SUPREME COURT OF QUEENSLAND

CITATION:	*Nathan v Williams & Anor* [2020] QCA 138
PARTIES:	**JULIAN PAUL ELIZER NATHAN** (appellant) **v** **DANIEL SATKUNAM BALARAJAN WILLIAMS** (first respondent) **NATHAN LAWYERS BRISBANE PTY LTD (IN LIQUIDATION)** ACN 154 104 426 (second respondent)
FILE NO/S:	Appeal No 7325 of 2019 SC No 12663 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 127; [2019] QSC 150 (Boddice J)
DELIVERED ON:	23 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2019
JUDGES:	Sofronoff P and Philippides JA and Brown J
ORDERS:	**1. Order 1(b) of the Orders made on 14 June 2019 is set aside;** **2. The appeal is otherwise dismissed; and** **3. The parties are to provide submissions of no more than three pages as to costs within 14 days of these reasons being published.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – COMMON INTENTION – where the second respondent was an incorporated legal practice – where the appellant and first respondent had agreed to operate separate practices through the second respondent – where the appellant and first respondent each held equal shareholding in the second respondent – where the second respondent was ordered to be wound up – where the first respondent contended the second respondent held each practice for the appellant and first respondent under a common intention constructive trust – where the trial judge found that the second respondent held the separate practices on constructive trust for the appellant

and first respondent – where the appellant contends that the second respondent did not hold each practice on trust for the appellant and first respondent – where the appellant contends that the corporate structure governed the distribution and the appellant and first respondent are entitled to 50 per cent of the surplus assets of the second respondent – where the trial judge found the appellant was not a credible witness – whether objective facts not considered – whether the second respondent held the separate practices on trust for the appellant and first respondent

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – LIBERTY TO APPLY – GENERAL PRINCIPLES – where the learned trial judge found that a debt of a third party was not a debt of the second respondent – where the third party creditor was not a party to the proceeding – where the appellant contended that orders should not have been made in the absence of an entity whose rights were directly affected – whether the learned trial judge erred in ordering that the debt should not be admitted by the liquidators of the second respondent

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – LIBERTY TO APPLY – GENERAL PRINCIPLES – where orders excluded prospective and contingent creditors of the first respondent and provided for surplus assets to be transferred in specie to the first respondent – where the first respondent not the second respondent brought action to claim monies withdrawn by the appellant – where no objections by the appellant to the first respondent claiming monies had and received – where the trial judge ordered money be repaid into an account in the name of the second respondent – whether first respondent lacked standing – whether the trial judge erred in ordering the whole of the debt be repaid and not a lesser amount – whether the orders were inconsistent with the common intention constructive trust – whether the orders were discriminatory against the appellant

Corporations Act 2001 (Cth), sch 2, s 90-15

Austin v Keele (1987) 10 NSWLR 283, distinguished
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, followed
Grundt v Great Boulder Pty Gold Mines Ltd (1939) 59 CLR 641; [1937] HCA 58, considered
Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc [2018] VSC 413, cited
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19, considered

Muschinski v Dodds (1985) 160 CLR 583; [1985] HCA 78, considered
News Limited v Australian Rugby Football League Ltd (1996) 64 FCR410; [1996] FCA 870, considered
Parsons v McBain (2001) 109 FCR 120; [2001] FCA 376, considered
Ramage v Waclaw (1988) 12 NSWLR 84, considered
Raulfs v Fishy Bite Pty Ltd [2012] NSWCA 135, distinguished
Shepherd v Doolan [2005] NSWSC 42, considered
Staatz v Berry (No 3) (2019) 138 ACSR 231; [2019] FCA 924, considered

COUNSEL: B O'Donnell QC, with P O'Brien, for the appellant
A Crowe QC, with L Copley, for the first respondent
C Crawford for the second respondent

SOLICITORS: Mullins Lawyers for the appellant
Sparke Helmore Lawyers for the first respondent
K & L Gates for the second respondent

[1] **SOFRONOFF P:** I agree with Brown J.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Brown J for the reasons given by her Honour.

[3] **BROWN J:** The present dispute involves two principals of a law firm where legal work was conducted through an incorporated legal practice. Each principal owned a fifty per cent share in the incorporated legal practice. Notwithstanding the adoption of a corporate structure, each principal operated his legal practice separately from the other. The relationship between the two principals has long since soured.

[4] In late-2015, tensions began to develop between Julian Nathan, the Appellant in these proceedings (**Nathan**), and Daniel Williams, the First Respondent in these proceedings **(Williams**), as Nathan sought to assert a level of control over Williams' practice through their shared directorship of the Company, accusing Williams of not properly discharging his obligations as a director of the Company. Williams responded on the basis that he and Nathan were always to operate their practices separately.[1]

[5] Proceedings were brought by one principal, Nathan, to wind up the Second Respondent, Nathan Lawyers Brisbane Pty Ltd (the **Company**), on the just and equitable ground and an order was successfully obtained. The other principal, Williams, opposed the winding up application and subsequently sought orders that the Company (in liquidation) held his practice on constructive trust for him. That was the subject of a trial which has given rise to this appeal.

[6] The learned trial Judge determined that notwithstanding the corporate structure that was adopted by Nathan and Williams, each principal operated their own separate

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1 See for example: *Williams v Nathan* [2019] QSC 127 (***Reasons***) at [53].

practice and that it was their common intention that if the working relationship between them failed, each would continue to own their own practice.

[7] Multiple grounds of appeal have been raised, many of which seek to revisit factual findings of the learned trial judge. Incidental orders made by his Honour are also challenged. This Court, in the present appeal, must determine whether the learned trial judge erred in finding that there was a common intention that each separate practice constituted a separate business and that the Company held the practices of Nathan and Williams on constructive trust for the benefit of each of them respectively after the Company's outstanding liabilities were paid. This Court must also determine whether his Honour erred in his findings that Nathan had no entitlement to withdraw monies from the general account operated by Williams and that the monies were used to pay personal debts of Nathan. Finally, this Court must determine whether his Honour erred in making orders in relation to a debt owed to the Bank of Queensland and other orders affecting the constructive trust.

[8] The Company was a party to the proceedings and admitted, in its defence, that it asserted ownership over all the assets and liabilities recorded on the books and records of the Company on, and from, November 2018. At trial, the Company did not take a position as to the arrangement between Nathan and Williams and whether there was a constructive trust. However, the Company argued that if there was an agreement as alleged by Williams, he was in breach of s 117 of the *Legal Profession Act* 2007 (Qld) and that the agreement should not be enforced by the Court. That allegation was rejected by the learned trial judge and is not challenged in this appeal. The Company did not adopt a position at trial, or in this appeal, as to whether there was a constructive trust over Williams' practice. It sought, however, to defend some of the orders made by his Honour as to controversial debts.

[9] The present case is an unusual one which turns on the peculiar factual circumstances in the conduct of the legal practices of Nathan and Williams in connection with a corporate vehicle.

This Appeal and the Findings at Trial

Grounds of Appeal

[10] Nathan raises 12 grounds of appeal, namely that:

(a) The learned trial judge failed to find that part 5.6 of the *Corporations Act* 2001 (Cth) and the Company's Constitution (the **Constitution**) regulated what would happen to the assets of the Company in the event of a breakdown of that practice; (**Ground 1**)

(b) The learned trial judge erred in that:

(i) His Honour did not find that the corporate structure created rights and obligations between Nathan, Williams and the Company which required that the remaining assets of the Company be divided equally between Nathan and Williams as equal shareholders; and

(ii) It was not unconscionable to hold Williams to the legal arrangement that had been put in place at the commencement of the Company; (**Ground 2**)

(c) His Honour erred in finding that Nathan accepted the agreement entered into between the parties did not include provision for the distribution of assets in the event of such a breakdown; (**Ground 3**)

(d) The learned trial judge erred in finding that Nathan and Williams had a common intention that they would have the beneficial interest in the legal practices that they conducted as part of the Company; (**Ground 4**)

(e) His Honour erred in finding that Williams had suffered detriment as the evidence does not support such a finding and the finding does not satisfy the legal test for detrimental reliance; (**Ground 5**)

(f) The orders made at trial were based upon the erroneous assumption that the assets of the Company, that were held on trust for Williams, could be used to pay all of the Company's debts, including those debts that were not incurred in respect of Williams' practice; (**Ground 6**)

(g) The orders made at trial discriminated against Nathan, insofar as once all of the Company's creditors are paid, the surplus assets of the Company are held on trust for Williams; (**Ground 7**)

(h) No orders should have been made in relation to the Bank of Queensland debt, on the basis that:

(i) The finding was against the weight of the evidence;

(ii) Williams had not agreed that the debt was transferred to the Company upon its formation; and

(iii) The order directly affected the Bank of Queensland, such that the Bank of Queensland ought to have been a party to the proceeding; (**Ground 8**)

(i) The learned trial judge erred in finding that the debt owed to Mr Parker was not a debt of the Company; (**Ground 9**);

(j) The order that Nathan pay a sum of money to the general account of the Oxley Practice was erroneous, on the basis that Williams had no legal entitlement to the money and the Company made no claim for repayment; (**Ground 10**)

(k) The learned trial judge erred in failing to make a number of findings of fact in relation to the formation and operation of the Company; and (**Ground 11**)

(l) The learned trial judge erred in finding that both Nathan and Williams had decided what actual drawings of profit would be made from the general account of their respective practices. (**Ground 12**)

[11] Based upon the learned trial judge's analysis of the factual evidence before him, his Honour was satisfied that there was an agreement that Nathan and Williams operated separate practices and that the agreement, and their subsequent conduct, supported a finding that there was a common intention that each separate practice constituted a separate business which, upon payment of all outstanding obligations of the Company, was held by the Company on constructive trust for the benefit of Nathan in respect of what ultimately became the West End practice, and for the

benefit of Williams in respect of what ultimately became the Oxley practice.[2] His Honour made a declaration that following the payment of creditors and the costs of the liquidators by the Company, in accordance with the Court Orders, the Company held the remaining assets on trust for Williams.

[12] In the present appeal, Nathan challenges the determination that the beneficial ownership of the assets generated by Williams' practice was held on constructive trust for Williams. Nathan contends that this Court should find that there was no such common intention, or even if there was, the provisions in the Constitution and in the *Corporations Act*[3] applied to how the surplus assets were to be divided. Further, Nathan submits that his Honour misapplied the law in determining there was a common intention constructive trust. Nathan also contends that his Honour erred in finding that Williams had suffered the relevant detriment required to found a constructive trust. (**Grounds 1–5**) Nathan challenges very few of his Honour's factual findings but rather, relies on evidence of other objective facts. Those facts were unchallenged and presented at trial, but were not the subject of findings by the learned trial judge. (**Ground 11**) Nathan contends that this Court is in a position to draw inferences on factual matters, notwithstanding the trial judge's unfavourable findings of credit in relation to Nathan.

[13] Nathan does, however, claim his Honour erred in fact in finding that:

(a) Nathan accepted that the agreement entered into between the parties did not include provision for the distribution of assets in the event of such a breakdown; (**Ground 3**) and

(b) Nathan and Williams had decided what actual drawings of profit would be made from the general account of their respective practices. (**Ground 2**)

[14] Williams contends that the learned trial judge's findings were supported by the evidence and that there was no error. He further contends there was no error in his Honour's application of the law.

[15] Prior to seeking the winding up of the Company, Nathan withdrew monies from Williams' Practice's general practice account in the amount of $236,880, without the authorisation of, or notice to, Williams. His Honour found that those monies were used by Nathan to pay personal expenses,[4] or debts, which were not debts of the Company. One of those debts was a loan to Mr Parker. His Honour rejected the argument and evidence of Nathan that a debt of the Company, in the sum of $81,880, was due and payable to Mr Parker (**Parker Loan**). His Honour found that there was no legal basis upon which Nathan could withdraw funds from Williams' Practice general account in payment of his own personal expenses.[5] Nathan contends that, even if the finding of a constructive trust is upheld, Williams has no cause of action to recover the monies withdrawn by Nathan, as Williams had no claim in law to bring an action to recover monies had and received since he only held a beneficial interest in the monies in question. Further, Nathan contends that his Honour erred in not finding a debt, at least in the sum of $67,775, was owed by the Company to Parker (**Grounds 9 & 10**). Williams contends that at trial, counsel

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2 *Reasons* at [116].

3 At pt 5.6.

4 *Reasons* at [110] where it was noted that Nathan had ultimately accepted that the monies paid to TED Enterprises Pty Ltd and Mullins Lawyers were in respect of expenses incurred by Nathan.

5 *Reasons* at [109].

for Nathan did not object to orders requiring the repayment of monies to Williams if a constructive trust was imposed by the Court on the basis that Williams lacked of standing. Williams further contends that the findings as to the Parker Loan were supported by the evidence relied upon by the learned trial judge. The Company contended that Nathan had no entitlement to withdraw the sum of $236,880 for his own use and benefit and Order 6, which required repayment to the Company, was the appropriate order.[6] The Company submitted that the liquidators invited the learned trial judge to determine how debts that were controversial should be dealt with in the winding up and that the Court had the power to make such an order.

[16] Nathan also challenges determinations by the learned trial judge that the monies owing to the Bank of Queensland (**BOQ Debt**) was not a debt of the Company, which Nathan had contended was a debt of the Company. (**Ground 8**) Williams had objected to the inclusion of that liability as a debt of the Company at the trial.[7] Both Nathan and Williams gave evidence in relation to that BOQ Debt.

[17] The learned trial judge rejected Nathan's evidence that the BOQ Debt was a debt which Williams had agreed would be met by the Company.[8] His Honour ordered that the Bank of Queensland (**BOQ**) should not be admitted by the liquidators as a creditor of the Company. Nathan challenges that ruling and contends that the order should not have been made when BOQ was not a party to the proceeding and when no order was sought in the Statement of Claim, such that it should have been dealt with in the ordinary course of the winding up. Williams contends that that finding was supported by the evidence and should not be disturbed. The Company contends that his Honour's ruling was not made in error and that the BOQ Debt was a matter of controversy between the parties on the basis of evidence which was admitted at trial. His Honour was invited by the Company to determine how controversial debts should be dealt with and his Honour did so. The Company further contended that BOQ was sufficiently protected by the provision that it have liberty to apply.

[18] Nathan claims that Orders 1(a), 1(e), 3 and 4 made by the learned trial judge were in error, as they discriminate against Nathan in favour of Williams, notwithstanding that no issue was taken with the proposed orders by Nathan prior to them being made. (**Ground 7**) The Company objects to the argument being raised upon appeal for the first time and, in any event, contends that there is no error in the orders made. Williams similarly submits that in the circumstances in which the orders were made, there was no error by his Honour.

[19] Nathan further claims that the learned trial judge erred by proceeding on the assumption that the assets that the Company, held on trust for Williams, could be used by the Company to pay the debts of the Company. (**Ground 6**) Nathan contends that the Company had no right to pay creditors of one trust with the assets of the other trust. Both Williams and the Company object to Nathan raising such an argument for the first time on appeal, especially given that no issue was raised as to those proposed orders prior to them being made and sought at trial. In any event, Williams and the Company submit that in the circumstances of the present case the order was appropriate.

[20] The learned trial judge found that Nathan was neither accurate nor reliable. His Honour did not accept any of Nathan's evidence unless it was supported by

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6 Second Respondent's Notice of Contention dated 12 September 2019.

7 ABII vol 2 at 153, Updated Outline of the Plaintiff.

8 *Reasons* at [114].

independent contemporaneous documentation. In contrast, his Honour found Williams' evidence was credible and reliable.

