SUPREME COURT OF QUEENSLAND

CITATION:	*Wise Investments Pty Ltd v Cullen atf The Cullen Trust & Ors* [2018] QSC 221
PARTIES:	**WISE INVESTMENTS PTY LTD** (plaintiff) **v** **GRANT PAUL CULLEN as trustee of the CULLEN TRUST** (first defendant) **RUDDY TOMLINS & BAXTER SOLICITORS (A FIRM)** (second defendant) **ANIL CHAND MISHRA** (third defendant) **MICHELLE CHRISTI CULLEN** (fourth defendant)
FILE NO/S:	Supreme Court No 8216 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 October 2018, Orders made on 17 January 2019
DELIVERED AT:	Brisbane
HEARING DATE:	9-13 April, 16-18 April 2018
JUDGE:	Martin J
ORDERS:	

1. **Judgment for the Plaintiff against the First Defendant for $815,000 with interest to be assessed.**

2. **The Plaintiff's claim against the Second Defendant is dismissed.**

3. **The Plaintiff's claim against the Fourth Defendant is dismissed.**

4. **The First Defendant's counterclaim against the Third Defendant is dismissed.**

5. **The Plaintiff pay the Second Defendant's costs of the proceeding to be assessed on the standard basis until 23 November 2017 and on the indemnity basis thereafter.**

6. The First Defendant pay the Plaintiff's costs of the proceeding to be assessed on the standard basis.

7. The First Defendant pay the Third Defendant's costs of the counterclaim to be assessed on the standard basis.

8. The plaintiff pay the Fourth Defendant's costs of the proceeding on the standard basis.

9. The freezing orders made in paragraph 6 of the order of Applegarth J dated 17 March 2015 are continued:

(a) for 28 days after the date of these orders if no appeal is filed; or

(b) if an appeal is filed, until the final determination of any such appeal;

and are thereafter discharged.

THE ORDER OF THE COURT BY CONSENT IS THAT:

10. Pursuant to rule 687(2)(d) that the Plaintiff pay to the Second Defendant an amount for costs of the proceedings ordered in paragraph 5 above, that is to be assessed in the following way:

(a) the costs are to be assessed by an independent person, qualified as a costs assessor under UCPR Chapter 17A part 5;

(b) the independent person is to be a person agreed between the Plaintiff and the Second Defendant within 7 days of the date of these orders coming into effect subject to order (j) below, or failing agreement, a person appointed by the Registrar of the Supreme Court within a further 7 days;

(c) the independent person is to be given:

A. this order;

B. the affidavit of Geoffrey Leon Hyland sworn 15 October 2018 (Court Document 225) and the affidavit of Paul David Garrett sworn 16 October 2018 (Court Document 224);

C. access to such parts of the file of the Second Defendant's solicitor, Hyland Law, as the independent person may request; and

D. evidence and submissions of the Plaintiff as directed by the independent person; and

E. any response by the Second Defendant.

(d) the independent person is to make a summary determination of what is fair and reasonable for the costs ordered to be paid by the Plaintiff in the circumstances, so as to fix a gross sum broadly, without the specificity involved in an assessment of costs;

(e) the independent person shall provide a report to the parties and to the Court as to the sum fixed for costs and a brief explanation of the way in which that sum has been fixed as soon as practicable but no later than six weeks from the date on which the material in (c) above has been provided to the independent person;

(f) the independent person shall spend no more than 3 days, or an alternative time agreed by the parties in writing, undertaking the determination and preparing the report in (d) and (e) above;

(g) the costs of the independent person shall be paid equally by the Plaintiff and the Second Defendant;

(h) liberty to apply on three days' notice in writing to the other party;

(i) upon the delivery of the report in accordance with (e), the security be released to the Second Defendant insofar as is necessary to satisfy the costs order;

(j) costs orders in paragraphs (a)-(i) above are stayed:

A. for 28 days after the date of these orders if no appeal is filed; or

B. if an appeal is filed, until the final determination of any such appeal.

CATCHWORDS: RESTITUTION – CLAIMS ARISING OUT OF INEFFECTIVE CONTRACTS – GENERALLY – TOTAL FAILURE OF CONSIDERATION OR AGREED RETURN – where dispute arises out of a proposed real property transaction – where monies were paid by the Plaintiff to the First Defendant or to third parties in anticipation of the Plaintiff acquiring seven lots of land – where no written contract was entered into for that agreement – where the First Defendant alleges that the relevant payment of monies was in fact done in pursuit of a scheme to conceal assets, and not by virtue of that agreement – where that allegation is a serious accusation and gives rise to the considerations referred to in *Briginshaw v Briginshaw* (1938) 60 CLR 336 – whether the First Defendant's evidence was no more than inexact proofs, indefinite testimony, or indirect references – whether the Plaintiff can and did assign the debt – whether the First Defendant pleaded to the Plaintiff's capacity to assign the debt – whether the Plaintiff can recover monies paid on the ground that there has been total failure of consideration

CONVEYANCING – VOLUNTARY ALIENATION OR CONVEYANCE TO DEFRAUD CREDITORS – where the First Defendant transferred property to the Fourth Defendant, who became the registered proprietor – where the Plaintiff alleges that this was done with an intent to defraud creditors – where the Fourth Defendant became the registered proprietor in order to pay out the First Defendant's debts – whether there was an intention to hinder, delay or defeat creditors – whether the conveyance was made for value – whether the interest in property was conveyed for valuable consideration and in good faith to the Fourth Defendant – whether the Fourth Defendant has, at the time of the conveyance, notice of the intent to defraud creditors

PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – RETAINER – EXTENT OF THE RETAINER – where the Plaintiff alleges that the Second Defendant was retained to act for the Plaintiff in relation to a contract for the purchase of seven lots, rather than a contract for the purchase of one lot – where the Second Defendant submits it was retained to act for the First Defendant in relation to a contract for the purchase of one lot – where both the Plaintiff and First Defendant only gave instructions in relation to a contract for the purchase of one lot – where there were no apparent instructions given for the ownership of seven lots to be transferred to the Plaintiff or its representative – where the

	solicitor of the Second Defendant did not believe she needed to seek the Plaintiff's, or its representative's, instructions – whether, in the absence of any instruction to act with respect to the conveyance of seven lots, the Second Defendant had a duty to advise the Plaintiff or its representative – whether the Second Defendant owed any duties to the Plaintiff in relation to the conveyance of one lot – whether the Plaintiff's representative lacked legal and commercial knowledge and acumen – whether the Second Defendant breached any of its duties owed to the Plaintiff and its representative
CASES AND LEGISLATION:	*Property Law Act* 1974 (Qld) s 228
	Uniform Civil Procedure Rules 1999 (Qld) r 166
	Baltic Shipping Co v Dillon (1993) 176 CLR 344
	Bell Group Ltd (in liq) v Westpac Banking Corporation (2008) 39 WAR 1
	Briginshaw v Briginshaw (1938) 60 CLR 336
	Commissioner of Taxation v Oswal [2012] FCA 1507
	Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32
	Fox v Everingham (1983) 50 ALR 337
	Hawkins v Clayton (1988) 164 CLR 539
	Lardis v Lakis [2018] NSWCA 113
	Marcolongo v Chen (2011) 242 CLR 546
	Petrovic v Brett Grimley Sales Pty Ltd [2014] VSCA 99
	Pico Holdings Inc v Wave Vistas Pty Ltd (2005) 214 ALR 392
	Robert Bax & Associates v Cavenham Pty Ltd [2013] 1 Qd R 476
	Wentworth v Rogers [2004] NSWCA 430
COUNSEL:	T Alexis SC and P Afshar for the plaintiff and the third defendant P Travers for the first defendant G Beacham QC and A Nicholas for the second defendant
SOLICITORS:	Bennett & Philp Solicitors for the plaintiff and third defendant Diamond Conway Lawyers for the first defendant Hyland Law for the second defendant

[1] The disputes in this case arise out of a broken marriage, a ruined friendship, and an unsuccessful real estate development called Gloucester Views Estate in Bowen (the Bowen land).

[2] Anil Mishra and Grant Cullen were once close friends. They socialised together. They took holidays together. Mr Mishra was Mr Cullen's best man at his second wedding. Their friendship commenced soon after Mr Cullen retained Mr Mishra's accounting firm. It shattered in September 2013 after a falling out over a business venture they were pursuing in Fiji. These proceedings started soon after that.

[3] Mr Cullen as Trustee of the Cullen Unit Trust (Cullen as Trustee) owned the Bowen land and was engaged in subdividing it. He was the trustee and became the holder of all the units in that trust. His first marriage was breaking up and he was concerned to protect his interest in the Bowen land.

[4] The development in Bowen consisted of number of lots situated around a cul-de-sac. There were three stages of the development. The contest among the parties is centred upon the terms of an agreement entered into between Cullen as Trustee and Wise Investments Pty Ltd (Wise) for part of Stage 3 of the developed land. Anil Mishra is the sole director and shareholder of Wise Investments Pty Ltd.

What is the case about?

[5] The claim is in two parts. The first concerns the alleged sale of seven lots in the Bowen land from Cullen as Trustee to Wise. Wise contends that it paid $815,000 for the land, that there has been no conveyance, and that there has been a complete failure of consideration by Cullen as Trustee. It seeks, among other things, restitution. If the plaintiff succeeds in that claim then a further order is sought with respect to property which is now in the name of Michelle Cullen – the fourth defendant and second wife of Grant Cullen.

[6] Mr Mishra's case is that he paid Cullen as Trustee $815,000 during 2010 for the purchase of the land. Mr Cullen agrees that the $815,000 was given to him by Mr Mishra, but says that it was not for the purchase of the land. Rather, he says, it was the return of money which Mr Cullen had been surreptitiously depositing with Mr Mishra for the purpose of hiding it from Natasha Cullen – Mr Cullen's first wife.

[7] The second part of the claim concerns allegations that the second defendant, Ruddy Tomlins & Baxter (RTB), breached the retainer it held for Wise or that it was negligent in failing to properly advise and take steps to protect Wise's interests as a purchaser for value or both.

[8] Substantial segments of the trial were taken up with the exploration of issues which were more concerned with the credibility of the particular parties than with the particular dispute. Neither Mr Mishra nor Mr Cullen could be relied upon to always render a reliable, unvarnished account of the many incidents which constitute this case. Where it is possible, I have relied upon contemporary written records to inform my decisions.

[9] Many of the things which Mr Mishra and Mr Cullen did – in particular the arrangements concerning Lot 504 in the Estate – make little sense at this remove. But, their activity has to be viewed in the context of their relationship in 2010. They were close friends. They

relied on each other. They would help each other if possible. That relationship, and the conduct which grew out of it, was heavily influenced by Mr Cullen's view of his soon to be ex-wife which caused him to fixate on the protection of his assets.

The orders of the Federal Magistrates Court

[10] Before turning to the allegations concerning the payment of money and its proper characterisation, it is appropriate to briefly examine the effect of orders made concerning the property of Mr Cullen's first marriage. A substantial part of the evidence from Mr Cullen concerned his desire to "protect" his assets from Natasha Cullen. They had separated in 2008. On 26 October 2009 consent orders were made by the Federal Magistrates Court with respect to, among other things, the property of the marriage.[1]

[11] Mr Cullen understood that the making of those orders brought to an end all issues with his ex-wife concerning property. The order required that a number of things be done. So far as is relevant, the orders effectively provided that:

(a) Mr Cullen was to pay his ex-wife $150,000 within seven days of the order. In return, Mrs Cullen was to:

  (i) release to him the balance of funds held in a particular Cullen Unit Trust bank account,

  (ii) effect the transfer of the 100 units in her name in the Cullen Unit Trust to him, and

  (iii) release the caveat which she had lodged over the property in Bowen.

(b) Mr Cullen was to pay his ex-wife $400,000 within 12 months of the order. In return, Mrs Cullen was to transfer to him all of her interest in the former matrimonial home at Burleigh Waters (Burleigh Waters property).

[12] The first amount was paid in time and the releases and transfer occurred. The second amount was paid late and Natasha Cullen's lawyers pursued Mr Cullen for it. The order allowed for the possibility that Mr Cullen might fail to pay the second amount. It provided, in that event, that Mrs Natasha Cullen could have redress against the Burleigh Waters property.

[13] The intent of the order was made clear by order 15 which recites that Mr Cullen was to:

> " … retain as his property absolutely free of all claims from the wife:
>
> (a) his interest in the Cullen Unit Trust,
>
> (b) his interest in the former matrimonial home at … Burleigh Waters
>
> …"

The claim for restitution – among other things

[14] In the Second Further Amended Statement of Claim (SFASOC) Wise Investments alleges that, in late 2009, Mr Mishra and Mr Cullen agreed that Mr Mishra, by a nominee, would purchase seven lots in the Stage 3 Subdivision of Gloucester Views. Payment of

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[1] Exhibit 26, p 334.

$805,000, being $115,000 for each lot, was to be made as and when required by Cullen as Trustee so that the Stage 3 Subdivision could be completed (the 7 lot agreement).

[15] The next pleaded step was that Mr Mishra and Mr Cullen met Ms Leah McDonnell of RTB and told her (among other things) of this agreement, and retained RTB to attend to the preparation and completion of an agreement for the sale of seven lots (the 7 Lot Agreement). This, the plaintiff pleads, was not done. Rather, it is said, a different contract was prepared which would result in the conveying of one large lot – Lot 504 (the Lot 504 Agreement). The price for that lot was recorded in the contract as $200,000. There was a provision for Cullen as Trustee to subdivide Lot 504 into seven lots.

[16] A sunset date was incorporated into the contract. The survey plan was to be registered, effectively, by 7 March 2012. If not, either party could terminate the contract in writing. The settlement date was 21 days after Cullen as Trustee gave notice to Wise that the survey plan had been registered. The survey plan was registered on 10 March 2011.

