SUPREME COURT OF QUEENSLAND

CITATION: *Alford & Ors v Ebbage & Ors* [2003] QSC 294

PARTIES: **ANTHONY JAMES ALFORD**
(first plaintiff)
DARIO PTY LTD ACN 051 964 697
(second plaintiff)
A E HOLDINGS PTY LTD ACN 010 697 266
(third plaintiff)
A E FINANCE CO PTY LTD ACN 010 766 775
(fourth plaintiff)
IPA (QLD) PTY LTD ACN 074 450 089
(fifth plaintiff)
ALFORD EBBAGE SERVICES PTY LTD
ACN 059 651 286
(sixth plaintiff)
A E GROUP PTY LTD ACN 059 315 178
(seventh plaintiff)

v

RAYMOND JOSEPH EBBAGE for himself and as executor of the estate of **PAUL GERRARD EBBAGE** deceased
(first defendant)
HPM INVESTMENTS PTY LTD ACN 083 664 680
(second defendant)
ADVANCED ENGINE TECHNOLOGY PTY LTD
ACN 063 092 759
(third defendant)
STEVEN CHARLES MANTHEY
(fourth defendant)
OX2 INTELLECTUAL PROPERTY INC
(fifth defendant)
OX2 ENGINE (DISTRIBUTION) LIMITED
(sixth defendant)
EQUITY HOLDINGS INC
(seventh defendant)
SOUTHPAC NOMINEES INC
(eighth defendant)
MACRO MANAGEMENT GROUP INC
(ninth defendant)
BRENDA MARY MANTHEY
(tenth defendant)
GREEN FIT N.Z. LIMITED ACN 088 084 673
(eleventh defendant)
MOTOR CITY INC
(twelfth defendant)

EBBCO OFFICE SERVICES PTY LTD
ACN 053 769 789
(thirteenth defendant)

FILE NO:	SC 3677 of 2000
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 September 2003
DELIVERED AT:	Brisbane
HEARING DATES:	21, 22, 23, 24, 25, 28, 29, 30, 31 October; 1, 4, 5, 6, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 27, 28, 29 November 2002.
JUDGE:	Atkinson J
ORDER:	**Judgment is given for the defendants**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – AGREEMENT CONTEMPLATING EXECUTION OF FORMAL DOCUMENT – WHETHER CONCLUDED CONTRACT – where no executed written agreement – where evidence of oral agreement given only by the plaintiff – where the plaintiff was unreliable witness – where documentary evidence equivocal – whether contractual agreement entered into CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – MATTERS NOT GIVING RISE TO BINDING CONTRACT – STATEMENTS OF INTENTION, NEGOTIATIONS AND INVITATIONS TO TREAT – INFORMAL CONTRACT – where alleged joint venture agreement – where numerous proposed agreements drafted – where evidence as to alleged oral agreements unreliable and not supported by independent evidence – where written agreements executed – where plaintiff not a party to the written agreements – where plaintiff alleges written agreements executed secretly with intention to deprive him of his interest – where evidence the plaintiff knew of the executed agreements to which he was not a party and in which he did not have an interest – whether alleged joint venture agreement existed EQUITY – FIDUCIARY OBLIGATIONS – GENERAL PRINCIPLES – JOINT VENTURE AGREEMENT – where plaintiff alleges property of alleged joint venture held on trust in respect of his interest – whether property of joint venture vehicle dealt with in breach of fiduciary obligations

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – where no executed written agreement – where alleged payments made by the plaintiffs' interests to the defendants' interests as loans – where alleged accountancy services provided by the plaintiffs' interests for the defendants' interests in respect of which fees were owing – where plaintiffs' version of events uncorroborated – where allegation accountancy fees remained owing not supported by documentary and independent evidence – where an accounting required to reconcile loan payments made – where no such accounting sought in the proceedings

Allcard v Skinner [1886-90] All ER 90, cited
Australian Broadcasting Commission v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540, cited
Geroff & Ors v CAPD Enterprises Pty Ltd & Ors [2003] QCA 187, cited
G Scammell and Nephew Ltd v H C and J G Ouston [1941] AC 251, cited
Natural Extracts Pty Ltd v Stotter; G G Jay Investments Pty Ltd v Doveka Pty Ltd (1997) 24 ACSR 110, NG 3192 and 3238 of 1992, 16 May 1997, cited
Nelson v Larholt [1948] 1 KB 339, cited
Orr v Ford (1989) 167 CLR 316, cited
Summergreene v Parker (1950) CLR 304, cited
Thorby & Ors v Goldberg & Ors (1964) 112 CLR 597, cited

COUNSEL: W Sofronoff QC, with D A Savage SC and M Hoch, for the plaintiffs
E Goodwin (*sol*) for the first, second and ninth defendants
J A Griffin QC, with J H Bryson for the third, fourth, tenth and twelfth defendants
G M Egan for the eleventh defendant
No appearance for the thirteenth defendant

SOLICITORS: J F Connors & Associates (Southport) for the plaintiffs
Minter Ellison Lawyers (Brisbane) for the first, second and ninth defendants
Johnston Lawyers (Burleigh Heads) for the third, fourth, tenth and twelfth defendants
Rostron Carlyle Solicitors (Brisbane) for the eleventh defendant
No appearance for the thirteenth defendant

Introduction

[1] Anthony James Alford, the first plaintiff, commonly known as Tony Alford and Paul Gerrard Ebbage were both accountants who practised at the Gold Coast. Steven Charles Manthey, the fourth defendant, was a motor mechanic and inventor

who also lived and worked on the Gold Coast. This matter involves the determination of the legal relationships and liabilities which existed between these three men and the many companies under the control of one or more of them in the years from 1993 until Mr Ebbage's unexpected death on 2 December 1998 and the present consequences of any such relationship.

[2] Mr Alford, the first plaintiff, was represented at trial by Mr Sofronoff QC, Mr Savage SC, and Ms Hoch, instructed by a solicitor, Mr J F Connors. That team of lawyers also represented the second to seventh plaintiffs, Dario Pty Ltd ("Dario"), A E Holdings Pty Ltd ("AEH"), A E Finance Co Pty Ltd ("AEF"), IPA (Qld) Pty Ltd ("IPA"), Alford Ebbage Services Pty Ltd ("AES") and A E Group Pty Ltd ("AEG"), which were all companies associated with or under the control of Mr Alford.

[3] At the commencement of the trial, the plaintiffs' action was against twelve defendants. The first defendant was Raymond Joseph Ebbage ("Mr Ebbage Snr") who was a party to the action in his own right and as executor of the estate of his son, Paul Ebbage. Mr Ebbage Snr was represented by Mr Goodwin, a solicitor from Minter Ellison. Minter Ellison also acted for the second defendant, HPM Investments Pty Ltd ("HPM"), and the ninth defendant, Macro Management Group Inc ("Macro Management"). Mr Griffin QC, with Mr Bryson, (instructed by a solicitor, M Johnston) acted for the fourth defendant, Steven Charles Manthey, the tenth defendant, Mr Manthey's wife, Brenda Mary Manthey, and companies under Mr Manthey's control, the third defendant, Advanced Engine Technology Pty Ltd ("AET") and the twelfth defendant, Motor City Inc ("Motor City"). Mr Egan of counsel instructed by a solicitor, Mr Rostron, acted for the eleventh defendant, Green Fit NZ Limited ("Green Fit"). The thirteenth defendant, Ebbco Office Services Pty Ltd ("EOS"), whose directors were Mr Alford, Mr Ebbage's ex-wife, Susan Ebbage, and Mr Ebbage Snr, was unable to give effective instructions and was joined so that it was bound by the judgment.

[4] From time to time, it will be convenient to refer to the plaintiffs as the Alford interests, the first, second and ninth defendants as the Ebbage interests, the third, fourth, tenth and twelfth defendants as the Manthey interests, and the eleventh defendant as Green Fit.

[5] At the commencement of the trial, the plaintiffs identified three claims which they made against the defendants. Against the Ebbage interests, they claimed $170,000 as a debt owing by Mr Ebbage to Mr Alford in respect of the agreement they entered into when they formed an accountancy partnership together. In the fifth amended statement of claim (which, unless otherwise indicated, will be referred to as the "statement of claim"), the plaintiffs claimed that the debt with interest was in fact $416,714.47. The second claim was for the repayment of moneys advanced by one or more of the plaintiff companies to AET. The third claim involved an accounting for and a tracing of what was asserted by the plaintiffs to be a 25 per cent interest in a joint venture entered into between the Alford, Ebbage and Manthey interests. If the third claim were to be successful, then the plaintiffs asserted an interest in the assets and profits of the joint venture wherever they might be traced. It can been seen that the first claim involved the accountancy partnership between Mr Alford and Mr Ebbage, while the latter claims involved a business carried on in partnership between Mr Ebbage and Mr Manthey in which Mr Alford

said he had an interest and to which he said he, or companies associated with him, had lent money.

[6] As this was a managed case, much of the evidence-in-chief was in the form of affidavits with the opportunity for the other parties to orally cross-examine each deponent.[1] In addition, a bundle of documents initially containing some 64 volumes of documents was tendered by the plaintiff at the commencement of the trial. During the trial, many other documents and a videotape were tendered, some of the documents being added to the bundle.

[7] Within the bundle of documents were depositions taken from a number of persons in the course of litigation in New Mexico in the United States involving some of the parties to this action, particularly those which represented the Ebbage interests and those that represented the Manthey interests, about cognate subject matter ("the New Mexico litigation"). The New Mexico litigation was eventually settled prior to the trial of this action on terms acceptable to the parties. Also in evidence were transcripts and tapes of a telephone call between Mr Manthey and Mr Alford on 2 September 1999, which was secretly taped by Mr Alford, and of a meeting in July 2000 in the boardroom of Mr Alford's Southport practice which was secretly videotaped by Mr Alford. At the end of the trial, any document in the bundle which was not referred to during the evidence or submissions, was, pursuant to an intimation given at the commencement of the trial and a ruling made at the end of the trial, removed from the bundle by the parties. A number of other documents which might have been useful were not retained or were destroyed before the litigation commenced.

[8] Although a large number of documents were referred to at trial, two significant features made determination of the matters in dispute more difficult. The first was the death of Mr Ebbage in December 1998. His oral evidence as to the course of events would have been of great assistance in determining the history of the matter and the precise nature of the legal relationship between the parties. The second, and necessarily related, difficulty arose from the fact that the plaintiffs were unable to point to important contractual arrangements being made in writing, but rather relied on agreements said to have been made orally, often with or in the presence of Mr Ebbage.

The accountancy partnership between Tony Alford and Paul Ebbage

[9] The business, professional and personal relationship between Mr Alford and Mr Ebbage commenced in the early 1980s. Because of the death of Mr Ebbage, inevitably the source of much of the evidence about their relationship was

---

1 This process tends to induce a certain caution in a trial judge since affidavits almost invariably reflect the more nuanced and sophisticated legal thinking of a party's legal representatives: see the views expressed by Heerey J in "Storytelling, Postmodernism and the Law" (2000) 74 *ALJ* 681 at 689. As His Honour has subsequently written in a paper entitled "Aesthetics, Culture and the Whole Damn Thing" delivered to the International Conference of Law and Literature Association of Australia: *Mediating Law: Theory, Production, Culture* held at the Law School, University of Melbourne, 29 November – 1 December 2002: "More importantly, the Court loses the truth-revealing benefit of the witness having to give, in the isolation of the witness box, an account unprompted by leading questions". The cross-examination certainly assisted in hearing the authentic voices of the witnesses and determining matters in dispute.

Mr Alford. Some of his evidence about these matters was uncontentious. Other evidence required a careful assessment of his credibility.

[10] Mr Alford is an accountant and a member of the Australian Society of Certified Practising Accountants and the Taxation Institute of Australia. At the time of trial, he was a director of A E Operations Pty Ltd ("AEO") trading under the firm name or style of "Alfords Accountants & Business Advisers".

[11] Mr Alford commenced employment on the Gold Coast in 1984 at an accounting firm in which Mr Ebbage held a 10 per cent interest as a partner. Until 1 January 1987, Mr Alford did not have a practising certificate and was not a registered accountant.

[12] In 1986, Mr Ebbage purchased an accountancy practice at Beaudesert ("the Beaudesert practice") and established an accountancy practice at 17 Short Street, Southport ("the Southport practice") known as PG Ebbage & Co. Mr Alford was employed at the Southport practice on a salary together with a 40 per cent profit share. Susan Ebbage, who was married to Mr Ebbage, worked as a receptionist at the Southport practice although she separated from her husband towards the end of 1986. There were subsequent reconciliations and separations.

[13] In March 1987, Mr Alford purchased a 40 per cent interest in the Southport practice for which he said he paid $30,000 plus moneys owing to him. Although a draft partnership deed was drawn up by a firm of solicitors, no written partnership agreement was ever executed. The service entity established for the Southport practice was a trustee company, Whitewell Pty Ltd ("Whitewell") as trustee of the unit trust, PG Ebbage & Co Management Trust ("PGEMT"). Whitewell was subsequently renamed AEH. The unit holders of PGEMT were Ashtead Trust No 1 (controlled by Mr Ebbage) which held 60 per cent of the units and Highgain Trust No 1 (controlled by Mr Alford) which held 40 per cent of the units. The partnership was dissolved on 28 February 1989 after various disagreements between Mr Alford and Mr Ebbage. A draft deed of dissolution prepared by solicitors was, once again, never executed.

[14] This pattern by Mr Alford of not executing written agreements about important practice matters has apparently continued to this day. Alicia Atkinson gave evidence that the contractual arrangements showing the equity of herself and others in the present accountancy practice of Mr Alford, Alford's Accountants and Business Advisers, have not been reduced to writing. There are a number of possible explanations for, and consequences of, this state of affairs. Perhaps, as Mrs Atkinson asserted, there is a high degree of mutual trust meaning that it is not necessary to record agreements in writing. On the other hand, the omission to record agreements in writing apparently removes the requirement which would apply to a written contract to pay stamp duty. If there is a dispute as to the terms of the contract, each party may assert what it says are the terms of the contract. This uncertainty may suit those who are less scrupulous with the truth. It was, according to Mr Alford's evidence, rare for an important business agreement with a third party not to be reduced to writing, if not immediately by formal written agreement, at least by note or letter confirming the agreement.

[15] On 10 February 1988, Cravdon Pty Ltd, which was equally owned by entities controlled by Mr Alford and Mr Ebbage, purchased an investment property at

Woodroffe Avenue, Main Beach ("the Woodroffe Avenue property"). Mr Alford asserted that Mr Ebbage failed to honour his obligations and so in April 1991, Mr Alford arranged to purchase the Woodroffe Avenue property. However, the property was sold at a loss before that agreement was finalised. Mr Alford asserted that no formal documentation or agreement was contemplated or prepared between himself and Mr Ebbage in respect of the Woodroffe Avenue property.

[16] Mr Alford agreed to pay Mr Ebbage $30,000 to purchase his interest in the Southport practice. The client fee base of the Southport practice was then, according to Mr Alford, in excess of $420,000. In February 1989, Mr Alford borrowed money from Esanda Finance Corporation Ltd ("Esanda Finance") to finance his purchase of the Southport practice and to run the practice. This was Esanda Finance Professional Equity Facility account no 464037864 in favour of Mr Alford (the "Esanda Finance Facility"). Esanda Finance required the production of a partnership dissolution agreement as a condition of providing finance. Mr Alford agreed with Mr Ebbage that Mr Alford would instruct solicitors to draw up a formal partnership dissolution agreement, but as I have already noted, it was never executed. Esanda Finance was, however, prepared to accept a written confirmation and acknowledgment from Mr Ebbage that the unencumbered ownership in the Southport practice had been transferred to Mr Alford.

[17] From 1 March 1989, Mr Alford owned and operated the Southport practice as a sole trader under the business name, "Alfords". Cranot Pty Ltd ("Cranot") acted as the service provider to the Southport practice, as trustee of the Cranot Trust No 3, a trust under Mr Alford's control. Mr Ebbage retained certain clients whom he had introduced to the Southport practice and was provided with an office and telephone at the offices of the Southport practice. The business name, PG Ebbage & Co, was transferred to Mr Alford. Mr Alford deposed that the fee base of the Southport practice increased substantially over the following three years and that in March 1992, it was his intention to reduce the number of clients and increase the services offered to the remaining clients. By this time, he said, Mr Ebbage was no longer using his office at the Southport practice. Mr Ebbage had in the meantime invested in a trawling venture through a company called Exocal Pty Ltd ("Exocal"). He borrowed $1,075,626.80 from Esanda Finance on 3 December 1990 for that purpose. That debt was paid in full by 22 September 1998.

[18] On 28 July 1992, Crayfield Pty Ltd ("Crayfield"), a company associated with Mr Ebbage's parents, loaned $155,000 to Tunleigh Pty Ltd ("Tunleigh"), a company associated with Mr Ebbage. On 5 October 1992, Crayfield lent a further $300,000 to Tunleigh.

[19] In October 1992, Bronzebay Pty Ltd, a company controlled by Mr Alford, purchased property at Hicks Street, Southport and he relocated the Southport practice to that address. In the same month, Mr Alford commenced using office space rented by Stephen Diamond ("Mr Stephen Diamond"), a solicitor trading as Diamonds Solicitors at Nerang. In January 1993, Mr Alford formally opened an accountancy practice at 30 Price Street, Nerang, trading as Alfords ("the Nerang practice") and engaged staff. The office was in a partitioned area of Mr Diamond's office.

[20] During February and March 1993, Mr Alford and Mr Ebbage negotiated to renew their partnership in the various accountancy practices. Mr Alford gave evidence

that an oral agreement was reached whereby they intended to avoid any "adverse capital gains tax or stamp duty consequences". They agreed to conduct the practices under the business name Alford Ebbage (the "AE practice"). The individual practices would trade as Alford Ebbage Beaudesert (the "Beaudesert practice"), Alford Ebbage Southport (the "Southport practice") and Alford Ebbage Nerang (the "Nerang practice"). The ownership of the Southport practice would remain with Mr Alford; ownership of the Beaudesert practice would remain with Mr Ebbage; and the Nerang practice would be owned by AEH, a company jointly owned by Mr Alford and Mr Ebbage or entities controlled by or associated with them. AEH was to own the Nerang practice as trustee for the AE Holdings Trust No 3 ("AEH Trust No 3"). It was further agreed that only new clients of the Nerang practice would be considered part of the goodwill of the Nerang practice. Clients who transferred from the Southport practice or the Beaudesert practice would not be considered part of the goodwill of the Nerang practice. As part of the agreement, Mr Ebbage paid Mr Alford to reimburse him for his costs in setting up the Nerang practice. The agreement was to operate with regard to the Nerang practice from 1 April 1993 and with regard to the Southport and Beaudesert practices from 1 July 1993. As partners they had fiduciary duties to each other.

[21] The trading company which conducted the Southport practice was AEG; the trading company which conducted the Nerang practice was AEO formerly known as AE Nerang Pty Ltd; and the trading company which conducted the Beaudesert practice was AE Beaudesert Pty Ltd ("AEB").

[22] Mr Alford and Mr Ebbage agreed to share equally in the expenses and profits of the three practices. A complex business structure was to be put in place where separate operating companies would be set up to operate each practice, a service company structure would be set up, and another company would purchase any new plant, equipment, furniture and fittings for the practice. The structure would be implemented by discretionary trusts. Mrs Atkinson, who had commenced working for Mr Alford as a bookkeeper in 1991, was instructed to draw up the necessary trust deeds.

[23] AEH was a trustee of six trusts. The shareholders of AEH were Dario, as trustee of the Dario Management Trust which represented Mr Alford's interest, and EOS, as trustee of the Ebbco Holdings Trust, which represented Mr Ebbage's interest. Mr Alford and Mr Ebbage were the sole directors.

[24] AE Holdings Trust No 1 ("AEH Trust No 1") was to receive operators' fees in respect of the Southport practice. According to Mrs Atkinson, whose evidence on these matters was uncontroversial, those fees were to be paid by the practice trading entity, Alford Ebbage Pty Ltd ("AE"). The trust would then distribute the operators fees received by it to Mr Alford and/or specified beneficiaries nominated under the trust. The income assessable in the hands of Mr Alford as beneficiary was to be set off against the expense of the interest payments made to Esanda Finance giving rise potentially to a tax neutral position.

[25] The second trust was AE Holdings Trust No 2 ("AEH Trust No 2") which was to receive operators' fees in respect of the Nerang practice. Those fees were to be paid by the practice trading entity, AE. However, the expenses of the Nerang practice exceeded the fees generated by it and a decision was made by Mr Alford and Mr Ebbage to cease operations at the Nerang practice in mid-1994.

[26] The third trust was to be AEH Trust No 3 which was to receive operators' fees in respect of the Beaudesert practice. Those fees were again to be paid by the practice trading entity, AE. The trust would then distribute the operators fees received to Mr Ebbage and/or specified beneficiaries nominated under the trust. The income which was assessable in the hands of Mr Ebbage as beneficiary was to be set off against the expense of interest payments to Esanda Finance and Crayfield giving rise potentially to a tax neutral position.