[21] There is no challenge the trial judge's finding that Nathan was neither accurate nor reliable and that his evidence demonstrated a lack of candour, nor that Williams was both credible and reliable. Nathan does, however, rely on uncontroverted facts to support his contention that this Court should determine that the learned trial judge's findings were made in error. In that regard, he relies on the fact that given his reliance on uncontroverted facts, this Court is in as good a position "as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge."[9]

Appellate review of factual findings

[22] In *Fox v Percy*, McHugh J, having reviewed the relevant authorities with respect to appellate review, stated:[10]

> "Mason CJ, Deane, Dawson and Gaudron JJ, the other members of the Court, agreed with my judgment. *Abalos* was applied in *Devries v Australian National Railways Commission* where Brennan and Gaudron JJ and I said:
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> > "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against — even strongly against — that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."" (citations omitted)

[23] McHugh J further stated that:[11]

> "It is a serious mistake to think that anything said in *Abalos* or *Devries* necessarily prevents an appellate court from reversing a trial judge's finding when it is based, expressly or inferentially, on demeanour. Those cases recognise — in accordance with a long line of authority — that it may be done. But there must be something that points decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses. Recently in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)*, for example, this Court held that undisputed and documentary evidence was so convincing that no reliance on the demeanour of witnesses could rebut it." (citations omitted)

Constructive Trust

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9 *Fox v Percy* (2003) 214 CLR 118 at [25] per Gleeson CJ, Gummow and Kirby JJ citing *Warren v Coombes* (1979) 142 CLR 531 at 551.

10 (2003) 214 CLR 118 at [66].

11 *Fox v Percy* (2003) 214 CLR 118 at [90].

[24] A common intention constructive trust, while the subject of some debate in terms of the legitimacy of its existence, has been recognised in Australian law.[12] The Full Federal Court in *Parsons v McBain*[13] recognised the existence of a common intention constructive trust. In *Staatz v Berry (No 3*) (***Staatz***),[14] Derrington J recently summarised the circumstances in which the courts have recognised the existence of a constructive trust, either on the basis of a failed joint endeavour or on the basis of a common intention. In that respect, his Honour referred with approval to McMillan J in *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* (***Imam***), where McMillan J identified the relevant principles as follows:[15]

> "*Common intention constructive trust*
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> [402] The second class of constructive trust is a common intention constructive trust, which is distinct from the joint venture constructive trust. The court will construe a common intention constructive trust where:
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> (a) there is an actual or inferred common intention of the parties as to their beneficial interest in a property;
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> (b) there has been detrimental reliance on that common intention by the claimant; and
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> (c) it would be an equitable fraud on the claimant to deny his or her interest in the property.
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> The onus of proving such a trust lies on the party asserting the beneficial interest against the legal owner.
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> [403] The parties' intentions can be found or inferred from the party's contemporaneous words and conduct, also having regard to the surrounding circumstances and context in which they were uttered or performed. The relevant intention may arise after the property has been acquired. The intention to be established need not designate a specific share of the property; it is sufficient that the claimant should have a beneficial interest.
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> [404] The cases considering this form of constructive trust have commonly concerned persons in a domestic relationship, but the principle can be applied to disputes between parties to a commercial relationship.

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12 Dal Pont in "Equity and Trusts in Australia", Thomson Reuters 7th edition at [38.220] comments that "the label "common intention constructive trust" is, in any case, misleading, as the existence of an actual or inferred common intention to create a trust by definition gives rise to an express trust…not a constructive trust." However it states at [18.230] that notwithstanding the "juridical incorrectness" of the common intention trust "Australian (principally New South Wales) case law continues to recognise its availability as an alternative to a remedial constructive trust." However, Ford and Lee Law of Trusts identify the point of distinction between an express trust and a constructive trust is that the latter is imposed by operation of law where, according to established equitable principles, it would be unconscientious for the holder of the property to deny the claimant a beneficial interest in that property, or for the defendant to deny that he is liable to account to the claimant as if he were an express trustee: at [22.020].

13 (2001) 109 FCR 120.

14 (2019) 138 ASCR 231.

15 [2018] VSC 413 at [402]–[405].

> [405] A common intention constructive trust creates substantive rights and is not merely a remedy that arises when a court makes a declaration to that effect. The trust will generally take effect from the moment at which the conduct giving rise to its imposition occurs. The interest created may, however, be deferred in accordance with principles governing priority between competing equitable interests." (citations omitted)

[25] Although his Honour in *Staatz* recognised, as did McMillan J in *Imam*, that cases where common intention constructive trusts arise are often recognised as arising between spouses or persons in personal relationships, *Staatz* and *Imam* did not consider that the category of cases where a common intention or constructive trust arise are closed.[16] Further, his Honour in *Staatz* noted that there may be an important difference between the common intention constructive trust and the failed joint endeavour constructive trust, which concerns the occasions when the trust comes into existence. His Honour commented that it may not be necessary in the case of a common intention constructive trust that any unconscionable assertion of title need occur. The foundation for equitable intervention in relation to the common intention constructive trust is the suffering of detrimental reliance by the party asserting the trust. That was a matter which his Honour did not need to resolve. Nor has it been the subject of argument in the present case and there is no need for this Court to resolve the matter.

Finding of Common Intention Constructive Trust — Grounds 1–5 and 12

Trial judge's findings

[26] In his reasons His Honour stated at [83]–[95] that:

> "[83] I accept the plaintiff's evidence that it was agreed between the first defendant and the plaintiff that from the commencement of the operation of the incorporated legal practice by the second defendant, each would conduct their own separate practices. The email communications exchanged between them at the time are consistent with that agreement.
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> [84] Their conduct in the operation of those separate practices thereafter was also consistent with such an agreement. Each practice had its own areas of specialisation. Each maintained separate general accounts. Each kept separate financial records. Each accounted for its own revenue and expenses. Each kept its own files, including records of work in progress. Neither transacted on the other's practice account. Each accepted responsibility for its share of GST or income tax liabilities.
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> [85] Further, whilst the second defendant operated the incorporated legal practice, the plaintiff's separate practice traded under the name "Nathan Lawyers Brisbane Pty Ltd", and operated a website "nathanlawyers.com.au", which contained no reference to the first defendant, the first defendant's separate practice, or

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16 *Staatz* at [168]; *Imam* at [405].

its staff. Similarly, the first defendant traded under the name "Nathan Lawyers", operating a website "nathanlaw.com.au", which likewise, contained no reference to the plaintiff, the plaintiff's separate practice or staff employed in the plaintiff's separate practice.

[86] In addition to those arrangements, each practice operated on the basis that capital items were funded from the respective practice's general account. Neither required the authority or approval of the other before making capital purchases. Importantly, each decided what amounts would be drawn from their respective accounts by way of wages and actual drawings.

[87] Whilst the incorporated legal practice had obligations to file taxation and other documentation, the practices were carried out entirely separately and independently. Neither the plaintiff nor the first defendant exercised control over the operation of the other's separate practice throughout that time. Neither sought to access funds generated from the other's practice. Neither sought to obtain any benefit from the income derived by the other's separate practice.

[88] I do not accept the first defendant's evidence that the agreement to operate separate practice was on the basis each would own 50% of the other's separate practice. That contention is not consistent with the email communications exchanged between them prior to and at the commencement of the incorporated legal practice operated by the second defendant. Such a contention is also inconsistent with the conduct of the parties after the commencement of the agreement.

[89] The first defendant's own conduct in surreptitiously seeking, for the first time, to withdraw virtually all available funds from the plaintiff's practice general account was also inconsistent with a conclusion that the first defendant genuinely believed that was the agreement between the parties. If that was his genuine belief, there would be no reason for the first defendant to engage in such conduct. His conduct is consistent with a conclusion that his own practice having been unsuccessful, the first defendant attempted to wrongfully take the assets of what he knew to be the plaintiff's own separate business to meet the first defendant's debts.

[90] The agreement reached between the plaintiff and the first defendant to operate separate practices and their subsequent conduct, support a finding that it was their common intention that each separate practice constitute a separate business which, upon payment of all outstanding obligations of the second defendant, was held by the second defendant on constructive trust for the benefit of the plaintiff, in respect of

the Oxley practice and for the benefit of the first defendant, in respect of the West End practice.

[91] A constructive trust arises in circumstances where it would be unconscionable for the holder of the legal title to property to assert that that property was held free of any beneficial interest in the claimant. Equity will intervene to prevent the unconscientious denial of a claimant's legal rights if it is established the parties agreed to that claimant having an interest in the property or that it was their common intention that the claimant have such an interest, and it is further established that that claimant has acted to his or her detriment on the basis of that agreement or common intention.

[92] The requisite intention may be established by agreement between the parties or by expressed statements as to their intention, or may be inferred form their conduct. Here, the common intention that each would have the beneficial interest in their respective practices arose both from their conduct of the practices and the conduct of the second defendant. The latter conduct was evidenced by a separation, in the financial records of the second defendant, of the income and expenses of each separate practice and an apportionment of each separate practice's liability for what were common expenses paid by the second defendant.

[93] The requisite detriment arises if the claimant has acted in a way referrable to the agreement or intention that they have that beneficial interest. A person will have acted on that common intention, if that person has engaged in conduct that could not reasonably have been expected to have occurred unless that person was to have an interest in the property. The interest will be that agreed upon or intended if it can be established.

[94] The plaintiff has conducted his separate practice and business on the basis of an agreement to conduct separate practices. That conduct was to his detriment, unless the plaintiff was to have the beneficial interest in his separate practice. The plaintiff's conduct could not reasonably have been expected to have occurred without such an interest. In such circumstances, equity should intervene, subject to the protection of others from unjust consequences."

[95] The fact that the plaintiff and the first defendant agreed to operate those separate practices and business under an incorporated legal practice conducted by the second defendant does not alter that conclusion. That corporate structure governs the obligations of the second defendant to third parties, such as creditors, during the operation of the incorporated legal practice. Upon the meeting of all of those obligations there is no reason equity ought not to apply to prevent the first defendant from asserting an entitlement to benefit from the plaintiff's separate practice

and business, when it would be unconscionable for him to do so." (citations omitted)

[27] The following matters which were the subject of findings by his Honour were not the subject of controversy at trial and are not the subject of any controversy in this appeal, namely that:

(a) The Company was operating two legal practices at the time of the winding up order;

(i) Williams' legal practice operated almost exclusively in personal injuries law and from November 2014 was conducted by him from premises at Oxley;

(ii) After November 2014, the second legal practice conducted by Nathan primarily operated in commercial law from premises in West End;

(b) The formation of the Company had occurred after the dissolution of a legal practice known as "*Nathan Lawyers*" which commenced operation in 2002. Originally had as its partners, Nathan, Robert Stevenson and Matthew Stapleton with Williams joining the partnership as a salaried partner on 4 February 2008. In November 2008, Nathan Lawyers became an incorporated legal practice known by the same name. Nathan, Stapleton and Williams were all directors of the incorporated practice known as Nathan Lawyers. Subsequent to that, issues arose between the Nathan, Stapleton and Williams, as a result of which Stapleton severed ties with that practice on 31 March 2012;

(c) On 1 April 2012, the Company was incorporated and commenced operating as an incorporated legal practice known as Nathan Lawyers Brisbane;

(d) Williams and Nathan both notified the Queensland Law Society and Lexon Insurance Pty Ltd of the fact that they were operating separate practices;

(e) Up until November 2014, the practices conducted separately by Nathan and Williams were both conducted from offices in South Brisbane and the lease was in the Company's name. The lease for the Oxley premises was in the name of a company, of which Nathan was the sole director and shareholder. The lease for the West End premises was in the name of the Company;

(f) The Company provided employees and administrative services for the separate legal practices and held the professional indemnity insurance policy for both the Nathan's and Williams' practices;

(g) Williams traded under the name Nathan Lawyers Brisbane Pty Ltd while Nathan traded under the name "Nathan Lawyers". Each had separate websites which did not refer to the other's practice;

(h) The work in progress generated by each practice was kept, billed and received by that practice;

(i) The revenue from each practice was deposited into general accounts operated solely for each respective practice. However, each general practice account was in the name of the Company at the time that the practices were conducted from premises at West End by Nathan and Oxley by Williams. Also at that

time, Nathan and Williams began to each operate separate trust accounts, albeit the separate trust accounts were in the Company's name;

(j) The direct costs and expenses for each practice were paid from that practice's general account, including employment expenses, such as wages and superannuation;

(k) Any costs which were not a direct cost of either practice were split on a pro rata basis based on the head count for each practice between April 2012 and February 2014 or otherwise were split equally including for certain shared administrative staff;

(l) There was no mixing of funds, in the respective general accounts, as consolidated revenue;

(m) Nathan and Williams determined the amount of their wage that was drawn from their respective general accounts without consultation with the other;

(n) Neither Nathan nor Williams used or accessed funds from the other's general account or claimed any entitlement to the income generated from the other's practice, save for when Nathan made the withdrawal of $236,880 out of William's general account on 14 September 2018;

(o) Until September 2015, a consolidated monthly business activity statement (**BAS**) was prepared for the Company to meet goods and services tax (**GST**) and pay as you go (**PAYG**) withholding tax obligations from calculations setting out the GST and PAYG withholding tax obligations of each respective practice. Each practice paid its share of those obligations using the payment slip;

(p) After September 2015, each practice was granted separate branch registration by the Australian Taxation Office (**ATO**), and as a result, each practice prepared and lodged its own BAS and PAYG withholding tax as individual branches and commenced reporting to the ATO for BAS and PAYG withholding tax as individual branches;

(q) The Company lodged a consolidated income tax return of income and expenses but each practice paid its respective component of income tax based on its contribution to the profit of the company;

(r) Each practice maintained separate accounting records, prepared its own profit and loss statements, prepared its own balance sheets and maintained its own work in progress and practice files;

(s) Any profit of Williams' practice was dealt with on the instruction of Williams, and any profit from Nathan's practice was dealt with on instruction of Nathan. Williams did not draw any profit from his practice and the profits were retained within the practice, while the West End practice had no profits and had accumulated losses at the time the Company was wound up; and

(t) Nathan and Williams did not have any knowledge of each other's files nor how the other's practice operated.

[28] A number of facts were not controversial between the parties, including factual matters which were not, but according to the Appellant should have been, the subject of findings between the parties. Those factual matters have been set out in the Schedule to Nathan's submissions. Williams took no issue with any of those

facts. Nathan complains by Ground 12 that his Honour erred in not making findings about each of those matters.

The Trial

[29] Williams contended that on or about March 2012 he and Nathan had agreed to conduct an incorporated legal practice through the Company with effect from 1 April 2012 which was partly in writing and partly by conduct.[17] Williams contended that the terms of the Agreement included a term that he and Nathan would conduct separate legal practices and that he and Nathan would each own their respective practices.[18] Nathan contended that there was no agreement as to ownership of the practice and contended that the material terms of the agreement were that: he and Williams would continue to practice law together as shareholders of the Company; that they would commence legal practice as directors of the Company; that they would continue to operate their own legal practices within their areas of expertise; and each of them would have their own general account.[19]

[30] Evidence in chief was generally provided by way of affidavit, which was admitted without objection. The scope of dispute at the trial was limited since a large number of facts as to how Nathan and Williams operated their practices and the Company's role were not the subject of dispute. According to Nathan, those matters were only relevant to the manner in which they would operate their respective practices. The decision largely turned on the proper characterisation of the facts. Nevertheless, there were credit issues between Nathan and Williams in relation to what had been agreed between them and in relation to Nathan's withdrawal of funds out of Williams' Practice's general account and the utilisation of those funds by Nathan.

