street Partnership, either because it had an action for monies had and received or for damages for breach of fiduciary duty. It was not clear from the proposed pleading what was the nature of the interest which it asserted in relation to the Wyandra Street property, although a reader of the pleading might speculate that the interest claimed was somehow that which the law accords to a partner.
- [34] Clause 2(g) dealt with a property which may be referred to as “the Doggett Street property”. It was the subject of proposed amendments in the first proceeding. I observe:
- (a) The registered owners of the Doggett Street property were the defendant and Ralph Lauren 33 Pty Ltd as tenants in common in the shares of 3/10 and 7/10 respectively. Accordingly, the plaintiff did not have any legal proprietary interest in the property accorded to it by the *Land Title Act*.
- (b) However, because the plaintiff also proposed to seek an order for the appointment of statutory trustees for sale of the Doggett Street property, it may be assumed that the plaintiff contended that it should be regarded as a co-owner of the property because such an order can only be obtained on the application of a co-owner of property held in co-ownership. It was not clear from the proposed pleading how the plaintiff justified the conclusion of co-ownership.
- (c) Nor was it clear from the plaintiff’s pleading what was the nature of any interest which it asserted in relation to the Doggett Street property. Give the other allegations in the pleading, one might speculate that the interest claimed was somehow that which the law accords to a partner.
- [35] In summary then as at the time of entry into the compromise agreement the parties knew that:
- (a) For the properties referred to in clauses 2(a), 2(b), 2(c) and 2(d):
- (i) in fact the plaintiff had a particular legal proprietary interest in property pursuant to the *Land Title Act*; and
  - (ii) but it also seems that the plaintiff’s pleaded case encompassed the possibility that a relevant partnership was ongoing and its interest in relation to the properties was that which the law accords to a partner;
- (b) for the property referred to in clause 2(e), 2(f) and 2(g):
- (i) in fact the plaintiff did not have any legal proprietary interest in property pursuant to the *Land Title Act*;
  - (ii) however because the plaintiff sought an order for the appointment of statutory trustees for sale of the property, the plaintiff contended that it should be regarded as a co-owner of the property; and
  - (iii) although it was not entirely clear from the material which existed as at the date the compromise agreement was entered into, it may have been that the plaintiff’s claimed interest in relation to the property was that which the law accords to a partner.

The terms of the compromise agreement

[36] Against that background, the relevant terms of the agreement were as follows:<sup>5</sup>

2. Peter Sheehy (Sheehy) is appointed, on the terms set out herein, the parties agent for the purpose of selling the following properties (the Properties):
  - (a) Level 15 and 16, 344 Queen Street, Brisbane described as Lots 20 & 21 on Building Unit Plan 10464, Title References 18071171 and 18071172;
  - (b) Lots 1-9, 16 & 35 Brickworks Annex, 19 Brolga Avenue, Southport and described as Lots 1, 9, 16 and 35 on Building Unit Plan 104226, Title References 50126674, 50126682, 50126689 and 50126708; and
  - (c) 12 McLachlan Street, Fortitude Valley and described as Lot 2 on SP1098103, Title Reference 50663672;
  - (d) 166 Knapp Street, Fortitude Valley described as Lot 23 on RP10048;
  - (e) Lots 29-31 on SUP 11572, 269 Wickham Street, Fortitude Valley;
  - (f) 27 Wyandra Street, Newstead described as Lot 12 on SP133246; and
  - (g) 49 Doggett Street, Newstead described as Lot 5 on RP109188.
3. Where the registered owners of any of the properties at paragraph 2 include persons other than the parties, the Defendant will be responsible for procuring the agreement of such persons to paragraphs 2, 4, 5 and 6 of these terms within 14 days. Any property for which the agreement of an owner is not obtained will be excluded from the operation of these terms but otherwise the balance of these terms will continue to have full force and effect.
4. Pursuant to the appointment in paragraph 2 and subject to paragraph 9 (if applicable):
  - (a) subject to subparagraph (b) below, Sheehy may in his discretion appoint a real estate agent for the purpose of marketing the Properties;
  - (b) Sheehy is to market each of the Properties for sale by a one stage tender;
  - (c) on the occurrence of the tender, the Defendant shall be entitled to make offers on the Properties or any of them;
  - (d) Sheehy is able to enter into a contract for the sale of the Properties, or any of them, on such terms and conditions as he determines.
5. In respect of any Property, in the event that Sheehy accepts an offer to purchase made by the Defendant, then:
  - (a) there is deemed to be a contract between the Plaintiff and the Defendant for the purchase by Defendant of **the Plaintiff's interest in the relevant Property**;
  - (b) the purchase price of the contract (for **the Plaintiff's interest in the relevant Property**) (Price) shall be:
    - (i) 50% of the amount of the offer in the case of properties listed in subparagraphs 2(a)-(c);
    - (ii) 16.67% of the amount of the offer in the case of the property listed in subparagraphs 2(d);
    - (iii) 7.5% of the amount of the offer in the case of properties listed in subparagraphs 2(e)-(g);
  - (c) Sheehy shall sign a Property Occupations Act real estate agency appointment which provides that in the event of a sale of a partial interest in a property between the disposing and acquiring parties, the agent's commission is to remain constant as a percentage but be calculated by reference to the Price, and payable by the Plaintiff;
  - (d) prior to, or with Sheehy's agreement, at and in order to enable settlement of the sale to the acquiring party to occur, the registered proprietors shall pay in accordance with their interests in each respective property to Sheehy or otherwise secure or discharge the following costs:

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<sup>5</sup> I have identified by bold print emphasis the phrases the meaning of which is in dispute between the parties.