[17] Wise pleads that the settlement date was 31 March 2011. Cullen as Trustee says that he was entitled to, and did, terminate the contract on 21 October 2013. On the other hand, RBT pleads that Cullen as Trustee was not entitled to terminate the contract because it was, in any event, void or had been abandoned or was never intended to be performed.

[18] So far as the nature of the contract is concerned, Wise says that the issue as to termination need not be determined in its claim against Cullen as Trustee. It says that it has a claim in restitution or, alternatively:

(a) for money paid for a consideration which has wholly failed,

(b) for money paid by the plaintiff and at the request of the first defendant, or

(c) for money had and received.

[19] For the reasons which follow, I have found that Mr Mishra transferred to Mr Cullen, either directly or by payments to third parties, $815,000. That sum was paid in anticipation of Mr Mishra acquiring seven lots in the Bowen land. No written contract was entered into because the relationship between the parties, at that stage, was such that they had complete trust in each other. The nature of the claim was not explored in any detail by the parties. So far as the plaintiff was concerned it seemed sufficient to argue that Mr Mishra was a bona fide purchaser for value.

[20] A proper analysis of the claim would have it fall into that category described by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[2] where, at 61 he said:

> "Another class is where … there is prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due. There was in such circumstances no intention to enrich the payee...This is the class of claims for the recovery of money paid for a consideration which has failed."

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[2] [1943] AC 32.

[21] There has been some debate about whether or not the word "consideration" is appropriately used in that context. In *Fibrosa* Viscount Simon LC said, at 48:

> "In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act – I am excluding contracts under seal – and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration; but, when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking not the promise which is referred to as the consideration, but the performance of the promise."

[22] This matter has been dealt with by the High Court in *Baltic Shipping Co v Dillon*[3] where Mason CJ said, at 350-351:

> "In the context of the recovery of money paid on the footing that there has been a total failure of consideration, it is the performance of the defendant's promise, not the promise itself, which is the relevant consideration."

[23] His Honour also made it clear that *Fibrosa* correctly reflected the law in Australia.[4]

What payments were made? And why were they made?

[24] There is no dispute that payments were made by or on behalf of Mr Mishra into accounts controlled by Mr Cullen or at his direction. Of the $815,000 which was transferred, $439,000 went into accounts controlled by Mr Cullen and the balance of $376,000 was paid to contractors working on Stage 3. This is supported by Mr Mishra's evidence, unchallenged schedules of payments and underlying bank statements. There is a dispute about the source of some of the money paid by Mr Mishra and his ability to assign the right to recover some of those payments, but that is dealt with later in these reasons.

[25] Mr Cullen accepted, in cross-examination, that:

(a) Mr Mishra paid him various sums of money during the 2010 calendar year.

(b) He applied the money that he was paid to the development costs and associated costs of the Stage 3 development.

(c) He directed Mr Mishra to pay contractors working on the development, in particular, East Coast Civil.

(d) In the period January 2010 to November 2010 he received, or contractors were paid at his direction, sums totalling $815,000.

[26] On 20 October 2010, Mr Cullen sent Mr Mishra an email to which he attached a document "with the dates and amounts you have given me so far". That document showed payments from 18 January to 18 October amounting to $484,000.

[27] Mr Cullen's answer to the allegation that all of this money was paid to him or at his direction was that he hid money from his then wife by "funnelling" it to Mr Mishra to hold for him and the $815,000 was just that money coming back to him (the money scheme).

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3 (1993) 176 CLR 344.

4 (1993) 176 CLR 344, at 355 fn 55.

[28] He also said that, in 2010, he and Mr Mishra agreed that Mr Mishra would hold the shares in Wise on trust for Cullen as Trustee to protect a large part of the Bowen land from his ex-wife (the trust scheme).

[29] Mr Cullen described these schemes in the written submissions provided on his behalf in the following way:

(a) Between 2004 and 2010, Mr Cullen, acting on the advice of Mr Mishra, withdrew money from his personal bank account and the Unit Trust account and "passed" that money to Mr Mishra for Mr Cullen's use as required at a later date.

(b) Mr Cullen transferred in excess of $1 million by this method.

(c) In late 2009 Mr Cullen sought advice from Mr Mishra in relation to taxation and "structuring" in relation to Stage 3.

(d) On 9 February 2010, Mr Mishra provided written advice to Mr Cullen in relation to tax planning for the Cullen Unit Trust and his divorce.

(e) In April 2010 Mr Cullen and Mr Mishra agreed that Mr Mishra would form a company (the Plaintiff) which he would hold on trust for Mr Cullen. That company would purchase land from the Stage 3 development to be held on trust for Mr Cullen in order to protect him in relation to his divorce, and "in particular, if he was to breach the terms of the Family Law Orders by not paying the amounts required to be paid."

(f) Any payment made by Mr Mishra to Mr Cullen in 2010 was simply Mr Mishra returning Mr Cullen's money to him and not payments made by him in reliance on an agreement made in or about late 2009.

[30] Thus, it was the case for Cullen as Trustee that he and Mr Mishra had worked together with the intention of:

(a) concealing assets which might otherwise have been taken into account when the appropriate division of matrimonial property was being considered and when orders were being made with respect to the property of that marriage, and

(b) changing the ownership of the Bowen land in order to protect it from possible action from his ex-wife.

[31] That is a serious accusation to make and, as Mr Travers (who appeared for Cullen as Trustee) correctly conceded during oral submissions, it is appropriate that the considerations referred to in *Briginshaw v Briginshaw*[5] be applied:

> " … it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the

[5] (1938) 60 CLR 336.

> tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."[6]

The money scheme

[32] Mr Cullen, to support this part of his case, gave evidence in chief that:

(a) He gave the money to Mr Mishra in cash and cheques.

(b) He did it to stop his ex-wife spending it.

(c) He had probably given him "well in excess of $1 million over the years".

(d) He gave him some of the money at his house or at Mr Mishra's house.

[33] This was consistent (in part) with what he said in May 2015 in an affidavit filed in proceedings brought to remove a caveat lodged by Mr Mishra:

> "30. From 2008 in the context of the dispute with my former wife Natasha, Mr Mishra advised me and I acted upon that advice to make cash withdrawals from the Unit Trust's bank account and my personal joint account from time to time and pay those amounts in cash to Mr Mishra who would hold the funds in his trust account on my or the trust's behalf. …
>
> 31. Accordingly, from that point onwards, from time to time, I would withdraw cash form [sic] the Unit Trust and my personal joint account and pay those amounts to Mr Mishra in cash on the Gold Coast. …"

[34] In support of this contention, Mr Cullen produced a document during examination in chief which he said he had created and which purported to set out a summary of the source of the payments he said he had made to ACM Partners Anil Mishra Trust Account.[7] That document lists a number of withdrawals from the Cullen Unit trust account and the "G and N Cullen flexi joint account". But the total of the withdrawals is much less than the amount of more than $1,000,000 Mr Cullen said he advanced. It is also less than the $815,000 which Mr Cullen said was money returned to him by Mr Mishra. The amount shown as having been withdrawn from the trust account was $394,810. The amount withdrawn from the joint account was $257,733. Thus, a total of $652,543. There was no evidence of other withdrawals.

[35] Exhibit 6 also purports to show that the first amount "funnelled" to Mr Mishra was by a cheque drawn on 17 May 2005 for $20,000. On the same day another cheque was drawn for $40,000 and is also said to be part of the money scheme. This, of course, is inconsistent with Mr Cullen's evidence in his affidavit that the amounts were in cash and that the scheme started in 2008.[8]

[36] The summary in Exhibit 6 was said to have been drawn from particular entries in a bundle of the bank statements which became Exhibit 7. In order for that to be correct, Mr Cullen would need a memory of elephantine proportions. It is implicit in his evidence that he is capable of identifying withdrawals he made almost 14 years ago as being amounts which

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6 *Briginshaw v Briginshaw*, Dixon J at 362.

7 Exhibit 6.

8 Exhibit 6 commences with a notation concerning a cheque drawn on 12 January 2004 but, when it was tendered, Mr Travers said that that entry was to be ignored.

he then passed to Mr Mishra. For example, he was able to recall that the $300 he withdrew from an ATM on 9 September 2004 and another amount of $300 from an ATM on 13 September 2004[9] were amounts he passed to Mr Mishra. But an amount of $50 he also withdrew from an ATM on 13 September 2004 was not. This keen memory continues throughout his recall of what he was doing more than a decade ago when, for example, he can recall that on 10 April 2006 the $50 he withdrew from an ATM at 7:30 AM was not money he gave to Mr Mishra but the $100 he withdrew from an ATM some five hours later was. Another example of this remarkable ability can be seen by his recollection that, when he withdrew $400 from an ATM at 10:31am on 26 April 2006 that amount, like the $400 he withdrew from the same ATM two minutes later, was money which he would eventually give to Mr Mishra.

[37] I do not accept that Exhibit 6 supports the First Defendant's case. The notion that Mr Cullen was surreptitiously withdrawing small amounts, squirrelling them away, and then giving them in cash to Mr Mishra is redolent of convenient reconstruction. In cross-examination, he said that Mr Mishra kept a book in which he recorded the money which Mr Cullen gave to him.[10] Notwithstanding that evidence, no call was made for the production of this "book".

[38] Further, as I have noted, the total amount of cash withdrawals noted in Exhibit 6 is much less than the more than $1,000,000 he said he gave to Mr Mishra. Mr Cullen attempted to explain the shortfall by relying on notations in his bank statements about cheques being drawn and internet transfers being made, but there is no evidence of the recipients of those cheques and transfers. And, even then, the total only reached some $650,000.

[39] In cross-examination, Mr Cullen gave different accounts of what he had done. He said, for example that the first occasion on which he spoke to Mr Mishra about withdrawing cash in random amounts was "around the 2004 period". In that conversation, he said that Mr Mishra told him that he could hold the cash for him in Mr Mishra's trust account and "when I needed it or required it, then to give him a call and he gives it back."

[40] There is nothing in any of the documents in this trial which confirms that any amounts were given to Mr Mishra for the purpose of hiding them from Mrs Cullen. There is evidence that money was withdrawn, but there is no documentary evidence of where it went. The ACM trust account – into which Mr Cullen's money was said to be deposited – was not the subject of any evidence.

[41] Mr Cullen's evidence was unconvincing. In his affidavit, he said payments under this scheme commenced in 2008. Yet he claims in Exhibit 6 to have started withdrawing sums in 2004. He denied that Mr Mishra lent him any money, yet he is recorded in an RTB file note[11] of 10 September 2013 as saying that: "Anil [had] loaned money to me for development. A$400,000".

[42] Mr Cullen's evidence on this point was inconsistent with other, documentary evidence and the concessions he had made. For example, in an email of 20 October 2010 sent by Mr Cullen to Mr Mishra he records at least twelve amounts that Mr Mishra had "given [him] so far" before the alleged agreement was formed to conceal money from

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[9] From the G and N Cullen Flexi Joint Account.
[10] T4 – 88.
[11] Exhibit 24.

Mrs Cullen. Two of those payments ($20,000 and $10,000) were made before the email[12] from Gaurav, which allegedly attached the "advice", was sent.

[43] The evidence advanced by Mr Cullen was no more than "inexact proofs, indefinite testimony, or indirect inferences."[13] On the other hand, his admission that Mr Mishra had given him, or paid contractors, amounts totalling $815,000 was consistent with Mr Mishra's account on this point.

[44] I am satisfied that Mr Mishra did make or arrange payments to Mr Cullen (or at his direction) in the sum of $815,000 for the purchase of land at Gloucester Views. I do not accept that Mr Mishra received any money from Mr Cullen pursuant to any agreement that he would hold it on trust for Mr Cullen in order to conceal it from Mr Cullen's then wife.

The trust scheme

[45] Mr Cullen said[14] that this scheme to conceal assets from his then wife grew from a "strategy document"[15] prepared by Mr Mishra and sent to him in February 2010. He described it as being "in relation to the structuring of stage 3 of the development for tax purposes and given the terms of the consent orders entered in the Federal Magistrates Court." Mr Mishra denied creating or giving the "advice".

[46] That document was the subject of considerable dispute. Mr Cullen said it was the attachment to an email sent by "Gaurav"[16] from ACM on 9 February 2010. The body of the email reads:

> "Please find the attached file in relation to proceed [sic] further with Cullen Unit Trust."

[47] At the foot of the email is an icon usually used to denote the attachment of a document to the email. The document which Mr Cullen said was attached provided:

> "Tax Planning for Cullen Unit Trust and Divorce
>
> 1. If it's done through Unit trust:
>
> | | |
> |---|---|
> | **Land Cost** (as at 30/06/2008) | $200,000 |
> | **Land Development Cost** | $700,000 |
> | | $900,000 |
> | Sale of 17 Lots @ $180,000 each | $3,060,000 |
> | Net Profit on this Project | **$2,160,000** |
> | You will end up paying half the Tax | $1,080,000 |

[12] Considered further below.
[13] *Briginshaw v Briginshaw*, Dixon J at 362.
[14] Affidavit of Grant Paul Cullen sworn 28 May 2015, paragraph [11].
[15] Affidavit of Grant Paul Cullen sworn 28 May 2015.
[16] Mr Mishra admitted that Gaurav was an employee of ACM at the relevant time.

2. Land to be sold now to Two Different Companies:

A) Company by ACM as previously agreed:

ACM to pay Unit Trust $250,000 to purchase undeveloped parcel of Land. Once the Property is developed and sold by Unit Trust, The Trust can cease operation without any further Tax Liabilities.

Therefore, $200,000 Land Cost will be offset against Sales of $250,000 leaving some profit to offset other expenses.

The Balance of Money ($200,000) will be paid to your new company for Development upon Registration of Individual Titles.

B) Once the Property is developed, then the Individual Titles will be registered in 2 separate Companies one for ACM - 7 Lots held in trust for you and the Other - 10 Lots of Land can be Registered in another Company owned by Grant, which can sell properties on its own right and incurring Tax and GST Liabilities (**Later Liquidated**)

We suggest that we should look at the Second alternative to prevent being taxed personally via the Income passing through Unit Trust and to further protect you in your divorce.