[31] Nathan, Williams and Mr Ralph gave evidence. Mr Ralph was a director of TED Enterprises Pty Ltd which Nathan contended was providing advice to the Company. TED Enterprises Pty Ltd was also one of the companies paid by Nathan with the monies withdrawn from Williams' Practice's general practice account. Nathan ultimately conceded in evidence that was not, in fact, the case. Both Nathan and Williams were cross-examined as to the nature of the agreement between them and aspects of the operation of their separate practices and the role of the Company. Nathan was also cross-examined about:

(a) the circumstances of the $236,880 withdrawal from Nathan's Practice's general account;

(b) the expenses which he paid with the $236,880, including to TED Enterprises;

(c) allegations made by him in the affidavit evidence when seeking the winding up of the company; and

(d) the BOQ debt.

[32] As stated above, the learned trial judge did not find that Nathan's evidence was accurate or reliable. His Honour found that Nathan's evidence, together with aspects of his conduct in the winding up proceeding, demonstrated a lack of candour.

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17 Amended Statement of Claim at [4], [5] and [6].
18 Amended Statement of Claim at [5].
19 ABI vol 1 at 53, Amended Defence at [3(d)].

Provision for the division of assets of the company — Grounds 1 and 2

[33] Nathan relies on Part 5.6 of the *Corporations Act* together with the Constitution to contend that they contain detailed provisions as to how the assets of the Company will be applied in the event of the termination of the Company. In particular, Nathan points to clause 5.1 of the Constitution. Clause 5.1 provides that the holders of ordinary shares will have the right to participate in any division or distribution of surplus assets equally. Nathan contends that clause 5.1 provided a specific legal arrangement, as between the Company and Nathan and Williams, which regulated how net assets of the incorporated legal practice would be distributed upon termination. That specific legal arrangement required both Nathan and Williams to receive 50 per cent of all surplus assets. Nathan contends that the trial judge erred by failing to recognise that and to take it into account. His Honour was not specifically referred to clause 5.1 of the Constitution at trial in this context.[20]

[34] Nathan further contends that, by the Parties' adoption of the specific corporate structure of the Company, the present situation was analogous to that discussed by Deane J in *Muschinski v Dodds*.[21] Namely that the parties had made provision in their legal arrangement for what was to be the division of assets in the event of the failure of their relationship or joint endeavour, such that it was not unconscionable for them to be held to the arrangement and there was no cause for equity to intervene. Nathan contends that the combined effect of the arrangements put in place by Nathan and Williams, namely that: each had an equal shareholding in the Company; the adoption of the Constitution, which provided for equal division of profits and surplus assets between shareholders; and the undertaking of their practices through an incorporated legal structure; all evidenced the fact that they had agreed to put in place an arrangement in the event of the failure of the Company, such that there was no cause for the imposition of a constructive trust. Nor was it unconscionable to hold the parties to the legal structure that they adopted at the outset. It submits that the present case is similar to the decision in *Raulfs v Fishy Bite Pty Ltd*.[22]

[35] Williams, however, contends that the complaints of Nathan, in respect grounds 1 and 2, assume that the respective legal practices were in fact assets of the Company. Williams submits that the contention of Nathan is contrary to the undisputed facts, the evidence of Williams and the findings of the learned trial judge.

[36] Williams contends that neither Part 5.6 of the *Corporations Act* nor the Constitution represent an agreement of how the assets would be applied in the event of a breakdown in their relationship. Williams asserts that Part 5.6 of the *Corporations Act* did not apply to the winding up of a solvent company. That is however incorrect. Part 5.6 applies to a voluntary winding of a company, which includes a solvent company.[23] However, it is true to say that Part 5.6 would not apply to an orderly informal winding up undertaken by the directors/shareholders.[24]

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20 Nathan referred to clause 5.1 obliquely in the context of Nathan's withdrawal of the $236,880 from Williams' Practice's general account.

21 (1985) 160 CLR 583 at 618.

22 [2012] NSWCA 135.

23 *Corporations Act* 2001 (Cth), s 513.

24 Although they would apply to a voluntary winding up under the *Corporations Act*. However, s 501 provides (subject to the provisions of the Act as to preferential payments) for the distribution of the

[37] Williams contends that clause 5.1(c) of the Constitution makes no provision for the ownership of the assets of the Company, which his Honour had found were held on trust for the benefit of Williams in respect of Williams' practice and for the benefit of Nathan in respect of Nathan's practice.

[38] Williams also contends that neither Part 5.6 of the *Corporations Act* or the Constitution specify what the assets of the Company were, which are said to be the subject of the application of those provisions. Nor do those provisions represent any agreement as to how the assets will be applied in the event of a breakdown in their relationship.

[39] Williams also submits that the agreement now put forward by Nathan is inconsistent with the undisputed arrangements to operate separate practices. The argument now contended by Nathan, Williams submits, is inconsistent with the evidence of Nathan. During cross-examination at the trial, Nathan gave the following evidence:[25]

> "You never asserted to Mr Williams that when moneys [sic] came in on a settlement of any files, you were entitled to 50 per cent of those moneys [sic]? – No I never did…"

[40] In reply, Nathan submitted that to the extent that Williams asserted that the assets of the two legal practices were not assets of the Company, but were assets of the Parties respectively, that was contrary to the findings of the learned trial judge. His Honour found that the Company holds the assets of each practice on trust for Nathan and Williams respectively. Nathan contends that that finding necessarily entails that the Company is the legal owner of the assets.

[41] Nathan contends that an orderly informal winding up undertaken by director shareholders would be constrained by cl 5.1(c) of the Constitution, such that surplus assets of the company will be required to be shared equally amongst members having similar rights.

[42] Further, Nathan submits that there is no inherent conflict in a company, with two equal shareholders, owning and operating two separate businesses in which the financial affairs and management of each business is separate from one another.

Consideration

[43] His Honour found that the Company's corporate structure governed its obligations to third parties such as creditors, and upon the meeting of all of those obligations, there was no reason why equity ought not to apply to prevent Nathan from asserting an entitlement to the benefit from Williams' Practice when it would be unconscionable for him to do so. His Honour found that neither Nathan nor Williams had turned their mind to a division of assets upon the breakdown of the relationship.

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assets to be distributed to members according to their rights and interests in the company unless the constitution provides otherwise.

25 ABII vol 6 at 2081/30–33.

[44] The contention that the trial judge failed to recognise that the Constitution and *Corporations Act* contained provisions which would apply to the division of assets upon termination cannot be accepted. His Honour stated that:[26]

> "[T]he applicable provisions were not framed to meet the contingency of premature failure of the … relationship."

[45] In the context of a failed endeavour, Deane J in *Muschinski v Dodds* stated that:[27]

> "Both common law and equity recognize that, where money or other property is paid or applied on the basis of some consensual joint relationship or endeavour which fails without attributable blame, it will often be inappropriate simply to draw a line leaving assets and liabilities to be owned and borne according to where they may prima facie lie, as a matter of law, at the time of the failure. Where there are express or implied contractual provisions specially dealing with the consequences of failure of the joint relationship or endeavour, they will ordinarily apply in law and equity to regulate the rights and duties of the parties between themselves and the prima facie legal position will accordingly prevail. Where, however, there are no applicable contractual provisions or the only applicable provisions were not framed to meet the contingency of premature failure of the enterprise or relationship, other rules or principles will commonly be called into play. If, in the last-mentioned case, the relevant relationship is merely contractual and the contract has been frustrated without fault on either side, the present tendency of the common law is that contributions made should be refunded at least if there has been a complete failure of consideration in performance…" (citations omitted & emphasis added)

[46] His Honour's statement at [97] was drawn from *Muschinski v Dodds*. The reference to "applicable provisions" is clearly referring to the *Corporations Act* provisions as the preceding sentence stated "A contrary conclusion is not mandated by the terms of the shareholding of the [Company]."[28] The clear inference is that his Honour was referring to the submissions made by Nathan in that regard, which relied on the shareholding of Nathan and Williams and the provisions of the corporate structure in contending that there was not a constructive trust.[29] That is further supported by the fact that the Plaintiff's claim was brought in the context of the Company being wound up.

[47] Notwithstanding the above, the further issue is whether his Honour was in error in not finding that the provisions of the *Corporations Act* were legal arrangements made by the Parties as to the division of assets in the event of the termination of their relationship or enterprise such that it should apply both in law and equity.

[48] Generally the rights, expectations and obligations of the people standing behind a company are sufficiently and exhaustively stated in the *Corporations Act* and the

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26 *Reasons* at [97] citing Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 613.
27 (1985) 160 CLR 583, at 618–619.
28 *Reasons* at [97].
29 ABII vol 2 at 101–103; Reasons at [17].

company's constitution.[30] That will not always be the case. While it will be an uncommon circumstance, it does not preclude equity intervening in limited circumstances where there are no specific provisions governing the circumstance that has arisen and where the evidence supports the intervention of equity, such as by the imposition of a constructive trust.

[49] His Honour found that the fact that "[t]he lack of any specific agreement between [Nathan] and [Williams], in the event of a breakdown in the running of an incorporated legal practice by the [Company], is a consequence of neither the plaintiff nor the first defendant turning their mind to a division of assets upon the breakdown of that relationship."[31] In that regard his Honour further found that:[32]

> "The first defendant accepted the agreement entered into between the parties did not include a provision for the distribution of assets in the event of such a breakdown."

[50] The finding is challenged by Nathan given his evidence also referred to the fact that their respective shareholdings dictated the position between the parties, which governed what would occur between the parties. While it may be accepted that the adoption of a corporate structure with equal shareholdings was part of the arrangement between the Parties, particularly in dealing with third parties, the findings of his Honour were consistent with the evidence of Nathan and Williams that they had not discussed what would occur if their relationship broke down and particularly whether the corporate structure was to be the determinant factor. While his Honour, in [98] of his reasons, used terminology consistent with cases dealing with a constructive trust arising out of a failed joint endeavour, his Honour also found that it was the common intention of Nathan and Williams that each separate practice constituted a separate business which, upon payment of all outstanding obligations of the Company was held by the Company on constructive trust for Nathan and Williams respectively.[33]

[51] To the extent his Honour found such a common intention, his Honour was satisfied that that was the overriding intention of Nathan and Williams to which the Company was also bound and a contrary conclusion was not mandated by the terms of the shareholding of the Company.

[52] Part 5.6 of the *Corporations Act* contains provisions of general application in the context of winding up. One of the circumstances where a winding up of a company may be ordered is where there is a breakdown of the relationship between the directors of a company on the just and equitable ground. While the adoption of a corporate structure gives rise to the possibility of winding up on the just and equitable ground, that is a matter within the Court's discretion.[34]

[53] Section 556 operates in relation to the priority of various debts, expenses and claims upon the company. Section 485(2) of the *Corporations Act*, which is also relied upon by Nathan, provides that the Court "must adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it." It

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30 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379.
31 Reasons at [98].
32 Reasons at [98].
33 Reasons at [90].
34 See summary of relevant principles by Bond J in *Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd* [2017] QSC 74 at [16].

applies to winding ups other than voluntary winding ups.[35] Section 485(2) does not, however, indicate how such a judgment will occur. According to McPhersons Law on Company Liquidation, the *Corporations Act* makes no attempt to prescribe, in rigid fashion, the manner in which the company's assets are to be dealt with on winding up.[36] According to Barrett J in *Visnic v Sywak*,[37] the shareholder register establishes a prima facie position but his Honour considered it at least arguable that equitable interests in or claims upon the shares of contributories are cognisable by the liquidator.

[54] Upon appeal, Nathan presented a new and expanded argument insofar as it contends that part 5.6 of the *Corporations Act*, read together with the Constitution, contained detailed provisions as to how the assets of the Company would be applied in the event of the termination of the incorporated legal practice. Nathan had not specifically relied on clause 5.1(c) of the Constitution before the learned trial Judge, although he had referred generally to the Constitution. Williams did not object to the new argument being raised, in any event, Williams contends that clause 5.1(c) does not define the assets to which it applies and was contrary to the undisputed arrangements to operate separate practices and the conduct of the parties found to give rise to the common intention.

[55] Clause 5.1 of the Constitution provides that:

> "Holders of Ordinary shares and A Class and B Class shares have:
>
> (a) the right to vote at all meetings of the Company;
>
> (b) the right to participate in any dividend declared on the class of shares held; and
>
> (c) the right to participate in any division or distribution of any surplus assets or profits of the Company equally with all other Members having similar rights."

[56] Clause 5.1(c) of the Constitution represents an agreement between the shareholders and the Company and between shareholders themselves. It is a provision which applies to the distribution of surplus assets generally. It is not one which specifically deals with the event of termination. It is, however, broad enough to provide the shareholders with a general right to participate in the distribution of surplus assets, which prima facie would extend to the situation where the Company had been wound up.

[57] While the provisions of the *Corporations Act* and the Constitution make provision for the distribution of assets, the priority of claims upon the Company and the payments of debts, neither the *Corporations Act* nor the Constitution define what the Company assets are that are available for distribution. In particular, while they would prima facie apply to the assets held by the Company, that is not the case where it holds the beneficial ownership on trust for other parties. They are provisions of general application rather than specific provisions dealing with the consequences of a failed relationship between joint shareholders operating separate practices through a corporate vehicle. The *Corporations Act* and the Constitution did not preclude the Court from finding that there was a constructive trust which

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35 For voluntary winding ups, *Corporations Act* 2001 (Cth), s 501 applies.
36 At [14.240].
37 (2011) 86 ACSR 569.

arose from the common intention of the shareholders of the Company, which would be binding upon the Company in the determination of the assets available for distribution.

[58] The learned trial judge found that the present case was distinguishable from the case considered by the New South Wales Court of Appeal in *Raulfs v Fishy Bite Pty Ltd* (***Raulfs***).[38] In that case, there was a breakdown in the personal and business relationship between Mrs Raulfs and the second respondent. Mrs Raulfs had entered into a partnership agreement with Fishy Bite Pty Ltd which was owned and controlled by the second respondent. Consent orders had been made for the winding up of the partnership business. Mrs Raulfs sought repayment of $400,000 paid by her to Fishy Bite Pty Ltd. One of the bases relied upon by Mrs Raulfs was that there was a constructive trust over the monies. The Partnership Deed provided that the payment of $400,000 by Mrs Raulfs was a contribution to capital.[39] Clause 23.1 of the Partnership Deed provided that upon termination of the Deed that a general account would be taken and that "the assets…shall be realised and sold and in settling accounts between partners the following rules shall, subject to any contrary agreement between the partners be observed." Clause 23.1 then set out the order in which monies would be paid including "in payment to each Partner (pro rata if necessary) of the final balance of his Capital account".[40] Having regard to the principles stated by Deane J in *Muschinski v Dodds*, Campbell JA considered that it was possible for an equity of the type recognised in *Muschinski v Dodds* to arise in the context of a partnership.[41] His Honour accepted that the partnership had failed prematurely and assumed that there was no "attributable blame." However, his Honour found that even if Fishy Bite Pty Ltd had the $400,000 (which it did not) paid by Mrs Raulfs, there was no occasion for the imposition of a constructive trust.[42] His Honour found that the *Muschinski v Dodd* trust did not arise because Clause 23 of the Partnership Deed contained an express provision specifying the manner in which the partnership assets were to be divided upon termination,[43] and that there was therefore nothing unconscionable in holding the parties to their agreement. There was no issue that the $400,000 was an asset of the partnership which was to be treated as capital.[44]

[59] The presence of clause 5.1(c) of the Constitution does not dictate a contrary conclusion to that reached by his Honour. Unlike *Raulfs*, 5.1(c) of the Constitution did not specifically identify the assets of the Company or address how the asset in question as to be dealt with upon termination. The Constitution of the Company did not contain any specific provisions similar to those found in the Partnership Deed in *Raulfs* defining the assets of the Company and how they were to be treated.