[27] AE Holdings Trust No 4 ("AEH Trust No 4") was to receive fees from AE for that company's hire of equipment used in the operation of the respective practices. It was intended that the trust remit hire fees received by it to Cranot, the owner of the business equipment used at the Southport practice (prior to 1 March 1993) and to EOS (the owner of the equipment used at the Beaudesert practice prior to 1 March 1993). AEH Trust No 4 purchased all unencumbered assets acquired by the AE practice after 1 March 1993.

[28] Mrs Atkinson says that although she was the settlor of the AE Holdings Trust No 5 ("AEH Trust No 5"), she was not aware of its intended purpose at the time the trust was settled. Mr Alford, however, deposed that a principal purpose of the AEH Trust No 5 was to own assets of the AE practice and any other assets acquired jointly between Mr Ebbage and himself or entities associated with their respective families. As was admitted in the pleadings, AEH Trust No 5 was a discretionary trust of which the beneficiaries were Dario and EOS both for themselves and as trustees respectively of the Dario Practice Trust and the Ebbco Trust. Dario was related to Mr Alford (as that term is used in the *Corporations Law*) in that Mr Alford was, and Mr Alford's father is, a director and shareholder of Dario. Beneficiaries of the Dario Practice Trust included corporations related to Mr Alford and members of his family. EOS was related to Mr Ebbage (as that term is used in the *Corporations Law*) in that Mrs Ebbage and Mr Ebbage Snr were the directors and shareholders of that company. Beneficiaries of the Ebbco Trust included Mr Ebbage, corporations related to Mr Ebbage and members of Mr Ebbage's family. It was controlled by Mr Ebbage. Mr Alford and Mr Ebbage jointly held the power to remove and appoint the trustee.

[29] Mrs Atkinson gave evidence that AE Holdings Trust No 6 ("AEH Trust No 6") was established to accommodate joint share trading by Mr Alford and Mr Ebbage, both in their own right and for and on behalf of clients of the AE practice.

[30] In spite of the structure that was set up, Mrs Atkinson says that AEH Trust No 4 was the only trust to receive operators' fees based on financial accounts prepared by Mr Ebbage.

[31] Other trusts which were established included the AE Service Trust, the trustee of which was AES. This trust was settled for the express purpose of providing staff and facilities to each of the trading entities generating fees from the Southport, Nerang and Beaudesert practices.

[32] EOS was the trustee for two trusts: the Ebbco Trust and the Ebbco Holdings Trust. Mrs Atkinson said that the Ebbco Trust was settled by her on instructions from Mr Ebbage for the express purpose of distributing surplus income received by each of the AEH trusts between Mr Ebbage and Mr Alford through companies and/or trusts associated with them. It was for this express purpose, Mrs Atkinson says, that

Dario, in its own right and in its capacity as trustee, was nominated as a specified primary beneficiary under the trust in addition to Professional Practice Group Pty Ltd ("PPG") again, in its own right and in its capacity as trustee. The Ebbco Trust was, however, a discretionary trust.

[33] Mrs Atkinson also gave evidence that the Ebbco Holdings Trust was settled by her on instructions from Mr Ebbage for the express purpose of holding shares in joint corporate structures as between Mr Ebbage and Mr Alford or companies and/or trusts associated with each of them. Mrs Atkinson says that she recalls that the trust was used by Mr Ebbage to acquire shares in Split Cycle Technology Ltd ("SCT Ltd"). However, this was Mr Ebbage's own interest in SCT Ltd and not one he shared with Mr Alford. In cross-examination, Mrs Atkinson conceded that at time of creation of the Ebbco Trust and the Ebbco Holdings Trust, she was unaware of the differences between them. The purpose of both of them was to hold assets and distribute income to Mr Ebbage and persons and companies associated with him.

[34] The PPG Trust was settled by Mrs Atkinson, again on instructions from Mr Ebbage, for the express purpose of sharing (on behalf of Mr Ebbage) the joint exploitation of the fee base generated by the AE practice with the Dario Practice Trust, the trust established for the benefit of Mr Alford and his family.

[35] The instructions were given to Mrs Atkinson by Mr Ebbage on 2 April 1993. He instructed her to establish the Ebbco Trust and the Ebbco Holdings Trust with EOS as their trustee and the PPG Trust with PPG as the trustee. The appointee was to be Tunleigh. The specified beneficiaries were to be Mr Ebbage, Mrs Ebbage, Mr and Mrs Ebbage Snr, Gordon Rolinson, Gladys Rolinson and each of the children of the above, as well as Harcroft No 3 Pty Ltd as trustee of the PGE Trust, Greyvil Pty Ltd, Greyvil Pty Ltd as trustee for the Greyvil Trust No 1, Ashtead Pty Ltd, Exocal, Adleigh Contractors Pty Ltd, PPG as trustee for the PPG Trust, EOS as trustee for the Ebbco Trust, EOS as trustee for Ebbco Holdings Trust, Dario as trustee for the Dario Practice Trust; in addition there was a general clause.

[36] The directors of AES, the service company for the AE practice, were Mr Alford and Mr Ebbage. Its shareholders were EOS and Dario to represent the interests of Mr Ebbage and Mr Alford respectively. Its first annual return for the financial year ended 30 June 1993 was filed with the Australian Securities Commission (now "ASIC") by Mr Ebbage. The annual return for the year ended 30 June 1995 was filed by Mr Alford.

[37] Both Mr Alford and Mrs Atkinson gave evidence that Mr Ebbage was responsible for the administration of the AE practice. Those responsibilities included, but were not limited to, the co-ordination and authorisation of all payments to creditors, the preparation of all compliance matters, all communications with the Australian Taxation Office and financiers of the AE practice, and the preparation of all associated financial reports and/or statements. Mrs Atkinson said that he was assisted by the practice administrator, Julianne Kliese, until September 1993. Working under Mr Ebbage's supervision with regard to the administration of the AE practice were Michelle North, Shannon White, Michelle Leeming, Amanda Alford, Mrs Ebbage and Geoff Hayes. Damien Peters was, from his employment in early 1994, under the supervision of Karl Farmer but was directed by Mr Ebbage in respect of matters involving or concerning AET. Mrs Atkinson says that Mr Alford was not involved in the administration of the AE practice, being responsible for the

provision of advices to clients and the development of the AE practice and its client base.

The Crayfield loans

[38] On 31 August 1993, Crayfield lent $25,000 to AES. On 7 July 1994, AEF repaid $10,000 to Crayfield. AEF was the internal and external finance company of the AE practice. On 25 August 1994, Crayfield lent AEF $49,700.32. Bobray Pty Ltd ("Bobray"), a company associated with Mr Ebbage Snr, lent a further $20,299.68 to AEF. Subsequently, the debt owed by AEF to Bobray was transferred to Crayfield so that Crayfield became the creditor. On 28 October 1994, Crayfield lent $30,000 to AEF. The total amount of money lent by Crayfield to Alford Ebbage entities was $125,000 of which $10,000 had been repaid. On 30 June 1995, Mr Ebbage consolidated all moneys owed to Crayfield as being owed by him.

The Esanda Finance Facility

[39] One of the matters in dispute in these proceedings was who was responsible for repaying Mr Alford's Esanda Finance Facility. Mr Alford's liability under the Esanda Finance Facility had increased to $199,819 by 22 March 1993. Mrs Atkinson gave evidence, to which I have already referred, that the payments to Esanda Finance were to be offset against Mr Alford's income from the Southport practice after he recommenced his partnership with Mr Ebbage. Mr Ebbage had his own liability to Esanda Finance under another facility.

[40] In the affidavit evidence on which Mr Alford relied at trial, he said that Mr Ebbage told him that the Beaudesert practice generated fees of approximately $500,000 per annum in March 1993. Mr Alford deposed that the Southport practice generated fees in excess of $1,000,000 per year. Mr Alford said they discussed and agreed upon a position which would recognise and compensate for the disparate quantum of fees between the Southport practice and the Beaudesert practice as at the inception of the AE practice. However it appeared that Mr Alford's sworn assertion that the Southport practice generated fees in excess of $1,000,000 a year as at March 1993 was incorrect. Mr Alford's tax return for the financial year ending 30 June 1993 included a trading and profit and loss statement which shows professional fees received of $486,638.39. When expenses are deducted it appeared that he operated at a loss for the year of $10,173.37. The fees received for the previous financial year, ending 30 June 1992, were shown as $502,265.57. In that year, his operating loss was even greater, at $144,104.55.

[41] In attempting to explain his sworn assertion that the "Southport practice generated fees in excess of $1,000,000 per year" as at March 1993, Mr Alford pointed to a reconciliation of income to 30 June 1993 which revealed net profit of $317,053.11. This was calculated on an accruals basis including debtors and work in progress but did not show gross fees of $1,000,000 per year. He said in evidence that he had not disclosed any document which showed that the fees received by the Southport practice in the year to March 1993 were $1,000,000. He then asserted under cross-examination that he said that the fees were $1,000,000 because that was the agreement between Mr Ebbage and himself. Mr Alford's sworn statement about the fees generated by the Southport practice is, in my view, not true. It reflects very poorly on his credit as a witness. When asked by me why he said it, if it was not

true, he then asserted that if he said it was $1,000,000, then it was $1,000,000. His attempted explanations put him in an even poorer light as a witness.

[42] Mrs Atkinson was recalled by the plaintiffs to support Mr Alford's assertion that the Southport practice generated fees in excess of $1,000,000 per year as at March 1993. Mrs Atkinson annexed as Exhibit 5 to an affidavit sworn 14 November 2002, what was said to be a debtors' listing for the accountancy practice operated by Mr Alford as at 31 March 1993, totalling $561,891.61. This exhibit in fact included debts dated April, May, June, July, August, September, November, December 1993 and July 1994. The debtors' listing was prepared by her in late 1994 to determine, she said, the payments received by the AE practice in respect of the debtors of Alfords. She asserted that the debtors' listing showed that the total debtors for the Alfords practice as at 31 March 1993 were $561,891.61. In her affidavit, she said that the date listed next to each debtor was the last date on which a payment was received on the debtor file according to the office costing records. In her oral evidence, however, she said that the date column featured the date the last entry on that file was made, whether that be when the bill was raised or a payment received or any other entry on the file.

[43] There was, as Mrs Atkinson conceded in cross-examination, no way of determining when the debts accrued, whether in 1989, 1990, 1991, 1992 or 1993. All that Exhibit 5 revealed was that a particular debt accrued at some time prior to the date appearing beside the debt. A number of the entries had dates prior to 1992 so could not support a contention that they showed the fees generated in the year to March 1993. Others may well have accrued, in whole or in part, prior to the year before March 1993. There was no way of telling.

[44] Only $184,357.23 was estimated not to be doubtful debts.

[45] Even if it could be said that AE practice had generated unpaid debt of $561,891.61 prior to March 1993, this figure could not simply be added to any other figure which was produced to say that the Southport practice generated fees in excess of $1,000,000 per year as at March 1993.

[46] In spite of Mrs Atkinson's further evidence, Mr Alford's evidence to that effect remained untrue.

[47] Mr Alford gave evidence that Mr Ebbage agreed that Mr Alford's indebtedness to Esanda Finance in the sum of $200,000 would be paid by Mr Ebbage from his profit share of the AE practice. Mr Alford said the manner in which the repayment was to be effected needed to achieve the following:-

(1) The Esanda Finance indebtedness was to be funded from Mr Ebbage's profit share from the AE practice, which would, except for this arrangement, be to Mr Ebbage's benefit;

(2) There was to be no disparity between the profit share entitlements payable to Mr Ebbage or to Mr Alford solely as a consequence of the payments to be made by Mr Ebbage to Esanda Finance;

(3) The profit sharing entitlement was to be, from inception, formalised as an equal entitlement as between Mr Ebbage and Mr Alford obviating the requirement to make some

future adjustment to profit share entitlements upon full payment of the Esanda Finance debt by Mr Ebbage;

(4) Any arrangement should leave neither Mr Ebbage nor Mr Alford in a position different from that which would have prevailed had Mr Ebbage simply made a cash payment to Mr Alford;

(5) Mr Ebbage was to pay interest at a rate equivalent to the interest charged on Mr Alford's Esanda Finance Facility, thus ensuring that Mr Alford was not placed in a financially disadvantageous position compared to an immediate cash settlement.

[48] Mr Alford said that ultimately it was agreed between Mr Ebbage and himself that the profit share entitlement would be equal as between themselves except to the extent that the first $400,000 of profit share entitlements and benefits owing to Mr Ebbage would be paid to Mr Alford, thus resulting in an approximate after tax net payment to Esanda Finance of $200,000. Mr Alford could not, when first asked about it in cross-examination, remember the date on which that agreement was reached, although he later said that it was around 20 to 24 March 1993, at the conclusion of that year's Indy Car Race. The agreement was never documented whether by written contract or minutes of meeting. Some undated notes were made by Mr Alford which said in part, "take on 400,000 or $200,000". This note was by itself equivocal.

[49] Mr Alford said it was agreed that interest payable on the Esanda Finance Facility would be paid from Mr Ebbage's entitlement to profits from the AE practice. If Mr Ebbage's profit share did not reach $400,000, then he was not liable to make the payment to Esanda Finance of Mr Alford's debt. He said in cross-examination that Mr Ebbage's liability was absolutely contingent on his profit share reaching $400,000. As the profit and loss statements for their partnership has not been finalised, Mr Alford was unable to say whether Mr Ebbage's profit share had reached $400,000. Later, Mr Alford asserted that the repayment was not absolutely conditional on Mr Ebbage receiving $400,000 profit share. If Mr Ebbage received only $300,000 profit share, then according to this later evidence, he was to use that to repay Mr Alford's Esanda Finance Facility.

[50] Another reason for Mrs Atkinson being recalled by the plaintiffs was in an endeavour to show that Mr Ebbage had in fact received a profit share in excess of $400,000. There were a number of problems with that evidence. Firstly, Mrs Atkinson gave evidence as to payments made or attributed by Mr Ebbage or companies associated with him in the 1993/1994, 1994/1995, 1995/1996 financial years. These, she said, amounted to $863,008.31. It could not be said, however, that this figure represented Mr Ebbage's profit share from the partnership. They were simply payments or liabilities attributed to Mr Ebbage rather than profit share.

[51] Secondly, a number of the payments attributed to Mr Ebbage were controversial. For example, Mrs Atkinson attributed the interest of $60,521.92 paid on Mr Alford's Esanda Finance Facility as a benefit received by Mr Ebbage. She did this on Mr Alford's instructions. She gave evidence that half the fees billed to AET to 29 February 1996 were attributed to Mr Ebbage. This was said to be an amount of $43,572.52. The reconciliation statement on which she relied did not mention the division by 50 per cent under this item. As will be seen later in the discussion under

the claim made as Schedule B to the Statement of Claim, $87,145.04 (being $43,572.52 x 2) was not in fact the amount of billed fees which had not been paid. A further problem in regarding this amount as Mr Ebbage's profit share was that not only were the moneys said not to have been received, but also that no allowance had been made for what expenses, if any, would be taken out of them.

[52] Mrs Atkinson included as part of Mr Ebbage's profit share $109,000.30 which was said to be a consultancy to Morecabs. Apart from asserting that Morecabs was a business operated as a joint venture between Mr Alford and Mr Ebbage, Mrs Atkinson said that she did not know the content of the joint venture and was "not aware of the arrangements with Morecabs". This was 50 per cent of a payment apparently made to Morecabs for what is described as a consultancy by Morecabs. On what basis that payment could be regarded as Mr Ebbage's profit share, Mrs Atkinson was unable to explain.

[53] $68,702.03 was attributed as a benefit received by Mr Ebbage from 1993 to 1996. This was said to be "operators fees (Kent Lyon)". Mrs Atkinson explained that Kent Lyon Shields was a former name of the Beaudesert practice and these were an expense of the Beaudesert practice. It was difficult to see how this could be regarded as profit share.

[54] Wages paid to Mr and Mrs Ebbage were undifferentiated in the schedule provided by Mrs Atkinson. Mrs Ebbage was in fact actually employed at the practice and did work for the benefit of the partnership for which she received remuneration. This was not a profit share of Mr Ebbage. Neither were wages paid to Mr Ebbage which were an expense of the practice and would, therefore, according to Mrs Atkinson's oral evidence have been deducted from gross income before profit share was calculated. Superannuation was in the same category. The total attributed to wages and superannuation was $214,407.80.

[55] With regard to consultancy fees, $86,688.40 was attributed as a benefit to Mr Ebbage in 1994/1995. The first item listed under that total in the Profit and Loss Adjustments for that year[2] is $12,500 paid to Esanda Finance by AES (on behalf of Cranot) on 2 May 1995. That was, Mrs Atkinson said, a payment of capital on Mr Alford's loan to Esanda. $25,300 paid by Cranot to Esanda on 15 March 1995 was also attributed as a consultancy paid to the benefit of Mr Ebbage. In fact, that was also a payment made by a company associated with Mr Alford towards the principal owing on Mr Alford's Esanda Finance Facility. Their attribution as a benefit to Mr Ebbage by Mrs Atkinson when these statements were drawn up in November 2002 was therefore, based on a controversial assumption which depended on a finding by this court that there was the arrangement with regard to the repayment of Mr Alford's Esanda Finance Facility by Mr Ebbage which was contended for the statement of claim. An additional problem was that Mrs Atkinson was unable to say why that payment appeared under the heading "Consultancy – Ebbage". She said that was "just where it's landed, basically". That was clearly an inaccurate description of these items. If they had in fact been consultancy fees, they would have been an expense which was to be deducted from the gross profit. She explained that these were draft profit and loss statements but nevertheless she could not explain why, as a person accustomed to preparing profit and loss statements, she has placed these items under consultancy fees. At first it appeared that the

---

[2] See Exhibit 64

explanation probably lay in the haste with which these profit and loss statements were prepared but Mrs Atkinson's evidence revealed that the explanation in fact lay in the forensic use intended to be made of them by the plaintiffs. The attribution to Mr Ebbage was based solely on what Mr Alford told Mrs Atkinson. He told her that it was a consultancy. She entered it as such. The effect was to falsely inflate what was said to be Mr Ebbage's profit share.

[56] A number of other entries under the heading "Consultancy – Ebbage" were entitled "MR2 Lease", "Fuel" and "M2 Rego". These payments were for a car used by Mrs Ebbage partly for work and partly for personal purposes. To the extent that the use was work related, those payments would be an expense deducted from the gross income before profit was determined. It was not possible for Mrs Atkinson to say how much of the $9,185.40 attributed to the MR2 motor vehicle was for business and how much was personal use and therefore how much would be a business expense which would not form part of Mr Ebbage's profit share.

[57] The same problems applied in relation to other years and to the vehicle used by Mr Ebbage for both business and personal purposes. In 1993/1994, $9,523.21 was attributed to the vehicle used by Mr Ebbage. That others in the business appeared to use it is suggested by a number of entries for fuel put in by other employees. Indeed under another heading of "Associated - Consultancy (Ebbage)", $26.59 was attributed to a payment of fuel by Mr Alford on an Amex card. Mrs Atkinson was not "100 per cent sure" what that related to. In 1994/1995, $18,372.48 was attributed to Mr Ebbage's vehicle. In 1995/1996, $73,916.96 was attributed to "Associated - Consultancy (Ebbage)", most of which appeared to be payment for Mr Ebbage's vehicle or payment of Mr Alford's Esanda Finance Facility by companies associated with Mr Alford.

[58] Mrs Atkinson also attributed $1,330.66 in 1993/1994 and $1,450 in 1994/1995 in advertising to the benefit of Mr Ebbage although this was a fully deductible expense of the practice.

[59] A number of movements in loans were noted and added or subtracted but Mrs Atkinson conceded in cross-examination that none of the loan entries would have been taken into account in calculating profit and loss.

[60] It was simply not possible for me to be satisfied on the balance of probabilities that Mr Ebbage had in fact received a profit share of in excess of $400,000. This was an elaborate construction designed solely, and unsuccessfully, to bolster Mr Alford's credibility.

Documentation of the accountancy partnership

[61] Mr Alford asserted that, given their previous lax attendance upon formal documentation of agreements between them, it was agreed that the structure adopted for the AE practice would be formally documented with all the associated agreements, companies, trusts and the like being attended to. Mr Alford said Mr Ebbage was charged with the responsibility of documenting the AE practice arrangements as well as incorporating the necessary companies, amending existing company shareholdings, directorships, settling trusts, attending to minutes, consents, authorities, bank records and the like. He said that Mr Ebbage completed this task in late April 1993 and completed the necessary company and trust

requirements. A meeting of Mr Alford and Mr Ebbage as directors of AE on 5 April 1993 noted the completion of the PPG Trust, associated, as Mr Alford said in his evidence, with him, and the Ebbco Trust and Ebbco Holdings Trust, associated with Mr Ebbage.

[62] Solicitors were engaged to finalise draft agreements prepared by Mr Ebbage. Mr Alford said that he gave instructions himself to Michael King, who was at that time a partner of McLaughlins, the law firm that they then used.

