

SUPREME COURT OF QUEENSLAND

CITATION: *Cheshire Contractors Pty Ltd v Everett* [2018] QSC 228

PARTIES: **CHESHIRE CONTRACTORS PTY LTD**
(ACN 124 700 385)
(Plaintiff)
v
MARK LANSDOWNE EVERETT
(Defendant)

FILE NO/S: 154 of 2016

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 8 October 2018

DELIVERED AT: Cairns

HEARING DATES: 2, 3, 10, 11 August 2017; 8, 9 November 2017;
15, 16, 17 January 2018; 10, 11 April 2018.

JUDGE: Henry J

ORDERS: **1. Judgment for the plaintiff in the amount of \$450,493.59.**
2. I will hear the parties as to costs if not agreed in the meantime at 9.15 a.m. on 24 October 2018.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – where there was an oral contract for works – where full payment for works was not made – where there were complaints of non-compliance of works performed – where there were complaints of other breaches of implied terms – whether the works were compliant – whether there were remedial works required – whether there was loss or damage occasioned.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – where there was an oral contract for the commencement of works – where there were two phases to the works involved – where phase one was a work for pay engagement – where phase two had no substantive pay arrangement – where payment was to be by reference to hourly rates for phase two – where there existed a promise to delay the seeking of payment – whether that promise amounted to a promissory estoppel.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS – where there were two phases to the works involved – where there existed an oral contract for phase one works – whether a further oral contract, joint venture or new contract existed for further works – where there were works completed after payment in full was not received for phase one and other works completed– whether there existed any agreement for payment for the further works.

Amos v Citibank Ltd [1996] QCA 129, cited.

Bellgrove v Eldridge (1954) 90 CLR 613, cited.

Combe v Combe (1951) 2 KB 215, 219, followed.

Foakes v Beer, (1884) 9 AC 605, followed.

Giumelli v Giumelli (1999) 196 CLR 101, cited.

Hughes v Metropolitan Railway Co (1877) 2 AC 439, cited.

John Alexander’s Clubs v White City, (2010) 241 CLR 1, followed.

Legione v Hateley (1983) 152 CLR 406, followed.

Masters v Cameron (1954) 91 CLR 353, cited.

Riches v Hogben [1985] 2 Qd R 292, cited.

COUNSEL: WGC Lawyers for the plaintiff
Ascione & Associates for the defendant

SOLICITORS: C E Taylor for the plaintiff
C J Ryall for the defendant

Introduction

- [1] The plaintiff, a civil contractor, performed development work on a proposed rural subdivision of the defendant’s property west of Ingham. It claims \$966,890.74 as damages for breach of contract or as a debt pursuant to a contract.
- [2] The work was performed in two phases, the first in 2011 (“phase one”), the second in 2014 (“phase two”). There was no apparent dispute by the end of phase one that the defendant, Mr Everett, was obliged to pay the plaintiff, Cheshire Contractors Pty Ltd (“Cheshire Contractors”) for the work it had performed. The problem at that stage was that Mr Everett could not afford to pay. To cope with this dilemma, he successfully prevailed upon Cheshire Contractors to confirm in an email of 20 December 2011 that it would not seek payment for work performed until there were sufficient sales or presales to allow Mr Everett to make payment. Mr Everett is hiding behind this email and recently conceived technical complaints as an unrealistic basis to avoid his obligation to pay for the phase one works.
- [3] He is not the only party who will not concede the obvious. After two further years went by without payment to it, Cheshire Contractors took the fateful decision to become proactively involved in assisting Mr Everett to advance the project. Amidst

talk of a joint venture Cheshire Contractors rolled the dice and ploughed on into the phase two works, without agreement about payment for the works having been reached. Cheshire Contractors eventually ceased its phase two works, optimistically asserting that it ought be paid for its speculative folly.

- [4] So it is, with each party bogged in unrealistic positions, it is necessary to wade the evidentiary mire of several years of ill-fated property development to expose the reality of their commercial obligations to each other.

Determining the case

- [5] Cheshire Contractors says its case is straightforward – its invoiced work should be paid. What began as a listed hearing of four days but became an eleven day trial, involving broken sets of hearing days spanning many months, as well as the determination of a separate question,¹ was far from straightforward.
- [6] Cheshire Contractors asserts in respect of both phases of work it had an agreement with Mr Everett to perform the works for payment at agreed rates, that it performed the works and that it is entitled to be paid what it invoiced at the agreed rates for the performance of the works. The consequent loss and damage is claimed as damages for the breach of contract inherent in Mr Everett’s non-payment or alternatively as money due and payable as a debt payable under each contract. The quantum of its claim is founded upon the invoiced sums.
- [7] No reliance was placed at trial on a quantum meruit or unjust enrichment claim.² There was at one point a mid-trial application to amend the pleadings in a way which may have varied that position but following a ruling on a separate question,³ that application was dismissed.⁴ As a result of the ruling the parties agreed the plaintiff’s claim would be reduced by \$96,000.⁵
- [8] Cheshire Contractors’ relatively simple pleading of its case attracted a lengthy defence, the content of which raised a plethora of issues of varying significance. A lengthy reply followed.
- [9] In respect of phase one, Mr Everett does not deny there was an agreement. Rather he alleges that, in breach of the implied terms of the agreement, the works were not performed consistently with the project’s progressive compliance testing and inspection requirements, the amounts charged for the phase one works were not invoiced for several years and exceeded the agreed amounts and some of the invoiced work was not required by the agreement or any variation thereto (“performance compliance complaints”). He sets off the damages allegedly arising therefrom.⁶

¹ [2017] QSC 287.

² See, eg, T2-88-89, T2-95-96.

³ [2017] QSC 287.

⁴ T6-5 L41.

⁵ T6-5 L9.

⁶ The determination of the separate question dispensed with a counterclaim.

- [10] Quite apart from the performance compliance complaints, Mr Everett raises an overarching complaint of significance. He asserts Cheshire Contractors is precluded from claiming for the phase one works by reason of its allegedly binding promise, contained in its email of 20 December 2011, that it would not seek payment for work performed until there were sufficient sales or presales to allow Mr Everett to make payment.
- [11] In respect of phase two, Mr Everett denies there was any agreement akin to that for phase one. Instead he asserts phase two proceeded pursuant to a joint venture agreement, consistently with the promise not to seek payment presales. He contends by that agreement sales profits were to be shared, any outstanding amount owing to Cheshire Contractors became a liability of the joint venture and the works performed by Cheshire Contractors were part of its contribution to the joint venture. He complains Cheshire Contractors breached the joint venture agreement in declining to continue work in late 2014.
- [12] Alternatively, Mr Everett asserts that if there was an agreement pursuant to which Cheshire Contractors was to be paid for works performed in phase two, those payments were to be confined to a budgeted total exceeded by the claim. Mr Everett also alleges if there was such an agreement it was breached in ways similar to those alleged in respect of the performance compliance complaints regarding phase one. An additional breach is said to arise by reason of Cheshire Contractors allegedly agreeing but failing to affect the subdivision of lot 77 of Mr Everett's land, thus preventing its sale and consequent satisfaction of Mr Everett's debt to the bank with consequent loss to Mr Everett and deprivation of his capacity to advance the development or sell it. He claims a set off of his losses caused by Cheshire Contractors' alleged breaches.
- [13] The task of ascertaining what are alleged to have been essentially oral agreements is plagued by a lack of evidentiary precision about them. Neither of the main protagonists, Mr Everett and Mr Barry Cheshire, the managing director of Cheshire Contractors, impressed as having a reliable recollection of matters of detail. Mr Everett was unwilling to make reasonable concessions and appeared too ready to shift responsibility rather than concede his own involvement in and knowledge of relevant events. His answers implausibly cast him as a powerless, ignorant bystander in his own property development. Mr Cheshire tended to testify in broad and sometimes unresponsive terms and was at his vaguest about the supposed agreement under which he performed the phase two works. If there exists a sensible explanation for why Cheshire Contractors embarked upon the phase two works in 2014, other than that it gambled on the parties reaching an agreement and the project succeeding, the Court did not hear it from Mr Cheshire.
- [14] Determination of the performance compliance complaints may be assisted by the content of the admittedly limited documentary communication and the industry and project document requirements for work of the kind undertaken. This may include documents like plans and approvals dealing with development compliance requirements, such as progressive inspections of works at so-called hold points, some of which the defendant complains were not complied with. That said, the significance of such compliance documents or industry requirements is dependent

upon whether such agreement as was reached expressly or implicitly required Cheshire Contractors to perform a role in respect of compliance requirements.

- [15] The case requires the analysis of relevant events during and between each of the two phases of works, with a view to identifying any agreements and the extent to which they were complied with. The analysis ought also deal with events between the phases, particularly in connection with the 20 December 2011 email. The length of the pleadings in this case makes it unhelpful to structure these reasons around them. It is simpler to integrate the resolution of the issues to which the pleadings give rise within the above analysis.
- [16] These reasons will therefore progress in four parts:
- Part A - General factual background
 - Part B - Phase one analysis
 - Part C - The December 2011 promise
 - Part D - Phase two analysis
 - Part E - Determination of award and or set off.

PART A - GENERAL FACTUAL BACKGROUND

Ph 1 works

- [17] The phase one works focussed upon the western end of Mr Everett's property, which was owned by him in his representative capacity as trustee of the Everett Family Trust.⁷
- [18] The residential development planned for the property was then known as Hinchinbrook Habitats. The development was planned to extend over a number of areas on the property, not just the area the subject of the phase one works.⁸ Various areas of the property were excluded from the development as sensitive environmental habitats, pursuant to a development approval for material change of use of 14 May 2010.⁹
- [19] The works consisted principally of the installation of a road along an existing road easement through the property.¹⁰ The primary purpose of the phase one works was to provide better access to the property and the lots for potential purchase, so as to excite expressions of interest by prospective purchasers. In addition, as Barry Cheshire conceded, the works "were also part of the proposed completed development".
- [20] The road was built to subgrade level. This, Barry Cheshire explained, is the layer directly beneath the pavement layer. The latter layer typically involves a further two or three layers of gravel followed by bitumen or asphalt.¹¹

⁷ SOC [1], Def [1].

⁸ See, eg, Ex 45.

⁹ Ex 47.

¹⁰ T2-92 L15.

¹¹ T2-50 L33.

- [21] Barry Cheshire testified that other work performed at Mark Everett's request during phase one included the clearing of mangroves,¹² the removal of an old bridge which was part of a causeway,¹³ putting a drain along some lots on the high side of the road,¹⁴ building a boat ramp,¹⁵ applying extra fill so the batters were less steep and could be mowed,¹⁶ the clearing of 15 lots,¹⁷ rock work near the dam,¹⁸ excavation up the hill,¹⁹ the installation of ag pipe to drain some blocks²⁰ and putting some gravel running surface on the road for use during construction when the surface was slippery.²¹
- [22] Some excavation material, which was excess to the needs of a project being conducted on the Mt Cudmore Road near the Cardwell Range, was supplied by an entity known as Abigroup for Cheshire Contractors' use on embankments and bridging out an area of mangrove in the phase one works.²² Barry Cheshire testified the work involved in respect of the material brought on site from Abigroup was "considerable".²³ Mr Cheshire explained a large compactor was used to break down the fill material, which was quite coarse, for use in lessening the batter slopes. This involved stripping back topsoil, placing and compacting the material, levelling it out and then putting the topsoil back over the top again.²⁴
- [23] The nature of the works additional to building the road to subgrade was canvassed more extensively in exhibit material such as timesheets. It was work for which Cheshire Contractors invoiced Mr Everett. There was a belatedly conceived and faintly argued debate, with which I now dispense, about some work not being performed or required. I accept the work which was invoiced for was in fact performed and required.²⁵ Mr Everett was unconvincing in his denials of the occurrence of some work, which of its nature he would be unlikely to realise had happened unless witnessing it directly.²⁶ I accept the performance of works additional to those initially agreed to was requested by Mr Everett. I reject as implausible the notion inherent in Mr Everett's unconvincing testimony about this debate²⁷ that additional works were performed without request by Mr Everett.

Ph 2 works

- [24] The phase two works focussed upon the eastern end of Mr Everett's property. By this time the planned residential development was known as Riverviews Estate. Once again, the works did not constitute the whole of the project and were targeted

¹² T2-56 L14, T3-14 L41.

¹³ T2-59 L8, T3-15 L33.

¹⁴ T3-15 L44.

¹⁵ T2-54 L25 – T2-55 L1.

¹⁶ T2-55 L23.

¹⁷ T2-55 L42.

¹⁸ T2-56 L28.

¹⁹ T2-58 L16.

²⁰ T2-58 L33.

²¹ T2-59 L29, T4-8 L28.

²² T1-75 LL15-47.

²³ T3-14 L38.

²⁴ T4-6 LL35-45.

²⁵ Subject to the invoicing errors discussed below.

²⁶ Eg T8-46 L46, T8-47 L25.

²⁷ Eg T7-18 L27, 7-20 L1

upon getting the first 31 lots in an adequate state to go to market with disclosure notices to attempt to secure presale contracts.²⁸ The 31 lots included the original 15 lots reconfigured into 10 lots.²⁹

- [25] Barry Cheshire described the phase two works as including building a road to subgrade level, which included creating a road away from the existing track into alignment with Mt Separation Road. Barry Cheshire explained the works also involved levelling and draining lots and removing and restoring topsoil so that the lots were at what he described as the disclosure stage, meaning they were ready for sale without much further work.³⁰ Barry Cheshire testified the works also involved application of hydro mulch, the provision of environmental controls, the creation of rock check dams and the installation of culverts.³¹
- [26] The phase two works performed by Cheshire Contractors extended beyond mere construction work. Cheshire Contractors was involved in managing and marketing the project – a marked difference from its “construction only” role in phase one.

Roles

- [27] Barry Cheshire only attended construction “possibly weekly”.³² He explained he discussed matters daily with Mr Everett and visited him weekly.³³ Mr Everett testified that while the phase one work was being performed he was on site for a “little bit of time most days”³⁴ and he worked on site “every day” during the phase two works.³⁵
- [28] The foreman throughout the entirety of the phase one and phase two works was Barry Cheshire’s son Shannon Cheshire.³⁶ Another of his sons, Clinton Cheshire, worked in office administration dealing with wages, age receivables, age payables and the bookwork in general.³⁷ Cheshire Contractors’ administrator was Daniel Spencer³⁸ and its safety officer was Nicki Spencer.³⁹
- [29] Shannon Cheshire’s recollection was that Mark Everett assisted during the works by driving a dump truck, driving his own excavator (Shannon Cheshire recalled Mr Everett acquired a new excavator for the phase two works), putting in drains, moving logs, digging holes to let spring water out and laying stormwater pipe.⁴⁰ Shannon Cheshire testified Mark Everett was not charged for performing such works by Cheshire Contractors.⁴¹

28 T8-75 L15.

29 T8-78 L37.

30 T2-78 L33 – T2-79 L22.

31 T2-81 L40.

32 T2-38 L35.

33 T4-14 L43.

34 T5-5 L41.

35 T7-44 L22.

36 T1-45 LL5-10.

37 T1-77 L2.

38 T2-38 L16.

39 T2-38 L17.

40 T1-74 L43 – T1-75 L12.

41 T1-68 L11.

- [30] Mr Everett testified he did perform some work in phase one with an excavator, albeit one owned by Cheshire Contractors.⁴² Mr Everett testified that during phase two he worked on site every day doing the works, with an excavator he had bought by then, and also watered the roads on the weekend.⁴³
- [31] David Johnstone of LCJ engineers, the project designers, testified LCJ's main dealings with the clients for phase one were with Mark Everett and his nephew Glen Everett. Indeed, LCJ's drawings name Glen Everett as the client.⁴⁴ Mr Johnstone testified that Glen Everett appeared to be more involved in phase one and Mark more involved in phase two.⁴⁵ Glen Everett was not called as a witness.
- [32] Of the work performed by LCJ in phase one, Mr Johnstone's recollection was that LCJ designed documentation such that plans were produced to construct works and that LCJ's Owen Carter did work to obtain approvals from Government agencies.⁴⁶ Mr Johnstone, the only witness from LCJ, could give little direct evidence relevant to LCJ's role in phase one.

Timesheets

- [33] Shannon Cheshire testified timesheets were filled out daily by all staff working on the project and verified and signed off by him as foreman the following morning.⁴⁷ Every employee had a triplicate copy timesheet book.⁴⁸ It recorded name, date, hours, work/machine type description and work's description.⁴⁹
- [34] The exhibited timesheets for phase one⁵⁰ recorded work occurring from 7 July 2011 to and including 7 December 2011.
- [35] The exhibited time sheets for the phase two works recorded work occurring from 16 July 2014, with physical work on site from early August, to and including 17 November 2014.⁵¹
- [36] Shannon Cheshire explained the accuracy of the timesheets he checked was important to not charging the client for more work than was performed and also to the efficacy of Cheshire Contractors.⁵² On his account, copies of them were posted back to Cheshire Contractors' office weekly.⁵³

⁴² T7-17 L47.

⁴³ T7-44 L23.

⁴⁴ Ex 1 Vol 1 Tab 10.

⁴⁵ T2-6 LL9-15.

⁴⁶ T2-6 L33 – T2-7 L1.

⁴⁷ T1-55 LL37-43.

⁴⁸ T1-55 L30.

⁴⁹ T1-55 L33.

⁵⁰ Ex 1 Vol 3.

⁵¹ Ex 1 Vol 4.

⁵² T1-56 L16.

⁵³ T1-55 L46.

- [37] Shannon Cheshire testified that client copies of the timesheets were not collected by the client during the project nor did the client sign the timesheets.⁵⁴ Barry Cheshire explained in evidence that he had told Mark Everett the timesheets were available all the time on site, but Mr Everett said he did not want them.⁵⁵ Mr Everett claimed to the contrary in his testimony,⁵⁶ but I accept Mr Cheshire's evidence.

Invoices

The issuing of the invoices

- [38] Clinton Cheshire generated invoices to the client from the timesheets, creditors' invoices, dockets and purchase orders.⁵⁷
- [39] Clinton Cheshire testified he would forward the client the invoice, the job sheet listing the various work charged by reference to numbered timesheets and the timesheets with the relevant entries highlighted.⁵⁸ He testified that during phase one he was emailing each invoice and its associated documents to Mr Everett about a fortnight after the work dates referred to in the invoice. Evidence given by Clinton Cheshire in re-examination seemed to implicitly accept the invoices were sent via the post in contrast to via email.⁵⁹ Despite this variation in testimony and despite the absence of exhibited copies of any covering letters or email communications annexing the invoices, Clinton Cheshire's assertion that the invoices were sent was credible.
- [40] Clinton Cheshire explained he sent invoices to Mr Everett less regularly in phase two, doing so only when Barry Cheshire told him to.⁶⁰ That is unsurprising and fits the different character of the commercial arrangement in play. As will be seen, phase one was a conventional, work for pay engagement. Phase two was more speculative as to payment.
- [41] A suggestion put to Mr Cheshire, that all Cheshire Contractors had done was to bundle timesheets and hand them over to Mr Everett, was rejected as untrue.⁶¹ Mr Everett testified he did not receive any claim for payment from Cheshire Contractors during phase one.⁶² It is not entirely clear whether this was meant to amount to testimony that no invoices were received. Assuming it was, I in any event accept Clinton Cheshire's evidence that the invoices were sent to Mr Everett regularly during phase one and infer they were in turn received by Mr Everett.
- [42] Over two years subsequent to the conclusion of phase one, on 16 May 2013, Barry Cheshire emailed Mark Everett setting out the costs of completing further works.

⁵⁴ T1-56 L30.

⁵⁵ T2-53 L6.

⁵⁶ T8-46 L11.

⁵⁷ T1-77 L42.

⁵⁸ T1-79 LL10-38.

⁵⁹ T1-82 L20.

