

# SUPREME COURT OF QUEENSLAND

CITATION: *Isakka v Sth Australian Asset Management Corp* [2002] QSC 029

PARTIES: **BENJAMIN ISAKKA**  
(**plaintiff**)  
v  
**SOUTH AUSTRALIAN ASSET MANAGEMENT CORPORATION**  
(**defendant**)

FILE NO: S848 of 1991

DIVISION: Trial Division

DELIVERED ON: 22 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 8-10, 13,14,16 and 17 August 2001

JUDGE: Mullins J

ORDER: **The proceeding is dismissed**

CATCHWORDS: BUILDING AND ENGINEERING CONTRACTS – SUBCONTRACTOR’S CHARGES – money payable under the building contract charged in favour of subcontractor – whether financier of developer liable for the amount of the subcontractor’s charges which was not retained by developer – whether conduct of financier in administering the loan to developer brought financier within the definition of “employer” under the *Subcontractors’ Charges Act 1974 (Q)*

EQUITY – FIDUCIARY DUTY – whether there was a fiduciary duty owed by the contractor to the subcontractor or owed by the developer to the subcontractor as a result of the *Subcontractors’ Charges Act 1974 (Q)*

*Subcontractors’ Charges Act 1974*, s 3(1), 3(2), 5(1), 6, 7(1), 10(1), 11(1), 11(2)

*Ex parte Austco Pty Ltd* [1985] 2 Qd R 1

*Commonwealth Bank of Australia v Finding* [2001] 1 Qd R 168

*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41

*Stumann v Spansteel Engineering Pty Ltd* [1986] 2 Qd R 471

COUNSEL: JW Greenwood QC, PA Hastie and P McDermott for the plaintiff  
EJ Lennon QC and PJ Flanagan for the defendant

SOLICITORS: Prentice Lawyers for the plaintiff  
Clarke and Kann for the defendant

- [1] **MULLINS J:** The plaintiff, Mr Benjamin Isakka (also known as Mick Amos Isakka), is the assignee of the chose in action being the rights of action in this proceeding of Sange Holdings Pty Ltd (in liquidation) (“Sange”) against Beneficial Finance Corporation Limited (“BFC”). South Australian Asset Management Corporation is the successor to BFC and the defendant in this proceeding. The hearing of this proceeding conducted in August 2001 was limited to questions of liability only.
- [2] In 1989 Sange conducted business as a formworker in multi-storey building construction. Its principal shareholder and director was the plaintiff. At that time JC Scott Developments Pty Ltd (“Scott Developments”) was the owner of certain land at Bardon in Brisbane on which Scott Developments proposed to build a block of 41 apartments (“the project”). On or about 10 November 1989 Scott Developments entered into a building contract with JD and JC Scott Nominees Pty Ltd trading as JC Scott Constructions (“Scott Constructions”) as builder for the project.
- [3] Mr James Douglas Scott and Mrs Janet Charlton Scott were directors and shareholders of Scott Developments and Scott Constructions. The plaintiff’s pre-contractual negotiations were with Mr Scott. After the project commenced in early 1990, Mr Scott was supervising the project on site on a daily basis. The project was completed in about May 1991.
- [4] The finance for the project was provided by BFC by means of a loan facility provided for in a deed of loan dated 17 November 1989 by which Scott Developments could draw down money to pay for work undertaken by Scott Constructions pursuant to the building contract. The facility limit under the loan was originally \$10,780,000. That limit was increased to \$13,000,000 by letter of offer dated 1 February 1991 from BFC to Scott Developments. The relevant deed of variation of the loan agreement was executed by Scott Developments in February 1991. The deed is dated 26 March 1991. The loan by BFC to Scott Developments was guaranteed by Mr and Mrs Scott and Scott Constructions.
- [5] On 17 November 1989 Scott Developments granted to BFC a mortgage debenture by which it charged all its property and assets, both real and personal and both present and future, to BFC. On 17 November 1989 Scott Constructions granted to BFC a mortgage debenture in similar terms. Both debenture mortgages were lodged and registered with the National Companies and Securities Commission. On 17 November 1989 Scott Developments also granted to BFC a mortgage over the land which was the subject of the project which was registered under number K107800B (Ex 22). That mortgage incorporated the covenants in registered memorandum number J923811F (Ex 23).

- [6] Sange entered into a subcontract with Scott Constructions to construct the formwork for the project. The particulars and terms of that subcontract were in issue, although the defendant did not actively seek to controvert the plaintiff's evidence on the issue. Sange undertook construction of formwork for the project. Sange made claims for payment under the subcontract which were not met by Scott Constructions. Sange caused notices of intention to claim charge ("the notices") pursuant to the *Subcontractors' Charges Act 1974* ("SCA") to be issued and served on Scott Developments on the following dates and for the following amounts:

10 September 1990	\$218,784.54
1 October 1990	368,386.50
5 October 1990	417,111.00
6 November 1990	148,866.50
	\$1,153,148.54

Requisite notices of claim of charge being given under the SCA were also served on Scott Constructions.

- [7] The plaintiff engaged quantity surveyor Mr Andy Steele to conduct a remeasure of the formwork on the project and Mr Steele certified the claims made in each of the notices.
- [8] Sange commenced an action in the Federal Court against Scott Constructions and Scott Developments on 7 November 1990 making a number of claims including for damages pursuant to the *Trade Practices Act 1974* (Cth), moneys payable pursuant to contract, damages for breach of contract and an entitlement to a charge on the moneys payable to Scott Constructions by Scott Developments in respect of the amounts claimed in the notices.
- [9] The subcontract between the plaintiff and Scott Constructions was terminated in or about November 1990. The parties differ as to the basis of that termination. Sange had left the site by 30 November 1990.
- [10] The proceeding by Sange in the Federal Court was ultimately not defended, although defences and counterclaims were filed. Sange obtained judgment against Scott Constructions on 10 April 1991 for the sum of \$1,053,482.00 and against Scott Developments on 11 April 1991 for the sum of \$755,836.04. The judgment against Scott Developments was obtained on the basis of the entitlement pursuant to the SCA.
- [11] Sange received no payment on account of these judgment amounts from either Scott Constructions or Scott Developments. BFC appointed Mr Philip Jefferson as receiver and manager of the assets and undertakings of both companies on 2 April 1991 pursuant to the mortgage debentures. On 5 April 1991 Mr Jefferson was appointed by BFC as agent of the mortgagee in order to complete the construction of the project. Mr Jefferson on behalf of Scott Developments terminated the building contract with Scott Constructions in mid April 1991. Both companies went into liquidation on 28 May 1991.

- [12] This action which was initially brought by Sange has been continued by the plaintiff in order to pursue claims against the defendant for the moneys which Sange was unsuccessful in recovering against either Scott Constructions or Scott Developments.

### **Summary of causes of action**

- [13] The first group of claims is based on the application of the *SCA* to the payments made by BFC under the loan facility between 10 September 1990 and May 1991. The plaintiff seeks to impugn the payments made by BFC directly to Scott Constructions from 10 September 1990 onwards on the basis that the payments were made in reduction of the contract price owed by Scott Developments to Scott Constructions or on the basis that BFC should have retained funds from the progress payments after it had been notified of the existence of the changes or on the basis that BFC was a party to Scott Developments' breach of the *SCA*. In addition there is an allegation that by its conduct on 4 March 1991 BFC entered into a contract with Scott Developments and Scott Constructions to complete the project, it is claimed that BFC became the "employer" for the purpose of the *SCA* and it is then alleged that the plaintiff is therefore entitled to recover the amounts claimed in the notices from the defendant, because of payments made by BFC to Scott Constructions between 4 March and 2 April 1991. There is also an allegation that BFC is liable to Sange under the *SCA* for the payments made by Mr Jefferson in April and May 1991.
- [14] The second cause of action is based on an alleged breach of fiduciary duty. The plaintiff alleges that Scott Developments and Scott Constructions owed Sange a fiduciary duty from the time each of the notices was served and, as a result of the conduct of BFC from on or about 4 March 1991, BFC owed a fiduciary duty to Sange to act in good faith and to avoid profiting from its position. It is alleged that BFC breached the fiduciary duty by causing other subcontractors to be paid, when BFC had knowledge of Sange's charge and of the moneys owed under the subcontract to Sange.
- [15] There are two causes of action based on breach of trust. The first is based on an allegation that Scott Developments had not drawn down the whole of the moneys available under the loan facility from BFC and that, if Scott Developments had done so, it had an obligation to retain sufficient funds to satisfy Sange's claims in the notices. It is therefore alleged that BFC held the remainder of the moneys able to be provided under the loan facility for the benefit of and on constructive trust for Sange pursuant to the notices.
- [16] The alternative claim for breach of trust is based on an alleged telephone conversation between the plaintiff and one Mr John Oates on the one hand and Mr Mark Lamond of BFC on the other alleged to have occurred in March 1991. It is alleged on behalf of the plaintiff that it was represented that BFC would ensure that Sange was paid for the work done and materials supplied to the project and that as a result of that promise Sange did not serve statutory demands on Scott Constructions or Scott Developments.
- [17] The claim for damages for breach of contract is based on the same conversation.

- [18] The final cause of action relied on by the plaintiff is based on an allegation that BFC was unjustly enriched at the expense of Sange.