Please contact to discuss and arrange these scenarios."

[48] It was not satisfactorily explained why, after the orders were made by the Federal Magistrates Court, that there would need to be planning of this nature for Mr Cullen's divorce. And, by the time that Mr Cullen said he received this "advice", his ex-wife's share of the units in the Cullen Unit Trust had been transferred to him and he was the sole owner.

[49] It was not obvious why it was suggested in the first part of the "advice" that he would "end up paying half the Tax". One might expect from an accountant a greater degree of precision. Perhaps it was intended to read: "You will end up paying half [in] Tax." It is not uncommon for persons to arrange their affairs in such a way that the imposition of tax will be reduced. Whether the proposal outlined in the "advice" would have that effect is not relevant. But, the remark that the "Second alternative" would "further protect you in your divorce" makes no sense in the light of the orders which had already been made.

[50] Part 2 of the "advice" is headed: "Land to be sold now to Two Different Companies". It then refers to "Company by ACM as *previously* agreed". There was no suggestion by Mr Cullen that there had been any previous agreement about a company by ACM.

[51] There are other curious aspects. In Part 2, it suggests that ACM pay the Cullen Unit Trust $250,000 to purchase the undeveloped parcel of land. It then suggests that the property would be developed and "sold by Unit Trust". It does not explain how, having sold the undeveloped parcel to ACM, the Unit Trust could then sell the same land once it was developed. It obviously contemplates the sale to ACM because it refers to the land cost of $200,000 being set off against the sale price of $250,000.

[52] The language used in the "advice" is inconsistent. In part B of the "Second alternative" there is a reference to individual titles being registered in two separate companies. One of those was proposed to be for ACM and "the Other – 10 Lots of Land can be Registered in another Company owned by Grant". It was not obvious why, in an "advice" to Grant Cullen that he would be referred to in the third person. In any event, the advice contemplates that, somehow, the developed property would have the individual titles registered in those two companies but nothing is said about sales or prices.

[53] Another troublesome aspect of the "advice" is that the recommended strategy could lead to a significant tax liability in the proposed company for no apparent good reason. Similarly, the proposal could have resulted in unnecessary transfers with a consequent increase in stamp duty. Mr Cullen's answer to these problems was to repeat that he relied upon his accountants.

[54] It was submitted on behalf of Wise that the document was likely to have been created by Cullen or someone on his behalf. Similarities between it and other documents known to have been created by Cullen were pointed out to Mr Cullen in cross-examination. He denied being its author. In broad terms it was contended that Mr Cullen had presented to the court a document which he knew to be in the nature of a forgery. The principles in *Briginshaw* apply just as much to that accusation as to Mr Travers' accusation that Mr Mishra conspired with him to hide money from Mr Cullen's ex-wife.

[55] The following may be accepted:

(a) Gaurav sent Mr Cullen an email with an attachment.

(b) ACM did not produce the "original" email (in any form) in response to a subpoena.

(c) Mr Mishra, while denying that he was the author or otherwise knew of the attachment, cannot then deny that it was attached to the email.

[56] It should also be observed that Mr Cullen did not produce the "original" email which he received in an electronic form nor was a subpoena to that effect served on him.

[57] It was submitted by Mr Beacham QC that there was no more probable source for the email than ACM. The argument from Mr Mishra that the document was created by Mr Cullen or someone on his behalf raises the same issues of standard of proof as adverted to earlier. The fact that the document is replete with inconsistencies and illogicalities does not compel a finding that it was not produced by ACM. There was no evidence about Gaurav's experience or ability. But, if he was the author, then neither were of a high standard. The important issue is whether Mr Mishra knew of the advice or acted upon it.

[58] The "advice" was relied upon by Mr Cullen and formed the basis for Mr Cullen's allegation that there was an agreement that Mr Mishra would hold the shares in Wise on trust for Cullen as Trustee. The fact that he relied on it does not require the conclusion that Mr Mishra was complicit in the scheme (so far as it can be described as one) set out in the advice. Whoever was the author of the advice, I accept that Mr Mishra had not seen it before these proceedings.

Has there been an assignment to Wise?

[59] Wise pleads that it can sue Cullen as Trustee pursuant to an assignment. Paragraph 39A of the SFASOC alleges:

> "The rights to the First Defendant's indebtedness to Mishra, prior to the Plaintiff's incorporation, was assigned to, and thereby vested, in law, in the Plaintiff, by effect of ("the Assignment"):
>
> (a) Heads of Agreement dated 5 November 2010;
>
> (b) Notice of Assignment dated 27 June 2014;
>
> (c) Deed of Assignment dated 13 August 2014."

[60] There was evidence from Mr Mishra that some of the money advanced came from other sources, such as his sister and from a joint account with his wife. Cullen as Trustee contends that Mr Mishra cannot assign a debt or chose in action in which he does not have a proprietary right. So much may be accepted. But, before considering those arguments, it is necessary to consider the issue (if any) which emerges from the pleadings.

[61] In response to para. 39A of the SFASOC, Cullen as Trustee pleads, in para. 20 of the Second Further Amended Defence (SFAD):

> "In relation to paragraph 39A of the second further amended statement of claim, the First Defendant:
>
> (a) repeats and relies on the allegations contained in paragraphs 4, 4A, 4B, 9A and 10 herein;
>
> (b) denies that the First Defendant was indebted to the Plaintiff for the reasons pleaded herein;
>
> (c) otherwise admits the allegations contained therein."

[62] Paragraphs 4, 4A, 4B, 9A and 10 of the SFAD constitute the version of events advanced by Cullen as Trustee, namely, that the shares in Wise were held on trust for Cullen as Trustee and that the payments to Cullen as Trustee were no more than the return of money held by Mr Mishra for Mr Cullen. Thus, para. 20 denies an indebtedness. But, it then "otherwise admits the allegations in contained" in para. 39A of the SFASOC. The use of the word "otherwise" will, in the ordinary meaning of that word, denote "in the circumstances other than those considered". The effect of that pleading is to maintain the denial that there was a debt but there is no denial that Mr Mishra had the capacity to assign a debt which might be found to exist.

[63] Rule 166 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> "(1) An allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless—
>
> (a) the allegation is denied or stated to be not admitted by the opposite party in a pleading"

[64] In his submissions in reply Mr Alexis SC argued that there was nothing in the First Defendant's pleading to challenge Mr Mishra's capacity to assign the debt (or any part of it) alleged in this case. I agree. On the pleadings, Cullen as Trustee has admitted the capacity to assign and, thus, the assignment

[65] So far as RBT is concerned, it did not plead to para. 39A of the SFASOC. Yet, despite the absence of any issue on the pleadings about Mr Mishra's capacity to assign, it argues

that Wise has failed to prove an effective assignment of some of the amounts which came from other sources. That is a submission I do not accept. If A lends money to B, then it matters not that A first borrowed the money from C. The source of A's funds is irrelevant to the creation of, for example, a debt owing by B to A. A can pursue B for payment and whatever the arrangement is between A and C will govern them

[66] In any event, the existence of an assignment is not relied upon by Wise in its action against RTB and so, there having been an admission by the affected party (Cullen as Trustee) there was no need to prove anything. As Mr Alexis SC said in submissions: " … if this was a real issue, as raised on the pleadings, then we would've called evidence about it, and that would've been the subject of a rather important topic in and around the assignment document in Mr Mishra's evidence-in-chief."

The claim against Cullen as Trustee and Michelle Cullen

[67] Wise seeks an order pursuant to s 228 of the *Property Law Act* 1974 (Qld) (PLA). That section provides:

> "**Voluntary conveyances to defraud creditors voidable**
>
> (1) Subject to this section, every alienation of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person prejudiced by the alienation of property.
>
> (2) This section does not affect the law of bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors."

[68] Michelle Cullen was not represented at the trial. She did, though, attend to give evidence. Neither Mr Travers nor Mr Beacham QC sought to cross-examine her.

[69] The main orders sought by Wise are:

(a) A declaration that the transfer of the Burleigh Waters property by Mr Cullen to Mrs Michelle Cullen is void pursuant to s 228 of the PLA,

(b) A declaration that the payment of $36,793.43 (the disputed payment) by Mr Cullen to Mrs Michelle Cullen and the mortgage granted by Mrs Michelle Cullen to Diamond Conway (the second Diamond Conway mortgage) is void pursuant to s 228 of the PLA, and

(c) A declaration that Mrs Michelle Cullen holds the Burleigh Waters property on trust for Wise.

[70] The case for Wise was that Mr and Mrs Cullen effected transfers of the Burleigh Waters property so as to put Mr Cullen's equity in the property beyond Wise's reach.

[71] The elements which must exist before a person prejudiced by the alienation of property can seek an order under this section are:

(a) There must be an alienation of property.

(b) It must have been done with an intent to defraud creditors.

Was there an alienation?

[72] This occurred. There were transfers which resulted in Mrs Michelle Cullen replacing Mr Cullen as the registered proprietor. This was not controversial.

Was it done with an intention to defraud creditors?

[73] The matters to be considered when answering this question were summarised by Meagher JA in *Lardis v Lakis*:[17]

> "[7] Whether an alienation of property is made with intent to defraud creditors is a question of fact to be determined in all the circumstances. The requisite intent is "an intention to hinder, delay or defeat creditors", as distinct from an animus towards or motive of causing harm to creditors: *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 at 456–457 (Blanchard and Wilson JJ), adopted in *Marcolongo v Chen* (2011) 242 CLR 546; [2011] HCA 3 at [32] (French CJ, Gummow, Crennan and Bell JJ). Absent direct evidence, that mental state may be inferred where the hindrance, delay or defeat of creditors is the necessary consequence of a voluntary settlement. To that extent, the absence of consideration is prima facie evidence of an intent to defraud creditors: *Marcolongo* at [25], citing JD Heydon, *Cross on Evidence*, (8th Aust ed 2010, LexisNexis) at 121 [1600]."

[74] The intent to defraud need not be the sole motivating factor. In *Marcolongo v Chen*[18] French CJ, Gummow, Crennan and Bell JJ said:

> "[57] The second point is that s 37A requires a finding, which Hamilton J made, of intent to achieve the proscribed prejudice. **The section does not postulate a mixture of motives from which there must be extracted what is identified as a predominant intent to defraud**. Further, as Stephen J indicated in his discussion in *Barton v Deputy Federal Commissioner of Taxation* (III), a provision such as the Elizabethan Statute **does not require for its operation that the proscribed intent to defraud be the sole intent**. Nor is it an answer to an application under the section that the transferor formed the intent of which it speaks by reason of the misconduct of another or, as here, of the transferee; the transferor, as in this case, will have remedies against that party but that does not deny success on the application made under the section by the person prejudiced." (emphasis added)

[75] In *Petrovic v Brett Grimley Sales Pty Ltd*[19] the Victorian Court of Appeal adopted the summary of *Marcolengo* set out in the reasons of Gilmour J in *Commissioner of Taxation v Oswal*[20] where he examined the meaning of the phrase "intent to defraud creditors" in

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[17] [2018] NSWCA 113.
[18] (2011) 242 CLR 546; [2011] HCA 3.
[19] [2014] VSCA 99.
[20] [2012] FCA 1507.

the context of the cognate provision in s 89 of the Western Australian *Property Law Act* 1969. Gilmour J said that:

> "[22] …The principles derived from *Marcolongo* as applied to s 89 are as follows:
>
> (a) s 89 of the *Property Law Act* applies to conveyances and assignments made with intent to hinder or delay creditors and renders void against all creditors so hindered or delayed the conveyance or assignment, that being the language of the *Statute of Elizabeth* (at [12], [19], [22] - [23] and [28]);
>
> (b) there is no superadded requirement to be found in s 89 of the *Property Law Act* to show dishonesty or fraud over and above an intention to hinder or delay creditors and there is no requirement to find an animus against a particular creditor: an intention to hinder or delay creditors is the relevant species of fraud (at [29]-[33] and [56]);
>
> (c) the fact that a conveyance or assignment of property is made voluntarily is a fact which may, on its own, support an inference of the existence of the intention to hinder or delay creditors, but need not do so (at [25]-[26]). At the same time, the fact that the conveyance was made for value does not necessary establish the absence of the relevant intention (at [12]). The intention required by the statute is an actual intention, but ordinarily the existence of the actual intention will be inferred from the objective facts ([26]); and
>
> (d) there is no requirement in s 89 of the *Property Law Act* that the intent to hinder or delay creditors be the sole or even the predominant purpose of the conveyance or assignment and it does not matter if the relevant intention was formed because of or at the instigation of another (at [57])."

[76] The Court of Appeal went on to refer to the first instance judgment in *Bell Group Ltd (in liq) v Westpac Banking Corporation*[21] where Owen J, before the decision in *Marcolongo*, had reviewed in detail the authorities relevant to s 89 of the *Property Law Act*. Owen J at [9146] collected together a number of principles. Excising those propositions affected by *Marcolongo* and the Court of Appeal's decision in *Petrovic*, Owen J said:

> " …
>
> 3. Intention can be established by inference.
>
> 4. If the natural and probable consequences of the disposition are such that its effect will be to defeat or delay creditors, the necessary inference can be drawn and a court might more readily do so. But a finding to that effect is a finding of an actual or real intention, not one that is imputed to the disponor by virtue of a legal presumption.
>
> 5. The essence of the concept of defrauding creditors lies in a disposition which subtracts from the property which is the proper fund for the

[21] (2008) 39 WAR 1.

payment of the debts, an amount without which the debts cannot be paid … .

6. Other relevant circumstances from which the necessary inferences might be drawn include:

(a) the insolvency or difficult financial circumstances of the disponor (although establishing insolvency at the time of the disposition is not a necessary element); and

(b) whether the transaction was voluntary or the consideration was colourable, negligible or trivial.

