SUPREME COURT OF QUEENSLAND

CITATION:	*Gallop Reserve Pty Ltd v Matton Developments Pty Ltd & Anor* [2019] QSC 113
PARTIES:	**GALLOP RESERVE PTY LTD** ACN 010 759 421 (plaintiff) **v** **MATTON DEVELOPMENTS PTY LTD** ACN 100 028 340 (first defendant) AND **STEPHEN ROSS CLARK** (second defendant)
FILE NO/S:	SC No 6522/17
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	13 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 – 23 November 2018
JUDGE:	Holmes CJ
ORDER:	**1. The balance of the funds paid into court by the solicitors for the first defendant in February 2018 is to be paid, with any accrued interest, to the plaintiff.** **2. It is declared that:** **(a) The litigation funding agreement executed on 12 March 2012, and the Deed of Variation by which it was ratified, are valid and effective;** **(b) the Continuation Deed is valid and effective;** **(c) the plaintiff is entitled to apply monies received from the proceeds of the first defendant's settlement with CGU Limited to discharge amounts owing to it in respect of the litigation funding agreement, as varied, in priority to amounts owed in relation to the loan agreement between the first defendant and Westpac Banking Corporation.** **3. The second defendant's counterclaim is dismissed.**
	CORPORATIONS – INTERNAL ADMINISTRATION OF CORPORATIONS – COMPANY OFFICERS – APPOINTMENT OF COMPANY DIRECTORS –

CONSEQUENCE OF DEFECTS IN APPOINTMENT OF DIRECTORS – where the plaintiff entered into an agreement to provide litigation funding to the first defendant, one of whose two directors was the second defendant – where the litigation funding agreement was invalidly executed by the first defendant's other director, Kenward – where Kenward purported to hold a directors' meeting without the second defendant and appointed a third director of the first defendant, despite the absence of a quorum – where Kenward and the director purportedly appointed signed a Deed of Variation to ratify the litigation funding agreement and a power of attorney in favour of Kenward – whether the absence of a quorum for the purported appointment of the third director was a mere procedural irregularity automatically validated by s 1322(2) of the *Corporations Act* – whether the conditions in 1322(6) of the *Corporations Act* applied so that this Court should declare under s 1322(4) of that Act that the appointment of the purported director was not invalid – whether the plaintiff was entitled by virtue of s 128(2) and s 129 of the *Corporations Act* to assume that the actions of the director purportedly appointed were performed with authority and that the power of attorney and Deed were duly executed

ESTOPPEL – ESTOPPEL BY CONDUCT – RELIANCE – where the plaintiff contends that the first defendant represented through its solicitors' production of various agreements and Kenward's execution of a Deed pursuant to a power of attorney that Kenward had authority to make decisions on its behalf and that the litigation funding agreement was binding on it – where the plaintiff contends that the second defendant by failing to take any steps to revoke Kenward's power of attorney represented that he had authority to act on behalf of the first defendant – where the plaintiff contends that the first and second defendants' representations were designed to cause the plaintiff to advance funds or continue to advance funds towards the first defendant's litigation – where the plaintiff contends that it relied on the representations – whether the first and second defendants should be estopped from denying Kenward's authority to act on behalf of the first defendant

GUARANTEE AND INDEMNITY – ASSIGNMENT – where the plaintiff entered into an agreement to provide litigation funding to the first defendant – where the litigation settled with a substantial payment to the first defendant – where an earlier debt owed by the first defendant to a bank was assigned by deed to the plaintiff – where the plaintiff purported to enter an agreement with Kenward on behalf of the first defendant to give priority to recovery of the litigation funding debt from the proceeds of the litigation – whether the priority agreement was valid – whether the Deed of Assignment entitled the plaintiff in

any event to alter the order of recovery

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – where the plaintiff entered into an agreement to provide litigation funding to the first defendant – where the litigation settled with a substantial payment to the first defendant – where an earlier debt owed by the first defendant to a bank was assigned by deed to the plaintiff – where one director of the first defendant, Kenward, executed the Deed of Assignment on its behalf pursuant to a power of attorney – whether the plaintiff engaged in misleading and deceptive conduct or unconscionable conduct in relation to the execution of the Deed of Assignment

CORPORATIONS – where the second defendant alleges that the plaintiff knowingly assisted Kenward in breaches of fiduciary duties under ss 180 and 182–184 of the *Corporations Act* – where the second defendant alleges that the plaintiff thereby acquired rights under the Deed of Assignment and litigation funding agreement – where the second defendant contends that the plaintiff should therefore be required to return funds received under the litigation funding agreement to the first defendant whether there was any breach of fiduciary duty by Kenward – whether the plaintiff assisted in any fraudulent design to obtain benefits for it

CORPORATIONS – CHARGES – SECURITY INTERESTS – where the plaintiff acquired rights under a charge which the first defendant had granted over its assets to secure its obligations under a loan agreement with a bank – where the second defendant had guaranteed the first defendant's obligations under the loan agreement, leading to default judgment against him – where the charge was a 'security interest' as defined by s 12(1) of the *Personal Property Securities Act* – where the second defendant alleges that the plaintiff did not exercise its rights to recover payment under the charge in a commercially reasonable manner — whether the plaintiff's attempt to enforce the default judgment against the second defendant before recourse to its rights under the charge amounts to a dishonest and commercially unreasonable exercise of rights pursuant to s 111 of the *Personal Properties Securities Act*

Australian Consumer Law (Cth)
Australian Securities and Investments Commission Act 2001 (Cth)
Competition and Consumer Act 2010 (Cth)
Corporations Act 2001 (Cth)
Personal Property Securities Act 2009 (Cth)

Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd (2013) 282 FLR 351
Barnes v Addy (1874) LR 9 Ch App 244
Caratti v Mammoth Investments (2016) 50 WAR 84
Clark v Gallop Reserve Pty Ltd [2016] QCA 146
Clark v Matton Developments Pty Ltd & Anor [2016] QSC 251
Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd (2005) 55 ACSR 185
Correa v Whittingham [2013] NSWCA 263
Farah Constructions v Say-dee Pty Ltd (2007) 230 CLR 89
Jones v Dunkel (1959) 101 CLR 298
Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266
Soyfer v Earlmaze Pty Ltd [2000] NSWSC 1068
Story v Advance Bank Australia Ltd (1993) 31 NSWLR 722
Weinstock v Beck (2013) 251 CLR 396
Westpac Banking Corporation v Clark & Ors; ex parte Gallop Reserve Pty Ltd [2015] QSC 353
Wood v Inglis (2008) 68 ASCR 420

COUNSEL: A G Reilly for the plaintiff
No appearance entered by the first defendant
Stephen Ross Clark (self-represented) as the second defendant

SOLICITORS: Ready Hocking Law for the plaintiff
No appearance entered by the first defendant
Stephen Ross Clark (self-represented) as the second defendant

[1] Having settled, after protracted litigation, an insurance claim against CGU Insurance Limited, the first defendant, Matton Developments Pty Limited, paid the proceeds into court. Some of the funds were subsequently paid out to the plaintiff, Gallop Reserve Pty Limited, whose action turns around two claims against Matton Developments: the first in respect of money lent to enable it to litigate against CGU and the second in respect of Matton Development's indebtedness under a Westpac Banking Corporation loan agreement, the rights and obligations in which were assigned to Gallop Reserve. Gallop Reserve now seeks: an order for payment to it of the funds remaining in court; declarations as to the validity and enforceability of certain deeds and agreements in relation to the litigation funding; and a declaration that it is entitled to apply already recovered funds to discharge Matton Developments' debt under the litigation funding agreement in priority to the amount which Matton Developments owes in respect of the assigned Westpac debt.

[2] Matton Developments did not defend the action (its two directors being at loggerheads), and no relief was sought against the second defendant, Stephen Clark, who is one of those directors. However, he resisted the granting of the relief as against Matton Developments, which would affect him because Westpac had obtained default judgment against him (as a guarantor) in respect of the assigned debt, and if it were not paid out, Gallop Reserve as assignee of the rights conferred by the guarantee would seek to

enforce that judgment against him. Mr Clark, who appeared for himself at the trial, sought a declaration that his liability under the default judgment had been discharged by Gallop Reserve's receipt of sufficient funds to meet the Westpac debt or an injunction restraining Gallop Reserve from enforcing it against him, on the basis of an alleged breach of the *Australian Consumer Law,* which is Schedule 2 to the *Competition and Consumer Act* 2010 (Cth).

[3] Mr Clark also sought damages against Gallop Reserve equal to the amount of any liability under the default judgment, pursuant to s 271 of the *Personal Property Securities Act* 2009 (Cth), contending that the company was required by s 111 of that Act to exercise its rights to recover the assigned debt in a "commercially reasonable manner" but it had instead through malice subordinated those rights to its entitlements under the litigation funding agreement. In addition, he alleged that Gallop Reserve acquired "money, property and benefits" by its director, Douglas Foggo, knowingly assisting the other director of Matton Developments, Mark Kenward, to breach obligations owed under ss 180 and 182-184 of the *Corporations Act* 2001 (Cth), and contended that it should be required, on *Barnes v Addy*[1] principles, to disgorge what were said to be the proceeds of those breaches.

The principal witnesses – some background

[4] To understand the context in which this litigation arises, it is necessary to set out something of the background of dealings between the three main players, Mr Clark, Mr Kenward and Mr Foggo. Mr Clark and Mr Kenward were at all material times, and still are, directors of Matton Developments. Its sole shareholder was Master Projects Group Pty Ltd, which has been deregistered; Mr Clark and Mr Kenward were the directors and only shareholders of the latter company. An ASIC search reveals that between 15 July 2007 and 28 June 2013, the sole director of Gallop Reserve was Mr Douglas Foggo, while from 15 July 2007 until December 2013 Mrs Lea Foggo (Mr Foggo's wife) was the company's secretary.

[5] In the 2000's, the three men were involved in a company called Project Realty Group (Qld) Pty Ltd, which undertook industrial building. Mr Clark and Mr Kenward were two of its three shareholders. According to an admitted allegation in the pleadings, Mr Foggo was the third, but seems more likely from evidence about steps taken in relation to the company that the share was in fact held by Gallop Reserve. In September 2007, Gallop Reserve applied for the appointment of a liquidator to Project Realty. The company had assets in the form of buildings and cash at bank, and substantial returns to its shareholders were expected. In the course of the liquidation, Mr Foggo and Mr Kenward made allegations of misappropriation against Mr Clark. The result was litigation by the liquidator which largely absorbed the funds thought to be available for distribution to the shareholders. That led to considerable animosity between Mr Clark, on the one hand, and Mr Foggo and Mr Kenward, on the other. That state of affairs was not improved by an application which Gallop Reserve brought (unsuccessfully) against Mr Clark in 2008 in the Richlands Magistrates Court in order to recover some property, and renewed in 2012, again unsuccessfully, with Mr Kenward called as a witness for the company.

The Westpac loan agreement

[1] *Barnes v Addy* (1874) LR 9 Ch App 244.