[63] Mr Alford said the agreement with Mr Ebbage that Mr Ebbage would pay Mr Alford's Esanda Finance Facility was recorded in notes which are no longer in Mr Alford's possession. There was, as I have said, no executed written agreement.

[64] Minutes of a management meeting of AE Pty Ltd held at the Southport practice on 30 March 1993 refer to a number of matters including the $200,000 owing on the Esanda Finance Facility for the Southport practice and $200,000 owing to Crayfield in respect of the Beaudesert practice. No mention is made of Mr Ebbage's having responsibility for the repayment of the Esanda Finance Facility.

[65] Mr Alford asserted that, at the time of the inception of the AE practice, his Esanda Finance Facility was being serviced on an interest-only basis. Discussions had been held with officers of Esanda Finance and Mr Alford with a view to formalising a debt reduction programme. Mr Alford said that his relationship with Esanda Finance was excellent. Mr Alford also said that Mr Ebbage had an outstanding loan facility with Esanda Finance in the amount of $100,000, and that Mr Ebbage's relationship with Esanda Finance was very strained. Mr Alford said his own relationship with Esanda Finance became difficult after November 1993 when various arrangements and undertakings to repay principal amounts of the Esanda Finance Facility were made but not honoured. Mr Alford said that Esanda Finance placed pressure on him to repay the Esanda Finance Facility "after forming the view that the earnings or profits of the Southport practice were being shared with [Mr Ebbage]".

[66] Mr Alford said that his indebtedness to Esanda Finance was never fully discharged by Mr Ebbage. Mr Alford gave evidence that Mr Ebbage endeavoured to sell the Beaudesert practice in late 1995 and agreed to use the proceeds from the sale of the Beaudesert practice to settle, wholly or substantially, the Esanda Finance Facility. Mr Alford said that Mr Ebbage did not honour this commitment and that the balance of the outstanding liability under the Esanda Finance Facility was paid by Mr Alford. He said that all payments to Esanda Finance were made by Cranot or other companies associated with Mr Alford's family and funded from the AE practice, except for one payment of $30,000 made by Mr Ebbage immediately after the sale of the Beaudesert practice in January 1996.

Sale of the Beaudesert practice

[67] Mr Ebbage sold the Beaudesert practice by contract dated 15 December 1995 to Karric Pty Ltd ("Karric") and Alise Pty Ltd ("Alise") ("the Beaudesert sale contract"). Karric was a company under the control of Richard Gillow who had been an employee of AE at the Beaudesert practice from the time the AE practice commenced in 1993 and of AES from 1 July 1994. Alise was controlled by Alan Teese. The sale price was $348,000, made up of $30,000 for plant and equipment

and $318,000 for goodwill. The sale settled on 2 January 1996. The negotiations for the sale of the Beaudesert practice took place from early 1995. Mr Gillow and Mr Teese retained a Brisbane firm of solicitors who drew up a draft contract. Further negotiations ensued and towards the end of 1995 Mr Alford negotiated with Mr Gillow and Mr Teese over the terms of the contract. A new contract was drawn up by another firm of solicitors.

[68] On 3 January 1996, Mr Ebbage received into his bank account the proceeds of the sale of the Beaudesert practice. On 8 January 1996, Mr Ebbage paid $300,000 to Crayfield and $30,000 to Cranot. On 11 January 1996, Mr Ebbage paid a further $17,500 to Cranot. Both payments to Cranot were recorded as a loan.

[69] The accountancy partnership between Mr Alford and Mr Ebbage was severed in January 1996 with the sale of the Beaudesert practice. Mr Alford asserted in cross-examination that it was then that $400,000 became immediately payable by Mr Ebbage in respect of the Esanda Finance Facility even though that had not been a term of the original agreement but was, Mr Alford said, agreed by Mr Ebbage in mid-1995 when he decided to sell the Beaudesert practice.

[70] Thereafter Mr Ebbage received $600 per week which was subsequently reduced to $346 per week until about June 1998. In addition, $3,000 per month was paid on the mortgage on Mr Ebbage's principal place of residence at Monaro Drive, Bonogin and sundry debts were paid. Mr Alford said these moneys were paid from the income generated by the Southport practice. He said he agreed to pay these moneys because of what he described as his equal interest in AET and his understanding that Mr Ebbage would act in his best interests in relation to his management of AET. This agreement was not verified in writing. Another, more likely explanation was that this was part of the financial settlement between them at the termination of the partnership, the responsibility for run-off matters, the maintenance of goodwill of the Southport practice and the payments received by the Beaudesert practice for work in progress which had not been purchased by the new owners.

[71] Mr Alford said that Mr Ebbage told him the reason that he did not pay more to discharge the Esanda Finance Facility was that he was obliged to repay debts owed to his father, Mr Ebbage Snr. Yet it appears from the affidavit filed by Mr Alford in these proceedings that he had a power of attorney to act on behalf of Mr Ebbage during the negotiations and anticipated settlement of the transaction and so had the capacity to direct payment of moneys received. Mr Alford executed the sale contract of the Beaudesert practice for Mr Ebbage under his power of attorney. Mr Alford's role in the sale of the Beaudesert practice was confirmed by Mr Gillow.

[72] Mr Alford asserted that the failure by Mr Ebbage to discharge undertakings to make partial repayments of the principal under Mr Alford's Esanda Finance Facility as well as Mr Ebbage's failure to discharge undertakings with respect to his own finance facility with Esanda Finance, irretrievably damaged Mr Alford's relationship with Esanda Finance. However, that is a self-serving version of the true reasons for the deterioration in Mr Alford's relationship with Esanda Finance.

[73] Esanda Finance was clearly increasingly unhappy that its debtor, Mr Alford, was not making repayments of capital owed by him. He had not assigned the debt and its repayment so of course he remained personally liable for repayment of the debt.

Mr Alford said in his affidavit that he was outraged that Mr Ebbage put his own financial needs and that of his estranged wife above the need to repay Mr Alford's debt to Esanda Finance. Mr Alford asserted that Mr Ebbage took far in excess of 50 per cent of the profits from the AE practice and "did not sacrifice any or very little of his profit share to accommodate the $400,000 profit share payment to which [he] was entitled".

[74] Mrs Atkinson gave evidence as to her reconstruction of the Esanda Finance Facility and its repayment history as well as by whom the debt was to be paid. Her affidavit showed that she did not discuss the liability for repayment of the Esanda Finance Facility at the time. It appeared that the only source of her information, other than contemporaneous documents, which speak for themselves, was Mr Alford and so her evidence on that matter added nothing to his. For example, she said that she was told by Mr Alford that Mr Ebbage had assumed liability for repayment of the loan and had agreed that the principal would be repaid from the sale of the Beaudesert practice in 1996. But it appeared from cross-examination that she was not told this information at that time, but rather subsequently, once this litigation had commenced. As such, her evidence was no more than a repetition of the self-serving statements made to her by Mr Alford and cannot make his case any stronger.

[75] This matter points to a difficulty in relying on Mrs Atkinson's evidence. She was first employed by Mr Alford as a young book-keeper in 1991. He effectively took her into partnership with him and two others before she was even a qualified accountant. She only graduated with a Bachelor of Business in April 2001 and at the time of trial had not yet achieved her professional qualification as an accountant. She was, perhaps understandably, very loyal to him and accepted what he told her in the preparation for this litigation without question. Her trust in him was shown by the fact that the joint venture in the accountancy practice in which she believes herself or her corporate vehicle to be a party remains undocumented. She was unable to say which entity held Mr Alford's interest in this joint venture. During her evidence, she appeared reasonably intelligent but somewhat naïve and relatively unsophisticated compared, in particular, to Mr Alford and his associates such as Mr Diamond. Her lack of concern about being a party to such an oral agreement where she does not even know the identity of one of the joint venturers was, in the context of this litigation, indicative of her trusting, loyal but unsophisticated and naïve nature. The lack of objectivity in her evidence often undermined its utility.

[76] Mrs Atkinson conceded that she did not distinguish in her affidavit, which constituted her evidence-in-chief at the trial, between what she knew at the time of events or transactions she described and what she was told by Mr Alford after the death of Mr Ebbage or in preparation for the trial of this matter.

The history of the Esanda Finance Facility

[77] The contemporaneous documents in evidence showed that Mr Alford borrowed money from Esanda Finance. The account number was 464037864. The loan was secured by a Bill of Sale 01009/89 which was renewed as 780/94 in respect of property described as "leases, personal property, goods, chattels, effects, furniture, fittings, plant and equipment, goodwill, bookdebts and all assets and undertakings of the business known as 'Alfords' ". The loan was also secured by a company

charge BC891617 (renewed as 276345) over the same property. It was due for repayment on 11 October 1993.

[78] The records of the AE practice showed that Grant Ferguson ("Mr Ferguson") from Esanda Finance phoned on 18 October 1993 about the debt which was by then due for repayment. On 19 January 1994, Mr Alford wrote to Mr White, the State Manager, Commercial Finance of Esanda Finance, complaining that he had been given verbal assurances by employees of Esanda Finance that his expired Finance Facility would be extended without further security, but that this had later been contradicted by a letter of 24 November 1993 from Mr Kling of Esanda Finance. Mr Alford said that he had asked Mr Ferguson if he could extend the interest-only loan for 12 months and thereafter convert to a principal and interest loan for seven years. Mr Ferguson said he was not confident that another period of interest-only loan would be approved. Mr Alford said that nonetheless he assumed that approval had been granted. However, he was contacted by another employee of Esanda Finance, Ms Jenkins, who told him that additional security would be required if Esanda Finance was to consider extending the loan at all. Mr Alford told her that he had assumed that the loan had been renewed because of the length of time in which he had not been told anything to the contrary.

[79] Mr Alford said in the letter that subsequently, on 2 November 1993, he received advice from Mr Kling confirming that the advance had been extended for a further six months on an interest-only basis, and that upon expiry of the six months, a further extension would be on a principal and interest basis for which freehold security might be required. However, Mr Alford said he received a letter from Mr Kling dated 24 November 1993 which in no way correlated with his interim advice of 2 November 1993. Mr Alford went on to assure Esanda Finance that his association with Mr Ebbage had no effect on his income or upon the security that Esanda Finance had. He said that:

> "It appears Esanda has some concern with Mr Ebbage, however, I fail to see what this concern has to do with my facility. As previously stated my conduct should be under review not that of a person who in real terms has no authority over the practice known as Alfords which is Esanda's prime security."

These representations to Esanda Finance as to his relationship with Mr Ebbage make no mention at all of the agreement that he asserted in this matter that he had made with Mr Ebbage that Mr Ebbage was in fact responsible for the repayment of Mr Alford's Esanda Finance Facility. His contemporaneous statements to Esanda Finance were inconsistent with what his assertions were during the trial of this matter.

[80] In order to further convince Esanda Finance of his capacity to repay moneys owing to Esanda, Mr Alford asserted that "Gross Fees for the years ended 30/6/92 and 30/6/93 were approximately $700,000 and $600,000 respectively". He said that his maintainable fee base could be assumed to be $500,000. This of course contradicts the evidence which he gave in this court that as at March 1993 the Southport practice generated fees in excess of $1,000,000 per year. As I have said previously, that evidence was patently untrue. When faced with this further contradiction of his evidence, Mr Alford said that what he and Mr Ebbage did was sit down with a list of clients and place against each of those clients the estimated fee base that would

be generated in a year. However, he said the document evidencing that had not been discovered as it was "totally irrelevant".

[81] On 26 May 1994, Craig Camm, Manager, Professional Equity Finance from Esanda Finance, wrote to Mr Alford saying that the Finance Facility had expired on 11 October 1993 and the subsequent delay in renegotiating the facility was unsatisfactory and that Mr Alford's reluctance to return his numerous telephone calls was most disappointing. Mr Camm called for certain information to be provided by 3 June 1994 including up-to-date trading results to 31 March 1994 for the practice and its service company; an updated statement of position; latest cash flow forecast or budget for the practice to 30 June 1995; the signed *Privacy Act* agreement; and his intended repayment arrangement with regard to the facility.

[82] Everything within the AE practice was not going smoothly. In June/July 1994, the Nerang practice of the AE practice was closed down. Both Mr Alford and Mr Ebbage were concerned with other matters. Mr Alford was considering a move to the United Kingdom. Mr Ebbage was preoccupied with AET.

[83] On 4 October 1994, a Notice of Exercise of Power of Sale under the Bill of Sale was given to Mr Alford because of his default in repaying the principal of $199,819 which was due on 11 October 1993, together with interest. The total sum owing as at 29 September 1994 was $202,674.74. On 6 October 1994, Esanda Finance served a Notice of Exercise of Power of Sale on AEH, formerly Whitewell, pursuant to the company charge. On 10 October 1994, Mr Alford and Mr Ebbage considered the debts owed by each of them and the AE practice and a debt reduction programme. A note prepared showed that Mr Ebbage personally owed $1,155,000 and Mr Alford owed $970,000. In addition, they jointly owed $2,897,000. The $200,000 owed under the Esanda Finance Facility was part of Mr Alford's personal liabilities. There was no suggestion that that liability had been taken on by Mr Ebbage or was a joint liability. The method proposed for repayment of the Esanda Finance Facility was the sale of SCT Ltd shares.

[84] On 4 January 1995, Mr Alford wrote to Mr Camm at Esanda Finance submitting a repayment proposal showing an immediate payment of $25,000, further payments of $25,000 at the end of January, February and March with payments of $50,000 at the end of June 1995 and December 1995. In that letter he says, "I confirm that the above repayments will be sourced from the sale of public company shares". That statement does not tend to support his claim in these proceedings that the repayments were to be made by Mr Ebbage. On the same date, Mr Alford sent a cheque to Esanda Finance for $25,000; while it is signed by him the cheque is from Cranot as trustee for Cranot Trust No 3. In evidence, Mr Alford said that, contrary to the representation in his letter to Esanda Finance, those funds came from AEF or AES but not from the sale of SCT Ltd shares. He was unable to say what the ultimate source of that money was.

[85] There were file notes of various telephone calls between Mr Alford and Mr Camm with regard to the Esanda Finance Facility in January, February, and August 1995. A file note on 30 January 1995 recorded:-

> "1. AJA rang Rick Mayne and instructed him to sell $150,000 worth of SC shares at any cost.
>
> 2. Sell Charter Pacific shares and options prior to 28/2/95.

3. Get $25,000 of [sic] Reid for 30 days – AJA to put funds in Cranot name and draw Esanda cheque from Cranot P/L 1/2/95."

That file note appears to be in Mr Ebbage's handwriting. Mrs Atkinson asserted that the SCT Ltd shares belonged to Mr Ebbage but provided no basis for this assumption. The fact that Mr Alford instructed their sale suggests that, on the contrary, they belonged to him. She said that the Charter Pacific shares belonged to both Mr Alford and Mr Ebbage, but, even if that were true, and there was no objective evidence as to its truth, it is equivocal as to whether Mr Ebbage had taken on the responsibility for repayment of Mr Alford's Esanda Finance Facility.

[86] The balance sheet and the annual trial balance for Mr Alford drawn up on 16 July 1996 for the financial year ending 30 June 1996 showed the Esanda Finance Facility of $200,000 as a liability of Mr Alford's. It made no mention of the $400,000 or any other figure said to be owing to Mr Alford from Mr Ebbage.

[87] A file note apparently in Mr Ebbage's handwriting on 3 August 1995 recorded:-

"CC [Craig Camm] - Advises
AJA – Lack of co-operation
- has had a gutful of AJA's promises
- treated with total disdain
- had only just provided 94 F/State
- he had been given unconditional promises on numerous occasions for financial statements and letters
- sure that PE had nothing to do with S/port practice
- fees had deteriorated in '94 and they were concerned with their security.

There was no way Esanda wanted the loan or any part of it on their books. IT MUST BE PAID OUT.
CC had copped a lot of flack internally about how AJA loan had been conducted.
AJA to ring CC by 11th August to discuss payout. Esanda may give extra time eg. 2 weeks to 1 month to pay out loan."

[88] A long file note dated 15 August 1995, apparently in Mr Alford's handwriting, of a telephone conversation with Mr Camm did say, *inter alia*, "association with PGE is still basically the problem". It is possible that that comment by Mr Alford may suggest some support for his assertions that the Esanda Finance Facility was repayable by Mr Ebbage and that his association with Mr Ebbage was the source of his problems with Esanda Finance. However, it is more consistent with his asserting to Esanda Finance that the source of his problem with repayment of the loan was his association with Mr Ebbage. His failure to repay moneys well overdue would, of course, require him to give some explanation. His behaviour before and after this date showed that Mr Alford made various promises and representations about repayment which he did not keep.

[89] Nothing in the documentary evidence suggests that he informed Esanda Finance what he now asserts, that Mr Ebbage was contractually bound, by an agreement he made with Mr Alford, to repay Mr Alford's Esanda Finance Facility.

[90] On 17 August 1995, Mr Alford on behalf of Cranot, wrote to Mr Camm at Esanda Finance with a repayment proposal which would result in a balance at 30 December 1995 of $50,000 which would be paid on 31 December 1995. He confirmed that the progressive payments which were outlined would be primarily funded from practice cash flow and that the final payment on 31 December 1995 would, to a large extent, be reliant on proceeds from asset disposal. On 25 October 1995, Terry Simpson of Esanda Finance telephoned and Mr Alford told him that he still expected to be able to pay the remainder owing on 31 December 1995.

[91] On 21 December 1995, Mr Alford told Esanda Finance that settlement of the sale of the AE practice would occur on 30 January 1996, that an amount of $30,000 would be paid by 3 January 1996 with the balance on 31 January 1996. On 8 January 1996, Mr Alford sent a cheque for $30,000 in repayment of the Esanda Finance Facility to Esanda Finance. Cranot had on that day received $30,000 by cheque from Mr Ebbage. As previously noted, Mr Ebbage paid $30,000 to Cranot on 8 January 1996 and $17,500 on 11 January 1996 both of which are recorded as loans to Cranot. There were numerous phone calls in February 1996 from Esanda Finance with regard to the settlement on 31 January 1996 which Mr Alford said had not gone ahead.

[92] On 11 March 1996, Esanda Finance wrote to Mr Alford referring to the fact that the loan agreement expired in October 1993 and that despite various agreements and indulgences an amount of $74,827.61 was owing on the Finance Facility as at 14 March 1996. Esanda Finance said in the letter, "We understand that some problems have been incurred in respect to the proposed sale of part of your practise [*sic*] which has again caused delay to the conclusion of this lending". The "proposed sale" of the Beaudesert practice had in fact occurred by then. Mr Alford said in evidence that this in fact referred to his sale of part of the Southport practice to Garry Best, Alicia Atkinson and Karl Farmer. If so, then it was money which he was to receive and not Mr Ebbage's funds that were to be used to repay the Esanda Finance Facility. Mr Alford was informed in the letter that if Esanda Finance had not received payment by 15 March 1996 they would refer the matter to their solicitors.

[93] The liability was finally discharged on 12 February 1997.

[94] In the statement of claim, the plaintiffs claimed $400,000 as the sum in which Mr Ebbage was indebted to Mr Alford as well as expenses incurred of $76,714.47. Mr Alford said in cross-examination that the figure pleaded of $400,000 was incorrect as $30,000 of that sum had been paid.

[95] Apart from his assertions, the only objective factor which might support Mr Alford's case that Mr Ebbage was responsible for the repayment of Mr Alford's Esanda Finance Facility was the actual payment of $30,000 by Mr Ebbage to Cranot upon the sale of the Beaudesert practice. Like so much of the other evidence, however, this payment was equivocal. It was the price set out in the Beaudesert sale contract for plant and equipment. I did not, for reasons previously set out, find Mr Alford to be a reliable witness on controversial matters and I am therefore unable to rely on Mr Alford's assertions. There was insufficient evidence to persuade me on the balance of probabilities that Mr Ebbage, or any entity associated with him, had agreed to repay Mr Alford's Esanda Finance Facility and that

Mr Ebbage still owes $170,000 or any other amount to Mr Alford, or any entity associated with him, in respect of Mr Alford's Esanda Finance Facility.

Investment in Split Cycle Technology

[96] In February and March 1993 when Mr Ebbage and Mr Alford were discussing the renewal of their partnership and formation of the AE practice, Mr Alford told Mr Ebbage about SCT Ltd. This was an unlisted public company incorporated in New South Wales in March 1988 to research, develop and commercially exploit a patented adaptation of the internal combustion engine invented by Rickard Mayne. Mr Alford took a substantial investment in SCT Ltd himself when he became aware of it after having advised clients of his accountancy practice as to their potential tax liability from their investment in SCT Ltd. Mr Alford did not reveal to Mr Ebbage the names of those shareholders, who were Bretton and Francis Hawker, but told Mr Ebbage that there were many SCT Ltd shareholders who stood to make significant capital profits as a result of share and option purchases in SCT Ltd and that Mr Alford, his family, and other clients, including Colin Diamond, had procured shares or options in SCT Ltd.