…

8. It is not necessary that the disposition affects creditors as a class generally; it is sufficient if one or some creditors are adversely affected. In this context 'creditor' is not confined to those to whom a debt is (at the time of the disposition) presently due and owing. It extends to impending liabilities and future creditors … [12]"

[77] With those principles in mind, the chronology of events is important when assessing the actions of Mr Cullen and Mrs Michelle Cullen:

(a) from 20 July 2012 Mr Cullen was the sole registered proprietor of the Burleigh Waters property,

(b) there was one mortgage over the Burleigh Waters property in favour of the National Australia Bank (the NAB mortgage) and another in favour of CEG Capital and Equities Group Direct Securities Pty Ltd (the CEG mortgage),

(c) May 2014 – Mr Cullen sought to refinance, among other things, the NAB and CEG mortgages,

(d) 4 June 2014 – CEG gave notice under s 84 of the PLA with respect to the Burleigh Waters property,

(e) 14 August 2014 – CEG commenced proceedings in this court for recovery of possession,

(f) 25 August 2014 – Diamond Conway (Mr Cullen's solicitors) registered a mortgage (the first Diamond Conway mortgage) – securing all current and future fees and disbursements – over the Burleigh Waters property,

(g) 10 September 2014 – Mrs Michelle Cullen was successful in securing refinancing in the sum of $950,000 from Westpac,

(h) 8 October 2014 – Mr Cullen was served with these proceedings,

(i) 10 October 2014 – Mr Cullen listed the Burleigh Waters property for sale with a real estate agent with an asking price of $1,669,000,

(j) 17 October 2014 – Wise filed an application for a freezing order over the Burleigh Waters property. The application was listed for hearing on 28 October 2014,

(k) 27 October 2014 – Mr Cullen executed a transfer of the Burleigh Waters property from himself to himself and Mrs Michelle Cullen as joint tenants,

(l) 30 October 2014 – Mr Cullen and Mrs Cullen executed a transfer of the Burleigh Waters property from themselves to Mrs Cullen (on each transfer the consideration was noted as "natural love and affection"),

(m) 4 November 2014 – a hearing took place on the freezing order application and it was adjourned to 2 December 2014,

(n) 20 November 2014 – Mrs Cullen executed a guarantee for the payment of Mr Cullen's legal fees and granted a mortgage to Diamond Conway securing that guarantee (the second Diamond Conway guarantee),

(o) 2 December 2014 – Boddice J made orders freezing Mr Cullen's assets up to the unencumbered value of $815,000,

(p) 3 December 2014 –

a) Diamond Conway released the first Diamond Conway mortgage,

b) Diamond Conway was paid its legal fees of $39,813,

c) The two transfers concerning the Burleigh Waters property were lodged and registered, and

d) Mr Cullen paid his wife $36,793.

[78] The amount owing on the mortgages to NAB and CEG was about $900,000. Mr Cullen's equity in the Burleigh Heads property was, therefore, whatever he could sell the property for less the $900,000.

[79] Mr Cullen was asked about the process of obtaining the Westpac loan and said:

> "Mr Cullen, we were speaking before about the loan amounts. I took you to correspondence where it noted the loan in the amount of $950,000?---Yes.
>
> What was to happen with that?---That was to go to pay out NAB, CEG and other – other debts.
>
> Okay. In this process – you've gone through a process of transferring a property to your wife?---Yes.
>
> You said it was to get a loan?---Yes.
>
> Why did you have to give you the property to your wife to get the loan?---Because of my credit record and the defaults and the action against me, I couldn't apply to any bank to get a loan."[22]

[80] In cross-examination, Mr Cullen accepted that he had transferred his equity in the Burleigh Heads property for the equivalent of the stamp duty paid on the transfer. He was confused, though, when he accepted that suggestion because he didn't receive it and it was only payable because of the transfer. It seems to be uncontroversial that Mr Cullen was, because of his bad credit history, unable to obtain refinancing and that was, at least, one of the reasons for Mrs Cullen undertaking the burden of the new loan.

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[22] T4 – 73.

[81] It was put to him that he transferred the property so that it would not be available to satisfy any successful claim by Mr Mishra. He denied that and maintained that the purpose was to clear debt. It did have the effect of clearing his debt, but, of course, the property was still encumbered for about the same amount.

[82] Mr Travers, in the absence of any submission from Mrs Cullen, argued that the consideration provided by Mrs Cullen included approximately $910,000 in refinancing loans and the guarantee of Mr Cullen's legal costs.

[83] It was not in dispute that the two stage transfer was undertaken to reduce the incidence of stamp duty. It was not obvious on what value the stamp duty for the second transfer was assessed.

[84] Mrs Cullen gave very brief evidence in chief. She referred to conversations she had with a mortgage broker, Peter Goldberg, and what she did as a result. She said:

> " … can you recall when these discussions took place?---This was in May – early May.
>
> May which year?---Two thousand and fourteen.
>
> Yes. You had a discussion with Mr Goldberg and what did you do after that?---I then – I then agreed to get a valuation of the property. I then – while that ha – was happening – this was just after I gave birth to our daughter on the 12th of May. We then got the property valued. I then thought of my options as I was not working; Grant was not working. I went back to full-time employment on the 5th of August. I then knew that I could service my own mortgage and own my own property. I then went into full-time employment. We literally had – I had people knocking at the door wanting to repossess the home**. I just wanted it for my children. I would do anything to protect our children.** And I had worked hard to make sure that I could service the mortgage on my own. On the – so I got conditional approval on the 10th of September – unconditional approval on the 10th of September. **I was extremely happy that I could do this by myself and my children. I didn't care about Grant at all at this stage. I was just wanting to protect my children**. Then on the – and it took some time for the transfer due to CEG caveats and certain caveats on the property that I was unaware of. And then when the transfer went through on the 26th of November, it was all happy…"[23]

[85] She also said that the first time she heard of Wise was when, in January 2015, she received a letter from Westpac. She said:

> "It was dated the 2nd of January and we returned from Christmas holidays on the 5th of January and it was a letter from Westpac stating that I can't re – my redraw facility had been cancelled on my mortgage through a Wise Investment. This is the first time I had actually ever heard of Wise Investment. I went straight to Grant to ask him what it was about because, to me, Wise was always in Grant's previous businesses. So I had no idea

[23] T7 – 74.

> what was going on. That's the first time I had ever heard of it, and I assumed that it was something to do with him. So I had no – no idea."[24]

[86] Mrs Cullen was cross-examined about her reasons for purchasing the property. She said:

> "And what was that reason?---The reason was financial hardship, in some way. We – my husband was in a lot of debt, bad credit rating, wasn't working. I went back to work after three months still breastfeeding my child to service a – so I could afford the mortgage.
>
> Would you agree that when the discussion about you purchasing the property from him occurred, the purpose was to reduce the risk to his business activities?---Reduce risk to his debt and for our house not being taken from us.
>
> And when you mentioned, as you just did in your answer, it was to reduce our risk to his business, what did you mean?---I didn't say business.
>
> Well, when you mentioned to his Honour that it was to reduce risk, what did you mean?---Debts.
>
> But what's the risk in relation to debts?---I didn't want my house taken from me and my children.
>
> And you thought that there was a risk of that happening at that point in time because of the debts that your husband owed. Is that right?---Correct."[25]

[87] Mrs Cullen denied knowing anything about any problems her husband was having with Mr Mishra over the Bowen land and she denied knowing that her husband had received a letter from KB Legals (Mr Mishra's then solicitors) in June 2014 in which it was claimed that he owed Mr Mishra $824,000. She also gave this evidence:

> "Nonetheless, you well-understood, didn't you, that he, Mr Mazzone, was acting for your husband in relation to Queensland Supreme Court proceedings that were brought against him by Wise Investments?---No.
>
> You didn't know that at all?---Not at all.
>
> Did you know in about the middle of October 2014 that your husband had been served with a statement of claim in these proceedings?---No."[26]

[88] Later in her cross-examination she denied knowing that, in mid-October 2014, Wise's solicitors expressed some concern to Mr Cullen that the sale of the property might lead to a dissipation of assets.

[89] It was agreed on the pleadings that:

(a) the property had a market value – at the time of the pleadings – of $1,350,000,

(b) that the loan from Westpac to Mrs Cullen was for $950,000.

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[24] T7 – 75.
[25] T7 – 76.
[26] T7 – 79.

[90] The matters which are relevant in determining whether the necessary intent was present include:

(a) a consequence of the transfers was to insulate the property from a future creditor – Wise,

(b) at the time the transfers took place, the only mortgages were to NAB and CEG which were to be paid out and replaced by Westpac,

(c) Mr Cullen knew that Mr Mishra claimed to be entitled to the 7 lots at Bowen,

(d) Mr Cullen could not service the debts secured on the Burleigh Waters property,

(e) CEG had commenced proceedings for recovery of the Burleigh Waters property,

(f) Wise had commenced proceedings against Mr Cullen at the time of the transfers,

(g) Wise had applied for a freezing order at the time of the transfers,

(h) No money passed from Mrs Cullen to Mr Cullen for the transfers.

[91] Those matters allow an inference to be drawn, notwithstanding his denials, that Mr Cullen engaged in the transfers for the purpose of defeating or delaying or hindering Wise in recovering what it was owed.

[92] But that does not conclude the matter. Section 228(3) confines the capacity to make an order under s 228(1). It does not apply to any estate or interest in property conveyed for valuable consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors. Where a finding has been made that the conveyance was effected to defraud creditors, then the onus is on the transferee to establish that the property was conveyed for valuable consideration and that she acted in good faith without notice of the intention to defraud creditors.[27]

Was there valuable consideration?

[93] Mr Travers submitted that the consideration provided by Mrs Cullen included:

(a) approximately $910,000[28] in refinancing Mr Cullen's loans,

(b) guaranteeing Mr Cullen's past and future legal costs owing to Diamond Conway.

[94] Mr Alexis SC contended that the only consideration was that which was expressed in the transfer documents – "natural love and affection".

[95] There was ample evidence that Mr Cullen could not meet his commitments to NAB and CEG. He was, as Mrs Cullen said: "… in a lot of debt, bad credit rating, wasn't working."[29] Mrs Cullen was concerned that they might lose their home – the Burleigh Waters property. Attempts to refinance the NAB and CEG debts commenced in May 2014 and were successful in September 2014.

[96] The consideration from Mrs Cullen was that she paid out Mr Cullen's debts to NAB and CEG. This did not appear on the transfer documents (no doubt to reduce the stamp duty) but it was a part of the arrangement which led to the transfers.

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[27] *Wentworth v Rogers* [2004] NSWCA 430.
[28] Being $950,000 less the amount of about $40,000 received by Mrs Cullen at settlement.
[29] T7 – 76.

[97] The consideration referred to in s 228(3) must be "valuable" but it need not pass to Mr Cullen.[30] Mrs Cullen paid the debts he owed to NAB and CEG. In order for that to be done she needed to offer security and, so, she needed to become the registered proprietor. The consideration was the payment by Mrs Cullen of Mr Cullen's debts to NAB and CEG as well as the guarantee she gave for his legal fees.

Did Mrs Cullen act in good faith without notice of intent to defraud?

[98] Mrs Cullen's evidence was consistent on this point. She wanted to protect her home and she was willing to enter into new securities and commitments to do that. She knew her husband could not refinance the property and so she was placed in a position from which there was only one exit.

[99] In order to demonstrate that the she acted in good faith, she needed to demonstrate that the transactions were regularly executed and that she did not have notice that any fraud was intended. In her cross-examination she denied all knowledge of the claims of Wise against her husband. Her husband had sought to refinance the NAB and CEG loans in May 2014 but failed. She was successful in doing that in September of that year. Mr Cullen was not served with these proceedings until a month after that and Mrs Cullen was not then a party to them.

[100] An application for a freezing order was made by Wise seven days after service of these proceedings. Mrs Cullen was not a respondent to that application.

[101] In its argument, Wise relies on this exchange in cross-examination. Mrs Cullen was asked why she agreed to purchase the property from Mr Cullen. She said:

> " … The reason was financial hardship, in some way. We – my husband was in a lot of debt, bad credit rating, wasn't working. I went back to work after three months still breastfeeding my child to service a – so I could afford the mortgage.Would you agree that when the discussion about you purchasing the property from him occurred, the purpose was to reduce the risk to his business activities?---Reduce risk to his debt and for our house not being taken from us."[31]

[102] Later in her cross-examination she agreed that she knew that Diamond Conway were a firm of solicitors in Sydney that were acting for her husband. She said that they were acting in relation to the Fiji business but she did not know of their involvement in these proceedings because she had "no idea of these proceedings". She denied any knowledge of the problems that her husband was having with Mr Mishra and the demands being made to transfer property at Bowen to him. She said that she first became aware of these court proceedings when she received the letter from Westpac in relation to Wise.

[103] Mrs Cullen's evidence on these matters was consistent and was undisturbed by cross examination. There was no documentary evidence which contradicted anything she said. I accept that she was telling the truth when she said she was not aware of these proceedings. This was not the type of case where a spouse is the beneficiary of a voluntary conveyance of property. Mrs Cullen took on the full burden of refinancing the debt owed on the Burleigh Heads property and she did that absent any knowledge of the dispute

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[30] *Pico Holdings Inc v Wave Vistas Pty Ltd* (2005) 214 ALR 392.
[31] T7 – 76.

between her husband and Mr Mishra. She has satisfied the onus of demonstrating that the conveyance to her was, from her perspective, in good faith and without knowledge of any intent to defraud creditors.

[104] It follows, then, that the order sought under s 228 of the PLA cannot be made.

[105] An order was also sought for a declaration that the second Diamond Conway mortgage is and was void pursuant to s 228 of the PLA. The second Diamond Conway mortgage stood as security for the payment of Mrs Cullen's legal fees. For the reasons given above, (and because Diamond Conway was not a party to the claim for this relief) such an order is not available.