### **Witnesses**

- [19] The plaintiff gave evidence himself. He relied on the evidence of project management consultant Mr John William Oates who was engaged on behalf of Sange and/or the plaintiff in about July 1990 to assist the plaintiff in recovering amounts claimed as being owed by Scott Constructions to Sange. The plaintiff called two former employees of Sange who worked on the project, Mr Koskinen and Mr Rasmussen, and quantity surveyor Mr Rodney Keith Johnson and builder Mr Richard Allan Butler whose firm, Butler Wright & Partners (“BWP”), had been engaged by BFC in respect to the project. The plaintiff’s sister, Ms Lisa Anneli Isakka, who used to do some typing work for the plaintiff, gave evidence about documents she typed for the plaintiff in late 1990/early 1991. The plaintiff’s wife, Mrs Anita Isakka, gave evidence about posting envelopes addressed to Scott Constructions and BFC in January 1991 which became irrelevant when the plaintiff withdrew his allegation that he had caused copies of the notices to be sent to BFC in early 1991.
- [20] Former officers of BFC who had some involvement in BFC’s financing and dealings in respect of the project gave evidence: Messrs Peter Anthony Hurwood, Phillip Maxwell Ahrens, Merrill Paul Bignell, Mark Lamond and Christopher Robin Freeman. Mr Hurwood was credit manager for Queensland for BFC from February 1990. Mr Ahrens had held that position from 1988 until February 1990 when he became corporate finance manager for Queensland until March 1991. In March 1991 BFC set up a division to look after problem accounts and Mr Ahrens’ task in that division was to coordinate the completion of the project. Between October 1989 and March 1991 Mr Bignell was the manager of BFC’s commercial division in Brisbane. Mr Lamond is a quantity surveyor who was engaged by the State Bank of South Australia (of which BFC was part) in late 1988 to assist with problem accounts. Mr Freeman was the manager for Queensland for BFC from 1985 until December 1990 when he moved to Adelaide to work for BFC as executive director of its Australian Business Division.
- [21] Neither party called Mr Scott or any other person able to give evidence on behalf of Scott Constructions or Scott Developments.

### **Scott Developments’ loan facility with BFC**

- [22] In October 1999 Scott Developments negotiated with BFC for the loan facility required for the project. At that stage Scott Developments had pre-sold 28 of the proposed 41 units in the project. The letter of offer made by BFC dated 23 October 1989 was accepted by Scott Developments on 26 October 1989. The loan facility of \$10,780,000 covered construction costs of \$7m proposed to be made progressively subject to certification by BWP on a cost to complete basis. One of the conditions of the offer was that the percentage of \$7m to be advanced at any time was not to exceed the percentage of work completed at that time as certified by BWP on a cost to complete basis.

- [23] BWP undertook a building cost estimate for the project and their report dated 2 February 1990 to BFC showed an anticipated construction cost of \$7.36m. That estimate was based on the drawings and quotations identified in the report including a quotation for the formwork by another company associated with the plaintiff (Mickana Constructions) for \$650,000.
- [24] When Scott Developments applied for a progress payment, BWP would estimate the value of the work to complete the project at that date (by reference to the anticipated construction cost) which would determine the extent of the progress payment which would be advanced by BFC.
- [25] The initial cheque drawn by BFC for the first progress payment under the loan facility on account of construction work was in favour of Scott Developments. The second progress payment that was drawn on 29 March 1990 was in the form of a cheque in favour of Scott Constructions (apart from some fees paid directly to BWP). In the subsequent period to 4 March 1991 it appears that all cheques were then drawn by BFC in favour of Scott Constructions and not Scott Developments.
- [26] Mr Ahrens stated in evidence that it was likely, even though he could not be certain, that BFC had been instructed by Mr Scott on behalf of Scott Developments to make the progress payments in favour of Scott Constructions. I accept that that is the likely explanation for the drawing of cheques by BFC in favour of Scott Constructions, even though each payment by way of advance was debited against the loan facility of Scott Developments with BFC.
- [27] BWP advised Scott Constructions by letter dated 12 July 1990 that it was a requirement of BFC that all progress payment certificates submitted to BWP for approval must be accompanied by a statutory declaration signed by the builder that all moneys due to the employees and subcontractors on the project had been paid under the terms of their awards or contract conditions up to the date upon which the builder presented that particular progress payment certificate.
- [28] Mr Scott made such statutory declarations and provided them to BFC between 18 July and 21 November 1990.
- [29] BWP's valuation of the cost to complete the project as at 25 September 1990 which was sent with Scott Constructions' claim for progress payment number 10 showed that of the estimated formwork cost of \$650,000 only work to the value of \$84,450 remained to be completed. BWP's assessment of the cost to complete the project as at 22 November 1990 showed that of the allowance of \$650,000 for formwork, work to the value of \$633,750 was completed with work to the value of \$16,250 remaining to be completed. That meant that after that progress claim had been processed, BFC's records showed that it had advanced to Scott Developments the sum of \$633,750 to pay for formwork.
- [30] By letter dated 10 December 1990 Mr Scott advised BFC that there were disruptions to the progress of the works during October and November due to the termination of two subcontracts (including that of Sange), union disputes and bans and a dispute with the reinforcing supplier. Mr Newbold prepared a summary of credit transaction for the approval of BFC's credit committee on 18 December 1991 in which reference was made to Sange's claim of \$978,000 in the Federal Court

and that a counterclaim had been lodged and trial was anticipated in October 1991. By this time the project had been reduced to 39 units and there were 37 units pre-sold.

- [31] Because of BFC's concern about the progress of the project, Mr Lamond was requested by the head office of BFC in Adelaide to undertake an independent assessment of the project. That request was made on 26 December 1990. By 7 January 1991 Mr Lamond had visited the site and prepared a report of that date. Mr Lamond made a number of recommendations to improve the management of the construction and in respect of the monitoring that should be undertaken by BFC's account manager. In that memorandum Mr Lamond stated:

“We should monitor the states of subcontract claims against the builder and ensure that:

- a) settlement of these claims is delayed for as long as legally possible
- b) the Builder has competent advice
- c) the claimants are unable to affect the issues of titles and our repayments”

- [32] I will deal with subsequent events in connection with Scott Developments' loan facility with BFC in the section of these reasons for judgment that deal with BFC's conduct in March 1991.

### **Subcontract between Scott Constructions and Sange**

- [33] In the agreed bundle of documents (Ex 9) there is a copy of a written subcontract between Sange and Scott Constructions dated 7 March 1990 relating to the project. It provided for the works to be carried out by Sange as “complete formwork inc all circular columns, decks, walls, lift shaft, planters and tennis (*sic*) court”. The contract sum was shown as \$650,000 with the date for commencement being January 1990 and the date for completion being June 1990. That subcontract was therefore executed after Sange had commenced on site.
- [34] The plaintiff gave evidence that he on behalf of Sange orally agreed with Mr Scott on behalf of Scott Constructions in or about November 1989 to construct the formwork for \$650,000, on the basis that Scott Constructions would supply all round columns and egg-shaped columns and put the rebates on the slabs and the fillets. The plaintiff had estimated from the information provided to him by Mr Scott in November 1989 that formwork would be 21,666m<sup>2</sup>. The plaintiff explained in evidence that Mr Scott's original proposal for the project was that each of the floors would be constructed half on the ground and half suspended and it was on that basis that the plaintiff ultimately agreed to the subcontract price of \$650,000.
- [35] The plaintiff stated in evidence that the method of construction was changed soon after construction commenced, when it was apparent that it was not feasible to rely on each floor being partially supported by the hillside. According to the plaintiff, each of the floors had to be fully suspended which had the consequence of doubling

the plaintiff's materials and labour for each unit. The change in the method of construction was verified by Mr Butler who stated in evidence that the early concept drawings showed the project as built up on the hill on a series of cut and fill excavations, whereas, as constructed, the whole building was suspended on a series of high concrete columns. Mr Johnson also stated in evidence that the construction was to follow the contours of the ground up the hill, but instead the construction was suspended.

- [36] The plaintiff stated that Mr Scott told him that Sange should measure the floor area that it formed up and that he would pay for the cost on an area basis. The plaintiff also stated that Scott Constructions did not supply the columns that Mr Scott had agreed to supply at the outset. The plaintiff also stated that Sange undertook additional works at Mr Scott's request such as providing labour at day labour rates to assist in the excavations of the footings and drainage pits.
- [37] By 30 August 1990 Sange had invoiced Scott Constructions for \$953,387.50 of which only \$366,216.46 had been paid.
- [38] As this hearing was limited to questions of the liability, the defendant conceded that it was appropriate for the case to proceed on the basis that Sange was owed some amount for the works undertaken by it, when the only payments made by Scott Constructions were in the total sum of \$366,216.46. The defendant expressly reserved, however, the right to argue at any hearing in respect of the quantum of the plaintiff's claim all matters relating to the issue of quantum, including the allegation in paragraph 30 of the defence.
- [39] Scott Constructions sent Sange a letter dated 8 October 1990 denying that there were any moneys owing or that Sange had any entitlement to claims for variations or extensions of time for the performance of the formwork.
- [40] In view of the state of the evidence before me on the issue of the terms of the subcontract and the variations claimed by the plaintiff, I accept the evidence of the plaintiff to the extent that it is necessary to do so for determining the questions of liability in this proceeding.
- [41] When Sange left the site, the formwork which was remaining to be completed was for unit 39, two planter boxes and a fancy archway.

### **Communications between Sange and BFC**

- [42] Some of the plaintiff's claims depend on the establishment of a factual basis to support either actual or constructive notice on the part of BFC of the notices. The plaintiff pleads in paragraph 13(1) of his pleading that in October, November and December 1990 and again in January and March 1991, BFC was notified by Sange of the existence of the notices. Alternatively, the plaintiff alleges in paragraph 13(2) of his pleading that BFC had constructive notice of the existence of the notices in effect from the time the first notice was issued on 10 September 1990, relying on the inference which can be drawn from the facts set out in that subparagraph of the pleading.