⁶⁰ T1-80 LL1-13.

⁶¹ T3-19 L26.

⁶² T7-23 L37.

His email noted the “costs of work to date” was \$643,870.50.⁶³ Counsel for Mr Everett at one point seized upon this email in support of the notion that Cheshire Contractors had not delivered any invoices to Mr Everett for phase one, a suggestion rejected by Barry Cheshire.⁶⁴ While Mr Cheshire could not recall why he had sent the email of 16 May 2013,⁶⁵ Mr Everett’s memory was that the email was sent in response to a request from him to know how much it would cost to complete the development.⁶⁶ The content of the email, which is quite detailed about the future costs, is entirely consistent with such a request. The email provides no implicit support for what turned out to be an unconvincing attempt to contend invoices were not sent during phase one.

- [43] The coup de gras to Mr Everett’s claims about not having received invoices were his own words in correspondence by him with a solicitor acting in the settlement for sale of a lot from Mr Everett’s property – lot one – to Mr Cheshire and others in 2014. In that email of 22 July 2014 Mr Everett wrote:

“[J]ust a quick note to let you know that the balance of settlement will be made up by work completed by Cheshire Contractors to the value of \$200,000 plus GST. I have been invoiced for this work and I am happy for this to happen.”⁶⁷ (emphasis added)

The above emphasised words were a reference to the phase one invoices. Mr Everett’s remarkable explanation for those words was to maintain that in fact he had not received invoices by that time and had merely written what Barry Cheshire had told him to write.⁶⁸ I reject that evidence.

Phase One Invoices

- [44] The main particulars of the 12 invoices tendered in evidence in respect of phase one⁶⁹ are as follows:

Date	Invoice No	Description	Amount
30/07/2011	00300021	Multiple quantities of concrete (listed).	\$96,865.88 ⁷⁰
31/07/2011	00300035	Machine & labour hire, as per attached worksheets which list various work performed by named personnel by reference to numbered timesheets from 04/07/2011 through to & including 28/07/2011.	\$ 19,219.75
15/08/2011	00300034	Pegs for & rolls of silt fence and dust.	\$ 1,345.97

⁶³ Ex 27 (also Ex 62).

⁶⁴ T3-19 L22.

⁶⁵ T4-7 L47.

⁶⁶ T7-63 L4.

⁶⁷ Ex 103.

⁶⁸ T9-33 L14.

⁶⁹ Ex 1 Vol 2 pp 236-312.

⁷⁰ This is the total of the invoice’s nominated total sales amount of \$88,059.89 plus its nominated GST amount of \$8,805.99, which should more accurately have been \$8,805.99. The correct total is therefore \$96,865.88. The invoice’s “balance due” is “\$0.00” – an unexplained anomaly.

15/08/2011	00300039	Machine & labour hire, as per attached worksheets which list various work performed by named personnel by reference to numbered timesheets from 02/08/2011 through to & including 31/08/2011.	\$ 28,804.88
15/09/2011	00300697	Work performed at Hinchinbrook Habitat listed in attached spreadsheet, which lists various work performed by named personnel by reference to numbered timesheets from 01/09/2011 through to & including 15/09/2011.	\$103,626.88
01/10/2014	00300688	Work performed at Riverviews Estate	\$110,500.50
30/09/2011	00300698	Work performed at Hinchinbrook Habitat listed in attached spreadsheet, which lists various work performed by named personnel by reference to numbered timesheets from 24/09/2011 through to & including 30/09/2011.	\$106,647.75
30/09/2011	00300699	Work performed at Hinchinbrook Habitat listed in attached spreadsheet, which lists various work performed by named personnel by reference to numbered timesheets from 01/10/2011 through to & including 31/10/2011.	\$100,502.88
30/09/2011	00300700	Work performed at Hinchinbrook Habitat listed in attached spreadsheet, which lists various work performed by named personnel by reference to numbered timesheets from 01/11/2011 through to & including 07/12/2011.	\$ 20,900.00
01/10/2011	00300045	Various quantities of substances like crusher dust, mortar & concrete listed along with water truck hire & transportation costs, charges for multiple field density determinations (5, 6 and 68 determinations), moisture density relationship tests (5, 6 and 67 tests), soil tests (7 tests) as well as soil testers.	\$ 64,680.15
31/10/2011	00300083	Charges for construction equipment such as excavator hire.	\$ 10,511.53
01/01/2012	00300130	Guide posts, concrete pipes, headwalls & soil tests.	\$ 3,364.42
Total charge:			\$666,970.59

- [45] Curiously invoice 00300688 is typewritten dated 1/10/2014 but there is also a handwritten date of 31.8.11 on it. The timesheets annexed to it span from 16/08/2011 to 31/08/2011. While not the particular focus of argument this date anomaly was borne in mind by me in nonetheless accepting the evidence that the above invoices were rendered in the era of the phase one works.
- [46] It is evident that the early and latter above invoices related to the costs of various equipment and supplies. The invoices for the physical works performed on site range from invoice 00300697 of 15 September 2011, with its attached spreadsheet listing active site work from 1 September 2011, through to and including invoice 00300700 of 30 September 2011, which lists active work on site through to 7 November 2011. By then clean-up tasks were being performed, although a number of other miscellaneous aftermath tasks evidently continued through the balance of November into early December.

Phase Two Invoices

- [47] The main particulars of the seven invoices tendered in evidence in respect of phase two⁷¹ are as follows:

Date	Invoice No	Description	Amount
27/08/2014	00300644	Progress claim 1 – Riverviews Estate subdivision	\$139,596.75
11/11/2014	00300027	LCJ Engineers - for professional services rendered on consultation, detailed design & documentation & submission to Council for operational works approval for Riverviews Estate – Stage 1.	\$ 77,147.40
26/11/2014	00300701	Work performed at Riverviews Estate, listed in attached spreadsheet.	\$396,236.45
26/11/2014	00300702	Work performed at Riverviews Estate, listed in attached spreadsheet.	\$ 53,532.97
26/11/2014	00300703	Work performed at Riverviews Estate, listed in attached spreadsheet.	\$118,775.25
16/01/2015	00300028	Professional fees for survey services Progress Claim 4.	\$ 30,022.08
03/03/2015	00300740	Surveying fees from G Pozzi.	\$ 62,598.40
Total charge:			\$877,909.30

- [48] Of the above invoices for phase two the first, a reference to progress claim 1, does not of itself indicate what the work claimed for involved. Invoice 00300701 dated 26 November 2014, while referring to “work performed”, annexed a variety of supporting documents relating to the physical cost for equipment and services paid

⁷¹ Ex 1 Vol 2 pp 318-408.

by Cheshire Contractors to others. Invoice 00300702 of 26 November 2014 similarly involved a description of “work performed” which was supported by documents in respect of various costs of goods and services paid by Cheshire Contractors.

- [49] Invoice 00300703 of 26 November 2014, which again referred to “work performed at Riverviews Estate” attached a schedule containing multiple entries for “project managing, marketing/advertising and accounting” spanning from 3 March 2014 through to and including 26 November 2014. It is readily apparent from this annexure that the majority of the charges do not merely relate to the administrative costs of Cheshire Contractors managing the physical works it performed on the project. As much is also implicit in the descriptions, “project managing” and “marketing/advertising”. However, any doubt on the point is removed by the fact that such descriptions of work appear throughout March, April, May and June, substantially before the commencement of any physical works on site in early August 2014.

Monies allegedly outstanding

Phase one

- [50] The total of the above listed invoices for phase one is \$666,970.59.
- [51] It is common ground that if such a sum was owing it was reduced by a credit of \$220,000 on 7 August 2014, that amount being applied in part reduction of an amount owed for purchase from Mr Everett of lot one of his property by Mr Cheshire and others (discussed further below). On Cheshire Contractors’ case this gives an amended balance claimed of \$446,970.59.
- [52] However, in the course of the trial, as a result of the aforementioned ruling on a separate question, there was a further reduction of the amount allegedly owed by \$96,000. This gives rise to a further amended unpaid balance claimed for phase one of \$350,970.59.

Phase two

- [53] The total of the above listed invoices for phase two is \$877,909.30.
- [54] Pozzi Surveying’s claim for \$62,598.40 for their services, constituted by their progress claims 1 to 4, was invoiced in invoice 300740. However, progress claims 1 and 3, totalling \$26,570, were also claimed in invoice 300702 and progress claim 4, totalling \$30,022.08, was also claimed in invoice 300028. This erroneous double invoicing of three of the Pozzi progress claims necessitates a reduction of the invoiced total by \$56,592.08 to an amended balance claimed of \$821,317.22.
- [55] It is common ground Mr Everett made two payments to Cheshire Contractors, namely, \$139,596.76 on 18 September 2014 and \$62,598.40 on 4 March 2015. Those payments so coincide with the amounts and general timing of invoices

300644 of 28 August 2014 and 300740 of 3 March 2015 as to compel the conclusion they were made in payment of those invoices. Those payments, totalling \$202,195.16 should also be deducted from the above balance claimed. So too should an amount of \$3,201.81 incorrectly invoiced for design fees.

- [56] Making those reductions gives a further amended unpaid balance claimed for phase two of \$615,920.25.

PART B - PHASE ONE ANALYSIS

Ph 1: An agreement is reached

- [57] Barry Cheshire's involvement in phase one commenced via a mutual acquaintance, resulting in Mr Everett asking him to attend a meeting at Mr Everett's house, located on a hill of the property. He attended the meeting. Mr Everett, his nephew Glen and his son Stephen were present, along with Owen Carter of LCJ, perhaps another representative of LCJ, a number of persons from the local Council and Mr Everett's then project manager Mr Roselle, from an entity known as Empero.
- [58] Mr Cheshire testified the purpose in him attending was to give an opinion to Mr Everett. The opinion given was that the costs to Mr Everett proposed by Empero were too high.⁷² On Barry Cheshire's account, Mr Roselle was speaking of the project being a full-blown subdivision with reticulated power and sewage and \$1 million worth of landscaping.
- [59] Barry Cheshire testified Mark Everett asked him to look at Mr Everett's Bill of Quantities. Mr Cheshire subsequently did so and on his account forwarded Mr Everett Cheshire Contractors' hourly rate price list.⁷³ Mr Everett testified he did not receive such a document.⁷⁴ It is obvious that he did - a copy of an email dated 12 July 2010 to Mr Everett attaching Cheshire Contractors hourly hire rates was exhibited at trial.⁷⁵
- [60] Mr Cheshire testified that "they" – apparently a reference to LCJ – forwarded a Bill of Quantities to Cheshire Contractors for pricing in August 2010.⁷⁶
- [61] On 16 August 2010 Daniel Spencer from Cheshire Contractors emailed Mark Everett enclosing Cheshire Contractors' priced submissions schedule for the project.⁷⁷ The covering email said:
 "Please find attached our price to complete works for Mount Cudmore Road access and stage 1 for the abovementioned project.

⁷² T2-39 LL1-27, T7-8 L34.

⁷³ T2-40 L8, Ex 2 Tab 12 p 1.

⁷⁴ T7-16 L38.

⁷⁵ Ex 78.

⁷⁶ T2-40 LL25-38.

⁷⁷ Ex 14.

Please note this price includes project management and landscaping.”⁷⁸

- [62] Notwithstanding the covering email’s reference to the price including “project management”, the attachment, styled “Submissions Schedule Hinchinbrook Habitats Mt Cudmore Access and Stage 1”, listed a variety of physical works of the kind to be expected for a construction contractor but listed no specific project management tasks. Barry Cheshire accepted that the total price of \$1,239,156.05 quoted in the attachment, was the price he had priced for the project (as distinct from the smaller component of it which would become phase one).⁷⁹
- [63] Mark Everett testified he was “pretty keen” on Cheshire Contractors’ pricing submission of 16 August and told Mr Cheshire, “looks like you’re doing it”.⁸⁰
- [64] Barry Cheshire testified that in early 2011 he attended a meeting at Mark Everett’s house with Mark Everett and Tony Duggan of NAB. Mr Everett’s recollection was that the meeting occurred earlier, in August 2010.⁸¹ Mr Everett also testified Mr Duggan said the lending value ratio of the land looked good and the bank would fund the cost of building the access road and stage 1 of the development.⁸² Mr Everett was aware of a valuation dated 1 April 2011 which valued the “as is” land value of the property at \$4,500,000.⁸³ On Barry Cheshire’s recollection, Mr Duggan said the lending value ratio of the property looked good and both Mr Duggan and Mr Everett told Barry Cheshire that funding would be available for the works.⁸⁴
- [65] On Mr Everett’s account, when Mr Duggan left the meeting, Mr Everett informed Mr Cheshire he could not afford to pay for works without the NAB providing funding.⁸⁵ He testified that when Mr Cheshire subsequently told him they would soon be delivering machinery to the property to start the works Mr Everett said he could not pay without the bank funding whatever was done, to which Mr Cheshire allegedly responded, “That’s okay. I’ll get started, and we’ll sort it out later”.⁸⁶ I reject the notion Mr Everett told or implied to Mr Cheshire that there was doubt hanging over his capacity to fund the phase one works. Such evidence may have been more credible if it had been given regarding phase two, when there was a speculative commercial quality about Cheshire Contractors’ involvement. I accept the true position, as evidenced by Mr Cheshire, is that Mr Everett represented he would have funding available for the works. Phase one was a conventional engagement and Mr Cheshire had no reason to embark upon it had he known there was a material risk of non-payment.

⁷⁸ Ex 14.

⁷⁹ T2-57 L38.

⁸⁰ T7-9 L12.

⁸¹ T7-10 L7.

⁸² T7-10 LL20-33.

⁸³ Ex 48 p 33.

⁸⁴ T2-43 LL15-33.

⁸⁵ T7-16 L15.

⁸⁶ T7-17 L4, T8-40 L45.

- [66] On Barry Cheshire’s account, Mr Everett asked Mr Cheshire in early 2011 to perform the works on an “hourly hire and cost plus basis”.⁸⁷ Mr Cheshire testified he discussed with Mark Everett doing the phase one works on, what Mr Cheshire described as, a “contract basis”, namely a lump sum or fixed price project, or an hourly rates “plus” basis.⁸⁸ He testified it was agreed the works would be performed on an hourly rate for Cheshire Contractors’ equipment and labour, and any materials or services which Cheshire Contractors had to pay for would be “cost plus the margin”.⁸⁹
- [67] Mr Cheshire explained it was Mr Everett who made the decision that the roadworks would only go to the top of subgrade because of the expense of going higher.⁹⁰
- [68] On Mr Everett’s account there was no discussion at the meeting with Mr Duggan or, implausibly, on any other occasion about what rates would be charged by Cheshire Contractors.⁹¹ He later seemed to retreat from that position, conceding that Mr Cheshire told him it would be cheaper to work on an hourly rate and cost plus.⁹²
- [69] Mr Cheshire testified he agreed with Mr Everett to build the road in to get access, up to subgrade, according to LCJ’s plans, at an hourly rate and cost plus (terms explained above), and any other work that was requested by Mr Everett.⁹³ I accept that evidence accurately states the oral agreement reached between the parties.
- [70] The evidence was muddy as to the point at which the agreement was reached – there were evidently multiple conversations. However, I infer it was by about 1 July 2011.⁹⁴ On that date Owen Carter of LCJ emailed Barry Cheshire and Daniel Spencer requesting insertions for a Bill of Quantities with blank rates,⁹⁵ enclosing various approvals for “implementation during construction” and inviting the arranging of a prestart meeting.⁹⁶ While the content of that email did not of itself dictate the terms of any agreement as between Cheshire Contractors and Mr Everett, it is obvious Mr Everett had given his agents, LCJ, authority to initiate activity calculated at getting the phase one works underway. It is inevitable, for Mr Everett to have taken that logistical step, that he must by then have reached agreement with Cheshire Contracting.
- [71] It is convenient to now deal with a number of additional terms and complaints raised by Mr Everett in respect of phase one.

Ph 1 implied term: Works to be charged on a “cost plus” basis not exceeding the Bill of Quantities?

⁸⁷ T2-42 L18.

⁸⁸ T2-40 L43.

⁸⁹ T2-53 L30.

⁹⁰ T2-51 L10.

⁹¹ T7-15 L40 – T7-16 L1.

⁹² T8-43 LL29-34.

⁹³ T2-48 L40 – T2-49 L5.

⁹⁴ The parties admit agreement was reached on or about that date.

⁹⁵ Ex 4.

⁹⁶ T2-45 L27.

- [72] Mr Everett pleads:
 “That the cost of the works were to be completed on a “Cost Plus” basis that would not exceed the amounts specified in the Bill of Quantities produced by LCJ Engineers ...”.⁹⁷ (emphasis added)
- [73] I have already found the works were to be performed at an hourly rate and cost plus basis.
- [74] As to the works not exceeding the Bill of Quantities it is not entirely clear what document the pleading means. Mr Everett testified the Bill of Quantities was a document “that had to go to Council”.⁹⁸ He went on to testify a Bill of Quantities, dated 17 October 2011,⁹⁹ “was submitted to Council as part of our operational works application”.¹⁰⁰ However Council’s operational works permit had been granted back on 1 April 2011.¹⁰¹ Mr Everett retreated from his assertion when the anomaly was pointed out to him.¹⁰² The evidence did not explain how a Bill of Quantities which did not yet exist featured in some binding way in the agreement reached by 1 July 2011.
- [75] True it is Mr Cheshire conceded he may have stated the works would not cost more than the amount quoted in the Bill of Quantities, but he qualified this by explaining if the volume of work contemplated by the Bill of Quantities was exceeded, then it would cost more.¹⁰³ He also explained they were not “working on a Bill of Quantities”.¹⁰⁴ I accept that testimony. Indeed, as much is inherent in the fact, already found, that they were working at an hourly rate and cost plus. Further to those considerations, it is in any event determinative of this point that Mr Everett requested additional works, inevitably taking the potential cost beyond the province of the works eventually alluded to in the Bill of Quantities. The evidence does not support the inference it was agreed the cost of works would not exceed the amount calculated by LCJ in a Bill of Quantities.

Ph 1 implied term: Exercise of reasonable skill?

- [76] Mr Everett pleads it was an implied term of the contract for phase one that Cheshire Contractors would, in the performance of services, “exercise the degree of skill, expertise, diligence and foresight which would from time to time be expected of reasonably skilled and competent contractors or suppliers engaged in similar civil works and construction projects”.¹⁰⁵
- [77] Mr Everett pleads such a term was necessary to give business efficacy to the contract and was so obvious as to go without saying. I agree it is an obvious implied term of the agreement. An expectation of professional competence in performing

⁹⁷ Def [3c].

⁹⁸ T7-9 L16.

⁹⁹ Ex 1 Vol 1 Tab 8 p 11.

¹⁰⁰ T7-9 L34.

¹⁰¹ Vol 1 Tab 4 p 15.

¹⁰² T8-38 L40.

¹⁰³ T2-53 L39 – T2-54 L16.

¹⁰⁴ T3-14 L46.

¹⁰⁵ Def [3h].

the contracted service is unremarkable. However, that expectation is necessarily confined to the performance of the contracted service. That service was the performance of civil construction works, not the overall management of the development project. I do not accept the implied exercise of professional competence here extended to some form of prescience in anticipating, or obligation to make up for, shortcomings in the principal's management or delegation of management of the development project.

Ph 1 implied term: Fitness for purpose?

