SUPREME COURT OF QUEENSLAND

CITATION:	*Eaton v Rare Nominees Pty Limited* [2019] QCA 190
PARTIES:	**CHRISTOPHER JOHN EATON** (appellant) **v** **RARE NOMINEES PTY LIMITED ACN 094 976 833 as trustee for the MACKELLAR FAMILY SUPERANNUATION FUND** (respondent)
FILE NO/S:	Appeal No 11105 of 2017 DC No 4799 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 238 (Dorney QC DCJ)
DELIVERED ON:	13 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2018
JUDGES:	Philippides and McMurdo JJA and Davis J
ORDERS:	**1. Allow the appeal.** **2. Set aside the judgment against the appellant in favour of the respondent.** **3. Give judgment for the appellant against the respondent.** **4. Set aside the order for costs made by the trial judge against the appellant.** **5. Order the respondent to pay the appellant's costs of the proceeding against him and the costs of the appeal.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – FIDUCIARY DUTY – SCOPE GENERALLY – where a company, of which the appellant was the sole director and controlling mind, and the respondent, entered into a joint venture agreement for the development of an "Asset", being a piece of land, and the sale of serviced residential lots – where the appellant's company was the proprietor of the "Project" and the respondent was one of a number of contributors to it – where, under the joint venture agreement, the respondent advanced money to the Project – where the joint venture agreement provided that the proprietor of the Project shall pay "Contributors' Entitlements" to the respondent at least annually

– where the joint venture agreement further provided that the relationship between the parties to the joint venture agreement shall be "contractual only", that to the extent permitted by law, duties of a fiduciary nature were excluded, and that the appellant company, as proprietor, held all legal and beneficial interest in the Asset and did not hold it on trust for the contributors – where the respondent contended that the appellant's company owed fiduciary duties to the respondent, which it breached by prioritising non-development payments of the Project over paying entitlements to the respondent as a contributor – whether a fiduciary duty proscribing that conduct arose in the circumstances

Assad v Eliana Construction & Developing Group Pty Ltd [2015] VSCA 53, considered
Australian Oil & Gas Corporation Ltd v Bridge Oil Ltd [1989] NSWCA 239, applied
Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4] (2007) 160 FCR 35; [2007] FCA 963, considered
Caple v Wilson [2016] VSC 704, considered
Farah Constructions Ltd & Anor v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, considered
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, applied
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19, applied
News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410; [1996] FCA 870, applied
Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd (2017) 348 ALR 385; [2017] FCAFC 141, considered
Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910, distinguished

COUNSEL: S B Whitten for the appellant
B A Hall for the respondent

SOLICITORS: Saal & Associates for the appellant
Robinson Locke Litigation Lawyers for the respondent

[1] **PHILIPPIDES JA:** This is an appeal concerning a proceeding brought in the District Court against E-Coastal Developments Pty Ltd, the appellant, Mr Eaton (who was the sole director and controlling mind of E-Coastal) and Mrs Eaton, amongst others, by the respondent, Rare Nominees Pty Ltd as Trustee for the Mackellar Family Superannuation Fund (Rare). Mr and Mrs Mackellar were the directors of Rare and had known Mr Eaton since the late 1980s. They had been involved in a number of projects developed by E-Coastal.

[2] The proceeding arose out of a joint venture agreement entered into in 2006 (the JVA) between E-Coastal, as proprietor, and Rare, as one of a number of

"Contributors".[1] The joint venture entered into concerned the facilitation of "the Project", being the development and subdivision of the "the Asset" and sale of serviced residential Lots.[2] The "Asset" was defined as land at Ningi, Queensland,[3] of which E-Coastal was the proprietor.[4] While the project progressed to completion, no payments of "Contributors' Entitlements" were made to Rare under the JVA.

[3] By the time of the trial, E-Coastal had gone into liquidation and had been deregistered. Rare, in a seventh Amended Statement of Claim, sought relief solely against Mr and Mrs Eaton. Rare claimed that, in the performance of its role and duties pursuant to the JVA, E-Coastal owed fiduciary duties to Rare which were breached. The trial judge found E-Coastal owed Rare fiduciary duties which were breached and that Mr Eaton was liable to Rare pursuant to the second limb of *Barnes v Addy*[5] and gave judgment against Mr Eaton, ordering him to pay to Rare the sum of $226,000.55 inclusive of interest.[6]

[4] Mr Eaton appeals against the trial judge's decision on three grounds:

- Ground 1 concerns the proper construction of the term "Receipts" in the JVA.
- Ground 2 concerns whether the trial judge erred in his determination that there was a breach of fiduciary duty by E-Coastal.
- Ground 3 concerns whether the trial judge erred in finding that Mr Eaton was liable pursuant to the second limb of *Barnes v Addy*.

The JVA

[5] Clause 3.1 identified the "general objectives" of the JVA as being:

- to "*protect* the Contributors from the *commercial risks* associated with the Project" (cl 3.1.1); and
- to "reward the Parties according to their respective roles" (cl 3.1.2).

[6] Clause 3.2 provided that, "*[t]o those ends*", the "legal relationship of the Parties under the Joint Venture shall be *contractual only*" (cl 3.2.1) and that their roles "shall be as set out in Clauses 3.3 and 3.4" (cl 3.2.2).

[7] Clause 3.3 specified the Proprietor's role as being:

- by cl 3.3.1, to be the "holder of title to the Asset";
- by cl 3.3.2, to conduct and manage "the Project and maintain Accounts" (the latter term being defined in the JVA[7]);

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1 The other Contributors were Marzabella Pty Ltd and Jeffery John Campbell (as Trustee for the Campbell Family Trust). Modern City Living Pty Ltd (as Trustee for the Eaton Family Superannuation Fund) was initially a contributor but was removed as such by Mr Eaton.

2 Defined in Pt 9 of the Sch to the JVA.

3 Part 7 of the Sch identified the Asset as Lot 1 on SP 173014, County Canning, Parish Toorbul, Title Reference 50584072 situated at 942-968 Caboolture/Bribie Island Road, Ningi.

4 See Pt 2 of the Sch.

5 (1874) LR 9 Ch App 244.

6 *Rare Nominees Pty Ltd v E-Coastal Developments Pty Ltd & Ors* [2017] QDC 238 (Reasons).

7 By cl 1.1.1 of the JVA the term "Accounts" meant "all books of account, registers, instruments of title, records and financial statements kept or to be kept, maintained or prepared for the purpose of providing a true and proper record of the affairs, assets and liabilities, income and expenditure of the Joint Venture".

- by cl 3.3.3, to account to the "Contributors" for the "Contributors' Entitlements",[8] defined in the JVA as a percentage of the "Receipts", itself a defined term;[9]
- by cl 3.3.4, to enter "such contracts and do such things as are necessary to undertake the Project";
- by cl 3.3.5, to pay "all outgoings in respect of the Asset"; and
- by cl 3.3.6, to provide "such Contributions, if any, as set out in Part 5 of the Schedule", namely $2,630,000 (being the Maximum Borrowing Amounts plus $150,000).

[8] By cl 3.4, each Contributors' role was stated as being "to provide the Contributions", specified in the Schedule as $70,000.[10]

[9] Clause 3.5 stated that the "only duties of any Party are those set out in this Agreement". In addition, it was stated, "To the extent permitted by law" duties "(including duties of a fiduciary nature) are excluded".

[10] Clause 3.6 stated, "No Party will acquire property nor borrow nor enter into any commitment or liability which is not provided for in this Agreement".[11]

[11] By cl 3.9, it was stated that Contributions:

- did not constitute a loan (cl 3.9.1);
- represented risk capital (cl 3.9.2); and
- did not raise "Obligations"[12] on "any other Party to repay such Contributions to the Party contributing them or to pay any amount to any Party to this Agreement (other than under Clauses 6 and 8)" (cl 3.9.3).

[12] Clause 4 provided, in relation to "Dealing with the Asset and Project":

- "The Proprietor will be the registered proprietor and owner of the Asset and the Contributors will not acquire any interest in the Asset except under Clause 6" (cl 4.1).
- "Each Party will deal with its interest under this Agreement only in accordance with the terms of this Agreement and not deal with or otherwise do or omit to do anything which may adversely affect the value of the Asset, the Project, or their interests in the Joint Venture, except in accordance with the terms of this Agreement" (cl 4.3).
- Except as permitted by the JVA, "no Party will during the continuation of its Obligations (whether actual, prospective or contingent) sell, give or otherwise

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8 Clause 1.1.10 of the JVA and specified in Pt 11 of the Sch as "3.448% of Receipts".

9 Clause 1.1.18 of the JVA defined "Receipts" as "all proceeds of any kind, whether of an income or capital nature, received in connection with or relating to the Project including … the proceeds of sale of the Asset or part of it … and any deposits forfeited pursuant to any contract for the sale … of the Asset or part of it".

10 See Pt 5 of the Sch of the JVA.

11 Clause 3.7 of the JVA provided that the Proprietor "may raise and borrow money for the purposes of the Project and may subject the Asset to securities to secure such borrowing", but that the borrowing should not exceed the Maximum Borrowing Amount and that the Contributors should not "be required to guarantee or indemnify the repayment of any borrowings or any other Obligations of the Proprietor" and the Contributors would "perform their obligations under any securities to third parties".