[6] To a large extent, the history of the events involving Matton Developments' litigation against CGU and its becoming indebted to Gallop Reserve can be traced through a series of tendered documents: agreements, emails, solicitors' file notes, letters and admissions in the pleadings. That history begins in 2007, when the company obtained a loan from Westpac to enable it to purchase a crane. Mr Clark, Mr Kenward and Master Projects Group Pty Ltd guaranteed Matton Developments' obligations under the loan agreement and the company granted a fixed and floating charge over its assets and a bill of sale over the crane to secure its obligations.

[7] Significantly for the purposes of this litigation, the loan agreement contained these provisions:

> 13.2 Assignment
> The Lender can transfer to someone else any Document and all or any part of any debt owing under or secured by any document without your consent.
>
> If it does, the Document will apply to the transferee as if it was the Lender.

("Document" was defined as including a loan agreement and a guarantee.)

> 13.10 Use of Money
> a) The Lender may apply any money it receives or recovers in any way in respect of money you owe, in paying whatever of the money you owe that it chooses (despite any direction to the contrary)...

[8] The idea was that the company would hire the crane out for the installation of concrete panels in industrial buildings. In 2009, however, the crane's boom collapsed, and it was badly damaged. Matton Developments made a claim on the company's insurance policy with CGU, which refused to pay. Without the income from the crane hire, Matton Developments was not able to maintain its payments under the loan agreement with Westpac, which obtained default judgments against the three guarantors, Mr Clark, Mr Kenward and Master Projects Group Pty Ltd, for the outstanding amount of the loan with interest.

The beginning of the CGU litigation and funding arrangements

[9] Mr Clark and Mr Kenward instructed a solicitor, Mr Flint, of the firm of Moray & Agnew, to bring proceedings against CGU. According to Mr Kenward, Mr Flint's advice was that Matton Development's case was strong and should be resolved within 12 months; Mr Flint confirmed in his evidence[2] that he expected an early settlement, because he saw little scope for CGU to resist the claim. An action was commenced in this Court on 1 March 2011. Moray & Agnew, not surprisingly, sought funding in advance for the continuing litigation, but Matton Developments was without income or assets. According to Mr Clark, Mr Kenward had raised as an option the appointment of a liquidator to the company. Contemplating that possibility, Mr Clark took advice from his own accountant which dissuaded him from proceeding in that way. His concern was that if the company went into liquidation, Westpac would pursue him on his guarantee, and he would be bankrupted.

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[2] Mr Flint was called as a witness by Mr Clark.

[10] Mr Clark also said that after the initial contact with Moray & Agnew, he had been advised by Project Realty's liquidator that Mr Kenward and Mr Foggo had accused him of misappropriation. That put considerable strain on his relationship with Mr Kenward. Nonetheless, he attended a meeting to try and resolve the deadlock between them. The result was that on 5 October 2011, Mr Clark and Mr Kenward executed a deed titled "Resolution Deed", drawn up by a different firm of solicitors, Rodgers Barnes & Green. By that Deed, it was acknowledged that Mr Kenward had previously contributed some funds to the conduct of the litigation, and would deposit another $5,000. Mr Clark agreed to deposit $40,000 for that purpose within seven days, and another $5,000 within five months. Further deposits were to be made by both men at prescribed intervals. The Deed provided that Moray & Agnew could obtain litigation instructions from either of them, which would be binding, except in relation to making or accepting offers of settlement. Disagreement as to any offer could be resolved by seeking counsel's opinion as to it, in which case either man could act on the basis of that opinion in accepting an offer.

[11] If Mr Kenward and Mr Clark were unable to provide further funds beyond the specified amounts for the conduct of the litigation, they would

> "…do all things necessary to obtain litigation funding from an external source agreed between [them]".

By the Deed they also agreed as to the order of priority of distribution of any settlement or award from the litigation: firstly, Westpac would be paid the amount outstanding to it, secondly, any litigation funder agreed pursuant to the Deed would be paid the amount it was due; thereafter, other payments – to any expert, to Mr Clark and Mr Kenward and to Matton Developments – were set out in order of priority.

[12] Mr Clark did not deposit the specified $40,000 because of some misfortunes of his own, involving the theft of an excavator he had planned to sell. At no stage did he provide any funds towards the conduct of the litigation. Mr Kenward borrowed $20,000 from Mr Foggo and deposited it to Moray & Agnew's trust account. By an email dated 16 October 2011, Mr Kenward asked Mr Flint to receive the money on the basis that it was to be returned if Mr Clark did not deposit his $40,000, and not, "for obvious reasons," to disclose its provision (presumably to Mr Clark). Mr Flint responded that he would treat the money as coming from Mr Kenward so that it could be transferred back at his direction. Their email exchange to that effect was copied to Mr Foggo. Also on 16 October, Mr Kenward emailed Mr Clark asking him to do one of three things: to deposit the $40,000 within two days; to sign a draft litigation funding agreement (without, apparently, any identified funder) within two days; or to have Matton Developments put into administration.

The Gallop Reserve litigation funding agreement

[13] Mr Kenward said that because Mr Clark had failed to make the deposit of $40,000 he had promised by the Resolution Deed, the CGU litigation came to a standstill. On 25 October 2011, another solicitor, Mr Rodgers from the firm of Rodgers Barnes & Green (one assumes, acting for Mr Kenward), emailed Mr Clark, proposing that if he were not able to contribute more funds, he and Mr Kenward as directors of Matton Developments pass a resolution authorising Mr Kenward to find a litigation funder prepared to provide funding subject to Westpac's priority. To avoid deadlock, he, Mr Rodgers, would

certify that the proposed agreement satisfied the resolution, upon which Mr Kenward would be authorised to sign the litigation funding agreement. Mr Clark was asked to indicate his agreement with the proposal, either by forwarding a signed copy of the email which would then be co-signed by Mr Kenward, and would form the resolution; or by arranging with Mr Kenward to hold a directors' meeting by telephone for the purposes of passing the resolution.

[14] Neither occurred, but on Mr Kenward's account, he had, at least from the time of his first borrowing from Mr Foggo to meet his commitment under the Resolution Deed, been discussing with him the possibility of litigation funding. In evidence, he said that while the two were involved together in the winding up of Project Realty in October 2011, he had told Mr Foggo about Matton Developments' lack of funds and the return a litigation funder might expect, of three times the amount advanced. Mr Foggo expressed interest. Mr Flint made a file note on 29 February 2012 which records that Mr Foggo wanted to deposit $40,000 into Moray & Agnew's trust account, apparently on a basis which would allow him to retrieve it; he expressed concern that Mr Clark

> "… would come into the picture at a later date and then challenge any lending agreement".

Mr Flint advised that this was not possible, and an alternative was discussed, of Mr Foggo paying the funds to his own solicitors who would then, on invoice, meet Moray & Agnew's fees.

[15] Mr Foggo's evidence about the timing of the funding discussions was different from that of Mr Kenward. He confirmed that he had originally lent Mr Kenward $20,000 in 2011, but said that that was the only request made at that time. In March 2012, he was asked if he (Gallop Reserve) would be prepared to fund the litigation. He attended a meeting with Mr Flint, at which he was informed about the 3-1 return available. It was expected that the litigation would cost about $180,000, and it was thought that Gallop Reserve would need to advance about $160,000. Mr Flint was, Mr Foggo said, "extremely confident" about the prospects of success. Mr Foggo (on Gallop Reserve's behalf) entered a litigation funding agreement, which was prepared by Moray & Agnew. (Mr Flint said that he had first approached one or two other litigation funders on Matton Developments' behalf, without success.) The document was executed on 12 March 2012 by Mr Kenward, as a party to it and as a director of Matton Developments, purportedly on the company's behalf. That was despite the fact that s 127(1) of the *Corporations Act* provides for execution of documents not under seal by two directors or a director and the company's secretary.

[16] Mr Kenward said he had been told he could execute the document for the company (although he did not say by whom). He conceded that he had not notified Mr Clark that Matton Developments was entering the litigation funding agreement. Mr Foggo signed the agreement on behalf of Gallop Reserve. When asked in cross-examination whether, when contemplating the agreement, he had checked who the directors of Matton Developments were, he said that Mr Flint had told him Mr Clark and Mr Kenward were both directors of Matton Developments. However, his evidence seemed to fluctuate on that subject. When I asked him to look at the statement in the document's signature block that Mr Kenward had signed it on Matton Developments' behalf

> "… in accordance with [the company's] constitution by a director and director/secretary or by a sole director (if applicable) …",

he initially agreed that he knew that "sole director" was not applicable. However, when then asked whether that concerned him, he professed to be unaware that there were two directors of the company. He said that he had not made any approach to have Mr Clark sign the document, because he relied on the fact it was prepared by a solicitor and he expected it to be in order. For the same reason, he said, he had no concerns about the effectiveness of the agreement.

[17] Under the agreement, Gallop Reserve undertook to provide litigation funding "as required by Moray & Agnew". No amount was specified. The agreement provided that the funds advanced could be applied on Mr Kenward's written authority and that settlement or judgment monies would be distributed by payment, first to Westpac of the amount owed to it, and then to Gallop Reserve by way of payment of three times the amount it advanced. Any balance was then to be distributed in accordance with the order of priority set out in the Resolution Deed.

[18] After entering the litigation funding agreement, Mr Foggo said, he regularly attended meetings with Mr Kenward and with the solicitors acting for Matton Developments to keep abreast of, and to discuss the course of, the litigation. He denied at any time instructing the solicitors involved in the litigation.

[19] At about this time, there were some interactions between all three protagonists in this case. On March 2012, Gallop Reserve, through Mr Foggo, unsuccessfully renewed its application against Mr Clark in the Richlands Magistrates Court. In April of that year, Gallop Reserve applied, again unsuccessfully, to re-register Project Realty, with the support of Mr Kenward; Mr Clark was joined in that application.

The appointment of Mrs Kenward as a director

[20] By May 2012, Moray & Agnew seems to have been completely out of the picture, and Rodgers Barnes & Green was conducting the litigation. A solicitor with that firm, Mr Muller,[3] emailed Mr Kenward to advise that the litigation funding agreement, having been signed by only one director, should be ratified. He proposed that Matton Developments enter a Deed of Variation to ratify the Resolution Deed and to replace references in it to Moray & Agnew with references to Rodgers Barnes & Green and any other law firm acting in the future for Matton Developments in the litigation against CGU.

[21] Mr Muller advised Mr Kenward that under s 201H of the *Corporations Act*, he could appoint another director in order to form a quorum for a director's meeting. (This advice appears to have overlooked the fact that s 201H confers the power of appointment on the company's directors, not an individual director when there is more than one.) He proposed that Mr Kenward give Mr Clark notice by email of a directors' meeting to be held a week later. Then, when Mr Clark did not attend, Mr Kenward could appoint his wife, Fiona Kenward, as director. That appointment (he said) would be valid for two months, during which time a power of attorney appointing Mr Kenward as attorney for

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[3] Mr Muller gave evidence, called by Mr Clark.

Matton Developments should be signed. Mr Muller also provided a Deed of Variation with provision for Mrs Kenward's signature.