- (A) all selling costs including (otherwise than real estate agent's commission), legal costs, marketing and advertising costs and all other necessary costs incurred by the Trustees in the sales;
  - (B) any liabilities secured against the Property by registered mortgages;
  - (C) Sheehy's remuneration and other costs and expenses (otherwise than real estate agent's commission) incurred in effecting the sale;
  - (e) the Plaintiff shall pay the agent's commission calculated in accordance with clause 4(d);
  - (f) subject to subparagraph (d), the terms of the contract referred to in subparagraph (b) are to reflect the terms of the successful offer referred to in subparagraph (a) above; and
  - (g) the net sale proceeds after the deduction of the matters in subparagraph (e) shall be held by Sheehy pending further order or written agreement concerning the distribution of the said monies as between the parties;
  - (h) the sales are without prejudice to any final accounting between the parties as to their respective entitlements.
6. Otherwise at settlement of the sale of any of the Properties, Sheehy shall receive and deal with the proceeds as follows:
- (a) Firstly, in payment of all necessary selling costs including agent's commissions, legal costs, marketing and advertising costs and all other necessary costs incurred in the sales;
  - (b) Secondly, in discharge of any liabilities secured against the Properties by registered mortgages;
  - (c) Thirdly, in payment of Sheehy's costs and expenses incurred in effecting the sale and when the sale is settled; and
  - (d) Fourthly, to hold the remaining balance on trust by Sheehy pending further order or written agreement concerning the distribution of the said monies as between the parties.
7. Further:
- (a) Sheehy is authorised to expend money on the Properties in preparation for their sale and for their marketing or advertising and that the amount of such expenditure be paid from the respective joint Account of the parties owing the particular properties held with National Australia Bank Limited; and
  - (b) Sheehy may, but is not obliged to, obtain a valuation of any of the Properties if he deems that appropriate for the purposes of assistance in the determination value.
8. That Sheehy is entitled to charge all reasonable costs and disbursements incurred by him in performance of his obligations pursuant to these Terms and that his fees and expenses be a first charge on trust monies.
9. In relation to the properties listed in paragraphs 2(d) - (g) of these terms, after the tender process, the Defendant can elect, or the Plaintiff may require the Defendant, to purchase **the Plaintiff's interests in the properties** and in that event:
- (a) Notice of an election or requirement must be given by 14 days after the tender process ends;
  - (b) The Defendant is to obtain a market value valuation of those real properties at the Defendant's cost (with the Plaintiff to choose a registered valuer from one of the then panel of registered valuers chosen from time to time by the NAB Property Brisbane office);
  - (c) there will be deemed to be a contract between the Plaintiff and the Defendant for the purchase by Defendant of **the Plaintiff's interest in the Property** in accordance with paragraph 5(a) at a Price calculated in accordance with paragraph 5(b) as if the higher of the valuation of any such property or the highest unconditional tender offer was the offer accepted by Sheehy pursuant to paragraph 5.

#### The controversy as to the proper construction

[37] The following matters emerged from solicitors' correspondence exchanged before the defendant filed its application:

- (a) The plaintiff contended that the properties in respect of which the plaintiff had no interest as registered proprietor were assets of a partnership, and its interest was only a chose in action right as a partner, and, accordingly and as a matter of law, such an interest was not an interest which could be sold independent of a sale of the entire property.
  - (b) This view of the law was justified, having regard to High Court authority<sup>6</sup> which supported the proposition that a partner does not have an interest in each individual real estate property comprising a partnership asset but rather has a chose in action comprising a right to a fractional interest in any surplus of assets over liabilities after the assets have been sold and there has been a final accounting conducted.
  - (c) This created a problem because the agreement purported to give the defendant an entitlement to do something which it could not do at law. And it was clear that the compromise agreement did not involve the plaintiff purporting to dispose to the defendant the entirety of its interest in any of the partnerships.
  - (d) The compromise agreement would create complications for the valuation process in the event that the plaintiff established certain relevant partnerships because the terms of the agreement were silent as to how the value of the property is to be determined for the purposes of the final accounting and also as to how the plaintiff's interest would be calculated in the partnership having regard to the sale.
  - (e) The defendant's position was the agreement was capable of performance in full and the plaintiff's contention that it could not be performed was misguided.
- [38] The defendant sought a declaration that upon the proper construction of the terms of the compromise agreement, the phrases "the Plaintiff's interest in the relevant property", "the Plaintiff's interest in the Property" and "the Plaintiff's interests in the Properties" should be construed as meaning –
- (a) the plaintiff's proprietary interests, whether legal or equitable, in the relevant properties; or alternatively
  - (b) the plaintiff's legal or equitable rights in relation to the relevant properties.
- [39] Before me, the defendant submitted that the form of declaration in [38](a) should be made if I make findings as to the objective purpose of the compromise agreement consistent with the following exchanges to the course of oral argument:
- (a) At transcript 1-33 lines 15 to 25
 

HIS HONOUR: ... Do you say the purpose of this agreement is that it's done in the context of litigation where the parties knew that the plaintiff's claim in the litigation was that the property should be dealt with in a particular way and the purpose of this deal was to convert the relationship with the parties to an agreement that the property be dealt with in a different way, that is, the agreed way in the deal, and whatever rights might have existed for the plaintiff to assert the property should be dealt with in a particular way, namely, a statutory trustee for sale, be converted to a claim of some nature in relation to the proceeds of the sale of the property?

MR KELLY: I think that's a fair statement.
  - (b) At transcript 1-34 lines 35 to 44
 

HIS HONOUR: [So your side at the deal is saying to the other side] "... whatever right you have, it's not a right that affects the ability to cause this thing to be sold to a third party or to us in the way provided for."

MR KELLY: Yeah.

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<sup>6</sup> *Commissioner of State Taxation of the State of South Australia v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 513-519, which applied *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 687-688.

HIS HONOUR: “You’re converting whatever rights you have of whatever character you have into rights that don’t stop this sale happening.”

MR KELLY: Yes. ...

- [40] The defendant also submitted that the proper construction of the compromise agreement was that –
- (a) for the purpose of enabling the properties to be sold, the plaintiff compromised its right to contend that, as partnership assets, the defendant could not acquire the plaintiff’s share of those assets until there had been a final account of the alleged partnership; and
  - (b) the parties had agreed that, for the purpose of enabling any sale, the plaintiff’s interest in the respective properties should be fixed and represented by an agreed percentage, that agreement being without prejudice to the plaintiff’s right to any final accounting between the parties as to their respective entitlements (which entitlements were to still be determined by the Court).
- [41] For its part, the plaintiff submitted that until the factual issue as to the existence or otherwise of the alleged partnerships was determined in the proceedings, the plaintiff had no interest capable of being conveyed to the defendant under clauses 5 and 9 of the compromise agreement. It contended that the factual dispute in the proceedings revealed there was no meeting of minds as between the plaintiff and the defendant as to the meaning of those words, notwithstanding the execution of the agreement.

#### Analysis

- [42] In my view, the key to determining what a reasonable businessperson would have understood the compromise agreement to mean is to bear in mind the following critical aspects of the context within which the agreement was entered into:
- (a) At the time of the agreement was entered into, the parties were not in agreement as to what was the precise nature of the plaintiff’s rights in or in relation to the subject properties. That was something which awaited determination, whether by agreement or by the Court.
  - (b) The plaintiff had asserted a proprietary interest in all the properties. For those in which it was known to have a legal interest, it was obvious that at least that proprietary interest existed. But even where there was no legal interest, it was clear that the plaintiff asserted the existence of a proprietary interest sufficient to justify the appointment of a statutory trustee for sale.
  - (c) The plaintiff also asserted (at least in the alternative) that its interest in relation to the properties was that which the law accords to a partner. Any such assertions were contested by the defendant.
  - (d) The plaintiff’s evident short term goal was to have all the properties sold and then the extent of its entitlements worked out at some subsequent time by reference to net proceeds of sale. The plaintiff recognized that the defendant had capital gains tax concerns and was prepared to accommodate a mechanism which addressed those concerns.
- [43] A reasonable businessperson standing in the shoes of the parties at the time the compromise agreement was entered into would have thought as follows:
- (a) The purpose of the agreement was to achieve the plaintiff’s goal of converting its asserted interest in the properties into an interest in a pool of money, but at the same time to leave open the attainment by the defendant of its goal concerning capital

gains tax by not disposing of its interest in property thereby triggering a CGT event for the defendant.