[97] After Mr Ebbage expressed some interest in an investment in SCT Ltd, Mr Alford invited him to the Gold Coast Indy car race in March 1993 as a guest in the SCT Ltd corporate box. Mr Alford introduced Mr Ebbage to a number of people involved in SCT Ltd including Mr Mayne, the inventor of the engine known as the split cycle engine and managing director of SCT Ltd.

[98] Mr Alford said in evidence that he and Mr Ebbage attended a meeting with Mr Mayne at 6.00 am on 24 March 1993 at the premises of SCT Ltd at Arundel on the Gold Coast where Mr Mayne demonstrated the principles of his technology and the prototypes. On 26 March 1993, Mr Ebbage purchased an initial shareholding and option holding in SCT Ltd for $40,000. That investment was substantially increased by Mr Ebbage directly with Mr Mayne or through Mr Alford. Mr Alford, however, rather curiously denied under cross-examination that he invited Mr Ebbage to invest in SCT Ltd.

[99] Mr Alford said that Mr Diamond, and his clients and associates, acquired a significant shareholding and option holding in SCT Ltd through Chancetest Ltd ("Chancetest") a company which had been incorporated in the United Kingdom in 1991 specifically to invest in SCT Ltd. Mr Diamond said that Chancetest invested in SCT Ltd shares on Mr Alford's recommendation. It appears that Dario sold 145,000 shares to Mr Diamond for $149,350 on 14 December 1993. Mr Alford told Mr Diamond that he and Mr Ebbage had, independently of each other, each substantially invested in SCT Ltd.

Mr Manthey's invention and the initial agreement

[100] The third important character in the events that unfolded was Steven Manthey. Mr Manthey invented and developed new ideas for internal combustion engines whilst working as a mechanic on the Gold Coast. He had left school in the mid-1970s at the age of 13. While he has great difficulty with literacy, Mr Manthey is an intelligent person with an obvious inventive insight with regard to machinery. His literacy problems could be seen in the obvious difficulty he had reading documents put to him while he was giving evidence, moving his lips as he read to

himself. After leaving school, he started rebuilding car engines and thinking about ways in which they could be improved. Although he had no formal training, he obtained work with a light engineering firm, and then in the late 1980s, he opened a car repair and panel workshop known as Exotic Autos. At around the same time, he met Mr Ebbage who was a car enthusiast. Mr Manthey spent many years working from time to time on rebuilding a Pantera DeTomaso motor vehicle owned by Mr Ebbage. For various reasons, including his lack of skill and interest in that area, Mr Manthey's financial and business affairs were poorly recorded or managed. He has always relied on the advice of others in his financial and business affairs.

[101] During 1992, Mr Ebbage asked Mr Manthey about the organisation of his business. An informal arrangement was made for Mr Ebbage to gather together Mr Manthey's financial records and help Mr Manthey to organise his financial affairs. No cash payment was made by Mr Manthey for this. Instead, Mr Manthey assisted Mr Ebbage by, for example, inspecting a boat on the Sunshine Coast that Mr Ebbage was thinking of purchasing. Mr Ebbage had therefore gratuitously taken on responsibilities to Mr Manthey as his accountant.

Mr Alford's account of two agreements with Mr Ebbage and Mr Manthey

[102] Mr Alford gave evidence by affidavit sworn on 20 March 2002 that he had met Mr Manthey in Mr Ebbage's presence on a number of occasions. He said that in April 1993, Mr Ebbage told him that he had discussed SCT Ltd and its engine technology with Mr Manthey. Mr Ebbage said that Mr Manthey was scathing in his criticism of both the SCT Ltd technology and its inventor, Mr Mayne. Mr Alford said he knew from previous discussions with Mr Ebbage and Mr Manthey that Mr Manthey had many ideas regarding mechanical apparatus including some relating to purported significant improvements on the traditional internal combustion engine.

[103] Mr Alford said that in April or May 1993, Mr Manthey flippantly told Mr Alford and Mr Ebbage at Mr Manthey's workshop that rather than waste their money investing in SCT Ltd shares, they should fund him to develop his ideas. He gave reasons why the split cycle technology would not, and could not, be commercially exploited. Mr Alford said that he and Mr Ebbage disregarded Mr Manthey's criticisms but nevertheless became interested in funding the development of Mr Manthey's ideas.

[104] Mr Alford said that one weekend in late May or early June 1993, he visited Mr Manthey's workshop with Mr Ebbage and again discussed the split cycle technology and Mr Manthey's ideas for the development of an alternative engine technology for "a fraction of the cost" spent by SCT Ltd. He said that at the conclusion of that meeting it was resolved between the three of them that Mr Ebbage would continue discussions with Mr Manthey. Mr Alford said that after returning from Mr Manthey's workshop, he made a file note of those criticisms made by Mr Manthey that he could recall. That file note was not produced at the trial of this action.

[105] Mr Alford said that a week after his meeting with Mr Ebbage and Mr Manthey at Mr Manthey's workshop, an investor and shareholder in SCT Ltd, Gordon Bird, was at the office of the Southport practice for a meeting on a matter unrelated to

SCT Ltd. Mr Alford said that Mr Bird had an engineering background and had invested in SCT Ltd in 1992, having inspected the split cycle engine technology in 1991. Mr Alford said he told Mr Bird of the criticisms made by Mr Manthey of the split cycle engine. Mr Bird was, he said, dismissive of some of the criticisms but agreed that others had merit and had been raised by Mr Bird himself when he initially investigated the technology. Mr Bird did not give evidence at the trial of this matter.

[106] Mr Alford said that immediately after that meeting he told Mr Ebbage of Mr Bird's comments and that he and Mr Ebbage agreed that Mr Alford would discuss Mr Manthey's criticisms with Mr Mayne. Mr Alford said he also told Mr Hawker of Mr Manthey's criticisms. Mr Hawker gave evidence by affidavit and was cross-examined by telephone as he was in New Zealand at the time of the trial. Mr Hawker's evidence confirmed that Mr Alford told him that an associate of Mr Ebbage was critical of Mr Mayne's engine.

[107] Mr Alford gave evidence that on 16 June 1993 he met with Mr Mayne at the SCT Ltd premises and discussed the issues in the file note which he had made and told Mr Mayne that the criticisms had been made by an engineering associate of Mr Ebbage's (that is, Mr Manthey). Mr Mayne gave evidence by affidavit and was cross-examined. He did not recall whether Mr Alford met him on this date. He said that Mr Alford used to visit the factory regularly. Mr Mayne had no recollection of Mr Alford's mentioning the name Steven Manthey, or showing Mr Mayne a list of criticisms in mid-1993.

[108] Mr Alford said that Mr Mayne satisfied his queries. He said that Mr Mayne said he welcomed any inspection or meeting to discuss his technology.

[109] Mr Alford said that he met with Mr Ebbage on the evening of 16 June 1993 and that they agreed they would arrange for Mr Manthey to visit the SCT Ltd factory and inspect the latest version of the split cycle engine. He said that Mr Ebbage obtained Mr Manthey's agreement to inspect the split cycle engine prototypes and that he arranged with Mr Hawker and Mr Mayne for Mr Manthey and Mr Ebbage to attend the SCT Ltd factory. Mr Hawker gave evidence that he arranged for Mr Ebbage and Mr Manthey to meet and speak with Mr Mayne. He said that "from recollection" that occurred in or about mid-July 1993. Mr Hawker was not however himself present at any such meeting and has no independent knowledge of the date. His evidence was consequently of little assistance in determining the date of the visit by Mr Manthey and Mr Ebbage to the SCT Ltd factory.

[110] Mr Alford said that an inspection by Mr Ebbage and Mr Manthey of the engine took place at the SCT Ltd factory on 14 July 1993. Mr Alford said that he met with Mr Ebbage earlier that day and arranged to meet with Mr Ebbage and Mr Manthey after the inspection. Mr Alford said that he received a call from Mr Ebbage at about 12.35 pm advising that he was delayed and would arrive with Mr Manthey in approximately half an hour. Mr Alford said the meeting in fact took place at the Southport practice at about 2.00 pm and lasted for two hours and 45 minutes, and that as a result he was obliged to rearrange a meeting he had previously scheduled with clients at the Nerang practice for 4.00 pm that day.

[111] Mr Alford said that Mr Manthey was steadfast in his criticism of the split cycle technology. Mr Alford said that during the meeting on 14 July 1993 he wrote a

three page prompt itemising some 28 criticisms and comments made by Mr Manthey during that meeting. There is a file note on AE practice letterhead in Mr Alford's handwriting which he said was the prompt that he wrote during the meeting on 14 July 1993. However the file note was undated. Mr Alford said that he was nevertheless able to date the meeting from the telephone message recorded by a member of staff advising that "Steve" and Mr Ebbage would arrive in half an hour.

[112] There is a telephone message which Mr Alford referred to as supporting this version. It is to "Tony" from "Paul" dated 14 July 1993 at 12.35 pm and says, "Will be here in ½ hour with Steve". In the plaintiffs' submissions it was argued that what happened was that "Ebbage leaves message for Alford that he and Manthey would be at Alford Ebbage Southport office in half hour". The message does not refer in terms to Mr Manthey but rather to "Steve". As submitted by the defendants, it is equally likely that the message referred to any other client of the accountancy firm or indeed any other person called Steve.

[113] Mr Mayne was adamant, however, that no inspection by Mr Manthey took place on 14 July 1993. Mr Mayne's clear recollection was that Mr Manthey did not inspect his invention until about the last week of October 1993. In an affidavit filed in reply on 2 October 2002, Mr Alford denied the correctness of this statement. He asserted that Mr Mayne's recollection of events was coloured by demands he made on Mr Alford for the repayment of $80,000. A letter seeking repayment was annexed to the affidavit. Mr Alford asserted in his affidavit of 2 October 2002 that the loan was made by Mr Mayne to Mr Ebbage. Mr Mayne's letter suggests that the loan was made to Mr Alford and that Mr Alford was then asserting that he borrowed the money for Mr Ebbage. These matters were not put to Mr Mayne by Mr Alford's legal representatives who rather suggested to him when he was cross-examined by Mr Sofronoff QC that he was mistaken. I do not accept Mr Alford's assertion that Mr Mayne's evidence was coloured. He gave the impression of being an entirely honest, disinterested witness.

[114] Mr Alford said that during the meeting on 14 July, Mr Manthey elaborated on his own technology and said that he had ideas for at least three variations or adaptations of the internal combustion engine which he believed were both unique and of greater merit than the split cycle technology. Mr Alford said it was clear to him that Mr Manthey was no longer pretending to be a disinterested party merely assisting Mr Ebbage and Mr Alford in relation to the split cycle engine. Mr Manthey was instead promoting his own ideas and testing their interest in investing in his ideas. Mr Manthey stressed, according to Mr Alford, that his ideas could be developed at a minimum of cost and time.

[115] Mr Alford said that rather than taking detailed file notes he had previously agreed with Mr Ebbage that Mr Ebbage would attend on Mr Manthey after the meeting and prepare a comprehensive memorandum, both of Mr Manthey's criticisms of the technology and Mr Mayne's responses to those criticisms. He said that he recalled seeing such a file note which was discussed between himself and Mr Ebbage at considerable length but this document was not produced at the trial of this action. Mr Alford wished to sheet home blame for the loss or destruction of many documents which he said existed, to Mr Manthey but I do accept that is an explanation of the failure of Mr Alford to produce a number of significant documents.

[116] Mr Alford said that it was agreed at the end of that meeting that Mr Ebbage would meet with Mr Manthey not only to prepare a detailed file note of Mr Manthey's criticisms of the split cycle engine, but also to discuss Mr Ebbage's and Mr Alford's ability and willingness to offer financial support for the development of his ideas. Mr Alford said he was unable to take further part in any immediate discussion and that Mr Ebbage, in any event, had advised him that Mr Manthey would feel more comfortable discussing his ideas with Mr Ebbage only. Mr Alford deposed that the topic was the subject of an in-depth conversation between himself and Mr Ebbage on the next day.

[117] Mr Alford said that he was contacted by Mr Ebbage sometime during the next fortnight between 16 and 26 July 1993 when he was interstate. Mr Ebbage said that Mr Manthey was keen for Mr Ebbage and Mr Alford to fund the development of a prototype.

[118] In his affidavit, Mr Alford deposed that in the week commencing 2 August 1993, a meeting was held between himself, Mr Ebbage and Mr Manthey in the offices of the Nerang practice. He said that at that meeting, it was agreed that Mr Ebbage and Mr Alford would financially support Mr Manthey; that Mr Manthey would develop a prototype engine on behalf of a joint venture between the three of them; that Mr Ebbage and Mr Alford would attend to all other matters associated with the joint venture including providing accounting and legal advice, developing patent applications and the like; and that they would share equally, as between Mr Ebbage and Mr Alford on the one part, and Mr Manthey on the other, in relation to any benefit derived from the exploitation of Mr Manthey's technology. Mr Alford then referred to that agreement as the "AET joint venture". Mr Alford said that he and Mr Ebbage made a financial commitment to Mr Manthey on the basis of his estimate that a working prototype would cost no more than $10,000. This alleged agreement will be referred to as the 2 August 1993 agreement. Under cross-examination by Mr Goodwin, Mr Alford said that the agreement was to develop a prototype for an engine for $10,000 that would take no longer than three months to construct. Later he said the agreement was to own the technology rather than just to develop the prototype.

[119] During cross-examination by Mr Griffin QC, Mr Alford said that what was agreed at the August 1993 meeting was that he and Mr Ebbage would accept Mr Manthey's estimate of costs to develop the first prototype in an amount of $10,000; that Mr Manthey would build the first prototype for an amount less than $10,000 and in the time frame of approximately three months; that Mr Alford and Mr Ebbage would fund the $10,000; that there would be an agreement that the technology would be 50 per cent owned by Mr Manthey, 25 per cent owned by Mr Alford and 25 per cent by Mr Ebbage.

[120] Mr Alford said that, subsequently, he and Mr Ebbage discussed their respective interests in the AET joint venture and its funding. They agreed that he and Mr Ebbage, or companies associated with them respectively, would share equally in 50 per cent of the technology developed and any income or benefits derived from the exploitation of that technology, and that the AE practice would fund the venture in the initial stage. Mr Alford says that these agreements that were reached were never formally documented. Under cross-examination, Mr Alford said that he and Mr Ebbage agreed that the company which owned the invention would do so as a bare trustee for, at that time, unidentified beneficiaries. He later said that there was

never any decision made as to how Mr Alford and Mr Ebbage would hold their interests.

[121] Mr Alford, however, deposed in his affidavit that he agreed with Mr Ebbage that Mr Alford's interest in the joint venture company to be incorporated for that purpose, would be held by Dario as trustee for the Dario Practice Trust. He said that Mr Ebbage told him that it was his wish that his interest in the joint venture would be held by PPG as trustee for the PPG Trust.

[122] Mr Alford says that Mr Manthey told him, at a time not specified by Mr Alford, that he was not prepared to reduce his interest in the engine technology below that of 50 per cent.

[123] Mr Alford then swore in the affidavit on which he relied in this matter that a second meeting took place on the morning of 27 October 1993 between himself, Mr Manthey and Mr Ebbage at the offices of the Nerang practice. He referred to a handwritten memo on AE practice letterhead, dated 27 October 1993, in Mr Ebbage's handwriting, which refers to "Meeting with Steve Manthey". Mr Alford says that the file note was prepared by Mr Ebbage prior to the meeting on 27 October 1993 and reflected matters discussed between the three of them during that meeting. Mr Alford deposed that on the morning of 27 October, he attended upon two clients at their business premises, the first of which was at Molendinar, and the second of which was at Olson Avenue, Labrador. He said he then travelled from Labrador to the Nerang practice where he met with Mr Manthey and Mr Ebbage.

[124] Mr Alford said that one of the matters discussed was that the estimated cost to produce the first prototype engine had increased from $10,000 to $25,000, although Mr Manthey still prevaricated as to that sum, and could not guarantee that the engine could be produced for that amount of money. It was agreed that a detailed estimate of the funds required to develop the prototype would be undertaken and that Mr Ebbage was to obtain an estimate from a patent attorney in relation to the likely cost that would be incurred in undertaking searches, and in due course, lodging a provisional patent. Mr Alford said that the cost estimate had increased substantially as a direct consequence of Mr Manthey's need for payment of a wage during the development stage of the prototype engine. Notwithstanding Mr Manthey's original advice that he had concepts for at least three engines, Mr Alford said that the development of only one engine prototype was discussed.

[125] During the second meeting, Mr Alford said that he undertook to contact Thomas Ahearn, a patent attorney with whom he had a business association, to make arrangements for the three of them to attend on Mr Ahearn.

[126] Mr Alford said that Mr Manthey confirmed during the meeting that he had told Mr Ebbage that if Mr Alford and Mr Ebbage funded the development of the prototype engine, then they would also share in the rights to any other concepts, designs or ideas that Mr Manthey had in the past or which he might develop in the future during his association with them. The further agreement allegedly reached on that day will be referred to as the 27 October 1993 agreement.

[127] During cross-examination by Mr Griffin, Mr Alford said that the 27 October 1993 agreement varied the August 1993 agreement in the following ways: the price had increased from $10,000 to $25,000; that the moneys would be repayable; that

Mr Manthey would receive a wage for the work he had put in; that they would immediately move to have patent attorneys appointed to further investigate the novelty of the technology; that Mr Alford would make contact with Mr Ahearn; that the time frame for the development of the engine had extended from three months to four to six months; that Mr Manthey was not prepared to provide a guarantee as to the costs; that the name Advanced Engine Technology Pty Ltd was proposed to be the name of the company; that drawings and a written précis of how the engine worked needed to be prepared; and that Mr Ebbage was to attend upon Mr Manthey for the purpose of writing a précis of how the engine worked.

[128] Mr Alford said a number of steps were undertaken between 22 October and 3 November 1993 to implement the 2 August 1993 agreement. These included patent inquiries being undertaken; lengthy discussions between Mr Ebbage and Mr Manthey in relation to the proposed operation of the engine prototype and the need to prepare documents and drawings in anticipation of a meeting with patent attorneys; discussions between Mr Ebbage and Mr Alford in relation to the results of patent searches that were undertaken; Mr Manthey's preparing draft drawings in relation to the technology; the preparation of a written statement by Mr Manthey and Mr Ebbage in relation to the mechanical advantages of the technology sufficient for him to attend at the offices of the patent attorney to discuss the matter further; and reviews by Mr Ebbage of drawings and documents prepared by Mr Manthey.

[129] Mr Alford said that development of the technology progressed and a considerable amount of time and energy were expended by the three of them in preparing documentation for a provisional patent application and subsequently for patents.

Mr Manthey's account of the business agreement in 1993

[130] Mr Manthey's version of events during 1993 was rather different. He said that in mid-1993, he gave serious consideration to ideas for engine design which he thought would work. He had little time or money to devote to developing his ideas and was uncertain whom to trust to tell about his ideas. He discussed his ideas with a friend and customer, Paul Lingard, and another potential investor, Robert Sterling. He was not, as alleged in the statement of claim, engaged in research on variations and adaptations of the internal combustion engine from 1992.

[131] In late October 1993, Mr Ebbage visited Mr Manthey at his workshop and asked him to inspect a split cycle engine in which Mr Ebbage had invested as Mr Ebbage was considering increasing his investment. Mr Manthey went with Mr Ebbage to the SCT Ltd factory where the engine's inventor, Mr Mayne, showed them the engine and a video about its operation.

[132] Mr Mayne also recalled this meeting. Mr Mayne recalled receiving a telephone call from Mr Ebbage in the last week of October 1993. Mr Ebbage asked him if he could bring a mechanic friend, named Steven Manthey, to look at the split cycle engine running. As Mr Ebbage was a substantial shareholder, Mr Mayne agreed. It was his usual practice to hold demonstrations only on Saturdays except for substantial shareholders.

[133] On 27 October 1993, Mr Ebbage attended the SCT Ltd factory at 7 Technology Drive, Arundel with Mr Manthey, whom Mr Mayne had not previously met. Mr Mayne showed them both a video and then his engine. Mr Mayne said that

Mr Manthey asked a few questions and it was clear to him that Mr Manthey understood how his engine worked. The demonstration lasted for about thirty minutes. Mr Mayne was able to recall the date because about two or three weeks later, in mid-November 1993, a car belonging to Mr Ebbage that Mr Manthey was working on was stolen. This independent evidence given by Mr Mayne is strongly supportive of Mr Manthey's version of events. Mr Manthey recalled his embarrassment at Mr Ebbage's Pantera being stolen from in front of Mr Manthey's unit. That this occurred in mid-November is confirmed by a file note written by Mr Ebbage on 18 November 1993.