- [78] The defendant pleads it was an implied term of the contract for phase one that Cheshire Contractors would provide services and materials that were reasonably fit for the purpose for which they were supplied.¹⁰⁶ The purpose pleaded was:
 "...to supply an access road suitable for the promotion of presales of lots 1-31 on the proposed subdivision and to serve as part of the works necessary to complete the proposed subdivision works in accordance with the original decision." (emphasis added)
- [79] Mr Everett pleads the implication of the fitness for purpose term was necessary to give business efficacy to the contract and so obvious as to go without saying. Cheshire Contractors denies there was such an implied term.¹⁰⁷
- [80] Barry Cheshire testified, in respect of the need for the works to be "fit for purpose", the purpose that he undertook the works for was:
 "To allow vehicle traffic, buyers to view the lots".
- [81] Mr Everett acknowledged in cross-examination that the road constructed by Cheshire Contractors had been in place for in excess of five years and in use during that time, including being used by Mr Everett to go to and from his house. He acknowledged the road remains usable and that there had been no failure in it causing him to be unable to use the road.¹⁰⁸
- [82] The difficulty with the fitness for purpose term contended for by Mr Everett is that it goes beyond the readily inferred purpose of allowing vehicular access to view lots. It enlarges the purpose as being to serve as part of the works necessary to complete the proposed subdivision works "in accordance with the original decision". Such a broad term does not arise by implication. Whether the works, which were but part of the proposed subdivision, were fit for such an enlarged purpose was not inevitably a matter within the control of Cheshire Contractors. Cheshire Contractors was to perform civil construction works, not manage the overall development. Whether the works they were asked to perform met the purpose of the intended overall development was the responsibility of the person or persons in control of the overall development. If, as now discussed, Cheshire Contractors did not have that control, then whether there was an implied agreement that its works were to in some specific way accord with "the original decision" would depend on whether it agreed to meet some specific requirement.

¹⁰⁶ Def [3g].

¹⁰⁷ Further amended reply to defence ("Reply") [12].

¹⁰⁸ T9-40 LL29-45.

- [83] To put the point another way, it is self-evident that the phase one works were intended to be part of a broader project, but it was for the project's principal to ensure those works fitted the purposes of the broader project. If there was anything the principal specifically wanted Cheshire Contractors to do to meet those purposes it was necessary for there to be agreement on such specifics. To talk generally of the works needing to be fit for purpose, without identifying the specifics now complained about takes the matter nowhere.

Ph 1: Who was to be in control of the overall development?

- [84] As Shannon Cheshire testified, it is usually a so-called "superintendent" who directs works in a project of this kind.¹⁰⁹ The defendant's expert witness, construction engineer Patrick Brady, of UDP Consulting Engineers, a firm involved in land subdivisions in the Townsville region, explained in a project of the present kind the contractor ought not also be the superintendent. He said that is because the superintendent's role is to oversee the performance of the work, ensuring its adequacy of completeness and compliance which may require issuing directions from time to time to the contractor.¹¹⁰
- [85] Shannon Cheshire explained he regarded Mark Everett as superintendent because the superintendent is the agent of the customer and the customer had not appointed an agent¹¹¹ and because Mr Everett was "on the job" almost daily and would go through different tasks he wanted done with Shannon Cheshire.¹¹²
- [86] Barry Cheshire agreed in cross-examination that the purpose of a superintendent is to act as the principal's agent in the administration of the contract.¹¹³ Later, in re-examination, Mr Cheshire explained that in his experience the superintendent would deal with Council and other authorities in relation to:
 "Anything to do with the subdivision, as in test inspections, environmental, anything that's involved in that type of thing is dealt with by the superintendent."¹¹⁴
- [87] As to who the superintendent was, Barry Cheshire claimed that person would usually be the design engineer on subdivisions. He testified the superintendent's role was fulfilled by LCJ in both phases one and two.¹¹⁵
- [88] Under cross-examination Barry Cheshire seemed evasive when asked whether there were any conversations between him and Mark Everett in which Mark Everett said he was going to appoint LCJ as the superintendent of the project. He eventually asserted Mark Everett said LCJ was to be appointed as superintendent at the first meeting which Barry Cheshire had with Mr Everett in mid-2010.¹¹⁶ It is unlikely there was any such conversation at this first meeting, given it was a meeting where

¹⁰⁹ T1-57 L10.

¹¹⁰ T4-40 L30, T4-41 L4.

¹¹¹ T1-67 L37.

¹¹² T1-57 L35 – T1-58 L8.

¹¹³ T3-3 L12.

¹¹⁴ T4-3 L40.

¹¹⁵ T2-92 LL38-46.

¹¹⁶ T3-3 L25 – T3-4 L13.

Mr Everett's then project manager Mr Roselle, from Empero, was present. It was not the sort of meeting at which specifics as to who would be superintendent were likely to be discussed and, on Barry Cheshire's own account, it was only after that meeting that he made the suggestion to Mr Everett that he could do the works less expensively.¹¹⁷

[89] In cross-examination it was put to Barry Cheshire that during the phase one works he told Mark Everett he would supervise the works for Mr Everett and manage the works for him, in response to which Mr Cheshire answered: "I said I'd help him."¹¹⁸ It was also put that it would have been up to Barry Cheshire to liaise with anyone in relation to inspections and tests, to which Mr Cheshire responded, in apparent rejection of the propositions, "Construction only".¹¹⁹ He elaborated upon this response in re-examination, explaining there was liaison by Cheshire Contractors in the context of their construction in as much as they contacted Council in relation to inspections.¹²⁰

[90] It is noteworthy that in HSC's operational works permit dated 1 April 2011 clause 8(a) of its conditions of approval provided, "Civil works must be constructed as per the submitted drawings" and thereafter listed the specifications of various submitted drawings by LCJ. This included LCJ's drawing EVEA001 C01. As Cheshire Contractors' expert witness engineer, Darren Weir, highlighted,¹²¹ that drawing includes the following:

"ROADWORKS AND EARTHWORKS NOTES

1. EARTHWORKS ARE TO BE CARRIED OUT IN ACCORDANCE WITH "AS3798, GUIDELINES ON EARTHWORKS FOR COMMERCIAL AND RESIDENTIAL DEVELOPMENTS", EXCEPT WHERE VARIED BY THESE NOTES. CERTIFICATES OF ALL DENSITY TESTS TO THE ENGINEER." (emphasis added)

[91] As Mr Weir demonstrated, AS3798 contains a designation of personnel. Its s 1.3(d) defines "superintendent", for the purposes of the standard, as being "The principal's authorised person, sometimes referred to as the engineer or the architect."¹²² The same section refers to the "constructor" as "sometimes referred to as the contractor or the builder". This supports the conclusion Cheshire Contractors was not the superintendent.

[92] It is also relevant to note that the defendant's own expert engineer, Mr Brady, acknowledged in cross-examination that it is for a principal to appoint a superintendent.¹²³ He said he would have expected such an appointment for a project of this size.¹²⁴ He testified that often the design engineer takes the role of superintendent in a development contract.¹²⁵

¹¹⁷ T3-4 LL14-30.

¹¹⁸ T3-4 L42.

¹¹⁹ T3-4 L45.

¹²⁰ T4-3 L8.

¹²¹ Ex 39 p 22.

¹²² Ex 39 p 26.

¹²³ T4-33 L26.

¹²⁴ T4-33 L30.

¹²⁵ T4-33 L35.

- [93] Cheshire Contractors' Project Management Plan may be of some relevance to this issue. Mr Cheshire testified that prior to the prestart meeting Cheshire Contractors' Project Management Plan was emailed to Council.¹²⁶ That plan refers to the project name as "Hinchinbrook Habitats Stages 1A". Issue one of the plan was exhibited.¹²⁷ Its title page is dated 26 July 2011, the day before the prestart meeting (the date at the foot of the ensuing pages of the exhibit, prior to its attachments, is 16 August 2011, but no point was taken about that anomaly).
- [94] The Cheshire Contractors' Project Management Plan was produced in-house by Nikki Spencer of Cheshire Contractors.¹²⁸ Barry Cheshire testified by way of explanation:
- "The only way you can start the job is that you've got to have a Project Management Plan to give to Council. And Mr Everett, obviously, didn't have a Project Management Plan."¹²⁹
- [95] Cheshire Contractors' Project Management Plan did not define many of the terms it used, save for its annexed "Organisational Chart", which named various of its own staff as holders of various positions internal to its performance of its role in the project. This included naming Mr Steve Camp, of Cheshire Contractors, as "Project Manager/Engineer".¹³⁰ Contextually it is clear that designation of project manager and engineer was internal to Cheshire Contractors, referring to Mr Camp managing or engineering Cheshire Contractors' works project, not managing or engineering the broader development project in which the works were being performed. The chart contains no reference to a superintendent. The Project Management Plan's various earlier references to position titles that are listed in the Organisational Chart, are obviously to the holders of the positions which appear in the Organisational Chart, not to persons external to Cheshire Contractors. On the other hand, it is equally obvious the performance management plan's references to the "principal" and the "superintendent" are to persons external to Cheshire Contractors.¹³¹
- [96] At a later stage of the Project Management Plan there appears an induction booklet which begins:

"Job Number:	MEV10710
Job Name:	Hinchinbrook Habitats Stage 1A
Project Address:	Mt Cudmore Rd Bermerside, Qld
Client:	Mark Everett
Superintendent:	
Superintendent Representative:	
PRINCIPLE CONTRACTOR:	Cheshire Contractors Pty Ltd

¹²⁶ T2-46 L31.

¹²⁷ Ex 1 Vol 2 Tab 13.

¹²⁸ Ex 1 Vol 2 Tab 13 p 8 et seq.

¹²⁹ T2-46 L25.

¹³⁰ Ex 1 Vol 2 Tab 13 p 26.

¹³¹ See, eg, [9.4] and [13.2].

ENGINEER:	LCJ Engineers” ¹³²
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The plan’s induction booklet’s absence of any notation as to who the superintendent or the superintendent’s representative was, begs the question who the reference is to the superintendent in the earlier more substantive part of the plan?

- [97] Barry Cheshire testified the references in the Project Management Plan to the superintendent were, he believed, to the engineer.¹³³ Mr Cheshire maintained he believed LCJ acted as the superintendent in both phase one and two.¹³⁴ He explained:

“[T]hey did the design. I believe they were working with Mr Everett.”¹³⁵

- [98] Barry Cheshire claimed the Project Management Plan’s reference to “the project manager”¹³⁶ was to Mark Everett, explaining:

“Well it’s his project. We work on an hourly hire...plus costs basis...I don’t remember any of our invoices or anything that charged for a project manager; if it wasn’t charged for, it wasn’t supplied.”¹³⁷

- [99] That was an obviously erroneous interpretation – as already explained, Cheshire’s Steve Camp was listed in the plan’s organisational chart as Cheshire’s project manager. Much of Barry Cheshire’s evidence of his opinion of the meaning of his company’s Project Management Plan was of dubious admissibility. His opinions were in any event valueless because they seemed to overlook the distinction between Cheshire Contractors’ internal roles and the broader respective roles in the project of Mark Everett, LCJ and Cheshire Contractors. For instance, while Cheshire Contractors may have had its own project manager – that is to say an internal manager of Cheshire Contractors’ performance of the works project it had been engaged to perform – it does not follow that person was managing the overall property development project for the principal, Mr Everett.

- [100] In any event Cheshire’s Project Management Plan does not credibly support the notion that Cheshire Contractors was to superintend or manage the development project. Nor does any other aspect of the evidence.

- [101] To the extent any appointment of a superintendent could arguably be said to be supported by implication from the evidence it would support LCJ. On the known evidence however, it seems clear there was no express appointment of a superintendent. Control of the overall development remained in the hands of the principal, Mr Everett. He evidently delegated a degree of that control to LCJ, but he did not delegate that control, or the role of superintendent, to Cheshire Contractors.

Ph 1 implied term: Compliance with specific requirements?

¹³² Ex 1 Vol 2 Tab 13 p 31.

¹³³ T2-47 L39, Eg Ex 1 Vol 2 p 180.

¹³⁴ T3-2 L43.

¹³⁵ T2-47 L25.

¹³⁶ Eg Ex 1 Vol 2 p 19.

¹³⁷ T2-47 LL7-13.

- [102] It is pleaded by Mr Everett to be a material term of the agreement that:
 “The works were to be completed in accordance with the design completed by LCJ Engineers Pty Ltd and the specifications endorsed on the drawings recording the design (“the original design”).”¹³⁸
- [103] Cheshire Contractors’ reply admits that term “to the extent that such design is as shown on the LCJ Engineers’ drawings referred to in condition 8(a) of the *Development Approval*”.¹³⁹ However it denies the need to comply with the specifications in the drawings. That is on the basis that the specification for the works and the scope of works to be completed relevant to LCJ’s drawings was limited to:
- construction of the road to subgrade level to the extent necessary to enable access for potential buyers to present an expression of interest in purchase,
 - the stormwater and drainage works necessary to facilitate such construction of the road, and
 - the earthmoving and site clearing required to facilitate construction of the access road and the stormwater and drainage works pending final construction.¹⁴⁰
- [104] It is not suggested Cheshire Contractors were given any plans other than those in LCJ’s drawings in entering into the agreement to perform the works. LCJ’s drawings contained plans describing what the works Cheshire Contractors was engaged to perform were supposed to achieve, save that the plans were for a broader development, not merely the phase one works. It is reasonable to infer it was an implied term of the agreement that the phase one works to be performed by Cheshire constructions would be in accordance with the design described in the plans of those works in LCJ’s drawings, insofar as the plans related to the phase one works. However, the drawings were not an agreement. The extent to which specifications in those drawings were for Cheshire Contractors to perform obviously depends upon what was agreed. This is discussed further below.
- [105] Mr Everett also pleads it was an express or implied term of the first contract that:
- I. the plaintiff was to undertake all liaison with local, state and statutory authorities in respect of the completion of the work; and/or
 - II. comply with the requirements of local, state and statutory authorities in the completion of the work.”¹⁴¹
- [106] Cheshire Contractors’ reply denies that such a term was an express or implied term of the agreement.¹⁴²
- [107] Mr Everett pleads the term was necessary to give business efficacy to the contract and so obvious as to go without saying. On the face of it, such an assertion is unsustainable. It would obviously be necessary for Mr Everett to point to some

¹³⁸ Def [3b].

¹³⁹ Reply [7].

¹⁴⁰ Reply [7] read with [6(c)].

¹⁴¹ Def [3i].

¹⁴² Reply [14].

more specific aspect of what was agreed in support of such a term. It was not suggested such a term was specifically discussed and agreed between the parties.

[108] Mr Everett's particulars of this aspect of the pleading are:

- "A. The defendant supplied drawings of the works to be completed prepared by LCJ Engineers EVEA001-C01 to C36 in a way that in the circumstances communicated to the plaintiff that the works were to be done in accordance with the drawings and specifications contained in them. LCJ drawing EVEEA001-C01 states in the general notes as note 4 "*All liaison with local, state and statutory authority is the contractor's responsibility*".
- B. The plaintiff prior to commencement of works produced a Project Management Plan that included in it provision that "works shall not proceed past a "hold point" until the principal has released that hold point. Written evidence of the release of the hold point will be kept by Cheshire Contractors Pty Ltd"
- C. In the premises, it must be inferred that the plaintiff and defendant intended the plaintiff was to liaise with the authorities in respect of inspections and the like necessary to produce compliant works. ..."¹⁴³

[109] Again, such assertions are best considered in an issue specific way. That can be done by recourse to the content of LCJ's drawings and the Project Management Plan alluded to in particulars A and B, as well as HSC's operational works permit for the project.

LCJ's Drawings

[110] Barry Cheshire agreed that, for the phase one works, the LCJ drawings and the HSC approvals set out the technical requirements for the work he had to do.¹⁴⁴ Of the LCJ construction drawings he agreed that Cheshire Contractors had regard to the drawing notes, but not that part of the general notes which said:

- "4. All liaison with local, state and statutory authorities is the contractor's responsibility."¹⁴⁵

[111] On the face of it, Cheshire Contractors was the contractor referred to in the above quoted note. But care is required in drawing inferences as to contractual terms from such notes given the obvious prospect of a disconnect between what the drafter contemplates and what is agreed between contractor and principal. For instance, the drawings' roadworks and earthworks note 2 refers to "the superintendent". This reveals the drafter contemplated a superintendent would be appointed but says nothing of what the principal actually did in that regard either.

¹⁴³ Def [3i].

¹⁴⁴ T3-5 L33.

¹⁴⁵ Ex 1 Vol 1 construction drawing sheet CO1.

- [112] There was no express agreement between Cheshire Contractors and Mark Everett that Cheshire Contractors would have a role in dealing with government authorities.¹⁴⁶ Nor could such a role be inferred from the general nature of the engagement – as already discussed Cheshire Contractors was not the superintendent or manager of the development project. It does not follow as a matter of inference from general note 4 that Cheshire Contractors agreed to perform the role of “all liaison with local, state and statutory authorities”. The words “all liaison” are so broad as to render such an inference unrealistic and their meaning is not confined by any accompanying definition. Moreover, such an implication is inconsistent with some content of HSC’s operational works permit and Cheshire Contractors’ Project Management Plan, which contemplate others being involved in such liaison. I reject the implication that the general role imputed by general note 4 to the contractor was a role on which the parties agreed. That is not to say that agreement to perform some specific tasks involving some liaison does not arise by implication from Cheshire Contractors’ Project Management Plan discussed below.

Operational works permit

- [113] HSC’s operational works permit, which identified the “applicant” as the Everett Family Trust Pty Ltd, contained conditions at paragraph 8.¹⁴⁷ These included at 8(a) that, “Civil works must be constructed as per the submitted drawings”, which drawings were listed as including LCJ’s drawings. Further, paragraph 8(g) required, “A Certificate of Completion is to be supplied by the Superintendent as works are finalised”.
- [114] Paragraph 8(f) of the conditions of approval provided:
 “The applicant is required to submit a “Test and Inspection Plan” which includes “Hold Points” requiring Council’s approval prior to progressing works beyond the nominated points for the following stages of work:-
 (i) At the completion of subgrade works prior to commencing the placement of base layers;
 (ii) At the completion of pavement prior to priming;
 (iii) Prior to the installation of stormwater pipes, kerb and channel and inverts;
 (iv) Prior to backfilling sewerage mains and structures including inspection openings and manholes;
 (v) Prior to the backfilling of water mains, valves and hydrants;
 (vi) Prior to backfilling all stormwater pipes and culverts;
 (vii) At practical completion to allow for the preparation of a defects list prior to the commencement of the main list liability period...”
- [115] The reference to the “applicant” therein was to the Everett Family Trust Pty Ltd. Mr Everett was the trustee¹⁴⁸ and his case was conducted in implicit acceptance that he was the representative of the applicant. The permit’s requirement that the applicant

¹⁴⁶ T2-52 L36.

¹⁴⁷ Ex 1 Vol 1 Tab 4 p 16.

¹⁴⁸ T4-56 L8.

submit a test and inspection plan to Council was effectively a requirement for Mr Everett to fulfil.

- [116] On 1 July 2011 Owen Carter of LCJ emailed Barry Cheshire and Daniel Spencer inter alia attaching “Council, DERM and EPBC approvals...for your implementation during construction” and noting, “Council has addressed the hold point on the jobs on which they wish to inspect as well as ourselves”.¹⁴⁹ Barry Cheshire confirmed in his testimony that the email did annex the relevant approvals. He confirmed the prestart meeting, to which the email of 1 July 2011 referred, did occur although Mr Cheshire did not go himself.¹⁵⁰
- [117] On 15 August 2011 Hinchinbrook Shire Council wrote a letter to Owen Carter of LCJ in terms commencing:
 “Thank you for recently meeting onsite with Council’s Manager Engineering Services, Bruce Leach, and Infrastructure Engineer, Jenna Devietti, at the abovementioned location on Wednesday, 27th July 2011, to discuss operational works for the Hinchinbrook Habitats development.”¹⁵¹
- [118] The letter acknowledged receipt of the “Hinchinbrook Habitat stage 1A Project Management Plan and revision E construction plans, which were delivered onsite”. It went on to ask, “Please ensure you allow adequate time when requesting Council undertake an inspection of the hold points” and again set out paragraph 8(f) of the conditions of approval of operational works.¹⁵²

Project Management Plan

- [119] As earlier mentioned, Cheshire Contractors’ Project Management Plan,¹⁵³ was provided to HSC. Cheshire Contractors well knew it was a document others would act upon as representing how Cheshire Contractors would perform the works. To the extent that plan represented what Cheshire Contractors would do in carrying out the works it is reasonable to infer it was an implied term of its agreement with Mr Everett that it would do those things.
- [120] The performance management plan deals with “Quality” in part 9. Part 9 provides, inter alia:

“9.2 Inspection and Test Plans

Providing high quality work that satisfies or exceeds our clients’ expectations is our main goal. Inspection and test plans (ITP’s) generally include observations, measurements and/or tests at Cheshire Contractors Pty Ltd’s facilities. The project manager will be responsible for arranging all tests and inspections on the project.