- (b) The agreement sought to achieve the former aspect of the goal by authorizing the disposition of the properties by Mr Sheehy in a way as could create a pool of money which he would hold pending a court order or written agreement between the parties.
- (c) The agreement sought to achieve the latter aspect of the goal by permitting the possibility that the defendant would acquire the plaintiff's interest only, via a mechanism which would result in no disposition by the defendant of its own interest in the properties.
- (d) Either way, once the contracts had settled, it would be clear that the plaintiff would no longer have any proprietary interest in the properties concerned.

[44] To my mind, the foregoing considerations strongly suggest that to the extent the compromise agreement refers to the plaintiff's interest(s) in property, it must be taken to refer to the plaintiff's proprietary interest(s) in the property concerned. Whilst it is clear that a reasonable businessperson in the position of the parties may well have known that one possibility that the plaintiff might ultimately seek to establish was that it had a partner's interest in the land, that person would also have known that no such interest had yet been established and the parties contemplated that the land could, nevertheless be sold under the agreement. And, more importantly, that that would occur before the full nature and extent of the plaintiff's entitlements was established. Hence the interim nature of the settlement. This purposive view of the meaning of the disputed words is entirely consistent with the ordinary meaning of the language used.

[45] I am unable to see any merit in the plaintiff's contention that the agreement purported to give the defendant an entitlement to do something which it could not do at law. That proceeds on the assumption that the compromise agreement was entered into in the context of the plaintiff's interest being that which the law accords a partner.<sup>7</sup> But that assumption is contradicted by the evidence. The plaintiff had made that assertion, but the assertion was contested. That which was the subject of the agreement was not interests in a partnership, but rather interests in land. The plaintiff's proposition obviously has no merit for those properties in which the plaintiff had a legal interest (namely the properties in clauses 2(a), 2(b), 2(c) and 2(d)). And although during the argument before me the plaintiff conceded that it had no proprietary interest in the properties in clauses 2(e), 2(f) and 2(g), that was not the plaintiff's position as at the time the agreement was entered into. It had plainly contended that it had an ownership interest in all the land concerned.

[46] One aspect, however, of the plaintiff's submissions is undoubtedly true, and that is that the compromise agreement may create complications for any ultimate valuation and accounting process in the event that the performance of the agreement results in a contract between the plaintiff and the defendant for the purchase of the plaintiff's interest in property. If that occurred in relation to the properties in clauses 2(e), 2(f) and 2(g), just what had been achieved by the deeming process in clauses 5 and 9 would be very unclear. How whatever had been achieved would play out if the plaintiff ultimately established that it had the interest which the law accords a partner would also be unclear. It may be that the deemed fact of an agreement bearing the description given to it by the deeming has an evidentiary effect which could be significant in some way. However, I express no view on

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<sup>7</sup> If all a person has is an interest in a partnership then the person does not have a proprietary interest in the assets of the partnership. The interest a partner has in partnership property is an equitable right to a proportion of any surplus upon the dissolution of the partnership after the realisation of the assets and payment of the debts and liabilities of the partnership: see the authorities referred to by the plaintiff in footnote 6 above and see also *Commissioner of State Revenue v Danvest Pty Ltd* [2017] VSCA 382

that because it is premature to seek to anticipate those complexities or the result which would be achieved by the proper implementation of the terms of the compromise agreement. I am not here determining a dispute about the meaning of a contract actually entered into by Mr Sheehy. Nor am I determining anything at all about how the contemplated ultimate determination of entitlement should take place. Those are questions for another day.

[47] The question presently before me is whether I should make a declaration as sought by the defendant. For the reasons I have expressed, I think I should.

### Conclusion

[48] I would declare that upon the proper construction of the terms of the compromise agreement, the phrases “the Plaintiff’s interest in the relevant property”, “the Plaintiff’s interest in the Property” and “the Plaintiff’s interests in the Properties” should be construed as meaning the plaintiff’s proprietary interests, whether legal or equitable, in the relevant property. I will hear the parties on the question of the costs order which should be made in relation to the defendant’s application.

### **The validity of the compromise agreement**

[49] It was not controversial between the parties that the entry into the compromise agreement had, for each party, been an exercise of power by that party in its capacity as trustee.

[50] For its part the plaintiff contended that the agreement was void on the ground that it was beyond the power of either party as trustee to enter into such an agreement.

[51] The plaintiff’s argument was as follows:

- (a) The compromise agreement granted to Mr Sheehy the power to determine what contracts of sale (if any) were entered into in respect of the various properties and on what terms and conditions.
- (b) That was a delegation of a trustee’s discretion contrary to the general law limitations on a trustee’s power to delegate its discretion.
- (c) Clause 19(x) of the plaintiff’s trust deed (and the equivalent power in the defendant’s trust deed) permitted delegation, but only by way of power of attorney.
- (d) Neither the plaintiff nor the defendant had executed a power of attorney in favour of Mr Sheehy.
- (e) The consequence of the plaintiff (and the defendant) having acted *ultra vires* was to render the compromise agreement void.

[52] The first reason why the plaintiff’s argument must fail is that the critical concluding proposition must be rejected.

[53] Let it be assumed that on its proper construction a trust deed did not authorize a trustee to enter into a particular type of contract with a third party, but the trustee nevertheless entered into the contract. It would be obvious that the trustee would have committed a breach of trust by entering into the contract and that the trustee had acted *ultra vires*.