[22] Mr Kenward followed that advice, giving Mr Clark notice by email of a meeting to be held on 16 May 2012. In evidence, he agreed that he did not give any indication of its subject, although he contended that Mr Clark would have been able to surmise what it concerned, given that the CGU litigation was the only matter which Matton Developments was dealing with at the time. He had not sent any of the attachments to Mr Muller's email – the notice of meeting, consent to act as a director, Deed of Variation or draft minutes of meeting – to Mr Clark because he did not want to scan them (although, of course, he could have forwarded the solicitor's email, with or without its text, with those attachments).

[23] Mr Clark responded to Mr Kenward's email, indicating that he would not attend the meeting, and taking issue with a number of aspects of the form of notice as non-compliant with the company's memorandum of association: there was no agendum, the notice given was insufficient, and there was no notification of the meeting at the company's registered office. He would, he said, take part in a meeting organised in compliance with the memorandum of association.

[24] Mr Muller's file note for the meeting date (16 May 2012) records a telephone conversation with Mr Kenward where he advises him that he should proceed with the meeting

> "… then we will consider whether the directors [sic] meeting was valid later today".

He also notes Mr Kenward's advice that the memorandum of association of Matton Developments was lost long before Mr Clark became a director of the company, so that he would not have received it, but says that the meeting should be valid as in accordance with the replaceable rules.

[25] The meeting was held and purported to appoint Mrs Kenward as a director. It was resolved that Matton Developments would enter the Deed of Variation; that Rodgers Barnes & Green would represent Matton Developments in the litigation against CGU; and that Mr Kenward would be appointed the company's attorney for all matters relating to the litigation. On the same day, Mr and Mrs Kenward signed a power of attorney appointing Mr Kenward as attorney of Matton Developments, enabling him to do anything he considered necessary in relation to the CGU litigation or the Westpac debt. In evidence, Mr Kenward denied that Mr Foggo had any involvement in or knowledge of the relevant directors' meeting; Mr Foggo similarly denied involvement in any directors' meetings of Matton Developments or any other meeting which had led to the power of attorney being granted to Mr Kenward.

[26] Mr Clark's defence admitted that Mrs Kenward's appointment was recorded in the ASIC register, although there is no evidence as to when that occurred. Mr Muller's file note records his receiving the necessary forms from Mr Kenward on the day of the meeting. Mr Foggo said that he was given to understand at some stage that there were three directors of Matton Developments; Mr Rodgers from Rodgers, Barnes and Green had advised him that Mrs Kenward was validly appointed. He did not know how that had come about.

The Deed of Variation

[27] Later in May 2012, Mr and Mrs Kenward signed an undated Deed of Variation, with Gallop Reserve as a party, Mr Foggo signing on its behalf. The Deed of Variation acknowledged that the litigation funding agreement was not executed pursuant to s 127 of the *Corporations Act* and purported to ratify Matton Developments' entering of it, with effect from its date. The Deed varied the Resolution Deed and the litigation funding agreement by expanding their terms to embrace Rodgers Barnes & Green and any future solicitors. It was acknowledged, however, that Mr Clark not being a party to the Deed of Variation, it had no effect on his rights or obligations under the Resolution Deed. Mr Foggo said he had not sought Mr Clark's involvement in relation to the Deed of Variation because he had no contact with him for a number of years (although he had in fact been very recently involved in litigation against him). He had no concerns as to the validity of that document, because it was prepared by solicitors.

Discussions about assignment of Westpac debt

[28] After a fruitless attempt at mediation with CGU in September 2012, according to Mr Muller, Westpac expressed concern about the prospects of the litigation. Mr Foggo became anxious that Westpac would appoint a receiver to Matton Developments and settle the case for $500,000. He decided that Gallop Reserve should negotiate to take an assignment of the Westpac debt. Mr Muller's file notes record discussion of this prospect through December 2012 and January 2013. By an email to Mr Kenward and Mr Foggo, Mr Muller noted that Westpac was not enthusiastic about assignments to third parties, preferring to release the debt, securities and guarantees for a consideration of $400,000. Mr Muller suggested that either Mr Kenward seek the assignment, holding the rights on trust for Gallop Reserve, or that Gallop Reserve provide indemnities to the Bank which would satisfy it. According to Mr Muller's file note of 14 January 2013, Mr Foggo was not prepared to have Gallop Reserve provide any security because it would make it "a matter of public record" that Gallop Reserve was providing the funding.

Communications with Mr Clark

[29] Meanwhile, steps were being taken towards trial. On 21 January 2013, Mr Kenward sent an email to Mr Clark, advising that the case was being prepared for trial and indicating that it would be necessary for Mr Clark to meet Matton Developments' barristers to discuss the events around the crane's being damaged and an earlier unsigned statement he had made. In the email, Mr Kenward advised:

> "To date Matton [sic] action has been funded to the sum of over $200,000. I am now looking at another $150k - $200k to run this matter through court."

Notably, he did not mention the source of funding.

[30] Mr Clark replied with an angry email demanding to know, amongst other things, who had instructed the lawyers to act on Matton Developments' behalf and what the source of the litigation funding was. He also alleged that the Project Realty litigation involving Mr Foggo and Mr Kenward was the cause of the company's lack of funds. Under cross-examination, Mr Clark admitted that he had sent the same email to Mr Kenward six times. He said that he had "got out of control" because he was so angry. There were

further unfriendly exchanges between the two: at one point Mr Clark suggested that Mr Kenward had been involved in the theft of his excavator. Mr Kenward accused Mr Clark of leaving him to carry the burden of the CGU litigation and of reneging on promises to provide funds. He said:

> "I have had to arrange funding for Matton by way of borrowing money from friends & family for which I have had to guarantee".

[31] On 31 January 2013, Mr Clark spoke to Mr Rodgers, who confirmed that his firm had carriage of the matter and told him of the unsuccessful mediation. Under cross-examination, Mr Clark agreed that in this conversation Mr Rodgers had informed him of developments in the litigation and the fact that it was not progressing because an amount of $30,000 to $40,000 was outstanding. By way of context, a file note by Mr Muller made on that day recorded that once Westpac was "sorted out", Mr Kenward did not care what Mr Clark knew and was happy for the firm to say that it was currently not in funds. Mr Muller said in evidence that he could not recall on what basis it would have been said that there was a shortage of funding, but he would not have made any misrepresentation in that regard.

[32] Mr Clark agreed that in the conversation with Mr Rodgers there was some discussion about the way in which the crane had been damaged; he gave Mr Rodgers some information about who was present at the time of the accident with the crane and how, on his understanding, it had happened. Mr Rodgers advised that it would be necessary for the firm to contact Mr Clark again in order to obtain evidence from him, and he indicated his willingness.

[33] On 22 February 2013, Mr Muller recorded a telephone call with Mr Clark in which he informed him that Mr Kenward held a power of attorney. Giving evidence, Mr Muller did not say that the content of the power of attorney was disclosed, and Mr Clark was not asked about the telephone call. The rest of their conversation that day seems to have been concerned with arranging a time for Mr Clark's attendance at a conference with counsel. On 28 February 2013, Mr Kenward emailed Mr Muller, with a copy to Mr Foggo, enquiring as to progress in arranging for Mr Clark to attend on counsel. Mr Kenward made the observation that it was "imperative" that he did so "before settlement with Westpac". Cross-examined about the email, Mr Kenward could not recall why he made that statement.

The Continuation Deed

[34] In this period, Gallop Reserve and Matton Developments purported to enter a further funding agreement, prepared by Mr Foggo's solicitors, called a "Continuation Deed". It was undated, but it appears from the amounts recorded in the Deed as already advanced[4] that it was signed prior to April 2013. It was executed by Mr Foggo on behalf of Gallop Reserve, by Mr and Mrs Kenward as guarantors and by Mr Kenward as attorney for Matton Developments Pty Ltd. Mr Kenward said generally about his execution of documents in that capacity that no solicitor had raised any issue about his reliance on the power of attorney. Mr Foggo said that a solicitor from Rodgers, Barnes & Green had informed him that Mr Kenward had a power of attorney over Matton

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[4] The amounts advanced and the dates of the advances were the subject of a deemed admission because of Mr Clark's failure to respond to a notice to admit.

Developments' affairs, so he understood that Mr Kenward could sign documents for the company. He would not have anticipated that Mr Clark would have signed any of the relevant documents if asked to do so, because of his conduct in relation to Project Realty.

[35] Under the Continuation Deed, Gallop Reserve agreed to continue to advance funds on the same terms and conditions as those in the litigation funding agreement, up to a limit of $600,000, which it could, at its discretion, exceed. As consideration, Mr and Mrs Kenward undertook to give guarantees of all monies owed or to become owing by Matton Developments; which they duly did. The undated Deed of Guarantee (signed, according to Mr Foggo, on the same day as the Continuation Deed) defined, without otherwise referring to, a "Deed of Assignment" between Gallop Reserve and Westpac.

The Deed of Assignment

[36] As to that reference, Westpac by deed made on 10 April 2013 assigned all of its "legal and beneficial interest, right and title in" Matton Developments' loan agreement, the charge over its assets, the bill of sale and the directors' guarantees to Gallop Reserve for a consideration of $400,000. Matton Developments, Mr Kenward and Mr Foggo and his wife, as shareholders in Gallop Reserve, were also named as parties to the Deed of Assignment (as I will refer to it, although it was actually titled "Deed of Transfer and Acknowledgment"). Mr Kenward signed as attorney for Matton Developments; Mr Foggo said that he had no concerns about his ability to bind Matton Developments in doing so. Mr Clark, as guarantor, was given notice of the assignment by Westpac.

[37] The Deed of Assignment has since been a subject of litigation in this court. In May 2015 Gallop Reserve commenced an action against Mr Clark on the guarantee he had given to Westpac, but subsequently accepted that it had merged in the default judgment which Westpac had obtained. In *Westpac Banking Corporation v Clark & Ors; ex parte Gallop Reserve Pty Ltd,*[5] Martin J held that the Deed assigned Westpac's rights against Mr Clark, including the benefit of the default judgment, and gave Gallop Reserve leave to commence enforcement proceedings, on its discontinuing the action on the guarantee. Mr Clark was unsuccessful in an appeal against that judgment.[6] In 2016, Gallop Reserve served a bankruptcy notice on him for the amount of the default judgment with interest, but it was subsequently set aside on Mr Clark's application. Also in 2016, Mr Clark obtained a declaration that he was entitled to be discharged and exonerated from liability to Gallop Reserve under the guarantee and default judgment by payment by Matton Developments of the amount owing under the Westpac loan agreement.[7]

[38] Gallop Reserve has not proceeded against Mr Kenward in respect of the default judgment which Westpac obtained against him. Asked to explain why Gallop Reserve had brought bankruptcy proceedings against Mr Clark but had taken no action against Mr Kenward, Mr Foggo said that the company was confident that Mr and Mrs Kenward would meet their obligations under the guarantees they had given. He did not have a guarantee from Mr Clark in relation to the litigation funding agreement. He acknowledged that he disliked Mr Clark, but said he held no malicious intent towards him.