12 "Obligations" was defined by cl 1.1.14 to mean "all the liabilities and obligations of a party (including any indemnity granted by it)" under the JVA.

dispose, charge or encumber in any way the legal or any beneficial interest in the Asset or any other Joint Venture property" (cl 4.4).

[13] Clause 5 specified the "Duties" of the parties as follows:

- "The Proprietor shall make all decisions relating to the Project and need not consult with the Contributors" (cl 5.1).
- "The Contributors shall not become involved in the management of the Project" (cl 5.2).

[14] Clause 6 addressed the provision of "Security for Entitlements" and included provisions that:

- "The Proprietor charges the Asset with the due payment to the Contributors of all monies due and payable to the Contributors pursuant to this Agreement and agrees to execute in favour of the Contributors a mortgage in the form reasonably determined by the Contributors' solicitor ('the Mortgage')" (cl 6.1);
- "The Contributors shall not exercise any powers under the Mortgage unless there is a breach or non-performance by the Proprietor of its Obligations" (cl 6.2).

[15] By cl 7.1, all project costs were to be borne and paid expeditiously by the Proprietor.

[16] Clause 8 relevantly set out the "Entitlements" of a Contributor as:

- "The Proprietor shall pay to the Contributors the Contributors' Entitlements" (cl 8.1).
- "Financial Statements[13] shall be prepared by the Parties annually or at such more frequent intervals required by the Contributors (but not more frequently than quarterly)" (cl 8.2).
- "The Contributors' Entitlements shall be paid at least annually, the first payment being no later than three months (3) after the end of each year of the Joint Venture" (cl 8.3).

[17] Clause 9 provided for meetings to be held and required the Proprietor to supply to the Contributors on a six weekly basis a "Project Update Report", which should contain certain specified matters. Clause 13 provided the Parties with entitlements to access to books and records.

[18] Clause 10.1 stated that, "Upon the Expiry",[14] the Proprietor "shall cause the Asset to be sold to the best advantage of the Parties".

[19] The "Relationship Between the Parties" was dealt with in cl 14:

> "14.1 The relationship between the Parties does not constitute a partnership nor, will any Party have authority to act as agent of

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13 Defined by cl 1.1.9 to mean "statements setting out Receipts, entitlements of the Joint Venture to money from third Parties, moneys due to the Joint Venture by the parties, Project Costs (all on an accruals basis) and Contributors' Entitlements".

14 Defined by cl 1.1.8 to mean "the event or time described in Part 6 of the Schedule" – but which was left blank.

or otherwise for, or assume any Obligation of any other or the Joint Venture.

14.2 The Proprietor holds all the legal and beneficial interests in the Asset.

14.3 The Proprietor does not hold the Asset upon trust for the Contributors.

14.4 For the avoidance of doubt, the nature of a Contributor's interest in the Joint Venture is as follows:

14.4.1 The Contributor is not entitled to any asset of the Joint Venture.

14.4.2 …

14.4.3 The Contributor does not have any proprietary, beneficial or other interest in the Asset.

14.4.4 No Contributor is entitled, either by itself or together with any other Party to this Agreement, to any beneficial interest in the Asset.

14.4.5 Each Contributor's interest in the Joint Venture is limited to its entitlement to receive the Contributor's Entitlement payable by the Proprietor at the time and subject to the conditions stipulated in this Agreement.

14.5 The Proprietor is entitled to receive all of the Receipts for its own benefit."

[20] Clause 15.1 stated that "nothing" in the JVA "will be deemed to restrict in any way the freedom of any Party to conduct as it sees fit any business whatever (except in this Joint Venture) in any place without any accountability to the others".

[21] A "full faith and assurance" clause was provided by cl 20, which stated:

"20.1 Each Party will perform its Obligations and be just and faithful to the other parties in all its activities and dealings concerning the Project, the Joint Venture and any matter provided for in this Agreement.

20.2 Each Party will at all times whether or not expressly required to do so give a full and true account to the others of all matters within its knowledge relating to the Project and the Joint Venture.

20.3 Each Party will execute and do all such further documents, acts and things as are necessary or desirable to give full effect to this Agreement."

The issues at trial

[22] The key issues for determination identified at trial by Rare in relation to its claim were:

(a) whether the JVA created a trust and, or alternatively, a charge over the "Contributors' Entitlement of Receipts" as they were received into Mr Eaton's hands;

(b) what is the correct calculation of Rare's Contributors' Entitlement under the JVA (including whether the Contributors' Entitlement was calculable upon gross receipts of the Project or the nett receipts of the Project); and

(c) were Mr and Mrs Eaton knowingly involved in any breach by E-Coastal of any identified trust by way of their receipt of monies from E-Coastal and, or alternatively, were any such monies as received by Mr and Mrs Eaton charged in favour of Rare?

[23] Rare claimed that E-Coastal breached the fiduciary duty it owed to Rare by mixing funds payable to Rare with its own funds, transferring to Mr and Mrs Eaton funds payable to Rare and failing to maintain proper books and records which disclosed the accounting position of the Project and the Contributors' Entitlements.

The trial judge's findings as to Mr Eaton

[24] The trial judge considered[15] that Mr Eaton attempted to answer "in a reasonably straightforward way most of the questions put to him". These included questions that he had lied from the time of the last sale of the Ningi Lots in 2007 (which, in a concession made in Mr Eaton's evidence, was in early October 2007) up until sometime in 2013. Mr Eaton's explanation was that the financial troubles that E-Coastal experienced as a result of stressors to the different projects in which it had been involved led to serious financial difficulties for E-Coastal. He hoped to overcome them eventually, particularly by "his" other projects (that is, those undertaken by E-Coastal) turning a profit in their own right. Mr Eaton conceded that he refused, or failed, to provide any project updates or financial reports, which the trial judge found[16] was explicable in terms of the considerable financial mess that E-Coastal had got itself into. It was also consistent with the high likelihood that any "contractual" request for reports about, or examination of, the accounts of E-Coastal would have been rebuffed, "thereby adding to any vulnerability factor" in the relationship.

The trial judge's findings as to the use of funds by E-Coastal

[25] His Honour found[17] that E-Coastal, under the control of Mr Eaton, used significant funds of E-Coastal to pay for matters outside the ambit of the development costs of the JVA or in preference to making any payment to Rare to which it was entitled. His Honour also found that it was clear from the financial documentation that E-Coastal "could have paid" the entitlements as they fell due, since E-Coastal had sufficient funds for a very significant time up to 2013.

The trial judge's findings as to the meaning of "Receipts"

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15 Reasons at [60].
16 Reasons at [62].
17 Reasons at [63].

[26] The trial judge found[18] that the term "Receipts" in cl 1.1.18 of the JVA was not limited to nett receipts but extended beyond funds paid "into" E-Coastal's designated accounts for the Project, to include funds paid "to" E-Coastal from the purchasers of the Lots.

[27] Taking into account settlement amounts paid by the various purchasers of the subdivided Lots as "Receipts" (less the deductions made for the usual adjustments) of $3,588,900 less "adjustments" of $1,507.57, yielded $3,587,392.43 so that each Contributor was entitled to amounts equal to 3.488 per cent of the Receipts being a sum of $125,128.25.

The trial judge's findings as to the existence of an express trust, charge and constructive trust

[28] His Honour rejected Rare's contention that an intention to create an express trust should be imputed, given the following five provisions of the JVA:[19]

1. cl 3.2.1 – that the "legal relationship" of the parties "shall be contractual only";
2. cl 3.3 – defining the role of E-Coastal as "the holder of title" to the Asset (cl 3.3.1). Also in cl 3.3, although cl 3.3.3 stated that the Proprietor's role was to "[a]ccount" to the Contributors for the Contributors' entitlements, a trust intention is not necessarily imputed because there is an obligation to account;
3. cl 3.5 – that the "only duties" of any party are those set out in the JVA and that, "[t]o the extent permitted by law, any duties imposed by statute, common law or rules of equity … are excluded";
4. cl 4.1 – that the Proprietor would be "the registered proprietor and owner" of the Asset and that the Contributors "will not acquire any interest in the Asset except under Clause 6";[20]
5. cl 14 – dealing expressly with the relationship between the parties, and identifying:
    - that the relevant relationship "does not constitute a partnership", nor would any party "have authority to act as agent of or otherwise for, or assume any Obligation of any other or the Joint Venture" (cl 14.1);
    - that the Proprietor did not hold the Asset "upon trust for" the Contributors and that it "holds all the legal and beneficial interest in the Asset" (cl 14.2 and cl 14.3);
    - that, for the "avoidance of doubt", the nature of a Contributors' interest is that "the Contributor is not entitled to any asset" of the joint venture (cl 14.4);
    - that the Contributor did not have "any proprietary, beneficial or other interest in the Asset" (cl 14.4.3);

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18 Reasons at [74]-[77].