¹⁴⁹ Ex 4.

¹⁵⁰ T2-45 L27.

¹⁵¹ Ex 5 (also part of Ex 64).

¹⁵² Ex 5.

¹⁵³ Ex 2.

Frequencies for inspection and testing will be outlined in the inspection and test plans (ITP's) in appendix M. ...

9.4 Hold Points

Work shall not proceed past a "Hold Point" until the Principal has released that Hold Point. The Project Manager is responsible for ensuring that the Principal is given sufficient advance notice of Hold Points.

Written evidence of the release of a Hold Point will be kept by Cheshire Contractors Pty Ltd.

9.5 Contract Requirements

A list of contract specifications, legislation, approvals, licences and permits relevant to this contract have been provided in appendix N. Any obtained licences and permits will also be filed in appendix N, once obtained. ..." (emphasis added)

The appendices to the Project Management Plan appear to be included with the exhibit, albeit not marked with an appendix number.

- [121] It is not in dispute that Cheshire Contractors' project manager did not gather written evidence of the release of hold points by the principal.¹⁵⁴ The principal was Mr Everett. It will be recalled he was on the job daily. He was in a position to witness the progression of the works. There is no suggestion he intervened or did not approve of the progression of the works.¹⁵⁵ Whether there were hold points reached to require his release is returned to hereunder.
- [122] The inspection and test plan, inferentially appendix M, contains a table itemising various elements of work against which appear entries regarding witness and hold points under the heading "Engineer's responsibilities" and the heading "Council's responsibility".¹⁵⁶ The entries in the Project Management Plan's inspection and test plan identify the following potentially relevant elements of work and responsibilities:

"Elements of work"	Engineer's responsibility	Council's responsibility
Subgrade Compaction CBR tests (if ordered) Horizontal and vertical alignments Profile	Routinely visit site. HOLD POINT. Attend during proof rolling. Examine and assess all test results and cross section geometry. Forward to Council for	Visit site for random audit inspections. HOLD POINT Joint inspection during proof rolling.

¹⁵⁴ T1-69 L10, T3-5 L28.

¹⁵⁵ T8-45 L38.

¹⁵⁶ Ex 1 Vol 2 Tab 13 pp 180-182.

	approval.	...
Stormwater drainage Location of structures SL & IL of structures Material quality Manholes Drain lines Backfilling	HOLD POINT. Visits to assess compliance and to view progress and works.	WITNESS POINT. Visit site for inspection prior to backfilling, laying of pipe and bedding.”

- [123] It follows that Cheshire Contractors’ project manager was responsible for arranging the inspections contemplated by that table. Whether that occurred is in issue.
- [124] After the inspection table, the appendix contains a table of “test requirements”, therein detailing the relevant “construction activity”, “verification requirement – test description”, “test method”, “test frequency”, “specification” and “minimum no. of test number”.¹⁵⁷ These are the requirements to be met by the testing which was to be carried out by Cheshire Contractors’ project manager. For present purposes it is sufficient to describe the relevant testing as compaction testing. Whether compaction testing occurred as contemplated by the table is also in issue.

No loss occasioned

- [125] Issues about compliance breaches in phase one are a relatively recent development in this case. It is noteworthy that even as recently as an emailed statement by Mark Everett directed to his son Stephen to help in the settling of the initial defence of this case,¹⁵⁸ Mr Everett expressed no concerns that there had been a failure to comply with specifications during phase one. He wrote:
- “It should be noted that the first access road was built to Council’s specs after we had operational works approval. The second stage has not been checked by Council nor has any testing been carried out. The work was all but complete before we had operational works approval and all of the pipes and driveways have to be pulled up and redone as they are only temporary to try and get presales as per Cheshire’s instructions.” (emphasis added)
- [126] Mr Everett conceded he did not have any discussions with Mr Cheshire in the early days of the project about testing and inspections¹⁵⁹ or about liaising with local authorities.¹⁶⁰
- [127] The debate about inspection and testing of works in respect of phase one had a surreal character. The fact is that the development stalled and even by the time of

¹⁵⁷ Ex 1 Vol 2 Tab 13 pp 183-187.

¹⁵⁸ Ex 67, T8-4 LL25-35.

¹⁵⁹ T8-44 L2.

¹⁶⁰ T8-44 L10.

trial, years after the completion of subgrade, there is no evidence of the development being sufficiently completed for it to meet the requirement of the development approval. As Mr Weir observed, the lapse of time is such that some further trimming and testing of the works would now be required to meet the requirements of the development approval.¹⁶¹ I accept that evidence.

- [128] It is convenient here to consider the attempt via Mr Brady to undermine the evidence of compliance with testing and inspection and its consequences. The evidentiary foundation for many of Mr Brady's opinions was not identified. Mr Brady's expert report¹⁶² outlined various opinions premised upon some assumptions about contractual terms. The value of his opinion is necessarily influenced by whether there were in fact contractual terms of the kind upon which his opinions are premised. Notably his opinion imports the AS4000 general conditions of contract. It was no part of the expressed or implied terms of any agreement between Mr Everett and Cheshire Contractors that it included the general conditions of contract contained in AS4000.
- [129] A significant aspect of Mr Brady's opinion is that, because of the absence of documentation of the inspection process, the works are unlikely to be accepted by HSC as complying with its approvals. Mr Brady does not purport to express any opinion as to whether any of the material supplied by Cheshire Contractors was fit for purpose. He accepted that the phase one works were fit for purpose, if their purpose had been to allow potential purchasers access to the site.¹⁶³ To the extent he expresses an opinion that the works are not fit for purpose, it is by reason of his view that the absence of documentation of the inspection process or of a statement of compliance makes it unlikely HSC will accept the works are compliant.¹⁶⁴
- [130] That opinion's reference to the absence of a statement of compliance is a distraction – such a statement was the responsibility of a superintendent, not Cheshire Contractors, per paragraph 8(g) of the operational works permit. The foundation for the opinion arising from the absence of documentation of the inspection process is lacking in a number of ways.
- [131] Firstly, there is no evidence that the Council regards the works as non-compliant. Indeed, the phase one works did not advance the development to the point where Council has had to form a final view of the matter. Evidence from James Stewart, an executive manager from Hinchinbrook Shire Council, called as a witness by Mr Everett, fell well short of demonstrating Council regards the works as non-compliant. In an email to Mr Everett of 9 March 2016 Mr Stewart alluded to having driven on the road at the development and having concerns about its condition and compliance with construction drawings. The truth of this aspect of the email was not sought to be proved by evidence-in-chief but in any event it was neutralised in cross-examination when Mr Stewart conceded the road's condition was of an acceptable standard given how long ago it was built and allowing for wear and tear in the meantime.¹⁶⁵

¹⁶¹ Ex 39 p 2 [10],

¹⁶² Ex 42.

¹⁶³ T4-31 L20.

¹⁶⁴ T4-30 L43 – T4-31 L7.

¹⁶⁵ T4-22 L46 – T4-23 L13.

- [132] Secondly, Mr Brady's view as to the likelihood of what Council may or may not do is premised, by reason of what he understands to be the advice of James Stewart, on Council taking the view that no compliance inspections were requested or undertaken. As is soon explained, that is not supported by Mr Stewart's evidence. Thirdly, there appears to be no evidence of an absence of Council's records of it conducting inspections during the phase one works.
- [133] In Mr Stewart's email to Mr Everett of 9 March 2016¹⁶⁶ he indicated he could not locate evidence that conditions (c), (e), (f) or (g) of the operational works permit issued on 18 October 2014 had been addressed and complied with and could find no record of inspections requested or carried out in accordance with condition (g) of that permit. Mr Stewart confirmed the truth of those propositions in his testimony, although he acknowledged having found some further documents relevant to the project since his email.¹⁶⁷ None of this however related to any search for records of inspections requested or carried out in accordance with the conditions of the operational works permit issued in 2011. In short it was evidence relevant to the phase two works.
- [134] Its relevance even to phase two was neutralised when it emerged in cross-examination that Mr Stewart's inability to find records of inspections having occurred did not mean the inspections had not occurred. He confirmed the accuracy of what he had previously said in an affidavit on the topic to the following effect:
- "The results of that review have failed to locate records of inspections having been performed. That is not to say that they were not performed. The relevant staff members whom should have been tasked for that function are no longer employed by Council, and it is thus not possible to confirm with certainty the status of the record of inspections. ... I am thus unable to state with certainty that inspections were done or not done. All I can say that on my review, I have not been able to locate records of such inspections."¹⁶⁸
- It is unknown whether, like Mr Stewart's email, that affidavit related to an attempt to locate records relevant to compliance with the conditions of the 2014 operational works permit.
- [135] Further to all of this, Mr Brady accepted in cross-examination that normally when a Council inspector attends an inspection of works of the kind with which this case is concerned, the inspector does not leave the contractor with documentary evidence of that inspection.¹⁶⁹ He also acknowledged in cross-examination that, whilst rare, it does happen that Council inspectors contacted by a contractor with a request to attend site for an inspection may indicate they cannot soon attend but that the works can keep going rather than being held up waiting for the inspector.¹⁷⁰
- [136] My very strong impression of the evidence overall is that the quality of the product provided by Cheshire Contractors was good, that is, I am satisfied Mr Everett

¹⁶⁶ Ex 41.

¹⁶⁷ T4-20 L35.

¹⁶⁸ T4-22 LL11-24.

¹⁶⁹ T4-31 L30.

¹⁷⁰ T4-31 L45 – T4-32 L2.

received the product he bargained for. If any shortcomings regarding testing and inspection were to be causative of loss it would be that because of them Council would not approve the development or further development without requiring remedial action. There is no evidence from Council to indicate their actual position. Mr Brady's opinion that Council lacks documentation of the process is without evidentiary foundation. Thus, the premise for his opinion that Council would likely require substantial repetition of the works because of no documentation, is missing. Further, his prediction of what Council would do is itself bereft of an identified foundation, that is, the basis for him being able to forecast what Council will require is not explained.

- [137] The apparently satisfactory quality of the works makes it inherently unlikely that remedial action required by Council would in all seriousness be the removal of the works so that they may be started again from scratch. The much more probable scenario, consistent with Mr Weir's evidence, is that regardless of how satisfactory Council understands the old testing and inspection process was or was not, Council would in any event, because of the lapse of time, request the tidying up and testing of the works as they now present.
- [138] It is fatal to Mr Everett's recently conceived complaints that even if the alleged compliance breaches are proven they have occasioned no loss and are not of such magnitude as to avoid the contract. While this is sufficient to dispense with Mr Everett's complaints I will nonetheless deal with their substance.

Ph 1: Did Cheshire Contractors comply with inspection notification and hold point requirements?

Inspections

- [139] Shannon Cheshire testified he would give LCJ and Council notice when Cheshire Contractors was going to dig or lay stormwater piping.¹⁷¹ On his account, he would phone Council and LCJ and sometimes Council would opt not to come with its representative saying that they were too busy, however LCJ would come every time.¹⁷²
- [140] On Shannon Cheshire's account, Council and or LCJ would, when inspecting, just say the work was fine and to continue.¹⁷³ He testified he received no documents from Council or LCJ when they conducted their hold point inspections.¹⁷⁴ Mr Johnstone of LCJ testified LCJ "completed inspections" during construction in phase one.¹⁷⁵ He explained he had seen records of such inspections held by LCJ.¹⁷⁶
- [141] As simple as the evidence of compliance with inspection notification requirements was, it was credible. It was not contradicted, for instance by evidence from any

¹⁷¹ T1-59 L40 – T1-60 L5.

¹⁷² T1-65 LL15-45.

¹⁷³ T1-66 L4.

¹⁷⁴ T1-66 LL15-20.

¹⁷⁵ T2-7 L5.

¹⁷⁶ T2-7 L29.

employees or former employees of LCJ or Council.¹⁷⁷ It will be recalled Mr Johnstone from LCJ gave evidence but he had no active involvement in phase one.

- [142] I accept Cheshire Contractors did comply with its obligation to arrange inspections by LCJ and Council during the phase one works.

Hold points

- [143] There are two relevant hold points in issue – subgrade compaction and stormwater drainage. It will be recalled it was for Cheshire Contractors to ensure work did not proceed past a hold point until it was released by the principal, and to keep a written record of the release. The engineer and Council were to inspect proof rolling of the subgrade and inspect/witness stormwater drainage prior to backfilling.
- [144] Firstly, as to stormwater drainage,¹⁷⁸ it is apparent that work did progress past the relevant hold points. There appears to be no specific evidence of the principal releasing hold points or records of the release but I accept the above-mentioned evidence that LCJ and Council were notified when Cheshire Contractors was going to dig or lay stormwater piping. If the failure to seek and document the principal's release of hold points be a breach the measure of damage would be the amount required to remedy any defect arising.¹⁷⁹ There is no evidence to suggest the works are per se defective so that the only potential damage arising would be the cost of rectifying the works in the event Council required them to be re-done in whole or in part because of a lack of documented release of hold points by the principal. I am unpersuaded that is likely.
- [145] Secondly, as to subgrade, Barry Cheshire explained of the inspection and test plan within Cheshire Contractors' Project Management Plan¹⁸⁰ that the hold point relevant to subgrade is the point when subgrade is reached. He explained it is after that and before the next layer is going down, usually the day before, that proof rolling occurs.¹⁸¹ His point was that Cheshire Contractors had not proceeded past the relevant hold point in respect of subgrade. Shannon Cheshire testified to similar effect.¹⁸²
- [146] Mr Brady agreed that the carrying out of inspection and testing required to release a hold point is part of the next phase of work in the sense that the works should not progress further until the hold point has been released.¹⁸³
- [147] Mr Brady's supplementary report, responding to Mr Weir's opinions, inferred that completion of the works to subgrade level would include the compulsory inspection of those works by Council but provided no real foundation for that inference.

¹⁷⁷ Evidence adduced from HSC's James Stewart related to the 2014 operational works permit though in any event it was of neutral consequence on this issue.

¹⁷⁸ Some, not all, of the stormwater drainage work is amongst works excluded from consideration in the answer to the separate question determined during the trial.

¹⁷⁹ *Bellgrove v Eldridge* (1954) 90 CLR 613.

¹⁸⁰ Ex 1 Vol 2 p 180.

¹⁸¹ T2-84 LL15-40.

¹⁸² T1-71 L7.

¹⁸³ T4-42 L40.

Indeed, he conceded that ordinarily inspection of subgrade would occur before the commencement of the next phase, namely the laying of the base layers.¹⁸⁴ He acknowledged that for the testing and approval of the subgrade to be required at the completion of subgrade as distinct from prior to progression beyond subgrade, there would need to be a contract specific term providing for it.¹⁸⁵ There was no such contract specific term here. Mr Brady accepted that proof rolling, which is part of the inspection of subgrade process, is done just prior to the commencement of pavement work so that if there were to be a gap in time between completion of subgrade and commencement of pavement, it would be appropriate to defer the hold point inspection until the proof rolling occurs immediately before the commencement of the paving layer.¹⁸⁶

- [148] On the face of it, the hold point inspection of subgrade was unnecessary because the works did not progress beyond subgrade. However, Mr Cheshire testified that the transportation of the Abigroup fill onto site caused difficulties including with dust control as a result of which Cheshire Contractors applied a 70 mil minus gravel running surface to the road.¹⁸⁷ Mr Brady expressed the opinion that putting a gravel running surface on top of the subgrade would constitute work proceeding beyond the subgrade hold point.¹⁸⁸ I reject this. There is no evidence to suggest the gravel applied for dust control involved the actual commencement of the paving layers above subgrade or that it would prevent the ability to conduct proof rolling (whether over it or after sweeping it off).
- [149] For completeness I note there are references in LCJ's Bill of Quantities of 17 October 2011 referring at [2.5.2] and [5.8.2] to the application of subbase having occurred.¹⁸⁹ The tendering of documents by consent, as occurred with this document, does not overcome the need for such documents to be explained. If Mr Everett was serious about this issue he hardly needed to rely on some unexplained documentary anomaly. There still exists the road in question. Mr Everett could easily have gathered direct evidence about the surface of his road. That did not occur. Even assuming these references to "subbase", now emphasised by Mr Everett's counsel, are to some layer above subgrade, they are at odds with and do not cause me to doubt the weight of testimony that subgrade was not passed in any material sense.

Ph 1: Did Cheshire Contractors comply with test requirements?

- [150] Compaction testing in phase one was conducted by Soil Engineering Services ("SES"). Shannon Cheshire testified during the works at certain stages of layer depths he would call in SES to conduct tests.¹⁹⁰ He explained the need for testing was indicated by the testing plan which was part of Cheshire Contractors' Project Management Plan.¹⁹¹

¹⁸⁴ T4-43 L33.

¹⁸⁵ T4-43 L39.

¹⁸⁶ T4-44 L20.

¹⁸⁷ T4-8 L25.

¹⁸⁸ T4-55 L4.

¹⁸⁹ Vol 1 Tab 8 pp 3, 6.

¹⁹⁰ T1-58 LL16-25.

¹⁹¹ T1-58 L41 – T1-59 L3.

- [151] Mr Brady and Mr Weir have reviewed the supplied testing results.¹⁹² Mr Weir opined all but one of the tests met the minimum compaction requirements outlined in the Inspection and Test Plan. I infer from his evidence that Cheshire Contractors likely did meet their testing obligations under their Project Management Plan.
- [152] Mr Brady noted the test results do not include ground surface compaction (pre-road fill) results. He opined there should have been a minimum of 63 tests, though acknowledges 70 were provided. He noted 10 compaction tests were undertaken for allotments 1 to 5 and no results were provided for 6 to 10. He opined seven of the allotment tests were unsatisfactory because they did not adequately identify the test location or level. As to the 60 road compaction tests he opined one failed to achieve the minimum compaction standard of 97 per cent, one was taken at a chainage outside the supposed contract area and 12 are unsatisfactory because they did not adequately identify the test location or level.
- [153] In short, the bulk of the reports attracting Mr Brady's criticism result from his opinion they do not adequately identify the test location or level. No attempt was made to explain the foundation for this opinion, for instance by reference to the exhibited results (which appear detailed), and I accord no weight to it. I found Mr Weir's opinion to be a more reliable assessment.
- [154] Mr Brady's response to Mr Weir's opinion was to generally assert in disagreement, again without foundational explanation of the deficiency, that the testing was not sufficient in accordance with the Development Approval and LCJ Engineers design. He went on to say:
- “[T]he testing appears to have not been supervised or directed in accordance with the requirements of AS3798 and there is no as constructed information provided to show the works have been constructed to the correct levels and alignment as per the LCJ Engineers design.”
- [155] It is not apparent how the provision or non-provision of as constructed survey information bears upon adequacy of testing. That may have been a comment directed at another issue. As to the requirements of AS3798, they are relevant to the present issue but not in a way which helps Mr Everett.
- [156] It will be recalled LCJ's drawings contain a note requiring earthworks to be carried out in accordance with AS3798 guidelines. When cross-examined about those guidelines¹⁹³ Mr Brady acknowledged the standard at page 29 contemplates two different levels of potential testing by its clause 8.2, “8.2 level 1 inspection and testing”, and 8.3, “8.3 Level 2 sampling and testing”. He agreed the LCJ drawings did not specify which was the applicable level¹⁹⁴ but accepted, by reference to LCJ's Bill of Quantities, that it was clause 8.3, not clause 8.2, of the Standard which was relevant here.¹⁹⁵ Clause 8.3 provides:
- “8.3 Level 2 sampling and testing**

¹⁹² Ex 42 pp 15, 16; Ex 39 p 31.