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5 [2015] QSC 353.
6 *Clark v Gallop Reserve Pty Ltd* [2016] QCA 146.
7 *Clark v Matton Developments Pty Ltd & Anor* [2016] QSC 251.

[39] On my asking Mr Kenward whether he had reached any agreement with Gallop Reserve as to the discharge of his indebtedness to Gallop Reserve under the guarantees he had given, he said that he had received no assurances but hoped to come to an agreement with Gallop Reserve in the future when it was clear what the shortfall was. He denied Mr Clark's suggestion that he was appearing at the present trial in order to support Gallop Reserve.

The priority letter

[40] Somewhat prematurely, given the date of the Deed of Assignment, by a document dated 1 April 2013 on Gallop Reserve letterhead, Mr Foggo sought Mr Kenward's agreement to reversing the priority of payment as between the litigation loan funding agreement and Westpac Debt. His request was in these terms:

> "Now that Gallop Reserve Pty Ltd has had the Westpac debt assigned to itself. The order of preference under section 5 of the loan agreement dated 12th March, 2012, I require it to be reversed so that A becomes B and B becomes A.
>
> Another words [sic] I want the litigation loan paid out first in preference to the Westpac Debt.
>
> This litigation looks like putting Gallop Reserve Pty Ltd into debt thru borrowings and I want this debt cleared first as per our agreement.
>
> Please acknowledge that you are in agreeance with this condition, by signing below for this change."

Mr Kenward duly signed "on behalf of Matton Developments Pty Ltd". I will refer to this letter hereafter as the priority letter. The evidence was silent as to the agreement referred to in the statement:

> "… I want this debt cleared first *as per our agreement*".

[41] In questioning by me as to the proposed change to priority, Mr Foggo's evidence was as follows:

> "Why did you want to alter the priorities? What did you have in mind?---It – it – I – I understood that the resolution deed said that the – Westpac was to be paid out first, and I was quite happy to go along with that while I was only outlaying around about $200,000. When it came to – when I had to then turn around and borrow the money to clear the Westpac debt and then look for another couple of hundred thousand dollars-plus-plus on the way through, I wanted West – I wanted Gallop Reserve to be paid back first and then the Westpac debt paid back secondly. The resolution deed made allowance for that.
>
> And why did you want that?---I just wanted to clear Ga – get – get Gallop clear. I knew it was getting to the stage where – you know, when I first got involved in this, Matton's liability to me was going to be about $400,000. As – as – as things progressed, Matton's liability became bigger and bigger and bigger, and, on that

basis, I asked Mark and Fiona Kenward to give me a – a guarantee – an indemnity in relation.

I suppose what I'm asking you is what did you perceive as the advantage to you or to Gallop in altering the priorities?---Well, it just get – it gets Gallop cleared initially.

Why? How?---Well, the – the – the – the mo – the proceeds from the – the court case would – we would clear it – we clear it – should – should clear Gallop's outlays at that point in time.

Yes, but you've got two debts, and Gallop's entitled to recover both of them – the CGU one and the Westpac debt. I'm trying to get you to articulate why there's – what your reason is for wanting the order in which they'll be recovered changed?---I just wanted – I – I – I was more concerned about Gallop getting the – the litigation money back first.

Why?---Because of the borrowings that – that I had out at that point in time."

[42] Asked why he had not had the agreement in the priority letter recorded in a formal document, as had occurred with other agreements, Mr Foggo said that he was wishing to save money. He believed that Mr Kenward could sign the document on behalf of Matton Developments because he held a power of attorney.

More communications with Mr Clark and the progress of the litigation

[43] Mr Muller's file note of 3 April 2013 records an instruction from Mr Kenward not to disclose the Gallop Reserve funding yet. Mr Muller suggested that the concern for secrecy related to CGU rather than to Mr Clark; it was feared that CGU might make an application for security for costs if it was aware there was a litigation funder. On 5 April 2013, Rodgers Barnes & Green wrote to Mr Clark's lawyers, advising of the course of events involving Mrs Kenward's appointment as director and Mr Kenward's appointment as Matton Developments' attorney. In light of the Resolution Deed and the power of attorney, they said, it was proper for them to receive instructions from Mr Kenward. A copy of the power of attorney and the pleadings in Matton Developments' action against CGU were enclosed. The letter noted that Mr Clark had conferred with counsel in order to provide a statement (on 18 March). He was asked to sign a transcript of the conference and to assist with obtaining evidence from two witnesses of the crane's collapse. No mention was made of how the litigation was being funded.

[44] In mid-2013, a new firm of solicitors, Warlow Scott Lawyers, replaced Rodgers Barnes & Green on the record as Matton Developments' solicitors. Mr Flint, who had acted for Matton Developments at Moray & Agnew, had joined that firm. The evidence does not disclose any further development until well into the next year. It appears from a chronology in a later Warlow Scott letter that between March and May 2014, that firm was in contact with Mr Clark's lawyers, Broadley Rees Hogan, asking for Mr Clark's co-operation in speaking to Matton Developments' lawyers and advising that the trial was set down for November 2014. Mr Kenward also made approaches in that regard. On 16 April 2014, he asked Mr Clark by email to get in touch with his own solicitor in relation to Matton Developments, because Mr Flint sought a meeting with him and the barrister, and subsequently advised that the court dates had been set and it was

necessary that the evidence be settled. Mr Clark admitted that Mr Kenward had given him the phone number for the relevant solicitor at Warlow Scott, but he did not contact him.

[45] Through May and June 2014, there were further exchanges of aggressive emails between Mr Clark and Mr Kenward. Mr Kenward accused Mr Clark of failing to meet his obligations as a director of Matton Developments by his lack of cooperation in the litigation, in not meeting Matton Developments' lawyers. Mr Clark accused Mr Kenward of deceit and breach of his duties as director, adding some colourful and gratuitous observations about his intelligence and character. At one point Mr Clark asked:

> "Has Dougie run out of money??"

Cross-examined about that query, he did not concede that it was a reference to the CGU litigation, suggesting instead that it concerned claims Mr Foggo had brought against him. It appeared, however, in response to an email from Mr Kenward about not wishing to hear from Mr Clark unless it was to assist with the CGU litigation. In an email to Mr Kenward in early June, Mr Clark said that he thought that it was time for him to:

> "… speak to the insurer and their solicitors to discuss this claim in-depth".

Giving evidence, he agreed that this was a "veiled threat" made out of frustration, but maintained that he had not intended to act on it.

[46] In November 2014, the CGU litigation went to trial. Mr Clark was not called to give evidence. Mr Flint explained that this was because he had given inconsistent accounts of events; there was animosity between him and Mr Kenward and at some stage he had threatened to "tell the court the real story"; and he had been uncontactable over the two years prior to trial. (Mr Clark denied being entirely uncontactable, but acknowledged that because of his loss of income from Matton Developments and Project Realty, he had taken work as a crane operator in mining areas in the west of the State, and at times he was not able to be contacted because of the lack of phone and internet service in those areas.)

[47] Soon after the trial concluded, Broadley Rees Hogan sought a copy of the CGU litigation file from Warlow Scott, a request which was declined in the absence of further information as to why Mr Clark was entitled to it. On 12 February 2015, Mr Clark made an application against Warlow Scott for production of the file, which, he said, he discontinued because Warlow Scott claimed a lien over it on the basis that Matton Developments owed the firm a considerable amount of money. In an affidavit filed on that date for the purposes of that application, he adverted to being aware that Gallop Reserve was funding the CGU litigation.

[48] Mr Foggo said that he was aware through what was said at a meeting involving Mr Kenward and members of the firm of Warlow Scott that Mr Clark had demanded to see the Matton Developments file. He personally had no objection. He had not had any dealings with Mr Clark or made any decisions as to whether information should be withheld from him. Mr Clark had never approached him for information

The outcome

[49] Judgment was given against Matton Developments in April 2015. That, however, was reversed on appeal in August 2016. CGU filed an application for special leave to appeal to the High Court, which was abandoned after another, this time successful, mediation. In March 2017, CGU paid amounts totalling $2,130,000 into the trust account of Matton Developments' solicitors. Another $912,000 was later paid by way of costs. $1,560,000 of those funds were subsequently paid to Gallop Reserve with the agreement of both Mr Kenward and Mr Clark, with the balance being paid into court. Subsequently a further $1,288,721 was paid from the funds in court to Gallop Reserve. There was a deemed admission as to the amounts Gallop Reserve had advanced, together with unchallenged evidence of two further payments totalling $80,000 made in 2016, bringing the total amount to $1,237,056.33. Mr Kenward gave evidence that the advances were made for CGU litigation.

[50] Gallop says that it is entitled to the remaining funds in court and to apply those funds and the funds it has already received, in the first instance towards the amounts owed under the litigation funding agreement, which at three times the amounts advanced ($1,237,056.33) entitled it to recover $3,711,168.99. After subtraction of the amounts recovered, it would still be owed $862,447.99. The amount still owed under the Westpac loan, an amount of some $850,000, with interest added resulting in an amount now outstanding of $1,560,000, would take second priority, and thus would remain unpaid.

The issues for determination

[51] In his defence, Mr Clark admitted that Gallop Reserve was entitled to recover the funds it had advanced for the CGU litigation. But he submitted[8] that in order to prove its case, Gallop Reserve should have called a costs assessor to establish what was properly spent on the litigation, asserting that a *Jones v Dunkel*[9] inference arose because of the failure to do so. He suggested that some of the funds advanced by Gallop Reserve might have been expended on resisting his application to obtain access to Matton Developments' file, because there was an invoice in evidence from Warlow Scott to Matton Developments in respect of that matter. He also submitted that resources were unnecessarily expended because he was not called as a witness at the trial.

[52] It was not explained how Mr Clark's being called at the trial would have expedited the litigation, but there were plainly reasons not to do so, including his failure to co-operate with the solicitors in the six months or so leading up to the trial and his suggestion that he would speak to CGU and its lawyers with the implicit threat (genuine or not) that he would tell them something to Matton Developments' disadvantage. There was no evidence as to how Warlow Scott's fees on Mr Clark's application were paid; Mr Foggo said that he (Gallop Reserve) had not paid them. Mr Kenward's evidence as to the purpose of the funds paid by Gallop Reserve was not challenged, and nothing points to Gallop Reserve having advanced any part of them for any purpose other than the CGU litigation. It was not necessary for Gallop Reserve to take the further step of calling a costs assessor to show how the funds were actually applied. Its claim is based on its

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8 Both parties provided incomplete submissions at the conclusion of the trial and were given leave to supplement them, which they did.

9 (1959) 101 CLR 298.

agreement with Matton Developments, which was to provide funds for the purpose of the litigation, not to play any part in the application of those funds.