[134] Mr Mayne also recalled that a couple of days after Mr Ebbage and Mr Manthey came to the demonstration, Mr Alford visited the SCT Ltd factory. Mr Alford was already by that time a substantial shareholder and continued to increase his shareholding to a point where it exceeded $1,000,000. Mr Mayne gave evidence that Mr Alford must have visited him prior to 31 October 1993 because Mr Mayne departed from Australia on that date. Mr Alford told Mr Mayne that Mr Manthey had been critical of Mr Mayne's engine, and that Mr Ebbage was thinking about backing Mr Manthey who had his own idea for a combustion engine. Mr Alford agreed in cross-examination that he said words to that effect to Mr Mayne but said he did not recall, did not recollect and nor did he believe that he said that Mr Ebbage was thinking of backing Mr Manthey. I prefer Mr Mayne's evidence on this point to that of Mr Alford who managed to be more adamant whenever his evidence was less reliable.

[135] After their visit to the SCT Ltd factory, Mr Manthey told Mr Ebbage that he did not think the split cycle technology would work. Upon realising that Mr Ebbage had invested in a number of inventions, Mr Manthey broached the subject of his own invention to ascertain his interest in investing in it. Mr Ebbage assured Mr Manthey that he would respect any confidence given to him because of their "client-professional" relationship. He told Mr Manthey not to discuss his invention with anyone else. Mr Manthey estimated that it would take him about three months and cost about $30,000 to build an engine based on his novel ideas. Mr Ebbage offered to provide funding, accounting and business management expertise. No agreement was reached and discussions continued.

[136] Mr Manthey could not remember the date of his meeting with Mr Ebbage and Mr Mayne but it appears likely that it occurred on 27 October 1993 as recalled by Mr Mayne and recorded in a file note by Mr Ebbage. The client is noted as "Proposed Name Advanced Engine Technology P/L". The subject matter is said to be "Patent engine technology". The file note is in Mr Ebbage's handwriting and recorded as follows:

> "Meeting with Steve Manthey
>
> 1. Advise him not to discuss his engine with anyone.
> 2. Need to see Patent attorney immediately to see if it is patentable.
>
> Basically – uses centrifugal force to enable pistons to O/S of engine.
>
> [There follows a hand drawn diagram of a centrifugal engine which has not been reproduced in these reasons]
>
> 3. If idea is patentable and works in theory establish structure with

50% o/ship PE & AJA
50% SM

∴ is comp best??

4. Basis of agreement

PE & AJA to fund

(i) application for patent

(ii) Develop cost to get prototype engine - est costs $25,000 including wages to SM.

To be on a loan basis @ an int rate to be determined.
SM estimate 4-6 mths to build a working prototype.

SM agreed that entity established would have the rights to all engine designs developed by him.
Wants an undertaking that we would not stifle develop and marketing.
Basic plan

1. Preliminary meeting to determine if it can be patented.
2. If it can – establish Coy.
3. Apply for Patent.
4 Develop working prototype
5. Testing (basic).
6. Marketing for engine recognition
7. Public float
8. Sell technology."

[137] This records a joint intention to establish a joint venture agreement. There was no concluded agreement but rather a plan of action. At this stage, Mr Ebbage was obviously contemplating including Mr Alford in the investment.

[138] About a week after these discussions, Mr Ebbage offered to drive Mr Manthey to Brisbane to meet a patent attorney he knew. Mr Ebbage picked up Mr Manthey from his workshop in Burleigh Heads. During the drive to Brisbane, Mr Manthey asked Mr Ebbage what role he wanted to have. Mr Ebbage told him that they had entered a type of partnership. When Mr Manthey said that he had other people who were prepared to invest in the project, Mr Ebbage exclaimed angrily that he had the contacts and experience and the money that Mr Manthey needed. He told Mr Manthey that all Mr Manthey had to do was work on the invention and the proceeds would be split 50/50. He told Mr Manthey to make up his mind before they got to the Beenleigh exit or he would turn around and go back. Mr Manthey agreed to this proposition. They then attended at the office of patent attorney, Mr Ahearn. This oral agreement represented an initial agreement between Mr Manthey and Mr Ebbage in what became the AET joint venture.

[139] Mr Ahearn is a patent attorney and principal of Ahearn Fox Patent and Trademark Attorneys. He has been a registered patent attorney since 1955. He gave evidence, which I accept, that Mr Ebbage and Mr Manthey attended his office in Brisbane for the first time on 8 November 1993. Mr Alford's evidence, which I do not accept, was that Mr Ebbage told him that Mr Manthey and he attended on Mr Ahearn on Friday, 5 November 1993. Neither do I accept, as Mr Alford swore in his affidavit in reply sworn on 2 October 2002 that Mr Manthey attended on Mr Ahearn with Mr Ebbage on Friday, 3 November 1993. I do not accept that Mr Ebbage wished

Mr Alford to attend the meeting with Mr Ahearn but that Mr Alford was unable to do so.

[140] At the meeting on 8 November 1993, Mr Manthey was introduced to Mr Ahearn as the inventor of an internal combustion engine and Mr Ebbage was introduced as his accountant. Mr Ahearn had not previously met either Mr Ebbage or Mr Manthey. Mr Ahearn gave evidence that he did not recall if it was or was not clear at the first meeting whether Mr Ebbage was Mr Manthey's business partner in the development of Mr Manthey's invention. However, it certainly became apparent to him from discussions with Mr Ebbage early on regarding the assignment of the invention to AET, that he also had an interest in the invention and was not just Mr Manthey's accountant.

[141] Mr Ahearn did not recall Mr Ebbage expressly stating to him at the first meeting that he had been referred to him by Mr Alford. However, Mr Ahearn believed that he would have assumed Mr Alford had referred Mr Ebbage to him as Mr Alford referred a number of inventors to Mr Ahearn during the late 1980s and early 1990s. Mr Ahearn had, over that period of time, had brief dealings with Mr Alford from time to time. He had also filed two trademark applications in the name of his firm, Alfords, in December 1990 and these were registered in June 1993. Prior to meeting Mr Ebbage, Mr Ahearn was aware from his dealings with Mr Alford that Mr Ebbage was his partner in an accounting practice.

[142] At the meeting on 8 November 1993, Mr Ebbage spoke of the plans that he and Mr Manthey had to commercialise Mr Manthey's invention if it was patentable. They said that they were intending to build a prototype. At that meeting, the invention was only a very preliminary concept and components of the planned prototype had not been manufactured; nor had Mr Manthey drawn detailed diagrams of his concept to scale.

[143] Mr Ahearn recalled that Mr Manthey gave him two sheets of simple drawings to illustrate his concept. The drawings were very elementary. Mr Manthey also gave Mr Ahearn two double-sided sheets in which he set out a statement of practical applications and the differences and the advantages of his invention when compared to the much publicised engine of SCT Ltd.

[144] Mr Manthey explained to Mr Ahearn how his invention would work, using those sketches and notes. Mr Ahearn told Mr Manthey and Mr Ebbage that he had never seen anything similar to the concept as illustrated. Mr Ahearn said that the drawings and notes would be sufficient to enable him to prepare an initial draft provisional specification for the invention which was limited to radial engines (as opposed to the very different axial piston engine which Mr Manthey brought to him many months later). Mr Ahearn recalled that his initial instructions were that the application for the provisional patent would be filed in Mr Manthey's name. Mr Ahearn explained to Mr Manthey and Mr Ebbage at the first meeting that Mr Manthey would need to prepare more detailed drawings to support the application, particularly for the purpose of the complete application in 12 months time, and that further drawings before then might be made the subject of further provisional patent applications to be combined in a single complete application 12 months after the first provisional application.

[145] On 10 December 1993, Mr Ahearn wrote to Mr Ebbage enclosing a draft provisional specification. The purpose of the letter was to facilitate Mr Ebbage's reporting to Mr Manthey. In this letter, he confirmed with Mr Ebbage that as the invention developed, Mr Ahearn's firm would recommend a draftsman be engaged to provide adequate drawings, and further confirmed that the provisional patent would be in the name of "Steven Charles Manthey, of 7/15 Bridgeman Drive, Reedy Creek, Burleigh Heads, in the State of Queensland".

[146] In late December 1993, Mr Ebbage brought a sheet of paper to Mr Manthey's workshop on which the terms of their business agreement were typed in brief. Mr Manthey signed it and gave it back to Mr Ebbage. He has not seen it since.

[147] Mr Ebbage and Mr Manthey visited Mr Ahearn throughout the first three months of 1994 with more detailed drawings for the engine. These further dealings are referred to in more detail later in these reasons.

[148] Mr Ebbage agreed to pay Mr Manthey $500 a week as a wage while he developed the engine prototype. They agreed to use Peter McDonald ("Mr McDonald"), a local fitter and turner, to assist in the development of the engine. Mr Ebbage told Mr Manthey that he could begin work after Christmas 1993, and that Mr Ebbage would open a cheque account and deposit money in it as it was needed. Mr Manthey was to buy materials, write cheques for payment and write up the cheque butts and he and Mr Ebbage would meet weekly. This discussion occurred in early December 1993. Mr McDonald agreed with Mr Manthey to assist on the project. Both Mr McDonald and Mr Manthey started working long hours with Mr Manthey drawing cheques as necessary to pay for labour and materials.

[149] It is apparent that it is not possible for both accounts given of what arrangements were made, to be true.

[150] Mr Alford's account of the oral agreements reached on 2 August 1993 and then on 27 October 1993 is very clearly stated in his affidavit sworn on 20 March 2002. He admits to no uncertainty in his affidavit as to precisely what occurred or when and where. Yet the plaintiffs' pleadings and earlier affidavit show that this has not always been so. His dogmatic way of giving evidence, far from suggesting a person who was being candid, suggested that he had decided what version of events he was going to tell and from which he would not deviate.

[151] In paragraph 12 of the original statement of claim filed in this matter on 27 April 2000 prior to Mr Manthey or any of his interests being made a party, the plaintiffs alleged that an oral agreement was reached in about **September 1993** between Mr Alford, Mr Ebbage and Mr Manthey as follows:-

(a) That for the purposes of developing and exploiting the technology, the parties would form a joint venture vehicle;

(b) That Mr Ebbage and Mr Alford, and/or parties procured by him, would invest moneys in the joint venture vehicle for the development and exploitation of the technology; and

(c) That the interest in the joint venture vehicle would be held as follows:

- 50 per cent – Mr Manthey
- 25 per cent – Mr Ebbage (either personally, or beneficially through the PPG Trust)

- 25 per cent – Mr Alford (either personally, or beneficially through the Dario Practice Trust).

[152] In the amended statement of claim filed 6 October 2000 in which Mr Manthey and other parties associated with him were joined as defendants, the plaintiffs alleged in paragraph 3 that in **late 1992**, Mr Ebbage and Mr Alford agreed with Mr Manthey to form a joint venture to investigate the possibility of developing variations and adaptations in the internal combustion engine on terms that:

(a) Mr Ebbage and Mr Alford would contribute $10,000 to Mr Manthey to develop a working prototype of an internal combustion engine concept;
(b) Mr Manthey would develop the said working prototype; and
(c) The parties would share the benefits arising from the joint activity equally as between Mr Manthey on the one hand and Mr Alford and Mr Ebbage on the other.

[153] In paragraph 13, it was alleged that in or about **September 1993**, an oral agreement was made between Mr Manthey, Mr Ebbage and Mr Alford at the office of the Southport practice that:

(a) Mr Ebbage and Mr Alford would procure a company associated with them to contribute a further $40,000 to continue funding Mr Manthey's research into variations and adaptations of the internal combustion engine;
(b) A joint venture company would be established;
(c) Mr Manthey would hold a 50 per cent interest in the joint venture company, and persons or companies associated with Mr Alford and Mr Ebbage would hold a 50 per cent interest in the joint venture company;
(d) The joint venture company would thereafter have the opportunity to take intellectual property and other property from Mr Manthey as appropriate for the purposes of the joint venture;
(e) The joint venture company would commercially exploit any invention by Mr Manthey made in the course of Mr Manthey's research which had been funded as aforesaid; and
(f) The practice would provide accountancy services in the joint venture for which the practice would be paid if, and when, the joint venture was successful.

[154] In further amended statements of claim filed on 31 May 2001 and 9 October 2002, the allegation contained in paragraph 3 of the earlier amended statement of claim, that an agreement had been made in late 1992, and that a further agreement had been made in September 1993 remained in the pleading, as did the allegations in paragraph 13 as to its terms.

[155] There were some subsequent amendments which culminated in a fifth amended statement of claim filed by leave on 18 November 2002, near the end of the trial of this matter after Mr Alford had finished his evidence, in which paragraph 3 was amended to replace the opening words, "In late 1992", with the words, "In or about early August 1993 at the office of Alford Ebbage in Price Street, Nerang". In paragraph 13, the words, "In or about September 1993, at the Practice office at 5/7 Hicks Street, Southport" were replaced with the words, "On or about 27 October

1993, at the Practice office at Price Street, Nerang". The words in paragraph 13(a) that alleged that it was orally agreed that "Ebbage and Alford would procure a company associated with them to contribute a further $40,000 to continue funding Manthey's research into variations and adaptations of the internal combustion engine" were changed to replace the sum of "$40,000" with the sum of "$25,000". These changes conformed with Mr Alford's sworn evidence at the trial.

[156] In an affidavit sworn on 7 September 1999, Mr Alford deposed that, to the best of his recollection and in the absence of books and records to confirm his belief, he had a lengthy meeting with Mr Manthey and Mr Ebbage at his offices at Hicks Street, Southport in or about September 1993, on the day that Mr Manthey told him that Mr Manthey and Mr Ebbage had attended the offices of SCT Ltd to view the engine then under development by SCT Ltd.

[157] Mr Alford explained this evidence, which contradicted his later affidavit evidence as to the time, place and some of the terms of the contractual arrangements between himself, Mr Ebbage and Mr Manthey, by saying that he was requested by his solicitor to swear an initial affidavit in approximately August or September of 1999 for the purpose of seeking an injunction to prevent the appointor of the Ebbco Trust from changing the trustee from EOS to HPM. At that time, he did not have the books and records of AET, he had not reviewed the material that was then in the AE practice office and he had not received the information that was subsequently discovered. He said he did have documents prepared by Mr Ebbage that indicated a date of 1992 and that is why he used that date.

[158] The difficulty with that explanation is that there is nothing in the books and records which would refresh Mr Alford's memory of any meeting in August 1993 as there is no record of. Mr Alford admitted to being a prolific note taker and yet was unable to say whether or not he had taken a note of any such meeting. He blamed the defendants in the proceedings for not disclosing the note if it existed. There is no convincing reason why in October or November 2002 he would be able to recall the contents of two meetings and that they occurred in August and October 1993, if he was unable to recall that in 1999. At the trial, he said he had told his solicitors "some two years ago" there was no meeting in 1992. He was unable to say why his statement of claim had not been amended. What he appears to have done is to pore through books and records in an endeavour to construct a case that would make it appear that there were oral agreements entitling him to a share in the current proceeds of the development of Mr Manthey's technology. His evidence often had the appearance of contrived reconstruction from documents together with invention of conversations.

[159] When cross-examined by Mr Griffin QC, Mr Alford said that the agreement referred to in paragraph 12 of the statement of claim filed on 27 April 2000 as having occurred in about September 1993, should now be read as referring to the agreement made in August 1993. There is no mention in that statement of claim of any later agreement made in October 1993 or at any other time.

[160] In his affidavit sworn on 7 September 1999, Mr Alford deposed in paragraphs 19 to 21 to meeting Mr Manthey for the first time at his factory at Burleigh Heads at some time prior to September 1993. Mr Manthey told Mr Alford that he did not have the financial resources to develop the technology, that he had a strong distrust of outsiders and that unless his financial position improved, his ideas would remain

just that. Mr Alford said he and Mr Ebbage agreed to invest $10,000 in the development of an engine prototype by Mr Manthey. At the trial, Mr Alford said he was there referring to one of the many occasions on which he met Mr Manthey at his factory prior to September 1993.

[161] In paragraph 24 of the same affidavit sworn on 7 September 1999, Mr Alford referred to a meeting at Hicks Street, Southport in or about September 1993 where Mr Manthey told him that Mr Manthey and Mr Ebbage had that day attended at the offices of SCT Ltd to view the engine under construction there. When cross-examined on this matter, Mr Alford said it in fact referred to the meeting which he referred to in his affidavit sworn on 20 March 2002 as having occurred on 14 July 1993. Apart from the difference in dates between the two affidavits, there is a difference in chronology with the agreement to invest $10,000 referred to before, not after, the meeting of 14 July 1993. When faced with this in cross-examination, Mr Alford said that the meeting referred to in paragraph 21 of his affidavit of 7 September 1999 occurred in August 1993 at the Nerang practice after the meeting referred to in the following paragraph, paragraph 22, which actually occurred in July 1993 at the Southport practice.

[162] He attempted to explain these contradictions by saying that the affidavit of 7 September 1999 "was prepared in extreme urgency without the benefit of [his] review of many books and records, and, in addition, the affidavit was reviewed by [his] solicitors and counsel, and there were certain statements which [he] had written in which were removed as being unnecessary for the purposes of the statement". He said that when he swore that affidavit he had no recollection of the meeting at the Nerang practice at which the 2 August 1993 agreement was reached. It almost defies belief that in 1999, Mr Alford could not remember a meeting which by 2002 and 2003 he described as essential to the formation of the joint venture and of which he had acquired a good memory.

[163] With regard to the alleged meeting of 27 October 1993, Mr Alford did rely upon the handwritten note made by Mr Ebbage of that meeting. That handwritten note, however, makes no mention of Mr Alford being present at such a meeting. Mr Alford sought to explain that by saying that the note was prepared prior to the meeting rather than during or after the meeting. This is an opportunistic, adventitious explanation which I do not accept. He was obliged to concede that he did not see the document before the meeting and the basis of his sworn testimony that it had been prepared before the meeting was that Mr Ebbage told him the evening before that he would prepare a file note for the meeting. He said the file note reflected what had actually occurred at the meeting, which, of course, is consistent with its being a file note of a meeting. On no version did Mr Ebbage have any technical expertise. It is most unlikely that he could have drawn the diagram of the centrifugal engine which is contained in the file note without Mr Manthey being present. That is inconsistent with the note having been prepared prior to the meeting Mr Ebbage had with Mr Manthey and I do not accept that it was prepared prior to the meeting.

[164] Mr Alford was unable to recall whether or not he had made a file note of that meeting and was unable to produce any such file note, although his evidence was that he took notes at almost all meetings. Given the significance of those two alleged meetings on 2 August and 27 October 1993, it is most unlikely that

Mr Alford, had he attended any such meetings, would not have taken a file note of the meeting which he would have retained and been able to produce.

[165] The AE practice, in common with the practice of many professionals, recorded the time spent attending to work for clients by time sheets. AET was allocated the code "ADVEN14" in the time sheets kept by the AE practice. Mr Alford's practice was to record carefully all of the time which he spent at work for clients.

[166] The time sheets of the AE practice showed that the first work for AET was performed on 27 October 1993. It recorded a long meeting between Mr Ebbage and Mr Manthey noted by Mr Ebbage as "Meeting SM re engine design, DIS Ahearn re PA". It appears that they met with regard to the engine design and had a discussion about seeing Mr Ahearn about a patent application as recorded in the file note of that meeting to which I have already referred. Mr Ebbage did not note Mr Alford as being present at that meeting. Mr Alford did not himself record time spent at the meeting. His explanation was that he did not consider AET to be a client. Another, and in this case more compelling, explanation for the fact Mr Alford was not mentioned as being present in Mr Ebbage's note of the meeting, the time sheet recording by Mr Ebbage of the meeting and the failure by Mr Alford to record a time sheet of his attendance at the meeting, was that Mr Alford did not, contrary to his sworn testimony, attend this meeting. Mr Alford's dishonesty about his attendance at the meeting on 27 October 1993 necessarily threw even more doubt on the truthfulness of his account of attending a meeting with Mr Ebbage and Mr Manthey on 2 August 1993.

[167] I have previously set out in full the record that Mr Ebbage made of the meeting he had on 27 October 1993. It does not refer to any earlier agreement and I cannot accept that there was any such earlier agreement on 2 August 1993. Mr Alford's diary for 1993 made no mention of any meeting with Mr Manthey or Mr Ebbage on 2 August or 27 October 1993.

[168] As I have previously noted, Mr Ebbage's death in 1998 meant that the court was unable to hear evidence from him as to what occurred. His father however, gave evidence that Mr Ebbage never mentioned to him that Mr Alford had an interest in the "OX2 engine" or that Mr Alford and Mr Ebbage had formed a joint venture to develop the "OX2 engine". The contemporaneous documents are, in these circumstances, of even greater assistance than might usually be the case. I have been reluctant to rely on the oral or affidavit evidence alone of Mr Alford or, to a lesser extent, Mr Manthey except where it was uncontroversial, supported by evidence from some independent source, or was inherently credible. It was not forthrightly suggested to Mr Manthey in cross-examination that he took part in meetings on 2 August 1993 and 27 October 1993 where such agreements were made. Neither did Mr Alford put these meetings to Mr Manthey in the conversations with him which he covertly recorded. Mr Alford's evidence as to agreements made on 2 August 1993 or on 27 October 1993 was not uncontroversial nor was it supported by evidence from a reliable independent source; nor was it inherently credible. In addition, I gained a poor opinion of his credibility from his oral evidence. I do not accept the existence of either oral agreement as alleged by Mr Alford.