[54] But, “[t]he fact that a trustee acts in breach of trust does not mean that he has no capacity to do the act he wrongly did”: *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478 per Lord Browne-Wilkinson at 493. The trustee’s capacity to contract does not derive from the trustee’s powers under the trust instrument, but derives from the trustee’s status as a juridical person (whether natural or corporate).<sup>8</sup> Thus in

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<sup>8</sup> It has long been the case that the statute law in this country gave corporations the same powers as natural persons and abolished the doctrine of *ultra vires* applicable to corporations: see s 34 of the *Companies and Securities*

*Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, Browne-Wilkinson LJ (as he then was) said at 303:

In my judgment, for this purpose the position of a company is analogous to that of a human being who has fiduciary powers. If two trustees convey trust property in breach of trust, the conveyance is not void. As human beings they have the capacity to transfer the legal estate: their capacity to transfer flows from their status as human beings, not from the powers conferred on them as trustees. Even if their powers under the trust instrument did not authorise the conveyance, the legal estate will vest in the transferee. Beneficiaries under the trust would be entitled, if they learnt in time, to restrain the execution of such conveyance in excess of the powers of the trustees. If the beneficiaries only discovered the position after the conveyance, the transferee, if he took with notice, would be personally liable as a constructive trustee and the property conveyed could be recovered: but the conveyance would not be a nullity.

- [55] The consequence of a trustee entering into an unauthorized contract with a third party could not be to render void the contract entered into with the third party, such that the legal rights conferred on that party were treated as if they never existed.<sup>9</sup> *Snell's Equity*<sup>10</sup> puts the proposition in this way (at [10-028]) (citations omitted):

Where a trustee makes a contract that is beyond his powers, that contract may well bind him at law, because the trustee is a juridical person, and so may make contracts unless subject to some particular disability. If the trustee makes the contract in breach of trust, the breach will not affect the prima facie validity of the contract itself; but it will mean that the trustee may not indemnify himself out of the trust fund when he comes to perform his obligations under the contract. Equally, where trustees make a contract in breach of trust, a court will not grant specific performance of the contract.

- [56] In any event, in this country, and as a general proposition, an improper exercise of a fiduciary power giving rise to rights enforceable at law is voidable rather than void, and will require the intervention of equity to set it aside: see *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 per Samuels JA at 679–680 and per Mahoney JA at 689; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 per Mason, Deane and Dawson JJ at 294–295 and *Glover v Willert* (1996) 20 ACSR 182 per McPherson JA (with whom Fitzgerald P agreed) at 186.<sup>11</sup>
- [57] It follows that even if the plaintiff's construction of the trust deeds was correct (and the parties were not authorized to enter into a contract of the nature of the compromise agreement), the plaintiff's application for a declaration that the compromise agreement is void must fail, because the consequence of a trustee having contracted in a way which was *ultra vires* would be to render the contract voidable not void.<sup>12</sup>
- [58] The second reason why the plaintiff's argument must fail is that I reject the argument that the agreement amounted to an impermissible delegation of the trustee's powers. On the proper construction of the trust deeds it was permissible for the trustee to enter into a contract of the nature of the compromise agreement, notwithstanding the extent to which it delegated discretionary power to another person.
- [59] To explain my reasoning, it is necessary only to examine the terms of the trust deed in respect of the plaintiff, because the equivalent terms of the trust deed in respect of the defendant are not materially different.

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*Legislation (Miscellaneous Amendments) Act 1983* (Cth), s 47 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1985* (Cth), s 124 of the *Corporations Act 2001* (Cth).

<sup>9</sup> The third party's legal rights might well be subject to equitable constraint if it contracted with the requisite degree of knowledge that the plaintiff's trust deed did not authorize the plaintiff to enter into the contract, but there is no such contention here and it is unnecessary to consider that possibility further.

<sup>10</sup> John McGhee QC (ed), *Snell's Equity* (Sweet & Maxwell, 33<sup>rd</sup> ed, 2016).

<sup>11</sup> Given the status of the Australian authority which I have cited for the proposition advanced in this paragraph, I do not pause to consider the extent to which authority in the United Kingdom may have diverged from that in Australia: cf *Pitt v Holt* [2013] 2 AC 108 per Lord Walker at [93] – [94] and *Snell's Equity* at [10-028]–[10-030].

<sup>12</sup> For completeness, I record that the plaintiff cited *Thorby v Goldberg* (1964) 112 CLR 597 at 605-6 as authority for the proposition in [51](e), however the cited passage provides no support for the proposition.

[60] By clause 16, the trustee had the express power to act as if it were the beneficial owner of the trust property (emphasis added):

16. POWERS TO ACT AS BENEFICIAL OWNER:

**The Trustee shall have full and unfettered power to:**

- (a) **Act and contract as if it were the absolute owner of the trust property and shall have power to do and suffer all acts, deeds, matters and things (without exception) in relation to the trust property which it could lawfully do and suffer if it were the beneficial owner thereof.**
- (b) Hold the trust-property In its own name as though it were the absolute owner thereof and shall not be obliged or required to disclose to any person with whom it enters into any contract, arrangement, transaction or-undertaking that it holds the trust property or any part thereof upon and subject to the trusts hereby created.
- (c) **Exercise all other rights and powers conferred by or incident to the legal ownership of the trust property.**

**AND IT IS HEREBY EXPRESSLY DECLARED that the generality of the provisions of this Clause shall not be prejudiced or affected or limited by** any express powers of investment or of carrying on business or **any other power herein contained.**

[61] By clause 19, the trustee had certain general powers, including cl 19(x) to which reference has already been made (emphasis added):

19. GENERAL POWERS OF TRUSTEE

**Without prejudice to the generality of the provisions hereof the Trustee may in its absolute discretion exercise all or any of the following further powers in addition to the powers vested in it by law:**

...

- (b) **So long as any real property or Interest in real property shall form part of the Trust Fund at the discretion of the Trustee to manage, use or let the same or any part or parts thereof, to erect, pull down, rebuild and repair buildings and erections, to carry out improvements of any nature, to purchase such plant equipment and fittings as the Trustee considers necessary having regard to the purposes for which the real property is from time to time being used, to make allowances to and arrangements with tenants, to grant or acquire easements or other rights and generally to deal with such property or interest or join in dealing with the same as if the Trustee were the absolute owner beneficially entitled thereto without being responsible for loss and without any of the restrictions imposed by law on the Trustee.**

...

- (f) **To sell and convert any assets or investments comprised in the Trust Fund from time to time in such a manner and upon such terms and conditions as the Trustee may think fit with the same powers in that behalf as if the Trustee were absolute owner beneficially entitled including power to grant options to purchase any such assets or investments on such terms and conditions as the Trustee thinks fit and to re-invest the proceeds of sale or apply the same in accordance with the trusts and discretions herein contained.**

- (g) **In the execution of the trusts and powers herein contained to charge and be paid from the Trust Fund a reasonable remuneration for so acting or instead of acting personally from time to time to employ at the expense of the Trust Fund such agents, managers, advisers and accountants (including any Beneficiary) as the Trustee may in its sole discretion think advisable.**

...

- (x) **To delegate by power of attorney to any person the execution or exercise of all or any trusts, powers, authorities and discretions vested in the Trustee whether alone or jointly with any other person and including without limitation the power to execute any document or deed for any purpose.**

...