The counterclaim by Mr Cullen

[106] Cullen as trustee seeks:

(a) A declaration that Mr Mishra holds all shares in Wise on trust for him, and

(b) An order that Wise pay Cullen as trustee compensation under s 130(1) and (2) of the *Land Title Act* 1994.

[107] This part of the dispute between the parties concerns the allegation that Wise was incorporated for the benefit of Cullen as Trustee and that there was an agreement between Cullen as Trustee and Mr Mishra that he would hold the shares on trust for Cullen as Trustee. There was not any, or any substantial, investigation of the possibility that, if there was such an arrangement, it ceased after the conveyance of Lot 504 was abandoned.

[108] It is necessary to return to the advice attached to the email from Gaurav. Mr Cullen says that he discussed this in a meeting with Mr Mishra in "around March or April" 2010. He said that Mr Mishra told him that a company would be held in trust by him for Mr Cullen to further protect him "against any matters going forward when I do the development."[32]In his May 2015 affidavit,[33] Mr Cullen said that he reached agreement with Mr Mishra on the weekend of 16 to 18 April 2010 whereby it was agreed that Mr Mishra would hold the shares in the company which would buy the land and hold it on trust for Mr Cullen. In cross-examination, he agreed that Mr Mishra was paying money to him, apparently in connection with the Bowen land, at least a fortnight before that meeting and before any agreement had been reached. When tested on the unlikelihood of that making sense, Mr Cullen reverted to his constant refrain that it was his money coming back to him. The conduct of Mr Mishra, in depositing money into Mr Cullen's account, was inconsistent with the notion that an agreement was reached on the weekend of 16 to 18 April.

[109] For the reasons which are set out below dealing with the claim against RTB, I have come to the conclusion that, while there was an agreement between Mr Cullen and Mr Mishra with respect to the arrangement for Lot 504, there was no agreement that Mr Mishra would hold the shares in Wise on trust for Mr Cullen. Apart from the reasons set out below, there is the consideration that Mr Mishra would have been acting contrary to his own interest by assigning to Wise the debt for monies advanced by Mr Mishra to Mr Cullen if the shares in Wise were held on trust for the man which he says owed him the money.

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[32] T4 – 9.

[33] Affidavit of Grant Paul Cullen sworn 28 May 2015.

[110] The first defendant did not burden me with much in the way of submissions on this counterclaim. And the third defendant did not add greatly to that burden.

[111] Mr Cullen argued that Wise was incorporated for his benefit and that Mr Cullen and Mr Mishra agreed that Mr Mishra would hold the shares in Wise on trust for Mr Cullen.

[112] Mr Cullen's evidence was that he met with Mr Mishra, at the Gold Coast, on the weekend of 16 to 18 April 2010. He says, in his affidavit of May 2015,[34] that Mr Mishra advised him to adopt a strategy which included:

(a) incorporating a company to enter into a contract to acquire the single undivided lot from the Unit Trust for $200,000, and

(b) that the shares in that company would be held by Mr Mishra on trust for Mr Cullen.

[113] In his evidence in chief, Mr Cullen said that Mr Mishra told him: "That the company would be held in trust by [Mr Mishra] for [Mr Cullen] and that would further protect me against any matters going forward when I do the development."[35]

[114] I do not accept that those events occurred in the way Mr Cullen said they did. There may well have been discussions about the incorporation of a company – Wise was incorporated about a month later. But, by the middle of April 2010, Mr Mishra had made payments to Mr Cullen of about $139,000. This is not consistent with the creation of a trust, at that time, for the purposes described by Mr Cullen. Mr Cullen may have suggested the name of the company – he had a history of naming companies incorporating the word "Wise". But, for the reasons I have given above, the arrangement between Mr Cullen and Mr Mishra was not in the nature of a trust. Later, when they agreed to enter into the contract for the sale of Lot 504 that was not done because of, or pursuant to, a trust. The arrangement which they sought to procure was simply one which, on their view of the world, would protect Mr Cullen in the dispute he was having with his then wife.

[115] The First Defendant has not established that a trust of the type pleaded in its counterclaim came into existence.

The claim against RTB

[116] The uncertainty about the veracity of Mr Mishra and Mr Cullen continues in this part of the claim. If anything, it is exacerbated by the introduction of Ms McDonnell whose approach to giving evidence was, at times, reluctant and, on occasion, bordering on truculent. Much of the conflict in evidence arose with respect to whether or not there were particular meetings attended by Ms McDonnell, Mr Cullen and Mr Mishra and what was said.

[117] A lot of the conduct of both Mr Cullen and Mr Mishra was dictated by Mr Cullen's concerns about the property dispute he was having with his wife and whether or not she would be able to attack the Bowen land in order to satisfy the order made against him in the Federal Magistrates Court. It need not be decided, but it is most likely that the Bowen land would not have been susceptible to any form of recovery by Mrs Natasha Cullen. It is clear from the material that Mr Cullen was very concerned about that prospect and that Mr Mishra was willing to do all that he could to help protect Mr Cullen and the Bowen

[34] Affidavit of Grant Paul Cullen sworn 28 May 2015.
[35] T4 – 9.

land from this feared assault. Neither of them were willing to listen to the advice given to them by Ms McDonnell which was to the effect that if Mrs Cullen was entitled to seek redress against the Bowen land then the scheme being promoted by Mr Cullen and Mr Mishra could not stop her.

[118] Wise claims that Mr Mishra asked Ms McDonnell to act for Wise as its solicitor to take such steps, for and on its behalf, as was necessary, and to advise thereon, in attending to the preparations and completion of the 7 Lot Agreement. Further, it alleges that in reliance upon the professional skill and expertise of Ms McDonnell it retained and employed RTB as its solicitor with respect to the 7 Lot Agreement or, alternatively, the Lot 504 Contract. It pleads that, among other things, RTB had a duty to ensure that Cullen as Trustee was bound by an enforceable contract to perform its obligations under the 7 Lot Agreement. But, Wise says, instead of doing that, RTB acted upon Mr Cullen's instructions and prepared a contract for the sale of Lot 504.

[119] In the written submissions for RTB a summary of the claims made against it is set out and I adopt those:

> "RTB negligently, and in breach of its contractual duties owed to Wise, failed to:
>
> (i) prepare a contract to give effect to the seven lot agreement and to advise that the contract did not correspond with the seven lot agreement which itself would only be enforceable if in writing (Drafting the Contract);
>
> (ii) give advice prior to the execution of the Contract (Failure to give advice before execution);
>
> (iii) advise Wise of the consequences flowing from the termination or failure to complete the contract on the settlement date (Failure to give advice after execution);
>
> (iv) identify a conflict of interest and withdraw from acting or advise Wise to seek independent advice (Conflict of interest)."

[120] RTB says that it knew nothing of the 7 Lot Agreement. It says that it was retained to prepare the Lot 504 Agreement and no other.

[121] While I accepted, in broad terms, Mr Mishra's account of what happened leading up to the seven lot agreement and, in particular, the arrangements underlying his payments to Mr Cullen[36], I do not have the same level of confidence about his evidence concerning RTB. Among other things, his version of some events was inconsistent with earlier, sworn evidence and with his pleadings.

Mr Mishra's memory – the Conveyancing Cottage correspondence and other matters

[122] The "Conveyancing Cottage" is a division or business name used by RTB for conveyancing work. It sent a letter, dated 1 October 2010,[37] to which reference has already been made, to Wise. The letter confirmed that Wise wanted Conveyancing

[36] Based, to a large extent, on Mr Cullen's admissions and consistency with some of the documentary evidence.
[37] Exhibit 26, p 682.

Cottage to act on its behalf in the purchase of Lot 504 from the first Defendant. The letter contained the following advice:

(a) a settlement condition was for the registration of the survey plan due by 7 March 2012,

(b) Conveyancing Cottage undertook to advise Wise of the registration, and

(c) settlement was due to be effected 21 days after notification of registration of the plan of survey.

[123] One example of the flawed memory of Mr Mishra concerns that letter. He said that he signed it and returned the original by post to RTB. I do not accept that he returned the original by post. He did sign it, but his evidence about how the original document came into his possession at the start of the proceeding if, as he said, he had returned it to RTB, led him to a tangled series of explanations which cannot be accepted. He was eventually driven to say that he obtained the original letter from the original conveyancing file which he had procured during some related caveat proceedings. But, the letter did not show any of the usual indicia of having been on a file. His evidence on this point was, to say the least, careless.

[124] Another example may be found in the declaration Mr Mishra made in support of the caveat he caused to be lodged on the seven lots on 13 December 2013. Mr Alexis referred to it as an "important piece of contemporaneous evidence because it was … made … within about three months … of the fallout"[38] between Mr Mishra and Mr Cullen. Ordinarily, one would not regard a statement made three years after an event – the dealings with RTB – as being contemporaneous with that event. What is important, though, for this part of the consideration of his reliability, is that he was prepared to declare (in paragraph 11[39]) that Ms McDonnell had advised that: "In order to reduce tax, council rates and land tax for the benefit of the Vendor … that a contract should issue at $200,000 for the proposed purchase of Lot 504 as a single lot, rather than as 7 lots created from the subdivision of Lot 504." When he was cross-examined on that, Mr Mishra became very uncertain as to his recollection. He had earlier said that he had a very clear recollection about the meeting of 7 September but, when tested on this point, he retreated and said he could not remember whether Ms McDonnell had said that the purchase price should be $200,000. I do not accept that Ms McDonnell ever made a suggestion like that. Mr Mishra's recollections as expressed in the declaration cannot be regarded as reliable in all respects.

Was there a meeting on 24 or 25 May?

[125] Wise, in its Amended Reply, pleaded (for the first time) that Mr Mishra met with Ms McDonnell on or about 24 May. This was supported by Mr Mishra in evidence in chief when he said it would have been on 25 May. Both Mr Cullen and Ms McDonnell said there was no such meeting. Whether this "meeting" occurred assumed additional importance because of the implications of Mr Mishra's allegations that Ms McDonnell took no notes at the meeting and that, during the meeting, he was asked by Mr Cullen to go outside the room in which they were meeting and that he did so, leaving Mr Cullen and Ms McDonnell alone, for about 15 or 20 minutes. He recounted the meeting as consisting of Mr Cullen telling Ms McDonnell that Mr Mishra had been paying money

[38] T8-67.
[39] Exhibit 26, p 1476.

for the progress of the development and that he would pay it to the extent of $805,000. He further said that Mr Cullen put a price of $200,000 on the contract as that was the unimproved value of the land. He also said that he gave the certificate of incorporation of the plaintiff to Ms McDonnell and told her that it was the company he was going to use to buy the seven lots of land.

[126] Mr Mishra said that after the meeting he went with Mr Cullen to look at the land.

[127] For Cullen as Trustee, it was submitted that there was no meeting involving those three people on either 24 or 25 May. It was submitted that I should reject Mr Mishra's evidence on that matter.

[128] I do not accept that there was a meeting as described by Mr Mishra on either of those dates in May 2010. There was no file note of such a meeting and I do not accept that Ms McDonnell, being an experienced solicitor, would not have taken notes and made an entry in a file if such a meeting had taken place. She said that there was no such meeting and, therefore, there were no notes. There is a file note for 25 May 2010, but that records a telephone conversation between Ms McDonnell and Mr Cullen. As noted above, the first time a meeting is alleged by Wise to have been held at that time occurs in the Amended Reply. In an affidavit sworn by Mr Mishra he verified the truth of the allegations in the statement of claim. That pleading only referred to meetings in September 2010.

[129] Mr Mishra gave evidence about two meetings of substance with Ms McDonnell. He said that one occurred on 25 May and the second on 7 September. In his evidence about what occurred at those two meetings there is a remarkable, and unlikely, similarity of matters discussed. There was no meeting of the kind described by Mr Mishra on either 24 or 25 May. He is mistaken about that. The matters which he said occurred in that meeting, in fact took place during the meeting of 7 September.

The telephone conversation of Mr Cullen and Ms McDonnell

[130] Both Mr Cullen and Ms McDonnell agreed that they had a telephone conversation in May 2010. Ms McDonnell made a file note of the conversation and recorded that it occurred on 11 May. In that conversation, Mr Cullen told Ms McDonnell:

(a) Stage 3 would consist of 17 lots,

(b) there were 7 lots at the back of the cul-de-sac,

(c) he intended to sell those lots as "one parcel"

[131] There is a note about the sale price of the lots and amounts of $185,000 and $200,000 are recorded. Ms McDonnell recalled that she was told that Mr Cullen intended to introduce a new entity into the development for tax reasons.

Communications between Mr Cullen and Ms McDonnell

[132] Mr Cullen and Ms McDonnell sent each other emails in which the progress of the development was noted or requests were made for the other to do things that were necessary for the development.

[133] On 8 June 2010 Mr Cullen emailed Ms McDonnell (and it was copied to Mr Mishra) in which he said, among other things:

> "Could you please send the **contracts for the back seven (7) lots to Anil Mishra in his Company name** via email for signing once you have prepared them.
>
> If you need to discuss anything with Anil about the above requests please feel free to contact him, I have asked Anil to look after any issues while i am away and he will know what to do."[40] (emphasis added)

[134] In an email of 7 July 2010 Ms McDonnell said to Mr Cullen:

> "I have not seen any plan which depicts the balance land area which **you are selling to Anil**. This will be the plan we have to disclose in the Contracts as it will be the one actually registered with DERM."[41] (emphasis added)

[135] In her evidence, Ms McDonnell said that she used the words "selling to Anil" because Mr Cullen "had proposed a contract of sale to sell the block rather as opposed to it being a transfer by way of a gift, that there was consideration to be paid and a contract to be drawn." Later she said that the words represented the "company which the accountant had set up for Grant on his behalf."