19 Reasons at [84]-[87].

20 The trial judge observed that cl 6.1 had little scope for effect after the registration of the various Lots (as a consequence of the subdivision of the Asset). Mr Mackellar admitted in evidence that he did not seek that E-Coastal execute such a mortgage. The term "charge", in the context of the whole Clause and the other terms of the JVA, suggests a fixed equitable charge in the circumstances: Reasons at [23].

- that the Proprietor "is entitled to receive all of the Receipts for its own benefit" (cl 14.5); and
- that each Contributors' interest "is limited to its entitlement *to receive* the Contributors' Entitlement payable by the Proprietor at the time and subject to the conditions stipulated" in the JVA (cl 14.4.5).

[29] His Honour also concluded[21] that a close analysis of the provisions of the JVA did not demonstrate that the "Receipts" once received by E-Coastal as proprietor were held "on trust for" the Contributors such that that trustee "could do nothing else with it" other than pay the Contributors' Entitlements. This was especially so given cl 15.1, a non-restricting provision, showed that E-Coastal was entitled to conduct other business. His Honour was thus unable to conclude, by reference to the provisions of the JVA, the nature of the JVA and the circumstances attending it, that an imputed express trust was able to be inferred.[22]

[30] His Honour[23] held that cl 6 did not advance Rare's case, it only gave a Contributor a right to have a registered mortgage executed in favour of that entity but required it to be discharged at the time of registration of the subdivision. The fixed charge created by a Contributor availing itself of cl 6.1 became legally ineffective once the "Asset" ceased to exist upon subdivision, which was the object of the Project.[24] Taken with cl 14.5, reasonable business persons could not be held to have agreed that monies characterised as "Receipts" were to constitute a fund which was to be separately charged without some more explicit indication from the JVA itself.[25] Nor did the schedule to the JVA, by specifying the Contributors' Entitlement as 3.448 per cent of Receipts, designate an entitlement to be specifically payable *from* the "Receipts", since cl 1.1.10 defined the Contributors' Entitlements to mean "amounts equal to the percentage of the Receipts" set out in the schedule.[26] His Honour concluded that no charge was created over the actual Receipts and no equitable assignment to the extent of Rare's debt had occurred.[27] Nor did the circumstances of the case warrant the Court declaring a constructive trust over the Receipts.[28]

The trial judge's findings as to the existence of a fiduciary relationship

[31] In respect of whether a fiduciary relationship existed, the trial judge adopted the dicta in *Assad v Eliana Construction & Developing Group Pty Ltd*[29] that "there is no generally accepted checklist by reference to which it can be determined whether or not a joint venture involves a fiduciary relationship" and that whether the relationship is fiduciary "will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken".[30] In determining whether a fiduciary relationship arose, his Honour had regard to the established principles set out in *John Alexander's Clubs Pty Ltd v*

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21 Reasons at [86].
22 Reasons at [87].
23 Reasons at [70].
24 Reasons at [109].
25 Reasons at [70].
26 Reasons at [109].
27 Reasons at [111].
28 Reasons at [114].
29 [2015] VSCA 53 at [54].
30 Citing from *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11.

White City Tennis Club Ltd,[31] which adopted the statements of principle of Mason J in *Hospital Products Ltd v United States Surgical Corporation*.[32] In a finding that there was a fiduciary relationship and a limited fiduciary duty, owed by E-Coastal to Rare, his Honour also referred *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd*,[33] *Caple v Wilson*[34] and *Ross River Ltd v Waveley Commercial Ltd*.[35]

[32] His Honour made reference[36] to Professor Finn's extra-curial writing, "*Fiduciary Reflections*",[37] and his view that what must be shown for a fiduciary relationship is that the "actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his or her interests in and for the purposes of the relationship". Matters such as "ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement".[38] The critical matter is the role, or function, that the alleged fiduciary has, or should be taken to have, in the relationship; it must so implicate that party in the other's affairs or so align that party with the protection or advancement of that other's interest that the foundation exists for the "fiduciary expectation".[39]

[33] The trial judge summarised Rare's arguments for the foundation of a fiduciary expectation as arising from:[40]

> "… its position as a Contributor investing 'risk capital' and the position of trust and confidence that the JVA placed in E-Coastal, as Proprietor, both in terms of the management of the development and the management of [Rare's] investment, meant that it was vulnerable, that it had no means to satisfy itself about matters, and that the other parties were totally dependent on E-Coastal to honour its obligations to them."

[34] His Honour observed[41] that the evidence given by Mr Mackellar as to his inability "to obtain accurate, truthful information" occurred after the entry into the JVA when there were reasons to believe that the Project was far more developed than Mr Eaton was indicating. Further, his Honour noted[42] that the import of Mr Mackellar's evidence was that at the time of entry into the JVA, he, on behalf of Rare, "was simply involved in investing", having had reasonably successful investments involving Mr Eaton's entities previously. He was not concerned about strict adherence to the reporting obligations of the JVA, particularly where the only real risk, as he saw it, though significant in itself, was the loss of the original contribution of $70,000. His Honour observed that the JVA did protect Rare from "'the commercial risks associated with the Project' and expressly did provide that the Contributors were not to become involved in the management of the Project

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31 (2010) 241 CLR 1.
32 (1984) 156 CLR 41.
33 [2017] FCAFC 141.
34 [2016] VSC 704.
35 [2013] EWCA Civ 910.
36 Reasons at [95].
37 (2014) 88 ALJ 127 at 139.
38 (2014) 88 ALJ 127 at 139.
39 (2014) 88 ALJ 127 at 139.
40 Reasons at [97].
41 Reasons at [97].
42 Reasons at [98].

(thereby avoiding risking their personal exposure to liability)" and left all project costs to be borne by E-Coastal alone. Further, his Honour observed[43] that while Rare:

> "… did contractually concede to E-Coastal the conduct and management of the project, it was not otherwise precluded from inquiring. Clause 9 required meetings and interim reporting by E-Coastal to [Rare] and Clause 13 allowed each party to have access to 'books of account, information, accounts, registers and records or storage media' of whatever kind and/or other documents which related to the 'JVA' or anything done or to [be] done under 'the JVA' *and* 'to take extracts or copies'. [Rare], on the evidence, did not seek to take advantage of those rights."

[35] His Honour referred[44] to Rare's contention that cl 3 did not preclude the existence of fiduciary duties because, for instance, the obligation in cl 3.3.3 on E-Coastal to "account". His Honour identified the question as whether an obligation to "account" conveyed an obligation "to do more than calculate and pay that Entitlement as it became due from time to time". Further, his Honour observed that, while on its face, cl 3.5 sought to preclude the JVA being subjected to any specific fiduciary duty, it expressly acknowledged that it only applied to "the extent permitted by law".

[36] In determining the ambit and consequential effect of that "exclusion" in cl 3.5, his Honour referred to *ASIC v Citigroup Global Markets Australia Pty Ltd [No 4]*[45] where a letter of retainer, which provided expressly that the engagement was "not in any other capacity including as a fiduciary", was held to be effective. His Honour referred to the analysis of that decision by Professor Finn[46] and the commentary that, while the statement may have been "a genuine statement of intention", it was probably not an "effective" one, because "as a matter of characterisation, it appears to have mis-described the factual relationship created" and that "the courts should be slow indeed to give their blessing to a blanket denial of fiduciary responsibility in a relationship which manifestly would otherwise be fiduciary".

[37] In relation to the effectiveness of cl 3.5, his Honour reasoned:[47]

> "Where, as here, the JVA did not 'explicitly and unequivocally' authorise the use of a potential fiduciary's position, opportunity or knowledge 'for its own benefit or gain', a clause such as Clause 3.5 (even in the context of Clause 3.2.1) should be characterised as ineffective in the context of the JVA and the relationship generated from it (where a limited fiduciary relationship arose from the circumstances that occurred), such that a significant imbalance of knowledge (and the possible exploitation of it) resulted. Although Clause 14.1 purported to negate the assumption of any additional obligation, apart from what the JVA otherwise stated, it is acknowledged that no one aspect is conclusive. As discussed in *Strategic Property Reservoir Pty Ltd v Condec Pty Ltd* [2012] VSC 634 at [164], while

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43 Reasons at [98].
44 Reasons at [99].
45 (2007) 160 FCR 35 at 44.
46 (2014) 88 ALJ 127 at 143.
47 Reasons at [99].

> clauses such as clauses 20.1 and 20.2 are general in their expression, they can, if there are other indicators of a fiduciary kind, be used in aid of that conclusion."

[38] His Honour went on to consider[48] whether, in determining if fiduciary obligations arose at the time of the JVA, or later (by emerging circumstances such as explored in *John Alexander's Clubs*), the extent to which Mr Eaton's later behaviour, as the controlling mind of E-Coastal, including "lying about the state of the Project and preferring payments to be made otherwise legitimately (in the absence of contrary fiduciary or trust obligations) to other legal entities over those which were the subject of other obligations undertaken by E-Coastal outside the terms of the JVA", necessarily meant that Rare was relevantly vulnerable or disadvantaged.