[53] The issues raised on the pleadings for my determination are:

1. Whether the litigation funding agreement gives Gallop Reserve the right to recover three times the amount advanced, which raises these questions:

    (a) whether the litigation funding agreement was ratified, and in that connection whether the resolutions passed at the directors' meeting, particularly that which purportedly appointed Mrs Kenward as a director, were valid. She signed the Deed of Variation, which purported to ratify the agreement, as a director of Matton Developments. Gallop Reserve relied on s 1322 of the *Corporations Act* as a basis for the resolutions' validity;

    if I conclude against the validity of the resolutions,

    (b) whether Gallop Reserve acting through Mr Foggo was in any event entitled by virtue of sections 128(2) and 129 of the *Corporations Act* to assume that Mr and Mrs Kenward's actions thereafter were performed with authority and/or that the power of attorney and the Deeds relating to the litigation funding were duly executed;

    (c) whether, in the alternative, Matton Developments and Mr Clark are estopped from denying Mr Kenward's authority to act on behalf of the company; Gallop Reserve contends that they had permitted Mr Kenward to hold himself out as having that authority.

2. Whether Gallop Reserve was entitled to alter the order in which it recovered from Matton Developments in respect of the Westpac loan and the litigation funding loan, either by virtue of the assignment to it of Westpac's rights under its loan agreement or by reason of the priority letter.

3. Whether Gallop Reserve engaged in unconscionable conduct in connection with Matton Developments' entry of the Deed of Assignment so as to attract the application of the *Australian Consumer Law*, and should now be prevented from relying on the assignment of rights under that Deed.

4. Whether Gallop Reserve acquired rights under the Deed of Assignment and litigation funding agreement through knowingly assisting Mr Kenward to act in breach of his duties under ss 180-184 of the *Corporations Act,* so that it should now be required to return the funds received (presumably in excess of the amounts it actually paid) to Matton Developments.

5. Whether Mr Clark is entitled to damages against Gallop Reserve for a breach of s 111 of the *Personal Properties Securities Act* 2009 (Cth) because its attempt to enforce the default judgment against him amounts (on Mr Clark's case) to a dishonest and commercially unreasonable exercise of rights arising under that Act.

[54] Mr Clark, by post-trial submissions, raised further issues: whether he should be permitted to add, to the claim of unconscionable conduct, a claim of misleading and deceptive conduct, presumably under s 18 of the *Australian Consumer Law*; whether he should be permitted, if necessary, to amend his pleadings to allege breaches of the *Australian Securities and Investments Commission Act* 2001 (Cth) rather than the *Australian Consumer Law;* and whether he should be permitted to expand the relief claimed to seek damages under one or other of those Acts.

Some observations about the witnesses and their credit

[55] Before turning to deal with those issues, I will briefly set out some views I take of the evidence. I did not unreservedly accept the evidence of any witness, other than the solicitors, Mr Flint and Mr Muller. My reservations about particular parts of the remaining witnesses' evidence are explored later in these reasons. Generally, however, while I had no difficulty in accepting Mr Foggo's and Mr Kenward's accounts of the steps they each took,[10] I did not accept that they were, in all instances, frank about why they took them. In particular, it seemed to me that both were evasive when their evidence concerned what I was satisfied was their alignment against Mr Clark. That alignment was not so very surprising, given the history of hostility between them and him and perhaps their perception that they were taking all the risks for the litigation while Mr Clark stayed on the sidelines, waiting to benefit from it. But a good deal was left unexplained and unexplored about their mutual intentions, partly, and unfortunately, because Mr Clark was not represented.

[56] I accepted Mr Clark's evidence as mostly honest – indeed, he was disarmingly candid at some points in cross-examination – but I did not think that he was truthful when he denied that his reference to "Dougie[s]" running out of money had anything to do with the litigation funding. I am quite sure by this stage (mid 2014) he had, and was expressing, a strong suspicion of Mr Foggo's involvement. And I did not think that his general candour as a witness extended to his conduct over the course of the CGU litigation. My strong impression is that while expressing indignation about Mr Kenward's activities, he was quite content to let the litigation proceed in the expectation of benefiting from it, without any contribution to it, or, in its later stages, co-operation in it. Finally, I have no reason to doubt any part of the evidence of the two solicitors. I reject the inferences of misconduct which Mr Clark invited me to draw about all the solicitors involved in the litigation; they had no basis in any evidence.

The s 1322 argument

[57] Gallop Reserve did not contend that when Mr Kenward executed the litigation funding agreement he had authority to bind Matton Developments. That was not surprising; he clearly did not. Nonetheless, it relied on the litigation funding agreement as (on its case) ratified by the Deed of Variation and extended by the Continuation Deed to argue that Matton Developments was obliged to pay it three times the amount it had advanced. It made alternative arguments relying on s 1322(2) and s1322(4)(a) of the *Corporations Act* as to why the Deed of Variation and the Continuation Deed should be regarded as, or declared, valid.

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[10] Which were supported by the contemporary documentary evidence.

[58] Section 1322(2) of the *Corporations Act* provides for automatic validation of procedural regularities in the absence of a contrary declaration by the court:

> …
>
> (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

Section 1322(1) makes it clear that the reference to a "proceeding" extends beyond legal proceedings and, by way of example of a "procedural irregularity", gives, inter alia, that of an absence of a quorum at a meeting of directors.

[59] Gallop Reserve argued that the appointment of Mrs Kenward as a director of Matton Developments entailed a procedural irregularity, being an absence of a quorum at the directors' meeting. Since that would not invalidate the meeting, Mrs Kenward should be taken as being appointed as a director of Matton Developments. The results were that she and Mr Kenward had authority to enter the Deed of Variation and it was effective in ratifying the litigation funding agreement; and their execution of the power of attorney conferred on Mr Kenward was valid, so that he was authorised to execute the Continuation Deed and to enter the priority letter agreement with Gallop Reserve. Similarly, the resolutions to enter into the Deed of Variation and confer the power of attorney were not invalidated by the lack of a quorum. There was no substantial injustice caused by Mrs Kenward's appointment, which was necessary in light of Mr Clark's non-cooperation, in order to obtain funding for the CGU litigation in circumstances where it was expected to settle at mediation with the result, beneficial to Mr Clark, that the Westpac loan was likely to be paid out.

[60] In the alternative, Gallop Reserve sought a declaration that Mrs Kenward's appointment as a director was not invalid, pursuant to s 1322(4) of the *Corporations Act*, which provides

> Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
>
> (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation …

[61] Section 1322(6) precludes the making of an order under s 1322(4)(a) unless the court is satisfied:

> (a) …
>
> (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and …

(c) … that no substantial injustice has been or is likely to be caused to any person.

[62] Gallop Reserve argued that the appointment of Mrs Kenward was procedural; that Mr Kenward honestly believed that the way in which he was proceeding was proper on solicitor's advice and also necessary in order to advance the CGU litigation; and for those reasons it was also just and equitable that a declaration be made that Mrs Kenward's appointment was not invalid. Again, it was argued that there was no substantial injustice.

[63] Mr Clark contended that the court should declare the directors' meeting at which Mrs Kenward was appointed invalid. He argued that the authorities in relation to s 1322 reflected a view that the section should be applied only where the course adopted accorded with the views of a majority of shareholders; those authorities included, he said, the decision of the High Court in *Weinstock v Beck,*[11] relied on by Gallop Reserve. In addition, the steps taken here had caused a substantial injustice. It meant that an existing director who did not represent the wishes of a majority of shareholders had deliberately brought about an outcome amounting to an act of "quorum busting".

Conclusions – s 1322

[64] The remedial provisions of s 1322 are to be construed liberally and pragmatically, as reflecting:

> "… a long standing legislative recognition that mistakes will happen in corporate governance and that it is not in the public interest that the validity of decisions made in relation to corporations be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties."[12]

[65] Dealing first with the argument under s 1322(2), I do not accept Mr Clark's proposition that the determinant of whether the provision applies is whether a majority of shareholders' wishes were respected; and in this case, given that the sole shareholder of Matton Developments was a deregistered company, it would be rather difficult to ascertain its desires. But I do not consider that what occurred at the directors' meeting entailed a procedural irregularity. It was not merely the lack of a quorum, but the installation of a purported quorum. The CGU litigation was Matton Developments' only business at that stage, and the motivation was clearly to exclude Mr Clark from involvement in it. What occurred was intended to subvert Mr Clark's right to participate in decisions as to the company's management by the appointment of Mrs Kenward as an additional, compliant director, so that she and Mr Kenward could then pass resolutions which would not have been passed otherwise. To adopt the wording of

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11 *Weinstock v Beck* (2013) 251 CLR 396.

12 *Weinstock v Beck* (2013) 251 CLR 396 per French CJ at 414.

Palmer J in *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd,* [13] this was an irregularity which

> "… change[d] the substance of 'the thing to be done'";[14]

it did not merely depart from the prescribed manner of doing it. For the same reason, I do not accept that the passing of the resolution to enter into the Deed of Variation or the resolution to confer the power of attorney, in circumstances where only one person at the meeting was a director and entitled to vote, amounted to procedural irregularities. These were substantive irregularities.

[66] Nor am I satisfied that any of the prerequisites for the making of an order under s 1322(6)(a) is met. The purported appointment of Mrs Kenward as part of a plan to oust Mr Clark from involvement in the company's affairs was not a mere procedural step. And, although Mr Kenward (and no doubt Mrs Kenward) acted on legal advice, I am not satisfied that the actions of Mr Kenward, at least, are correctly characterised as honest. When he forwarded notice of the proposed meeting to Mr Clark, he had not told the latter of the litigation funding agreement he had purported to enter on Matton Developments' behalf. Although there is no evidence that the company's constitution required that the notice of meeting identify its subject matter, the failure in these circumstances to give any hint of what was proposed arouses suspicion. Mr Kenward could very easily have communicated the effect of the solicitor's advice. His explanation for not providing the proposed Deed of Variation or the power of attorney to Mr Clark – that he had not wanted to scan the documents – is unconvincing; nothing could have been simpler than to forward them, the solicitor having provided them as attachments to an email.

[67] It is quite evident that Mr Kenward was acutely aware that Mr Clark would be implacably opposed to the appointment of Mrs Kenward; would not have agreed to the entering of the litigation funding agreement with Mr Foggo had he known about it, and certainly would not agree to the entering of a further agreement to ratify it; and would not have entertained the idea of handing Mr Kenward the power, in the form of the power of attorney, to conduct Matton Developments' affairs in relation to the litigation and the Westpac loan. And while the issues which Mr Clark raised in relation to the notice of meetings may or may not have been legitimate, the absence of any response to his email and the refraining for almost a year from giving him any information about what had occurred at the meeting are also significant in assessing motivation.

[68] Mr Kenward's conduct was explicable; he knew that Mr Clark was hostile to him and Mr Foggo and was likely to be obstructive in circumstances where the planned litigation funding seemed the only possible option to keep the company solvent. Mr Clark's failure to deposit the agreed $40,000 can only have reinforced the perception that he was unlikely to take a positive role in this regard. But Mr Kenward's deliberate concealment from Mr Clark of his intent and the actions taken precludes satisfaction that he acted honestly for the purposes of s 1322(6).

[69] Finally, I am not satisfied, given that the contravention was designed to effectively prevent Mr Clark from exercising his role as a director, and the concealment from him

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[13] (2005) 55 ACSR 185.

[14] *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [103].

of the steps taken, that it would be just and equitable to make an order under s 1322(4)(a) declaring that Mrs Kenward's appointment was valid.