[60] It was open for his Honour to find that the *Corporations Act* provisions did not preclude the Court finding that there was a constructive trust arising out of a common intention shared between the two shareholders. A statute is to be read as operating harmoniously with equitable principles unless the statute makes it clear

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38 [2012] NSWSCA 135 (***Raulfs***).
39 *Raulfs* at [6] citing Clause 4.4 of the Partnership Deed.
40 *Raulfs* at [6].
41 *Raulfs* at [83].
42 *Raulfs* at [79].
43 *Raulfs* at [84].
44 *Raulfs* at [85].

that parliament intended to derogate from those principles.[45] That is not the case in the present circumstances in relation to the Corporations Law.

[61] Neither clause 5.1 of the Constitution nor the use of the corporate vehicle support an inference that Nathan and Williams had formed an express or implied intention, when incorporating the Company, about what was to happen in the event that their relationship broke down. As such, his Honour did not err in determining that they had not agreed in advance how the assets built up by each of them in their respective practices should be divided in that situation.[46] In those circumstances, the evidence of the parties' contrary common intention was sufficient to found a constructive trust and permit equity to operate upon the legal entitlement of the Company and Nathan where it was otherwise unconscionable for them to rely on that entitlement.

[62] I do not find Grounds 1 and 2 of the Appeal have been established.

Errors as to Nathan's evidence (Ground 3)

[63] Nathan contends that the trial judge erred in finding that he accepted that the agreement made between himself and Williams did not include provision for the distribution of assets in the event of a breakdown in their relationship.[47] In particular, Nathan contends that his Honour was in error by rejecting Nathan's evidence that there was an agreement to operate separate practices on the basis each would own 50 per cent of the other's practice.[48] According to Nathan, his Honour's finding was based on only part of his evidence. The evidence of Nathan, by way of affidavit, was that:[49]

> "To my recollection, it was always understood that we would each own 50% of Nathan Lawyers Brisbane Pty Ltd, hence the equal shareholding and there was never a separate agreement as to dividend or net profit distribution at the end of each financial year or as to splitting assets and liabilities on a winding-up." (emphasis added)

[64] Nathan claims that the thrust of his evidence was that:

(a) Nathan and Williams were to have equal shareholding in the Company;

(b) There was no separate discussion or agreement as to division of assets in the event of winding up and ultimately there was no need for such further agreement; and

(c) Nathans's reference to an understanding or agreement that each would own 50 per cent of the assets of the Company was an inference he drew based upon the taking of an equal shareholding.

[65] In cross-examination, counsel for Williams put it to Nathan that:[50]

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45 *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 700 per Kirby P; See also *Williams v Wreck Bay Aboriginal Community Council* (2019) 93 ALJR 279, [71]-[72] and [75].

46 Cf *West v Mead* [2003] NSWSC 161, [63] per Campbell JA.

47 *Reasons* at [98].

48 *Reasons* at [88].

49 ABII vol 2 at 365, Affidavit of Julian Nathan, sworn 21 November 2018 at [14].

50 ABII vol 6 at 2081, T2-13/8–10.

> "[t]o be fair to you, you extrapolate out of that [i.e. the 50 per cent shareholding] what you then say about how assets would be shared between you. You think – your understanding was based upon the mere fact of the 50 per cent shareholding each."

Nathan replied to that proposition in the affirmative.[51] He subsequently agreed, however, that there was no discussion by the parties as to what was going to happen with the assets.[52]

[66] Nathan's evidence at [14] of his affidavit,[53] asserted a common understanding "hence the equal shareholding" not that he inferred such an understanding arising out of each owning 50 per cent of the shares in the Company. He accepted that there was no separate discussion about what was going to happen to the assets.[54] While it was open to his Honour to construe Nathan's evidence in the way contended by Nathan, his Honour's finding was also open and not "inconsistent with facts incontrovertibly established by the evidence" or "glaringly improbable".[55]

[67] In any event, little turned on the evidence in question. His Honour's findings arose from the agreement between the Parties to operate separate practices and their subsequent conduct in how they conducted their practices. The evidence of Nathan, which is the subject of the alleged error, was not material to his Honour's decision. Nathan gave no evidence to the contrary. Nathan's case was based on inferences drawn from the *Corporations Act*, not any express discussion between the Parties. His Honour did consider the effect of Nathan's and Williams' shareholding and whether the corporate structure governed the distribution of assets and weighed against a constructive trust founded on the common intention found by his Honour.[56]

[68] I find that ground 3 of this appeal has not been established.

Common Intention – Ground 4

[69] Nathan contends that his Honour made a number of errors in finding a common intention as to beneficial ownership of Nathan's and Williams' practices. Nathan characterises his Honour's decision as finding that there was an agreement between Nathan and Williams that each would conduct separate practices with each practice having its own client bases and files, separate office and trust accounts. That finding is unchallenged but Nathan contends that the agreement was only as to the manner in which the practices were conducted, and did not go so far as to confer beneficial ownership of those practices. He also contends that his Honour inferred the common intention as to beneficial ownership solely from the conduct of the separate practices after the commencement of the Company's incorporated legal practice.

[70] Nathan contends, given his Honour's approach, that the inferring of the common intention was an objective exercise and that there are a number of facts which militate against the finding of a common intention, contrary to his Honour's findings which were not the subject of findings.

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51 ABII vol 6 at 2081, T2-13/10.
52 ABII vol 6 at 2089, T2-21/16–26.
53 ABII vol 2 at 365, Affidavit of Julian Nathan, sworn 21 November 2018 at [14].
54 ABII vol 6 at 2089, T2-21/16–26.
55 As was contended by Nathan in this appeal.
56 *Reasons* at [95].

[71] Given the way Nathan characterises the decision, he contends that the Court of Appeal is in as good a position as the trial judge to decide what intention should be inferred from the conduct of the parties.

[72] Nathan also contends that his Honour erred in law by treating the question of inferring a common intention as to beneficial ownership as one to be resolved as between Nathan and Williams. He submits that the correct question which his Honour should have addressed was whether there was a common intention as to beneficial ownership between Williams and the Company, not as between Nathan and Williams.

[73] Nathan contends that the fact that the learned trial judge asked the wrong question, was demonstrated by his Honour's reasons at [98] where he stated that there was no reason that equity ought not to prevent Nathan from asserting an entitlement to the benefit of Williams' separate practice when it would be unconscionable to do so.[57] The question that he contends that should have been asked is whether equity ought to prevent the Company from obtaining the benefit of the assets and income of the Oxley practice and whether it would be unconscionable for the Company to do so.[58] In that regard, Nathan particularly relies on *Muschinski v Dodds*[59] and *Shepherd v Doolan*.[60]

[74] According to Nathan, if the trial judge did ask the relevant question, he would have examined other objective evidence as to factual matters and made findings in that regard as outlined in paragraph 11 of the Draft Notice of Appeal and Schedule A to Nathan's submissions. He contends that those findings would have revealed that the key features of the relevant conduct as between the Company and Williams were that:

(a) At the outset of the incorporated legal practice of the Company a standard form letter was sent to clients telling them that the Company would now be providing legal services to them;

(b) It was the Company who entered into client agreements with clients of the practice;

(c) The assets that had formerly been used by Nathan Lawyers Pty Ltd in conducting its legal practice were acquired by the Company and were made available for use in the incorporated legal practice of the Company;

(d) All assets subsequently acquired for the purposes of the Company's incorporated legal practice were purchased by the Company and were paid out of a bank account of the Company;

(e) It was the Company who invoiced the clients, the clients paid their fees to the Company, and all fees were deposited into a bank account of the Company;

(f) Save for the lease of the Oxley premises, it was the Company who incurred all expenses of the practices and expenses were paid for out of a bank account of the Company;

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57 *Reasons* at [95].
58 Appellant Submissions at [15]; T1-105/28–35.
59 (1985) 160 CLR 583 at 619-620.
60 [2005] NSWSC 42 at [30].

(g) The Company employed all staff in the two practices, including paying wages and allowances to each of Williams and Nathan;

(h) The Oxley premises were leased in November 2014 by Williams' company, DW Lawyers Pty Ltd, but the rent on those premises was paid out of a bank account of the Company; and

(i) Each year the Company lodged a tax return in which it recorded the total income from both practices, the expenses from both practices and paid tax assessed by the difference between those two totals.

[75] Nathan contends that, as a result of examining the common intention between the wrong parties the learned trial judge gave undue significance to the separation of financial affairs and no proper weight to the corporate structure adopted between Williams and Nathan. According to Nathan, such an examination of the corporate structure weighed against the inference of the common intention found and similarly supported an inference that the Company had beneficial ownership of assets and income of the separate practices. Nathan submits that the adoption of the corporate structures was the strongest evidence of a contemporaneous intention regarding the division of the assets of the Company in the event of termination.

[76] Counsel on behalf of Nathan accepted that the authorities support the fact that the common intention may be inferred from parties' conduct, including conduct after the property has been acquired. However, Nathan submits that the cases where such an intention was inferred were developed in the context of domestic cases, not commercial cases. It is submitted that such an inference should not be readily drawn in a case of two solicitors, where it would be expected that they reduce their agreement into writing or provide a legal structure as to their entitlements.

[77] Nathan also contends that the trial judge's findings that all the company's assets were available to meet all the debts of the company was inconsistent with the finding that beneficial ownership for each practice lies with Nathan and Williams, since trust assets from one trust are not, in law, available to pay the debts of another trust. Further, it was inconsistent with financial statements and tax returns where income, expenses and losses of each of the practices were combined. If the common intention had been as his Honour found, Nathan contends there would have been a separate tax return for each trust.

[78] Williams contends that the trial judge's findings as to the agreement was not limited to the manner in which the practices were undertaken but extended to ownership, as is demonstrated by reading the finding at [83] together with the findings at [84]–[88]. Counsel for Williams particularly emphasised the second sentence of [87] where his Honour found that "neither sought to obtain any benefit from the income derived by the other's separate practice."

[79] Williams rejects the notion that his Honour erred in attributing a common intention as to beneficial ownership to Williams and Nathan. Williams points to the fact that the Company was a party to the proceedings and that neither Nathan nor the Company sought to assert that the court had to determine the question of common intention as between the Company and Williams, as opposed to Nathan and Williams, such that Nathan should not be permitted to rely on it now. In response, Nathan asserts it was a matter of proof for Williams and it did not need to be raised by Nathan. In any event, Williams contends that Nathan's submission that his

Honour erred in looking at the question of intention between Nathan and Williams, and not the Company and Williams, was artificial in the particular circumstances of this case.

[80] Williams also asserts that the contention of Nathan is inconsistent with the fact that both Williams and Nathan agreed that once work in progress was converted to cash, each was free to deal with it as they saw fit. Williams submits that it would be counter intuitive for men of business to operate their respective practices in the way they did through the one corporate vehicle with each free to deal with the assets and property of the practices as they saw fit but upon termination of the Company for assets to be pooled and any surplus assets to be distributed equally between them.

[81] Williams contends that, as was submitted by Nathan, common intention as to beneficial ownership may be inferred from a party's conduct, including conduct after the property had been acquired. In the present case, Williams contends that the undisputed facts he identifies at [6] of his submissions readily supported and confirm the common intention as to the ownership of their respective practices. He contends that other than the incorporation of the Company and one clause in the constitution no other evidence is relied upon by Nathan to rebut the common intention asserted.

Consideration

[82] The contention of Nathan that his Honour failed to analyse the common intention as between Nathan and Williams and the Company, particularly relies on the statement of Deane J in *Muschinski v Dodds*, where his Honour stated:[61]

> "Like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct."

[83] Similarly, Nathan relies on the statement by White J in *Shepherd v Doolan*,[62] that:

> "The ultimate basis for the imposition of a constructive trust is that it would be unconscionable for the holder of the legal title to the property to assert that he holds it free of any beneficial interest in the claimant."

[84] That contention ignores the fact that Williams did join the company to the proceedings and sought relief against it, namely a declaration of a constructive trust. Williams had pleaded that the Company asserted an entitlement to Williams' practice and did not recognise his equitable interest in the practice.[63]

[85] The Company did not seek at trial, or on appeal, to make submissions as to whether it held Williams' practice on constructive trust for him. It adopted the position that it was a matter for Nathan and Williams. Nathan did not seek to make submissions on behalf of the Company. Nathan and Williams were the only shareholders of the Company and were its sole directors. They were the controlling minds of the Company. The Company does not assert such a right to beneficial ownership upon this appeal nor did it at first instance, even though the relevant relief, namely a declaration of

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61 (1986) 1260 CLR 583 at 619–620.

62 [2005] NSWSC 42 at [30].

63 Amended Statement of Claim, [18]–[19].

a constructive trust, was sought against it.[64] Nathan and Williams as shareholders were the relevant parties to whom any distribution of assets was to be made.

[86] The statements relied upon by Nathan must also be seen in the context of the cases dealing with a contest between individuals. This is given some support by the commentary in Ford and Lee "Law of Trusts" where the authors state:[65]

> "The common intention must relate to a property to which the defendant holds title, or to which he acquires title after the plaintiff has acted to his or her detriment. It must not relate to a property to which a third party holds title. In *Re Glory Rise* [2005] HKCA 48 Ribeiro PJ stated at [39]:
>
> > The fact that A and B might form a common intention that they should have shared beneficial interests in C's property cannot in principle be sufficient to impose a constructive trust on C to hold C's property on trust for A and B. C is not party to and does not unconscionably depart from any common intention, so there is nothing to constitute C a trustee for A and B. If B does not make good his promise, he might attract personal liability to A, but it does not mean that an equitable interest in C's property is created in favour of A.
>
> The position will be different if A and B agree to interpose a company to hold property belonging to either of them in which both are intended to hold interests (see Ribeiro PJ in *Re Glory Rise* at [45])…" (citations omitted & emphasis added)

[87] In the present case, his Honour found that the parties did not intend that the Company would hold beneficial ownership in the property other than to meet the Company's obligations, not that the parties' intention was to share in the Company's property.

[88] The argument of Nathan also fails to recognise that it is Nathan who is, in effect, asserting a legal right, through his position as a shareholder of the Company, over 50 per cent of the surplus assets of the Company which includes Williams' practice. Nathan's submissions at trial were not premised on the relevant question for the Court being what was the common intention between the Company and Williams.

[89] In those circumstances, it was appropriate and consistent with the statement of Deane J in *Muschinki v Dodds*, for the learned trial judge to determine the question of common intention by reference to the agreement reached between, and the conduct of, Williams and Nathan. Nathan and Williams had agreed at the formation of the Company, the role of the Company and its relationship with each of their practices. While the Company was the interface of the legal practices with clients and undertook the administrative and management support of the incorporated legal practice, the individual conduct of Williams and Nathan's practice and particularly the use of the revenue generated by each practice was independently determined by each of them. That was consistent with what Williams and Nathan had agreed from the outset. Even if one examined the question of the intention between the

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64 Although it denied that entitlement in its defence.

65 At [22.4280].

Company and Williams, the outcome would be unlikely to have been different. The Company operated in a manner consistent with Nathan and Williams maintaining beneficial ownership of their practices. Significantly, each decided what the revenue that was generated by their practice was to be spent on. There was no company resolution determining what could be spent, or the wage to be drawn by Nathan and Williams respectively. While the Company did enter into the legal services agreements' with the clients on the basis its directors and employees were to carry out the work, each of Nathan and Williams conducted those practices independently and determined the expenses were to be incurred and paid on the basis of their own practice and the revenue generated by the work carried out was separately accounted for in a separate general account. While bank accounts, the client service agreements and invoicing were all in the Company name and the tax return was filed by the Company on the basis of consolidated income and expenses, the Company was analogous to a service Company with Nathan and Williams operating their practices under that umbrella but maintaining their own practices and conducting them in a way reflecting an intention to maintain ownership over those practices.