¹⁹³ Ex 44.

¹⁹⁴ T4-35 L45.

¹⁹⁵ T4-36 LL8-21.

A geotechnical testing authority (GTA) will be appointed to carry out sampling and testing as required or specified. The GTA is responsible for selecting the location of sampling and testing operations within each visit made to the site. The superintendent is responsible for advice as to when such visits are required and is responsible for ensuring that sufficient samples and tests are taken over the project.

On completion of the earthworks, the GTA may be required to provide a report, setting out the sampling and testing it has carried out, and the locations and results thereof. The GTA will not be in a position to express any opinion beyond this as to the compliance of the works with the specification or their suitability for any particular purpose.”¹⁹⁶

- [157] Mr Brady’s report asserted that compaction testing of the subgrade by a registered geotechnical testing authority is required to be submitted by the contractor and verified by the superintendent as compliant with the design and specification.¹⁹⁷ However it is clear that clause 8.3 of the earthworks Standard does not require the superintendent to verify the testing. Rather it is for the superintendent to co-ordinate and ensure the occurrence of sufficient testing.
- [158] Mr Brady acknowledged that, pursuant to clause 8.3, if the Standard was followed correctly, it is the superintendent who would advise when the visits are required and who was responsible for ensuring sufficient sampling and testing occurs.¹⁹⁸ He acknowledged in the absence of some contract specific requirement the task of ensuring compliance with AS3798 fell to the superintendent.¹⁹⁹ Clause 8.6 provides, “In cases where a GTA is employed for level 2 supervision only, the statement of compliance is the responsibility of the superintendent.” While Mr Brady noted the GTA, which in this case was SES, could provide a statement of compliance, responsibility for the provision of a statement of compliance fell to the superintendent.²⁰⁰ Mr Weir reiterated in cross-examination that a statement of compliance is provided on completion of works.²⁰¹
- [159] Mr Brady also accepted that the test reports from SES were, of their general nature, sufficient to satisfy the requirements for reporting in clause 8.3 of the earthworks Standard.²⁰² The earthworks Standard also makes provision for the frequency of field density tests in respect of type 1 earthworks which these earthworks were.²⁰³ Mr Brady agreed that the testing and inspection plan in Cheshire Contractors’ Project Management Plan for phase one satisfied the Standard’s relevant requirement for frequency of field density tests.²⁰⁴

¹⁹⁶ Ex 44 p 29.

¹⁹⁷ Ex 42 p 7.

¹⁹⁸ T4-38 L2.

¹⁹⁹ T4-38 L11.

²⁰⁰ T4-38 LL25-40.

²⁰¹ T3-76 L8.

²⁰² T4-39 L20.

²⁰³ Ex 44 p 31, T4-36 L35.

²⁰⁴ T4-36 L45.

- [160] The failure to have a superintendent to have ensured compliance with AS3798's was no fault of Cheshire Contractors. It might be thought that omission would be more likely to trouble an official considering testing compliance requirements than the one unsatisfactory test of the many arranged by Cheshire Contractors consistently with their testing plan in their Project Management Plan.
- [161] Further to all of this Mr Weir opined that satisfaction the work is complete and meets the requirements in AS3798 can be achieved through visual assessment, test rolling surveillance and the relative compaction testing.²⁰⁵ He emphasised it remains the case that the subgrade, which is the material being tested, is still available, albeit after exposure to weather for some years. So, the testing for compaction can still occur, along with visual assessment and test rolling, so that the opportunity to test and prove and gain satisfaction has not passed.²⁰⁶
- [162] None of this aids Mr Everett's arguments. In any event I am satisfied that Cheshire Contractors did not breach the testing obligations assumed by them in their Project Management Plan.

Ph 1: Other complaints

- [163] Other remaining complaints can be dispensed with briefly.
- [164] Mr Everett pleads that in breach of the implied terms²⁰⁷ as to the quality of the services to be provided, Cheshire Contractors failed to obtain and supply "as constructed" survey information.²⁰⁸
- [165] The particulars of this breach plead that without an as constructed survey it would not be possible for persons to know whether the works had been completed in accordance with the original design and thus know that they were fit for the purpose of serving as part of the works necessary to complete the proposed development. The alternative particular pleaded is that a contractor exercising reasonable skill would have ensured as constructed surveys were completed and provided to Mr Everett.
- [166] I am unpersuaded of the existence of the implied term. Mr Everett conceded he had no discussions with Cheshire contracting about the provision of as-constructed survey information during construction.²⁰⁹ Barry Cheshire testified:
 "There was no reason to have an as constructed survey at that stage of the job."²¹⁰

He explained the obligation to provide "as built data" or "as constructed information" had not arisen because the need for "as constructed" plans is when the sealing and approval of plans by Council is to occur. He explained they had such

²⁰⁵ T3-77 L13.

²⁰⁶ T3-77 LL12-33.

²⁰⁷ The implied terms are nominated as those pleaded in [3f and g] but the reference to "quality of the services" suggest they were probably meant to be those in [3g and h].

²⁰⁸ Def [4A].

²⁰⁹ T8-44 L39.

²¹⁰ T2-93 L13.

data stored electronically so that it would be available when the relevant need arose in the future.²¹¹

- [167] Mr Brady agreed that in the course of a normal construction contract, the as-constructed survey information is usually compiled towards the end of the job so it can be reviewed by the superintendent and ultimately supplied to Council.²¹² As to whether a provision of such information ought have occurred earlier in this particular project, Mr Brady acknowledged that would depend upon the scope of work or the reduced scope of work.²¹³
- [168] In Mr Brady's supplementary report he asserted that the testing and as-constructed information is required to be supplied by the contractor at the time of submitting a payment claim for the works and not at the end of the project.²¹⁴ However, Mr Brady conceded he was there talking about payment claims made progressively by contractors on projects where the payment claims claimed a percentage of completed project works.²¹⁵ He conceded the position was less clear where a contract involved payment by reference to hourly rates where there is no inherent requirement for the progressive supply of as-constructed information, explaining it would depend upon the terms of the contract.²¹⁶ There were no terms of the contract here requiring such progressive supplies of as-constructed information.
- [169] Mr Weir disagreed with Mr Brady's implication that the absence of an as-constructed survey was problematic because the development works were incomplete.²¹⁷ He rejected the proposition that the absence of an as-constructed survey ought result in the view that the works cannot be valued and are thus valueless. He went on to say:
- "I'd say there's clearly value in the works. There's been a large amount of work completed based on the records that I've seen and they're – up until the recent footage that I've seen, at least, they're – they're serving a purpose as – albeit uncomplete, as a road."²¹⁸
- [170] Even Mr Brady acknowledged the road built by Cheshire Contractors had been in place and in use over a number of years and that there must be some value to it.²¹⁹
- [171] Mr Weir emphasised that both of Council's operational works permits required a superintendent to supply a certificate of completion prior to release of the survey plan.²²⁰ As to the need for a superintendent to be satisfied the progressive compliant steps required had been taken, Mr Weir noted the Council did not describe what the certificate of completion was to include but suggested it would require an indication

²¹¹ T2-85 LL4-36.

²¹² T4-44 L35.

²¹³ T4-44 L40.

²¹⁴ Ex 43 p 3.

²¹⁵ T4-45 L8.

²¹⁶ T4-45 L12.

²¹⁷ T3-72 L22.

²¹⁸ T3-72 LL20-36.

²¹⁹ T4-52 L22.

²²⁰ T3-69 L20.

the works had been completed in accordance with technical drawings and specifications.²²¹

- [172] Finally, there was in summary an allegation of overcharging premised upon Mr Brady's evidence. Mr Brady acknowledged, while he was briefed to provide an opinion on the estimate of costs of Cheshire Contractors doing the work and supplying any materials, he did not provide such an opinion.²²² Rather, the assessment contained in his opinion is based entirely upon the Bill of Quantities.²²³
- [173] The Bill of Quantities does not provide a record of the work performed and charged for, nor, for reasons already explained, were the works confined to those contemplated by the Bill of Quantities.
- [174] Mr Brady acknowledged that while he had been briefed to provide an opinion assuming additional works were done beyond the scope of the LCJ plans, he did not take any additional works into account in respect of either phase.²²⁴ He conceded, in forming his opinion as to the value of work performed, he had no regard to the number of hours of labour and equipment use.²²⁵
- [175] The exercise carried out by Mr Brady does not support a complaint of overcharging. I am satisfied Cheshire Contractors charged for phase one works in accordance with the agreed rates.

Everett liable to pay for phase one works

- [176] The upshot then is that Mr Everett's attempts to avoid liability in respect of payment for the phase one works have failed. His obligation under his agreement with Cheshire Contractors was to pay for the invoiced works. His failure to do so was in breach of contract. Subject to the consequences of the below discussed December 2011 promise, I accept he is liable for the unpaid amount both as damages for that breach and as a debt under the contract.

PART C – THE DECEMBER 2011 PROMISE

The December 2011 promise

- [177] Mr Everett testified that by the time the phase one works were "all but finished or had finished",²²⁶ his loan application to the NAB, made subsequent to the meeting earlier in the year with Mr Duggan, was declined.²²⁷ The trust's debt to the bank was then about \$1,000,000 according to Mr Everett,²²⁸ who testified that while the

²²¹ T3-70 L10.

²²² T4-47 L4.

²²³ T4-47 L9.

²²⁴ T4-51 LL30-43.

²²⁵ T4-46 L45.

²²⁶ T2-21 L25.

²²⁷ T2-13 L6.

²²⁸ T7-21 L36.

bank declined the loan application to pay for the civil works it approved lending to fund the holding costs and maintenance of the property.²²⁹

- [178] Barry Cheshire testified that at the end of 2011 Cheshire Contractors demobilised offsite. Around this time he heard that Mark Everett's application for finance had been unsuccessful (though not from Mr Everett's bank manager Mr Duggan²³⁰ as Mr Everett's testimony claimed²³¹). Mark Everett assured him Mr Everett would have sales and Cheshire Contractors would be paid. The development did not advance and there were no sales. The situation drifted on without payment being made to Cheshire Contractors to about late 2013.²³²
- [179] That Cheshire Contractors took no action to compel payment in the interim may be explained by an alleged promise it made not to do so during December 2011.
- [180] On Barry Cheshire's account, in December 2011, when the phase one works were completed,²³³ Mark Everett told him the NAB would provide further funding just for maintenance, to give Mark Everett more time to market the property, on the condition that Barry Cheshire did not make a claim for the phase one works.²³⁴ The bank was concerned at the prospect of Mr Everett having an aggrieved creditor.²³⁵ This was evidently around 16 December 2011, because on that date Tony Duggan of the NAB sent an email to Mark Everett, stating:
- “Agreement between the client and road contractor is to be sighted by the Banker to ensure that no funds are required to be paid prior (sic) to the road contractor prior to presales occurring and development funding being provided.”²³⁶
- [181] Barry Cheshire testified Mark Everett sent him Mr Duggan's email of 16 December 2011 and told him, “If we don't get any funding, well, you're not going to get paid”.²³⁷ As a result, Barry Cheshire forwarded Mark Everett an email on 20 December 2011 stating:
- “Cheshire Contractors Pty Ltd will not seek payment for work performed on the Hinchinbrook Habitat subdivision until there sufficient sales or presales that allow you to make payment.”²³⁸
- [182] Mark Everett responded by email to Barry Cheshire the following day on 21 December 2011 writing:
- “thanks you. hopefully thats enough to satisfy them”²³⁹

²²⁹ T7-22 L28.

²³⁰ T3-16 L25.

²³¹ T7-22 L45.

²³² T2-62 LL1-10.

²³³ T2-61 L26.

²³⁴ T3-16 LL28-35.

²³⁵ Ex 79.

²³⁶ Ex 16.1.

²³⁷ T2-61 L2.

²³⁸ Ex 16.2.

²³⁹ Ex 16.2.

- [183] I will for convenience refer to Mr Cheshire's email of 20 December 2011 as "the December 2011 promise". What is its significance?

Discussion

- [184] Mr Cheshire obviously intended the December 2011 promise to be shown by Mr Everett to Mr Everett's bank, as an accurate statement of Cheshire Contractors' intention. Mr Cheshire did not testify that it was a false representation of his company's position. The position Cheshire Contractors took, of not taking action to recover payment, is also consistent with the truth of the representation. The December 2011 promise was a "promise" in the lay sense of the word but even in the lay sense its parameters are informed by more than its literal content. Taken literally the promise could mean Cheshire Contractors would never press for payment because if Mr Everett chose to never advance the project or did so unsuccessfully, then there would never be any sales or presales. That is obviously not what was contemplated by the promise. It was a promise to delay, not deny, the exercise of the right to payment. Mr Everett could not have thought otherwise.
- [185] It was a promise made on request for the purpose of assisting Mr Everett in his dealings with the bank. Implicit in Mr Everett's act of seeking it was the implication that he would continue to advance the project to the point where there would be sufficient sales or presales to fund payment to Cheshire Contractors of what they were owed. Putting it another way, this was not a promise to delay seeking payment indefinitely. Rather, it was a promise to postpone seeking payment until Mr Everett had had sufficient time within which to advance the project to the point of being able to raise money to pay from funds from presales or sales.
- [186] That finding of fact is very significant. Even if it were the case, as Mr Everett argues, that he acted to his detriment on the strength of the December 2011 promise, so that the December 2011 promise ought be legally binding, his problem remains that it was never more than a promise to delay seeking payment. Anything he did to his detriment by acting on the promise could only have been in the understanding that Cheshire Contractors would delay seeking payment. That delay was only as long as the passage of a sufficient period of time within which to advance the project to the point of being able to raise money to pay for the phase one works from funds from presales or sales.
- [187] Mr Everett had more than sufficient time after the December 2011 promise to advance his project to that point. Another year to a year and a half would have been amply sufficient time for Mr Everett to advance the project to that point if he could. However, making some further generous allowance for the variables inherent in development work, I find two years was sufficient time. I find the postponement period contemplated by the promise was over by 1 January 2014.
- [188] Remarkably, all these years later, Mr Everett still relies on the December 2011 promise as a means to try and avoid liability to pay for the phase one works. Even if the December 2011 promise was legally binding the time long ago passed for its continued operation as a basis to avoid liability for paying the monies outstanding on the phase one works. Subject to Mr Everett's claim of set off, Cheshire

Contractors should at the least have judgement for the total outstanding of those monies. As earlier explained that total is \$350,970.59.

- [189] This does not render the debate as to whether the December 2011 promise was legally binding irrelevant, because it bears upon the point in time from which the calculation of interest on the outstanding amount ought be calculated. The events of phase two may bear upon that. It is a therefore a topic to which I will return after dispensing with phase two.

PART D – PHASE TWO ANALYSIS

Ph 2: An elusive agreement to plead

Oral agreement?

- [190] Cheshire Contractors plead that on or about 12 August 2014 it entered into a further oral contract with Mr Everett, by which Cheshire Contractors agreed to supply services at Mr Everett’s request including civil services, consultation, obtaining operational work permits, surveying, supervision and site management and development management.²⁴⁰ By the agreement Cheshire contractors was allegedly to invoice for services as and when performed at the same rates as phase one for civil services, at a commercial rate for development management services and at cost plus 15 per cent for other services. It was allegedly agreed Mr Everett would pay the invoices within 30 days of issue.

Joint venture?

- [191] Mark Everett denies there was ever any agreement between him and Cheshire Contractors of the kind alleged by Cheshire Contractors in respect of phase two.²⁴¹ Rather Mr Everett pleads the parties reached an oral joint venture agreement on or about late January 2014 by which Cheshire Contractors were to provide an array of additional services beyond construction of roads, drainage and lots and including an array of other tasks including the employing of appropriate soil testers, design engineers, surveyors and real estate agents, and sourcing financial funding for the project.²⁴²
- [192] One of those tasks related to part of the land on the hill where Mr Everett’s house was located and which was to be surveyed as a separate lot, to be called lot 77. That task was pleaded as:
- “Arrange for all works to be done and steps to be taken to create the proposed Lot 77 so it may be sold to assist in facilitating funding of the development.”²⁴³

²⁴⁰ SOC [10].

²⁴¹ Def [10aa].

²⁴² Def [10b].

²⁴³ Def [10b i N].

- [193] Mr Everett’s pleading of the terms of the joint venture included that any sums outstanding under the terms of the first contract would be carried forward to and become the liability of the joint venture and that Mr Everett’s contribution would include the \$440,000 derived from net proceeds of sale of lot one.²⁴⁴

Alternatively a Riverviews Estate contract?

- [194] In the alternative to the joint venture Mr Everett pleads that in or about May 2014 the parties entered into a contract (“the Riverviews Estate contract”) whereby it was agreed the sale of lot one would occur with Mr Everett accepting \$220,000 of the purchase price as a credit against monies to fall due in the future under the first contract and to apply the balance in accordance with the project budget. Other terms alleged were that Cheshire Contractors would ensure the subdivision of lot 77 could proceed so as to facilitate further financing and Cheshire Contractors would complete all the works contemplated by the budget and would be paid for the works in accordance with the budget.²⁴⁵
- [195] Mr Everett pleads the implied terms of the Riverviews Estate contract were that Cheshire Contractors would provide services and materials reasonably fit for purpose, would perform services with reasonable skill and would undertake all liaison with local, State and statutory authorities in respect of the completion of the work and comply with the requirements of local, State and statutory authorities. The budget referred to was said to be the budget prepared by Cheshire Contractors to be submitted by Mr Everett in his name to his bank, prepared in draft form dated 8 May 2014 and in final form dated 28 May 2014.²⁴⁶
- [196] Cheshire Contractors denies the Riverview Estate contract pleaded by Mr Everett on the basis the oral contract was as pleaded by Cheshire Contractors.²⁴⁷

An agreement from the pleadings?

- [197] The fact that each side in different ways pleaded the existence of an agreement does not mean there was an agreement. The pleadings implicitly accept that Mr Everett and Mr Cheshire were in some way agreed that Cheshire Contractors would perform further works. As much is obvious from the fact that Mr Everett permitted, and Cheshire contractors performed, further works. But there is no common ground on the pleadings as to any agreement about the essential contractual element of consideration for those works.²⁴⁸ If there was any agreement it could at best arise from the evidence, not the pleadings.

Ph 2: Any agreement to be extracted from the evidence?

Cheshire Contractors ventures actively into the project

²⁴⁴ Def [10b iv vi].

²⁴⁵ Def [11E].

²⁴⁶ Def [11D].

²⁴⁷ Reply [42].

²⁴⁸ Compare for instance the highly qualified admissions in the Reply [42,43] to Def [11D, 11E].