- [43] It is therefore necessary to consider the evidence relevant to whether or not such notice to BFC of the existence of the notices was given or can be inferred.
- [44] As to actual notice, the plaintiff relies on a number of conversations which Mr Oates alleges that he had with officers of BFC and which the plaintiff also alleges he had with officers of BFC.
- [45] Although the plaintiff engaged solicitors, Messrs Bowdens, prior to 10 September 1990 to act on Sange's behalf in preparing and issuing the notices, the plaintiff engaged Mr Oates or his company Oates Holdings Pty Ltd separately to assist him in debt collecting from Scott Constructions. According to Mr Oates, his first involvement was with speaking to Mr Scott in late July or early August 1990 and on the same day Mr Oates stated that he telephoned Mr Freeman of BFC. Mr Oates described that conversation as follows:

“...so I reminded him that there was a debt that was unpaid. He said he was not aware of that – this is Chris Freeman – and I said to him, “Look, are you aware of the Subcontractors’ Charges Act?”, and he said, “No.”... So, I said to Freeman that, “Under the Subcontractors’ Charges Act the proprietor is liable to take the money that’s in dispute and set it aside into a trust account, which is to be dispersed at law.” I said, “Are you aware of that?” And he said, “No.” So, I said, “Well, you should be aware of it and what you should be doing is making sure that Scott Developments complies with the Act, that you pay the sum of money that’s in dispute to Scott Developments. Scott Developments then should then set the money aside into a trust account or alternatively, Scott Developments pays a sum of money to Scott Constructions and Scott Constructions should set the money aside into a trust account or alternatively, if that doesn’t work, you should do it yourself and keep Scott Constructions and Scott Developments away from that sum of money. Once that sum of money is allocated that sum of money should then be deleted from the development sum.” And he said, “Well, I really need to look at this. I – you know, this is the first time I’ve heard of it. Would you mind getting back to me?” And I said, “I’ll do that.””

- [46] It is apparent that Mr Oates’ view on how the SCA operated in relation to BFC as financier of Scott Developments was wrong.
- [47] Mr Oates stated that he telephoned Mr Freeman about a week later after the first conversation and in the course of that conversation Mr Oates stated in evidence that he “then repeated verbatim” what he had said in the first telephone conversation. Mr Oates stated:

“He then said, “Well, really, it’s got nothing to do with us in any event, John.”... He said that, “Scott disputes the money and, therefore, it’s up to him whether he pays it or not and really, we only finance the project. We’ve got really – we’ve got nothing to do with what he wishes to do with it.”...”

At the conclusion of that telephone conversation Mr Oates stated that he assured Mr Freeman that charges under the *SCA* would be enforced in due course as “These charges are at the moment, I’m led to understand from Mick Isakka, are being drawn up as we speak.”. Mr Oates was not given any precise information by the plaintiff as to when each of the notices was served or provided with copies of the notices.

- [48] Mr Oates stated that on 28 September 1990 he telephoned Mr Freeman from the plaintiff’s car while they were at the building site and the plaintiff was talking to Mr Scott and “said verbatim again” what he had said to Mr Freeman during the first telephone conversation.
- [49] The plaintiff also gave evidence about events on site on 28 September 1990 and stated that he was accompanied by Mr Oates. The plaintiff was able to refresh his memory from his work diary from 1990 which recorded that on that day the plaintiff was in Brisbane, recorded Mr Oates’ name, the words “on site Bardon” and the name of Mr Andy Steele, quantity surveyor, referred to a 9.00 am meeting with Mr Scott and contained a note “Beneficial and ring Chris Freeman”. The plaintiff stated in evidence that he and Mr Oates had a conversation on the two-way radio which the plaintiff had in his car and that both Mr Oates and he spoke to Mr Freeman regarding the moneys owing. The plaintiff stated that Mr Freeman stated that “There is plenty of money. Got no worries. Don’t panic. You panicking for nothing”. The plaintiff stated that Mr Oates put it to Mr Freeman that under the *SCA* BFC had to withhold moneys for Sange and that Mr Freeman’s reply was “No problems. Mr Scott’s got plenty of money. He’ll pay Sange. There is not a problem. He’ll see to that”.
- [50] Mr Koskinen gave evidence that on three occasions between September and November 1990 he was present on site when he heard and saw the plaintiff make a telephone call from his hands free loudspeaker system in the plaintiff’s car to Mr Freeman. In respect of the first of those occasions, Mr Koskinen recalled that it was after work when the plaintiff came to the building site and it was the first time that Mr Koskinen had ever seen the hands free loudspeaker system operating in the car. He recalled that all the workers gathered around the car, the car doors were wide open and Mr Koskinen heard the plaintiff ring BFC and ask for Mr Freeman. Mr Koskinen recalled hearing the plaintiff ask Mr Freeman for money for Sange, but that Mr Freeman said that the plaintiff should go and see Mr Scott and that the plaintiff responded that he did but Mr Scott would not pay and that under the *SCA* BFC was supposed to hold moneys for Sange. Mr Koskinen stated that Mr Freeman said that he knew all that and that they should go back to work and everybody would get paid in the end. Mr Koskinen stated that a similar conversation took place on another two subsequent occasions in similar circumstances. Mr Koskinen could not say whether or not Mr Oates was with the plaintiff on any of these three occasions.
- [51] By referring to his diary, the plaintiff stated in evidence that he made another telephone call to Mr Freeman on 5 October 1990. All that is recorded in the diary is “Beneficial Finance Co Chris Freeman” together with BFC’s telephone number and the words “Bardon” and “JC Scott”. The plaintiff prepared for his then solicitors a summary of the telephone conversations which he claimed to have had with Mr Freeman between 28 August and 7 December 1990. That summary in Ex 10 was

dated 16 April 1991 and did not record in respect of any of the summarised telephoned conversations that the plaintiff informed Mr Freeman that Sange had issued notices under the SCA against Scott Developments. In respect of the telephone call on 5 October 1990, that summary recorded that Mr Freeman advised the plaintiff that “the apprehensions of the sub-contractors does not concern Beneficial Finance Company”.

- [52] Again referring to his 1990 diary, the plaintiff stated in evidence that the next telephone call to Mr Freeman was on 12 October 1990 followed by another telephone call on 24 October 1990. All that the diary disclosed for 12 October 1990 was “JC Scott job Brisbane safety dispute no workers on site”. There is a reference in the diary on 24 October 1990 to “Beneficial Chris Freeman” together with the telephone number for BFC. The plaintiff did not refer in his evidence to a telephone call on 19 October 1990 in respect of which date the plaintiff’s diary recorded “Beneficial Chris Freeman” together with the telephone number of BFC and the statement “It is not our business we only lent the money to Scott”.
- [53] The plaintiff referred to the note in his diary for 7 November 1990 to recall another telephone conversation with Mr Freeman. The note in the diary stated “Chris Freeman Beneficial Mick said that you are with Scott defrauding subcontractors Mr Scott not paying subbies (*sic*)”. The plaintiff’s summary dated 16 April 1991 for this telephone call recorded “Mr Freeman responded that Mr Scott is our client and we lent him the money and it is his concern as to what he does with it. We are only money-lenders to developers according to Mr Freeman”.
- [54] The plaintiff relied on his diary to recall a further telephone conversation with Mr Freeman on 16 November 1990. The diary entry recorded:

“Ring Chris Freeman from Beneficial Finance about Scott and defruiting (*sic*) with Scott and Beneficial Mr Chris Freeman. We lent the money to Scott. He is doing well. He is building below cost. I said yes he is not paying subbies (*sic*) and Mr Chris Freeman we don’t worry about that.”

- [55] The plaintiff referred to the entry in his diary for 23 November 1990 to state in evidence that he made another telephone call to Mr Freeman on that date requesting payment from BFC to pay for the works that Sange had done. In evidence the plaintiff stated that Mr Freeman’s reply was:

“No problem. We get that paid. Just settle down and we’ll get – pay you up fully. You get paid from Jim Scott.”

That evidence did not accord with what the plaintiff had recorded in his summary dated 16 April 1991 about this telephone call:

“On 23 November, Mick Isakka phone Mr. Freeman notifying him that Mick Isakka’s opinion is that the money spent on site totalled about \$5 million dollars and Mr. Scott’s sons had units there in their names and that they were going to resell these units and collect the money. Mr. Freeman responded that such a revelation had nothing whatsoever to do with Beneficial Finance Company. Mr. Freeman

again pointed out that the money and units were of no concern to Beneficial Finance Company.”

[56] Mr Oates gave evidence that his next contact with Mr Freeman after the conversation on 28 September 1990 was in late October or early November 1990 when Mr Oates telephoned from his home in Sydney and that he said verbatim what he had said before in relation to charges under the SCA. Mr Oates stated that Mr Freeman said to him “We’ve got plenty of money left to finish the project”. In that same conversation Mr Oates stated that he informed Mr Freeman that the unions had been notified and were going to take industrial action and that there were three other subcontractors, apart from Sange that had not been paid. Mr Oates stated that Mr Freeman said that he would organise another meeting next week when he had other executives from BFC present.

[57] Mr Oates stated in evidence that he telephoned Mr Freeman seven or eight days later and that the conversation took place on a speaker telephone at Mr Freeman’s end, as Mr Oates could hear the reverberations of his voice going through the loudspeaker. Mr Oates stated that he “just reiterated what I had said before” and said:

“That charges under the Act are being processed as we speak and that it is my opinion that since the Scott Constructions and Scott Developments are not at arm’s length, as far as both those companies having joint directors, that the Beneficial Finance in my opinion at law is deemed to be the proprietor and it is up to Beneficial to ensure that this money is set aside to be dispersed at law.”

[58] Mr Oates gave evidence that the next contact that he had with Mr Freeman was on 16 November 1990 when he made a telephone call from the office of the quantity surveyor engaged by Sange, Mr Andy Steele. Mr Oates stated that “I said verbatim what I’ve just said before”. During cross-examination Mr Oates stated that in half of his conversations with Mr Freeman up until 16 November 1990, he told Mr Freeman that the SCA notices were being prepared and would be issued in due course.

[59] Mr Freeman can recall a number of telephone calls from the plaintiff and Mr Oates. The first diary note which Mr Freeman made about such a telephone call was in respect of a call from Mr Oates on 20 November 1990. In these telephone calls up to 20 November 1990, Mr Freeman does not recall any reference being made to the SCA.