[136] The proposed development was, on Mr Cullen's instructions, described by Ms McDonnell to the local council (in a letter of 29 July 2010) in the following way:

> "Our client proposes that the 17 lot subdivision be effected by registration of two plans, the first being that to create 10 lots of the 17 lots and the second plan to create the remaining 7 lots. The proposed plans create the full 17 lot subdivision in accordance with the original plans and specifications as submitted to the Council in seeking the approval. However, **due to matters of commerciality**, our client wishes to proceed to register to plans to create the full 17 lot subdivision."[42] (Emphasis added)

[137] Ms McDonnell said that the reference to "matters of commerciality" was a reference to Mr Cullen's desire to "stage the back area for taxation purposes".[43]

Mr Mishra and Lot 504: an inconsistent story

[138] The need for, and the disposition of, Lot 504 was the subject of a number of different stories. The first time Mr Mishra mentions it is in his statutory declaration of 5 December 2013 made in support of the caveats he lodged over lots 26 to 32 of the Bowen land. In that declaration he said:

> "11. In order to reduce tax, council rates and land tax for the benefit of the Vendor the said solicitor [Ms McDonnell] advised that a contract should issue at $200,000 for the proposed purchase of Lot 504 as a single lot, rather than as 7 lots created from the subdivision of Lot 504.

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[40] Exhibit 26, p 423.
[41] Exhibit 26, p 468.
[42] Exhibit 26, p 534.
[43] T6 – 13.

12. In reliance upon such advice the said solicitor prepared a Contract for Sale between my company Wise as the purchaser and Cullen as the Vendor which was entered into on the seventh day of September 2010."[44]

[139] That version was not repeated in the statement of claim. In paragraph 13(a) of the SFASOC Wise pleads:

> "McDonnell, as instructed by the First Defendant, did prepare an off-the-plan contract for the Plaintiff as the buyer and of the First Defendant as the seller, to convey, instead of the 7 Proposed Lots pursuant to the 7 Lot Agreement, a proposed lot 504 … because, to the knowledge of McDonnell:
>
> (i) the First Defendant decided to change the structure of the 7 Lot Agreement, for his sole benefit, by reason of his involvement in a family law property disputation with his ex-wife, whereby:
>
> (A) there would no longer be a straight out subdivision of the 7 Proposed Lots, that is, lots 26 to 32;
>
> (B) instead, firstly, a larger land parcel of Lot 504 would be created by subdivision and thereafter that said Lot 504 would be subdivided into the 7 Proposed Lots;
>
> (C) the purchase price would be changed from the agreed sum of $805,000.00 pursuant to the 7 Lot Agreement to the sum of $200,000 under the Lot 504 Contract;
>
> (D) upon the First Defendant's then subdivision into the 7 Proposed Lots, the Plaintiff would take the conveyance of those 7 lots by having paid the agreed consideration for them of $805,000.00"

[140] In his evidence in chief, Mr Mishra was asked about discussions he had with Mr Cullen concerning the land at Bowen and the stage 3 development. He said that Mr Cullen had put a proposition to him to the effect that he needed to finish the stage 3 development and sell the lots in order to pay his ex-wife out. He said he could not borrow money from the traditional banks, so he put a proposal to Mr Mishra to buy seven lots of land at around $800,000. Mr Mishra said that he agreed and said to him words to the effect "I will pay you as we go along doing the development of stage 3." Mr Mishra said that this discussion happened in about May 2010.

[141] Later in his evidence, Mr Mishra was asked about a meeting in May with Ms McDonnell and Mr Cullen. I have already found that there was no such meeting in May and that Mr Mishra, in giving this evidence, was referring to the meeting in September.

The meeting of 7 September

[142] All parties agree that Mr Cullen, Mr Mishra and Ms McDonnell met in RTB's Bowen office on 7 September. The dispute is about what was said and, connected with that, the veracity of Ms McDonnell's file note of that meeting.

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[44] Exhibit 26, p 1476.

[143] Mr Mishra's version of events was that he recalled Mr Cullen telling Ms McDonnell that he had been paid over $400,000 by Mr Mishra, that the development was going well and everything looked good. At that point, Ms McDonnell presented them with the contract for lot 504. It had a price of $200,000. Mr Mishra queried the price. Ms McDonnell told him that that was the unimproved value of the property and that it was just a contract from which "seven lot individual contract will be prepared"[45]. Ms McDonnell told him that there was a special condition to the effect that once the plans were registered, then the contract could be settled. She confirmed that she would be acting for both of them in the matter. Mr Mishra asked why the sum of $805,000 was not on the contract. Mr Cullen explained that he did not want his ex-wife to know anything about this and he did not want to show the figure of $805,000. Mr Mishra said he was content with that because it was his understanding that he would be getting the seven individual contracts once the title was out. Ms McDonnell told him that once Lot 504 was registered an application for the registration of seven lots would be made and seven individual contracts would be prepared. He understood that when that happened the contract for Lot 504 would be rescinded or cancelled. He said:

> "And what was then to happen with the contract that you just signed?---This contract will rescind or be cancelled.
>
> I see. And what would then happen in relation to the seven contracts that will you just referred to?---Them seven contract – I can use those contract to sell my land, and on which I would have paid stamp duty.
>
> And what was said about when, as a matter of timing, the contract for the purchase of 504 would be rescinded and the seven contracts would be entered into?---I think Grant said that basically he wants to get rid of all the problems with Natasha and then only the seven contract can be issued, because he didn't want his ex-wife to know anything about $805,000 - - -
>
> I see?---------contract."[46]

[144] Mr Mishra signed the contract for the sale of Lot 504 on 7 September 2014. He also signed a Disclosure Statement in which he acknowledged receiving the disclosure plan and disclosure statement prior to entering into the contract to purchase Lot 504. Mr Mishra went on to say that at the time he entered into the contract he understood that the land which Wise had contracted to buy was subject to a mortgage and that once the subdivision occurred Mr Cullen would sell his 10 lots, pay off the mortgage, and Wise would get its land unencumbered.

[145] Mr Cullen's recollection of what occurred at this meeting was sparse. He could recall that he asked Ms McDonnell to prepare the contract for Lot 504 in the name of Wise Investments; that she said that it could be undone if divorce proceedings "went again, if it's not shown as an arm's length transaction"[47]; and that Mr Mishra had advised her that he was the director of Wise Investments and was holding the shares for him on trust. I don't accept that Mr Cullen has a reliable memory of what occurred at that meeting. During his evidence on this point he was struggling to recall what happened and some of his statements smacked of uncertainty.

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45 T2 – 12.
46 T2 – 13.
47 T4 – 17.

[146] On the other hand, Ms McDonnell kept a note[48] of what occurred on that day. The authenticity of the note was challenged in a serious way. It was suggested that, at best, the note had been redrawn when RTB was first asked to disclose documents in these proceedings. Mr Alexis submitted that it should be accorded little weight. This submission was based, not on any hard evidence, but on a flirtation with doubt said to arise from the nature of the paper used and the pen used to write the note. I observe, first, that no independent evidence was offered to deal with the question of the age of the note or the pen used to write it.

[147] The attack on the legitimacy of the note started with the quality of the paper. It was argued that every file note that had been written by Ms McDonnell in relation to this matter had been on scrap paper, that is, the blank side of a sheet which had already been used once. The notes for 7 September were not of that type. But, as was able to be seen from other samples, these notes are not unique. They had perforations which matched other file notes made at about the same time.

[148] Ms McDonnell said that she had, when gathering the documents for disclosure, noticed that she had not written the year on the file note. She admitted that she inserted a year at that time but, mistakenly, inserted "14" (2014 being the year she gathered the notes) instead of the true date of "'10". She should not have done that but it is a mistake not a deception.

[149] Another point raised was that the ink used to write "14" looked "remarkably similar to the pen that [was] used for the rest of the file note". Ms McDonnell said that she had used the same type of pen for 20 years. If there was anything in the point, that answers it. In any event, the suggestion made, under cover of a submission about the weight of the evidence, was really that she had created this note after the event and was giving deliberately false evidence. I do not accept that. A diary note is not a formal document. While notes are often used in court, that is not their primary purpose. They are created quickly as an aide-memoire and should, ordinarily, be seen as just an informal recording of a conversation. That was what this note was. And I accept that it is an accurate record of what was said.

[150] Ms McDonnell records that Mr Cullen told her:

(a) that he was in Bowen to check on progress of the subdivision and that he had had discussions with the contractor and the real estate agent,

(b) that his ex-wife was chasing him for money and that he still had the Gold Coast firm acting for him in that matter,

(c) he was concerned about the security of the subdivision given that the solicitors for his ex-wife were looking to his assets to satisfy his obligations under the consent order,

(d) Stage 3 of the development consisted of 10 lots and he had received drawings for a further 7 lots,

(e) he wanted to protect the next stage and to sell as many lots as possible for the current stage.

[151] Ms McDonnell told him:

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[48] Exhibit 13.

(a) she could register the survey plan once it was returned from Council,

(b) to seek advice from his family law solicitors about the transaction he proposed because it could be set aside,

(c) that he and Mr Mishra would be wasting money on legal fees, stamp duty and tax and that he should pay his wife out as soon as possible.

[152] Mr Cullen told her that he wanted to go under contract on the balance land area for the Stage 4 subdivision so that his wife could not take it. He told her that he wanted to have the contract with a company in his accountant's name as he had agreed to help and would hold it for him.

[153] Mr Mishra told her that this company was Wise Investments Pty Ltd and that he was the sole director and shareholder. He told her that the purchase price would be $200,000 with no deposit and that the transaction might not happen.

[154] Ms McDonnell agreed to draw the contract and the disclosure statement and had a clerk start working on those documents while they were talking. They were prepared, read over and signed. It was left on the basis that Mr Cullen and Mr Mishra would work out whether the transaction was necessary and Mr Cullen would let her know.

[155] Mr Beacham QC, in his oral submissions, asked the rhetorical question: "Why is lot 504 there?". As he said, it makes no sense where, on his case, Mr Mishra had an agreement to purchase 7 lots, for him to enter into an agreement to purchase lot 504. I accept that such a view is open with the benefit of hindsight and an analytical legal approach. But these two men were not acting rationally at that stage. Mr Cullen's fears, probably unsubstantiated, about his ex-wife's capacity to attack the Bowen land in order to obtain the monies payable under the Federal Magistrates Court order, led him to believe that he could protect himself by means of this spurious agreement. Mr Mishra was his best friend. He was willing to help him to "insulate" the land until such time as their previous agreement could be put into effect.

Registration of the survey plan

[156] Lot 504 was registered on 10 March 2011. As far as Ms McDonnell was concerned there was nothing which suggested to her that the transaction for the sale of that lot was not proceeding.[49]

Mr Cullen's problems with finance

[157] In addition to the pressure from his ex-wife, Mr Cullen was also being pressed by the National Australia Bank to deal with the money he owed it. Mr Cullen kept Mr Mishra informed of this. On 17 March 2011 he forwarded an email from NAB to Mr Mishra.[50] In that email NAB told Mr Cullen that the settlement proceeds of sale of some of the land would not be released to him because there was no stable income available to service the debt. In particular, he was told that the NAB would not agree to the proceeds from settlement being paid to Natasha Cullen and that that he needed to reduce his level of debt.

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[49] T7 – 13.
[50] Exhibit 26, p 876.

[158] On the same day Mr Cullen spoke to Ms McDonnell about refinancing his debt. He was proposing going to the Commonwealth Bank of Australia to obtain finance to pay out NAB. Ms McDonnell, on 18 March, spoke to an officer of the CBA in which reference was made to the bank taking security over eight lots of land which did not include Lot 504.

[159] A month later, on 18 April, Mr Cullen forwarded an email which he had sent to his solicitor to Mr Mishra.[51] In that email to his solicitor he said: "I am in the process off [sic] re-financing with the Commonwealth Bank at the moment and they have requested a copy of the amended deed to finalizes [sic] my loan approval." Mr Mishra agreed that he received that email.

The 13 May 2011 teleconference

[160] On 13 May 2011, Mr Cullen and Mr Mishra were together in Brisbane. They made a telephone call to Ms McDonnell who confirmed that Lot 504 had been registered. Ms McDonnell made a file note of the conversation which I accept as accurate.[52] She records that there was some discussion as to whether or not the transfer would go ahead. Both of them asked whether the lot could be transferred without paying any duty as Mr Cullen did not want to pay it. They were told that was not possible. Ms McDonnell told them both that she was not prepared to process the settlement without a valuation because it was not "an arm's length transaction". She told them that duty would be calculated on which ever was the higher sum – the valuation or the purchase price. Both Mr Mishra and Mr Cullen told her that they did not want the money paid but she told them that consideration had to be paid. She advised that the transaction was a waste of duty and costs as the Family Court could set aside the transaction. The conversation concluded on the basis that the matter would be left until Mr Cullen decided what to do.

The re-financing continues – and fails

[161] On 25 May 2011 Mr Cullen forwarded to Mr Mishra an email he had sent the preceding day to the CBA which attached the authority to the NAB to surrender the deeds and other documents, including security documents relating to Lot 504, to the CBA.[53] These loans advanced by CBA included first registered mortgages over lots 21, 24, 25, 33 – 37, and 504 of the Bowen land. Ms McDonnell was involved in and assisted Mr Cullen in the refinancing of his debt.

[162] Mr Mishra denied knowing that Lot 504 was going to be used as part of the security for the refinancing by CBA. He was cross-examined about his knowledge of the security held by NAB and agreed that he understood that the bank had security over Lot 504. He accepted that he knew that NAB was surrendering its security over that lot as part of the refinancing exercise. He was asked:

> "And you knew that Commonwealth Bank would be taking a similar security, including over Lot 504?--- No, sir.

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51 Exhibit 26, p 885.
52 Exhibit 26, p 900.
53 Exhibit 26, p 951.

> It must have been the case, Mr Mishra?--- No, sir, because the value of those lands would have grown up and there was enough value for the – on the basis of the loan he has borrowed.
>
> Mr Mishra, I suggest to you that it's completely implausible to - that the Commonwealth Bank would take any less security for their refinance than NAB had at the time?--- That was my understanding, Sir, that Lot 504 will be free."[54]

[163] Mr Mishra did not explain how he arrived at that particular understanding.