[39] In relation to that question, his Honour derived assistance from *Caple* where Robson J found,[49] that a joint venture agreement had been entered with respect to "stage two" of a project development, under which one party contributed finance and financial skills and the other the land and management skills, with both guaranteeing construction finance with a view to the sharing the profits of the venture. It was held that the joint venture agreement was in all respects a partnership, except that neither party had power to bind the other.[50] While Robson J rejected the argument that the stage two assets were held on trust, his Honour found that the agreement was one that the stage two assets would be applied "solely to produce a profit for the joint venture". The trial judge placed reliance on the finding that the joint venturer land owner was thus "under a fiduciary duty to not permit the use of those assets other than for the purpose of the joint venture"[51] in circumstances where the stage two assets were effectively controlled by that joint venturer.

[40] The trial judge also derived assistance from *Ross River* which his Honour analysed in some depth. That case concerned whether a joint venture had been entered into and conducted "on purely a contractual basis"[52], the joint venture agreement containing the entirety of the rights and duties of the parties and the fastening of a fiduciary duty being inconsistent with the joint venture agreement.[53] The finding at first instance that a fiduciary relationship existed was upheld on appeal.[54] In finding that, in addition to the contractual duties, one joint venturer (the developer) owed fiduciary duties to the other parties to the joint venture, in particular, the duty to act in good faith in relation to the conduct of joint venture and payment of money, the judge at first instance observed that under the relevant agreement, one party "had complete control over the operation of the joint venture" at the latter stage when it was to receive the proceeds, incur expenditure, pay sums due and to "account" for specified profits.[55] Further, the other party "had no control over most if not all of those matters" and "had to trust" the controlling party and its relevant director both as to the operation and accounting. In addition to the fiduciary obligation to act in good faith, it was held that a duty was owed not to allow a conflict between its own

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48 Reasons at [100].
49 [2016] VSC 704 at [118], [129].
50 [2016] VSC 704 at [118], [128].
51 Reasons at [101] quoting *Caple* at [133].
52 *Ross River* at [30].
53 *Ross River* at [14].
54 *Ross River* at [61].
55 Reasons at [102] referring to *Ross River* at [39].

interests and its fiduciary duty to the other party. The content of that duty was "to act in good faith in relation to [the] … entitlement to receive (its defined benefit) and not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of the (other party's) entitlement to receive (its benefit)".[56]

[41] The trial judge observed that, in *Ross River*, it was held on appeal[57] that, while it was not a breach to pay an expense which was properly payable, the fiduciary duty threw the "burden" on the fiduciary to "justify any payment in any case where there was any doubt as to whether it was properly made". His Honour also noted that it was further held on appeal[58] that the correct analysis concerning such payments was that the operator/fiduciary was "not entitled to pay sums to itself, for its own benefit or to connected persons (not being proper development expenses)" in advance of payment; or, alternatively expressed, the fiduciary duty "did not permit (the operator) to make payment out of the joint venture revenues [in advance of any payment to (the other joint venturer) of its entitlement…] other than proper payments of development expenses…, and, secondly, required (the operator and its liable director) to justify any payment made, in the event of dispute." His Honour observed that, necessarily, any such onus can be only an evidential one in this case.

[42] His Honour proceeded on the basis that [59], although on appeal it was noted that cl 10.5 of the joint venture agreement required the developer to make payment to the other joint venturer in preference to itself, it was not on that basis alone that both the duty and the breach were determined. Rather, it stated[60] that "the main part of (the beneficiary's) case, certainly if measured in financial terms, was not that (the fiduciary) had paid itself its own share too early, but also that it had paid a substantial part of the beneficiary's share, which was a breach of a more fundamental obligation" than that of cl 10.5.

[43] His Honour concluded that, if a fiduciary duty was to be imposed in the present case, it would be in terms of the alternative expression of the formulation in *Ross River* and that that would accord with the pleadings.

[44] His Honour acknowledged that the case was "a finely balanced one where there are strong contractual arguments met by strong fiduciary arguments".[61] The "contractual arguments"[62] were those his Honour had already identified and considered in rejecting the contention for the imputation of an express trust.[63] In considering the weight to be given to "fiduciary arguments", his Honour identified four arguments:[64]

- "First, there was trust placed in E-Coastal by [Rare], in the context of previous successful dealings arranged by both dominant directors and by reason of the initial ongoing behaviour by Mr Eaton".

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56 *Ross River* at [41].
57 *Ross River* at [64].
58 *Ross River* at [96]-[98].
59 Reasons at [104].
60 Reasons at [92].
61 Reasons at [105].
62 Reasons at [105].
63 Reasons at [84]-[87].
64 Reasons at [105].

- "Secondly, the rights to inspect and to require information under the JVA were rendered nugatory in circumstances where Mr Eaton, as the controlling mind of E-Coastal, decided to lie and deny, thereby adding to the vulnerability of [Rare] which was otherwise excluded from the project's operation, especially in circumstances where its controlling mind had been [in the] United States since 1998 and was known to Mr Eaton to make yearly visits only".
- "Thirdly, although the right to be paid the entitlement under Clause 8 was not expressly premised on a priority, it existed in the circumstances of the JVA and the ongoing dealings in a way which gave rise to the entity in almost total control to determine if it would 'elect' to discharge that obligation when it arose each time, being a time when the entitlement should have been paid, and where it was able to conceal the circumstances which constituted the trigger for the right to sue".
- "Fourthly, the purpose behind the contribution was to achieve an entitlement protected from 'commercial risks'".

[45] His Honour considered[65] that those four factors led to a conclusion that it was "an appropriate expectation" on the part of Rare that E-Coastal would, in and for the purposes of the relationship, not prefer its own interests when they were in conflict with the duty ("as formulated as the alternatively expressed" duty in *Ross River*). His Honour found a breach of that duty:[66]

> "… [by] the acts which preferenced the payment of the non-development sums of the Project where Mr Eaton, as the controlling mind, decided that such competing claims on E-Coastal's overall funds should have preference over the discharge of that 'entitlement' obligation to [Rare] under the JVA, constituted a breach of E-Coastal's fiduciary duty not to use the assets of the joint venture for non-development purposes in preference to the rights of [Rare]."

[46] His Honour found such use of assets of the joint venture and "other non-JVA development expenses" were made in circumstances where the evidence showed that:[67]

> "… there were sums available to E-Coastal over a lengthy period of time where those available funds (even in those bank accounts of most direct relevance here) exceeded the relevant entitlement obligations. That prevailed when each of the two entitlements for [Rare] arose for payment."

[47] His Honour stated that:[68]

> "It is not relevant, on this conclusion, that the balance of money 'lent' generally to E-Coastal by Mr and Mrs Eaton equalled or exceeded the payments to them, or made for their benefit, from E-Coastal, especially where there were other E-Coastal 'accounts' … from which sums were, inferentially, paid, in this case, to Mrs Eaton. As well, E-Coastal used the two identified accounts with Suncorp

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65 Reasons at [106].
66 Reasons at [106].
67 Reasons at [106].
68 Reasons at [106].

> and NAB … to 'receive income' and 'pay out costs' 'associated with these *other* projects' ...Additionally, it does not matter whether [Mr Eaton] believed, in error, that E-Coastal had 15 months from each settlement for each Lot before the 'entitlement' was triggered, because the payments made by E-Coastal still preferred non-JVA obligations over JVA obligations such as the fiduciary obligation as determined and, in any event, were never paid by E-Coastal."

The trial judge's findings as to accessorial liability

[48] Proceeding on the basis that, for second limb liability, Mr Eaton's actions could be determined to involve liability only if "dishonest and fraudulent design" were established and acknowledging the necessary application of the assessment required by *Briginshaw*, as discussed in *Farah Constructions Ltd & Anor v Say-Dee Pty Ltd*,[69] his Honour found that Mr Eaton was a "knowing participant" in a "dishonest and fraudulent design", given:[70]

> "First, Mr Eaton's participation was necessary to generate a breach of fiduciary duty by E-Coastal. Secondly, in determining any 'design' about what E-Coastal did, Mr Eaton was the sole factor in the ongoing efforts to deceive [Rare] as to the existence of facts which would have been sufficient to trigger the right to claim for and, if necessary, sue for the entitlement. Thirdly, the payments from E-Coastal that he caused to be made, undoubtedly, at least for his and his wife's benefit (if not for the third defendant and others – even if only later on) were tied to the breaches of the fiduciary obligations found to have existed. Fourthly, Mr Eaton took deliberate steps to, at first, delay and then, later, obstruct [Rare's] efforts to seek recovery of its entitlements whilst deliberately paying, besides development costs of the Project, other sums to himself and Mrs Eaton (which could never have been Project Costs), as well as the debts of other projects for which E-Coastal had primary responsibility …In combination, they show the dishonesty and fraud necessary in equity to be found to be a knowing assistant to E-Coastal's breaches of fiduciary duty."

[49] His Honour found[71] that those sums exceeded the total entitlement of $125,128.25 and that there was a relevant connection between breach and loss in that, "by a combination of intentional delay and preferencing of interest over duty by relevant extra-JVA payments, [Rare] has been denied the opportunity to recover, contractually, its Contributors' Entitlements". Given the nature of control Mr Eaton had over E-Coastal, he was "a knowing assistant" and could be held liable for the consequences on the underlying fiduciary's breach.