[70] Given my conclusions, it is unnecessary for me to consider the question of substantial injustice in respect of the application of either s 1322(2) or s 1322(6). In *Cordiant Communications,* Palmer J expressed the view that in the context of a shareholders' meeting, the relevant enquiry was whether the shareholders' rights to attend and vote had been materially affected, not whether the result of the meeting would have been in the company's best interest in a commercial sense. That was a question of business judgment within the province of the directors and shareholders, not a matter into which the court should enter.[15] For similar reasons here, it seems to me, the question would be whether substantial injustice was occasioned to Mr Clark in a process designed to diminish his rights as a director to take part in the company's management; and the answer would have been in the affirmative.

The s 128 and s 129 assumptions argument

[71] Gallop Reserve submitted that it was entitled to make certain assumptions in relation to its dealings with Matton Developments by virtue of s 128 and s 129 of the *Corporations Act*. Section 128 provides:

Entitlement to make assumptions

(1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.

(2) A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.

(3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.

(4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

[72] Section 129 specifies the relevant assumptions:

Assumptions that can be made under section 128

Constitution and replaceable rules complied with

(1) A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.

Director or company secretary

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[15] (2005) 55 ACSR 185 at [86].

(2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:

(a) has been duly appointed; and
(b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.

Officer or agent

(3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:

(a) has been duly appointed; and
(b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

Proper performance of duties

(4) A person may assume that the officers and agents of the company properly perform their duties to the company.

Document duly executed without seal

(5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

…

[73] Gallop Reserve relied on ss 129 (2), (3), (4) and (5) as entitling it to assume: that Mrs Kenward had been duly appointed as a director, since she appeared from ASIC records to occupy that position; that Mr Kenward was duly appointed as Matton Developments' attorney, since the company's solicitors had held him out in that capacity by their production of the power of attorney, and the company had similarly held him out through Mr Clark's failure to take any action to prevent Mr Kenward's reliance on it; that in relation to the entering of the Continuation Deed and the Deed of Variation, Mr Kenward and Rodgers Barnes & Green (as agent of Matton Developments) were properly performing their duties to the company, Mr Kenward in exercising duties as attorney and the solicitors in advising; that the Deed of Variation was properly executed, since it appeared to be signed by two directors of the company; and that Mr Kenward was validly appointed as Matton Developments' attorney, the power of attorney having been executed by both him and Mrs Kenward as directors. Matton Developments was precluded from asserting that any of the assumptions were incorrect.

[74] Gallop Reserve contended that there was no evidence that Mr Foggo, on its behalf, had any knowledge or suspicion that those assumptions were incorrect. Mr Foggo was not privy to the legal advice Mr Kenward received about the convening of the directors' meeting and the appointment of his wife as a director; he had been told by Mr Rodgers that she was validly appointed.

[75] Mr Clark's contention was that there was concealment from him of what was occurring with the litigation, particularly the funding of it, which went to the bona fides of both Mr Kenward and Mr Foggo. It was to be inferred that Mr Foggo suspected that the transactions undertaken by Mr Kenward were unauthorised. He knew that both Mr Kenward and Mr Clark were directors; that Mr Kenward was concealing the funding arrangements from Mr Clark; and that there was animosity between Mr Clark and Mr Kenward. It would have been obvious that Mr Clark would not have voted for the appointment of Mrs Kenward as a director or agreed to the granting of a power of attorney. Mr Foggo had been a company director and had some legal training (Mr Foggo said that he had completed four months of a Solicitors' Admissions Board course in New South Wales) and should be taken to have an understanding of *Corporations Act* requirements.

[76] Mr Clark also submitted that Rodgers, Barnes & Green had acted for Gallop Reserve, so that the company should be taken to have constructive knowledge of the matters evident to those solicitors, including that Mr Clark had not attended the meeting at which the purported appointment of Mrs Kenward was made and that Mr Clark had not signed the power of attorney. He also asserted that a *Jones v Dunkel* inference arose in relation to the failure of Gallop Reserve to call Mr Rodgers and Mr Muller, the solicitors from the firm who had worked on the CGU litigation.

The available s 129 assumptions

[77] The entitlement to make the assumptions in s 129 arises under s 128(1) "in relation to dealings with a company". The expression "dealings" has been broadly construed and regarded as extending to dealings by a person with ostensible authority from the company; it is not necessary that that person have any authority to enter the particular transaction which is the subject of the negotiations. [16] It is unnecessary that the person seeking to rely on an assumption has actually made it.[17] The purpose of ss 128 and 129 is to put a person entitled to rely on an assumption in the same position as if the assumption were fact.[18]

[78] Mr Kenwood, to Mr Foggo's knowledge, was a director of Matton Developments and had, pursuant to the Resolution Deed (a copy of which Mr Foggo had received, attached to the litigation funding agreement), the right to give binding instructions to Moray & Agnew in relation to the CGU litigation. The Resolution Deed also contemplated that if they could not raise the funds for the litigation themselves, they would look for funding from another source. Mr Kenwood had effective charge of the litigation (as Mr Clark knew). The obtaining of funding for the litigation was in Matton Developments' interests. In those circumstances, it may be accepted that Mr Kenward had ostensible authority at least to undertake negotiations, albeit not to bind the company, in relation to litigation funding. Mr Foggo, on behalf of Gallop Reserve, had dealings with Matton Developments in the form of the negotiations with Mr Kenward in relation to funding which enlivened an entitlement to make the s 129 assumptions, where available on the facts, and subject to any contrary knowledge or suspicion on Mr Foggo's part.

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[16] *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722 at 733; *Soyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068 at [82]; *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* (2013) 282 FLR 351 at [44]; *Caratti v Mammoth Investments* (2016) 50 WAR 84 at [359]-[363], [592].

[17] *Caratti v Mammoth Investments* (2016) 50 WAR 84 at [351], [619].

[18] *Caratti v Mammoth Investments* (2016) 50 WAR 84 at [506], [593].

[79] In *Wood v Inglis*,[19] Barrett J considered whether the defendant's solicitors in that case were entitled to rely on the assumptions in s 129(2) and (3), which are as to the due appointment of a person appearing, "from information provided by the company that is available from ASIC" to be a director or company secretary, and of anyone "held out by the company to be an officer or agent". In that case, the defendant company had two surviving directors, the third having died. One of those directors convened a general meeting with notice to the other, but the latter did not attend. Despite the lack of a quorum, the meeting resolved that the absent director be removed and a new director be appointed; those results were recorded in the ASIC register. Barrett J found that the particulars of the company's directors were provided to ASIC without the authority of the company, since they had been furnished by one director only, the other not being validly appointed; so that s 129(2) had no application. For the same reason, s 129(3) did not apply, because any holding out of the invalidly appointed director as a company officer was not a holding out by the company; and the purported retainer of the solicitors was also invalid because it was by, in effect, one director only.

[80] For reasons similar to those of Barrett J, I do not consider that the assumption in s 129(2) was available to Gallop Reserve, because the information provided to ASIC was provided by a single director, without the authority of the company. Nor do I accept, for the purposes of s 129(3), that Mr Kenward was held out by Matton Developments as its agent by virtue of the production of the power of attorney. Gallop Reserve relied on a holding out to that effect by the solicitors, Rodgers, Barnes & Green. I will not make any positive finding as to that firm's retainer, because it was not a party and had no opportunity to put its position, but on the evidence before me, it does appear as though it was appointed by Mr Kenward, not Matton Developments. I am not prepared, at any rate, to regard it for present purposes as representing the company. So far as the alleged holding out by the company through Mr Clark's inaction is concerned, he was not provided with a copy of the power of attorney until April 2013, by which time all of the relevant transactions as to which Gallop Reserve sought to rely on assumptions had already taken, or were taking, place.

[81] However, other assumptions under s 129 were, absent contrary knowledge or suspicion, available to Gallop Reserve. The first was that in s 129(5): that documents which appeared to have been signed in accordance with subsection 127(1) – in this case the Deed of Variation and the power of attorney – were duly executed by Matton Developments, because they appeared to be signed by two directors. The Deed of Variation was signed by each of Mr and Mrs Kenward as director and was also expressed to be executed on behalf of the company in accordance with s 127(1). Each also signed the power of attorney as director. The second was an assumption pursuant to s 129(4), that Mr Kenward, as a company officer, was properly performing his duties to the company; but for the reasons I have given, I do not find any similar assumption available in relation to the activities of the solicitors.

Knowledge or suspicion that assumptions were incorrect

[82] The next question is whether Mr Foggo knew or suspected that either of those assumptions was incorrect so as to disqualify Gallop Reserve from reliance on it, by virtue of s 128(4). That question in turn depends on whether he knew or suspected that Mrs Kenward was not validly appointed as a director. Knowledge or suspicion for the

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[19] (2008) 68 ACSR 420 at [92]–[95].

purposes of s 128(4) must be actual. "Useful guidance" as to the concept of suspicion has been found[20] in Kitto J's discussion of the term in *Queensland Bacon Pty Ltd v Rees:*[21] the suspicion that a fact exists is "more than mere idle wondering" or "a reason to consider [it]"; it is

> "… a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence'".[22]

Mr Clark bears the onus of showing that Mr Foggo actually knew or suspected that the assumptions were incorrect.[23]

[83] I am satisfied that Mr Foggo was aware at all relevant times that Matton Developments had two directors. His evidence on the point shifted, but it is improbable, given the history of his dealings with Mr Clark and Mr Kenward, that he had not been made aware of that fact, and in any event, his initial answers were to the effect that Mr Flint had told him both men were directors and that he was aware that the "sole director" situation was not applicable. His change of position subsequently to a claim that he did not appreciate there were two directors was unconvincing.

[84] There can also be no doubt, in my view, that Mr Foggo and Mr Kenward were at pains to conceal Mr Foggo's, and Gallop Reserve's, involvement in the funding of Matton Developments' litigation against CGU from Mr Clark. Mr Flint was, to Mr Foggo's knowledge, asked to conceal the fact that he was the source of the initial deposit by Mr Kenward of $20,000 and he was concerned that Mr Clark would challenge "any lending agreement" (which is also suggestive that he knew Mr Clark had a role in managing the company which would entitle him to do so). I would also infer that there was some agreement between him and Mr Kenward that he would take an assignment of the Westpac debt and would pursue Mr Clark, not Mr Kenward. The reference to "our agreement" in the priority letter is very suggestive of some such understanding, and Mr Foggo's evasiveness in answering my questions as to what advantage he saw in altering the debt priorities also suggests that there was more to the arrangement than an explicable desire to maximise the avenues of recoupment. The evidence also indicates a concern to conceal Mr Foggo's involvement from Mr Clark until the assignment was a *fait accompli*. It may well be that Mr Kenward and Mr Foggo were concerned that Westpac would be less inclined to agree to the assignment if it were aware of opposition from one of Matton Developments' directors.