[164] Lot 504 was subdivided into seven lots by registration on 30 September 2013. Mr Cullen's financing woes continued and in October 2013 he obtained a second mortgage from CEG Capital and Equity Group over those seven lots. He did not tell Mr Mishra anything about that. Ms McDonnell was aware of that and assisted Mr Cullen in obtaining that further loan.

[165] Mr Cullen's endeavours came to nothing. He could not comply with the terms of his loans and CBA and CEG exercised their rights. They sold all the remaining properties.

What was RTB retained to do?

[166] Wise pleads, in its SFASOC, that in September 2010, Mr Mishra asked Ms McDonnell to act for Wise and "to take such steps, for and on its behalf, as was necessary, and to advise thereon, in attending to the preparation and completion of the 7 Lot Agreement." A similar allegation is made about RTB.

[167] It then pleads:

> "10. In or about early September 2010:
>
> (a) the First Defendant and Mishra attended the offices of the Second Defendants located at 8 Gregory Street, Bowen, in the State of Queensland;
>
> (b) they, together, had 2 meetings with Ms Leah McDonnell ("McDonnell"), a lawyer employed by the Second Defendants;
>
> (c) The First Defendant and Mishra did instruct McDonnell of those matters pleaded at paragraphs 5, 6, 7, 8 & 9 above;
>
> (d) Mishra thereafter did request McDonnell to act for the Plaintiff as its solicitor to take such steps, for and on its behalf, as was necessary, and to advise thereon, in attending to the preparation and completion of the 7 Lot Agreement;
>
> (e) In reliance upon the professional skill and expertise of McDonnell, the Plaintiff did retain and employee the Second Defendants as its solicitors, for reward, to take such steps, for and on its behalf, as was necessary, and to advise thereon, in attending to the preparation and completion of the 7 Lot Agreement or alternatively the Lot 504 Contract (a"retainer")."

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[54] T3 – 8.

[168] One of the matters referred to in paragraph 10(c) as having formed the instructions given to Ms McDonnell was that:

> "8. In the course of those meetings:
>
> …
>
> (d) the First Defendant did offer to Mishra that he should purchase 7 of the lots as depicted in the WS Group 17 Lot Plan, that being those lots 26 to 32 ("the 7 Proposed Lots");
>
> (e) they did agree that the value of each lot would be $115,000.00 inclusive of any GST;
>
> (f) they agreed that Mishra, by his nominee, would therefore purchase the 7 Proposed Lots by paying to the First Defendant the total sum of $805,000.00 inclusive of any GST (7 x $115,000.00), as and when required by the First Defendant, so he could complete the Stage 3 Subdivision;
>
> (g) they further agreed to formally document this arrangement using a jointly appointed solicitor."

[169] In paragraph 11 of its pleading, Wise pleads that:

> "By letter headed "Conveyancing Cottage" to the Plaintiff dated 1 October 2010 the Second Defendants did, inter alia, confirm their appointment to act as the legal representative on behalf of the Plaintiff in its purchase from the First Defendant of Lot 504."

[170] The Conveyancing Cottage letter was one of three of that date. On the letterhead of each of them are the words "Conveyancing Cottage" and "A division of Ruddy Tomlins and Baxter". They were:

(a) The letter to Wise confirming that it wished RTB to act on its behalf with respect to the purchase of Lot 504. It noted that the purchase would be "handled by Alicia Fletcher … supervised by Kevin Baxter who is a partner of the firm."

(b) A letter to Mr Cullen noting that he wished that they act for him in the sale of Lot 504. It noted that the sale would be "handled by Jenny Fitch … supervised by Leah McDonnell who is an Associate of the firm."

(c) A letter from the Conveyancing Cottage to RTB advising that it acted for the purchaser of Lot 504 and making the usual requests in a conveyancing arrangement.

[171] Wise argues that the breaches of contract and the negligence alleged against Ms McDonnell and, through her, RTB, was borne out of a mistaken assumption she made with respect to the character of Wise Investments Pty Ltd.

[172] This assumption, it is contended, arose from the telephone conversation she had with Mr Cullen on 11 May 2010. Wise relies upon the following evidence given by Ms McDonnell which must be set out in some detail:

> "And did [Mr Cullen] tell you what he was going to do with the balance area lot?---He told me that he was considering selling that to a **related entity of his**.

Did he tell you why he was going to do that?---He told me he had considered the taxation merits of it and was doing it for reasons of commerciality.

And - - -?---He mooted a purchase price of 200,000.

All right. Just stop there. Did he give you any information during this conversation about the related entity?---I believe he told me the proposed entity.

Okay. And what did he say about that?---It hasn't changed throughout. It was Wise Investments.

No, no, just stop there. Can you tell me what he told you in May 2010 during this conversation about the proposed entity?---That his accountant would be organising it."[55] (emphasis added)

[173] She was asked, in cross-examination, the following:

"Thank you. Now, you told us yesterday that you had an understanding that Wise Investments was a company that was a related entity to Mr Cullen. Do you remember telling us that?---Yes.

And the concept of a related entity, I gather, was something that was conveyed to you by Mr Cullen during that lengthy 46 minute telephone conversation you had with him back in May of 2010; is that right?---And between May and September.

Well, let's start with May. Is that when the concept of a related entity was conveyed by Mr Cullen to you?---I believe so. He gave me a proposal.

And there were other conversations, were there, after that initial lengthy telephone conversation through until September with Mr Cullen about that subject, was there?---There would have been other discussions about it perhaps also related to other conveyances also because in that intervening period I wrote to council on his behalf proposing that he stage it into two stages.

And do you tell His Honour that Mr Cullen actually used the expression "related entity"?---That's my expression.

Well, thank you, but could you answer my question. Do you tell His Honour that Mr Cullen actually used the words "related expression" or something similar to that effect? Sorry, "related entity"?---**He didn't use the words "related entity"**, no.

Well, what does your recollection tell you that he actually said to you?---That his accountant was forming – going to form a company on his behalf.

All right. And so may his Honour take it that what you assumed from being told that was that the company to acquire this land would be a related entity?---That's my assessment - - -

[55] T6 – 5.

Yeah? --------because if it's for the benefit of somebody it's a related entity in legal terminology."[56] (emphasis added)

[174] That was followed by this exchange:

"But just so we're clear, your evidence to his Honour about it being not arm's length - - -?---That's correct.

- - - is an assumption you made based on what Mr Cullen had told you; is that right?---Well, it's not an assumption. Those were the instructions I was given.

But Mrs McDonnell, Mr Cullen never said to you that this was not an arm's length transaction, did he? Yes, he did.

Well, when did he tell you that? The mere fact that he had his accountant form a company for his benefit tells me that it's not an arm's length transaction - - -

I see, so - - -?---------and that it's related.

So what you're telling his Honour in truth is that he never said to you, "This is not an arm's length transaction." That was an assumption you made based on nothing more than Mr Cullen telling you that this company had been set up for Mr Cullen's benefit? During the meeting when Mr Mishra sat there he indicated that he was prepared to – well, Grant indicated that his accountant was prepared to help out.

All right. But what does that tell you, if anything, about whether or not this was an arm's length transaction or not?---Well, if someone's prepared to help another person it doesn't appear to be an arm's length transaction to me.

But Madam, surely if Mr Mishra was helping out Mr Cullen that could have been assistance in numerous forms, including advancing money to him to assist with the completion of the development; correct?---Well, I know nothing about that.

Well, you've assumed that what that meant was that this was not an arm's length transaction, didn't you? I base my opinion on the contact that I'd had between May and probably 2011. It went on for a long period of time - - -

Yeah?--- - - - and that was my opinion throughout based on various discussions, meetings, etcetera.

Based on various meetings, etcetera?---Well, it started in May with a telephone discussion. There were exchanges of emails. There was a meeting in the office. There was a three-way conversation after the plan registered, etcetera.

Yeah? There was – it was a culmination of all of those – the conduct of the file.

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[56] T7 – 3, 4.

> **During which and as a result of which you assumed that Wise Investments was a related entity of Mr Cullen so that in effect all you needed to do was to obtain instructions from Mr Cullen; is that right?--Yes.**" [57] (emphasis added)

[175] It is clear from those excerpts that Ms McDonnell operated under the apprehension that Wise was not an independent entity and that she need not seek Mr Mishra's instructions. She used the term "related entity" in a loose way and not in the sense in which it is used in the *Corporations Act* 2001.

[176] Ms McDonnell was entitled to draw the conclusion from the discussions she had with Mr Cullen and, later with Mr Cullen and Mr Mishra, that this venture – the sale of Lot 504 – was one being carried out at the behest of, and in the interests of, Mr Cullen. As she told them on more than one occasion, the transaction made no sense if it was intended to protect Mr Cullen's interest in the land represented by Lot 504. But, this scheme was something from which they would not be diverted. They were of the view, misguided though it was and notwithstanding Ms McDonnell's advice, that it would be of use in protecting Mr Cullen from the claims being made by his ex-wife.

[177] On Mr Mishra's account of that meeting (referred to above), there were no instructions given to RTB other than with respect to Lot 504.

[178] The discussion during the telephone meeting of 13 May 2011 was consistent with the earlier conversations – Mr Cullen was still considering whether the transaction would go ahead and Ms McDonnell was not to do anything until she received Mr Cullen's instructions. Little of relevance happened until about ten months later.

[179] On 14 March 2012, Mr Cullen sent an email[58] to Mr Mishra which, in turn, forwarded an email from Ms McDonnell. It told Mr Cullen that "Natasha is on the war path". This concerned Natasha Cullen's demands for payment in accordance with the order. On the same day, ACM had sent Mr Cullen a calculation setting out the amount necessary to pay out Natasha Cullen.

[180] On 28 March 2012, Ms McDonnell informed Mr Cullen that the balance of the amount owing (less some small interest component) had been paid to Natasha Cullen and she was satisfied.[59]

[181] Instructions from Mr Cullen about Lot 504 arrived in a letter from him of 29 March 2012.[60] The letter was headed:

> "Re: Contract dated 7th September 2010
>
> Between: Cullen Unit Trust & Wise Investments Pty Ltd"

[182] In that letter he said:

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[57] T7 – 4, 5.
[58] Exhibit 26, p 1072.
[59] Exhibit 26, p 1079.
[60] Exhibit 26, p 1080.

> "As Natasha is now paid out from the proceeds of sale from lot 35, the asset protection plan and purpose of this contract is no longer required and will not be proceeding any more.
>
> As discussed, I have had a discussion with Anil about this and he has advised me to leave the land in the name of the Cullen Unit Trust as my divorce orders have now been completed and Natasha can't make any further claim against the land or myself.
>
> Natasha has now been paid in full along with her interest that was due as per Anils calculation on the family law court order and I am relived [sic] that this is now finally over.
>
> I will contact you in due corse [sic] when I decide to register the remaining 7 lots for titles."

[183] I was invited by Mr Alexis SC to compare the letter of 29 March 2012 with the "advice" Mr Cullen said he received from Gaurav because "the similarities between the two are obvious and ought to give rise to a significant question as to whether or not Mr Cullen is the author of the document, or at least caused that document to be prepared on his behalf." I have examined them and, to my eye, there are no similarities which are so obvious that they would raise a suspicion about the authorship of either. Both appear to have been created using a very common typeface. There is nothing that is unusual nor is there any marked similarity in style or expression which would found the suspicion suggested by Mr Alexis SC.

[184] It was also suggested that the letter was a fabrication in the sense that it had been backdated to appear as if it had been created the day after Natasha Cullen was paid out. That was not established. Documents which are consistent with the letter being genuine were created shortly after the letter, for example, the RTB file note of 12 June 2012 and RTB's letter to Mr Cullen of that date.

[185] The letter of 29 March 2012 concluded the arrangement so far as Lot 504 was concerned. The legal classification of what occurred after that is difficult to determine. At best for Wise and Mr Mishra there appears to have been some understanding that the seven blocks would be marketed and that Mr Mishra would be responsible for that. But no instructions were given for the ownership of the seven blocks to be transferred to either Wise or Mr Mishra.

[186] On the 2 April 2012, Ms McDonnell made a diary note of a telephone conversation which she said she had with Mr Mishra.[61] It is very brief:

> "Anil Accountant rang
>
> - Peter Lawton
> - 17th April 2012
> - only option is to enter into contract off plan"

[187] Mr Mishra was cross-examined by Mr Beacham QC on the topic of that conversation. Mr Mishra did not recall having such a conversation. Mr Beacham asked Mr Mishra

[61] Exhibit 26, p 1081.

whether he recalled having a conversation with Ms McDonnell in which he told her that he had had a conversation with Mr Lawton. It was put to him that Mr Mishra mentioned to her that there was a buyer for lot 27 and Ms McDonnell told him that he would have to enter into an off the plan contract with that buyer. Mr Mishra denied all of those suggestions.

[188] In cross-examination, Ms McDonnell agreed that she had provided instructions to RTB's lawyers with respect to that telephone conversation with Mr Mishra and how her file note should be understood. The matters which had been put to Mr Mishra with respect to this conversation were then raised with her. Her answers were inconsistent with what had been put to Mr Mishra on instruction. She denied telling Mr Mishra that he would have to enter into an off the plan contract. That inconsistency was not explained.

[189] In April 2012 the seven lots were being marketed. On 18 April, Ms McDonnell sent Mr Cullen a survey plan and disclosure statements for the seven lots.[62] At about this time, Mr Mishra became active again. In an email to Ms McDonnell of 27 April,[63] Mr Cullen said that he had been speaking to Mr Mishra (who was in Fiji) about offers which had been presented to prepare contracts. He said that Mr Mishra had told him that Ms McDonnell was not to prepare the contracts, that he would email his instructions through on an agreed sale price for which he will sell blocks of land. Mr Cullen said in the email: "I have informed Anil that I will not sign any contract of sale until such time as Anil tells me that he is happy with the sale price."