[62] It is true that there is a general rule that a trustee must not delegate its duties or powers. The principle which underlies this rule is that the trustee, being a person appointed to an office of personal trust and confidence, must act personally. However, the operation of

this rule is not absolute. The law has recognized that delegation is permitted where it is expressly authorised by the trust document; where it is specifically authorised by statute; and where, speaking generally, the delegation is to perform a purely ministerial act or, subject to certain conditions, is dictated by the necessity of the case: see J D Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2016) at [17-23], cited with approval by Besanko J in *Trustees of Kean Memorial Trust Fund v A-G (SA)* (2003) 86 SASR 449 at [96] and see also G Thomas and A Hudson, *The Law of Trusts* (Oxford University Press, 2004) at [15.39].

- [63] I will consider first the plaintiff's argument that the proper construction of the compromise agreement was that it authorized Mr Sheehy to determine whether to sell any of the various properties and, if so, on what terms and conditions, including as to price. Undoubtedly that would be to delegate to Mr Sheehy one aspect of the discretionary powers of the trustee. Would such a delegation be authorized by the terms of the trust document?
- [64] The approach which should be taken to the construction of the powers conferred on the trustee is analogous to that stated by Upjohn J in *Re Triffitt's Settlement* [1958] Ch 852 at 861 (emphasis added):

**I have to consider whether there is a power in the plaintiff to delegate the exercise of discretionary powers to others.** In my judgment, that is essentially a question of construction of the marriage settlement. **The donee of the power can delegate the exercise of discretionary powers to others in two cases: First, where there is a completely general power in its widest sense, that is tantamount to ownership, and, therefore, the donee of the power can exercise it in whatever way he pleases.** That is not this case for the reasons which I have already mentioned. In the first place, there are two persons in this world who are excluded from being the objects of the appointment, and, secondly, the appointment can only be made with the consent of the trustees. Mr. Goff very properly concedes that this power cannot be treated as tantamount to ownership. **Secondly, the donee may delegate discretionary powers where, as a matter of construction some power can be spelt out enabling the donee of the power to delegate his discretion.** That, of course, is frequently done in the case of special powers, and, as I have already said, it was in fact done by clause 3 (3) of this very marriage settlement. In all other cases the principle "*delegatus non potest delegare*" applies.

- [65] Clause 16 is a plain example of a completely general power in its widest sense, as discussed by Upjohn J.
- [66] Further, in *Rankine v Rankine* [1998] QSC 48, de Jersey CJ said of a clause in analogous form to cl 16:

Such provisions should be given their apparent effect. As put in Meagher and Gummow: "*Jacobs Law of Trusts in Australia*" 6th edition, para 1619 p 414:

"A settlor or testator can amend, alter or modify any of the powers, duties and discretions which would otherwise apply. He can also determine what consequences flow from the breach of a duty. Just as the law of contract permits the parties to a contract to determine its terms, subject to any relevant legislation, the law of trusts permits the settlor or testator to determine the incidents of a trust."<sup>13</sup>

- [67] It follows that the intention revealed by the words used in cl 16 is sufficiently clear as to permit the proposed delegation. A person who was the absolute owner of real property would have the power to authorize an agent to act in the way it is proposed that Mr Sheehy will act. It would follow that such an exercise of power by the trustee was authorized by cl 16.<sup>14</sup>

<sup>13</sup> The passage from *Jacobs' Law of Trusts in Australia* to which his Honour referred with approval is contained in [16-17] of the current edition of that work.

<sup>14</sup> There is an irreducible core of obligations which are so fundamental to the concept of a trust as not to be capable of being excluded by the terms of a trust deed: see *Armitage v Nurse* [1998] Ch 241, the authority of which in Australia was recently confirmed by Edelman J in *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75 at [281] - [284]. No argument was advanced that to construe the trust deed as authorizing

- [68] Another way to reach the same conclusion as to the proper construction of cl 16 is –
- (a) to note from cl 19(x) that, in principle, delegation is not inimical to the intention of this particular trust deed;
  - (b) to note the terms of cl 16 are sufficiently broad as to encompass delegation other than by power of attorney; and
  - (c) to conclude that it could not be the intention of this trust deed that delegation would be permitted only if it occurred by power of attorney, because so to conclude would be to use the wording of the specific power of cl 19(x) to limit the generality of cl 16 and that would be contrary to the direction contained in cl 16 and in the chapeau of cl 19.
- [69] The conclusion I have reached as to the proper construction of cl 16 is sufficient to dispose of the plaintiff's argument.
- [70] However, there are at least two other powers which would also, on their proper construction, be taken as authorizing the trustee to enter into the compromise agreement, even if it is to be construed in the way for which the plaintiff contends.
- [71] First, such an exercise of power would also be regarded as a dealing with real property within the meaning of cl 19(b). That clause notes that the power of the trustee to embark upon such a dealing is not the subject of any of the restrictions imposed by law on the trustee. Accordingly, cl 19(b) should also be regarded as expressly authorizing such a delegation of decision-making capacity to Mr Sheehy.
- [72] Second, the power in cl 19(g) would operate to permit a trustee to employ an agent to exercise the power in cl 19(f); i.e. instead of acting personally in the execution of the power in cl 19(f) (namely the trustee's power to sell and convert assets in such manner and on such terms as the trustee thinks fit) to employ an agent to execute that power. That would specifically authorize the proposed delegation of decision-making capacity to Mr Sheehy.
- [73] In the foregoing circumstances, it is unnecessary to consider the defendant's contention that cl 19(x) itself should be regarded as authorizing the compromise agreement because the compromise agreement could be construed as amounting to a power of attorney.
- [74] The result is that the plaintiff's application for a declaration that the compromise agreement is void as being *ultra vires* the powers of the plaintiff as trustee must be dismissed. I will hear the parties on the question of the costs order which should be made in relation to the plaintiff's application.