- [198] After the December 2011 promise Mr Everett evidently did not secure any pre-sales. On his account he did advertise,²⁴⁹ without success, and made an unsuccessful attempt to sell the property.²⁵⁰ This was not the decisive conduct of a developer able to advance his development in a timely way.
- [199] On Barry Cheshire's account, in late 2013 or early 2014, by which time he was doubtless rightly concerned by the lack of progress, he told Mark Everett he was interested in working with Mr Everett to continue the development in order that he could get paid. Barry Cheshire testified he came up with the idea of doing the project as a rural subdivision to eliminate a lot of infrastructure and cost.²⁵¹ He testified of his motivation at this point, "I thought it was probably the only way out",²⁵² an obvious reference to his desire to be paid for phase one.
- [200] An email from Mr Cheshire to Mr Everett of 28 October 2013 enclosed some draft plans for the varied project by Mark Valmadre.²⁵³ Mr Everett testified he and Mr Valmadre spoke with HSC about the potential change and Council was receptive.²⁵⁴ Mr Everett testified Mr Cheshire visited him, explaining his idea of changing the development to acreage blocks and pursuing it "fifty-fifty" as a joint venture.²⁵⁵
- [201] On 6 December 2013 they met without success with some potential private funders of the project.²⁵⁶ On 20 December 2013 Mr Everett consulted with Nathan Fien, a financier of Corporate Finance Group, in respect of development funding for Mr Everett's project. On the same date Mr Fien forwarded Mr Everett an email summarising the effect of their discussion, which email Mr Everett forwarded to Mr Cheshire.²⁵⁷
- [202] It was put to Barry Cheshire in cross-examination that in January 2014 he started paying for work which needed to be done in connection with the project, to which Mr Cheshire responded, "Only because he couldn't pay".²⁵⁸ That response, implicitly accepting the proposition put, confirms Mr Cheshire was moving to advance Mr Everett's project, presumably perceiving it had positive commercial prospects.
- [203] By 9 February 2014 Mr Everett was seeking advice from his accountant Mr Carey on a proposal of Mr Cheshire which he described in the email as follows:
 "...Barry's proposal to shift the larger blocks, not having the sewerage treatment plant, underground power and water treatment plant, all of these things are not required with the larger blocks reducing initial capital cost dramatically.

The blocks would end up bigger but able to be sold for less money.

249 T7-23 L44.
 250 Ex 49.
 251 T3-22 LL14-20.
 252 T3-22 L25.
 253 Ex 50.
 254 T7-26 L47.
 255 T7-27 L11.
 256 T7-27 L25, Ex 51.
 257 Ex 68, T8-6 L20.
 258 T3-22 L41.

NAB has given me an extension until June but with some covenants that may prove difficult to meet. As time is short should I go ahead with the changes or try to sell the whole place as is with the current approvals?

Barry has agreed to project manage the development for a percentage of the profit on each block so a potential JV partner can have comfort in the management.

As you would be aware pressure is a nasty thing and I need to make a decision and run with it before I run out of money again.”²⁵⁹

The email went on to mention that Mr Everett’s former wife Gail was “off the bank loans now and off the title”.

- [204] On 10 March 2014 Daniel Spencer of Cheshire Contractors wrote to a town planning firm known as RPS, identifying various changes, including a change in the development’s name to Riverviews Estate.²⁶⁰ Mr Everett testified that by this stage Mr Cheshire had made himself project manager. When asked to explain what he meant by that testimony he responded:

“That was one of the preconditions of him doing a joint venture. ... I admitted that I made a few mistakes in the past, and he appointed himself project manager. That was one of the conditions of him getting involved.”²⁶¹

- [205] On 21 March 2014 Mr Yelavich of town planning firm RPS emailed Daniel Spencer, explaining his firm’s dealings to date regarding conditions of the Federal Department of Environment, nominating RPS’s fee for proceeding further and requesting confirmation whether it was “OK to proceed”²⁶² to which, on 26 March 2014, Daniel Spencer authorised RPS to proceed.²⁶³

- [206] On 26 March 2014 Mr Cheshire emailed Mr Everett writing:

“As per our discussions recently regarding the possibility of JV or a partnership between Cheshire Contractors and Mark Everett to progress the development of your Mt Cudmore property I suggest a meeting with Robert Carey to obtain advice on the best possible way of proceeding.

One thought is for Cheshire Contractors and Mark Everett to purchase Racehub Pty as a vehicle to purchase the property from the Everett Family Trust with enough excess funding to enable the construction and sales of 24 lots in the initial stage.

Initial sale prices are attached and would realise about \$4.5 mil not including sale on Mt Separation.

The changes to design have enabled much lower costs for construction and also allowing lesser sales prices.

²⁵⁹ Ex 69.

²⁶⁰ Ex 53.

²⁶¹ T7-30 L10.

²⁶² Ex 54.

²⁶³ Ex 54.

Estimates to complete works to Mark's house intersection on Mt Separation Road is \$1,300,000 and estimates to complete the remaining is \$1,500,000.

We believe total sales would realise \$18 mil.

Cheshire Contractors are keen to progress this partnership and help make this a viable project."²⁶⁴

- [207] Mr Everett forwarded that email to his accountant Mr Carey and to Mr Duggan, writing, "This is what Barry is suggesting".²⁶⁵ The email's reference to Racehub Pty was a reference to a company owned by Mr Everett and his former wife.²⁶⁶
- [208] On 7 April 2014 Mark Everett emailed Barry Cheshire a list of Mr Everett's apparently monthly expenses for payments towards plant, equipment, insurance, rates and power.²⁶⁷ Mr Cheshire rejected the suggestion this email was sent because Barry Cheshire needed to know information for a potential financing arrangement.²⁶⁸ On Mr Everett's account he sent the email in response to a request from Clinton Cheshire so Cheshire Contractors would know what payments would need to be made when Mr Everett ran out of money.²⁶⁹ Further enmeshing itself in the affairs of the project, Cheshire Contractors made an application in around April 2014 to Telstra, to have headworks performed through the subdivision.²⁷⁰

Joint venture and the hunt for funding

- [209] Discussion of Cheshire Contractors becoming a joint venturer in Mr Everett's project must have been well underway by April 2014. At that stage Mark Everett was trying to secure project refinancing through Mr Fien. Barry Cheshire testified there was interest in Cheshire Contractors because they had income. On 15 April 2014 he emailed Mr Fien about Cheshire Contractors and Mark Everett being involved in a joint venture.²⁷¹ That email commenced:
- "Mark Everett from Ingham has given me your details. He has contacted you in regards to financing a development at Cardwell Range near Ingham in North Queensland."²⁷²
- [210] The email went on to explain the background of Mr Cheshire and his company. It then continued:
- "I have known Mark for several years and he has approached us to help develop his land at Ingham. His development has been going for some time but with little direction and with a development type which would be better suited to city outskirts boutique type subdivision with smaller lots. I have engaged town planners RPS

²⁶⁴ Ex 52.

²⁶⁵ Ex 52, T7-28 L38.

²⁶⁶ T7-28 L42.

²⁶⁷ Ex 30.

²⁶⁸ T3-24 L37.

²⁶⁹ T7-33 L33.

²⁷⁰ T2-64 L45.

²⁷¹ Ex 17.

²⁷² Ex 17.

from Cairns and redesigned the development to acreage lots in a rural zoning which has reduced the construction costs, lifted the yields so as to make it a very viable proposition. I believe the development will be self-funding after the first stage and have attached some forecasts for you to have a look at. The three scenarios provided and the cash flows are for the first stage only with the third as a reference to “if sales were catastrophic” with the first scenario being very probable and possibly exceeded with the advertising budget available.”²⁷³

- [211] The letter went on to describe the virtues of the property’s location and then continued:

“The NAB has a first mortgage over the property securing a loan of \$2.4 mil. We are seeking a lender to take over the NAB debt and fund the construction cost as shown in the cash flows. The loan would be secured by the land and subsequent developed lots and the proposal would be as a joint venture between Mark Everett and Cheshire Contractors.

This is a brief overview of the project looking to gain the interest of a prospective lender.

If you’re interested in the above project you can contact me...”²⁷⁴
(emphasis added)

- [212] Mr Cheshire asserted in re-examination that he was not involved in any approaches to financiers other than Mr Fien.²⁷⁵

- [213] Barry Cheshire agreed that in about April 2014 he had created a document styled “River views lifestyle acreage estate”,²⁷⁶ based on information from Mr Everett. The document, which Barry Cheshire testified he had drafted at Mark Everett’s request, provided a short overview about the proposed development and set out a variety of lot prices and construction costs through various stages of development, along with a number of cash flow projections based on different scenarios.²⁷⁷ Mr Everett testified he was unaware of the document being produced and on his account was given it by Mr Cheshire who requested he give it to Mr Duggan of the NAB.²⁷⁸ Mr Everett gave it to Mr Duggan.²⁷⁹

Sale of lot one to help funding

- [214] By May 2014 it had been agreed between Mark Everett and Barry Cheshire that lot one on Mr Everett’s property ought be sold to Barry Cheshire and his wife, and another couple associated with Cheshire Contractors. Lot one had been valued at

²⁷³ Ex 17.

²⁷⁴ Ex 17.

²⁷⁵ T4-10 L2.

²⁷⁶ Ex 18, T3-25 LL22-35.

²⁷⁷ Ex 18.

²⁷⁸ T7-32 L 7, T7-33 L3.

²⁷⁹ T7-33 L5.

about \$600,000.²⁸⁰ It was separated from the rest of Mr Everett's property by a railway line and had been used by Cheshire Contractors as their work depot during phase one.

- [215] The arrangement struck, evidently allowing for GST, was that the property would be purchased for \$660,000 – a fair commercial price - with the amount of a deposit of \$220,000 being credited by Cheshire Contractors against the amount of money Mark Everett owed to Cheshire Contractors, thus reducing that debt. The \$440,000 balance of the purchase price (the balance was said to be \$462,000 elsewhere in the evidence but nothing turns on the point) was to be paid to Mark Everett, hopefully to be used by him to advance the project to a stage where it could be offered for presales.²⁸¹

The hunt for further funding continues

- [216] Apparently on the strength of the arrangement for the sale of lot one, Barry Cheshire emailed Mr Tony Duggan of NAB on 8 May 2014 saying:

“Here is the 1st draft of land sale deal from Everett Family to Cheshire Contractors as previously discussed. Let me know your thoughts and suggest any amendments.”²⁸²

- [217] Attached to the email was an unsigned letter by Mark Everett of the same date marked for the attention of Mr Duggan, saying:

“I refer to the sale of Lot 1 CWL 2514 and advise as to the expenditure of the proceeds of the sale which will be used for further development and associated costs.

The following budget has been produced for this purpose.”²⁸³

- [218] There followed an itemised budget allocating expenditure to items of construction, lot preparation, Council and MRD contributions, engineering and survey design, town planning, estate management and maintenance, advertising and marketing, living costs and bank fees and charges and “payment of 30% deposit for part payment of the construction of the access road by Cheshire Contractors”. This gave rise to a total budgeted figure of \$900,000. The letter continued:

“I propose to have Mount Separation Road and Everett Road completed with earthworks, stormwater & a running surface to service all 31 lots in stage 1. These blocks will be able to be sold using disclosure plans and disclosure statements.

Town planners RPS have been engaged to redesign the development to acreage lots which will reduce construction costs & increase profit.

A contract has been extended with LCJ Engineers for engineering design to include the extra lots.

²⁸⁰ Ex 19 p 82.

²⁸¹ T2-63 LL1-10.

²⁸² Ex 32.

²⁸³ Ex 32.

An advertising program is being set up with a marketing company in Townsville and a sales person will be engaged to follow through with sales leads. The lots will also be available for sale through the buyers preferred real estate agent.

Estate management and maintenance includes estate presentation with costs to mow the lots & keep the estate tidy to attract potential investors.

I have included a summary of overall budget cost to complete stage 1 and a projected sales program. Stage 1 will be fully completed on the back of sufficient sales in stage 1.”²⁸⁴

- [219] On 28 May 2014 Tony Duggan responded to Barry Cheshire by email, saying:
“Have had a look at this and with Val now coming in at \$660K this will have to be revised.

Can you please liaise/discuss with Mark how this can be done with reduced amount.”²⁸⁵

Mr Cheshire did then discuss this issue with Mr Everett and Mr Everett testified he said he was still prepared to proceed with the sale of lot one “to get the JV going”.²⁸⁶

- [220] Two hours later on the same date, 28 May 2014, Barry Cheshire emailed Mark Everett saying:

“This is the land expenditure proposal for NAB. If you like it sign it and send to Tony.”²⁸⁷

- [221] Attached thereto was again an unsigned letter by Mark Everett for the attention of Tony Duggan, this time dated 28 May 2014. The letter was identical to the content of a letter which had been annexed in Mr Cheshire’s email to Tony Duggan on 8 May 2014 except that the costings for the various budgeted items were all reduced so as to give rise to a total of \$660,000 as distinct from the earlier total of \$900,000.²⁸⁸ Mr Everett signed the letter of 28 May 2014 and sent it to Mr Duggan.²⁸⁹

- [222] In this era Mr Everett also had dealings with David Manchee of Belvedere Share Managers who, on 11 June 2014, emailed Mr Everett with the details of two companies who had shown some interest in joint venture financing.²⁹⁰ Mr Everett forwarded this email to Mr Cheshire on the same date.

NAB variations

- [223] On 10 July 2014 the NAB offered variations to Mr Everett’s existing loan facility, which were accepted by Mr Everett on 16 July 2014. The variations were to extend

²⁸⁴ Ex 32.

²⁸⁵ Ex 33.

²⁸⁶ T7-40 L15.

²⁸⁷ Ex 34.

²⁸⁸ Ex 34.

²⁸⁹ Ex 65, T7-78 L13.

²⁹⁰ Ex 70.

the existing loan facility limit of \$1,750,000 to 31 December 2014 and remove lot one from the security supporting the facility. The variation also imposed additional lending covenants as follows:

“Additional lending covenants

Marketing plan to be provided to the bank by 30/09/2014.

Boundary realignment to be completed and separate title issued for proposed Lot 77, also known as “house block” by 30/9/2014.

In the event that equity partner or presales cannot be achieved, a marketing program for the sale of the proposed Lot 77, also known as “house block” is to be provided by 31/12/14.”²⁹¹

- [224] An explanatory note by the NAB, also signed by Mr Everett on 16 July 2014, explained the security provided by lot one was being released in order to allow its sale. The note recorded, inter alia:

“The property being sold is being released without associated reduction. The funds will be used to allow the customer to further improvements to develop the block with the main expense being an access road. The NAB has not assessed the revised development and previously has indicated the need for presales as part of any proposal.

The customers need to have the access road to allow presales to be a more realistic option.

At this stage the customer needs to clearly understand that the NAB has not made any commitment to funding the development and the allowing of some funds for this purpose does not constitute a future approval of support. ...

I note the customers have outlined three options prior to DEC 2014 to allow the additional \$1.0M to be sourced to complete the project.

1. the presales to allow the NAB or other financier to consider the development funding.
2. equity partner.
3. sale of house block, this option would again require the NAB to allow some funds from existing security being sold. This decision would be made on the information held at the time and the proposal put.

2 or 3 options require the NAB to agree to something which simply at this point in time we are not in a position to decision (sic). The customers need to clearly understand that the NAB is not making any commitment past 31/12/2014 to renew facilities or any funding of the development.

I would suggest the ABM clearly details the customers’ understanding of this.”²⁹²

- [225] The circumstance under which the bank came to release lot one from the lending facility’s security, namely the arrangement to sell lot one to raise some funds to advance the project, is clear from the facts discussed above. Much less clear is the

²⁹¹ Ex 56.

²⁹² Ex 57.

genesis of the additional lending covenant requiring the boundary realignment of lot 77 by 30 September 2014 and the provision of a marketing program for the sale of that lot by 31 December 2014 in the event that an equity partner or presales could not be achieved. Mr Everett unconvincingly claimed to have had no communication with the bank regarding the options of presales, the finding of an equity partner or the sale of lot 77.²⁹³ However, he later acknowledged in evidence-in-chief the possibility of separating title on the hill where the house block was located had been discussed with him by the bank 12 months earlier.²⁹⁴

[226] Mr Cheshire accepted in cross-examination that he knew Mr Everett would only have about \$400,000 available to him from the sale of lot one and allowing for third party payments would only have enough available from that amount to pay Cheshire Constructions for the first two budgeted road construction items, priced at \$115,000 and \$62,000 respectively.²⁹⁵ Mr Cheshire conceded he knew there would not be enough from the lot one sale proceeds to pay his company in full for its work.²⁹⁶

[227] When asked in re-examination why he was prepared to commit to doing further work with such knowledge, Mr Cheshire responded:

“Because there was always the chance at the end that the lots would be sold and we’d be paid out of the lots.”²⁹⁷

Such evidence makes a mockery of Cheshire Contractors’ attempt to allege that the phase two works involved an agreement like the phase one works, under which invoices were to be paid soon after they were issued.

What agreement?

[228] Barry Cheshire testified that within four to six weeks of his 15 April 2014 proposal being put to Mr Fien of Capital finance it was “knocked back”.²⁹⁸ In the meantime, on 16 May 2014 Mr Cheshire and Mr Everett each executed an agreement forwarded by Mr Cheshire to Mr Fien for the engaging of a finance broker.²⁹⁹ Cheshire Contractors paid the requisite brokerage fee of \$1650.³⁰⁰ It is noteworthy that in executing the document they each described themselves as a “JV partner”, though at that stage had only discussed a joint venture and not reached an agreement.³⁰¹

[229] Allowing for the passage of four to six weeks from 15 April would suggest Mr Fien’s “knock back” occurred about mid to late May though Mr Cheshire testified it was probably June.³⁰² Mr Cheshire’s recollection is consistent with an email of 19 June 2014 from Mr Fien to Mr Everett advising the preferred course was for Mr

²⁹³ T7-41 L38.

²⁹⁴ T7-42 L47 – T7-43 L2.

²⁹⁵ T3-34 L38 – T3-35 L2.

²⁹⁶ T3-35 L22.

²⁹⁷ T4-11 L28.

²⁹⁸ T2-77 L42 – T2-78 LL5-12.

²⁹⁹ Ex 55.

³⁰⁰ Ex 55 p 28.

³⁰¹ T8-12 LL25-35.

³⁰² T2-78 L9.

Everett to work with his existing lender.³⁰³ The email identified a number of issues detracting from the development's appeal to financiers.

- [230] Barry Cheshire explained it was after Mr Fien rejected their proposal that Mr Cheshire had discussions with Mark Everett about performing the phase two works charged at the same rates as phase one.³⁰⁴ As to what was said, this vague exchange occurred in evidence-in-chief:

“And do you recall – can you cast your mind back to recall the actual discussion with Mr Everett and what might've been said by Mr Everett and what might've been said by you? Are you able to recall that?---I think it was a situation we said we'll carry on from what we did in the first stage, we'll do in the second stage. And it would be under the same arrangement.

But did Mr Everett ask you to do that or did you - - -?---Yeah.

- - - propose to do that or - - -?---No, Mr Everett asked me to do that..”³⁰⁵

- [231] This was unconvincing evidence that there was any agreement on similar terms to phase one. As to terms of payment this similarly unhelpful exchange occurred in evidence in chief:

“Now, Mr Cheshire, you were saying just before the break that you'd had some discussions with Mr Everett about getting the work done and you were explaining the work that was to be done. What, if anything, was discussed with Mr Everett about the process for and the timing of claiming for payment of the work to be done, in respect of phase two?--- Our terms of payment have always been the same: 30 days after the end of the month.

Okay. So just – we won't repeat all that we did a little bit on about phase 1, but just in terms of any discussions with Mr Everett about that, did you have any discussions with Mr Everett specifically about the terms of payment for phase 2 works?--- No. Only apart from the fact that he was going to pass us of the sale.”

- [232] The first above quoted answer was unresponsive. The second answer seemed to acknowledge an absence of discussion of payment terms other than that payment was going to be made from “the sale”. Presumably that was a reference to funds from the sale of lot one, which were never going to be enough to cover the cost of the phase two works.

- [233] It will be recalled that by the time of this vague and unconvincing alleged exchange, inferentially in around the second half of June of 2014, Cheshire Contractors had already been performing “project managing” and “market/advertising” for three months. Barry Cheshire explained that Cheshire Contractors charged Mark Everett

³⁰³ Ex 71.

³⁰⁴ T2-77 L15.