[60] Mr Freeman’s diary note dated 20 November 1990 stated:

“You are aware that some weeks ago we were contacted by a Mr Johns Oats (*sic*) from Sydney... who informed us that a dispute has arisen between the form work contractor (Macano) (*sic*) and Scott. The issue involved cost overruns which we understand have emerged in the construction of certain piers.

Oats (*sic*) has today phoned again advising that this matter is set down for the Supreme court next week and the final claim could be

in the vicinity of \$2M given the accrual of interest on the unpaid amount. He has also stated that he is aware that the plumber and electrician are owed \$400,000 and as a result they have abandoned the site. He understands that the unions are meeting on the site this week and unless contractors are satisfactorily dealt with, it is possible that a black ban will emerge.”

Mr Freeman therefore requested Mr Bignell to conduct an inquiry into these allegations. There is no reference in Mr Freeman’s memorandum dated 20 November 1990 to Mr Oates’ having referred to claims by Sange under the SCA.

[61] BWP had advised BFC by letter dated 5 October 1990 of major items of cost overrun for the project on which they were awaiting detailed costing information from Scott Developments. One of those items which was estimated as costing \$250,000 was bored piers and columns for which there had been an increase in estimated founding depths and sizes. Mr Johnson stated that one-third of that cost was likely to have been for formwork. Mr Newbold prepared a summary of the state of the loan on 22 October 1990 for submission to BFC’s credit committee in order to obtain approval for a further advance, one aspect of which was to reimburse Scott Developments in the sum of \$300,000 in cost overruns in respect of the foundation works. This was the issue of cost overruns to which Mr Freeman was referring in his diary note of 20 November 1990.

[62] The investigation requested by Mr Freeman was conducted by Mr Newbold who did a memorandum dated 27 November 1990. He summarised the position in relation to the dispute between Mr Scott and the formworker:

“We have previously been briefed by Scott in respect to the formworker. This subcontractor executed a contract for \$650,000 to complete the entire project. He now claims that Scott gave him incorrect quantities by phone and is claiming misrepresentation. The legal action has commenced and is in the Federal Court. The case is up for mention in February with trial October 1991. Scott has employed a barrister to defend the action.

The formworker is no longer on site. Unfinished work is minor and consists of the entry archway the 2 planter boxes. The roof of the penthouse is poured. The formworker has attempted to stir the unions by claims of poor safety but has had little success. A new formworker will be on site by Thursday 29/11/90.”

[63] Mr Freeman also had a telephone conversation with Mr Johnson of BWP after Mr Oates’ allegations. According to Mr Freeman’s handwritten notes, Mr Johnson advised him in respect of the formworker that “extremely foolish the way he quoted that did not have sufficient information – has not run the job well. Scott was deliberate in not giving information. Unlikely that Scott would lose in litigation”.

[64] Mr Freeman stated in evidence that he did not believe he made any promises to either Mr Oates or the plaintiff about paying Sange or that he would see that someone paid Sange the amount of its claims.

- [65] The plaintiff gave evidence about a telephone call he had with Mr Freeman on 7 December 1990 which he stated lasted for 45 minutes. The plaintiff described it as a heated conversation in which he accused BFC and the State Bank of Adelaide (*sic*) of dishonesty against subcontractors. The plaintiff stated that Mr Freeman responded “Look, you’ve got no problem. Just panicking and you are losing your cool for no reason”. The plaintiff stated that in that telephone call he stressed to Mr Freeman that Sange had made claims under the *SCA* and that Mr Freeman replied that he was aware of that.
- [66] Mr Freeman could recall that the last telephone call which he had with the plaintiff involved a heated conversation, but he did not recall that it lasted 45 minutes. He did recall that he thought that the plaintiff was trying to get him to make some payment directly to his organisation. Mr Freeman could not recall that the plaintiff made any mention of charges under the *SCA* in that telephone conversation.
- [67] The facts that are alleged in the plaintiff’s pleading relating to communications with officers of BFC in 1991 are set out in paragraph 13(2):

“(x) early in March 1991 at a conversation on site, Mick Isakka and John Oates representing Sange reminded Mark Lamond representing the Defendant that Sange had lodged subcontractors charges and Lamond acknowledged that he was aware of the charges

(xi) on the same day at about 5.00 pm in the offices of the Defendant at a meeting attended by Mark Lamond, Robert Newbold, Merril Bignell and Max Ahrens, all officers of Beneficial Finance, and Mick Isakka and John Oates for Sange, Mick Isakka again referred to Sange’s charges;

(xii) approximately one week later Mick Isakka and Oates telephoned Mark Lamond in Adelaide concerning payment of the charges and was told that Sange would be paid by the Defendant.”

- [68] Mr Oates stated in evidence that his next contact with BFC after the telephone call of 16 November 1990 was in March 1991 on the building site. Mr Oates stated that Messrs Lamond and Newbold from BFC were present on site and that the plaintiff and Mr Oates spoke to both Messrs Lamond and Newbold. Mr Oates described Mr Lamond as having blond brushed-back hair. Mr Oates stated in evidence:

“...I said – again I told them verbatim what I said before where I believed that Beneficial – the onus is on Beneficial to have this money set aside. The – Lamond said, “Look, we’re not a bunch of cowboys. We are bankers. And you’ll get paid.” He even offered the – Mick Isakka, he said, “Would you like to finish the project?” And Mick Isakka said, “No, all I want to do is get paid.” We went through the whole project. They took us through it and they were picking up defects. They were a lot of defects particularly in relation to waterproofing of the project. We said that, “Look, something’s

got to be done.” He said, “Yes, I know. Don’t worry, we’ll pay you. However, let’s have a meeting in our offices this afternoon.””

- [69] The plaintiff in his evidence also referred to a meeting on site in March 1991 at which he was accompanied by Mr Oates, when they spoke to Messrs Lamond and Newbold from BFC. The plaintiff stated:

“...so then they asked me to, if I wanted to finish the project off, do the internal and fit-out and complete and gain 149 certificate and my reply was to Mark Lamond, I said, “You’re new. All I want is get my money out of here and that’s as far as I want to go. Just get my money and get out.”, and his reply was, “You know you’ll get paid.”, and he was a bit shaky. He was shaking and I said, “If I don’t get my moneys we will stop this site fully so you won’t be moving anywhere.” He was shaking like a leaf and he said, “You’ll get your money, no problem. We’ll fix you up. We’ll pay you in full.”, and he was repeatedly going, “We’ll pay you, we’ll pay you.”, like a record, and Bob Newbold said, “No worries.”, and then we started talking. They started to settle down themselves and they said, “You know, you’ve done everything. You’ve done pretty quick and everything here.”, and I said, “Yes, but I haven’t been paid.” “I understand, I understand, the bank will pay you. The bank will fully pay you.””

- [70] Mr Oates stated that on the same day as the site meeting there was a meeting at the office of BFC involving the plaintiff and Mr Oates with Messrs Lamond, Newbold, Bignell and Ahrens and that during that meeting Mr Lamond stated that BFC was going to pay Sange, that all the subcontractors would get paid and that he stated “Just finish the project and you will get paid. We’ve got plenty of money”.
- [71] The plaintiff in his evidence also recalled a meeting at the office of BFC involving the same people identified by Mr Oates together with a woman who was taking notes. The plaintiff stated that during that meeting Mr Lamond stated that “Look, mate, I make sure you get paid every penny what you owe on that site” and that he was going back to Adelaide and asked for them to telephone him the following week.
- [72] Mr Bignell stated that he had no recollection of attending a meeting in March 1991 with Messrs Ahrens, Newbold and Lamond at which the plaintiff and Mr Oates were present. Mr Bignell stated that if such a meeting took place, someone from BFC would have been designated to make file notes. There was no such file note in the bundle of documents (Ex 9) which incorporated documents from BFC’s files. The plaintiff was seated in the courtroom when Mr Bignell was giving his evidence and Mr Bignell stated that he had not seen the plaintiff before. Mr Ahrens was adamant that he did not attend such meeting that is described by the plaintiff and Mr Oates on 4 March 1991 and that he had never met the plaintiff before seeing him in court.
- [73] The last contact Mr Oates stated that he had with BFC was later in March 1991 when he was in the car with the plaintiff around 8.00 pm in Sydney when they telephoned Mr Lamond in Adelaide. Mr Oates said that Mr Lamond told them that

he would ring back and that he did so, telling them that he was ringing from his car phone outside his home. Mr Oates stated in evidence:

“And I said verbatim what I’d said before about the Beneficial – the onus being on Beneficial to set this money aside. He then repeated himself. He said, “We are not cowboys, Mick and John.” He said, “We are bankers and we will pay you.””