**APPENDIX A**

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: 4589/16

Plaintiff: **GRACE BUNCLE PTY LTD ACN 605 600 959 AS TRUSTEE OF THE CINDY FLEMING TRUST**

AND

Defendant: **RALPH LAUREN NO 57 PTY LTD ACN 079 745 056 AS TRUSTEE FOR THE JOHN JAMES TRUST**

PLAINTIFF'S SCHEDULE

<b>Number</b>	<b>The evidence</b>	<b>The basis upon which the tender is justified</b>	<b>How it would assist in resolving the disputed question of construction</b>	<b>The objective matter which it is said to be probative of</b>	<b>How evidence of that matter would assist the Judge in resolving the disputed question of construction</b>	<b>Response</b>	<b>Ruling</b>
1	The properties in paragraphs 2(a) to (c) of the Terms (the "CFT/JJT Partnership Properties") are registered in the names of the plaintiff and the defendant as tenants in common in equal shares	Evidence of surrounding circumstances known by the parties to the Terms at the time of its creation	The Terms do not define " <i>the plaintiff's interest in the relevant Property</i> ".	Whether the plaintiff has an interest in the property.	The plaintiff contends the words " <i>the plaintiff's interest in the relevant Property</i> " have the meaning in <i>Sojitz</i> and that the plaintiff does not have an interest because the property is partnership property. The defendant's submission do not articulate any meaning to those words. The parties to the Terms are not in agreement as to what the words mean notwithstanding the facts known at the time (in particular the partnership accounts signed by the	The defendant objects. First, there was no agreement between the parties as to the existence of any partnerships at law when the Terms of Interim Compromise were entered into. Second, the plaintiff does not rely on extrinsic material to assist with construction of the Terms of Interim Compromise, but instead seeks to argue for a finding to be made by this Court now of fact and law as to the existence of one or	Evidence admitted. The actual state of legal proprietary interest (if any) in the subject property was a fact known to both parties at the time of the creation of the instrument. It is relevant in the manner explained in the body of my reasons for judgment.

Number	The evidence	The basis upon which the tender is justified	How it would assist in resolving the disputed question of construction	The objective matter which it is said to be probative of	How evidence of that matter would assist the Judge in resolving the disputed question of construction	Response	Ruling
					defendant which are contrary to title searches).	more partnerships at law. The plaintiff then seeks to rely on such findings not as an extrinsic matter to aid in construction, but to instead argue the Terms of Interim Compromise cannot be performed. Thirdly, in the alternative, a finding now as to the existence of one or more partnerships at law was not an agreed fact when the Terms of Interim Compromise were entered into and is therefore not admissible as evidence to aid construction.	
2	The financial accounts for the CFT/JJT Partnership signed by Mr James reflect that properties in paragraphs 2(a) to (c) of the Terms are partnership property and that the partners are the defendant and the plaintiff in equal shares.	As above	As above	As above	As above	As above	Evidence not admitted. As explained in the body of my reasons for judgment, it was relevant that the plaintiff asserted its interest was that of a partner and that assertion was disputed. Evidence which might be probative as to the correctness or otherwise of the plaintiff's contention

Number	The evidence	The basis upon which the tender is justified	How it would assist in resolving the disputed question of construction	The objective matter which it is said to be probative of	How evidence of that matter would assist the Judge in resolving the disputed question of construction	Response	Ruling
							was not presently relevant.
3	The registered owners of 166 Knapp Street, Fortitude Valley in paragraph 2(d) of the Terms (the “Knapp Street Partnership” property) are the defendant 3/6, the plaintiff 1/6, proposed fourth defendants 1/6 and proposed fifth defendant 1/6 as tenants in common.	As above	As above	As above	As above	As above	As per 1
4	The financial accounts for the Knapp Street Partnership signed by Mr James reflect that the partners are the defendant and the Wyandra Street Partnership in the shares of 1/3 and 2/3 respectively.	As above	As above	As above	As above	As above	As per 2
5	The composition of the Wyandra Street Partnership is pleaded in the ASoC and sworn	As above	As above	As above	As above	As above	Evidence of allegations advanced in the pleadings (or proposed to be advanced)

Number	The evidence	The basis upon which the tender is justified	How it would assist in resolving the disputed question of construction	The objective matter which it is said to be probative of	How evidence of that matter would assist the Judge in resolving the disputed question of construction	Response	Ruling
	to in Mr Conley's affidavit. Relevantly, the CFT/JJT Partnership has a 50% interest in the Wyandra Street Partnership.						admitted for reasons explained in the body of my reasons. Evidence which might be probative as to the correctness or otherwise of the plaintiff's contention was not presently relevant, so the evidence from Mr Conley's affidavit is not admitted.
6	The registered owners of Lots 29-31 on BUP 11572, 269 Wickham Street, Fortitude Valley in paragraph 2(e) of the Terms are the defendant and Ralph Lauren 33 Pty Ltd as tenants in common in the shares of 3/10 and 7/10 respectively.	As above	As above	As above	As above	As above	As per 1
7	The defendant by Mr James has acknowledged to the NAB that these companies hold the properties as bare	As above	As above	As above	As above	As above	As per 2

Number	The evidence	The basis upon which the tender is justified	How it would assist in resolving the disputed question of construction	The objective matter which it is said to be probative of	How evidence of that matter would assist the Judge in resolving the disputed question of construction	Response	Ruling
	trustees for the Wyandra Street Partnership and Queen Street Partnership (collectively, the K Tower Partnership).						
8	The composition of the Wyandra Street Partnership and Queen Street Partnership is pleaded in the ASoC and sworn to in Mr Conley's affidavit. As stated above, the CFT/JJT Partnership has a 50% interest in the Wyandra Street Partnership.	As above	As above	As above	As above	As above	As per 4
9	The financial accounts for the K Tower Partnership signed by Mr James reflect that the partners are Wyandra Street Partnership and Queen Street Partnership in the shares of 30% and 70% respectively.	As above	As above	As above	As above	As above	As per 2



Number	The evidence	The basis upon which the tender is justified	How it would assist in resolving the disputed question of construction	The objective matter which it is said to be probative of	How evidence of that matter would assist the Judge in resolving the disputed question of construction	Response	Ruling
	Wyandra Street Partnership and Queen Street Partnership respectively (collectively, the K Tower Partnership).						
14	The financial accounts for the K Tower Partnership signed by Mr James reflect that the partners are Wyandra Street Partnership and Queen Street Partnership in the shares of 30% and 70% respectively.	As above	As above	As above	As above	As above	As per 2
15	The plaintiff disputes the interests allocated to it by the defendant in the above referred partnerships as recorded in the various financial statements and where recorded on title	As above	As above	As above	As above	As above	As per 4

## APPENDIX B

## SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 4589/16

Plaintiff:

GRACE BUNCLE PTY LTD AS TRUSTEE OF THE CINDY FLEMING TRUST

AND

Defendant:

RALPH LAUREN NO 57 PTY LTD AS TRUSTEE FOR THE JOHN JAMES TRUST

**Defendant's Application seeking declaration as to the proper construction of clauses 4(c), 5 and 9 of Terms of Compromise dated 9 March 2017 ("the Terms") filed 23 June 2017**

**SPREADSHEET OF EVIDENCE OF EVENTS, CIRCUMSTANCES AND THINGS EXTERNAL TO THE CONTRACTUAL INSTRUMENT THAT THE DEFENDANT WISHES TO TENDER**