[169] Mr Alford was not unaware, however, of the discussions that were going on between Mr Manthey and Mr Ebbage. Mr Ebbage's file note of 27 October 1993

made reference to Mr Alford. There are other later documents suggesting that Mr Alford and Mr Ebbage had proposed that Mr Alford would take a 50 per cent share in the half-share that Mr Ebbage had in the joint venture. The Ebbage defendants admitted that there were negotiations about such a proposed joint venture. But Mr Alford's pleaded case stands or falls on whether he was able to prove on the balance of probabilities that his interest in Mr Manthey's invention arose from agreements made on 2 August 1993 and 27 October 1993 between Mr Manthey, Mr Alford and Mr Ebbage. I am not satisfied that the agreements pleaded were made.

[170] Mr Alford gave oral evidence that it was proposed as at 27 October 1993 to incorporate a company with the name "Advanced Engine Technology Pty Ltd". He said that, to the best of his recollection, that was a discussion which occurred between Mr Ebbage and Mr Alford and separately between Mr Ebbage and Mr Manthey. This evidence about a matter which was not particularly significant perhaps unwittingly gave an insight into what actually occurred. It appears most likely that Mr Alford and Mr Ebbage discussed with each other the formation of a joint venture agreement with Mr Manthey. Mr Ebbage and Mr Manthey separately discussed the formation of a joint venture. There was no meeting between Mr Alford, Mr Ebbage and Mr Manthey at which there was an agreement to form a joint venture. The meeting in which an arrangement was discussed to form a joint venture was between Mr Ebbage and Mr Manthey. Mr Ebbage had an intention to invite Mr Alford to share his half interest. Various proposals were drawn up; but, as will be seen, for various reasons that was never the subject of formal agreement with Mr Alford or any entity representing his interests. Mr Ebbage also envisaged that the AE practice would provide his accountancy services and lend money to the joint venture he formed with Mr Manthey. It appears that this did occur.

Involvement of Colin Diamond

[171] Mr Alford deposed in his affidavit that prior to the incorporation of AET in January 1994, it became apparent to him from the estimates prepared by Mr Ebbage that he and Mr Ebbage would be obliged to commit more than was originally anticipated financially to the AET joint venture. Not only had they committed in the short term to investing in excess of what they had originally contemplated investing in AET, said Mr Alford, they had committed to a long term investment which would greatly exceed the original estimates provided by Mr Manthey in relation to development and commercialisation of a prototype engine. Mr Alford said he had consequently approached Mr Diamond in late 1993 and sought and obtained a commitment from him to financially assist them with the funding of the AET joint venture. He said Mr Diamond agreed to assist the AE practice in the discharge of its obligation to fund the AET joint venture.

[172] Mr Diamond deposed that in or about late 1993 he was contacted by Mr Alford who asked him to see Mr Ebbage for the purpose of advising him in relation to an appropriate commercial structure for the commercialisation of intellectual property associated with the development of what Mr Alford described to him as an "O2 engine".

[173] Mr Diamond said he met with Mr Alford and Mr Ebbage in or about September 1993 at the Southport practice. They told him that they each had an equal interest in fifty per cent of the technology in the joint venture. There was no other evidence

that such a meeting took place. It was in accordance with the statement of claim before amendment but not Mr Alford's evidence. Mr Diamond was not correct as to the timing of this meeting nor can it have been true that Mr Alford and Mr Ebbage told Mr Diamond that they each had an equal interest in fifty per cent of the technology in the joint venture as no such agreement had been made. Mr Diamond said he had three further meetings with Mr Ebbage, who told him that the inventor of the technology, Mr Manthey, owned the remaining 50 per cent of the intellectual property and it was their intention to establish a joint venture to hold the parties' respective interests as bare trustee. Mr Diamond gave the impression of evasiveness when he was testifying about these meetings.

[174] Mr Diamond said he met with Mr Ebbage in or about November 1993 when Mr Ebbage approached him for development funding for the exploitation and commercialisation of the technology. Mr Diamond said that Mr Ebbage told him that he and Mr Alford had made a financial commitment to Mr Manthey but wished to reduce their exposure by selling down their interest in the joint venture. Mr Diamond did not, however, ever meet Mr Manthey and Mr Manthey was not informed of Mr Diamond's identity or even of his existence, except in the most general terms. He was told that Mr Manthey would not agree to his interest being diluted below 50 per cent. Mr Alford and Mr Ebbage said they were concerned at the time Mr Manthey expended on his motor vehicle repair and panel beating business.

[175] Mr Diamond is a lawyer, now based in New Zealand, who specialises in "international structuring of companies and businesses". He has a good working knowledge of various international tax havens. The principal purposes of the "international structuring" appear to be to avoid transparency and to enhance tax avoidance. He and Mr Alford have been friends and professional colleagues since 1986. They continue to have a close relationship. Mr Alford said that in 1993 he, Mr Ebbage and Mr Diamond agreed to form a joint venture with regard to the interest of Mr Alford and Mr Ebbage in AET. Initially, Mr Diamond was to pay Mr Alford and Mr Ebbage $50,000. The total investment was later to be increased to $200,000. In return, he was to receive 60 per cent of the interest held by Mr Alford and Mr Ebbage. Mr Alford said he made a note of the agreement but no longer has any documents relating to AET.

[176] Mr Diamond said that at the November meeting he agreed to fund either personally or through investors on whose behalf he acted, an amount of $200,000 towards research and development of the technology. He then caused $50,000 to be paid by JLA Holdings Limited, which was the corporate trustee for John Landsbury & Associates, accountants in London whose principal was Terry Morris. Mr Diamond deposed that Mr Morris had informed him that funds were transferred to Hong Kong to an account maintained by AMP Services Limited which was under the control of Andrew Paul. He said that he had not been able to locate all the bank records to show where that money went but did not believe it would have been paid directly by Chancetest as that company did not maintain a bank account. Mr Diamond told Mr Alford that he was only prepared to recommend and make the payment of $50,000 because of Mr Alford's involvement in the joint venture and their longstanding friendship and that Mr Alford was therefore personally responsible for the repayment of the money paid. No more money was to be paid until there was a working prototype and patents had been obtained.

[177] Mr Diamond said that formal documentation was to be prepared to reflect the two joint ventures. He said a company representing his client's interests was to take a share in the joint venture given its speculative nature, rather than simply financing the undertaking. Whatever arrangements were made, Mr Diamond did not regard himself as bound to enter into any formal agreement.

[178] Mr Alford said that Mr Diamond did not give him $50,000. He believed that Mr Diamond gave it to Mr Ebbage. Mr Alford said that the payment was a "capital investment", however, there was an "unwritten guarantee" that Mr Alford would repay the $50,000 if no patent was obtained in respect of the first invention. That $50,000 was the moneys then on lent by Mr Alford and Mr Ebbage to AET. As such it was repayable. No further moneys were advanced by Mr Diamond. Mr Diamond's advance was made through Chancetest which was the company which had interest in SCT Ltd. The moneys were only advanced in relation to the first engine and not a second engine which was subsequently developed by Mr Manthey. No patent was ever obtained by AET in respect of the first engine.

[179] Mr Alford was not able to confirm from his own knowledge that the $50,000 had in fact been paid by Mr Diamond except from what he was told by Mr Diamond. Even if it were, it is not moneys owing by any of the defendants in this case to any of the plaintiffs in this case. It may have offset some of the expenses incurred in providing accountancy services or lending moneys to AET, but did not create any joint venture.

Continuing development of Mr Manthey's invention and documentation and financing of AET

1994

January 1994

[180] On 11 January 1994, Advanced Engine Technology Pty Ltd ACN 063 092 759 (AET) was incorporated. Mr Manthey was appointed as a director and Mr Alford was appointed as a director and secretary of the company. Mr Manthey held one share and the other was held by AEH as trustee for AEH Trust No 5. At the time of incorporation, it appears that Mr Ebbage still intended to share his 50 per cent share with Mr Alford. There were many plans and proposals as to how and through which entities this might occur although in the end none of them came to fruition.

[181] Mr Alford deposed that AET was to act as bare trustee for the AET joint venture, the participants in which were Mr Manthey who was to hold a 50 per cent interest, Dario in its capacity as trustee for the Dario Management Trust as to 25 per cent, and PPG as trustee for the PPG Trust as to 25 per cent. Mr Alford said his understanding was that there was no consequence attaching to the ultimate ownership of the shares in AET as it was not beneficially possessed of any assets, nor was it intended that it would own assets. It was simply to act in a trustee capacity for the AET joint venture. Mr Alford then said that AET was to manage the AET joint venture, therefore, the shareholding in AET would determine the control of the project.

[182] Mr Alford ceased being a director from 12 January 1994 although he said he has no recollection of resigning as director and secretary immediately following incorporation. Mr Alford asserted in his affidavit that the document headed

"Resignation of Director and Resignation of Secretary" incorrectly recorded his address and was incorrectly dated 12 January 1994 in Mr Ebbage's handwriting. He did not deny that the document which is in fact headed "Resignation of a Director" was signed by him. It recorded his signed resignation as a director of AET. The notification of change to office holders received by ASIC which was to be effective from 12 January 1994 was not received until 2 June 1994 so it is likely that it was signed at some time between 12 January and 2 June 1994. Mr Alford did not depose to the date on which he did sign it. While being cross-examined on a different topic, Mr Alford admitted resigning as a director of AET. He agreed that one of the reasons he resigned was because he had a concern about a perceived conflict of interest with his interest in SCT Ltd.

[183] In his affidavit sworn on 7 September 1999, Mr Alford deposed that on or about 8 May 1995, some 14 months after the incorporation of AET, certain share transfers and allotments in AET were effected. He deposed that he executed an undated share transfer in his capacity as director of AEH at about that time, resigning as a director of AET. He then referred to the stamp duty notation on the transfer being dated 17 May 1995. However, as ASIC received the notification of change of office holders in June 1994, Mr Alford's sworn evidence as to when he resigned as director of AET must be incorrect. His evidence is also incompatible with an allegation, made in the alternative in the reply and answer, that his signature was a forgery.

[184] Mr Ebbage was appointed secretary of AET from 12 January 1994. He remained in that position until his death at the end of 1998. Mr Ebbage told Mrs Atkinson that he had a controlling interest in AET.

[185] Mr Alford said that he and Mr Ebbage had formed a view that Mr Manthey would be concerned in circumstances where there were three shareholders in AET, notwithstanding the fact that Mr Manthey would hold 50 per cent of the issued shares, and accordingly, Mr Alford and Mr Ebbage agreed that one entity should hold one share in the AET joint venture on their behalf and the remaining share should be held by Mr Manthey. Upon incorporation, AET was issued with two shares. One share was issued to Mr Manthey and one share was issued to AEH (as trustee). The shareholding in AEH was equally distributed between Dario, a company associated with Mr Alford's family, and EOS, a company associated with Mr Ebbage's family. There was never any subsequent agreement that there would be an allotment of shares in the joint venture trustee company (AET) to reflect the individual interests of Mr Ebbage and Mr Alford. Mr Alford said that he and Mr Ebbage agreed that the AET joint venture and any documentation to reflect it should set out and identify the individual interests of each of the three parties in the AET joint venture.

[186] Mr Alford gave evidence under cross-examination that there was a meeting in January 1994, probably on 18, 19, 20 or 21 January, between himself, Mr Manthey and Mr Ebbage, where they discussed "all matters with respect to the incorporation of the company and the position which that company was to take in the joint venture."

[187] He could not at the time of trial recall any discussion where it was agreed that AET would hold their respective interests as trustee. He said his reason, for saying that, was the way in which the ownership was structured, was that this was the "current

structuring [they] were utilising at that point in time". Mr Alford said under cross-examination that the structure of AET acting as a bare trustee was explained to Mr Manthey. At one point, Mr Alford said this was explained to him in October 1993 and in another part of the cross-examination he said it was disclosed to him in January 1994 after the incorporation of AET. Quite apart from the unsatisfactory aspect of the evidence with regard to dates, it seems most unlikely that this was ever explained to Mr Manthey. Mr Manthey's lack of sophistication and business acumen at that time make it most unlikely that he would have been given this information which he would not easily have been able to understand. I accept Mr Manthey's evidence that he was not even aware of the name AET until February 1994 and that he did not realise at that time that it referred to a company.

[188] Mr Alford deposed that, as at the date of incorporation of AET, the form and structure of the AET joint venture had not been finalised in so far as the identification of the ultimate holding entities for the interested parties was concerned. What in fact this reflects, in my view, is that no final agreement had been reached between Mr Alford and Mr Ebbage. There was no agreement between them as to how any holdings should be structured. In Mr Alford's affidavit filed as his evidence-in-chief in this matter, he referred in particular to the tax ramifications of any agreement and therefore the need to get proper advice. This would need to be done before they reached final agreement.[3]

[189] Mr Alford gave evidence that from January 1994, AES made regular payments to or on behalf of AET in discharge of the obligation which he and Mr Ebbage had under the agreement which Mr Alford asserted had been reached between Mr Ebbage, Mr Alford and Mr Manthey. Those payments continued over the course of the following year. He said that Mrs Atkinson's evidence as to payments made is an accurate record of the moneys paid to AET and to Mr Ebbage pursuant to the terms of the AET joint venture between Mr Ebbage, Mr Manthey and Mr Alford. These payments did not necessarily give rise to equity in AET but, if made, constitute a debt to be repaid by AET. It matters not that Mr Alford's assertion of the reasons for the payment are untrue, it is nevertheless a debt. As McPherson JA recently observed in *Geroff & Ors v CAPD Enterprises Pty Ltd & Ors*:[4]

> "A debt once accrued has in law an independent existence and enforceability of its own apart from the transaction that gave rise to it. As was said in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 567:
>
> > 'The common law does not and never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract: it is rather the detention of a sum of money and that was so whether the creditor enforced his demand by an action of debt or by *indebitatus assumpeit*'."

[190] I shall return to a detailed examination of those payments which are set out in schedules to the statement of claim to determine which, if any, of those payments should be considered a debt repayable to one of the plaintiffs by one of the defendants. It appears that the written joint venture agreement gave a right to convert debt into equity but that this right was never exercised.

---

3 cf *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106.

4 [2003] QCA 187 at [3].

[191] Mr Alford deposed that following the incorporation of AET on 11 January 1994, the following steps and matters were implemented. Business structuring was undertaken; discussions were held in relation to patent enquiries and licensing agreements; a bank account was opened on behalf of the company; research was undertaken in respect of federal government grants; attendances were made by Mr Alford and Mr Ebbage on Mr Manthey in relation to the structure and shareholding of AET and the AET joint venture; Mr Ebbage attended both personally and by telephone on patent attorneys; the company's register was reviewed and the records maintained; discussions were held between Mr Manthey, Mr Ebbage and Mr Alford in relation to the progress of the first prototype engine; confidentiality agreements and employment agreements were drafted; and numerous attendances were made by Mr Alford and Mr Ebbage or by Mr Ebbage individually to inspect the progress of the prototype engine. Mr Alford said that Mr Manthey attended the Southport practice on numerous occasions to detail and finalise the documentation necessary to support patent applications in relation to the technology. I accept that work was done by the AE practice on the business, commercial and financial structuring of AET but do not accept that there were any meetings at which both Mr Alford and Mr Manthey were present.

[192] On 7 January 1994, Mr Ahearn, the patent attorney, contacted Mr Ebbage by letter with regard to the proposed patent application. As a result, on 11 January 1994, Mr Ahearn received a telephone call from Mr Ebbage in which Mr Ebbage advised that he had that day registered AET which would be the applicant for the patent. Accordingly, on the same date, Mr Ahearn sent a letter to the Commissioner of Patents with a provisional patent request form and provisional specification. The application was in the name of AET. The provisional patent application was given the number PM3323 by the Patent Office and accorded the filing date of 11 January 1994 and was entitled "Internal Combustion Engine".

[193] A file note was made by Mr Ebbage on 11 January 1994 at 2.25 pm with regard to the provisional patent noting that the patent was to be in the name of AET. He further noted that the shareholding was to be AEH Trust No 5 and a trust for Mr Manthey; funds were to be provided on a loan basis to be first priority on excess cash flow; AE was to time-charge at normal rates; a licensing agreement was to be granted to an overseas company; the production phase was to be 12 weeks with payment to Mr Manthey of $500 per week.

[194] Mr Ebbage then recorded that he had an interview with Mr Manthey at 2.30 pm. A file note of that interview showed that Mr Manthey and Mr Ebbage were present. They reviewed the correspondence from Mr Ahearn and the draft patent application which was amended as per Mr Manthey's advice. Mr Ebbage noted that he advised Mr Ahearn who said that the invention was protected from that date (11 January 1994). Mr Ebbage listed the other matters discussed with Mr Manthey as follows:

(1) Patent to be requested in company name AET. It appears that later (probably after the meeting), Mr Ebbage has then written in "as trustee for a joint venture";

(2) The shareholding of the company was to be:

"PGE/AJA or nominee 50 per cent

SM or nominee 50 per cent."

(3) The development phase was to be a minimum of 12 weeks and a maximum of six months;

(4) The money advanced by Mr Ebbage and Mr Alford or associated entities was to be treated as a loan to AET and repaid as soon as possible;

(5) Time spent by Alford/Ebbage was to be billed to AET at normal rates as soon as possible;

(6) Payment to Stephen Manthey etc was to be $600 per week if he worked a full week;

(7) Mr Ebbage was to establish a bank account and Mr Manthey was to keep all documents and write them up. They were to meet at 7.30 am each Friday morning to report on progress.

[195] Mr Ebbage noted that he advised Mr Ahearn that the company was to act as a trustee for a joint venture. However, that was denied by Mr Ahearn whose evidence on that and other points I accept.

[196] Mr Alford's evidence was slightly different. He said there was some urgency in attending to the incorporation of the company given that they had received the final draft provisional patent application from Mr Ahearn on 11 January 1994. That patent application reflected ownership of the patent in the name of the company, AET, notwithstanding the fact that it had not as yet been incorporated. Mr Alford said a provisional patent application was subsequently filed by Mr Ahearn on 14 January 1994 and allocated the provisional number PM3323. This was the provisional patent application to which Mr Ahearn referred in his evidence. Where they differ, I prefer the evidence of Mr Ahearn who was a disinterested party or the file note of Mr Ebbage to the evidence of Mr Alford. Mr Ahearn based his evidence on contemporaneous file notes and documents which are considerably more reliable than Mr Alford's rather tendentious memories.

[197] Mr Alford deposed that on 21 January 1994, Mr Manthey, Mr Ebbage and Mr Alford met at the Southport practice for about two and a half hours. He said in cross-examination that this meeting happened around 20 January and was recorded in AE's work in progress. They discussed all aspects of the structuring and funding of the AET joint venture, the patent applications that would be required, the agreements that would be necessary and the commitment of Mr Alford and Mr Ebbage to Mr Manthey to fund the AET joint venture. Mr Alford asserted that he told Mr Manthey that it was the intention of himself and Mr Ebbage to involve third parties to assist them in the funding of the AET joint venture given what then appeared to be a substantial financial requirement beyond that originally contemplated in their earlier discussions. Mr Alford said that Mr Manthey's response was dismissive. He used words to the effect that "he did not care how it was funded providing my interest of 50 per cent is not in any way affected and it (the AET joint venture) goes ahead". Mr Alford said that he told Mr Manthey that the funding was not open-ended.

[198] Mr Alford gave evidence under cross-examination that at a meeting in mid to late January, funding of $40,000 was discussed "and that the agreements would be written up whereby we agreed to input $50,000".

[199] Mr Ebbage's staff diary for 21 January 1994 does refer to "meeting SM and AJA re: structure etc [*sic*]." His time sheets likewise show time spent on that date on AET re: "business structure". Mr Alford's diary has the notation "2.30 S Manthey" in Mr Ebbage's handwriting on 21 January 1994. This diary records appointments which have been made. At this stage, Mr Alford was still interested in becoming part of a joint venture. I accept that a meeting occurred on this date.

[200] A note has been produced which the plaintiffs submitted showed that in January 1994 Mr Ebbage had noted the agreed structure of the joint venture between Mr Manthey, Mr Alford and himself with a sell down to the Diamond interests. There was, however, no evidence as to when the note was created. The same document is annexed to Mr Diamond's affidavit along with a file report which shows that it was created on 11 October 1994. On its face, the note does not note agreements made but rather "queries", "proposal" and "agreements required".

[201] Mr Mayne recalled that in early 1994 during one of Mr Alford's regular visits to the SCT Ltd factory, Mr Alford told him that Mr Ebbage and Mr Ebbage's partner, Mr Manthey, had started building a prototype. Mr Mayne sensed displeasure in this development on the part of Mr Alford who had persuaded Mr Ebbage to invest in SCT Ltd. Mr Alford, on the other hand, said under cross-examination that he believed that on one of the numerous occasions on which he visited the SCT Ltd factory, in early 1994, he told Mr Mayne that he, Mr Alford, was a party to a concluded joint venture with Mr Ebbage and Mr Manthey to develop Mr Manthey's technology. I do not accept that he said any such thing. If he had said it, Mr Mayne would certainly have remembered. And, in any event, if it had been true, it is unlikely that he would have told Mr Mayne.