[90] As to the facts which Nathan contends his Honour should have placed greater weight on if he had asked the right questions, those matters were largely pleaded in paragraph 3(e) of Nathan's amended defence and were largely admitted by Williams. Many of those facts were outlined in respect of the background to the separate practices in the learned trial judge's judgment.[66] In the circumstances, they were not matters about which his Honour was required to make specific findings. A number of the matters relied upon by Nathan related to the Company's dealings with clients and third parties, rather than relating to the beneficial ownership of Williams and Nathan's practice.[67] It was conceded by Williams, that if the Court determined that there was a constructive trust found to exist in relation to each of Nathan's and Williams' practice, that the debts of third parties would be met out of surplus assets of one of the practices in the event the assets of the other practice were insufficient to meet the debts incurred specifically by that practice but in the Company name. Nathan made no submissions to the contrary. Such provision could have been made in framing an appropriate order with respect to a constructive trust in any event. The flexibility of such orders in the equitable jurisdiction has been well recognised.[68]

[91] In relation to other matters relied upon by Nathan, such as the acquisition of assets by the Company, the payment of fees into Company bank accounts, the payment of staff out of Company accounts and the payment of rent for the Oxley premises out of Company accounts, Nathan's contention fails to recognise the full context of those matters. While the Company held each of the general practice accounts in its name, a general account was separately maintained by each practice, albeit in the Company's name, and expenses of the practice were paid from that particular practice's general account.[69] Similarly, while the Company did lodge a tax return which consolidated the income and expenses of each practice, separate

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66 *Reasons* at [32]–[36].

67 Appellants Outline of Submissions at [16(a), (d), (e) and (g)].

68 The impact of a constructive trust on third parties being a matter which must be considered in the imposition of any such trust: *John Alexander's Clubs Pty Ltd & Anor v White City Tennis Club* (2010) 241 CLR 1 at [75].

69 ABI vol 1 at 42–43, Amended Statement of Claim at paras 5(a), 5(d), 5(e) and 5(f)(i), (ii), (iii) and (vi) of the which were admitted in the Amended Defence at paras 4(a) and (c) (ABI vol 1 at 56).

contributions were paid by each of the practices commensurate with the profit of that practice. Further, while expenses were paid by the Company and staff were employed by the Company, payment was made by each practice out of their general practice account on a pro rata basis or for some staff who were carrying out administration, such as Mary Collins, on a 50/50 basis.

[92] While noting the things carried out by the Company, such as the Company operating the incorporated legal practice, the lodging of the consolidated tax returns and the bank accounts being held in the Company's names, his Honour also considered how those acts interrelated with the actual conduct of each practice in finding that Nathan's and Williams' Practices were carried out separately and independently.[70] Nathan's own conduct was consistent with him recognising that he had no entitlement to monies in Williams' general practice account. His Honour found that the fact Nathan acted surreptitiously in withdrawing funds from Williams' general practice account was consistent with the fact that he did not consider that he had basis for laying claim to the assets generated by Williams in his practice. His Honour considered that:[71]

> "His conduct is consistent with a conclusion that his own practice having been unsuccessful, the first defendant [i.e. Nathan] attempted to wrongfully take the assets of what he knew to be the plaintiff's [i.e. Williams] own separate business to meet the first defendant's debts."

[93] The acquisition by the Company of Nathan Lawyers Pty Ltd through which Williams, Nathan and Stapleton had operated, is a matter which is largely neutral in terms of the Parties' intention and not inconsistent with the intention that each own their separate practice, given that Nathan maintained the commercial files, Williams the personal injuries files and Stapleton gave up practice.

[94] Other than the reference to Nathan's evidence in [88], none of the findings in [83]-[88] and [89], insofar as it was found that his conduct was surreptitious, were challenged upon appeal.

[95] The matters relied upon by Nathan when judged in their proper factual context, did not contradict and were not inconsistent with the finding by his Honour that Nathan and Williams held an intention that, when all outstanding obligations of the Company were paid, each practice was held by the company on constructive trust for the benefit of Williams in respect of his practice and Nathan in respect of his practice. There was no error in this regard.

[96] Insofar as Nathan contends that the trial judge erred by placing undue significance on the separation of the financial affairs of the two practices, and in particular that his findings were inconsistent with the financial statements and tax returns of the company that again must be rejected. Those matters were evidence not simply of separate practices, but the parties' intention that their practices were separate, accounted for separately and for the benefit of the person conducting the practice only. His Honour considered the matters undertaken by the Company, as well as, the conduct of Nathan and Williams in the separate operation of their practices.[72] Further, although the converse situation to the present, White J considered that in

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70 *Reasons* at [84]–[88].

71 *Reasons* at [89].

72 See for example: Reasons at [85]–[87] and [95].

considering the question of common intention:[73] *"[t]he intention may be inferred from financial contributions, direct or indirect"* relevant in that case to the acquisition of property.

[97] While Nathan has tried to draw a distinction between the agreement between the parties as to what it describes as the "manner" of operating their practices and the question of beneficial ownership, he contends that it was from the subsequent conduct of the legal practices that the trial judge inferred a common intention between the Parties as to the beneficial ownership of the practices, which was conduct after the commencement of the legal practice operated by the company. Williams contends that his Honour inferred the intention on the basis of both the agreement and the subsequent conduct of the parties. Nathan also contends that his Honour's finding extended to the ownership of the practices not merely the manner of the conduct of the practices. His Honour's reference to a common intention that each practice constitute a separate business implicitly carried with it an intention that each would maintain beneficial ownership of their practice.

[98] The findings of his Honour in [90], however, are not so confined as Nathan submits. His Honour inferred a common intention on the basis of the agreement reached between the Parties to operate separate practices as well as on the basis of the subsequent conduct.

[99] The conduct of Williams and Nathan that was the subject of findings of his Honour, in addition to the agreement which his Honour found, supported the fact that the conduct of the practices was on the basis of maintaining beneficial ownership of them, particularly in:

(a) determining the work undertaken in their respective practice and separately maintaining files from each other, maintaining separate websites and names their respective practices;

(b) paying their own practice expenses from their respective practice's general account or if shared on a pro rata basis;

(c) determining what amounts would be drawn from their practices general accounts, including what wages they would draw;

(d) maintaining separate financial records for their respective practices;

(e) paying contributions for income tax based on their own level of profit; and

(f) maintaining independence from the other including not exercising any control over the other's practice or claiming the benefit of income in the general practice account maintained by the other's practice throughout the years in which their practices were operating, until Nathan sought to withdraw money from Williams' Practices general account.

Those features of the parties' conduct were matters from which his Honour could properly infer a common intention as to the beneficial ownership, as his Honour did, and were not merely operational. That his Honour intended such a finding is further supported by his Honour's reasons at [92].

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73 *Shepherd v Doolan* [2005] NSWSC 42 at [38].

[100] The contention of Nathan is that the operation of separate legal practices by he and Williams was consistent with the fact that a company can have two businesses that operate separately, but does not indicate that there is an intention to confer beneficial ownership of the separate businesses on the respective operators of the businesses who may be shareholders. A company may operate two businesses, but here the evidence did not suggest that was how this Company was operating. The evidence supported the fact that the Company was a vehicle by which Nathan and Williams shared expenses and took advantage of operating through an incorporated legal practice. The weight of the evidence supported his Honour's findings that Nathan and Williams were responsible for operating their practices independently and did not intend the Company to have the beneficial ownership of each practice upon termination of the Company after the liabilities of the Company were discharged. Rather, Nathan and Williams intended that each would retain beneficial ownership of their separate practices. That was clearly what his Honour determined, particularly given the emphasis of the matters found by his Honour in [85]–[87].

[101] His Honour's finding as to the common intention of Nathan and Williams was consistent with the terms of the principle stated by Deane J in *Muschinki v Dodds*, which operates upon the legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct. In particular, his Honour stated:[74]

> "Those circumstances can be more precisely defined by saying that the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis of the purpose of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do." (citations omitted)

[102] The fact his Honour found that the common intention as to beneficial ownership arose on payment of all outstanding obligations of the Company was consistent with a concession of Williams in recognition of third parties' who had dealt with the Company without any suggestion that there was a trust arrangement in place. Proceeding on the basis that all assets were available to pay the creditors of the Company was consistent with the fact in the granting of any remedy, equity has regard to the rights of third parties and a flexible approach is available to ensure those rights are not interfered with in the imposition of a constructive trust. His Honour's determination in this regard was not inconsistent with the finding of a constructive trust as Nathan submits.

[103] His Honour also did not err in failing to consider the fact that Williams and Nathan had not reduced their agreement into writing to spell out the quid pro quo for the creation of the beneficial interest claimed. It was obvious that the parties had not done so. His Honour properly made his determination on the evidence before him.

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74 (1985) 160 CLR 583 at 620.

[104] While one would normally expect parties in a commercial arrangement, particularly solicitors, to reduce their understating into writing, history has shown that that has often not been the case. The fact that the cases which recognised the imposition of a constructive trust were largely generated out of domestic relationships may suggest that a constructive trust being found to exist in a commercial relationship such as the present will be uncommon but there is no matter of principle precluding such a finding. Indeed, in *Muschinski v Dodds* Deane J described the relationship between Mrs Muschinski and Mr Dodds as partly personal and partly commercial.[75] Further his Honour recognised that a constructive trust may be imposed in a commercial relationship.[76] Similarly, McMillian J in *Imam* recognised that a constructive trust could apply to a commercial relationship.[77] Whether a constructive trust will in fact be found, depends upon a factual examination of the arrangements that exist, as was undertaken by his Honour in the present case. The agreement reached between the parties and the conduct of their practices including in relation to the Company's role supported his Honour's finding of a common intention.

[105] The weight of the evidence supported the inference of a common intention as to beneficial ownership drawn by his Honour. His Honour's findings in that regard were clearly open to his Honour. I find no error in this regard.

The additional ingredient

[106] Although not raised at trial, Nathan contends that it was not enough to find a common intention conferring beneficial ownership on Williams of the assets of his practice. A further requirement that needed to be established was an intention or expectation that a beneficiary will act in a particular way in return for being given beneficial ownership. Nathan relies on the decision of *Austin v Keele* in that regard.[78] Williams did not contend that Nathan should be allowed to raise the matter upon appeal on the basis that he would have called evidence in response.

[107] It is difficult to distinguish what was intended by the reference to that "additional ingredient" beyond the requirement of detriment, if the Court was minded to infer there was an "additional ingredient" at all. It would appear to have been intended to encapsulate the notion of detrimental reliance. The decision of *Muschinski v Dodds*, and subsequent cases such as *Imam*,[79] which was approved by Derrington J in *Staatz*,[80] do not identify this as an additional element which must be established prior to the imposition of a constructive trust.

[108] In the discussion of *Austin v Keele*,[81] the Privy Council had noted that the evidence of common intention was susceptible of other explanations. It stated however even if there was such evidence that was not enough. Their Lordships stated as follows:[82]

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75 (1985) 160 CLR 583 at 621.
76 (1985) 160 CLR 583 at 621.
77 [2018] VSC 413 at [404].
78 (1987) 10 NSWLR 283.
79 [2018] VSC 413.
80 (2019) 138 ASCR 231.
81 (1987) 10 NSWLR 283 at 291.
82 (1987) 10 NSWLR 283 at 291–292.

> "…A trust does not come into being merely from a gratuitous intention to transfer or create a beneficial interest. There has first of all to be the additional ingredient of an intention or at least an expectation that the cestui que trust will act in a particular way, normally, though not necessarily exclusively, by making some contribution towards the cost of the acquisition of property in which the interest is intended to subsist. Moreover, Lord Diplock's formulation of the principle in *Gissing v Gissing* involves the further essential element that the trustee has so conducted himself that it will be inequitable to allow him to deny to the cestui que trust the beneficial interest which it is provided that he was intended to have. There has to be some conduct detrimental to the [beneficiary], even if only in the sense of an irrevocable change of legal position, which is referrable to the common intention proved and undertaken on the footing of the grant of the beneficial interest claimed. Classically, this takes the form of some contribution towards the purchase of property, a feature which is entirely absent in the instant case.
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> …
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> [T]his was an arm's length arrangement between men of business and it is to be expected that there would be spelt out in some way the conduct or contribution anticipated as the quid pro quo for the creation of the beneficial interests claimed. What is pleaded is that this is to be found in contemplation that Keele and Austin would continue indefinitely to perform work for Sirs and other companies which work was in fact carried out — presumably in reliance upon the intended beneficial interests. That was the case raised for the first time in the Court of Appeal and with no further opportunity to examine or cross-examine witnesses. There was no direct evidence in support of it and it became necessary to seek to infer it from such evidence and documents as already existed.
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> …
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> …The pleaded case therefore is entirely unsupported by evidence. What was contended before the Court of Appeal in support of the plea that Austin had continued to be employed on the faith of the creation of a beneficial interest claimed was that he rendered valuable services at a very inadequate remuneration and that he left large sums of commission undrawn in Sirs. These contentions were carefully considered and rejected by Hope JA in the course of his judgment for reasons which it is unnecessary to repeat and with which their Lordships entirely agree." (citations omitted & emphasis added)

[109] The comments above support the fact that the above discussion was directed at detrimental reliance and was not a separate requirement. Further, it was made in the context of a case dealing with the acquisition of property where Austin had made no monetary contribution to the properties concerned.

[110] In any event, the requirement would be satisfied upon the evidence in the present case. Williams continued to undertake work to build a profitable practice in the

expectation that the fruits of his labour would be owned by him based on what he considered was the common intention between the Parties.

[111] The present case is distinguishable from the situation in *Austin v Keele*, where the Privy Council found that there was no act performed on the faith of the existence of the beneficial interest which the parties had agreed or had in mind, as there was no evidence that his continued employment was undertaken on the faith of the creation of a beneficial interest. Austin was employed by Sirs For Men Pty Ltd (**Sirs**) and other companies, and was paid a remuneration and a percentage of profits. Separate from his employment, Sirs purchased properties over which Austin claimed to have a beneficial interest. That was said to be based upon an agreement which was rejected by the Court. In the alternative, it was alleged that there had been a common intention formed that Sirs would hold on trust the three properties for Austin and Keele in equal shares in contemplation of Austin and Keele continuing to perform substantial work for Sirs indefinitely and that thereafter they carried out that work. Austin never gave evidence of any intention to continue performing work based on his expectation of obtaining a beneficial interest in property. The House of Lords found that the alternative case based on common intention was inconsistent with the agreement about his agreed remuneration and unsupported by his evidence. In the present case however, the property in which Williams claims he holds a beneficial interest is his practice. In respect of which, he engaged in work to build up. While Williams did draw a salary, the evidence supports that he actively engaged in building up his separate practice for his own personal benefit, which was referrable to his acquiring a beneficial interest and the common intention as to beneficial ownership being held in relation to that property.

[112] I find that Ground 4 of this appeal has not been made out.

Detriment (Ground 5)

[113] Nathan raises a number of bases upon which he contends that his Honour erred in determining that Williams had established detriment, namely that:

(a) His Honour misstated the test for detriment;

(b) His Honour did not apply the test prescribed by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* (***Grundt***).[83] If his Honour had applied the correct test he would not have found that detriment was established;

(c) His Honour failed to make any finding as to how Williams' conduct of his practice was to his detriment. Nor did his Honour make any finding of fact that Williams' work was in reliance of a common intention that he be given beneficial ownership of the assets; and

(d) The finding which his Honour did make of detriment, namely that Williams had operated his practice in the expectation that he would have beneficial ownership of the assets built up in that practice which was being denied, was not sufficient to establish detriment. To relevantly establish detriment for the cause of action, detriment cannot be the mere loss flowing from the non-fulfilment of the common intention.