³⁰⁵ T2-78 LL22-30.

for sales and marketing expenses because Mark Everett could not get credit for television and other media, and because “Mr Everett asked us to”.³⁰⁶

- [234] Mr Everett rejected the suggestion that agreement was reached with Mr Cheshire that Cheshire Contractors would be paid for carrying out the phase two works on the same hourly rate basis or the same cost plus basis that had applied for phase one.³⁰⁷ To the extent any common ground was conceded in this context by Mr Everett, he conceded that the amended decision notice of HSC of 22 July and the settlement of 7 August 2014 were events which enabled “the project to get going”.³⁰⁸ But Mr Everett rejected the suggestion there had been an agreement reached with Mr Cheshire as to the basis upon which the work being performed would be charged for.³⁰⁹
- [235] It is improbable in light of Mr Everett’s financial difficulties and Cheshire Contractors’ already active role in advancing the project, that there occurred an oral agreement for Cheshire Contractors to proceed with the phase two works on the basis it would be paid forthwith for work performed.
- [236] By the time settlement of the lot one sale occurred on 7 August 2014³¹⁰ the phase two works were underway.³¹¹ Shannon Cheshire, the foreman for Cheshire Contractors, did not know who gave the go-ahead for work on the second phase to commence, although he recalls there were meetings onsite with Barry Cheshire and representatives of LCJ.³¹²
- [237] Mr Everett acknowledged in cross-examination that at the time of lot one’s settlement he had had to arrange for NAB’s release of the mortgage to allow the settlement to take place “for the funds to flow through to get the work going”.³¹³ But, considered in context, this was not a concession of an agreement having been reached with Mr Cheshire.³¹⁴ The timesheets show that there was some work performed in July with the substantive construction work commencing from 31 July 2014.
- [238] Barry Cheshire testified Mark Everett asked for work to be performed, “as the works went on”.³¹⁵ Even if that is correct it says nothing of the commercial basis, if any, upon which the works underway were being performed.
- [239] In weighing up whether an agreement can be inferred it is of course relevant to bear in mind that on 18 September 2014 Mr Everett paid Cheshire Contractors’ first invoice for the phase one works, dated 27 August 2014, in the amount of \$139,596.76. It will be recalled settlement of lot one had occurred in August with

³⁰⁶ T2-83 L27.

³⁰⁷ T8-75 L25.

³⁰⁸ T8-76 L40.

³⁰⁹ T8-77 L3.

³¹⁰ Amended Statement of Claim (“SOC”) [6(b)], Further Amended Defence (“Def”) [7].

³¹¹ T2-75 L46.

³¹² T1-74 L13.

³¹³ T8-75 L3.

³¹⁴ T8-75 L3.

³¹⁵ T2-83 L12.

the consequence Mr Everett had some liquidity. In the mix of what was then occurring the payment at least carries the hallmark of a show of good faith support for the unfolding enterprise. It will be borne in mind no other invoices for phase two, other than the invoices covering the costs of Pozzi Surveyors, were paid. In the absence of any other credible evidence in support of the inference of agreement having been reached regarding consideration, this evidence of a one off payment in September, soon after the lot one settlement, does little to help sustain such an inference.

Attempt to document joint venture

[240] According to Barry Cheshire, the work in both phases one and two was “completely finished” before there was discussion of a joint venture.³¹⁶ That is plainly wrong. Mr Cheshire was referring to a prospective joint venture as long ago as his email to Mr Fien of 15 April 2014 and he signed the finance broker letter of engagement of 16 May 2014 as a “joint venture partner”.

[241] Moreover, the phase two works had not long been underway when, on 12 August 2014, Barry Cheshire forwarded to Mark Everett’s solicitor, Peter Elliott, a document headed “Basis of agreement for joint venture”, which document incorporated a dot point proposal as well as reference to the sale of lot one.³¹⁷ It appears Mr Everett had first consulted Mr Elliott back on 22 July 2014 at which time there had been a discussion by them with Barry Cheshire by telephone in respect of a proposed joint venture agreement.³¹⁸ Mr Everett conferred again with Mr Elliott on 5 August 2014, giving instructions for the contacting of Mr Cheshire regarding setting up a draft joint venture agreement.³¹⁹

[242] This likely prompted Mr Cheshire’s letter of 12 August, in which he contemplated the balance of the purchase price for the lot one sale, of \$462,000 would be applied to cover development costs until the presales stage. It explained:

“Mark Everett will reinvest this \$462,000 ... into the development to facilitate holding costs, town planning costs, engineering costs, surveying costs, construction costs, advertising and marketing and maintenance costs. These funds will allow construction to proceed to a stage where presales will be able to be put to contract.

It is anticipated that there will be sufficient presales to gain finance to complete the necessary works to grant title and receive settlements from the existing presales.

As proceeds from the sales exceed the required amount for day-to-day costs funds will be used to pay debts belonging to Mark Everett for the amount of \$2,800,000 ... and pay Cheshire Contractors for works completed.

After construction costs and Mark Everett’s debts have been settled the remaining funds excess to that previously mentioned and

³¹⁶ T3-30 L35.

³¹⁷ T2-68 L22, Ex 19.

³¹⁸ Ex 72, T8-18 L46.

³¹⁹ Ex 72.

required to maintain and keep the land will be split on a 50/50 basis between Cheshire Contractors and Mark Everett except for the initial \$2,000,000 excess which will be paid to Mark Everett being payment for 50% of the land valuation by Taylor Byrne of \$4,000,000.”³²⁰

- [243] On 11 September 2014 Mr Everett’s solicitors forwarded him a copy of a draft joint venture agreement. The letter also recorded a variety of information which may reasonably be inferred to have come from the solicitors’ client, Mr Everett,³²¹ despite Mr Everett’s reluctance to admit as much in the witness box.³²²

Cheshire Contractors continued active role in the project

- [244] Cheshire Contractors had used its finance and credit to engage GT Pozzi consulting surveyors to perform work during phase two.³²³ The role of Mr Pozzi’s firm included surveying and sub-dividing lot 77 from Mr Everett’s house, with a view to creating a registered title to lot 77 to sell. Mr Cheshire conceded in cross-examination he was aware the registration of lot 77’s title, with a view to its sale, was required of Mr Everett by his bank to raise money.³²⁴ He conceded in cross-examination that he became aware of this when Mr Everett’s approval from the bank to sell lot one had occurred, there had been an accompanying strict time limit imposed for the subdivision of lot 77.³²⁵ It will be recalled that the NAB’s variation of 10 July 2014 required the creation of the separate title by 30 September 2014. Mr Cheshire’s awareness of the need to advance the title creation was implicit in an email to him of 21 September 2014 in which Mr Everett wrote:

“Do you need me to do anything to get this going to meet the bank’s requirements?”³²⁶

Mr Cheshire responded to that email the following day, writing, “All done”.³²⁷

- [245] Mr Cheshire explained in re-examination that the surveying off of lot 77 had not been “part of the original plan”.³²⁸ He testified:

“Well, I knew nothing about it until I received a email from Mr Everett, saying, “What do we do about this?” And I found out that the – from that that a part of his funding from the bank was to have that lot cut off. ... I don’t believe it was anything to do with the subdivisional side of it until such a time as the titles were to be, basically, in the Council and the job was finished.”³²⁹

The reference to an email in that testimony was not specific but was likely intended to be a reference to the email of 21 September 2014. This fits a chronology outlined in a memorandum dated 17 August 2015 by Mr Hopkins of Pozzi Surveyors, setting out the chronology of their role. That memorandum describes how in August 2014

³²⁰ Ex 19.

³²¹ Ex 73.

³²² T8-20-21.

³²³ T3-41 L27.

³²⁴ T3-39 L35, T3-41 LL14-22.

³²⁵ T3-39 L26.

³²⁶ Ex 35.

³²⁷ Ex 35.

³²⁸ T4-10 L23.

³²⁹ T4-10 LL11-16.

Mr Cheshire had approached Pozzi Surveyors to carry out the boundary survey for Riverviews Estate and soon afterwards had advised that the excision of lot 77 would be the priority.³³⁰

- [246] Mr Everett agreed in cross-examination that the first occasion he raised the topic of lot 77 was around the same time as the settlement of lot one in August 2014.³³¹ Curiously, he rejected the suggestion he had requested Mr Cheshire to organise a surveyor for that purpose³³² although he acknowledged he subsequently paid via his accountant for the cost of the surveying work performed.³³³
- [247] On 26 September 2014 Barry Cheshire emailed Mark Everett a number of emails. According to Mr Everett's testimony this occurred after he complained to Mr Cheshire about not being kept informed of what was going on with the development and Mr Cheshire said he would send everything through.³³⁴ One of the emails sent on 26 September was a copy of an email to Cheshire Contractors from Evan Yelavich of RPS.³³⁵ Mr Cheshire had used RPS in relation to some of the town planning aspects of phase two,³³⁶ apparently including securing HSC's amended decision notice of 22 July 2014 approving development permits for reconfiguring a lot and material change of use.³³⁷ The email of 26 September 2014 related to RPS's proposals on how to persuade Council to approve an amended development proposal.³³⁸ Barry Cheshire agreed Cheshire Contractors paid RPS to be doing this "under instruction from Mr Everett" who could not pay for it.³³⁹ This is further powerful evidence that Cheshire Contractors was, by this stage, an active player in advancing the development, not just a firm contracted to perform works for money.
- [248] Also on 26 September 2014, at the same time as the above email was sent, Barry Cheshire emailed to Mark Everett an email internal to Cheshire Contractors of 30 January 2014, in which Daniel Spencer wrote:
- "Jobs set up as follows:
- RVE10114 – River Views Estate subdivision – construction of the development
 - RVE20114 – River Views Estate project management – project management, marketing, town planning, engineering, etc anything not associated with construction of the project".³⁴⁰
- [249] According to Barry Cheshire, this was a "normal costing program we use for every job we do".³⁴¹ Clinton Cheshire testified he was told to split the job administration

³³⁰ Ex 11.
³³¹ T8-83 L46.
³³² T8-84 L12.
³³³ T8-84 L15.
³³⁴ T7-45 L17.
³³⁵ Ex 28.
³³⁶ T3-54 L36; see also, eg, Ex 59.
³³⁷ Ex 1 Tab 6 p 35.
³³⁸ Ex 28.
³³⁹ T3-23 LL7-13.
³⁴⁰ Ex 29.
³⁴¹ T3-24 L3, T4-9 L30.

like that.³⁴² Such a split suggests Cheshire Contractors had not been approaching phase two in the capacity of a mere contractor engaged to construct works.

- [250] In cross-examination, Barry Cheshire agreed that for phase two Cheshire Contractors took on the role of project manager but said that was only for construction.³⁴³ He conceded that he had asked LCJ to organise the various consultants so that Cheshire Contractors could obtain an operational works permit.³⁴⁴ He also explained Cheshire Contractors had engaged LCJ Engineers on the basis they would be the quickest and because Mr Everett had not paid them for their earlier work.³⁴⁵ An undated Bill of Quantities, apparently relating to phase two by LCJ, was entitled:

“Riverviews Estate
For Cheshire Contractors Pty Ltd
Bill of Quantities”³⁴⁶ (emphasis added)

This is further evidence of the extent to which, in contrast to the phase one works, Cheshire Contractors was actively involved in advancing the property development project during the time of the phase two works.

- [251] On 7 October 2014 Peter Ellis of LCJ Engineers emailed Barry Cheshire about planning site inspections and seeking a “construction program” so LCJ could arrange inspections at “hold/witness points”, listing those points as including “pipes prior to backfill” and “proof roll of sub base”.³⁴⁷
- [252] In cross-examination, Barry Cheshire was obviously reluctant to concede that since Cheshire Contractors was both directing and conducting the works, there was no room for a superintendent. He claimed they still needed a superintendent to deal with the principal and the Council, and that Cheshire Contractors was not qualified to be and did not have the necessary insurance to be a superintendent.³⁴⁸ It is noteworthy that LCJ apparently continued to have a role as the engineers in phase two. For example, in the operational works permit issued by HSC on 18 October 2014 the applicant for the permit was described as LCJ Engineers.³⁴⁹
- [253] On 13 October 2014 Barry Cheshire emailed Mark Everett offering his thoughts on potential sale prices for lot 77.³⁵⁰ Mr Cheshire explained of this email, “It was a suggestion of mine...so I could get paid”.³⁵¹ Mr Everett’s recollection was that the email followed him seeking Mr Cheshire’s advice on how to price lot 77.³⁵² In any event, that email, like so much of what occurred in 2014, is inconsistent with Cheshire Contractors merely performing work for payment.

³⁴² T1-83 L5.

³⁴³ T3-7 L5.

³⁴⁴ T3-7 L17.

³⁴⁵ T2-80 L27 – T2-81 L3.

³⁴⁶ Ex 1 Vol 1 Tab 9 p 12.

³⁴⁷ Ex 26.1.

³⁴⁸ T3-7 LL20-42.

³⁴⁹ Ex 1 Vol 1 Tab 7 p 49.

³⁵⁰ Ex 31 (also Ex 63).

³⁵¹ T3-28 L17.

³⁵² T7-63 L31.

An operational works permit issues in the midst of works

- [254] HSC, by correspondence dated 18 October 2014 addressed to Peter Ellis of LCJ Engineers, granted an operational works permit.³⁵³ By this time works were already underway on site, and had been since early August.
- [255] It remains a mystery why Cheshire Contractors took the risk of lurching so prematurely into works, not only without waiting to reach an agreement with Mr Everett but also without waiting for the operational works permit to issue.

The joint venture documents are not finalised

- [256] There had still been no completion of any joint venture negotiations by the time of issue of the operational works permit, notwithstanding that the phase two works on site were well advanced.
- [257] On 16 October 2014 Mark Everett emailed Barry Cheshire seeking a copy of the dot points he had provided in his email to Mark Everett's solicitor Peter Elliott of 12 August 2014.³⁵⁴ Mr Everett acknowledged in that email that he probably should have asked for the dot points "way before now", consistent with the reality, which Mr Everett was curiously reluctant to concede in cross-examination, that no joint venture agreement had been finalised.³⁵⁵ Mr Everett received a response and, on his account, became concerned that the proposed joint venture was weighted heavily towards Cheshire Contractors.³⁵⁶ Mr Everett enlisted the assistance of his accountant in relation to the proposed joint venture.³⁵⁷
- [258] On 11 November Mr Everett emailed Mr Cheshire a copy of the most recent draft joint venture agreement.³⁵⁸ On 12 November 2014 Robert Carey, Mark Everett's accountant, emailed Mr Cheshire, saying, inter alia:

"I had a meeting with Mark yesterday to discuss the Riverviews Estate joint venture arrangement. I have also had an opportunity to review the Joint Venture Deed prepared by Peter Elliott (lawyer).

There are a number of matters in the Deed that require some adjustments or amendments and Peter Elliott has forward to me a copy of the draft agreement in Word format so that I can provide my input in a "marked up" version. The following information is also required for the JV Deed: ...

6. Under the heading "Development costs", there is an item called "Interest"!! Can you please advise specifically what interest that this refers to (JV borrowings, existing borrowings of the owner, new JV borrowings!!)

³⁵³ Ex 1 Vol 1 Tab 7 p 49.

³⁵⁴ Ex 20.

³⁵⁵ Eg T8-23 L14.

³⁵⁶ T7-47 L9, T7-47 L17, T7-48 L44, T7-49 L4.

³⁵⁷ Ex 74.

³⁵⁸ Ex 21.

7. Would you kindly forward the most recent development cost, advertising and marketing estimates schedule for the initial stage 1 of 31 lots.

8. Please forward a copy of the Developer's Public Risk insurance policy as outlined on the proposed agreement at clause 5(ii)(b).

9. Both the Developer and owner have independently paid costs towards the JV which will need to be reconciled. ...³⁵⁹

[259] Mr Cheshire emailed a response, at a time when he evidently did not realise a copy of the draft had been emailed to him the day before. He wrote, inter alia:

"Thanks for your email.

I find it all very interesting but I have never received a copy of the draft JV so really have no idea of what we are talking about.

Peter Elliott asked for some dot points to prepare the JV which I supplied about 3 months ago on the 12/08/14.

Mark did not want to be involved at that stage so I sent what I thought was relevant.

I did read the draft at Mark's house some time back but don't recall all of the details. ...

I realise this JV should have been in place before any work started on the development, but due to time and financial restraint issues by the NAB it was necessary for Cheshire to expend considerable money and work to get to a position to enable land sales before certain time lines were reached. ...³⁶⁰ (emphasis added)

[260] The following exchange occurred in cross-examination, after it was highlighted Mr Cheshire had said in the above email that he realised the joint venture should have been in place before any work started:

"What you're referring to there is you were saying that you should have had a written joint venture agreement in place before the work started?--- Should have had an agreement in place.

Well, just to make it clear, I'm suggesting to you that you're not suggesting there wasn't an agreement. There was an agreement, but what you should have had was a written agreement?--- Sorry, there was no agreement, but we should have had a written agreement."³⁶¹

[261] Mr Cheshire's final answer in the above exchange was a concession of the obvious - Cheshire Contractors' work on phase two had been undertaken without any agreement being in place.

[262] Mr Cheshire rejected the suggestion there had been a joint venture in contemplation before he started work because Mr Everett did not otherwise have the money or

³⁵⁹ Ex 40.

³⁶⁰ Ex 22.1.

³⁶¹ T3-37 LL1-8.

financial resources to pay for the works.³⁶² This prompted the following exchange in cross-examination of Mr Cheshire:

“Where was he going to get the money from?--- If we got the subdivision to a stage where he could get people on blocks and get sales of the blocks he would pay us out of the sales of the blocks, and up until a week before this I think he was – still had potential buyers visiting the site for him to sell the site for them, and he also had a JV deal he was looking at with some – Devine and someone else, I think, just a – I don’t know. Might have been a month before this.”³⁶³ (The reference in that answer to “this” was to his email of 12 November 2014, Ex 22.1.)

- [263] Once again, such evidence affirms Cheshire Contractors’ involvement in phase two was speculatively premised on the development succeeding and sales paying for the work performed.
- [264] Later on 12 November there were email exchanges between Robert Carey and Barry Cheshire by which a draft Joint Venture agreement was forwarded by Mr Carey and it was agreed there was a need, as Mr Cheshire put it, to meet “to quantify and document contributions and future commitments to the JV”.³⁶⁴
- [265] On 17 November 2014, the last day of work recorded in the timesheets, Barry Cheshire emailed Robert Carey and Mark Everett a number of tracked changes to the draft joint venture agreement.³⁶⁵

Cheshire walks out

- [266] Later, on Monday 17 November 2014, after the above email, there was a meeting between Barry Cheshire and Mark Everett, and perhaps Mr Carey. On Barry Cheshire’s account, after the meeting started Mark Everett said, “You realise this joint venture’s only for 31 lots, not for the entire subdivision” to which Barry Cheshire responded, “If that’s the case, well, I’m no longer interested” and he walked out of the meeting. He testified his reaction was because a venture involving only 31 lots would only cover costs, giving no margin and meaning there was “no point in being there”.³⁶⁶
- [267] On Mark Everett’s account of what occurred on the 17th, he was not satisfied with the changes Mr Cheshire had suggested to the draft joint venture agreement including, on his recollection, a replacement of a reference to mortgage with a reference to a lien.³⁶⁷ Mr Everett testified:
- “I was getting crooked I suppose and I said to him, “Look, this is not fair what is written here and we’ve got to try and sort something out”. And as far as the mortgage or lien is concerned I can’t do that

³⁶² T3-37 L21.

³⁶³ T3-37 LL23-28.

³⁶⁴ Ex 40 (also Ex 75), Ex 76.

³⁶⁵ Ex 22.2.

³⁶⁶ T2-74 LL1-13.