Ground 2 – Breach of a fiduciary duty

[50] The key ground of appeal was that the trial judge erred in finding limited fiduciary duties arose on E-Coastal's part to Rare. It is convenient to deal first with that ground, since if it succeeds the other grounds fall away.

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69 (2007) 230 CLR 89 at 162 [170].
70 Reasons at [126].
71 Reasons at [128].

Mr Eaton's submissions

[51] It was argued that whether a fiduciary duty as found by the trial judge was to be imposed required consideration of whether it was inconsistent with the express terms of the contract, including the exclusion in cl 3.5; and implicitly inconsistent with terms such as cl 14.5. Mr Eaton submitted that the trial judge erred in finding that E-Coastal owed a fiduciary duty to Rare as his Honour placed inadequate weight on relevant clauses of the JVA, too much weight on others, and misdirected himself in the application of the legal principles to be applied.

[52] In submitting that the JVA clearly expressed an objective intention between the parties that there would be no fiduciary relationship or duties arising from what otherwise was an ordinary contractual relationship, Rare placed reliance on provisions of the JVA which the trial judge had described as "strong contractual arguments":

- Clause 3.1.1, which it was argued, did not provide an indemnity against commercial risks and expressed merely a general objective to "protect" against the commercial risks.
- Clause 3.2.1, which specified that the "legal relationship of the Parties under the Joint Venture shall be contractual *only*"; the addition of the word "only" it was argued showed a clear intention to limit the relationship.
- Clause 3.5, which it was said was a clear expression of an objective intention to exclude from the relationship between the parties duties of a fiduciary nature, which they clearly had in mind (but intentionally, by the express terms of cl 3.5, decided to exclude).
- Clause 4.1 which provides that the Contributors will not acquire any interest in the Asset except under cl 6. Clause 6 could not have been clearer in permitting the creation of a secured interest by the Contributor, if he or she wishes to obtain it.
- There was no evidence to show that at the time the JVA was entered into Rare was vulnerable, or at a disadvantage, or needed protection which it could not obtain by the contractual mechanism, particularly given cl 6 provided a means to overcome any vulnerability.
- Clause 14 which addressed the relationship between the parties, excluding any relationship of partnership, agency, and the assumption of any obligation of the other party or trust.

[53] It was argued that, to the extent the trial judge concluded that the JVA did not "explicitly and unequivocally" authorise the use of a potential fiduciary's position, opportunity or knowledge "for its own benefit or gain", his Honour failed to place adequate weight on the examples provided above. In doing so, and in consequence his Honour erred holding that cl 3.5 was "ineffective", and "that a significant imbalance of knowledge … resulted". Any perception of imbalance could have been cured had Rare taken up the ability to obtain the security provided in cl 6 before subdivision. Thereafter, it could have sought to protect its charge by a replacement or amended mortgage over any number of agreed subdivided Lots.

[54] It was submitted that it was in error to hold, as his Honour did,[72] that Rare was relevantly vulnerable or disadvantaged by reliance on E-Coastal in circumstances

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72 Reasons at [100].

where the contractual provisions provided a contractual avenue which countered the factor of vulnerability as a significant one. It was not relevant to consider the conduct of the parties after the JVA was executed, and nothing should have turned on the fact that the persons behind Rare were USA residents as adding to Rare's vulnerability when there was no evidence they could not have instructed local solicitors in entering into the venture. The "control" that E-Coastal had over the Project was clearly expressed in the JVA and agreed to by Rare, and was subject to the charge created by cl 6, which Rare chose not to perfect and mould into enabling it to be a secured creditor by obtaining a mortgage. Prior "trust" in the appellant cannot be used by a reasonable business person faced with an agreement in which fiduciary duties and trusts are clearly excluded. His Honour erred in placing too much weight on this factor.

[55] The decisions relied upon by his Honour of *Caple* and *Ross River* are distinguishable on these bases. On the other hand, the proper application of the decisions *Assad v Eliana Construction*, *John Alexander's Clubs*, *Hospital Products* and *Oliver Hume* all should result in a finding that there was no fiduciary duty owed by E-Coastal to Rare.

Rare's submissions

[56] Rare argued that in considering whether a fiduciary relationship existed, that the trial judge was correct to observe that the fact that an agreement characterises itself in a certain way is not determinative of the relationship that it creates.[73] It was submitted that cl 14.1 of the JVA was merely one matter to take into account, but was not necessarily determinative of the issue.

[57] As to the complaint that Rare's vulnerability and disadvantage was not relevant because it arose after the date of the JVA, it was submitted that the trial judge's analysis proceeded on the basis that the JVA created a scenario where Rare placed trust in E-Coastal from the outset of the JVA. The trial judge identified[74] that the case against E-Coastal was a finely balanced one. These matters were all "live" matters at the point of entry into the JVA and were a proper basis for the conclusion of an appropriate expectation on Rare's part that E-Coastal would not prefer its own interests over Rare's. This was consistent with the alternative expression of the formulation found in *Ross River*, that the fiduciary (here E-Coastal) had paid a substantial part of the Contributors' share to itself (or applied it to its own purposes) rather than it simply being the case that the fiduciary had paid its own share too early. This too was consistent with the position expressed by Greenwood J in *Oliver Hume* that a more limited fiduciary relationship may exist.

[58] The trial judge's analysis of the authorities was correct, there was no error in the application of the law to the facts and, as the trial judge recognised, the issue was finely balanced. However, his Honour correctly concluded that the present circumstances did give rise to an expectation on the part of Rare, in terms of the nature of the relationship, which was factually well founded.

Relevant principles

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73 Reasons at [99].

74 Reasons at [105].

[59] The nature of fiduciary relationships was analysed in *John Alexander's Clubs*,[75] where French CJ, Gummow, Hayne, Heydon and Kiefel JJ, referred to Mason J's statement in *Hospital Products*,[76] that the "critical feature" of a fiduciary relationship was "that the fiduciary undertakes or agrees to act *for or on behalf of* or *in the interests of* another person in the exercise of a *power* or *discretion* which will affect the interests of that other person in a legal or practical sense" and that from this power or discretion "comes the duty to exercise it in the interests of the person to whom it is owed".

[60] The plurality adopted two points made by Lehane J (writing extra-judicially soon after *Hospital Products*) as to that statement of principle. The first was that phrases such as "for or on behalf of" and "in the interests of" another person "must be understood in a reasonably strict sense, lest the criterion they formulate become circular".[77] In a contractual setting, the question was whether "a contractual stipulation inserted for the benefit of one party" gave rise to "an undertaking to act 'for or on behalf of that party and therefore to act, in relation to the contract, solely in the interests of that party".[78] The second point was that "the reason why commercial transactions falling outside the accepted traditional categories of fiduciary relationship often do not give rise to fiduciary duties is not that they are 'commercial' in nature, but that they do not meet the criteria for characterisation as fiduciary in nature".[79]

[61] The plurality also adopted,[80] as "an important statement of principle", the observations by Mason J in *Hospital Products* that in cases where a contract provides the foundation for a fiduciary relationship "it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties" and that the "fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them"; the "fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction".

[62] Gageler J, in extra-judicial writing,[81] on the topic of the expansion of the fiduciary paradigm into commercial relationships, referred to the significant contribution of Professor Finn in identifying whether a relationship warranted the description of a fiduciary and to his statement, adopted in *News Ltd v Australian Rugby Football League Ltd* as central to determining the existence in a novel commercial setting of a fiduciary relationship,[82] that to establish a fiduciary relationship:[83]

> "What must be shown … is that *the actual circumstances of a relationship* are such that one party is *entitled* to expect that the other will act in his interests in and for the purposes of the relationship.

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75 (2010) 241 CLR 1 at 34 [87].
76 (1984) 156 CLR 41 at 35 [88].
77 (2010) 241 CLR 1 at 35 [88].
78 *John Alexander's Clubs* at 35 [89].
79 *John Alexander's Clubs* at 35 [90].
80 *John Alexander's Clubs* at 35 [91].
81 Gageler J, "Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience" in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, Oxford, 2018) at 173-174. See also S Worthington, 'Four Questions on Fiduciaries' (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 723.
82 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 541; [1996] FCA 870.
83 Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Annandale (NSW), Federation Press, 2016) at para 736.

> Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that *entitlement*." (emphasis added)

[63] In the context of contractual relationships, it has been observed that, while contractual labels have been held not to be determinative as to whether a relationship is fiduciary, express contractual exclusions of fiduciary duties have generally been effective.[84] Such was the case in *Citigroup*, where the letter of retainer which specified that Citigroup was engaged by Toll "as an independent contractor and not in other capacity including as a fiduciary" was held to amount to an effective exclusion of a fiduciary relationship. The decision has attracted criticism from Professor Finn (a matter to which the trial judge alluded in his reasons). The criticism is that the question was approached by Jacobson J as a matter of construction rather than characterisation. Gageler J has observed in the extra-judicial writing to which I have referred that proceeding on the premise that:[85]

> "… whether a relationship is fiduciary is a question of attributing a legal character to the relationship which has been formed in fact… a contractual description can sometimes be used as a shorthand description of the incidents of the relationship or transaction into which contracting parties have in fact entered. The contractual description of Citigroup as 'not a fiduciary' could have been interpreted as expressing an agreement that Citigroup remained free to benefit from the relationship without seeking the further consent of Toll and that Citigroup was at liberty to place itself in a position where its contractual duty to advise Toll conflicted with its own commercial interests.[86] On this approach, in the absence of some basis in law or in equity for holding that the agreement was not binding or that it was capable of avoidance by Citigroup, it is strongly arguable that the contractual description could have binding effect. This would reflect a contractual tailoring of the incidents of the relationship with the effect of removing the basis for fiduciary obligations.
>
> The issue joined between the parties in *Citigroup* and tendered for the determination of Jacobson J was whether, in the context in which Toll and Citigroup dealt with each other, the contractual description could and should be so read. There was no suggestion that a fiduciary relationship arose independently of the letter of retainer."

Consideration

[64] I agree with the arguments advanced on behalf of Mr Eaton that the trial judge erred in finding that a fiduciary relationship, albeit of a confined nature,[87] arose in the present case. In particular, the trial judge failed to give proper weight to the critical consideration that any fiduciary relationship in the present case had to accommodate

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84 See Gageler J at 180 referring to M Leeming, 'The Scope of Fiduciary Obligations: How Contract Informs, But Does Not Determine, the Scope of Fiduciary Obligations' (2009) 3 *Journal of Equity* 181 at 192-193.

85 Gageler J at 180-181.

86 Cf *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 (PC); *Kelly v Cooper* [1993] AC 205 (PC).

87 Reasons at [106].

the terms of the JVA so as not to be inconsistent with them. Fiduciary and contractual relationships may co-exist. However, superimposing the fiduciary obligation as the trial judge did, in the circumstances of the present case, had the effect of altering the operation which the contract was intended to have according to its true construction. The relationship between the parties, on a proper construction of the JVA, did not allow for the imposition of the fiduciary obligation found by the trial judge.

[65] The parties gave express and detailed attention in the JVA to the relationship between them. Clause 14 dealt in detail with the nature of the relationship between the parties to the JVA. The JVA expressly stated that the relationship did not constitute a partnership, that no party had authority to act as agent of or otherwise for any other (cl 14.1). It specified that E-Coastal held all legal and beneficial interest in the Asset (cl 14.2) and specifically identified that the Asset was not held by E-Coastal upon trust for the Contributors (cl 14.3) whose interest in the joint venture was additionally circumscribed for "the avoidance of doubt" by cl 14.4. Clause 14.4 expressly excluded that a Contributor had "any propriety, beneficial or other interest" in "the Asset" or was "not entitled to any asset" of the Joint Venture.[88] A Contributor's interest in the Joint Venture was expressly limited to its Contributors' Entitlement payable as provided in the JVA. Further, E-Coastal was specifically stated to be "entitled to receive all of the Receipts for its own benefit" (cl 14.5). Nor was there any restriction on E-Coastal conducting any business other than that of the Joint Venture without accountability for the other parties (cl 15.1). It was not required for separate receipts with respect to Joint Venture matters. By cl 3.5, the only duties imposed on E-Coastal were confined to those set out in the JVA, with it being expressly stated that any duties, whether "imposed by statute, common law or rules of equity", were excluded to the extent permitted by law. The parties specifically agreed that in terms of the "rules of equity", "duties of a fiduciary nature" were excluded. There was no dispute that such duties may be effectively excluded by contractual agreement.

[66] Given the parties addressed the nature of their relationship in such detail and given the express circumscription and limitations imposed in the contract on the parties' relationship, it is difficult to see that there could be said to have been a basis for the imposition of a fiduciary duty of the nature found by the trial judge arising as a matter of a reasonable expectation of loyalty. The reliance by the trial judge on *Ross River* was misplaced. It was a case where the fiduciary duties found to be owed were expressly observed, on appeal, to be "consistent with" cl 10.5 of the JVA which specified that no party receive development profits in advance of the other and were "not undermined by [that] separate contractual provision".[89]

[67] The fiduciary duties which the trial judge found to be owed to Rare did not conform with the express limitations imposed on the relationship in the JVA. Indeed, superimposing a fiduciary obligation in the present case (as identified by the trial judge) was inconsistent with the provisions of the contract and, as stated in *Australian Oil & Gas Corporation Ltd v Bridge Oil Ltd*,[90] would operate to "defeat, rather than give effect to, the legitimate expectations of commercial people".

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88 The word "asset", by its natural meaning, extended to any property beyond "the Asset" being the land before subdivision.

89 *Ross River* at [40].

90 [1989] NSWCA 239 at 21.

[68] None of the four matters identified by the trial judge were such as to overcome the critical impediment provided by the contractual provisions of the JVA. I turn to address each of those four matters the trial judge considered persuasive.

[69] The first matter identified by the judge concerned the trust placed by Mr Mackellar in Mr Eaton. The trial judge's finding[91] in that regard was challenged on appeal in that it was argued it failed to take into account the fact found that Mr Mackellar stated he believed the "only real risk" was the loss of the original investment of a $70,000 "Contribution". It was submitted that there could be no other consequences to him or Rare, and, accordingly, any trust in Mr Eaton could only have been directed to those matters beyond Rare's control relevant to gaining due payment of all moneys due and payable. That was a matter in respect of which cl 6.1 of the JVA (the ability to require a mortgage) was relevant, in that the parties agreed that Rare could take security over that entitlement. Mr Mackellar accepted that Rare had failed to avail itself of that provision. There is much weight in this submission, the trial judge's finding was at odds with the contractual allocation of risk and the evidence given by Mr Mackellar. Importantly, Mr Mackellar's evidence reflected what had in fact been agreed in cl 3 of the JVA, which provided that the "Contribution" represented risk capital and that such payments did not raise "Obligations"[92] on E-Coastal to repay "Contributions" or "any amount" other than as provided under cl 6 and cl 8.

[70] Another matter of significance to the trial judge was that of the prospect of the negation of the rights of Rare as a joint venturer to inspect and to require information under cl 8. His Honour considered[93] the rights given under the JVA would be rendered nugatory, "where Mr Eaton as the controlling mind of E-Coastal, decided to lie and deny" such rights. I agree that the trial judge erred in being influenced by that matter to impose on Rare fiduciary obligations above the obligations it contracted to undertake. In the present case, the JVA provided Rare with contractual entitlements by which its potential vulnerability to E-Coastal's position of control could be addressed. Rare has an entitlement to access (and to take copies of) the books of account and all other documentation of E-Coastal that "related" to the JVA or anything done under the JVA (cl 13). The JVA also gave each Contributor an entitlement to require "Financial Statements" to be provided which, under cl 8.2, extended beyond annual statements to statements at "such more frequent intervals required by the Contributors (but not more frequently than quarterly)" and extended to "statements setting out Receipts, entitlements of the Joint Venture to money from third Parties, moneys due to the Joint Venture by the parties, Project Costs (all on an accruals basis) and Contributors' Entitlements". Additionally, Rare had a contractual entitlement under cl 20.2 to require that E-Coastal provide a full and true accounts of all matters within its knowledge relating to the Project and the Joint Venture. Likewise, cl 8.2 and cl 20 provided contractual entitlements which empowered Rare to address a misuse by E-Coastal of its management position in failing to pay Contributors' Entitlements as required under cl 8.3. The trial judge failed to give adequate consideration to the impact of those contractual provisions in finding that payment of a Contribution Entitlement was subject to E-Coastal's "almost total control to determine if it would 'elect' to discharge that obligation when it arose each time, being a time when the entitlement

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91 Reasons at [105].

92 "Obligations" was defined by cl 1.1.14 to mean "all the liabilities and obligations of a party (including any indemnity granted by it)" under the JVA.

93 Reasons at [105].

should have been paid, and where it was able to conceal the circumstances which constituted the trigger for the right to sue".

[71] The final factor which influenced the trial judge's finding as to the existence of a fiduciary obligation was that "the purpose behind the contribution was to achieve an entitlement protected from 'commercial risks'". Issue was taken with that finding on the basis that the JVA did not specify the achievement of that entitlement. The general objectives of the JVA were stated to be to protect the Contributors from "the commercial risks associated with the Project" and to "reward the parties according to their respective roles". The submission underscores the essential complaint, correctly made, that the trial judge failed to consider how the imposition of fiduciary obligations contended for at trial accorded with and were consistent with the contractual provisions of the JVA agreed to by the parties and their contractual relationship.

Orders

[72] For these reasons I would allow the appeal and make the following orders:

1. Allow the appeal.
2. Set aside the judgment against the appellant in favour of the respondent.
3. Give judgment for the appellant against the respondent.
4. Set aside the order for costs made by the trial judge against the appellant.
5. Order the respondent to pay the appellant's costs of the proceeding against him and the costs of the appeal.