- [74] The plaintiff also gave evidence of a telephone conversation with Mr Lamond while Mr Oates was present with the plaintiff, when the plaintiff recalled that he telephoned Mr Lamond at home in Adelaide who responded “Look, I can’t talk to you. I’m at home. I can’t talk to you. But I’ll go in the car and I’ll ring you back”. The plaintiff stated that Mr Lamond rang back and that he stated “Look, Mick, I’ll make sure you get paid”.
- [75] Mr Lamond stated in evidence that he was in Brisbane on 4 March 1991 and can recall visiting the site on that day. That is confirmed by a letter from BFC to Scott Developments dated 4 March 1991 written by Mr Bignell which refers to “new arrangements agreed to in today’s (*sic*) meeting by all attendees Messrs Lamond, Bignell, Scott, Butler, Newbold and Johnstone (*sic*)”. Mr Lamond also wrote a memo to Mr Freeman dated 5 March 1991 in respect of the project which referred to “yesterday’s site inspection”.
- [76] Mr Lamond could not recall meeting Mr Oates on 4 March 1991. He conceded that it was possible he did meet the plaintiff, but stated that he would not have asked a formworker to finish the project. Mr Lamond was most adamant that he did not state to the plaintiff on 4 March 1991 the words that were attributed to him by the plaintiff to the effect that the bank would pay the plaintiff. Mr Lamond attributed his firmness about his not making such a statement to the plaintiff on the basis that Mr Lamond knew that BFC had no contract with the subcontractor, that he had no authority to make any offer on behalf of BFC and Mr Lamond was not convinced that there was a debt owed to Sange.
- [77] When Mr Lamond gave evidence, his hair was grey. He was asked what colour his hair was on 4 March 1991. He described it as black with a little bit of grey and stated that he had never dyed his hair blond or wore it brushed back.
- [78] Mr Lamond stated that it was highly unlikely that he had met Mr Oates on 4 March 1991, because of the content of a memorandum made by him on 17 April 1991 in relation to a telephone call which he had the previous day from Mr Oates whom he described in the memorandum as claiming to be a consultant acting for Sange. The memorandum recorded:

“Oates told me that they had a judgment against Scott and were in the process of “securing themselves” behind Beneficial. They were doing this as, on their calculations, there would be a \$1.0M - \$1.5M surplus in the project. He asked if I concurred with his assessment. I declined to comment other than to say that we could not comment and that possibly the Receiver would issue a statement in the near future.”

- [79] The memorandum also recorded other statements which Mr Lamond attributed to Mr Oates including that BFC should check where BFC's payment moneys went in the past, that Sange would be taking action against the directors of Scott Constructions and Scott Developments and that they would like to discuss the possibility of the unsecured trade creditors becoming secured to rank after BFC. Mr Lamond did not record any reference made by Mr Oates to notices under the SCA.
- [80] As a result of receiving the telephone call from Mr Oates, Mr Lamond telephoned some Sydney formworkers to find out about Mr Oates and recorded their comments in the memorandum. In evidence Mr Lamond stated that that confirmed for him that he had no previous dealings with Mr Oates, because he was making inquiries to find out who he was and what he did.
- [81] Mr Lamond was also firm in his evidence that he was not telephoned at his home by Mr Oates. He stated that he never gave his home telephone number to any person associated with work matters. He denied that he told Mr Oates that he would telephone him back from his carphone, as his home was in an area that was outside mobile telephone coverage.

#### **Findings in relation to notice of Sange's claims given to BFC**

- [82] It is apparent from the above summary of evidence in relation to the communications between Sange and BFC in the period August 1990 to April 1991 that there are inconsistencies between the evidence adduced on behalf of the plaintiff and that adduced on behalf of the defendant. There are also inconsistencies particularly within the evidence adduced on behalf of the plaintiff.
- [83] Each witness was being asked to recall events and conversations which took place between ten and eleven years previously. It was apparent that the plaintiff prior to giving evidence had refreshed his memory from notes which he had made in his 1990 diary and the typed summary of telephone conversations which the plaintiff had with Mr Freeman between 28 August and 7 December 1990 which summary was dated 16 April 1991. Mr Oates stated in evidence that he had made notes of his telephone conversations which he used when he gave instructions to a solicitor in about 1992, but the notes were subsequently destroyed.
- [84] The officers from BFC had the advantage of being able to peruse the contemporaneous diary notes and other memoranda and letters on the file of BFC before giving evidence.
- [85] It was apparent during the course of the plaintiff's evidence that he was affected by a sense of injustice that he had taken advice from solicitors, then proceeded to issue claims under the SCA against Scott Developments in accordance with that advice and then followed the advice about taking enforcement proceedings which did not result in payment, rather than taking the course that he was naturally inclined to follow which was to take steps to close down the building site by involving the unions in an endeavour to ensure he got paid. The plaintiff's emotions about his predicament were so overwhelming, that I concluded that he allowed his recollection to some extent to be coloured by his frustrations.

- [86] By taking the steps to issue notices to Scott Developments and Scott Constructions under the *SCA*, Sange was seeking to take advantage of the statutory regime which enables a subcontractor to charge the moneys payable to the contractor by the owner of the development to the extent of what the subcontractor is owed by the contractor. It is consistent with that course (and it makes it likely) that any communication by the plaintiff on behalf of Sange to BFC about seeking payment was in the context of Sange's seeking payment from the companies of Mr Scott and seeking BFC's assistance in that connection, until the heated conversation on 7 December 1990 when the plaintiff sought payment directly from BFC. That is confirmed by the lack of detail given by the plaintiff to BFC of the amounts for which the notices had issued. That is also confirmed by the lack of reference to the notices given by Sange under the *SCA* in the summary of the telephone calls dated 16 April 1991 which was prepared by the plaintiff much closer in time to the relevant conversations. That is also confirmed by Mr Freeman's evidence.
- [87] I find that between late August 1990 and 7 December 1990 that the plaintiff made a number of telephone calls to Mr Freeman complaining about the failure of Scott Constructions to pay Sange what it claimed it was owed for the formwork and in the telephone call on 7 December 1990 also sought payment directly from BFC. Although Mr Freeman does not recall any reference being made to the *SCA*, it is likely, and I find, that after the notices had commenced to issue, the plaintiff did mention to Mr Freeman the steps he had taken on Sange's behalf of having notices issued under the *SCA* to the companies of Mr Scott in an endeavour to procure payment from those companies, but that the plaintiff did not provide details to Mr Freeman of the amounts claimed in the notices. I accept that Mr Koskinen overheard two or three of the plaintiff's telephone calls to Mr Freeman made on the plaintiff's car telephone which had a loudspeaker facility. I consider that Mr Koskinen was mistaken in his recollection that the plaintiff said to Mr Freeman that under the *SCA* BFC was supposed to hold moneys for the plaintiff's company, as that is not consistent with what I have found to be the content of the plaintiff's conversations with Mr Freeman, nor the context in which the plaintiff was telephoning Mr Freeman.
- [88] Mr Oates was unconvincing while giving his evidence about the content of the telephone conversations he had with Mr Freeman in the latter part 1990. It strains belief that he would have said on six occasions exactly the same piece about BFC's obligations under the *SCA*, because of the relationship between Scott Constructions and Scott Developments. Even if Mr Oates did have the six telephone calls which he asserted, what he stated he said on each occasion did not amount to notice of charges having been issued. According to his evidence, he did not say on any of these occasions that charges had issued, but forewarned about the issuing of the charges. It is consistent with the plaintiff's strategy in the latter part of 1990 of endeavouring to take steps to force the companies of Mr Scott to pay Sange that Mr Oates made statements to Mr Freeman in support of that strategy. The contents of Mr Freeman's memorandum dated 20 November 1990 are consistent with that. I found Mr Freeman's evidence far more convincing than that of Mr Oates and, where there is conflict, I prefer the evidence of Mr Freeman.
- [89] It is likely that on one occasion at the site that the plaintiff and/or Mr Oates did speak to officers of BFC. What is clear from the evidence is that the plaintiff and Mr Oates did not speak to Mr Lamond on site on 4 March 1991. Mr Lamond was a

most impressive witness. As he could not recall whether or not he had spoken to the plaintiff at some time on site, he did not reject the possibility that he may have met the plaintiff on site. For the reasons that Mr Lamond gave in his evidence, I accept that he did not meet Mr Oates on any occasion before he spoke to him on the telephone on 16 April 1991. Mr Oates' description of Mr Lamond's hair supports that Mr Oates has wrongly identified another person as Mr Lamond. If support were needed for Mr Lamond's evidence, I accept the evidence of Messrs Bignell and Ahrens that there was no meeting involving both of them with the plaintiff and Mr Oates in the afternoon of 4 March 1991. It was quite apparent from how Mr Lamond gave his evidence and the content of his evidence that he was too experienced in 1991 in what he did for BFC in relation to the financing of development projects to make any statement to the effect that BFC would pay Sange.

- [90] By 4 March 1991 Sange had been gone from the site for over three months. That was a fact known to BFC. I do not accept that in those circumstances Mr Lamond would make a statement to the plaintiff and/or Mr Oates which amounted to an offer to Sange to take over the construction of the project.
- [91] I accept Mr Lamond's evidence that his only contact with Mr Oates was the telephone call which he received from Mr Oates on 16 April 1991 and that the contents of that telephone conversation were as recorded in Mr Lamond's memorandum dated 17 April 1991. I find support for Mr Lamond's evidence in the timing of the telephone call from Mr Oates in relation to the dates on which Sange obtained judgments against the companies of Mr Scott. It is likely that on 16 April 1991 Mr Oates would have been talking about the judgments just obtained by Sange. I therefore do not accept that the plaintiff and Mr Oates had the telephone conversation with Mr Lamond which is particularised in paragraph 13(2)(xii) of the plaintiff's pleading.

### **BFC's conduct in March 1991**

- [92] The involvement of Mr Lamond in the project from early January 1991 coincided with BFC's concern through its officers about its security position, as a result of delays in the completion date and other problems such as cost overruns that were being encountered with the project. It is apparent from BFC's file that more intensive monitoring of the account, as suggested by Mr Lamond, was implemented from January 1991. By 4 March 1991 BFC was concerned that Mr Scott was not disclosing the true extent of creditors of the project and that the actual cost to complete the project was significantly greater than the undrawn amount of the loan facility.
- [93] In paragraph 15 of his pleading, the plaintiff alleges that on 4 March 1991 BFC elected to finish the project rather than exercise its rights under the securities and in order to complete the project BFC entered into a contract with Scott Developments and Scott Constructions. The plaintiff alleges that it was a term of that contract that Mr Richard Butler of BWP was engaged to manage the completion of the project and that pursuant to that contract between 4 March and 2 April 1991 Mr Butler managed the project as agent of BFC, Scott Developments and Scott Constructions.