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
1	Exhibit LJP1 to the affidavit of Leslie John Power sworn 23 June 2017 filed in proceeding 4589/16 (court document [55])	The document that is the subject of the application		Agree	
2	Originating Application filed 9 May 2016 in proceeding 4589/16 (court document [1]), paragraph 1	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the plaintiff sought orders for the appointment of statutory trustees pursuant to section 38 of the <i>Property Law Act 1974</i> .	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	Evidence admitted. Evidence of steps taken and allegations advanced in the first proceeding (or proposed to be advanced) admitted for reasons explained in the

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
					body of my reasons.
3	Statement of Claim in proceeding 4589/16 filed 30 May 2016 (court document 15), each of paragraphs 10, 11, 13, 23, 24, 25, 26 of the facts pleaded, each of paragraphs 1 to 22 of the relief sought	(a) Evidence of an objective matter known to the parties; and (b) relevant to construction of an ambiguous expression - "any final accounting between the parties as to their respective entitlements" at paragraphs 5(h) of the Terms	Provides context to reasons why parties agreed to commercial compromise; the plaintiff alleged there was a partnership, with real property assets, that had been terminated and it required sale and an account. Further, will assist construction of the meaning of "any final accounting between the parties as to their respective entitlements" at paragraph 5(h) of the Terms.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
4	Defence in proceeding 4589/16 filed 12 July 2016 (court document [16]), each of paragraphs 4, 5, 7, 17, 18, 19 and 20	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the defendant admitted co-ownership, denied partnership, but if there was a partnership, denied it had been terminated;	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
5	Defence in proceeding 4589/16 filed 12 July 2016 (court document [16]), paragraph 4(a)(vii)	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the defendant pleads the plaintiff and the defendant had pre-emptive rights to purchase the interests of the other in property.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
6	Reply in proceeding 4589/16 filed 12 August 2016 (court document [21]), each of paragraphs 3, 4, 10, 11 and 12	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
7	Exhibit PLC1 to the affidavit of Peter Leslie Challen sworn 14 February 2017 filed in proceeding 4589/16 (court document [41]), each of paragraphs 9, 9A to 9J, 10, 11, 13, 13A, 21, 22A, 22G, 22J, 22M, 22N, 22P, 22S, 22V, 23 to 23F, 24, 25, 26, 27, 28, 29, 30 and 31 of the facts pleaded, each of paragraphs 1 to 22E, 23, 40, 47, 62 and 69 of the relief sought	(a) Evidence of an objective matter known to the parties; (b) relevant to construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms; and (c) relevant to construction of an ambiguous expression - "any final accounting between the parties as to their respective entitlements" at paragraphs 5(h) of the Terms	Provides context to reasons why parties agreed to commercial compromise; the plaintiff proposed to plead numerous additional partnerships involving more parties and real properties, sought appointment of statutory trustees for sale pursuant to section 38 of the <i>Property Law Act 1974</i> as to some, sought declarations that the first defendant (alone or with other defendants) held interests in real property on trust for partnerships or alternatively the plaintiff was entitled to joint ownership with the first defendant (alone or with other defendants) in proportion with contributions or as the Court considers appropriate. Further will assist with construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms and will assist construction of "any final accounting between the parties as to their respective entitlements" at paragraph	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
			5(h) of the Terms.		
8	Exhibit PLC1 to the affidavit of Peter Leslie Challen sworn 14 February 2017 filed in proceeding 4589/16 (court document 41), each of paragraphs 16, 17, 18, 19, 20, 22C, 22D, 22P, 22Y, 22AC, 22AG, 22AK, 22AN, 22AP, 22AT, 22BI, 22BJ, 22BM, 22BQ and 22BX of the facts pleaded	Referred to by the parties in paragraph 1(a) of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the plaintiff proposed to plead numerous financial transactions occurred.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says that some of the evidence (16, 17, 18, 19, 20, 22C, 22D, 22P) will assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
9	Statement of Claim in proceeding 4849/16 filed 13 May 2016 (court document [1]) each of paragraphs 12, 13, 17, 18, 19, 20, 21(d) of the facts pleaded, each of paragraphs 2 and 3 of the relief sought	Referred to, by inference, by the parties in paragraph 1(c) of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the plaintiff alleged redemption of units in a number of trusts was invalid because, inter alia, Mr Calabro did not determine "Fair Value".	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	Evidence admitted. Evidence of steps taken and allegations advanced in the pleadings (or proposed to be advanced) in the second proceeding admitted for reasons explained in the body of my reasons.
10	Defence in proceeding 4849/16 filed 12 July 2016 (court document [5]) paragraph 12(b)(ii)(iv) of the facts pleaded	Referred to, by inference, by the parties in paragraph 1(c) of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the defendant pleaded the valuation and methodology satisfied requirements.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 9
11	Reply in proceeding 4849/16 filed 12 August 2016 (court document [8]), paragraph 11(b)	Referred to, by inference, by the parties in paragraph 1(c) of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the plaintiff joined issue.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 9

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
12	Affidavit of Leslie John Power sworn 23 June 2017 filed 23 June 2017 in proceeding 4589/16 (court document [55]), each of paragraphs 12 and 13, exhibit LJP5	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the defendant agreed to forego enforcement rights against Michael Conley.	Reference to wrong [CDN] should be [57]. Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	Evidence admitted. Agree with defendant's submission.
13	Originating Application filed 9 May 2016 in proceeding 4589/16 (court document [1]), paragraph 1	(a) Evidence of an objective matter known to the parties; and (b) the subject of the compromise in paragraphs 2 to 9 of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the plaintiff sought orders for the appointment of statutory trustee pursuant to section 38 of the <i>Property Law Act 1974</i> .	Repeat of paragraph 2 above	As per 2
14	Application filed 14 February 2017 in proceeding 4589/16 (court document [40])	Referred to by the parties in paragraph 10 of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the plaintiff sought orders for leave to file the Claim and Statement of Claim in terms of the draft exhibited to the affidavit of Peter Leslie Challen sworn 14 February 2017 and leave to add parties as defendants and costs.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
15	Application filed 14 February 2017 in proceeding 4849/16 (court document [25])	Referred to by the parties in paragraph 10 of the Terms.	Provides context to reasons why parties agreed to commercial compromise; the plaintiff sought orders for leave to file the Claim and Statement of Claim in terms of the draft exhibited to the affidavit of Peter Leslie Challen sworn 14 February 2017 (and filed in proceeding 4849/16) and leave to add Mr Calabro	Reference to wrong [CDN] should be [40]. Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the</i>	As per 9