February 1994

[202] In or about early February 1994, Mr Manthey attended at Mr Ahearn's office to provide ongoing information on the development of the engine. Mr Manthey also started to prepare more detailed drawings. He also brought parts which he had manufactured but Mr Ahearn stressed that progress would require assembly drawings and study prototypes.

[203] Mr Alford deposed in his affidavit sworn on 7 September 1999, that he and Mr Ebbage jointly provided instructions to Kenny & Co, solicitors, ("Kenny & Co") on 11 February 1994 to prepare, among other documentation, a shareholders' agreement, AET agreement and subordinated loan agreement. Mr Alford deposed that by this time no agreement had been reached as to the form and structure of the AET joint venture or the ultimate holding entities for the interested parties concerned. This reflects, in my view, that no final agreement had been reached which gave Mr Alford any interest in Mr Manthey's invention or AET.

March 1994

[204] On 22 March 1994, Mr Ebbage consulted John Kenny the principal of Kenny & Co for advice. Mr Kenny is an experienced solicitor whose primary area of practice is company structuring of businesses associated with technology and in anticipation of the investment in such companies of venture capital. His evidence in this trial was given on affidavit and was uncontroverted. He made no mention of receiving

instructions on 11 February 1994, as was deposed by Mr Alford. I accept that Mr Kenny was first consulted as he said on 22 March 1994.

[205] Mr Kenny said that the process of such company structuring generally involved two steps, namely the relocation of assets into a non-trading entity or holding company and the incorporation of a joint venture between the shareholders, the respective companies and the directors. In providing legal advice with respect to corporate structuring, Mr Kenny's firm generally elected to act on behalf of one of the corporate vehicles for the incorporated joint venture. For that reason, each of the respective venturers was encouraged to seek independent legal advice.

[206] Mr Kenny's first consultation with Mr Ebbage was conducted in the company of Mr Kenny's then law clerk, Tim Harland. Mr Harland prepared a file note recording what occurred during the meeting. Mr Ebbage described a business venture he wished to embark upon with his friend and current partner, Mr Alford. The basis of the business was a new style of engine and the mechanic involved in the invention was Mr Manthey. Mr Ebbage told Mr Kenny that he and Mr Alford had agreed to help with the funding of this new engine "Advanced Engine Technology" which was owned by Mr Manthey and a trust associated with Mr Alford and Mr Ebbage. I accept that was what Mr Ebbage told Mr Kenny and that it reflected Mr Ebbage's intention at that time to reach an agreement with Mr Alford to share equally Mr Ebbage's interest in his partnership with Mr Manthey.

[207] The basis of the funding was for the engine to go through developmental stages. AET then had a patent pending. Mr Kenny said he understood that Mr Manthey was a client of the accounting practice conducted by Mr Alford and Mr Ebbage.

[208] There was discussion at this meeting regarding the sorts of agreement relating to the transfer of technology and the employment of Mr Manthey. Mention was also made of a rollover agreement and a shareholders' agreement. Mr Ebbage made some general comments about the engine technology and Mr Kenny requested that he provide provisional specifications. Mr Kenny went on to explain procedures for agreement. Mr Ebbage told him that he was funding up to $50,000. Mr Kenny explained the nature of the subordinated loan and described the shareholder agreement discussing the scope of the venture, contribution, administration of the agreement and the exit. Mr Alford gave evidence that Mr Kenny was instructed that preparation of the documentation was extremely urgent, however, that did not appear in any note made by Kenny & Co and Mr Kenny was not cross-examined on that (or any other) point. I do not accept that Mr Kenny was instructed that the work was extremely urgent.

[209] Mr Kenny said it became apparent to him that Mr Ebbage was not closely familiar with the dynamics of the structural relationship he was proposing for the venture with Mr Manthey. He explained to Mr Ebbage, for example, the professional conflicts of interest inherent in professionals entering into ventures with clients. Accordingly, Mr Kenny said he felt compelled to clearly explain the mechanics for adoption of the proposed business model.

[210] Mr Kenny said that since the accounting practice of Mr Ebbage and Mr Alford was not to be the vehicle for the venture, he suggested it would be appropriate to set up a separate entity to accommodate the involvement of the accountants. Mr Kenny said

the suggestion that the interest of Mr Alford and Mr Ebbage be held by way of a unit trust is likely to have come from Mr Ebbage based on tax implications of which Mr Ebbage would have been familiar. Mr Alford on the other hand, asserted in his affidavit that the unit trust structure was suggested by Mr Kenny and that Mr Alford rejected that recommendation on the basis of the potential adverse capital gains tax ramifications which Mr Alford believed would be associated with the use of a unit trust structure to hold their interests. I prefer Mr Kenny's evidence to that of Mr Alford, not just because of my generally negative view of Mr Alford's credit, but also because Mr Kenny was not cross-examined on this point by Mr Alford's very experienced legal team.

[211] Mr Kenny was aware that if the accounting practice of Mr Alford and Mr Ebbage were to break up, it was important that this break up not undermine the corporate structure of the joint venture. Mr Kenny suggested the accountants resolve their own relationship with each other as well as separately with their client.

April 1994

[212] Mr Alford's evidence was that the first engine was tested towards the end of March or early April 1994. He said that at about this time he and Mr Ebbage were attending Mr Manthey's factory on a regular basis to view the progress and development of the prototype engine. Those attendances continued over the ensuing months. I prefer the evidence of Mr Manthey that Mr Alford made only very infrequent visits to his factory. In April 1994, Mr Ebbage rang Mr Ahearn inviting him to see the engine running. This inspection was held at Mr Alford's home address in the presence of Mr Alford, Mr Ebbage, Mr Manthey and Mr Ahearn. Mr Alford said that the first prototype engine was demonstrated successfully at his home on Friday, 13 May 1994. In addition to Mr Ebbage, Mr Manthey and Mr Ahearn and himself, Mr Alford said that his wife, Amanda Alford ("Mrs Alford"), was present. Mr Ahearn made no mention of Mrs Alford in his evidence, and was not cross-examined on that point. Mr Manthey ran the engine for a brief period of time and answered Mr Ahearn's questions.

[213] Mr Ahearn does not recall Mr Alford saying anything during this inspection to suggest that he was in some way involved with Mr Ebbage and Mr Manthey in this project. Mr Ahearn had known Mr Alford for some years and assumed that he had provided Mr Ebbage, as his accounting partner, with a convenient location for Mr Manthey to show Mr Ahearn the engine running. This evidence was not objected to, and neither was Mr Ahearn cross-examined on this point.

[214] Mr Manthey said that this was the first time he met Mr Alford. However, the first meeting had in fact probably occurred on 21 January. After Mr Manthey demonstrated the engine, he packed up quickly because he could hear an argument going on inside the house between Mr Alford and Mr Ebbage about SCT Limited.

[215] On 18 April 1994, Mr Kenny wrote to Mr Ebbage and Mr Alford at the Southport practice. He apologised for his delay. Thereafter, on Mr Ebbage's instructions he sent the material to the Beaudesert office. By the letter of 18 April 1994, Mr Kenny gave a detailed outline to Mr Ebbage and Mr Alford of the necessary steps to undertake in order to establish the proposed joint venture. Mr Kenny included with the letter a diagram of his understanding of the overall structure, a proposed rollover agreement, a proposed subordinated loan agreement, a proposed heads of agreement

for the ultimate shareholders' agreement, a proposed letter for Mr Manthey to cover the remission to him by Mr Ebbage and Mr Alford on their personal letterhead of the rollover agreement and heads of agreement, an action list indicating the steps to be taken to drawdown, an agenda for the next meeting and a paper on stamp duties by Robert Mitchell, revenue specialist of Blakes, solicitors of Brisbane. Mr Alford agreed in oral evidence that he read Mr Kenny's letter dated 18 April 1994, on or about the date on which it was received. However, in his affidavit sworn on 20 March 2002, he said he did not receive either the letter nor any of the enclosures except for the draft shareholders' agreement and technology rollover agreement. Mr Alford also deposed that he did not recall receiving the draft loan agreement. I do not accept that evidence.

[216] Mr Kenny made it perfectly clear that Kenny & Co were acting for AET and recommended that Mr Alford and Mr Ebbage write to Mr Manthey distinguishing their proposed partnership with Mr Manthey from their professional responsibilities to him as a client. He enclosed a detailed draft letter from the AE practice to Mr Manthey stressing to him the importance of retaining an independent solicitor to advise him and recommending a choice of named solicitors with relevant expertise.

[217] Kenny & Co had by this time produced a number of draft contractual documents to give effect to the instructions they had received. These included a rollover agreement between Mr Manthey, AET and an Alford Ebbage trust; a subordinated loan agreement between the Ebbage Alford Unit Trust and AET; and a shareholders' agreement, heads of agreement, between Mr Manthey, Mr Ebbage, Mr Alford, the Ebbage Alford Unit Trust and AET. Mr Ebbage's staff diary records "Rev agreements from J Kenny & cor to SM re same". This might mean, as the plaintiffs submitted, that Mr Ebbage reviewed the agreements from Mr Kenny and couriered them to Mr Manthey on 21 April 1994. However, Mr Manthey denied that any of the draft documents prepared by Kenny & Co were submitted to him for his consideration. Whether or not they were sent to him, Mr Manthey did not consider the documents as he left such matters to Mr Ebbage.

[218] Mr Alford deposed, in an affidavit sworn on 20 March 2002, that he did not receive any draft agreements other than the shareholders' agreement and the technology rollover agreement. Under cross-examination by Mr Goodwin, Mr Alford asserted that he could not recall seeing the drafts of the rollover agreement or the subordinated loan agreement although he was prepared to concede that he had seen a document similar to the shareholders' agreement, heads of agreement, prior to Mr Ebbage's death. He said he discussed the contents of the draft shareholders' agreement and technology agreement at length with Mr Ebbage. Mr Alford disagreed with the recital that stated that Mr Manthey was a client of the AE practice. Later in his evidence, Mr Alford said he could not specifically recall seeing any of the documents although he said he would have seen those documents.

[219] Mr Alford's initial unwillingness to admit he had seen the subordinated loan agreement was not without significance, as this was the means by which Mr Ebbage and Mr Alford would lend moneys to the joint venture rather than take equity in it. This equivocation about whether he had seen the documents was more consistent with a lack of candour rather than genuine confusion, particularly as he preceded a later slightly inconsistent answer by saying rather impatiently he could not remember what his testimony had been earlier that day. An honest witness in this situation would not need to remember what he had said earlier in his evidence in

order to be able to give a consistent answer later in the same day. While that alone would not undermine his credit as a witness, it was consistent with many other pointers to his unreliability as a witness.

[220] Mr Kenny's evidence was that he raised the concept of "subordination" of the repayment of the loan from the Ebbage Alford Unit Trust to the vehicle of the project, AET. Mr Kenny said that this loan of up to $50,000 was intended to be the financial contribution of Mr Alford and Mr Ebbage to the proposed joint venture. Mr Kenny said his suggestion of subordination would have been in response to Mr Ebbage's proposal that he and Mr Alford intended to advance moneys to the joint venture as opposed to contributing equity to the joint venture. The subordinated loan agreement provided for the repayment of the loan by AET from net profits only. There was provision for interest and for repayment of the loan on the death of one of the trustees.

[221] Mr Kenny enclosed with his letter of 18 April 1994, a detailed action list setting out all the steps that would have to be taken, and by whom, so that the agreements could be finalised and drawdown could occur by the week beginning 9 May 1994.

[222] By separate letter dated 18 April 1994, Mr Kenny also wrote to Mr Ebbage and Mr Alford in relation to their own unit trust and enclosed two draft agendas. The first was for Mr Ebbage to consider when he rang Mr Kenny. The agenda would ensure that every issue which needed to be covered was precisely and specifically covered. The second agenda was for a proposed meeting between Mr Alford and Mr Ebbage. Mr Kenny asked Mr Ebbage in that letter whether he wanted Mr Kenny to make separate copies of everything available for Mr Alford at the Southport office. He gave further advice about trademark protection and the structuring of the Ebbage Alford Unit Trust.

[223] On 27 April 1994, Mr Ebbage drafted a letter to Mr Manthey said to enclose the proposed rollover agreement and the heads of agreement for a proposed shareholders' agreement. Mr Ebbage noted his own responsibilities as being day-to-day administration of AET, for no remuneration; Mr Manthey's responsibility to research and develop the technology for $600 net per week; and that AE in its capacity as accountants would be remunerated for any disbursements and fees for work undertaken on behalf of AET. It was envisaged that the technology would be valued at $2,000,000 resulting in the issue of 1,000,000 x $1 shares to Mr Manthey and 1,000,000 x $1 shares to the Trust. It concludes by saying, "The above was the basis of our original arrangement as I understand it and look forward to your comments regarding the same. Should you be in agreement with the above, please sign the copy of this letter provided". As a postscript only it was said that Mr Manthey "may need to retain alternative solicitors" to advise him on the documentation. This letter differed from Mr Kenny's draft letter in a number of respects. The proposed advice to Mr Manthey, albeit not given as vigorously as suggested by Mr Kenny, to retain his own solicitor, does not sit easily with Mr Alford's evidence that this matter had already been attended to by a letter, a copy of which had been executed by Mr Manthey. It should also be noted that there is no evidence that this draft letter was ever sent.

[224] Mr Alford deposed that both he and Mr Ebbage were surprised and disappointed with the documents prepared by Mr Kenny and therefore decided not to use Mr Kenny's services further. This sits oddly with Mr Alford's evidence that he had

seen Mr Kenny's letter of 18 April 1994 but only two of the enclosed documents. It must have been obvious from the covering letter that there were a number of other documents which Mr Alford had not, according to his version, seen and yet he purported to hold an opinion on the quality of Mr Kenny's documentation.

May 1994

[225] On 9 May 1994, Mr Kenny wrote to Mr Ebbage in response to a telephone call he had from Mr Ebbage where Mr Ebbage said that he was meeting Mr Manthey on Monday, 2 May 1994. Mr Kenny asked for Mr Ebbage's instructions as neither agenda had been acted on and he was unaware of the outcome of Mr Ebbage's discussions with Mr Manthey. On 11 May 1994, Mr Kenny wrote to Mr Ebbage expressing his concern that he had not been able to contact him and enclosing his account. By letters dated 13 and 20 June 1994, he continued to seek payment of his account. Mr Kenny's evidence was, since those events, he had had no personal discussion with Mr Ebbage either in person or by telephone and has never had an opportunity to speak with either Mr Alford or Mr Manthey.

[226] Mr Diamond deposed that he reviewed draft documentation and was annoyed by its lateness. He said he was also concerned in relation to the potential for stamp duty and other tax liability given the intention expressed in the documentation to assign the intellectual property in Australia from Mr Manthey to AET. He said he was also particularly concerned that the documents he reviewed failed to expressly acknowledge the interest "held by Chancetest", yet no instructions were ever given to Kenny & Co or any other law firm to document the interest purportedly held by Chancetest. Mr Diamond said that at his insistence another law firm was instructed to finalise the joint venture documentation.

[227] In May 1994, Mr Alford rang Donald Reynolds, a solicitor who conducted a law practice from offices situated in Price Street, Nerang under the name Reynolds Solicitors, for the purpose of arranging a meeting between himself and Mr Ebbage. Mr Alford gave oral evidence that the successful outcome of the demonstration of the engine provided further impetus to instruct another law firm. On cross-examination he said he might have rung or met with Mr Reynolds in late April 1994. He then said that he contacted Mr Reynolds before the demonstration of the engine and that Mr Reynolds was formally instructed after the demonstration.

[228] In his affidavit sworn on 7 September 1999, Mr Alford deposed that he and Mr Ebbage instructed Reynolds Solicitors on or about 18 May 1994 to finalise the draft documentation because of delays in receipt of documentation from Mr Kenny. However, this explanation, whilst having some superficial plausibility, does not withstand examination. Although there had been some initial delay for which Mr Kenny had apologised, by this stage Mr Kenny's work was well advanced and the documentation had already been prepared. It appears that it was to bolster this false reason for no longer using Mr Kenny's services that Mr Alford incorrectly said that Mr Kenny was instructed that the preparation of the documentation was "extremely urgent". In spite of asserting that the documentation was extremely urgent, on his version, Mr Alford never saw to it that the documentation was completed, nor did he instruct his lawyers to cross-examine Mr Kenny on this matter which Mr Kenny did not mention in his affidavit. It appears that, as at May 1994, Mr Alford was keen to invest in Mr Manthey's project. He did not yet have a concluded agreement and was keen to have an agreement and documentation which

was to his advantage and therefore suitable to him. He also needed to arrange to assuage the impatient Mr Diamond.

[229] There was continuing uncertainty as to exactly how any agreement would be structured. As the plaintiffs themselves pointed out in their written submissions, various plans and proposals were drawn up showing various percentages of interests and various parties' holdings in their own right or as trustee. No proposed agreement between Mr Alford and Mr Ebbage was yet sufficiently certain to be enforceable and there was no tripartite agreement between Mr Alford, Mr Ebbage and Mr Manthey. Only Mr Manthey and Mr Ebbage had, as yet, any concluded, albeit oral, agreement. Mr Ebbage obviously considered a wide variety of business structures and financing. The matters to be agreed and documented had become much more complicated. According to one file note by Mr Ebbage, they included such things as an employment agreement between Mr Manthey and AET; transfer of technology from Mr Manthey to AET; secrecy agreements between contractors and company; copyright agreements in respect of drawings; shareholder agreements; Mr Alford and Mr Ebbage (presumably their respective roles and/or interests); and marketing of the engine and manufacturing. There were also questions about how AET was to be funded and by whom.

[230] Mr Alford told Mr Reynolds that the purpose of the meeting was to discuss legal documentation to reflect Mr Alford and Mr Ebbage's interest in a proposed joint venture. It seems more likely that the reason that Mr Reynolds was instructed was that Mr Alford was dissatisfied with the advice given by Mr Kenny particularly as to the desirability of Mr Manthey's receiving independent advice and that Mr Alford sought out a solicitor whom he believed was less skilled and would be more compliant. Mr Reynolds occupied a partitioned area within the office premises occupied by the AE practice at Nerang. Mr Alford's own evidence was that he did not discuss the appointment of Mr Reynolds with Mr Ebbage until after he spoke to Mr Reynolds. Mr Alford deposed to forming the impression that Mr Reynolds was capable of discharging "our instructions to properly document the AET Joint Venture Agreements".

[231] Mr Alford gave evidence that Mr Ebbage told him and he believed that Mr Ebbage attended on Mr Reynolds on 18 May 1994. However, it was on 24 May 1994 that Mr Reynolds attended on Mr Ebbage. Mr Alford attempted to explain this relatively minor discrepancy between his own evidence and that of his witness, Mr Reynolds, by saying "I note that Mr Reynolds purportedly took instructions from Mr Ebbage on 24 May 1994 as opposed to 18 May 1994". I accept that Mr Ebbage consulted Mr Reynolds on 24 May 1994. It was confirmed by Mr Ebbage's time sheets. Neither of them gave Mr Alford any reason to believe that the date was any different. However, the plaintiffs had pleaded that 18 May 1994 was the commencement of Mr Reynolds' retainer and Mr Alford stuck to that date in his evidence even though it was not correct.

[232] Mr Ebbage provided Mr Reynolds with a number of documents that had been prepared by Kenny & Co. These included the AET rollover agreement; the AET subordinated loan agreement; the AET shareholders' agreement, heads of agreement; a joint venture agreement reflecting AET, Mr Manthey and "an EA Entity" as proposed joint venturers; and an operators agreement. In his affidavit in these proceedings, Mr Reynolds said that Mr Ebbage asked him at that meeting to have the documents typed onto Mr Reynolds' word processing system for the

purpose of having them finalised and the terms agreed upon by the parties to the documents. No instructions were given to him to draw up a joint venture agreement to give effect to any interest said to be held by Chancetest.

[233] Mr Reynolds made handwritten changes on the documents that had been provided from Kenny & Co. For example, on the rollover agreement, he deleted the recital that the AE practice acted on behalf of Mr Manthey and that the principals of that firm were the beneficiaries of the trust and that Mr Ebbage was a director of the company and principal of that firm. The words "Kenny & Co" are deleted and "Reynolds" put in their place. Clause 3.08 which provided that AET would reimburse Mr Manthey for his costs of and incidental to preparation and execution of the agreement was replaced with a provision that each party should pay its own costs. The document was otherwise essentially unchanged. The subordinated loan agreement appears unchanged. The shareholders' agreement, heads of agreement replaced the words "Kenny & Co" with the word "Reynolds" and was otherwise essentially unchanged.