[73] **McMURDO JA:** I agree with Philippides JA that the appeal should be allowed, because the trial judge was in error in deciding that there was a relevant fiduciary obligation which was owed to the respondent. I need not repeat the facts which are set out in her Honour's judgment.

[74] Under the Joint Venture Agreement, E-Coastal Developments Pty Ltd ("E-Coastal") promised to pay to the respondent *amounts equal to* a percentage of the Receipts. This was not a promise to pay such an amount or amounts *from* the Receipts. Rather, just as E-Coastal was at all times the owner of the land to be developed,[94] it was also "entitled to receive all of the Receipts for its own benefit."[95] E-Coastal was not obliged to keep the Receipts separate from other money, and the unchallenged findings of the trial judge were that none of the Receipts were held by E-Coastal on trust or were subject to a charge in favour of the respondent.[96]

[75] Nevertheless, the trial judge held that E-Coastal owed fiduciary obligations in the way in which it dealt with its own money. The critical findings, as to the existence and content of the fiduciary obligations and the breach of them, were as follows:[97]

> "Consequently, these factors lead to a conclusion that it was an appropriate expectation on the plaintiff's part that E-Coastal would,

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94 Clause 14.2 of the Joint Venture Agreement.
95 Clause 14.5 of the Joint Venture Agreement.
96 *Rare Nominees Pty Ltd v E-Coastal Developments Pty Ltd & Ors* [2017] QDC 238 ("Reasons") at [87] and [111].
97 Reasons at [106].

> in and for the purposes of the relationship, not prefer its own interests when they were in conflict with that duty as formulated as the alternatively expressed one in *Ross River*. Hence, the acts which preferenced the payment of the non-development sums of the Project where Mr Eaton, as the controlling mind, decided that such competing claims on E-Coastal's overall funds should have preference over the discharge of that "entitlement" obligation to the plaintiff under the JVA, constituted a breach of E-Coastal's fiduciary duty not to use the assets of the joint venture for non-development purposes in preference to the rights of the plaintiff. That and other non-JVA development expenses were made in circumstances where the defendants' own evidence showed that there were sums available to E-Coastal over a lengthy period of time where those available funds (even in those bank accounts of most direct relevance here) exceeded the relevant entitlement obligations. That prevailed when each of the two entitlements for the plaintiff arose for payment."

[76] The last sentence in that passage requires some explanation. By clause 8 of the Joint Venture Agreement, financial statements for the project were to be prepared annually, and the so-called Contributors' Entitlements were to be paid annually, no later than three months after the end of each year. It was common ground that the initial year for these purposes was that which ended on 30 June 2007. The trial judge found that the respondent was entitled to be paid, by 30 September 2007, an amount of $95,833.96, and by 30 September 2008, a further $29,294.29.[98] They were the "two entitlements" to which his Honour referred in the above passage. The effect of the judge's reasoning was that at each of those times (and presumably for as long as the respondent had not been paid that which was due to it), E-Coastal was obliged, in the application of its own funds, to pay the respondent in priority to any other claim.

[77] The considerations which his Honour found persuasive were as follows. The first was what he described as the "trust placed in E-Coastal by [the respondent], in the context of previously successful dealings arranged by both dominant directors and by reason of the initial on-going behaviour by Mr Eaton."[99] In my view however, the successful dealings between the parties, which had occurred before this project, provided no indication that the parties intended that E-Coastal would manage its own money in the interests of the respondent in preference to its own interest or the interests of other creditors.

[78] The second consideration was related to the respondent's right to inspect accounts and to acquire information about the project, under provisions of the Joint Venture Agreement, which the judge said "were rendered nugatory in circumstances where Mr Eaton, as the controlling mind of E-Coastal, decided to lie and deny, thereby adding to the vulnerability of the [respondent] which was otherwise excluded from the project's operation …".[100] However, a breach of the Joint Venture Agreement by E-Coastal, through Mr Eaton, in keeping critical information from the respondent could not be a basis for characterising the relationship between E-Coastal and the respondent under the Joint Venture Agreement, as and from the time it was made, as imposing a fiduciary obligation of this kind.

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98 Reasons [133].
99 Reasons [105].
100 Ibid.

[79] The third consideration was expressed as follows:[101]

> "Thirdly, although the right to be paid the entitlement under Clause 8 was not expressly premised on a priority, it existed in the circumstances of the JVA and the ongoing dealings in a way which gave rise to the entity in almost total control to determine if it would 'elect' to discharge that obligation when it arose each time, being a time when the entitlement should have been paid, and where it was able to conceal the circumstances which constituted the trigger for the right to sue."

In effect, his Honour held that the position of the respondent, as an investor in this project, was vulnerable because of the prospect that, in breach of the Joint Venture Agreement, E-Coastal would not provide a proper accounting of the amounts to which the respondent was entitled. In my view, it was not appropriate to find a fiduciary obligation, owed by E-Coastal from the outset, upon the premise that E-Coastal would breach its express obligations under the Joint Venture Agreement.

[80] The last of these considerations was that it was an express object of the Joint Venture Agreement that investors, such as the respondent, be protected, "from the commercial risks associated with the Project."[102] In effect, his Honour reasoned that the investors had to be protected against the risk that they would not be paid what was due to them. Of course, because the Receipts (or an investor's share of them) did not have to be kept separate from the funds of E-Coastal, and because there was no charge in favour of an investor over any part of the Receipts, there was necessarily a risk that, between the Receipts coming into the hands of E-Coastal and the date when an investor was entitled to be paid, E-Coastal might find itself without sufficient monies to pay even the investors, let alone other creditors. But his Honour reasoned that if E-Coastal had sufficient funds to pay the investors, more particularly the respondent, then E-Coastal was obliged to prefer the interest of the investor to its own interests or that of any other creditor. In my view, this fourth consideration should not have been persuasive. It is difficult to accept that the parties intended that the respondent's investment would be risk free. The expressed objective was to protect the respondent and other Contributors from the commercial risks *associated with the Project*, rather than from the risk of an investor not being paid what was due from a successful project.

[81] Therefore, those considerations ought not to have led the trial judge to conclude that there was the fiduciary obligation which his Honour found. And as the judge recognised, there were terms of the Joint Venture Agreement, most particularly clause 3.5, which strongly indicated the contrary conclusion.

[82] In *Hospital Products Ltd v United States Surgical Corporation*,[103] Mason J observed that the critical feature of those types of relationships which are generally accepted as fiduciary relationships "is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."[104] By the terms of the Joint Venture Agreement, in my view, it was clear

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101 Ibid.

102 Clause 3.1 of the Joint Venture Agreement.

103 (1984) 156 CLR 41 at 96-97; [1984] HCA 64.

104 See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited* (2010) 241 CLR 1 at 34-36 [86], [90].

that E-Coastal did not undertake to act in the interests of the respondent, in preference to any other interest, when disposing of its own money.

[83] I agree with what Davis J has written on the other grounds of appeal.

[84] For these reasons, I agree with the orders proposed by Philippides JA.

[85] **DAVIS J:** I respectfully adopt Philippides JA's analysis of the facts and the joint venture agreement.

[86] A notice of appeal was filed on 24 October 2017 and leave was given to amend the notice. Both versions contain many paragraphs. In his written submissions, the Appellant summarised three central complaints:

1. That no fiduciary duty arose (the first complaint).
2. That the learned trial judge erred in assessing the sum payable by E-Coastal to the Respondent (the second complaint).
3. That there was no proper pleading of the *Barnes v Addy* claim against the Appellant, and that no findings against the Appellant ought to have been made (the third complaint).

[87] I agree with the reasons given by Philippides JA and the separate reasons given by McMurdo JA for upholding the first complaint. I consider it appropriate to deal with the other two complaints.

[88] The second complaint relates to the method of calculation of "contributor's entitlements" which under the terms of the joint venture agreement is the money payable by E-Coastal to the Respondent.

[89] Clause 1.1.10 defines "contributor's entitlements" as "amounts equal to the percentage of the Receipts set out in Part 11 of the schedule". The term "Receipts" is defined as:

> "Receipts means all proceeds of any kind, whether of an income or capital nature, received in connection with or relating to the Project including (without limitation) the proceeds of sale of the Asset or part of it, the proceeds of any insurance policy effected pursuant to this Agreement, rental from the Asset or part of it and any deposits forfeited pursuant to any contract for the sale or rental of the Asset or part of it."[105]

[90] Part 11 of the schedule specifies the "contributor's entitlements" of the Respondent as "3.448% of Receipts".

[91] The Appellant firstly contends that the "Receipts" do not include money which it does not physically receive; for instance, money paid directly by the purchaser of a sub-divided lot to the first mortgagee. Secondly, the Appellant submits that "Receipts" is a reference to profits, so expenses which are recovered would not fall to "Receipts". The Respondent submitted both at trial and on appeal that "Receipts" included all money paid to, or for the credit of, the Appellant "in connection with or relating to the Project."[106]

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105 Clause 1.1.18.