³⁶⁷ T7-49 L25.

because it's not what is done in these sorts of arrangement where someone half finishes a road. ... I was really no better off than what I was before, especially after Mr Cheshire said the work he done was only temporary. And I said, "Look, let's just – I can't do it. Why don't you just buy the place?" and Mr Cheshire said, "We don't want it", and I said, "Well, just do stage 1 and, you know, do what you want to do", and he says not enough money in it and I said, well, tell me what I have to reduce the price of the land stage 1 to to make it viable for you, but before you do that I'm going to ask you to redo your prices on the roadworks and the civil works. At that stage there was four prices floating around. And he said, "I'm not going to redo my prices so you can show them to everyone else and get it done cheaper". And Mr Cheshire got pretty cranky and then I shut down."³⁶⁸

[268] Mr Everett acknowledged in his evidence he had at this meeting proposed that the joint venture only apply to the first stage rather than to the other stages.³⁶⁹

[269] On Wednesday, 19 November 2014 Mr Cheshire emailed Mr Carey saying, *inter alia*:

"Following our meeting on Monday, Mark requested another meeting with me at his house on Tuesday. This was to discuss costs involved in stage 1.

You may have gathered at our Monday meeting that I was a little surprised when told the JV was applicable to the 31 lots on stage 1 only.

As I stated at the meeting on Monday there is very little profit in stage 1 as was planned at the outset of the project design and certainly not enough to entertain a JV with the current exposure Cheshire Contractors have with this venture. ...

I have attached the rough outline of points to be included in the JV which I sent to Peter Elliott that clearly shows the 81 lots being included in the JV and as I have mentioned before Mark did not want any input at this stage although we had discussed the high upfront costs of this project.

If the following stages, 2, 3 and 4 were not included:

- How would Cheshire Contractors be compensated for the complete design and approval of the remaining 50 lots?
- What would prevent Everett from developing stages 2, 3 and 4 before stage 1 was sold and being in direct competition?
- Why would the JV on stage 1 pay for the upgraded road requirements to service future stages?
- Why would the JV on stage 1 pay for the upgraded Ergon requirements to service future stages?

³⁶⁸ T7-49 LL29-45.

³⁶⁹ T7-50 L2.

- Who would pay for the highway upgrade?

The Joint Venture draft points were emailed to Peter Elliott on the 12/8/14 which is one week after we started work on the construction work on the 5/8/14. The works were commenced before the revised operational works permit was issued [in] an effort to obtain presales within the timeframe as allocated by the NAB.

I therefore find it unacceptable that Mark has held back the JV agreement until the 12/11/14 and that on Monday 17/11/14 informed me that he now considers the JV is only applicable to stage 1.

I am willing to consider proposals that you may have with the JV attached to stage 1 only but this would only be considered if it included a guaranteed return appropriate to the costs and exposure including interest for the unsecured debts currently owed by Everett to Cheshire Contractors in 2011.

Failing an agreement we would have no option apart from taking the necessary steps to receive immediate payment for the current debt.”³⁷⁰

[270] As with Mr Cheshire’s email of 12 November 2014 this email also alluded to the phase two works having commenced in response to some financial pressure from the NAB. Whereas the email of 12 November 2014 noted the works had commenced before a JV was in place, the email of 19 November 2014 noted the works had commenced before the revised operational works permit had been issued. These hindsight acknowledgments are consistent with Cheshire Contractors having embarked upon the phase two works prematurely.

[271] The content of an email by Barry Cheshire to Robert Carey of 24 November 2014 was emblematic of the reality there had actually been no agreement. It noted the absence of response since 19 November 2014 regarding the proposed joint venture agreement and then said:

“As you are aware the Cheshire Group have a considerable investment in the Riverviews Estate project and because of this investment we are anxious to enter a suitable agreement between the parties involved.

As it is over 3 months since the draft points were forwarded to Everett’s lawyer, I believe there has been ample time to produce a joint Venture Agreement that suits all parties.

If I have not received a suitable proposal regarding these issues by COB at the end of this week ... we shall issue all appropriate invoices and pursue payment by whatever means necessary. ...”³⁷¹
(emphasis added)

³⁷⁰ Ex 40 p 99.

³⁷¹ Ex 41 p 101.

- [272] On 1 December 2014 Barry Cheshire emailed Mark Everett and Robert Carey, referring to there having been “no attempt to sort out the JVA since I sent a draft dot point proposal to Mark’s solicitor, Peter Elliott in August”.³⁷² The email advised:
 “As a result I hereby withdraw our offer of a joint venture agreement and enclose our accounts for works performed less credits due. ... Please find attached invoices.”³⁷³
- [273] The email attached copies of all of the phase one invoices and four of the phase two invoices, namely invoices #688 of 1 October 2014, #701 of 26 November 2014, #702 of 26 November 2014 and #703 of 26 November 2014, all of which were for work performed by Cheshire Contractors at Riverviews Estate.³⁷⁴
- [274] On 3 December 2014 email exchanges between Mr Everett and his accountant’s bookkeeper, Ms Brown, show they were already embarking upon scrutinising information in support of the invoices. One such email by Mr Everett noted:
 “[W]e have only seen construction invoices, I am predicting management ones to follow.....just thinking.”³⁷⁵

Payments contemplated but not made

- [275] On 6 January 2015 Mr Cheshire emailed Mr Carey advising, inter alia:
 “I have accounts from the surveyor in relation to subdividing Mark’s house on Lot 77 into a separate title.
 I have paid \$38,000 and expect a further \$26,500 in accounts to complete this exercise. Some of this survey overlaps onto the subdivision.
 Upon payment of the amount of \$64,500 incl GST I will release all documents etc related to the work performed by G Pozzi Surveyors.”³⁷⁶

It was suggested to Mr Cheshire in cross-examination that his expectation of a further \$26,500 in accounts to complete the exercise was because it had not been completed and the surveyor was still working, to which Mr Cheshire responded, “It was completed, but they hadn’t sent the final account in.”³⁷⁷

- [276] On 23 January 2015 Mark Everett emailed Barry Cheshire, referring to Barry Cheshire having terminated the “proposed joint venture” on 1 December 2014 and notifying expenditure beyond the date of termination “will be at your cost”. The email also stated Mark Everett would be paying “costs incurred with the subdivision to 1 December 2014”, once verified by an accountant and bookkeeper.³⁷⁸

372 Ex 23.
 373 Ex 23.
 374 Ex 23.
 375 Ex 104.
 376 Ex 36.
 377 T3-43 L9.
 378 Ex 24.

- [277] By the time of the above email exchanges in December and January, the phase two works had ceased.³⁷⁹ As mentioned above, the timesheets show the last work was on 17 November 2014.
- [278] On 24 January 2015 Robert Carey emailed Barry Cheshire seeking access to information to allow verification of costs through to 1 December 2014.³⁸⁰
- [279] On 4 March 2015 \$62,588 was paid to Cheshire Contractors to pay for surveyors fees on Mr Everett's behalf by his accountant Mr Carey.
- [280] On 10 March 2015 Ms Brown, bookkeeper to Mr Everett's accountant Mr Carey, emailed Mr Carey and Mr Everett, writing:
 "The current "official" outstanding amount to Cheshire is \$815K, however that includes "project management" fees of \$118K, which are yet to be confirmed as legitimate. It has also included the \$62K surveyor invoice, which you have now settled. The other invoices charged, appear to be accurate, based on the timesheets that Cheshire's have provided. I'm waiting on Clinton to revise the accounts and send an adjusted final total, however based on above, the amount outstanding is \$635K."³⁸¹ (emphasis added)
- [281] Mr Everett accepted Ms Brown's role had included checking through the invoices and timesheets to verify what was outstanding.³⁸²
- [282] On 26 March 2015 Barry Cheshire emailed Robert Carey requesting immediate payment of \$1,181,236.17, being the amount owing (seemingly calculated at \$919,389.50 as at that time plus interest).³⁸³
- [283] On 30 March 2015 Robert Carey emailed Barry Cheshire, referring to an attempt underway to have the project refinanced so as to include the outstanding development costs to date.³⁸⁴
- [284] On 1 April 2015 Robert Carey emailed Barry Cheshire, explaining a refinance application had been lodged and that, once approved, Cheshire Contractors' accounts would be settled. Barry Cheshire responded giving them two weeks' grace, but no payments were made.³⁸⁵

Everett not liable for phase two

- [285] In light of the evidence reviewed above I find there was no agreement reached, whether expressly or impliedly, regarding the essential contractual element of consideration in respect of Cheshire Contractors' performance of the phase two

³⁷⁹ T2-75 L35.

³⁸⁰ Ex 25.

³⁸¹ Ex 105.

³⁸² T9-39 L19, T9-40 LL1-7.

³⁸³ Ex 25.

³⁸⁴ Ex 25.

³⁸⁵ Ex 25.

works or work related thereto. With the acquiescent approval of Mr Everett, Cheshire Contractors appear to have embarked entirely speculatively upon performing such work in the hope that agreement regarding consideration for the work would eventuate. It never did. The fact that works were embarked upon does not mean agreement had been reached. In some cases, such a fact might support that inference, but not in this case, not where there is such an abundance of evidence to the contrary.

- [286] Further the fact that some payment was actually made by Mr Everett to Cheshire Contractors in respect of the phase two works does not alter my view there was no contract. Mr Everett would not be the first person to pay money out of a sense of moral obligation, for instance a sense of otherwise being unjustly enriched. His property did after all benefit from the works performed.
- [287] To remove doubt, I also reject the notion that there was a joint venture agreement or alternatively the agreement pleaded by Mr Everett as the “Riverviews Estate Contract. The latter pleading built upon what I find was a stand-alone agreement regarding the sale of lot one, to link it in as part of an agreement that Cheshire Contractors would perform the phase two works for payment in accordance with the budget. In fact there was no agreement reached regarding payment for performance of the works. The so-called Riverviews Estate Contract did not occur.
- [288] As to the alleged joint venture agreement, the term “joint venture” in this context is nothing more than a badge to describe an agreement by which, if the agreement was reached, the parties would each contribute to the progression of the property development and would share in the profits of the development after deduction of funds to recompense them for their contributions. The fact that the badge name was bandied about between the parties does not mean there was an agreement reached. As was confirmed by the High Court in *John Alexander’s Clubs v White City*,³⁸⁶ the name “joint venture” ascribes no legal consequence and what must be considered is the detail of what the parties have agreed and done.
- [289] It is unnecessary to consider the categories of potential agreement discussed in *Masters v Cameron*,³⁸⁷ for this is was not a case in which the parties agreed upon contractual terms not yet dealt with by a formal contract. It is clear they were unable to reach agreement on terms in the first place (Even if that conclusion is incorrect and it can be said they reached an agreement of sorts to be formalised, such agreement would in any event be in the unbinding third category discussed in *Masters v Cameron*, namely one where no bargain is to be concluded without formalising a formal contract).
- [290] The conclusion there was no agreement is fatal to Cheshire Contractors’ claim in respect of the outstanding payments invoiced in phase two. That is because the claim is premised on proof of a further oral contract which it failed to prove. None of this means works of some value were not provided during phase two but I am not here concerned with a quantum meruit or unjust enrichment claim.

³⁸⁶ (2010) 241 CLR 1, 21.

³⁸⁷ (1954) 91 CLR 353, 360.

- [291] Because of the failure of this aspect of Cheshire Contractors' claim it is unnecessary to consider Mr Everett's allegations of Cheshire Contractors' compliance breaches and breach of contract for this aspect of the claim.

PART E – DETERMINATION OF AWARD AND OR SET OFF.

Everett's offsetting claim

- [292] The pleaded offsets in respect of phase one, premised on compliance breaches, have failed in light of my findings regarding those alleged breaches.
- [293] Mr Everett's offsetting claim is otherwise made on the basis there was a breach of the joint venture agreement.³⁸⁸ There was no joint venture agreement. The foundation for the offsetting claim fails at the threshold.

December 2011 promise legal binding?

- [294] It will be recalled that even if the December 2011 promise was legal binding it was not of indefinite duration and is no longer a basis for Mr Everett to avoid liability for paying for phase one. Nonetheless it remains necessary to determine whether it was legal binding at all, for that likely impacts upon when interest ought be calculated from.
- [295] A number of arguments were advanced by Mr Everett. One was that the promise was made when the contract was still in the executory phase because Cheshire Contractors had agreed to undertake additional works requested by Mr Everett. I reject that. The agreement to perform additional works requested by Mr Everett was not like an ongoing retainer. It only related to the performance of works during the phase one works. The phase one works had been completed by the time of the December 2011 promise.
- [296] Another argument advanced was premised upon the invoices not having been rendered by the time of the December 2011 promise but I have accepted Cheshire Contractors' position on that topic. It is true that the last of the phase one invoices remained to be issued at that time but that has no material bearing on the argument advanced.
- [297] Another argument advanced was that the December 2011 promise was binding as a contract. How could that be? The rule in *Foakes v Beer*,³⁸⁹ that the consideration for discharging an indebtedness cannot consist of a promise to pay later, remains good law in Queensland.³⁹⁰ What consideration could there have been? Two fanciful purported forms of consideration were contended for.³⁹¹ One was supposedly avoiding the "disbenefit" of forcing a failure of Mr Everett's liquidity and consequent incapacity to pay all creditors including Cheshire Contractors by Mr

³⁸⁸ Defendant's amended written submissions [175].

³⁸⁹ (1884) 9 AC 605

³⁹⁰ *Amos v Citibank Ltd* [1996] QCA 129.

³⁹¹ Defendant's amended written submissions [30].

Everett being given time to continue the development and raise enough money to pay. This falsely frames what is no more than a promise to pay later as a benefit because it is better than the option of not now being paid much of an existing debt. It is not consideration. The other argument is that, if payment were not pressed for, Mr Everett could further pursue the development, thus giving Cheshire Contractors “the opportunity to engage in further potentially profitable work”. It is sufficient to dispense with this argument by observing that it lacks evidentiary foundation – there was no holding out of an opportunity for further work at the time the promise was solicited and made.

[298] Having dispensed with these drossy distractions I finally come to a more substantive argument – that the promise and events which followed it gave rise to a promissory estoppel in equity. The equitable doctrine of promissory estoppel was articulated in *Hughes v Metropolitan Railway Co*³⁹² by Lord Cairns LC thus:

“... if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.”

[299] The doctrine, which has been accepted in Australia,³⁹³ is a safeguard against a party insisting on the party’s strict legal rights when it would be unjust for them to be enforced in light of what has taken place in reliance upon the promise.³⁹⁴ In observations approved by the High Court,³⁹⁵ McPherson J in *Riches v Hogben*³⁹⁶ explained the crux of the doctrine:

“It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise.”

[300] Setting to one side the events of 2014, then long in the future, the change in Mr Everett’s position, said to have occurred in reliance upon the December 2011 promise, is his “entry into further obligations to the NAB”, allegedly making it impossible for him “to return to the position anterior to the promise of time to pay”.³⁹⁷

[301] Consideration of what followed has a hypothetical flavour in that it is not suggested Cheshire Contractors pressed for payment during the period of the promise’s currency, that is, prior to 1 January 2014, although by late 2013 it was certainly pressing in an active way for the project to be advanced. The hypothetical enquiry is whether equity would have prevented them from doing so. If it would have then the

³⁹² (1877) 2 AC 439, 448.

³⁹³ *Legione v Hateley* (1983) 152 CLR 406

³⁹⁴ *Combe v Combe* (1951) 2 KB 215, 219.

³⁹⁵ *Giumelli v Giumelli* (1999) 196 CLR 101, 121.

³⁹⁶ [1985] 2 Qd R 292, 300-301.

³⁹⁷ Defendant’s amended written submission [44].

award of interest on the amount owing probably ought not claw back to that period and ought only commence from 1 January 2014, a topic to which I will return.

[302] It is uncontroversial that what followed the making of the promise urged by the NAB was the NAB continued Mr Everett's existing loan facility. Mr Everett testified the bank also approved the advancing of "a few hundred thousand dollars" to help with holding costs and maintenance.

[303] In effect, the December 2011 promise helped Mr Everett to "keep the dream alive" of holding onto his property and developing it. The following exchange in cross-examination about the email of 20 December 2011 illustrates the point:

"Once you've received that email from Mr Cheshire and you forwarded it onto the bank, your evidence yesterday was that you then got going to go to the market to try to get some sales?--- That's correct.

But the – what I'm putting to you – the proposition that I'm asking you to consider is that you didn't do anything different after getting that email than you would have done in any event. You did the same thing as you were always going to do anyway, isn't – that's true, isn't it?--- I suppose you're right, yeah."³⁹⁸ (emphasis added)

[304] That the December 2011 promise assisted Mr Everett does not however mean he did not change his position on the strength of the promise. The evidence is not entirely clear on the "but for" scenario, but it appears likely, absent the promise, that the bank would not have continued its loan facility or at least would have confined it. At one level that would have been to Mr Everett's disadvantage but at another it would have meant he did not extend his level of indebtedness to the bank. While acting on the promise was helpful to him to keep his dream alive, it also meant he incurred a greater level of debt to the bank than he otherwise likely would have, had the promise not been made.

[305] In weighing these considerations, it is important to bear in mind the promise had a direct causal connection with Mr Everett's financial position vis a vis his bank. Not without some hesitation, I conclude against the above background it would have been inequitable to permit Cheshire Contractors to exercise its legal right to payment until the elapsing of a sufficient period of time within which to advance the project to the point of being able to raise money to pay for the phase one works from funds from presales or sales. I have found as a matter of fact that period had passed by 1 January 2014. Coalescing with that finding I conclude by reason of the protection equity would have given Mr Everett on account of him acting upon the December 2011 promise that Cheshire Contractors would have been estopped from seeking payment for the phase one works prior to, and only prior to, 1 January 2014.

[306] A final argument advanced by Mr Everett is that a form of estoppel by conduct or convention arose from the combination of the December 2011 promise and the 2014 sale of lot one. The argument as elaborated upon was that the promise became irrevocable with the arrangement by which there was a credit of \$220,000 given as

³⁹⁸ T9-2 LL34-43.

part of the sale of lot one. There is no doubt that Mr Everett changed his position in entering into the 2014 sale and allowing the crediting of the deposit against his debt to Cheshire Contractors. But that has nothing to do with the 2011 promise. That promise, as Mr Everett would well have appreciated, was only a promise to postpone pressing for payment for a sufficient period, which period I have found had ended by 1 January 2014. I additionally note the fact that Mr Everett entered an arrangement later in 2014 by which he sold property at a fair market price and a payment would be credited to reduce his indebtedness to Cheshire Contractors is entirely consistent with him no longer acting on the strength of the December 2011 promise.

- [307] There is no evidence supporting the implication of some new or varied promise that by the arrangements for the sale of lot one and the crediting of the deposit against the existing debt, Cheshire Contractors would not pursue payment of the balance of the phase one debt. Perhaps that might have been a clause to which Mr Everett could have aspired for a joint venture agreement but, as I have already found, no such agreement was reached.
- [308] The final matter to consider is the significance of the finding that the December 2011 promise was only good as a protection against demand for payment before 1 January 2014. Does it mean that Cheshire Contractors' entitlement to interest on its award for the outstanding phase one amount dates from the initial time of non-payment of invoices when due or does it date from 1 January 2014?
- [309] The evidence and submissions were largely silent on this issue. One can conceive of cogent arguments either way but they are not well informed by evidence. The onus in this context was on the plaintiff to have satisfied me both that interest was payable upon unpaid invoices once past their due date and that the December 2011 promise did not relieve Mr Everett of the burden of interest accruing upon the debt during the currency of the promise not to seek payment of the debt. Given the dearth of relevant evidence I am not so satisfied, with the consequence the outcome should favour the party who does not carry the onus.
- [310] The award in respect of the amount outstanding on the phase one works, of \$350,970.59 should therefore attract interest from 1 January 2014 to today, an amount of \$99,523. This gives rise to a judgment sum for that component of the claim – the only component to have succeeded – of \$450,493.59.

Orders

- [311] It will be necessary to hear the parties as to costs unless they are agreed.
- [312] My orders are:
1. Judgment for the plaintiff in the amount of \$450,493.59.
 2. I will hear the parties as to costs if not agreed in the meantime at 9.15 a.m. on 24 October 2018.