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[83] (1939) 59 CLR 641 at 671.

[114] Nathan's arguments demonstrate a detailed examination of his Honour's judgment to find error rather than reflecting how this matter was conducted at trial. He again raises a number of arguments which were not the subject of submissions to his Honour.

[115] Williams contends that the findings of his Honour had to be viewed in the context of the evidence led by Williams at trial, where he set out a number of matters that go to detriment, namely that:[84]

> "(a) The nature of William's [sic] personal injury practice was that client matters are undertaken on a speculative basis and take a long time to resolve;
>
> (b) Williams grew the cash at bank from $2,528.09 in August 2012 to $673,176.78 by April 2018;
>
> (c) That during the period 27 November 2018 to 8 March 2019 the sum of $570,744.47 was realised in fees and paid to the liquidator which would otherwise could have [sic] been drawn as profit;
>
> (d) Williams did not draw down any profit as he was funding outlays through cash flow;
>
> (e) Williams spent $128,000 on upgrading IT equipment, servers and software in mid 2018; and
>
> (f) Williams was building up the funds in the general account in anticipation of his retirement."

[116] Williams further stated in his affidavit that:[85]

> "[26] …I never considered that there was any reason why I would need to draw it. I certainly never considered that it was at risk or that half of it was owned by Julian Nathan;
>
> [27] Had I considered or known that Julian would, contrary to the Agreement reached in mid March 2012 … assert that we are operating one practice and thus lay claim to half of the assets of Daniel's practice, including the available cash at bank from time to time, I would have conducted Daniel's Practice very differently and/or would have interacted with Julian very differently;
>
> [28] …I would have sought to minimise the assets of practice and maximise my profit draw. I certainly would not have retained significant profits in the Practice;
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> …
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> [29] I would have conducted Daniel's Practice in a manner consistent with how I understand many other personal injuries practices are operated…'

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84 Respondents Outline of Submissions at [24].

85 ABII vol 3 at 1180, Affidavit of Daniel Williams, sworn 8 March 2019 at [26] – [30].

> [30] …I would have been far more concerned about the performance of Julian's practice and insistent that Julian improve his contribution to the joint endeavour."

[117] Williams submits that Nathan did not contend any of the above matters were incorrect as a matter of fact, but rather that Williams did not act to his detriment based on any conduct of Nathan. That contention was not accepted by his Honour. Williams contends that the evidence identified amply supported the learned trial judge's finding that it could not reasonably be expected that Williams would have conducted his separate practice and business the way that he did without a beneficial interest in his separate practice.

[118] The relevant findings were set out at [90]–[94] of his Honour's reasons.[86]

Consideration

[119] Dealing first with the question of whether his Honour misapplied the law.

[120] Nathan submits that, when his Honour stated that "[t]he requisite detriment arises if the claimant has acted in a way referrable to the agreement or intention that they have that beneficial interest",[87] he failed to accurately state the sentence of White J from *Shepherd v Doolan*. The sentence referred to was:[88]

> "[t]he plaintiff must show that she acted to her detriment in a way [referrable] to the agreement or intention that she have an interest in the property" (emphasis added).

[121] Nathan submits that the words omitted, namely "to her detriment", was significant as it suggests that his Honour approached the matter on the basis that it was sufficient that Williams acted in a way referable to the common intention to establish detriment. His Honour had not sought to quote verbatim the relevant sentence. It does not demonstrate any misunderstanding by his Honour. It is evident from his Honour's statement at [91] that his Honour recognised that it must be shown that the person has acted to his/her detriment in a way referrable to the agreement or intention that he/she have an interest in the property.

[122] In any event, Nathan contends that the statement referred to by his Honour derived from *Shepherd v Doolan* was insufficient and that the correct statement of principle is that of Dixon J in *Grundt*,[89] on the basis that detrimental reliance has been required in cases of common interest constructive trust.

[123] Dixon J in *Grundt* stated:[90]

> "That other must have so acted or abstained from acting upon the footing of the state of affairs assumed, that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. … [T]he real detriment or harm from which the law seeks to give protection is that

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86 Which have been extracted above at [24].
87 *Reasons* at [93].
88 [2005] NSWSC 42 at [40].
89 (1939) 59 CLR 641 at 671.
90 (1939) 59 CLR 641 at 674.

> which would flow from the change of position if the assumption were deserted that led to it."

[124] According to Nathan, had his Honour approached the issue of detriment correctly, applying the statement of Dixon J in *Grundt*, there were two factual questions which his Honour would have considered:

(a) Did Williams change his position in reliance on the common intention that he would have beneficial ownership of the assets of Williams' practice?

(b) Upon the Company departing from that common intention, can it be seen that Williams' changed position has been to his detriment?

[125] In contending that the proper test to be relied upon was that stated by Dixon J in *Grundt*, Nathan refers to the decision of *Imam* at [477].[91] That same reference in *Imam* was made by the learned trial Judge when referring to the requirement of detriment where his Honour said:[92]

> "Equity will intervene to prevent the unconscientious denial of a claimant's legal rights if it is established … that it was their common intention that the claimant have such an interest and it is further established that the claimant has acted to his or her detriment on the basis of that agreement or common intention." (citations omitted)

[126] There is no substance to Nathan's complaint that his Honour did not apply the correct test in determining the question of detriment.

[127] According to Nathan his Honour only found that Williams had conducted his separate practice on the basis of an agreement to conduct separate practices, but that there was no finding of fact that his work was undertaken in reliance on a common intention that he be given beneficial ownership of the assets. As to the second question, Nathan contends that the trial judge did not address the benefits Williams received for his work in Williams' practice, in order to determine whether he suffered detriment. If he had addressed this question, his Honour would have understood that he had to consider whether Williams would have adopted a different course had he understood that he was not to receive beneficial ownership of the assets in Williams' practice.[93]

[128] While the learned trial judge's reasons as to detriment were brief, it is incorrect to assert that his Honour failed to consider the question of detriment correctly. His Honour had correctly identified that detrimental reliance, referable to the common intention and beneficial interest, was a necessary ingredient to found a constructive trust. His Honour found that Williams' conduct could not reasonably have been expected to have occurred unless he had a beneficial interest in his practice. While stated at a level of generality, as submitted by Williams, his Honour's findings implicitly were referring to Williams' evidence as to his reliance on the fact that he owned his practice and Nathan did not own half of it, and what he would have done had that not been the position.

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91 Appellant's Outline of Submissions at fn 34.
92 *Reasons* at [91].
93 *Sidhu v Van Dyke* (2014) 251 CLR 505 at [93].

[129] The evidence of Williams supported the fact that he had undertaken the work in his practice in reliance on a common intention that he would be given beneficial ownership of that practice. According to Williams' affidavit, having described how he operated his practice,[94] he stated that he would have sought to minimise the assets of the practice and maximise his profit draw and would not have retained significant profits in the practice if that had not been the case. He stated that he would have operated Williams' practice in a manner consistent with how he understood many other personal injuries practices were operating. It is true that, as submitted by Nathan, the Constitution regulated the process for the distribution of a dividend, such that not retaining profits was not a decision for Williams' alone and not a relevant detriment. However, as his Honour found, Nathan and Williams each decided what amounts would be drawn from their respective accounts by way of wages and actual drawings and did not require authorisation from the other party. Williams, in cross-examination, accepted that dividends had not been paid and clarified that he could determine the amount he drew as wages. That was done on an ongoing basis, as was the purchase of assets as he determined appropriate. Nathan's approval was not required for Williams' to determine that he draw a higher wage, thus reducing the retained profits and the monies in his general account.[95] Williams' evidence was also that he would have sought to minimize the assets of his practice. In that regard, his evidence was that he funded outlays through cash flow and capital items such as an IT upgrade in 2018.[96] The evidence supports a finding that Williams had changed his position in reliance on the common intention that he would have beneficial ownership of his practice.

[130] Nathan sought to object to Williams relying on the matters raised at [24] and [25] of Williams' outline as evidence of detrimental reliance. Those matters were the subject of evidence by Williams at trial, and were tendered without objection.[97] While the particulars of Williams' detriment was not pleaded, detriment was alleged in the Amended Statement of Claim and the evidence was identified at trial as evidence of Williams' detriment.[98] Williams was cross-examined about certain aspects of that evidence at trial.[99] It is well established that parties are bound by the case which is led at trial. There is no basis for Nathan's objection. As stated above, it may be reasonably inferred his Honour relied on Williams' evidence in his determination.

[131] Williams' detriment was not merely the loss arising from the non-fulfilment of the common intention.[100] His evidence supported the fact that his conduct was in reliance of such a common intention as to the beneficial ownership of his practice, whereby he did not spend the monies in his general account or draw greater wages, in order to build his practice's general account in reliance on the expectation that he beneficially owned the practice he was building.[101] In opposition to that contention, Nathan submits that the monies were earnings in the Company's account for the legal services rendered by the Company through its employees. That contention ignores the fact that the practices were operated separately and separate general

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94 ABII vol 3 at 1179, Affidavit of Daniel Williams, sworn 8 March 2019, at [22] – [25].
95 ABII vol 6 at 2037, T1-63/40-41.
96 ABII vol 3 at 1179, Affidavit of Daniel Williams, sworn 8 March 2019, at [24] and [25].
97 ABII vol 2 at 145, Williams Outline of Submissions at Trial at [57], [74] and [75].
98 ABII vol 6 at 2011, T1-37/1-6.
99 See for example ABII vol 6 at 2037, T1-63/40-41.
100 Cf *Delaforce v Simpson Cook* (2010) 78 NSWLR 483 at [41] per Handley J.
101 See *Sidhu v Van Dyke* (2014) 251 CLR 505 at 523 per French CJ, Kiefel, Bell and Keane JJ, [58].

accounts (albeit in the Company name) were maintained by Williams and Nathan and the expenses that were solely those of their respective practice paid from their own practice's general account, otherwise for shared expenses borne on a pro rata basis. The departure from the common intention as to beneficial ownership was to Williams' detriment, given that he would not enjoy the ownership of his practice including its earnings (after the debts of third parties were paid by the Company) but would otherwise be sharing it with Nathan proportionate to their shareholding.

[132] Nathan contends that Williams did benefit from his work in Williams' Practice by the Company paying him a salary and allowance for his work. Further, that through his shareholding he had an entitlement to 50 per cent of the net wealth built up by both Nathan and Williams. As there was no finding that either of those matters were an inadequate reward for Williams' work, Nathan contends there was no basis for the trial judge's conclusion that the way in which Williams conducted his practice was to his detriment unless he achieve beneficial ownership of his practice. Nathan further contends that the evidence does not support the proposition that Williams would not reasonably be expected to have undertaken that work unless he was to have beneficial ownership of his practice.

[133] Nathan seeks to draw an analogy with the case of *Austin v Keele*,[102] which I have considered above. However, that case was factually different from the present case. In *Austin v Keele*, the pleaded case supporting the element of detriment had failed given that it was unsupported by the evidence. The acquisition of property in respect of which it was claimed that there was a common intention that the plaintiff held a beneficial interest was separate from the conduct of the business for which Austin received remuneration and a percentage of profit. Austin's evidence did not suggest that he had ever relied on a common intention that he would receive a beneficial interest in the property for undertaking his work, for which he received remuneration. On appeal, a new case was sought to be raised on behalf of the plaintiff. The plaintiff sought to contend that he had worked in the business for an inadequate remuneration and not drawn large sums of commission as being the relevant detriment. That was never established at trial and was rejected by the Court of Appeal, with the Privy Council agreeing. *Austin v Keele* is not prescriptive as to how detriment may be proved but was framed by the arguments presented.

[134] In the present case, the evidence of Williams was that he had embarked on the work in respect of his practice on the basis of his understanding of the common intention that he would beneficially own his practice. Williams gave evidence as to the fact that he would not have conducted his practice in the way that he did if he had not relied on the common intention. Unlike Austin in *Austin v Keele*, it was well within Williams' power, as he stated, to have paid himself a greater wage and minimised the assets he purchased if he anticipated that the assets of his practice and Nathan's practice would be combined and distributed according to their shareholding. The evidence supported the fact that he had purposefully built up the cash in the bank of the general practice account operated by him and the assets of his practice whereas Nathan had not. In relying on the expectation of the Company holding the beneficial ownership of his practice on trust for him, not holding all the assets built up over time legally and beneficially, Williams' lost the opportunity to act as he stated he would have done.

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102 (1987) 10 NSWLR 283.

[135] The contention of Nathan that Williams' evidence was only referable to the agreement in March 2012 to operate separate practices, not to beneficial ownership cannot be accepted,[103] given that his definition in his affidavit that the "Agreement" was to "operate separate practices under the umbrella of… [the Company]" cannot be accepted. The notion of the Company being an umbrella was clearly premised on an understanding that Williams and Nathan each owned their own practices and that they conducted their practices according to that expectation. Williams' evidence was directed to his conduct of the practice over time and not confined to the Agreement to operate separate practices, but to his understanding that Nathan was conducting his own practice independently and each were to retain beneficial ownership of their practice. Nathan's contention in this regard is not made out.

[136] The present case is not one where Williams merely acted on the basis of a belief that he would have a beneficial interest in the practice but would have acted in the same way in any event and that detriment is merely the common intention being unfulfilled.[104] The present case is one where, based on the agreement to operate separate practices and their conduct in separately and independently operating their practices, Williams acted upon the common intention that he would own his practice. While the value of Williams' practice and the amount of cash in the bank fluctuated over time, consistent with the fact that he undertook personal injuries work on a speculative basis, it consistently grew. That is consistent with his evidence that he focussed on building up his practice in the expectation that he would have the beneficial ownership in his practice. Notwithstanding the fluctuating nature of the practices over time, the evidence of McCann was that Nathan had insufficient assets to meet the liabilities of his practice. As at 27 November 2018, the work in progress for Williams' practice was valued at $2,884,514 whereas the work in progress for Nathan's practice was $11,930.[105] He had grown the cash in the bank of his general practice account from $2,528.09 in August 2012 to $673,176.78 by April 2018.[106] He stated that he would have acted differently in the way he conducted his practice. Further, unlike Austin in *Austin v Keele*, Williams was in a position to have acted differently consistent with his evidence and taken steps to progressively benefit from the earnings in his practice to a greater extent had he not been acting on the basis he was to have the beneficial ownership of his practice. His Honour correctly identified that the relevant detriment that would be suffered if that common intention was repudiated, was that Williams would not receive 100 per cent of the beneficial ownership of his practice after the debts of the Company had been paid.

[137] Nathan has not established any error in the finding of detriment by his Honour such that ground 5 fails.

[138] Nathan therefore fails in establishing grounds 1-5 of its appeal.

Further Grounds of Appeal

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103 ABII vol 3 at 1180, Affidavit of Daniel Williams, sworn 8 March 2019 at [27] and [28].

104 *Cf Sidhu v Van Dyke* (2014) 251 CLR 505 at [92]–[93] per Gageler J; it does not need to be the sole factor influencing the conduct: see the majority [69]–[73].

105 ABII vol 5 at 1492, Affidavit of Michael McCann, sworn 7 March 2019 at exhibit MMO7 "Statutory Report by Liquidator".

106 ABII vol 3 at 1178, Affidavit of Daniel Williams, sworn 8 March 2019 at [22].

[139] Having determined the finding of a constructive trust should be upheld, Nathan still raises complaints about the consequential orders made by his Honour which he contends were in error. I will address them in the order in which they were argued.