106 The phrase in clause 1.1.18.

[92] The learned primary Judge correctly accepted the Respondent's submissions on this issue.[107] The Respondent's "contribution"[108] was $70,000.[109] That contribution is described as "risk capital".[110] It was not a loan to E-Coastal, and there is no provision in the joint venture agreement for the contribution to be repaid or credited back to the Respondent. There is no provision in the agreement whereby a calculation of profit is to be undertaken and nothing to suggest that any payment due to the Respondent is calculated by striking a profit. The intention of the agreement is that the Respondent is to receive 3.448 per cent of all money paid in relation to the sale of the lots. The purchase price, once adjusted under the terms of a sale contract, forms part of "Receipts". The fact that some of that money was not physically received by E-Coastal but was paid at E-Coastal's direction to a third party is irrelevant. The money is part of the "Receipts".

[93] The joint venture agreement anticipates that once the Respondent has received $70,000, it has recovered its "contribution" and any further money is, in effect, its return on its capital investment. No concept of "profit" on the project is relevant to the parties' obligations.

[94] The third complaint raises a pleading issue. In its seventh amended statement of claim, the Respondent, after pleading breaches of equitable obligations allegedly owed to it by E-Coastal, then pleaded its claim against the Appellant based on the principles in *Barnes v Addy*.[111] It was submitted by the Appellant that the plea did not particularise the "dishonest and fraudulent design" necessary to fix liability under the second of the two bases establishing the liability of accessories for breaches of fiduciary obligations under *Barnes v Addy*.[112]

[95] After pleading the misappropriation of the money by E-Coastal, the Respondent pleaded:

> "20. At all relevant times, the Second Defendant knew well from his position as Director and controlling mind of the First Defendant that:
>
> (a) The First Defendant had not accounted to the Plaintiff for the money held by it on the Plaintiff's behalf or otherwise owing to the Plaintiff pursuant to the Joint Venture Agreement;
>
> (b) The funds held by the First Defendant on behalf of the Plaintiff were mixed with its own funds;
>
> Particulars of mixing of funds
>
> The First Defendant had the following accounts:
>
> i. Suncorp Metway account 034202589;
>
> ii. NAB 084-004 56-427-6459.

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107 Primary judgement at [71]–[77].
108 Joint venture agreement clause 1.1.7.
109 Schedule part 5.
110 Joint venture agreement clause 3.9.
111 (1874) LR 9 Ch App 244.
112 *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75 at [88]-[92].

The First Defendant admits in the Further Amended Defence (to the Fifth Statement of Claim) at paragraphs 11, 15(cB) and 15(cC) that it mixed funds.

(c) The First Defendant was required to pay to the Plaintiff 3.448% of all proceeds of any kind received by the First Defendant in connection with or relating to the Ningi Project and the sale of the Development Property under the Joint Venture Agreement and was in breach of the Joint Venture Agreement by not doing so;

(d) The First Defendant was required to hold 3.448% of all proceeds of any kind received by the First Defendant in connection with or relating to the Ningi Project and the sale of the Development Property on trust for the Plaintiff and subject to the Plaintiff's Charge pursuant to the Joint Venture Agreement and the transfer of these funds to another party would be in breach of that trust and subject to the Plaintiffs Charge;

(e) The First Defendant owed fiduciary duties to the Plaintiff pursuant to the Joint Venture Agreement;

(f) The First Defendant did not have funds other than those received as Receipts pursuant to the Joint Venture Agreement by which it could make payment of the funds owing to the Plaintiff under the Joint Venture Agreement;

21A. Further or alternatively to paragraph 21 above, an honest and reasonable person in the position of the Second Defendant would have known the matters identified at paragraph 21 above.

21B. In the circumstances described above at paragraphs 18 to 21A:

(a) the sum of $124,434.90 held by the First Defendant from sales of lots in the Ningi Development owing to the Plaintiff pursuant to the Joint Venture Agreement and was held on trust by the First Defendant for the Plaintiff;

(b) [previously deleted]

(c) the Second Defendant took beneficial receipt of the funds from the First Defendant in breach of trust, in breach of fiduciary duty and in circumstances where those monies remained subject to the Plaintiff's Charge; and

(d) the Second Defendant knew, or an honest and reasonable person in the position of the Second Defendant would have known, the matters described at sub-paragraphs (a) and (c) immediately above.

22. In the circumstances, the receipt by the Second Defendant of funds from the First Defendant:

(a) Amounted to the Second Defendant's knowing participation in a breach of trust, and breach of fiduciary duty;

(b) Was to the benefit of the Second Defendant;

(c) Was unconscionable;

and

(d) It would be unconscionable for the Second Defendant to deny the Plaintiff's beneficial entitlement to the said sum of $124,434.90; and

(e) the receipt by the Second Defendant of the funds from the First Defendant were received in his hands subject to a constructive trust in favour of the Plaintiff and subject to the Plaintiff's Charge in favour of the Plaintiff.

23. The Second Defendant had mixed such funds with his owns funds, and not retained them separately for the purpose of accounting to the Plaintiff ('the Second Defendant's Mixed Funds')."

[96] In response, the Appellant pleaded:

"16. As to paragraph 20A of the Statement of Claim:

(a) the Defendants object to the allegations as they are embarrassing and liable to be struck out because:

(i) the Plaintiff alleges in paragraph 12 that the amount of $124,434.90 was held on trust and subject to the Plaintiffs Charge;

(ii) the Plaintiff alleges by paragraph 20A that the whole of the amount of $418,695.707 was 'held …, for the Plaintiff' and 'subject to the Plaintiff's Charge';

(iii) the allegations in paragraph 12 and 20A are inconsistent with one another and are liable to be struck out;

(b) without prejudice to that objection, the Defendants deny the allegations in paragraph 20A of the Statement of Claim on the grounds:

(i) that the first Defendant did not hold any amounts for the Plaintiff as alleged or at all;

(ii) set out in paragraphs 5-8A, 8, 10 and 15 herein;

(iii) further and alternatively, for the reasons set out in Annexure A hereto and pleaded in paragraph 15(cA)-15(cC) above.

17. As to the allegations in paragraph 20 of the Statement of Claim:

(aA) the Defendants object to the allegations because the plaintiff has failed to plead or particularise the time at which it is alleged the Second Defendant had the knowledge pleaded;

(aB) without prejudice to that objection, the Defendants plead as follows;

(a) the Defendants deny, because it is untrue, that the Second Defendant had the knowledge attributed to him in subparagraph (a) and the Defendants repeat and rely upon the allegations in paragraphs 11 to 20 herein;

(b) the Defendants deny, because it is untrue, that the Second Defendant had the knowledge attributed to him in subparagraph (b), as the premise, that there were distinct funds held on behalf of the Plaintiff, which were mixed with other funds, is wrong for the reasons pleaded in paragraphs 5 - 15 herein;

(c) as to subparagraph (c) the Defendants:

(i) admit that the Second Defendant knew of the contractual obligation under the Agreement on the First Defendant to make payments in accordance with clause 8.1;

(ii) otherwise deny, because it is untrue, that the Second Defendant had the knowledge attributed to him in subparagraph (c) because for the reasons pleaded in paragraph 9(c) above, the First Defendant was not in breach of the Agreement;

(d) as to subparagraphs (e):

(i) Not used.

(ii) the Defendants deny that the Second Defendant knew that the First Defendant owed fiduciary duties to the Plaintiff pursuant to the Agreement because the Second Defendant did not have that knowledge.

(e) the Defendants otherwise deny the allegations therein because they are untrue for the reasons pleaded in paragraphs 5 to 16 herein, because the Second Respondent did not have the alleged knowledge, and because the Receipts were not the First Defendant's only funds.

18. As to the allegations in paragraph 21A of the Statement of Claim, save to the extent the allegations in paragraph 20 are admitted above, the Defendants deny that the matters in paragraph 21 would have been known by a reasonable person in the position of the Second Defendant for the reasons pleaded in paragraph 17 herein.

19. As to the allegations in paragraphs 21 B of the Statement of Claim:

(a) the Defendants deny subparagraph (a) for the reasons pleaded in paragraphs 7 to 18 above;

(b) Not Used (c) the Defendants otherwise deny the allegations therein because they are untrue for the reasons pleaded in paragraphs 7 to 19(a) herein.

20. The Defendants deny the allegations in paragraphs 22 and 23 of the Statement of Claim on the grounds pleaded in paragraphs 2 to 19 herein.

[There are no paragraphs numbered 24 to 26 in the Statement of Claim]"

[97] It is unnecessary to set out paragraphs 2-18 of the defence. These paragraphs answer the allegations of misappropriation by E-Coastal.[113]

[98] It is well established that dishonesty and fraud must be clearly pleaded and particularised.

[99] The statement of claim could have been clearer. It did though allege that the Appellant took the money believing it was the property of the Respondent. In other words he acquired the money by dishonest means.[114] The Appellant met these allegations in his defence.

[100] The Appellant was on notice of the allegations against him. Evidence was led in support of the pleas in the statement of claim and the Appellant was cross-examined on those issues. The learned trial judge made careful findings which do not disclose error.[115] The third complaint is not made out.

[101] I agree with the orders proposed by Philippides JA.

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113 Paragraph 2 was deleted by amendment.
114 *Peters v The Queen* (1998) 192 CLR 493.
115 Judgment [126].