[190] On 28 April 2012, Mr Mishra sent an email to Mr Lawton.[64] In it he said:

> "This email is to let you know that I am responsible for selling the remaining seven lots at Soldiers Point Road Bowen.
>
> …
>
> … I strongly believe that the remaining seven lots could fetch upto [sic] or close to $200k each knowing that these are the only lots left for sale in the vicinity of the Town and Beach.
>
> Further, as I explained over the phone I am not in a rush to sell these properties unless and until I get the price close to $200,000.
>
> Please let me know if you have any Buyer who would like to buy at this price."

[191] Mr Cullen had been sent that email, he forwarded it to Ms McDonnell the same day. On 30 April Ms McDonnell sent an email to both Mr Mishra and Mr Cullen stating:[65]

> "Hi Anil
>
> I note your email. We won't prepare any further contracts until such time as we have received your confirmation of price and contract terms.
>
> The plan has been sent to Council for resealing and the Easement for signing. Can you and Grant please let me know if you want this work officially costed

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62 Exhibit 26, p 1085.
63 Exhibit 26, p 1193.
64 Exhibit 26, p 1195.
65 Exhibit 26, p 1199.

> to Grant or do you want all accounts and fees directed to you. I need to know for the purpose of making up my new file for the second plan registration."

[192] On 15 May 2012 Ms McDonnell forwarded an email to Mr Cullen and Mr Mishra from Mr Lawton which referred to an offer to purchase one of the lots.[66] Ms McDonnell sought from both of them instructions as to whether they were agreeable with the terms proposed by the real estate agent. In response, Mr Cullen said that he would wait for "Anils instructions on what to do with this contract. Also do you know how long until the plan is registered from DNR, I think it will be better for Anil to do the contract once the title is through."[67]

[193] Neither Mr Cullen nor Mr Mishra refer to Mr Mishra as being the owner of the lots in any of the emails. Mr Mishra's involvement could be because he was the "owner" of the lots or it could be because he was simply continuing his long-standing role as an advisor to Mr Cullen. Mr Mishra was sent many emails which were apparently just for his information. It was at this time that both of them were considering projects to undertake in Fiji and there was, it appears, a requirement that they had to demonstrate an investment of $1 million in Fiji in order to proceed. Mr Cullen sought Mr Mishra's advice on how that could be done.

[194] From about the middle of 2012 until September 2013 little of any importance happened with respect to the Bowen land.

[195] The relationship between Mr Cullen and Mr Mishra broke down about halfway through 2013. They were engaged in a venture called International Wise Property Developments in Fiji. Something occurred which resulted in Mr Mishra being charged with intimidating Mr Cullen. Whether there was any basis for that is not relevant to these proceedings. But it did mean that their long-standing friendship was over.

[196] In early September 2013, Mr Mishra called Ms McDonnell and left a message for her. She did not reply. On 26 September Mr Mishra sent an email[68] to Alicia Fletcher, a conveyancing clerk employed by RTB which said:

> "Subject: Transfer of Land … Wise our Purchase Lot 504 ADA Place Bowen From GP Cullen
>
> Dear Alicia,
>
> I have contacted Leah McDonnell about 3 weeks ago inorder [sic] to Transfer the above mentioned land.
>
> I just wanted to know what is the progress on this matter."

[197] Within an hour of sending that email, Mr Mishra forwarded it to Mr Baxter of RTB asking him to "please look into this matter urgently."

[198] On the same day, Mr Baxter sent a letter by email to Mr Mishra which stated:

> "We acknowledge receipt of your email of the 26th September 2013. We advise that we do not have any current instructions from Mr Cullen to act in

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66 Exhibit 26, p 1205.
67 Exhibit 26, p 1207.
68 Exhibit 26, p 1346.

> respect to a transfer of Lot 504. If the transaction is to proceed, we would be acting for Grant Cullen as Vendor and you would need to seek independent representation in respect to a transfer of the land."[69]

[199] In response to that letter, Mr Mishra's then solicitors wrote to RTB[70] on 11 October 2013 seeking details of the property and some documents and the advice that it was "proposed to instruct you to seek a settlement of the property".

[200] RTB responded on 18 October enclosing a copy of the contract of 7 September 2010 and stating:

> "Our understanding was that each party allowed the Contract to lapse and neither party intended to proceed with the transaction. We certainly did not receive any instructions from Anil Mishra regarding payment of the purchase monies referred to in the third paragraph of your letter. This firm is named as both the solicitors for the Seller and Buyer in the transaction. In view of the fact that we foresee the possibility of a conflict in interest in the sellers and purchasers rights, we advise that we are now proposing not to act for either party in the transaction and invite your client to seek his own independent advice. We are advising Grant Cullen similarly."[71]

[201] On 21 October 2013, Mr Cullen sent a notice to KB Legals in which he purported to terminate the contract.[72]

[202] As I have observed earlier in these reasons, the application of a legal or rational analysis to the behaviour of Mr Mishra and Mr Cullen simply demonstrates the unwisdom of what they did. But, as has also been observed, at the relevant times they were the best of friends. On Mr Cullen's case, he deposited hundreds of thousands of dollars with Mr Mishra to hide those funds from his wife and he did not have anything in writing to support that arrangement. On the other hand, Mr Mishra was content to transfer similar amounts to Mr Cullen and to contractors without any terms of the agreement being recorded or any security being provided.

[203] Neither Mr Mishra nor Mr Cullen told Ms McDonnell of an agreement for Mr Mishra to purchase 7 lots. They did not ask her, or RTB, to act for them in the conveyance of anything other than Lot 504. They did not ask her to create or record any document in relation to the 7 lots. What they wanted her to do, and what she did do, was to create a contract for a single parcel of land with the sale price of $200,000 but with the overriding condition that it was for Mr Cullen to decide whether or not the contract would proceed. They did this in the teeth of advice from Ms McDonnell about the imprudence of the arrangement. But they persisted in it because of a misguided view that this arrangement would assist Mr Cullen to protect his Bowen land from his ex-wife.

[204] In the absence of any instruction to act with respect to the conveyance of the 7 lots, there was no duty upon RTB to advise Mr Mishra in the way set out in the SFASOC. RTB had no duty to advise the plaintiff with respect to Lot 504 in the way suggested by the plaintiff because its purpose – known to Mr Mishra – was to protect the land from Natasha Cullen.

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[69] Exhibit 26, p 1344.
[70] Exhibit 26, p 1374.
[71] Exhibit 26, p 1389.
[72] Exhibit 26, pp 1462-1464.

Any duty that might have existed would only have arisen if Mr Cullen had decided to proceed with the transaction. Until that happened, everyone involved in the transaction – Mr Cullen, Mr Mishra and Ms McDonnell – was content that no steps be taken.

[205] In any event, the case advanced for Wise is inconsistent with the conduct of Mr Mishra. On his case, he went to RTB with the intention of entering into an ordinary transaction to purchase seven lots from Mr Cullen. Instead, he emerged as the purchaser of Lot 504. He was prepared to pay $805,000 for the seven lots, but ended up as a purchaser of one lot for $200,000. He had had the contract explained to him. He knew it was for Lot 504. He did not complain about that. He made no enquiries about the progress of the contract.

[206] Mr Mishra did not seek any advice about the purchase until his relationship with Mr Cullen broke down. Mr Mishra has been a practising accountant, with his own firm, for many years. He was not some bamboozled neophyte who could not understand what he was doing. When pressed as to why he did not make any enquiries about the transaction he simply repeated a variation of a mantra to the effect that he relied upon his solicitors for all advice and was waiting for them.

The extent of RTB's duty

[207] Mr Mishra's argument about the extent of RTB's duty to him was based upon his view of the retainer – which I have rejected. Nevertheless, RTB was retained, to the extent outlined above, with respect to the Lot 504 contract. Given the nature of Wise's case that raises these questions – what were its duties and were they breached?

[208] Wise argues that the principles enunciated in *Robert Bax & Associates v Cavenham Pty Ltd*[73] are relevant and should be applied. The gist of what Muir JA said[74] is accurately summarised in the headnote:

> "That the existence of a duty to advise owed by a solicitor to his or her client with respect to transactional work, **in circumstances where the standing and experience of the client is such that the client lacks legal and commercial knowledge and acumen**, does not depend on advice or information being specifically sought by the client, such that the solicitor's duty requires that he or she inform him or herself with a view to determining what advice needs to be given to sufficiently explain the transaction and protect his or her client's interests." (emphasis added)

[209] The decision in *Robert Bax* was premised on the capacity of the client and the nature of the work which was to be done. Mr Mishra could hardly be described as someone who lacks "legal and commercial knowledge and acumen". While he was content to enter the arrangement to "protect" the Bowen land, he was otherwise an experienced accountant.

[210] The limits of a solicitor's duties are determined by the terms of the retainer and any duty of care which is sought to be implied must be related to the instructions which were given to the solicitor.[75] In *Robert Bax* the transactions in question were loans and an example of a question which the court said should have been considered was: whether each mortgage should be security for the repayment, not merely of the loan in respect of which

[73] [2013] 1 Qd R 476.
[74] Holmes JA and Martin J agreeing.
[75] *Hawkins v Clayton* (1988) 164 CLR 539.

it was granted, but for all loans made to the borrower. That type of issue did not arise in this case.

[211] In *Fox v Everingham*[76] the Full Court of the Federal Court of Australia considered the scope of a solicitor's retainer in respect of the sale of land and the minimum work expected to be done under a retainer of that nature. The minimum obligations imposed on the solicitor in those circumstances were held to be: to go through the contract and explain the salient points of it to the client, to explain any provisions of the contract which were in an unusual form and which might affect their interests as they were known by the solicitors to be, and to give attention – before the contract was signed – to the question of whether it, from the client's point of view, contained adequate provisions to protect them against a variety of contingencies which might reasonably have been foreseen as likely to arise if things did not go as expected.[77]

[212] Both Mr Mishra and Mr Cullen were advised by Ms McDonnell of the futility of what they proposed, but they continued. Mr Mishra, in any event, had the contract explained it to him before he signed it. Mr Mishra was, at all times, and at least as a result of being told by Ms McDonnell, aware that this was an unusual contract and that its primary purpose was not to convey land. It was a flimsy façade intended to conceal the true ownership of land from Natasha Cullen.

[213] RTB's duty to Mr Mishra was confined by the purposes of the transaction. One duty was to warn the parties about the effectiveness of the arrangement. This was done. Another was to warn about incurring unnecessary costs. This was done. It was an artificial arrangement which gave to Mr Cullen the power to bring it to an end. Mr Mishra knew that and understood it. RTB did not breach its duty to Mr Mishra.

Conclusions

[214] Mr Mishra has established that he advanced the sum of $815,000 to Cullen as Trustee and received nothing in return. He has failed in his claims against Michelle Cullen and RTB. Cullen as Trustee has failed in his counterclaim against Wise.

On 17 January 2019, the following orders were made:

1. Judgment for the Plaintiff against the First Defendant for $815,000 with interest to be assessed.

2. The Plaintiff's claim against the Second Defendant is dismissed.

3. The Plaintiff's claim against the Fourth Defendant is dismissed.

4. The First Defendant's counterclaim against the Third Defendant is dismissed.

5. The Plaintiff pay the Second Defendant's costs of the proceeding to be assessed on the standard basis until 23 November 2017 and on the indemnity basis thereafter.

6. The First Defendant pay the Plaintiff's costs of the proceeding to be assessed on the standard basis.

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[76] (1983) 50 ALR 337.
[77] Ibid, at 341.

7. The First Defendant pay the Third Defendant's costs of the counterclaim to be assessed on the standard basis.

8. The plaintiff pay the Fourth Defendant's costs of the proceeding on the standard basis.

9. The freezing orders made in paragraph 6 of the order of Applegarth J dated 17 March 2015 are continued:

   (c) for 28 days after the date of these orders if no appeal is filed; or

   (d) if an appeal is filed, until the final determination of any such appeal;

   and are thereafter discharged.

THE ORDER OF THE COURT BY CONSENT IS THAT:

10. Pursuant to rule 687(2)(d) that the Plaintiff pay to the Second Defendant an amount for costs of the proceedings ordered in paragraph 5 above, that is to be assessed in the following way:

   (k) the costs are to be assessed by an independent person, qualified as a costs assessor under UCPR Chapter 17A part 5;

   (l) the independent person is to be a person agreed between the Plaintiff and the Second Defendant within 7 days of the date of these orders coming into effect subject to order (j) below, or failing agreement, a person appointed by the Registrar of the Supreme Court within a further 7 days;

   (m) the independent person is to be given:

      F. this order;

      G. the affidavit of Geoffrey Leon Hyland sworn 15 October 2018 (Court Document 225) and the affidavit of Paul David Garrett sworn 16 October 2018 (Court Document 224);

      H. access to such parts of the file of the Second Defendant's solicitor, Hyland Law, as the independent person may request; and

      I. evidence and submissions of the Plaintiff as directed by the independent person; and

      J. any response by the Second Defendant.

   (n) the independent person is to make a summary determination of what is fair and reasonable for the costs ordered to be paid by the Plaintiff in the circumstances, so as to fix a gross sum broadly, without the specificity involved in an assessment of costs;

   (o) the independent person shall provide a report to the parties and to the Court as to the sum fixed for costs and a brief explanation of the way in which that sum has

been fixed as soon as practicable but no later than six weeks from the date on which the material in (c) above has been provided to the independent person;

(p) the independent person shall spend no more than 3 days, or an alternative time agreed by the parties in writing, undertaking the determination and preparing the report in (d) and (e) above;

(q) the costs of the independent person shall be paid equally by the Plaintiff and the Second Defendant;

(r) liberty to apply on three days' notice in writing to the other party;

(s) upon the delivery of the report in accordance with (e), the security be released to the Second Defendant insofar as is necessary to satisfy the costs order;

(t) costs orders in paragraphs (a)-(i) above are stayed:

C. for 28 days after the date of these orders if no appeal is filed; or

D. if an appeal is filed, until the final determination of any such appeal.