- [94] The plaintiff alleges that one of Mr Butler's duties under the contract was making payments to subcontractors and other workers or suppliers of goods for moneys due for goods already supplied and work already undertaken on the project and for moneys to become due for goods to be supplied or work to be undertaken on the project. The plaintiff alleges that Mr Butler made payments to other subcontractors, workers and suppliers for the project, but did not make any payments to Sange. The defendant denies that BFC entered into any such contract on 4 March 1991 with Scott Developments and Scott Constructions as alleged and claims that during the relevant period the conduct of BFC was in the exercise of its rights as mortgagee under the debenture mortgages.
- [95] The issue therefore is the characterisation of BFC's conduct on and from 4 March 1991: whether that conduct was referable to a new contract entered into by BFC with Scott Developments and Scott Constructions on that date or whether it was referable to the existing legal relationships arising from the respective security documents.
- [96] In order to support the allegation of the contract, the plaintiff relied on memoranda and correspondence obtained from BFC's file pertaining to the period between 4 March and 2 April 1991. BFC sent a letter to Scott Developments dated 4 March 1991 after a site meeting involving Messrs Lamond, Bignell and Newbold of BFC, Messrs Butler and Johnson of BWP and Mr Scott. That letter was in the following terms:

“This letter is to confirm new arrangements agreed to in today's meeting by all attendees Messrs Lamond, Bignell, Scott, Butler, Newbold and Johnstone (*sic*) in an effort to rectify the impact of further cost overruns and construction delays on the above project.

- a) Mr Richard Butler of Butler Wright & Partners Quantity Surveyors be appointed Building Co-ordinator Programmer reporting to Mr Jim Scott.
- b) Mr Richard Butler of Butler Wright is to prepare a report detailing a list of factors that will form the basis of an extension to the registration date of the B.U.P. on the 37 existing contracts of sale. Such extension to be notified to the purchasers by Purvis Duncan after preparation by Clarke & Kann.
- c) Mr Rod Johnstone (*sic*) of Butler Wright and Mr Max Ahrens of Beneficial Finance are to conduct an audit of all creditor accounts of J C Scott Construction Pty Ltd and then proceed to quantify the current state of the project to produce a revised cost to complete.
- d) A bank account is to be opened in the name of J C Scott Constructions Pty Ltd “Stuartholme Apartments” to be operated by two signatories, one approved by Beneficial, the other approved by J C Scott Constructions Pty Ltd. Both co-signatories will be required for cheque drawing and

payments must be authorised by Butler Wright & Partners Quantity Surveyors. The bank is to acknowledge in writing that the funds are held on behalf of Beneficial Finance Corporation Limited. All future progress payments/construction draws etc will be channelled exclusively through this bank account.

- e) Approval is currently being sought to provide interim funding for the project until formal new credit lines are put in place as a result of the investigative report by Butler Wright as detailed in Item C.”

[97] Mr Lamond sent an internal memorandum to Mr Freeman dated 5 March 1991 in which he summarised the steps being taken as a result of the site inspection and various meetings held on 4 March 1991. That summary was:

- “i) Richard Butler will become the Project Planner and Co-ordinator (i.e. virtual Project Manager).
- ii) The right to claim on extension of time for unit settlements will be exercised after review by Butler and Clark & Kann (I complement Richard Butler on this initiative).
- iii) Rod Johnson will do a revised cost to complete exercise and a worst case scenario.
- iv) Scott will spend more time getting authority approvals in place.
- v) The project accounts will be reviewed and “audited” by Rod Johnson and Max Ahrens and all orders will be approved by us.
- vi) All future payments will be via a specific project account and every payment to each creditor will be signed by a Beneficial Officer.”

[98] Mr Hurwood wrote a memorandum to Mr Siegele from the head office of the State Bank of South Australia in which he reported “...the project is now under the control of Beneficial with the assistance of the Quantity Surveyor’s staff. Scott is still designated as the Builder, however all decisions and payments must be approved either by ourselves or the Quantity Surveyor”.

[99] The plaintiff also relied on the contents of an internal BFC memorandum written by Mr Ahrens on 20 March 1991 for the purpose of seeking the approval of the credit committee of BFC in respect of certain action proposed for the project. The relevant passage is:

“Richard Butler, senior partner of our Quantity Surveyors Butler Wright & Partners, took control of the project on 5/3/91 as Project Coordinator, although in the eyes of the suppliers and sub-

contractors Scott remains in control and the registered builder for the project.”

- [100] It is apparent from the evidence of Mr Ahrens and Mr Lamond and, to a lesser extent, Mr Butler that the arrangements outlined in BFC’s letter of 4 March 1991 were implemented.
- [101] Mr Ahrens stated in evidence and I accept that the priority of BFC as at 4 and 5 March 1991 was ensuring that BFC recovered its loan which it considered would only be done by completion of the project and settlement of the pre-sales. As there was a sunset clause in the standard contract for each of the pre-sales, BFC wished to ensure that the construction was completed, so that those contracts could be settled before the sunset clause took effect.
- [102] The steps provided for in the letter which BFC sent to Scott Developments dated 4 March 1991 were directed at more intensive involvement on the part of BFC in protecting its position. Although the plaintiff can point to some aspects of the correspondence and memoranda which may appear superficially to be consistent with his claim that a contract was entered into between BFC and Scott Developments and Scott Constructions on 4 March 1991, such as the use of the word “agreed”, closer analysis shows that the correspondence and communications reflected the imposition by BFC on Scott Developments and Scott Constructions of the steps which BFC considered were necessary to achieve its objectives as the financier of Scott Developments in protecting the recovery of the loan. The evidence of Mr Ahrens and Mr Lamond, in particular, and the documents from BFC’s file are consistent only with BFC’s acting as mortgagee in the steps it took post 4 March 1991.
- [103] It is alleged in paragraph 15 of the defence that BFC crystallised its charges pursuant to the debenture mortgages on 4 March 1991. Little attention was given during the hearing as to the nature of the defaults of Scott Developments and Scott Constructions on which BFC relied to act as it did from 4 March 1991 until the appointment of Mr Jefferson and the nature of the powers under the securities that were relied on by BFC to support that conduct. No particulars were sought by the plaintiff or provided by the defendant as to the default of Scott Developments and Scott Constructions that was relied on by BFC to exercise its rights under the debenture mortgages or other securities from 4 March 1991.
- [104] It was submitted on behalf of the defendant that the critical feature of the arrangements imposed by BFC on 4 March 1991 was that payments by BFC were to be channelled through a bank account opened in the name of Scott Constructions, but to be operated upon by two signatories, one from Scott Constructions and one from BFC and that payments could be made from that account only if they were authorised by BWP. BFC required the bank at which the account was held to acknowledge that the funds were held on behalf of BFC. It was submitted that what could be concluded from this condition was that BFC was intending to expend its funds on completing the project.
- [105] This is the distinction between the position of the plaintiff and the defendant in this proceeding. It is essential to the plaintiff’s case that it can show that the payments made by BFC between 4 March and 2 April 1991 came from the funds of Scott

Developments. The defendant's position is that BFC was spending its own funds, even though it was still entitled under the security documents to debit those funds as part of the advance to Scott Developments.

- [106] In submissions, the default of Scott Developments that was relied upon was the failure to comply with one of the restrictions on advances set out in item 20 of the deed of loan between BFC and Scott Developments. That requirement was that Scott Developments would cause to be paid from each progressive advance made under the deed of loan and any advance under the constructions tranche all consultants, contractors, subcontractors, agents and employees for all the work completed or carried out in respect to the project up to the date of the relevant progressive advance. The list of creditors in respect of the project prepared by BWP as at 5 March 1991 showed a total existing debt of \$1,473,029.02. It can also be inferred from the subsequent history of the project that Scott Developments was in default of other obligations under the deed of loan as at 4 March 1991.
- [107] Failure of Scott Constructions to pay subcontractors and others in accordance with the deed of loan amounted to default by Scott Developments under cl 21.1.1 of the mortgage debenture. Once default occurred, BFC was entitled to rely on the various options provided for in the security documents. The regime imposed by BFC on 4 March 1991 on Scott Developments could be justified by reference to cl 26.1 of the mortgage debenture which, upon default under cl 21.1.1, permitted BFC to exercise all of the powers conferred on a receiver under the mortgage debenture. Those powers included carrying on or concurring in carrying on the business of Scott Developments in any manner and for so long as the receiver thought fit, operating to the exclusion of Scott Developments on any banking account of Scott Developments and doing all such other acts and things without limitation as the receiver thought expedient in the interests of BFC.
- [108] Further submissions were made by the parties subsequent to the completion of the hearing in respect of the covenants in the land mortgage (Ex 23). The letter from counsel for the defendant dated 30 November 2001 will be Ex 24. The letter from counsel for the plaintiff dated 26 November 2001 will be Ex 25. The letter from senior counsel for the defendant dated 10 December 2001 will be Ex 26. I accept the submissions made on behalf of the defendant that, in addition to the powers conferred on BFC under the mortgage debentures, cl 6.3 of the covenants applying to the land mortgage also enabled BFC to take the action which it did from 4 March 1991. When BFC expended funds in exercise of the powers which accrued to it on the default of Scott Developments and/or Scott Constructions, it was entitled under the various securities to treat those funds as part of the loan, e.g. cl 1.13.7 of registered memorandum number J923811F.
- [109] The plaintiff was never privy to what occurred between Scott Developments, Scott Constructions and BFC on 4 March 1991. It was always a difficult position for the plaintiff to advance a case that a new contract was made between those parties on that date, when that was denied by BFC, was not supported in substance by the documents on BFC's file or the evidence adduced on behalf of BFC, and no evidence was called from those associated with Scott Developments and Scott Constructions. The likelihood was that BFC with comprehensive security documents at its disposal would endeavour to rely on what rights those documents gave. Those security documents were clearly sufficient to allow BFC to implement

the steps undertaken on and from 4 March 1991. The only conclusion which is open on the evidence is that the arrangements which BFC imposed on Scott Developments and Scott Constructions as from 4 March 1991 were in the exercise by BFC of its rights as mortgagee. I accept that it also follows from the steps taken by BFC as from 4 March 1991 and, particularly, the reservation that the funds in the bank account of Scott Constructions were held on behalf of BFC that BFC was expending its own funds in making payments in respect of the project.