Order for Nathan to repay $179,980 – Ground 10

[140] Order 6 of his Honour's Orders provided for Nathan to pay to the general account of Williams' Practice the sum of $179,980.08, being a principal amount of $172,869.65 as well as making provision for the payment of interest.

[141] The amount of $179,980.08 is that part of the amount of $236,880 withdrawn by Nathan from Williams' practice general account, which Nathan had not otherwise agreed to repay in circumstances where his Honour found he had no entitlement to do so and where the monies had been used to pay for his personal expenses.[107]

[142] Although the Order provides for payment to the general account of Williams' Practice, that account is in fact in the Company's name. That resolves one of the complaints originally made on behalf of Nathan that the Court had wrongly ordered that monies be paid to Williams when he only held a beneficial interest.

[143] Nathan also contends that his Honour erred in making the Order on the basis that Williams had no standing to recover monies had and received based on a beneficial interest in the money, but that the Company was the proper party to pursue the cause of action of monies had and received.

[144] Williams conceded at trial that the cause of action would generally be one which should be pursued by the company. He conceded that if the Court did not make a finding of a constructive trust, then it was not a claim that could be pursued by him.[108] Rather it was a claim that belongs to the Company.[109] He now relies on the fact that the Company was a party and contends that, in the special circumstances of this case, he could maintain the action.

[145] Notably, Nathan did not raise any issue with the standing of Williams to make the claim at first instance.

[146] The Company, by way of notice of contention, sought to sustain the order on the footing that Nathan had no legal entitlement to withdraw $236,880 from Williams' practice's general account for his own use and business, and contends that Order 6, which required repayment to the Company, specifically to the general account of Williams' practice was the appropriate order.

[147] Nathan contends that the Company should not be able to rely on the Notice of Contention upon appeal because it made no claim or cross-claim seeking an order for repayment against Nathan at trial. Nor was it a matter which was admitted by the Company in its defence of the claim and further that they pleaded that the relief sought by Williams should be refused. While those matters are true, the Company's Counsel had invited[110] his Honour to make determinations in relation to whether debts were company or non-company debts relying on the power of the Court in

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107 *Reasons* at [109].
108 AB II vol 2 at 149, Plaintiff's Closing Submissions at [78].
109 AB II vol 2 at 149, Plaintiff's Closing Submissions at [78].
110 ABII vol 6 at 1990, T1-16/38–45.

section 90-15 of schedule 2 of the *Corporations Act* 2001 (***Insolvency Practice Schedule***) to "make such orders as it thinks fit in relation to the external administration of a company" both at the outset and at the end of trial.

[148] No objection was made on behalf of Nathan to that course proposed by the Company to his Honour.

[149] The question of whether the monies withdrawn from Williams' practice's general account were properly withdrawn by Nathan and used to pay company debts or non-company debts was an issue clearly canvassed at trial and in submissions. Nathan sought to contend that the monies were used for Company debts.[111]

[150] Even if the matter was not properly raised by way of pleadings, given the conduct of the trial, Nathan was able to address the issues in question and there is no prejudice in permitting the Company to raise the Notice of Contention or permitting Williams to contend that there were special circumstances which entitled it to pursue the action given the Company did not. While it was for Williams to establish his cause of action, it is contradictory for Nathan to object to either Williams or the Company raising matters now, to meet matters that Nathan raised for the first time in its appeal.

[151] Williams would only be permitted to maintain an action for money had and received if there were special circumstances permitting it to do so.[112] In oral submissions, Williams contended that such special circumstances existed.[113] The claim made by Williams for monies had and received was on the basis that the monies were misappropriated by Nathan (accepting that it was on the basis of a finding of a constructive trust). The Company is in liquidation and as trustee was a party to the proceeding. It did not sue for the return of monies even though it was a reasonably sizeable part of the trust asset. Further, Williams seeks to rely on the fact that the Company invited his Honour to deal with the disputed debts upon determination of the issues between Nathan and Williams and the Company now seeks to support the Order made. There is no question that the Company would have had standing.

[152] The question of standing was discussed by Powell J in *Ramage v Waclaw*,[114] particularly by reference to the statement of the law in "Jacobs Law of Trust in Australia"[115] His Honour noted that it was recognised that where there are special circumstances and the relief sought is in the equitable jurisdiction of the court, a beneficiary may take proceedings in his own name with the trustee and other beneficiaries being added as defendants.[116] His Honour noted that the "exceptional" or "special" circumstances were not to be regarded as limited as they once were.[117] In the present case, the pleaded case was to recover the outstanding portion of the $236,880 as monies had and received, which had been withdrawn by Nathan from Williams' practice's general account. Given that Nathan had utilised the monies to pay debts which were found by his Honour to be personal debts, and the liquidators

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111 ABII vol 6 at 1996, T1-22/21-42; *Reasons* at [67].
112 *Ramage v Waclaw* (1988) 12 NSWLR 84.
113 T1-84/1-15.
114 (1988) 12 NSWLR 84.
115 4th ed, 1977.
116 (1988) 12 NSWLR 84 at 91 citing "Jacobs Law of Trusts in Australia, 4th ed, 1977 at 531.
117 *Ramage v Waclaw* (1988) 12 NSWLR 84 at 91.

of the Company had chosen not to take a position at trial in relation to those debts but invited his Honour to make orders in relation to the disputed debts, there were special circumstances justifying Williams pursuing the cause of action. Otherwise, there was a real risk the monies, which were impressed with a constructive trust for the benefit of Williams, would be lost to the Company.

[153] Even if Williams did not have standing, given the matters ventilated at trial and particularly the contention by Nathan that the monies withdrawn had been used to pay the Company debts, the Company can properly seek to now maintain the Order given its standing to pursue the return of the monies is not in question. While Nathan contends that his Honour's decision turned on the consideration that the monies were impressed with a trust for the benefit of Williams and therefore could not be used by Nathan for non-trust purposes, his Honour's findings went further than that and he found that the monies were used in payment of his own personal expenses.[118] That was a matter which had been canvassed in both parties' submissions and indeed in relation to which Nathan had, at trial, made partial concessions. Nathan's partial concessions were that part of the monies used to pay TED Enterprises and Mullins Lawyers were not for the benefit of the Company but for his own personal benefit.[119] It is not suggested that Nathan could have led any evidence to improve the position so found.

[154] Even if the cause of action was not properly brought by Williams to recover monies owing to a trustee, the Company was a party to the proceedings and the Order is one which in all of the circumstances was a correct one and should not be set aside.

Repayment of $81,880 paid to Parker – Ground 9 (alternative)

[155] Nathan claims that even if the court upheld the finding that the company held assets of the Oxley practice on trust for Williams, the order for repayment of $179,980 (including interest) should not have included the amount of $81,880 that was paid to Mr Bruce Parker (defined as the **Parker Loan** above)[120] out of the $236,880 withdrawal.

[156] Nathan contends that his Honour's finding was not that the Parker Loan was not a Company debt, but rather his Honour did not find that Nathan had established that the sum of $81,880 was in fact owing by the Company. It further contends that Williams did not dispute the fact that the Parker Loan was a Company debt but disputed the amount claimed. It submits that the evidence (relevantly that of Williams and Mr McKay, the accountant who generally did Williams' accounts) established that the amount owing was at least $67,605.47. The Parker Loan had been recorded in the Company Accounts between 2015–2017, as "Loan-Parker… $48,527.90" and Nathan claims that even on Williams' evidence, interest had accrued of $17,605.47. Nathan therefore contends that his Honour was in error in not finding that the Company owed a debt to Mr Parker, namely, $67,605.47, even though a claim had been made by Mr Parker's solicitors on 14 September 2018 for $81,880.

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118 *Reasons* at [109].

119 ABII Vol 2 at 110–111, Submissions of Nathan at [120]–[121]: ABII vol 2 at 151, Submissions of Williams at [103] rejecting the contention that the monies had been used for company purposes; *Reasons* at [77].

120 Although referred to as a debt owed to Mr Parker, it is in fact a loan from International Financial Services of which Mr Parker is the sole director and shareholder. I will continue to refer to the loan by reference to Parker given that is how it was referred to in the judgment at first instance and in the submissions upon appeal.

[157] His Honour had, in his summary of the relevant evidence,[121] referred to the Plaintiff's evidence that the money from the Parker Loan had been loaned to Nathan's family trust in about 2009 and subsequently was loaned to Nathan Lawyers. However, even allowing for interest, the sum was less than the amount of $81,880. His Honour referred to Nathan's evidence that the sum of $81,880 related to a loan originally made to him in his capacity as trustee of a family trust in 2009 and was subsequently loaned to Nathan Lawyers. He claimed Williams had agreed that the loan would be taken as an injection of funds for the practice of Nathan Lawyers and that subsequently it had been transferred as a liability of the Company with interest being paid by the Company. Nathan claimed that he and Williams agreed that it would be a debt of the Company.

[158] His Honour noted that the Parker Loan first appeared in the books of the Company in 2015, which according to Nathan was the result of his raising it with Williams. Nathan had no explanation as to why it was not recorded in the 2012 or 2013 accounts. Nathan again accepted that the Company records recorded a debt of approximately $47,000 to Mr Parker, which did not vary in 2015, 2016 and 2017. The solicitors for Mr Parker issued a letter of demand to Nathan, dated 14 September 2018, seeking repayment of the Parker Loan within 7 days. Nathan agreed he had not shown that letter of demand to Williams and accepted that he did not want Williams to know in advance of his plan to repay the Parker Loan. He claimed that there was an interest calculation attached to the letter of 14 September 2018. He accepted however that the document which provided an interest calculation[122] was not attached, or referred to in the letter of demand. Nathan had no explanation for the heading of the document nor why the interest calculation only calculated interest to May 2018 if it was attached to the letter of demand as he had contended. He accepted that he had sought to repay the Parker loan directly from the bank account of the company rather than from his own account on his solicitor's advice.

[159] Nathan does not take issue with any of the matters contained in his Honour's summary of the facts. Rather, Nathan refers to other evidence from the business records, particularly the company accounts for the years ending 2015, 2016 and 2017 and that the circumstances were largely undisputed based on the evidence of Williams and Mr McKay.

[160] In his reasons, his Honour found that there was no basis upon which Nathan could withdraw funds from Williams' practice's general account in payment of his own personal expenses.[123] He noted the concession by Nathan that monies paid to TED Enterprises and Mullins were in respect of expenses incurred by Nathan independently of the Company and should be returned to the practice account of Williams' practice.[124] His Honour stated that Nathan should "also refund to that practice account, the sum of $81,880 purportedly paid in repayment of monies loaned by the Parkers."[125] His Honour then proceeded to discuss the evidence as to the amount

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121 *Reasons* at [70]–[75].

122 The document providing the interest calculation was headed "Loan from Julian Family Trust to Nathan Lawyers Pty Ltd".

123 *Reasons* at [109].

124 *Reasons* at [110].

125 *Reasons* at [111].

owing and determined that he did not accept Nathan's evidence as to the amount owing.[126]

[161] Nathan contends that his Honour made no finding that the debt was not a debt of the Company. Williams contends to the contrary.

[162] While his Honour's analysis focussed on whether the evidence supported a debt owing of $81,880, his Honour's reasons at [109] and the reference to the payment being for personal circumstances was speaking of the entire amount that was withdrawn including the Parker Loan. That indicates that his Honour was not satisfied that the Parker Loan was a Company debt at all, which is consistent with the Orders made by his Honour.[127] That is given further support by his Honour's statement at [112] that "the first defendant's evidence as to the circumstances in which such a sum was due and payable lacked substance" and the relief granted.

[163] Nathan submits that the scope of the dispute was only in respect of the amount of the Parker Loan as, even on Williams' evidence, he accepted that the Company owed the debt and that he had accepted that there was accrued unpaid interest of $17,605.47. The evidence of Mr Williams was however far more equivocal.[128] The relevant evidence of Williams was that:[129]

> "11. I am not aware of the precise details but I understand that Bruce Parker loaned the sum of $50,000 to a Julian's family trust in about 2009. The loan was something arranged by Julian at a time when I was a salaried partner of the Firm. I have very limited knowledge of it. As I now understand it, the funds were on-loaned to Nathan Lawyers Pty Ltd. Nathan Lawyers Brisbane Pty Ltd assumed liability for that loan in April 2012. Interest was paid on that loan by Nathan Lawyers Brisbane at the agreed rate of 8.5% per annum to 26 July 2014. Assuming no interest was paid thereafter (a matter of which I am not aware), interest at 8.5% per annum on the principal sum of $50,000 from 26 July 2014 to 14 September 2018 is $17,605.47. The total required to discharge the loan as at 14 September 2018 would have been $67,605.47. I am unsure as to why the sum of $81,880 was paid to B & KM Parker." (emphasis added)

[164] The calculations made by Mr McKay and referred to by Williams were on the premise that such interest was payable. Williams gave evidence as to the matters of which he is aware. His evidence did not constitute a concession that the Company owed the Parkers at least $67,605.47.

[165] The recording of the debt in the Company's accounts in 2015–2017 is evidence of a debt owed by the Company to Mr Parker, as was the payment of interest by the Company in 2013 and 2014. The inclusion of the debt in the Company accounts which were signed by both Nathan and Williams as directors could be explained by the fact that it was included at the behest of Nathan,[130] rather than as an admission

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126 *Reasons* at [111]–[113].
127 *Reasons* at [111]–[113].
128 ABII vol 3 at 760, Affidavit of Daniel Williams, sworn 21 November 2018 at [11].
129 ABII vol 3 at 760-761, Affidavit of Daniel Williams, sworn 21 November 2018.
130 ABII vol 6 at 2103, T2-35/22–35.

by Williams. No explanation was provided or asked as to Williams' knowledge that the debt was contained in the accounts which he signed off on as a director. Nathan's evidence was that Williams agreed to the inclusion of the debt in the Company's accounts. However, in cross-examination, Nathan said he could not recall a specific conversation with Williams rather that the agreement was on the basis of both Nathan and Williams signing off on the accounts.[131] As set out above, Williams' evidence was not a concession or admission that the debt was a Company debt, although he accepted that it was treated as such and that he was aware that interest was paid upon it by the Company in 2013–2014. While there was evidence of the loan being made to Nathan Lawyers in 2009, there was an absence of evidence showing the specific liability that had been transferred to the Company upon its creation, although, it was uncontentious that the assets and liabilities of Nathan Lawyers had been transferred to the Company in April 2012.[132]

[166] In this appeal, Nathan does not seek to defend the payment of $81,880 which is said to have been paid by Nathan in respect of the Parker Loan as the discharge of a company debt. Rather, Nathan seeks to now allege that the Court should have found that there was a company debt of $67,605.47 based on the concessions it submits were made by Williams. As to the existence of the debt, Nathan relies on material which it states is "largely" undisputed. That material is annexed to Nathan's Affidavit as documents disclosed in a supplementary list by Williams.[133] It appears no objection was taken to the material at the time of the trial nor has any point been raised with the evidential material now. That documentary material contains:

(a) Memoranda of Mary Collins that had been discovered by Williams, referring to a loan of $50,000 at 8.5% per annum which was originally repaid by Nathan Lawyers Pty Ltd at the end of eighteen months. According to her last memoranda on 26 April 2012, the loan to Nathan Lawyers Pty Ltd was extended "until further notice as per JPN's email";[134]

(b) Email correspondence between Nathan and Mr Parker as to the loan together with a letter of understanding signed by Bruce Parker;[135]

(c) A copy of a cheque of $50,000 said to support the payment from funds that were to be repaid to Parker but which were ultimately paid to Nathan Lawyers;[136]

(d) Emails between Nathan and Mary Collins as to the payment of interest up until 26 November 2010;

(e) Email correspondence which is copied to Nathan and Williams from Mary Collins informing them that the Parker loan was due to finish on 26 May 2012;[137] and

(f) Emails between Mary Collins and the accountant suggesting that the Parker Loan was to be recorded in the Company accounts in 2014.[138]

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131 ABII vol 6 at 2103, T2-35/25–30. Williams was not cross-examined as to the transaction.