[85] There is no basis, however, for Mr Clark's contention that Rodgers, Barnes & Green acted on behalf of Gallop Reserve. It seems largely to turn on a point of the trial at which counsel indicated that Gallop Reserve did not waive privilege in respect of some advice from Mr Muller but then disavowed the indication on the basis that Gallop Reserve had not retained Rodgers, Barnes & Green. Mr Foggo certainly attended meetings with solicitors from that firm and from others acting for Matton Developments, but nothing in the evidence indicates that any of those solicitors acted on his behalf or on behalf of Gallop Reserve. He was privy to advice given to Matton Developments, but the advice was not given to him or his company. And there is no reason to draw a *Jones v Dunkel* inference in relation to Gallop Reserve's failure to call

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20 *Correa v Whittingham* [2013] NSWCA 263 at 161.
21 (1966) 115 CLR 266.
22 (1966) 115 CLR 266 at 303.
23 *Caratti v Mammoth Investments* (2016) 50 WAR 84 per Buss JA at [377].

the solicitors from Rodgers, Barnes & Green, or indeed any of the solicitors who acted in the litigation. They acted for Matton Developments, not Gallop Reserve, and there is no reason to suppose they would have added anything to Gallop Reserve's case (as opposed, in the case of the two solicitors called by Mr Clark, to providing some support for it when cross-examined) or would reasonably be expected to be called by it.

[86] I did not find Mr Foggo to be a uniformly credible witness, but nothing contradicts his evidence that he was not involved in or aware of the process by which Mrs Kenward became a director. Even if I were prepared to infer from the evident closeness of his relationship with Mr Kenward that he did know of it, it is another matter whether he was aware that it was not a permissible method of appointment under s 201H of the *Corporations Act*. Although I have found that the process by which Mrs Kenward was appointed was part of an attempt on her husband's part to exclude Mr Clark from management of the litigation, undertaken against a background of concealment of what was intended, there is no evidence that Mr Kenward had any idea that there was any legal defect in it or, consequently, could have communicated any such concern to Mr Foggo. Matton Developments' own solicitors seem to have been oblivious to their error; so even if their knowledge were imputed to Mr Foggo it would have no bearing on the entitlement to make the relevant assumptions. Mr Foggo had minimal legal training; to posit that he was aware of the legal deficiency, when the solicitors were not, would at the highest be speculative.

[87] It is unnecessary to consider the remaining assumption, that Mr Kenward, as a company officer, was properly performing his duties to the company. Mr Clark has not discharged his onus of showing that Mr Foggo knew that the procedure by which Mrs Kenward was appointed was not effective. Hence, Mr Foggo had no reason to suspect that the Deed of Variation and power of attorney were not duly executed. It further follows that he was entitled to assume that there was a valid power of attorney in place when Mr Kenward executed the Continuation Deed. The result, then, is that the Deed of Variation was effective and ratified the litigation funding agreement, while the Continuation Deed extended it, so that Gallop Reserve is entitled to recover three times the amount advanced.

Estoppel

[88] Given those conclusions, it is strictly unnecessary to reach any conclusion on estoppel, but I will make some findings. Gallop Reserve contended that Matton Developments and Mr Clark had permitted Mr Kenward to hold himself out as having authority to represent the company in the steps he took, and it had relied on those representations, so that it would be unjust if either were permitted to resile from them, and they should be estopped from denying that authority. As to Matton Developments' representations, firstly, it was said that the litigation funding agreement was prepared by lawyers acting for it and the parties' signatures on it were witnessed by Mr Flint, thus representing that the agreement was binding on Matton Developments; secondly, the Deed of Variation contained representations that Matton Developments had entered the litigation funding agreement and that Mrs Kenward had been appointed as a director, and it was produced by Rodgers, Barnes & Green as Matton Developments' lawyer; and thirdly, the Continuation Deed was executed by Mr Kenward as Matton Developments' attorney and contained a representation that Matton Developments had entered the litigation funding agreement. Those representations were designed to cause Gallop Reserve to fund or to continue funding the CGU litigation.

[89] As to Mr Clark, it was submitted that he had represented that Mr Kenward had authority to bind Matton Developments by doing nothing to prevent the latter from relying on the power of attorney, although it had been sent to him on 5 April 2013. Gallop Reserve had relied on the representation in advancing further funds for the litigation. Both he and Matton Developments should be estopped from denying Mr Kenward's authority in executing the litigating funding agreement, the Deed of Variation and the Continuation Deed.

[90] Moray & Agnew were, it may be accepted, appointed as solicitors for Matton Developments; both Mr Clark and Mr Kenward took part in that decision. But Mr Foggo was, as I have found, aware that both men were directors; and the litigation funding agreement itself distinguished in its signature block between the possibilities of signature by two directors, a director and secretary, or a sole director. It actually had provision for a Director and a Director/Secretary to sign, but only one signature, that of Mr Kenward, appeared. That document did not constitute an effective holding out to Mr Foggo that Mr Kenward had authority to act on Matton Developments' behalf. The Variation Deed and the Continuation Deed were not, as a matter of fact, representations by the company; nor were they shown (for the reasons I have already explored) to have been made by solicitors appointed by it.

[91] I do not consider that Mr Clark's failure to take any steps to revoke the power of attorney could have amounted to a representation by him to Mr Foggo, and through him, Gallop Reserve, that Mr Kenward had authority. Mr Foggo was familiar with the relationship between the two men, and was as anxious as Mr Kenward to keep Mr Clark in a state of ignorance as to what was occurring. He was not under any misapprehension that Mr Clark was supporting Mr Kenward's conduct of the litigation. And in any event, Mr Clark's silence could hardly be relied on as a relevant representation to Mr Foggo, when he was under no duty to disclose the situation to him, not having been informed at any stage of his involvement (although it appears that by mid-2014, at least, he was able to make an educated guess).

[92] I would not have upheld the estoppel argument.

The effectiveness of the priority letter and the Deed of Assignment

[93] Gallop Reserve argued that it was entitled to rely on the priority letter or, alternatively, the Deed of Assignment, as giving it the right to determine in which order it would recover the Westpac debt and the litigation funding debt. Mr Clark contended that neither document was effective, because Mr Kenward was not authorised to sign them, and there was no consideration for the agreement in the priority letter.

[94] I do not consider that the priority letter was effective as an agreement for reordering the priorities of the repayment of the Westpac debt and the litigation funding loan. Mr Kenward had no actual authority to bind Matton Developments to such an agreement. He did not purport to execute it as an attorney pursuant to the power of attorney, so no assumption was available to Mr Foggo in that regard. And there appears to have been no consideration for Matton Developments' agreement; Gallop Reserve had already undertaken through the litigation funding agreement, the Deed of Variation and the Continuation Deed to fund the CGU litigation.

[95] However, the Deed of Assignment was effective. The Westpac loan agreement allowed Westpac to transfer the agreement and guarantees in respect of it without Matton Developments' consent; but in fact, Matton Developments was named as a party to it, and Mr Kenward signed as its attorney pursuant to the power of attorney; so that Mr Foggo was entitled to assume it was duly executed, and it is to be treated as if it was. Through the assignment, Gallop Reserve acquired the right under cl. 13.10 of the Westpac loan agreement to apply the money received from Matton Developments to satisfaction of whichever debt it chose.

Barnes v Addy and alleged breaches of ss 180 and 182–184 Corporations Act

[96] Mr Clark pleaded that Gallop Reserve had assisted Mr Kenward to act in breach of ss 180 and 182-184 of the *Corporations Act* and on *Barnes v Addy* principles should be required to disgorge the property and money received in consequence of that breach, being the rights acquired under the Deed of Assignment and the funds paid to Gallop Reserve.

[97] Sections 180, 182 and 183 of the *Corporations Act* set out a series of duties of directors: to exercise their powers and discharge their duties with the care and diligence that a reasonable person would apply, and not to improperly use their position or information gained in their position to gain an advantage for themselves or someone else or to cause detriment to the company. Section 184 creates criminal offences in relation to failures of those kinds which are reckless or intentionally dishonest. (Curiously, no reliance was placed on s 181, which requires a director to act in good faith and for a proper purpose.) The second limb of *Barnes v Addy*

> "…makes the defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest or fraudulent design on the part of the trustee or fiduciary".[24]

[98] Unfortunately, Mr Clark did not provide any particulars, either in his pleadings or in his submissions, as to what, precisely, the breaches by Mr Kenward were, or what form of assistance Gallop Reserve had given him so as to lead to the claimed result. Mr Clark's contention seems to be that the litigation funding agreement, the Deed of Variation, the Continuation Deed and the Deed of Assignment should be regarded as having been entered by Mr Kenward in breach of one or all of the relevant duties. Presumably, Mr Clark would say that Mr Kenward breached his fiduciary obligations by recklessly or deliberately carrying out his duties without proper care and by using his position to gain an advantage for Gallop Reserve, the fraudulent design being to divert the proceeds of the CGU litigation to it. But the evidence does not support such a conclusion.

[99] I am not satisfied that there was any relevant dishonest or fraudulent design on Mr Kenward's part, let alone one which was assisted by Mr Foggo or Gallop Reserve. While Mr Foggo and Mr Kenward concealed what they were doing from Mr Clark and may have reached some agreement that Mr Clark would bear the brunt of the liability for the Westpac loan, there is no evidence that there was any breach of duty to Matton Developments. When Mr Kenward entered each of the three agreements which in combination formed the litigation funding arrangement, there were no other options apparent for Matton Developments in attempting to recover under the CGU insurance

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[24] *Farah Constructions v Say-dee Pty Ltd* (2007) 230 CLR 89 at [160].

policy. Mr Flint said that he had made some enquiries of litigation funders without success, and the agreement under the Resolution Deed for funding had been promptly breached by Mr Clark's failure, for whatever reason, to provide his promised $40,000. It was in Matton Developments' interests that it litigate its action against CGU, because it had nothing else, and the alternative was insolvency. Indeed, Mr Clark seems to have shared the view that the litigation was the only and the best way forward. He did not want the company to go into liquidation and he admitted in cross-examination that he still hoped to obtain a benefit from the litigation, without having contributed funds towards it.

[100] There is no evidence to suggest that the arrangement by which Gallop Reserve would receive a return of three times the amount provided was out of the usual for a litigation funding agreement. When the relevant agreements were entered, it was anticipated that the action would settle with costs well below the expected return. The fact that CGU appears to have been intransigent and run up both sides' costs to disastrous levels does not alter the reasonableness or the bona fides of what was done in the first instance. The Deed of Assignment was entered to avert Westpac's intervention in the litigation, and it did not operate to Matton Developments' disadvantage. Mr Kenward was not honest with Mr Clark about the arrangements he had made, but it does not mean that he had not honestly made them in the interests of Matton Developments.

[101] Since there was no relevant breach of duty nor any dishonest or fraudulent design on Mr Kenward's part, it follows that neither Mr Foggo nor Gallop Reserve knowingly assisted him in a way which would make the latter liable to return any of the proceeds of the litigation to Matton Developments.