- [110] The list of creditors prepared by BWP in respect of the project as at 5 March 1991 did not show Sange as a creditor.
- [111] There was much examination and cross examination of witnesses on behalf of the plaintiff directed at eliciting the reason for why Sange was not shown as a creditor in the list of creditors compiled by BWP as at 5 March 1991 and subsequently. I accept the evidence of Mr Ahrens and Mr Johnson that the primary source of the information for compiling the list of creditors was Mr Scott. I infer that as Mr Scott was, at that stage, disputing Sange's claims, he wrongly did not disclose that Sange was a creditor for the amounts claimed. It is also quite apparent from what Mr Johnson understood of the history of Sange's subcontract, that he did not consider that Sange was a true creditor. Mr Ahrens stated in evidence that his knowledge of Sange's formwork contract as at 4 March 1991 was that BFC had advanced Scott Developments the moneys to pay Sange's contract in full.
- [112] The documents in Ex 9 support the proposition that in this period between 4 March and 2 April 1991 BFC was seeking to pay those subcontractors whose debts were incurred prior to 4 March 1991 only where that was essential to ensure the smooth completion of the work. That was the choice made by BFC in expending its funds, in order to minimise its exposure.
- [113] Much was made on behalf of the plaintiff of the failure of BFC from the time it became aware that Sange had issued the notices and commenced proceedings in the Federal Court (which was by late November 1990) that it did not make inquiries to ascertain all details of Sange's claim. In view of the information which had been provided by Mr Scott to BFC about Sange's claim prior to 4 March 1991, it is not surprising that BFC simply decided to instruct its solicitors to monitor the Federal Court action.
- [114] A consideration of BFC's letter of 4 March 1991, internal memoranda dated 5, 11 and 20 March 1991 or subsequent conduct in relation to the project in context does not support a finding that BFC entered into a contract with Scott Developments and Scott Constructions in the terms alleged in paragraphs 15 and 15A of the plaintiff's pleading. The only conclusion which can be drawn is that at all times between 4 March 1991 and the appointment of Mr Jefferson BFC was exercising its rights under the securities.

### **Subsequent history**

- [115] In May 1991 BFC terminated BWP's project management role and appointed Baulderstone Hornibrook to complete the project. Considerable rectification works were required. Ultimately the project was completed and the units sold. BFC wrote off the sum of \$6,229,825.89 which was the loss which it sustained on the loan.

**SCA**

- [116] The *SCA* confers a statutory charge in favour of a subcontractor in specified circumstances. Section 5(1) of the *SCA* provides:

“**5.(1)** Where an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor shall be entitled to a charge on the money payable to the contractor or a superior contractor under the contractor’s or superior contractor’s contract or subcontract.”

- [117] The charge does not take effect until a notice of intention to claim charge which is a valid claim under s 10(6) of the *SCA* is served and the provisions of the *SCA* otherwise complied with. Section 10(1) of the *SCA* expressly provides that the notice of claim of charge must be given by the subcontractor to the employer or the superior contractor by whom the money is payable. The charge is extinguished if an action to enforce the charge is not brought within the time specified in s 12 of the *SCA*.

- [118] The definition of “employer” is found in s 3(1) of the *SCA*:

““**employer**” means a person who contracts with another person for the performance of work by that other person, or at whose request or on whose credit or behalf, with the person’s privity and consent, work is done, and includes all persons claiming under the person whose rights are acquired after the work is commenced, and in relation to a subcontractor includes the contractor or other subcontractor with and under whom the person has contracted, but a mortgagee who advances money to an employer shall not be deemed to be an employer by reason thereof;”

- [119] The extent of the money payable to the contractor which can be the subject of the charge is dealt with by s 3(2)(a) of the *SCA* which provides that in the *SCA*, except where the contrary intention appears:

“references to the amount of money payable under a contract or subcontract shall be deemed to include all amounts that, under the contract or subcontract, are to be credited or allowed in complete or partial satisfaction of the contract price otherwise than upon payment in money, and references to the payment of any moneys in reduction of the contract price shall include amounts so credited or allowed;”

The extent of the money payable to the contractor for the purpose of *SCA* is also clarified by s 6 of the *SCA* which provides:

“**6.** For the purposes of the charge of a subcontractor the amount of money payable to the contractor or subcontractor by whom the first mentioned subcontractor is employed or to a superior contractor, under the contract or subcontract, shall be deemed to include all money paid in reduction of the contract price to a person other than

the subcontractor claiming the charge unless that money is paid in good faith and not for the purpose of defeating or impairing a claim to a charge existing or arising under this Act and is paid otherwise than in contravention of section 11.”

[120] Section 11(1) of the *SCA* provides:

“**11.(1)** Where a notice of claim of charge is given pursuant to section 10, the person to whom it is given shall retain, until the court in which the claim is heard directs to whom and in what manner the same is to be paid, a sufficient part of the money that is or is to become payable by the person under the contract to satisfy the claim.”

The effect of Sange’s serving each of the notices on Scott Developments (and the corresponding notice on Scott Constructions) was that a charge in respect of moneys payable by Scott Developments to Scott Constructions under the building contract attached to the extent of the amount claimed in the relevant notice.

[121] Notwithstanding that Scott Constructions and/or Scott Developments disputed the entitlement of Sange to issue the notices and claim the charges, each of the charges took effect, in accordance with the *SCA*, from the service of the relative notice on Scott Developments and the corresponding notice on Scott Constructions: *Ex parte Austco Pty Ltd* [1985] 2 Qd R 1. Although Scott Developments and Scott Constructions were defending the Federal Court proceedings instituted by Sange, the charges were in force while those proceedings remained unresolved.

[122] There is no issue in these proceedings that Scott Developments and Scott Constructions ignored the obligations that arose as a result of the charges lodged by Sange taking effect under the *SCA*. Each time Scott Developments obtained a further advance from BFC between 10 September 1990 and 4 March 1991 which it directed to be paid to Scott Constructions or other creditor of Scott Constructions in respect of the project, Scott Developments breached its obligation to retain that part of the advance which was required to meet the charges of Sange. That meant that Scott Developments assumed personal liability for the amounts of the charges which could have been paid from those advances, as a result of the effect of s 11(2) of the *SCA* which provides:

“(2) A person who fails to retain the amount that the person is required to retain shall be personally liable to pay to the subcontractor the amount of the claim not exceeding the amount that the person is required by this section to retain.”

[123] Paragraphs 19 to 28A of the plaintiff’s pleading formulate a number of different ways in which the plaintiff now seeks to hold BFC liable for Scott Developments’ failure to comply with the *SCA*.

[124] In order to impugn liability to BFC for advances made to Scott Developments between 10 September 1990 and 4 March 1991 that were paid to or in respect of the debts of Scott Constructions in respect of the project, paragraph 22 of the plaintiff’s pleading alleges:

“The money Beneficial Finance paid directly to Scott Constructions referred to in paragraph 17B was made in reduction of the contract price owed by Scott Developments to Scott Constructions.”

- [125] Paragraph 17B of the plaintiff’s pleading alleges that BFC made payments to Scott Constructions with respect to the project which payments were particularised in annexures I and X of the pleading. Annexure I dealt with payments made by BFC and debited to the loan facility of Scott Developments between 6 and 28 March 1991. Annexure X dealt with 48 cheques drawn by BFC and deposited to the bank account of Scott Constructions between 1 February 1990 and 28 March 1991.
- [126] Paragraph 22 of the plaintiff’s pleading uses the language found in the *SCA* in defining what moneys are caught by the charge under the *SCA* operating on “the money payable to the contractor... under the contractor’s contract”.
- [127] The extended definition of “money payable” in the *SCA* is for the purpose of identifying what moneys are subject to the charge that is provided for in s 5(1) of the *SCA*. The identity of the person against whom the charge operates is found in s 5(1) of the *SCA*. In this case, the employer is Scott Developments, as it is that company which contracted with Scott Constructions for the performance of the project. It is expressly clarified in the definition of “employer” that a mortgagee who advances money to an employer shall not be deemed to be an employer by reason of advancing money to the employer.
- [128] The fact that the moneys advanced by BFC went directly to Scott Constructions or for the benefit of Scott Constructions under the building contract is not a basis for which the *SCA* imposes liability on BFC.
- [129] The plaintiff alleges that in making the payments referred to in paragraph 17B of his pleading, BFC dealt with property that was subject to charges in Sange’s favour in a manner contrary to Sange’s statutory interest and thereby converted the property of Sange to its own interest. The plaintiff therefore claims common law damages for the conversion of property by BFC which was subject to the charges.
- [130] Although BFC was prepared to extend a loan to Scott Developments to a specified amount, the loan was advanced in stages in accordance with the conditions of the deed of loan. Until BFC advanced a sum under the loan, those moneys earmarked by BFC for the advance belonged to BFC. It was not until the advance was made to or at the direction of Scott Developments that the actual funds the subject of the advance became moneys which could be dealt with by Scott Developments. The charges of Sange therefore did not attach to any progress payment advanced by BFC to Scott Developments until the payment was made by BFC. The act of making the payment which is what is attacked in the plaintiff’s pleading created the fund of money to which the charge attached. As Sange’s interest as a secured creditor in the charged amount did not arise until that payment was made, the making of the payment itself was not a dealing by BFC with property that was subject to a charge in Sange’s favour. BFC is therefore not liable to the plaintiff for damages for conversion in respect of the payments made to Scott Constructions between 10 September 1990 and 4 March 1991.