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
			as a defendant and costs.	<i>relevant Property</i> ".	
16	Order made 10 March 2017 in proceeding 4589/16 (court document [51])	(a) Order arising from paragraph 10 of the Terms; and (b) relevant to construction of an ambiguous expression - "the applications be adjourned" at paragraph 10 of the Terms	Provides context to the commercial compromise; the plaintiff and defendant agreed the plaintiff's application filed 14 February 2017 in proceeding 4589/16 would be adjourned. Further will assist in the constructions of the ambiguous expression - "the applications be adjourned" at paragraph 10 of the Terms.	Disagree. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
17	Order made 10 March 2017 in proceeding 48499/16 (court document [29])	(a) Order arising from paragraph 10 of the Terms; and (b) relevant to construction of an ambiguous expression - "the applications be adjourned" at paragraph 10 of the Terms	Provides context to the commercial compromise; the plaintiff and defendant agreed the plaintiff's application filed 14 February 2017 in proceeding 4849/16 would be adjourned. Further will assist in the constructions of the ambiguous expression - "the applications be adjourned" at paragraph 10 of the Terms.	Disagree. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 9
18	Affidavit of Leslie John Power sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [57]), paragraph 10 and exhibit LJP3 being plaintiff's written outline of submissions dated 7 March	Evidence of an objective matter known to the parties	Provides context to the commercial compromise; the plaintiff contended it was a co-owner of some of the real properties the subject of the Terms. Further will assist with construction of an ambiguous expression - "the Plaintiff's interest in the relevant	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words	As per 2

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
	2017 (each of paragraphs 1 and 16)		Property" at paragraphs 5(a) and 5(b) of the Terms.	<i>"the plaintiff's interest in the relevant Property"</i> .	
19	Affidavit of Leslie John Power sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [57]), paragraph 10 and exhibit LJP3 being plaintiff's written outline of submissions dated 7 March 2017 (each of paragraphs 36(c), 36(d) and 36(e))	(a) Evidence of an objective matter known to the parties; and (b) relevant to construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms	Provides context to reasons why parties agreed to commercial compromise; (i) the plaintiff was aware of, though it did not accept, that the defendant claimed to have pre-emptive rights and that the plaintiff had no objection to the [defendant] acquiring the plaintiff's interest in partnership properties but the plaintiff wished to go to market to ascertain the properties' value (as opposed to relying upon valuations); (ii) The plaintiff was aware the defendant asserted break costs would be incurred on sale of real properties; (iii) The plaintiff was aware the defendant asserted the terms of partnership/co-ownership were locked up. Further, will assist construction of the meaning of "the Plaintiff's interest in the relevant Property" at paragraph 5(a) and 5(b) of the Terms.	Disagree; submissions by a party are not evidence. Says the evidence will <b>not</b> assist in the construction of the words <i>"the plaintiff's interest in the relevant Property"</i> .	As per 2

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
20	Affidavit of Leslie John Power sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [57]), paragraph 9 and exhibit LJP2 being letter Hawthorn Cuppaidge & Badgery to Barry Nilsson Solicitors dated 27 May 2016 together with letter Hawthorn Cuppaidge & Badgery to National Australia Bank dated 21 May 2016	(a) Evidence of an objective matter known to the parties; and (b) relevant to construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms	Provides context to reasons why parties agreed to commercial compromise; the plaintiff had expressed a willingness to treat and deal with real property on the basis of joint ownership in lieu of as partners. Further will assist with construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms.	Agree it is evidence of surrounding circumstances known by the parties to the Terms at the time of its creation. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
21	Affidavit of Leslie John Power sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [57]), paragraph 11 and exhibit LJP4 being Outline of Submissions on Behalf Of The Defendant dated 7 March 2017 (paragraph 39)	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the defendant opposed the appointment of statutory trustees pursuant to section 38 of the Property Law Act 1974 because, inter alia, it alleged a pre-emption agreement between co-owners.	Disagree; submissions by a party are not evidence. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2
22	Affidavit of Leslie John Power sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [57]), paragraph 11 and exhibit LJP4 being Outline of Submissions on Behalf Of The Defendant dated 7 March 2017 (paragraphs 40 to 43)	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the defendant opposed the appointment of statutory trustees pursuant to section 38 of the Property Law Act 1974 because, inter alia, it would give rise to immediate Capital Gains Tax liability.	Disagree; submissions by a party are not evidence. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 2

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
23	Affidavit of Robert John James sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [56]), paragraphs 4(a) and 4(b)	Evidence of an objective matter known to the parties	Provides context to reason why parties agreed to commercial compromise; the defendant was aware of the factual issues in dispute as regards the existence or otherwise of partnerships, would deny the existence of further alleged partnerships and claims of interests in real property if the plaintiff obtained leave to file an amended statement of claim and that the plaintiff contended fixed-term investments and pre-emptive rights.	Disagree as it is evidence of the subjective thought processes of the defendant. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	To the extent that the evidence is probative of the fact that the contents of the documents referenced were known to the both parties, overrule the objection. Uphold the objection for the reasons expressed by the plaintiff in relation to the awareness which the deponent actually had by reason of those documents.
24	Affidavit of Robert John James sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [56]), paragraph 4(c) and exhibit JJ1	(a) Evidence of an objective matter known to the parties; and (b) relevant to construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms	Provides context to reasons why parties agreed to commercial compromise; the plaintiff had expressed a willingness to treat and deal with real property on the basis of joint ownership in lieu of as partners. Further will assist with construction of an ambiguous expression - "the Plaintiff's interest in the relevant Property" at paragraphs 5(a) and 5(b) of the Terms.	Disagree as it is evidence of the subjective thought processes of the defendant. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 23

Number	Evidence or Document the defendant wishes to tender	Basis upon which the tender is justified	Explanation of how it will assist the Court	Plaintiff's response	Ruling
25	Affidavit of Robert John James sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [56]), paragraphs 4(d) to 4(f)	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed commercial compromise; the plaintiff sought appointment of statutory trustees for sale, the defendant opposed the appointment, the defendant and plaintiff had previously agreed to appointment of trustees without vesting of real property and where the plaintiff or the defendant could purchase the other's interests in the real properties.	Disagree as it is evidence of the subjective thought processes of the defendant. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	To the extent that the evidence is probative of the fact that the steps referenced were taken as known to the both parties, overrule the objection. Uphold the objection for the reasons expressed by the plaintiff in relation to the awareness which the deponent actually had by reason of those steps being taken.
26	Affidavit of Robert John James sworn 23 June 2017 and filed 23 June 2017 in proceeding 4589/16 (court document [56]), paragraph 4(l)	Evidence of an objective matter known to the parties	Provides context to reasons why parties agreed to commercial compromise; the defendant agreed to forego enforcement rights against Michael Conley.	Disagree as it is evidence of the subjective thought processes of the defendant. Says the evidence will <b>not</b> assist in the construction of the words " <i>the plaintiff's interest in the relevant Property</i> ".	As per 12