The alleged breach of the Australian Consumer Law

[102] Mr Clark's counterclaim pleaded unconscionability in the subordination by Gallop Reserve of its right to be paid the Westpac debt to its entitlement under the litigation funding agreement, on the basis that it was said to be the product of malice towards him in circumstances where he was entitled to be discharged and exonerated from his liability by payment of the Westpac debt, and it alleged that the subordination took place because Mr Foggo wanted Gallop Reserve to recover all it could from Matton Developments, without diminishing its ability to recover against Mr Clark. The pleading did not, however, identify any relevant agreement, bargain or transaction as between Gallop Reserve and Mr Clark which could be affected by the alleged unconscionability. Mr Clark had added an allegation by amendment that the subordination was

> "… fraudulent, as an underhand bargain transacted mala fide"

in respect of him; however, he pleaded nothing to support that allegation.

[103] Mr Clark did not say anything about those parts of the pleading in his submissions, but instead relied on a further pleading in his counterclaim as to the application of s 20 of the *Australian Consumer Law*, which prohibits corporations from engaging in unconscionable conduct in trade or commerce. The particulars of the pleaded unconscionability were those already described in the previous paragraph. In Mr Clark's submissions, he identified the unconscionability as consisting of Mr Foggo's not telling him that Westpac would accept $400,000 for the debt, and would release the guarantors from their obligations; colluding (one assumes, with Mr Kenward) to conceal the

proposed assignment from him; relying on the power of attorney knowing it to have been invalidly conferred on Mr Kenward; and not advising Matton Developments that the real intention in seeking the assignment was to pursue him into bankruptcy.

[104] Mr Clark went further than the pleading in this respect: he also alleged misleading and deceptive conduct, presumably under s 18 of the *Australian Consumer Law*. The conduct in question, according to his initial submissions, was Gallop Reserve's reliance on the power of attorney pursuant to which Mr Kenward executed the Deed of Assignment. That argument depended, of course, on the premise that the power of attorney was ineffective. In later submissions, Mr Clark expanded on the misleading and deceptive conduct to include what he said were Gallop Reserve's collusion with Mr Kenward in concealing the litigation funding arrangements from Mr Clark; misleading Matton Developments as to its intentions in acquiring the rights under the Westpac loan agreement, which were to pursue Mr Clark into bankruptcy; and misleading Westpac as to there being a validly executed power of attorney, so that Westpac entered the agreement assuming that both directors had agreed to it. All of this was said to give rise to a right to an injunction to prevent enforcement of the default judgment.

[105] In response to some questions I raised at the end of the trial, Mr Clark addressed the issue of whether the assignment to Gallop Reserve of the rights under the Westpac loan agreement would involve financial services or products as defined by s 12BAA and s 12BAB of the *Australian Securities and Investments Commission Act* and thus excluded from the application of the *Australian Consumer Law* by virtue of s 131 of the *Competition and Consumer Act*. (Gallop Reserve contended that it was a financial product.) Mr Clark submitted that the acquisition of the rights under the Westpac loan agreement did not involve a financial product or service. In further submissions, he contended that if it did, he should be allowed to amend his pleadings to allege unconscionable conduct and misleading and deceptive conduct in connection with financial services under s 12CB of the *Australian Securities and Investments Commission Act* and to seek an injunction under s 12GD of that Act, on the basis of conduct contravening it. He also sought to expand his claim to seek damages under either s 236 of the *Australian Consumer Law* or s 12GF of the *Australian Securities and Investments Commission Act* for alleged loss caused by contravention of one or the other relevant provisions.

[106] One might allow the amendment to identify a different Act as the source of the rights Mr Clark alleges, and perhaps even the addition of the misleading and deceptive conduct claim, since Gallop Reserve did not express any concern about it in its submissions. But the amendment to claim damages, which was first identified in a set of submissions filed after Gallop Reserve's submissions in reply, could not, with any fairness to Gallop Reserve, be contemplated. But I would not allow any of the amendments, because Mr Clark cannot succeed on these claims, with or without the proposed changes. He has failed to identify anything which amounts to unconscionability or misleading and deceptive conduct in relation to the Deed of Assignment, or in consequence, Gallop Reserve's acquisition of rights against him under his guarantee.

[107] Firstly, there was nothing unconscionable about Gallop Reserve's acquisition of those rights through the entry of the Deed of Assignment by Matton Developments and the other parties. The evidence, including Mr Muller's contemporaneous file notes, indicates that it was considered necessary in order to prevent Westpac's intervention to

settle the CGU litigation to Matton Developments' disadvantage. There was no obligation on Westpac or Gallop Reserve to seek Mr Clark's views on the assignment; it could take place without his consent. Nor was there any obligation to reveal the negotiations which took place with Westpac, including the fact that Westpac would be prepared to release the guarantors if it were paid $400,000; and in any case, since Matton Developments could not have made such a payment, that was not a live proposition.

[108] More importantly, there was no dealing between Mr Clark and Mr Foggo or Gallop Reserve in which Mr Foggo can be seen to have taken advantage of some superior position so as to act unconscionably. The enforcement of the default judgment against Mr Clark would amount to the exercise by Gallop Reserve, in the place of Westpac, of rights which Mr Clark had long since conferred, and there is no suggestion that when he gave the guarantee he was in any position of disadvantage. The fact that through the assignment, Gallop Reserve gained the right to enforce the default judgment against Mr Clark is not the product of unconscionable conduct but rather of Mr Clark's having taken the inherent risk of signing a guarantee of obligations under a loan agreement, the rights under which, including the right to alter priority of payment, could be assigned to a third party.

[109] As to the assertion of misleading and deceptive conduct in relation to Mr Kenward's execution of the Deed of Assignment pursuant to the power of attorney, Mr Foggo was entitled to rely on the assumption that the power of attorney was validly executed and hence that Mr Kenward was able to sign the Deed of Assignment on behalf of Matton Developments. Westpac would be entitled to make the same assumption. Whatever Mr Foggo's and Mr Kenward's apprehensions, there is no evidence that Mr Clark's anticipated opposition to the Deed of Assignment would actually have been of any interest to Westpac. The fact that Mr Kenward and Mr Foggo had refrained from informing Mr Clark of the identity of the funder of the litigation did not amount to misleading and deceptive conduct relevant to Matton Developments' entry of the litigation funding arrangements, since the identity of the funder was known to Mr Kenward, and thus to it.

[110] I do not accept that the intention of Gallop Reserve in entering the Deed of Assignment was primarily to pursue Mr Clark, as opposed to preventing Westpac from terminating the CGU litigation, although I do consider it likely that Mr Foggo had indicated to Mr Kenward, that of the two guarantors, Gallop Reserve would seek to recover first from Clark. But even if that inference is correct, that information was made known to Mr Kenward, and hence to Matton Developments. In any event whether or not Mr Clark would be pursued could have no relevance to Matton Developments' interests in entering the Deed of Assignment.

[111] There is nothing to indicate that any of the parties to the Deed of Assignment was misled. But in any case, it was not a transaction to which Mr Clark was a party or needed to be. Again, the true cause of his liability under the default judgment is his entry in the first instance of the guarantee of the Westpac loan agreement.

The Personal Property Securities Act argument

[112] By virtue of the Deed of Assignment, Gallop Reserve acquired rights under the charge which Matton Developments had granted over its assets to secure its obligations under

the Westpac loan agreement. The charge was a "security interest" as defined by s 12(1) of the *Personal Property Securities Act*. Section 111 of that Act prescribes the way in which rights under such a charge are to be exercised:

111 Rights and duties to be exercised honestly and in a commercially reasonable manner

(1) All rights, duties and obligations that arise under this Chapter must be exercised or discharged:

(a) honestly; and

(b) in a commercially reasonable manner.

(2) A person does not act dishonestly merely because the person acts with actual knowledge of the interest of some other person.

(The Chapter referred to in s 111(1) is Chapter 4 of the Act: Enforcement of security interests.)

[113] Section 271 creates the right in certain persons to recover damages where there is a breach of duties or obligations:

271 Entitlement to damages for breach of duties or obligations

(1) If a person fails to discharge any duty or obligation imposed on the person by this Act:

(a) the person to whom the duty or obligation is owed; and

(b) any other person who can reasonably be expected to rely on performance of the duty or obligation;

has a right to recover damages for any loss or damage that was reasonably foreseeable as likely to result from the failure.

(2) Nothing in subsection (1) limits or affects any liability that a person may incur under any of the following:

(a) a law of the Commonwealth, a State or a Territory;

(b) the general law.

[114] Mr Clark's counterclaim pleaded that by virtue of s 111, Gallop Reserve was obliged to exercise its rights to recover payment from the proceeds of the CGU litigation in "a commercially reasonable manner," and it was not commercially reasonable to subordinate its rights to be paid the Westpac debt to its rights under the litigation funding agreement. It was also pleaded that the reason for the subordination was malice on Mr Foggo's part towards Mr Clark or a desire on his part to see Gallop Reserve recover all that it could from Matton Developments without diminishing its ability to recover against Mr Clark. On that basis, it was pleaded, Mr Clark was entitled to

damages under s 271 in an amount equal to his liability under the default judgment. Mr Clark submitted that Mr Foggo's malice was demonstrated by the fact that Gallop Reserve had litigated against him repeatedly and by Mr Foggo's pursuit of him, rather than Mr Kenward.

[115] The flaw in both the pleading and the submissions was that neither identified any duty or obligation imposed by Chapter 4 of the Act, referred to in s 111, which had been exercised at all, let alone dishonestly or in a commercially unreasonable manner. The difficulty for Mr Clark is that the Chapter is concerned with what may or may not be done in enforcing a security interest in personal property, and his complaint was in essence that Gallop Reserve had not enforced the charge, but had rather failed to rely on the rights it gave to recover the secured debt. There was no relevant breach of duty for the purposes of the *Personal Property Securities* legislation.

Conclusions

[116] Gallop Reserve sought an order for payment of the remaining funds in court to it; declarations as to the validity of the litigation funding agreement, the Deed of Variation, the Continuation Deed, the Deed of Guarantee executed by the Kenwards and the priority letter; and a declaration that Gallop Reserve was entitled to apply the funds it recovered to discharge the amounts owing to it under the litigation funding agreement, as varied, in priority to the amounts owed under the Westpac loan agreement.

[117] Given my findings as the effectiveness of the various instruments, Gallop Reserve is entitled to the funds in court and to a declaration to the effect that it is entitled to apply them, and those already held, in the order it chooses. No submissions were made as to why the Deed of Guarantee should be declared valid, and I can see no reason for making such a declaration. I have reached the view that the priority letter was not valid, so there is no question of a declaration in that respect. However, Gallop Reserve is entitled to declarations in respect of the three documents which make up the litigation funding arrangement. Mr Clark's counterclaim must be dismissed.

Orders

[118] I will:

1. order that the balance of the funds paid into court by the solicitors for the first defendant in February 2018 be paid, with any accrued interest, to the plaintiff;

2. declare that the litigation funding agreement, executed on 12 March 2012, and the Deed of Variation by which it was ratified are valid and effective;

3. declare that the Continuation Deed is valid and effective;

4. declare that the plaintiff is entitled to apply monies received from the proceeds of the first defendant's settlement with CGU Limited to discharge amounts owing to it in respect of the litigation funding agreement, as varied, in priority to amounts owed in relation to the loan agreement between the first defendant and Westpac Banking Corporation;

5. dismiss the counterclaim.

I will hear the parties as to costs.