132 ABI vol 1 at 55–56, Amended Defence [3(e)]; ABI vol 1 at 71, Reply [4] where [3(e)] of the Amended Defence was admitted.

133 ABII vol 3 at 564-629.

134 ABII vol 3 at 568-570.

135 ABII vol 3 at 604-607.

136 ABII vol 3 at 609.

137 ABII vol 3 at 614-622.

138 ABII vol 3 at 624-625.

[167] The evidence that the Parker Loan was a Company debt also relied on the evidence of Nathan, who his Honour had not accepted as a credible witness.[139] Nor did his Honour accept Nathan's evidence that the amount of $81,880 was owing.[140] In addition, there was a letter of demand sent by express post from Sciaccas & Associates Solicitors to Nathan, dated 14 September 2018, stating that the sum of $81,880 was due by 21 September 2018. The letter of demand does not provide any details of the debt owed, who owed it or how the amount of $81,880 was calculated, nor that it included an amount of interest. The letter in fact states "Once proceedings are commenced you may be held liable for interest…".[141]

[168] There is objective evidence that supports the fact that a loan of $50,000 from the Nathan Family Trust to Nathan Lawyers Pty Ltd was made using funds loaned from Mr Parker to the Nathan Family Trust, and that interest of 8.5 per cent was paid by the Company in respect of the loan until 2014. However, there is apparently no explanation for why the amount recorded in the accounts in 2015–2017 was a sum of $48,527.90, nor why no interest was paid after 2014. Further, Nathan, in his defence, alleged that he paid $81,880 in discharge of a liability of the Company owed to Parker with the funds withdrawn by him from Williams' practice's general account. The evidence does not substantiate that there was any such debt owed by the Company in September 2018, save for an equivocal letter of demand from Sciacca & Associates Solicitors. Nathan's evidence that such a debt was owed was rejected by the learned trial judge. The onus was on Nathan to prove that he had used the monies withdrawn to pay a Company debt in the amount of $81,880.[142] He has failed to discharge that onus.

[169] While there may have been a loan from Mr Parker which was on loaned to the Company, there is no evidence that it was for the amount contended by Nathan nor that the Company owed the debt in September 2018. In the circumstances, it was open for his Honour to reject the contention that the amount of $81,880 had been used to discharge a Company debt. It was not a matter of determining whether there was a loan of a lesser amount owing. That was not the matter in issue for determination by the Court, nor was the Court asked to determine if it was a lesser amount.

[170] This ground of appeal fails.

Bank of Queensland Debt – Ground 8

[171] Order 1(b) of his Honour's orders ordered that the winding up of the Company was to take place by "the Liquidators not admitting (or otherwise treating) the Bank of Queensland as a creditor of the second defendant".

[172] Nathan contends that order 1(b) should not have been made because:

(a) No order to that effect was sought in the claim and statement of claim;

(b) The question of admitting or not a proof of debt by the bank is a matter which the court ought to have left to be dealt with in the liquidation in the ordinary

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139 *Reasons* at [112].
140 *Reasons* at [111]–[113].
141 ABII vol 2 at 374, Affidavit of Julian Nathan, sworn 21 November 2018, at exhibit JN102.
142 See Amended Defence at [10(c)(i)], which was denied in the Further Amended Reply at [6(bi)].

course, there being no evidence that the liquidators have received a proof of debt from BOQ; and

(c) The order directly affected the rights of BOQ and as such, BOQ was a necessary party and ought to have been joined such that BOQ had an opportunity to be heard.

[173] Williams contends that the question of whether the Company owed a debt to BOQ became an issue at trial and that Nathan had contended throughout the proceeding that the BOQ Debt was a debt of the Company. Evidence was led at trial in relation to that matter and submissions were made. Further, Counsel for the Company submitted that the liquidators would be assisted if the court was to determine the issues in relation to the BOQ Debt, notwithstanding that normally a liquidator would adjudicate on whether the debt was provable or not. Williams contends that to the extent that BOQs rights are affected, they had liberty to apply and did not exercise it. The Company contends that his Honour did not err by making the order under section 90-15(1) of the *Insolvency Practice Schedule* and that the argument of Nathan should be rejected because:

(a) The court may determine a controversy between the parties on the basis of the evidence at trial, notwithstanding the controversy is not raised on the pleadings;

(b) The liquidators invited the learned primary judge to determine how debts which were controversial should be dealt with in the winding up and the *Insolvency Practice Schedule* section 90-15(1) is sufficiently broad to permit such a determination; and

(c) It was not necessary for BOQ to be joined as it was sufficiently protected by the liberty to apply. Further, an aggrieved party has standing to seek leave to appeal from a decision which affects it.[143]

[174] Counsel on behalf of the Company stated it was not strictly true that there was no issue in the pleading in relation to BOQ as the Company had pleaded at [12(n)] that a contingent creditor was BOQ in the sum of $251,318, which had been expressly denied by Williams. However, it was conceded by Counsel acting on behalf of the Company that no relief was sought in relation to that debt. Further, counsel for the Company pointed to the fact that the Company's counsel had expressly stated to his Honour that the liquidators wanted directions from his Honour as to how to carry out the winding up,[144] which had been foreshadowed in the opening.

[175] His Honour rejected Nathan's evidence that the debt owed to BOQ was a debt the Company had agreed was to be met by the Company.[145] His Honour's determination in that regard was supported by the evidence considered by his Honour. At [115] of his Honour's reasons, his Honour pointed to the contemporaneous evidence, none of which supported the Company owing money to BOQ, which arose out of a bill of sale entered into between Nathan, Matthew Stapelton and Robert Stephenson (the partners of Nathan Lawyers Pty Ltd in 2005). The BOQ Debt was never listed in a business separation report of assets and

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143 *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher & Barnet* (2015) 89 NSWLR 110 at [76]- [97].

144 ABII vol 6 at 2137, T2-69/42–45.

145 *Reasons* at [114].

liabilities assumed by Nathan Lawyers Brisbane Pty Ltd.[146] Further, in the DMP accounts report of 30 June 2014, there was no record of a loan to BOQ, and in fact there was an express statement that the "Partnership Bank Overdraft 20213896" which refers to the BOQ loan, was not taken over by the Company.[147]

[176] While no relief was sought in relation to the BOQ Debt, it was clearly a live issue between the parties at the trial.

[177] Given that the order directly affects BOQ's rights and the recoverability of any debt which it may wish to claim against the Company, it was a necessary party and ought to have been joined before such an order was made.[148] While BOQ is not bound by the judgment because it was not a party to it, the Company and its liquidators are so bound in relation to the treatment of the BOQ Debt. The real question is whether the grant of liberty to apply after the order was made, in circumstances where the liquidator was obliged to give notice of the orders to the relevant creditors within seven days, was sufficient to accord BOQ a right to be heard.[149]

[178] According to the Full Federal Court in *News Limited v Australian Rugby Football League Ltd*,[150] providing for non-parties to make submissions after the delivery of judgment as to the form of orders, does not cure the denial of natural justice as a result of their non-joinder. The Court considered that by that stage, the non-party has been deprived of the opportunity to participate in the trial of the issues that had already been determined in the way that the trial judge thought required redress in terms of the orders made.[151] Accordingly, the Court set aside the Orders affecting the non-parties.

[179] While the BOQ Debt was the subject of competing evidence between Nathan and Williams, it was not necessary for his Honour to make a determination in relation to the BOQ Debt in order to resolve the dispute. While the liquidators of the Company were seeking to adopt a pragmatic approach by requesting that his Honour make directions in relation to the disputed debts in order to avoid further time and costs to revisit a matter that was the subject of dispute and evidence at the hearing, the fact remains that BOQ was a necessary party to such a determination and should have been joined to the proceedings. Insofar as liberty to apply was granted to BOQ, as was pointed out above, that that does not cure the denial of natural justice to the non-party. Further, provision for liberty to apply provided for BOQ to make submissions to the court as to the appropriateness of making such an order which affected its rights but that that could not affect the substantive findings made by his Honour, namely that the BOQ debt was not a debt of the Company.[152]

[180] In the circumstances, Order 1(b) was made in error and should be set aside.

Errors in the terms of the Orders made – Grounds 6 and 7

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146 ABII vol 4 at 802, Affidavit of Daniel Williams sworn 20 February 2019 at exhibit DW-4.

147 Account number 20213896 is a BOQ loan.

148 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [131].

149 Order 5 of Boddice J dated 14 June 2019.

150 (1996) 64 FCR 410 at 527.

151 *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 526.

152 *Ross v Lane Cove Council* (2014) 86 NSWLR 34: at [70], where the New South Wales Court of Appeal found that the liberty to apply that was granted in that case gave no rights at all to the person applying to be joined as a party and the grant of liberty to apply, which merely facilitated the working out of orders and could not be used to alter their substance, was not the means by which natural justice was afforded to a person who had not been heard.

[181] Nathan submits that the orders made by his Honour discriminate in favour of Williams insofar as:

(a) Order 1(a) directs the liquidators not to realise (without first obtaining leave of the court) the plant, equipment, IT, client files and work in progress of the files in Williams' practice, but no equivalent order is made in respect of Nathan's practice;

(b) Order 1(e) excludes contingent and prospective creditors of Williams' practice from needing to be paid by the liquidators out of the assets of Williams' practice. No equivalent order is made in relation to Nathan's practice;

(c) Orders 3 and 4 direct that after the assets of the Company have been applied in paying all liquidators' remuneration and/or creditors, the surplus assets of the Company which are held on trust for Williams and are to be transferred in specie to Williams. Nathan states that even assuming the assets of Williams' practice are held on constructive trust for Williams, the most that can be ordered is that surplus assets of Williams' practice (after paying its share of the liquidator's remuneration and the creditors of Williams' practice) be held on trust for Williams.

[182] Nathan submits that there is no legal basis on which the trial judge could make the Orders by which the Company preferred one of its trusts over the other. It also contends that Order 1(f) proceeds on an assumption that any assets of the Company can be used to pay any creditors of the Company, but that is inconsistent with the finding that the Company held assets pursuant to two separate trusts.

[183] Dealing with the last matter first, it was specifically recognised in *Muschinski v Dodds* that in relation to constructive trusts the remedy can be framed so that the consequences of its imposition are operative only from the date of the judgment or a formal court order, to take account of the third party interests, namely those of the creditors, which is a relevant matter to be considered in any grant of equitable relief.[153] Further, consistent with the use of the Company to incur the liabilities of the incorporated practice and pay those parties, his Honour found that the common intention was not only that the Nathan and Williams' practices were separate practices, but that upon payment of all outstanding obligations of the Company each practice was held on trust by the Company for Nathan and Williams respectively.[154] In those circumstances, the order that the remaining assets in the winding up could be used to meet the liabilities of Nathan's practice or Williams' practice in the event of a shortfall was open to his Honour, notwithstanding the finding that the respective practices were held on constructive trust by the Company.

[184] The complaints now raised by Nathan were not raised when the parties were given the opportunity to do so prior to the orders being made. In particular, Nathan could have made submissions about the draft order, which encompassed the orders now the subject of complaint. No reason has now been provided as to why he should be allowed to now raise arguments against the orders made.[155] In that regard, the Company objected to Nathan being permitted to do so.

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153 (1985) 160 CLR 583 at 615.

154 *Reasons* at [90].

155 *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71.

[185] According to the submission made on behalf of Williams, the orders in 1(e) were specifically sought to address Williams' evidence that as a part of his personal injuries practice barristers were briefed on a speculative basis. Paragraph 1(e) was sought, and made, on the basis that the contingent or prospective creditors of Williams' practice were barristers who accepted briefs on a speculative basis.[156] Nathan did not raise the same considerations relevant to any order made in respect of contingent or prospective creditors or make submissions such that a similar order was required.

[186] As to orders 3 and 4, it is true that they assume that all the surplus assets of the Company will be assets of Williams' practice. In that regard, Williams contends that the evidence showed that Nathan's practice was "hopelessly insolvent".[157] The Company also submitted that Nathan's practice lacked sufficient assets to pay its creditors, whereas Williams' practice had significant assets, albeit largely contingent.[158] The Company therefore submits that the orders made were responsive to the evidence and appropriate in the circumstances.

[187] Nathan contends that the estimates of Mr McCann regarding the assets and liabilities are of a preliminary nature only and inconclusive, on the basis that the estimates were based on information provided by only one of the directors. It appears that information was provided by Nathan.[159]

[188] The affidavit of Mr McCann showed that Nathan's practice lacked sufficient assets to pay its creditors, whereas Williams' practice has significant assets, albeit that they were largely contingent. He was not challenged on his evidence. The orders made by his Honour in relation to the winding up were responsive to the evidence and appropriate, given that the evidence was that Nathan's practice would not have surplus assets on any of the scenarios considered by Mr McCann. If Williams does not have any surplus assets the Company may apply for a variation of the orders in [1(a)]. Orders were made to meet the evidence before a Court and in the present case, his Honours' orders were appropriate.

[189] Nathan further complains that the orders were framed to allow Williams to continue carrying on Williams' practice and employ his staff, when he was not provided with the same opportunity. However, Nathan was provided with the same opportunity to make submissions as to appropriate orders. Nathan did not present evidence to support the fact he would have sufficient assets to continue his practice and employ staff. Nor did he make a submission that he should be given the opportunity to do so. That is unsurprising given the evidence of Mr McCann.

[190] In all of the circumstances, it is not appropriate to permit Nathan to raise grounds 6 and 7 when they were not matters raised below. In any event, the learned trial judge's orders made were appropriate and open to the Court on the basis of the evidence before it.

Agreement on Actual Drawing – Ground 12

[191] Nathan was granted leave to read and file an Amended Notice of Appeal at the outset of the appeal hearing. That Amended Notice of Appeal included a challenge

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156 ABII vol 4 at 807, Affidavit of Williams, sworn 20 February 2019 at [16(b)].
157 Written submissions of Williams at [45].
158 AB II vol 5 at 1582, Affidavit of Michael McCann, sworn 14 March 2020 at exhibit MM-18.
159 AB II vol 5 at 1483, Affidavit of Michael McCann, sworn 7 March 2020 at [5(c)].

to his Honour's finding at paragraph 86 that the arrangements between Nathan and Williams allowed each to determine amounts to be withdrawn from the respective accounts by way of "actual drawings".[160]

[192] It is submitted by Nathan that "actual drawings" must refer to profit. There was no evidence that any profits had been drawn and a dividend paid to the shareholders. However, there was evidence that each partner determined the wages that they each would draw from their respective practice accounts without consulting the other. While that reference by his Honour may have been referring to profit and was therefore in error, it had no consequence for his Honour's overall findings such that it requires the decision be set aside.

Conclusion

[193] Nathan has failed to substantiate its appeal on all grounds, save in respect of ground 8 relating to the BOQ Debt and order 1(b) of the orders of the Court below made on 14 June 2019. The parties should be permitted to make submissions as to costs.

[194] In my view the orders should be:

1. Order 1(b) of the Orders made on 14 June 2019 is set aside;

2. The appeal should be otherwise dismissed; and

3. The parties should provide submissions of no more than three pages as to costs within 14 days of these reasons being published.

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160 *Reasons* at [86].