- [131] The plaintiff then sought to impugn the payments made by BFC between 4 March and 2 April 1991 on the basis that they were made by Mr Butler pursuant to the contract alleged by the plaintiff to have been made on 4 March 1991. Those allegations fail, because of the finding which I have made against the plaintiff that there was no contract as alleged. In any case the claim for damages for conversion in respect of the payments made to Scott Constructions or in respect of the subcontractors or employees of or the suppliers to Scott Constructions between 4 March and 2 April 1991 must fail, because the payments were from the funds of BFC. The same can be said of the funds provided by BFC to Mr Jefferson after 2 April 1991.
- [132] It was argued on behalf of the plaintiff that because there is an express exclusion from the definition of “employer” in respect of a mortgagee who advanced money to an employer, a mortgagee who does something more than merely advance money to the employer can place itself in the position of “employer” for the purpose of the *SCA*. Arguably, there could be circumstances where the financier of the employer conducts itself, so as to fall within the definition of “employer”. The key to the application of the *SCA* is that it is only a person who falls within the definition of “employer” who can be held liable as an employer under the *SCA*.
- [133] The plaintiff alleges that as a result of the contract which he alleges in paragraphs 15 and 15A of his pleading between BFC and Scott Developments and Scott Constructions, BFC became an “employer” for the purpose of the *SCA*. That allegation is not made out, in view of my finding that there was no such contract.
- [134] Another means by which the plaintiff seeks to hold BFC liable under the *SCA* is on the basis that s 11(1) of the *SCA* in dealing with the consequences of the notice of claim of charge refers to the obligation of the person to whom the notice of claim of charge is given. It is argued on behalf of the plaintiff that s 11(1) does not impose an obligation on the person to whom the notice is directed according to the terms of the notice, but on the person to whom the notice is given.
- [135] Firstly, s11(1) of the *SCA* cannot be read in isolation from s 5(1) of the *SCA* which identifies the person against whom the charge operates or from s 10(1) of the *SCA* which identifies who should be the recipient of the notice of claim of charge being given by the subcontractor. Secondly, the plaintiff’s argument proceeds on the basis that in each instance BFC received a copy of the notice of claim of charge which was not the case. The plaintiff’s argument based on the construction of s 11(1) of the *SCA* cannot be sustained.
- [136] Another means by which the plaintiff seeks to hold BFC liable under the *SCA* is on the basis of BFC’s knowledge of the creation of the charges from what its officers were told by the plaintiff or could infer from the court proceedings commenced by Sange and by making payments directly to Scott Constructions, rather than Scott Developments, it participated in Scott Developments’ avoiding its obligations under the *SCA*. The plaintiff therefore argues that as BFC was a party to a breach of the *SCA*, it is liable with Scott Developments for the amount secured by the *SCA*.
- [137] It is pleaded in paragraph 27D of the plaintiff’s pleading that BFC by its conduct from the time the notices commenced to issue either alone or in cooperation with Scott Developments and Scott Constructions attempted to avoid a charge being

fixed on the moneys drawn down under the loan. It is pleaded alternatively in paragraph 27E that BFC procured and induced the breach by Scott Constructions and Scott Developments of the statutory duties which they owed to Sange under the SCA.

- [138] These are serious allegations and were unsupported by the evidence. Much reliance was placed by the plaintiff on Mr Lamond's memorandum dated 7 January 1991 which showed that he was alert to possible complications which could be caused by claims of subcontractors and referred to ensuring that settlement of those claims was delayed for as long as "legally" possible. It was clear from Mr Lamond's evidence that these notes were written from the viewpoint of taking steps to protect BFC's interests as mortgagee. BFC had nothing whatsoever to do with the decisions which Scott Developments and/or Scott Constructions made about not making payments to Sange. There was no reason for BFC to refuse to act on Scott Developments' direction to pay the advances under the loan facility directly to Scott Constructions. I find that BFC did not and had no reasonable basis to connect Scott Developments' conduct in directing that the advances be paid to Scott Constructions with any purpose of Scott Developments or Scott Constructions which may have been relevant to Sange's position as a creditor of Scott Constructions.
- [139] In view of the findings which I have made about the conduct of BFC from 10 September 1990, the plaintiff has failed to establish the factual basis which underlies the allegations in paragraphs 27D and 27E of his pleading.
- [140] In oral submissions it was advanced on behalf of the plaintiff that BFC was participating in a method of payment by Scott Developments to Scott Constructions which necessarily involved a breach by Scott Developments of s 7(1) of the SCA. That provision applies where it is the contractor (which in this case was Scott Constructions) who made or gave an assignment, disposition or charge of any kind upon the money payable to the contractor under the building contract with the employer. Section 7(1) of the SCA is not directed at the conduct of the employer.

### **Fiduciary duty**

- [141] The basis which is found in the pleading for the allegation of the existence of a fiduciary duty is that Sange placed reliance and confidence in Scott Developments and Scott Constructions performing their duties under the SCA and continued to perform work under the subcontract because of that reliance and confidence, despite the failure of Scott Constructions to pay for work already done and the relationship between Scott Developments and Scott Constructions. The plaintiff therefore pleads that as a result of the duties under the SCA, Scott Developments and Scott Constructions were required to act for and on behalf of Sange and in Sange's interest.
- [142] The SCA gives a subcontractor additional preferential rights which did not exist at common law or in equity. The extent of those rights (and the corresponding obligations) are found in the SCA: *Stumann v Spansteel Engineering Pty Ltd* [1986] 2 Qd R 471, 475, 477. Under s11(2) of the SCA a person who fails to retain the amount that the person is required to retain is personally liable to pay to the subcontractor the amount of the claim. The SCA does not, according to its terms,

purport to impose a fiduciary relationship between the employer and the subcontractor or the contractor and the subcontractor.

- [143] The plaintiff also pleads in paragraph 32D of his pleading that Sange was vulnerable under its subcontract with Scott Developments and Scott Constructions. In submissions it was stated on behalf of the plaintiff without reference to any authority that the fiduciary duty on the part of Scott Constructions and Scott Developments arose by reason of the fact that Sange was a subcontractor and therefore vulnerable to not being paid for work done.
- [144] Where a relationship is essentially founded in contract and is not one of the established fiduciary relationships, there must be some special feature which justifies the imposition of a fiduciary relationship between the same parties: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97; *Commonwealth Bank of Australia v Finding* [2001] 1 Qd R 168 at para [9].
- [145] The relationship between Scott Developments and Scott Constructions is not the type of special feature which, in accordance with principle, justifies the imposition of a fiduciary relationship on Scott Developments or Scott Constructions *vis-à-vis* Sange. In general terms, any subcontractor is vulnerable to not being paid for work done by virtue of the nature of the relationship of parties to a contract where one party chooses not to perform its obligation to pay under the contract. Similarly, the fact that Sange continued to perform work under the subcontract after issuing the notices under the *SCA* in anticipation that Scott Developments would act in accordance with the *SCA* cannot logically result in Scott Developments' assuming the role of fiduciary in respect of Sange or having the role of fiduciary imposed. The rights of Sange against Scott Developments, as a result of the issuing of the notices, are found in the *SCA*.
- [146] On this threshold issue, the claim based on the existence of a fiduciary duty must fail.
- [147] In any case the plaintiff seeks to impose the fiduciary duty on BFC, if the fiduciary duties alleged against Scott Developments and Scott Constructions had existed, on the basis of the allegation that BFC took over the contractual obligations of Scott Developments to Scott Constructions under the building contract and Scott Constructions' contractual obligations to other subcontractors, workers and/or suppliers of goods relating to the project. The plaintiff's failure to prove that allegation is another reason why he must fail in the claim based on the existence of a fiduciary duty on the part of BFC.

### **Breach of trust**

- [148] This claim is based on the allegation that as at 4 March 1991 BFC had not exercised any power under the debenture mortgages or the land mortgage or otherwise that it may have had in the event of a default by Scott Developments or Scott Constructions. That allegation is inconsistent with the findings I have made about BFC's conduct in the controls over the project which it implemented from 4 March 1991.

- [149] This claim is also based on an allegation found in paragraph 35D of the plaintiff's pleading that if Scott Developments had drawn down further or the whole of moneys due under the loan, it had a statutory obligation to retain sufficient funds to satisfy the claim in the notices. It is then alleged in paragraph 35E that BFC held the remainder of the moneys in the loan account for the benefit of and on constructive trust for Sange pursuant to the notices. Moneys earmarked for the loan facility belonged to BFC. The premise which underlies paragraph 35E is that the moneys have not been advanced to Scott Developments. There is therefore no basis whatsoever for the imposition of a constructive trust for the benefit of Sange on moneys belonging to BFC.

#### **Alternative breach of trust**

- [150] This claim is based on the allegation that Mr Lamond made Sange the promise referred to paragraph 13(2)(xii) of the pleading. As I have found that Mr Lamond did not make that statement, this claim must fail.

#### **Breach of contract**

- [151] This claim is based on the allegation that in or about March 1991 Sange entered into an agreement with BFC by which BFC agreed to pay Sange the amount claimed under the notices for its work on the project. The agreement is alleged to be found in the conversation particularised in paragraph 13(2)(xii) of the pleading. As I have found that Mr Lamond did not make the statements alleged to have been made by him in March 1991, this claim must fail.

#### **Inducement of breach of contract**

- [152] This claim depends on a finding of the existence of the contract which the plaintiff has failed to establish. This claim must therefore fail.

#### **Unjust enrichment**

- [153] This claim also depends on the plaintiff's allegation that on 4 March 1991 BFC elected to finish the project, rather than to exercise its security under the mortgages.
- [154] That allegation is inconsistent with the findings which I have made in relation to BFC's conduct from 4 March 1991 onwards. This claim also fails.

#### **Order**

- [155] The consequence of the findings which I have made on the critical factual matters is that the causes of action which the plaintiff sought to rely on cannot be successfully pursued against the defendant. It follows that the proceeding must be dismissed.
- [156] I will give the parties an opportunity to make submissions on costs.