[234] In Mr Reynolds' handwritten notes of his meeting with Mr Ebbage on 24 May 1994, he has noted that the recital was wrong as Alford Ebbage did not act for Mr Manthey. Mr Reynolds made a note of discussing with Mr Ebbage a letter to Mr Manthey which set out the joint venture agreement. This was based on the draft letter dated 27 April 1994 from Mr Ebbage to Mr Manthey which said, *inter alia*, the AE practice would act as accountants for AET. Mr Reynolds has handwritten changes on it particularly with regard to the responsibilities respectively of Mr Manthey and of Mr Alford and Mr Ebbage. The postscript regarding the original arrangement was deleted. This failure to properly consider conflict of duty is not without significance as a professional's understanding of his or her ethical obligations may reflect on his or her credit.

[235] Mr Reynolds deposed that the brief he received from Mr Ebbage was limited in that he told Mr Reynolds that little, or no advice was required in relation to the terms of the documents, or the parties to the proposed agreement. Mr Reynolds made very few changes to the documents. The essential changes were to the parties reflected in the final documents which were constituted by a joint venture agreement; an offer to assign intellectual property; and a loan agreement. He was, however, instructed to obtain specific advice in relation to the stamp duty ramifications potentially attaching to the form of the draft deed that provided for a transfer of technology from Mr Manthey to AET.

[236] Later in the same affidavit sworn by Mr Reynolds and filed by the plaintiffs in these proceedings, Mr Reynolds says that a document entitled "Assignment of Intellectual Property", from Mr Manthey to AET, was the initial draft of this document prepared by him in April 1994. He gives reasons for this belief; however, it cannot possibly be true. In the first place, he did not receive any instructions until a month later towards the end of May 1994. Secondly, the document is relatively sophisticated and differs from a mere tinkering with documents prepared by Mr Kenny. I am forced, therefore, to disregard Mr Reynolds' sworn evidence that he believed that this document was the initial draft prepared by him in April 1994.

[237] Mr Reynolds deposed in his affidavit filed in these proceedings that he was not privy to the financial relationship between Mr Alford and Mr Ebbage. He said he was aware, however, from previous matters in respect of which he had received

instructions from their firm and in particular, in respect to conversations he had with both Mr Alford and Mr Ebbage, that the joint venture was between Mr Manthey on one part and the AE practice on the other. The extent of, and the respective shares, or interests held by Mr Alford and Mr Ebbage in the joint venture, were however never fully explained to him.

[238] He recalls Mr Ebbage telling him that both he and Mr Alford, or companies associated with them, had invested, or paid some $40,000 to Mr Manthey, or to the joint venture vehicle, AET, in discharge of their obligations under the loan agreement. He also recalls having seen, although he did not retain, a copy of the breakdown of the $40,000 which was advanced by them to AET.

[239] He did not recall ever having been told by either Mr Ebbage or Mr Alford, that Mr Alford no longer held or maintained an interest in the joint venture. It was his understanding from conversations he had with Mr Ebbage and Mr Alford, the particular contents of which he did not recall, that at all material times both Mr Alford and Mr Ebbage maintained an interest in the joint venture. However, whatever Mr Reynolds was told, it does not appear to me that Mr Alford's proposed interest was ever finalised.

[240] While Mr Reynolds was attending to the documentation, by letter dated 25 May 1994, Mr Ebbage wrote to Mr Ahearn requesting he obtain details of patents applied for by SCT Ltd with particular emphasis on lever armed pistons.

[241] Mr Alford deposed that in May 1994, Mr Manthey told him that he had a new idea for a variation to the engine prototype. This variation subsequently became identified as the "Mark II engine" and thereafter the "OX2 engine". Mr Alford said that Mr Manthey's advice to him regarding a new engine concept was a direct result of Mr Manthey's review of the further patent search information which had been provided by Mr Ahearn.

[242] Mr Alford further asserted that, prior to Mr Manthey telling him this in May 1994, he had received a bulky facsimile from Mr Ahearn as a result of further enquiries made by Mr Ahearn in respect of the provisional patent which raised concerns in relation to the novelty aspects of the first prototype engine. Mr Alford said that the facsimile was actually received by him in Mr Ebbage's absence and that Mr Manthey attended at the Southport practice offices to review the documentation received by Mr Alford after numerous telephone calls between Mr Alford and Mr Manthey. This was not able to be verified.

[243] Mr Alford asserted that the facsimile included patent diagrams and that upon Mr Manthey's attendance at the Southport practice they discussed the contents of the report provided by Mr Ahearn in relation to competing prior art that had been discovered. Mr Alford said that the searches in respect of other patented engines indicated that the first engine did not have sufficient inventive quality or novelty to be granted a patent. Mr Alford said that Mr Manthey responded to him after reviewing those patent searches that he had already further progressed a new concept he had for an alternative internal combustion engine.

[244] The problem with accepting this evidence is that it was not corroborated by Mr Ahearn. The patent searches were not obtained until 17 June 1994. I do not accept Mr Alford's evidence.

[245] Mr Manthey gave an inherently credible explanation as to how he came up with his new idea. By May 1994 he was not happy with how the pistons in the engine loaded against the bore. He was at Mr McDonald's factory when thinking about how to stop this problem. They discussed the matter outside Mr McDonald's factory and Mr Manthey drew diagrams using chalk on the cement to illustrate to Mr McDonald that they needed to get the drive downwards in such a way that they could achieve "tremendous torque". Over the next couple of nights, Mr Manthey thought about his ideas and it suddenly occurred to him how he could do it. By the next day he had worked out the details and pictured in his mind a completely different engine from the prototype he had just built. He explained his ideas to Mr McDonald and started doing diagrams and mathematical calculations immediately. Mr Manthey recorded these ideas in his diary for May 1994. He rang Mr Ebbage and told him that he had a new idea and within a couple of weeks gave him more details of his calculations. Those more detailed calculations were recorded by Mr Ebbage in a note he made of a telephone conversation he had with Mr Manthey on 6 June 1994. It was not until a few weeks later that Mr Ebbage rang Mr Manthey and said that there was a problem with the patents for the first engine because Mr Ahearn was concerned that there was not sufficient novelty.

June 1994

[246] The plaintiffs submitted that Mr Ebbage met with Mr Alford on 9 June 1994 to draft the basis of agreements, including an employment agreement between Mr Manthey and AET, a transfer of technology by Mr Manthey to AET and shareholders' agreement between Mr Alford and Mr Ebbage, for discussion with Mr Reynolds. The evidence of this was submitted to be entries in Mr Ebbage's Beaudesert staff diary on 9 and 10 June 1994. However, the relevant entry for 9 June reads "various telephone dis with D Reynolds re amendments to JV agreement". The entry for 10 June reads "dis S Manthey re progress of mark II engine". Neither of these supported the assertion in the submissions.

[247] On 10 June 1994, Mr Reynolds spoke to Neil McClafferty of the Office of State Revenue in relation to the potential stamp duty ramifications of a sale and transfer of the intellectual property from Mr Manthey to AET. A draft revenue ruling which had been issued on 24 May 1994 was sent by the Office of State Revenue by facsimile transmission to Mr Reynolds on 10 June 1994 about a case referred to as the "Carnation case" which involved an agreement for sale of an Australia-wide business which included assignment of Australian registered trademarks.

[248] On 10 June 1994, Mr Reynolds sent a copy of a document referred to in the facsimile header sheet as a "draft agreement". In handwriting Mr Reynolds said he had amended "pages 7 to 11 herewith". Six pages were sent in that facsimile transmission although none of those pages have been disclosed. It appears to me to be unlikely that it was the letter dated 27 April 1994 from Mr Ebbage to Mr Manthey which was said to be the joint venture agreement.

[249] It was, as I said, not until 17 June 1994 that Mr Ahearn wrote to Mr Ebbage providing him with the results of international novelty searches that he had requested. The searches were carried out specifically in relation to the radial piston rotary engines which had been the subject of the provisional patent application number PM3323. Mr Manthey read that letter at Mr Ebbage's accounting office at some time between its receipt and when Mr Manthey left for overseas on 28 June.

Mr Manthey was not particularly concerned as he already had a workable idea for a completely different engine.

[250] In June/July 1994, the Nerang practice of the AE practice was closed down.

[251] The profit and loss statement for AET shows that by 30 June 1994, $36,448.95 had been actually expended including $13,800 in wages. This amount excluded the value attributed to the intellectual property. By that time, a prototype of the first engine had been completed.

July 1994

[252] In paragraphs 26 and 26A of the statement of claim, the plaintiffs alleged that from about July 1994, pursuant to the 2 August 1993 agreement and the 27 October 1993 agreement, and notwithstanding that the joint venture had not been finally documented:

(a)(i) AEF advanced funds sourced from the AE Practice to AET for the purposes of the joint venture particulars of which are contained in Annexure "A" to the statement of claim; or

(ii)(A) AEF advanced funds sourced from the AE Practice to EOS for the purposes of enabling EOS to make contributions to the joint venture, particulars of which are contained in Annexure "A" to the statement of claim; and

(B) the advanced funds were repayable by EOS to AEF upon demand;

(b) AEG provided accountancy services to AET in connection with the joint venture particulars of which are contained in Annexure "B";

(c) Mr Manthey continued with Mr Manthey's research funded by the money advanced by AEF and assisted by the provision of the accountancy services.

[253] The allegations made in (a), (b) and (c) will be dealt with later in these reasons. For the present, it suffices to reiterate that by July 1994, the documentation of the joint venture between the Manthey interests and the Ebbage interests had not been finalised. As I have said, I am not satisfied that there were agreements made as the plaintiffs alleged on 2 August and 27 October 1993.

[254] Paragraph 29(c) of the statement of claim alleged that after the non-Manthey party to the joint venture agreement had become EOS, Mr Ebbage knew that AEF was advancing money to AET after 8 May 1995 on terms which involved a risk that AEF would not recover that money. What occurred in fact was that the moneys from AEF were lent to EOS rather than directly to AET. It is EOS to whom AEF must look for repayment of those moneys. EOS was also a vehicle for Mr Ebbage to receive his profit share of the partnership and a taking of accounts of the AE practice would be needed to reconcile such payments. No such taking of an account of the partnership has been sought in these proceedings.

August 1994

[255] In August 1994 Mr Ahearn was advised by Mr Ebbage that Mr Manthey had a concept for a new engine radically different from the prototype he had completed in

April 1994. Mr Ebbage told Mr Ahearn that Mr Manthey no longer intended advancing the first engine in light of the results of the various patent searches, and that instead they intended concentrating on the new concept that Mr Manthey had devised. This is supported by the evidence of Mr Mayne who recalls that on one of Mr Alford's regular visits to him in mid-1994, he told Mr Mayne that Mr Ebbage and his partner (who was Mr Manthey) had run into trouble with patent searches. Mr Alford said that they could not get around one of the patents filed by SCT Ltd. Mr Alford denied in evidence passing on this information although he admitted passing on general information about Mr Manthey's first engine to Mr Mayne. However, I accept, as Mr Mayne said, this was the kind of information Mr Alford would pass on to him each time he visited the SCT Ltd factory. Mr Alford gave Mr Mayne the impression that Mr Alford was a little jealous and threatened by Mr Ebbage and Mr Manthey as he continued to keep Mr Mayne updated about their progress as if he were spying on them.

[256] Mr Ahearn said that when Mr Manthey explained the new invention to him, it was clear that the engine employed a plurality of pistons having their axes parallel to the shaft axis and arranged in a generally circular pattern around a shaft axis with the pistons designed for parallel longitudinal reciprocation relative to the shaft axis. This represented a maximum departure from the principle of the earlier engine in which all pistons moved at right angles to the shaft axis.

[257] Mr Ebbage instructed Mr Ahearn to obtain computer novelty searches in respect of the new invention involving the principle of an internal combustion engine having parallel cylinders equidistant from and around a shaft axis.

[258] On 10 August 1994, Mr Ahearn sent a letter to the attention of Mr Ebbage to AET at the Southport practice with regard to that computer novelty search and three United States patents showing a plurality of pistons arranged in a generally circular pattern around a shaft axis and designed for parallel longitudinal reciprocation. Mr Ahearn suggested further searches which could and should be undertaken.

September 1994

[259] By letter dated 2 September 1994, Mr Ahearn responded formally to Mr Ebbage's letter of 25 May 1994 regarding the various patent applications in the name of SCT Ltd.

[260] Mr Alford said that, during September 1994, there were a number of meetings between himself, Mr Ebbage, Mr Diamond and Mr Reynolds to finalise the terms of the AET joint venture so that they could satisfy Mr Diamond's requirements for the preparation of further agreements between his clients, Mr Ebbage and Mr Alford, which could not be attended to until the AET joint venture documentation was finalised. However, Mr Alford also said that the documentation was never finalised and yet he never contacted Mr Reynolds to find out why the documentation had not been concluded. He said that this was Mr Ebbage's responsibility. Nonetheless, he never raised with Mr Ebbage why the documentation had not been concluded. This was to my mind consistent with what happened. After his failure to compete in the Targa Tasmania Car Rally in April 1995, which I will refer to later in these reasons, Mr Alford lost interest in Mr Manthey's work and did not want to become part of the concluded joint venture which was formalised by the written agreements.

[261] Somewhat contradicting his earlier evidence, Mr Diamond said that he was not particularly concerned at the delays in the preparation and finalisation of the joint venture documentation because there was no immediate obligation to provide further funding. Mr Diamond said that, after reviewing further draft documentation, he again raised his concerns with both Mr Alford and Mr Ebbage in relation to the potential tax ramifications that would follow a direct assignment of the intellectual property from Mr Manthey to AET and the absence of clauses in the agreement specifically directed towards preserving the interests of Chancetest.

[262] On 19 September 1994, a further draft joint venture agreement between Mr Manthey, AET and AEH was produced. On 21 September 1994, Mr Ebbage's time sheets showed that he had separate discussions with Mr Alford with regard to the agreements and Mr Manthey with regard to engine development. The work in progress report of the AE practice shows that Mr Alford discussed the draft with Mr Diamond on that day. On 23 September, Mr Ebbage discussed the joint venture agreement with Mr Alford and Mr Diamond. He then attended the factory and discussed the progress of the XTC with Mr Manthey and Peter Darcy ("Mr Darcy").

October 1994

[263] On 11 October 1994, Mr Ebbage drew up another proposal for the agreements which were required. It shows another possible structure which again did not come to fruition.

[264] On 14 October 1994, Mr Alford recorded that he carried out research with regard to the structuring of AET.

[265] Mr Alford said that in the period following May 1994, there were numerous attendances and telephone conversations between Mr Reynolds, Mr Ebbage and Mr Alford in relation to the form and content of the AET joint venture documentation, and in particular, the loan documents. Mr Alford said in relation to the loan documentation, it was his desire to limit the amount of funding to the AET joint venture. He recalled that the documents reflected advances being made by AEH to AET, and that those advances were limited to $50,000. He said that it was at his insistence in drafting those documents that provision was made for the right to convert advances to AET into equity in the AET joint venture where funding exceeded $50,000 and where there was an inability on the part of the joint venture to repay that funding within a certain time frame.

[266] This evidence by Mr Alford gives some insight into the true nature of his interest in the agreement which was, in essence, providing a loan. The loan could only be converted into equity in certain circumstances. Another insight was given by Mr Alford's answers to the following questions by Mr Griffin QC:

> "Would it have been Mr Diamond's understanding that any payments made by you would have been repayable as loans, or would it be his understanding that that would be venture capital?-- Repayable.
> Repayable?-- As loans.
> And what about Diamond's money?-- Repayable.
> As loans?-- Correct.
> Not venture capital?-- No.

> Why do you say that?-- I say it simply because the funds which Paul and I introduced into AET were on the basis that they were loan funds and repayable, and that, by the same basis, Mr Diamond's introduction of funds into the AEH joint venture – which is the venture that I'll refer to now as between Paul, myself, and Colin – would have also been repayable.
> I put it to you that any moneys that were provided to Mr Manthey were provided by Mr Ebbage by way of venture capital?-- No, that's incorrect."

November 1994

[267] On 18 November 1994, Mr Ahearn filed PM9543 being "Improvements in and relating to internal combustion engines". This was subsequently refiled on 9 November 1995, 4 December 1996 and 23 December 1997.

Targa Tasmania

[268] Mr Alford deposed that he and Mr Ebbage had for some time wanted to compete in a motor car rally held annually in Tasmania called the Targa Tasmania Rally. Mr Alford was planning to race in the Targa Tasmania Rally to be held in Tasmania in April 1995. Mr Ebbage intended to race in the rally as a driver with Mr Alford as navigator. Both attended the compulsory driver training and obtained licences to drive in the rally. They had intended to race in a Nissan vehicle, but a change in the rules made that car ineligible. But both were very keen to compete. In the absence of their being able to locate a suitable vehicle, Mr Ebbage suggested to Mr Alford that they construct a car specifically for the event. They proposed to use a lightweight engine in a prototype body which became the XTC. Mr Manthey agreed to build it for them in November/December 1994. Originally, it was intended to use a conventional lightweight motor but later it was proposed to use the new OX2 prototype engine.

December 1994

[269] In late 1994, Mr Manthey had completed the prototype OX2 engine which had taken him three months to manufacture and assemble. He also prepared extensive diagrams and notes for Mr Ahearn to file with the patent office. Mr Ebbage instructed Mr Ahearn to prepare a provisional application for the new engine. Mr Manthey provided him for this purpose with 13 sheets of drawings and six sheets of notes which he had prepared. This engine became the subject of a provisional patent application in the name of AET on 2 December 1994. This provisional patent application was numbered PM9827 by the patent office and accorded a filing date of 2 December 1994. The provisional patent was subsequently granted. The new engine has become known as the OX2 engine for commercial purposes. It was described in the provisional specification as "new and improved rotary engine".

[270] A document which is dated December 1994 and which has Mr Ebbage's handwriting on it is entitled the AET business plan. It contains handwritten changes which show the joint venture being owned fifty per cent by Mr Manthey and fifty

per cent by AEH (in place of Mr Ebbage or nominee and A Alford or nominee with 25 per cent each).

[271] When Mr Ebbage saw the OX2 engine he said he would like to put it in a car and take it to the Targa Tasmanian Rally. After an argument between them, Mr Manthey agreed to build a car which they called the XTC. Mr Darcy assisted him to build it. It took about three months to build and was to be ready in time for the rally which was to occur in April 1995.

January to February 1995

[272] In about January 1995, Mr Ebbage told Mr Gillow, one of the purchasers of the Beaudesert practice, about his involvement in AET. Mr Ebbage did not make any mention to him of Mr Alford having an interest in AET.

[273] By January/February 1995, Mr Alford said it became increasingly obvious that the OX2 engine was not going to be sufficiently developed to propel the XTC vehicle for the Targa Tasmania Rally in April 1995. Mr Alford was informed by Mr Ebbage on a couple of occasions about the progress and promotion of the car and engine for Targa Tasmania Rally.

[274] Mr Manthey said that Mr Alford visited the factory once with Mr Ebbage to look at the XTC vehicle in March or April 1995 and that this was only the second time he met Mr Alford. Mr Alford had a disagreement with Mr Darcy about whether a video camera could be mounted in the front of the vehicle to take footage during the rally. Mr Manthey did not see Mr Alford again until Mr Ebbage's funeral in December 1998. In fact, it appears from Mr Ebbage's staff diary that Mr Alford and Mr Ebbage attended the factory on 27 January 1995. This is confirmed by the work in progress records of the AE practice which show that on 27 January 1995 Mr Alford attended on Mr Ebbage and Mr Manthey at Burleigh. There was another relevant attendance by Mr Alford at Burleigh on 7 March 1995. However, unlike the attendance noted on 27 January, the persons with whom he met, if any, are not noted nor is the exact location. It may have been at Mr Manthey's factory or at some other premises in Burleigh such as Mr Darcy's workshop. There is no independent evidence that Mr Alford met with Mr Manthey on this date.

[275] On 24 February 1995, some eight months after Mr Reynolds' last communication with Mr Ebbage, Mr Reynolds again discussed his concerns in relation to the stamp duty issue with Mr Ebbage and confirmed his instructions to brief a specialist law firm on the matter. On that date, Mr Reynolds spoke to Jeff Mann, a partner with Mallesons Stephens Jacques, a specialist in stamp duty law. Mr Reynolds asked Mr Mann to consider the draft agreement to assign intellectual property and draft joint venture agreement and give his opinion as to whether the assignment of intellectual property would attract stamp duty and if the documents were otherwise dutiable.

March 1995

[276] Damien Peters was employed by AES as an accountant between 31 January 1994 and 17 November 1995. On 2 March 1995, on Mr Ebbage's instructions, he prepared documents to reflect the transfer of one share in AET from AEH as trustee for the AEH Trust No 5 to Mr Ebbage; a Declaration by Mr Ebbage (as trustee of one share in AET) in favour of Mr Manthey; the allotment of 1,000 ordinary shares

in AET to Mr Manthey; the allotment of 1,002 ordinary shares in AET to EOS as Trustee for the Ebbco Trust; minutes of meetings of the Directors of AET wherein appointment and resignations of officers to the company and the allotment of shares in the company were, among other things, considered. The documents prepared on that date included minutes of meetings of AET purportedly held on 11 January 1994 and 12 January 1994. The resignation of Mr Alford as a Director and Secretary of AET, the appointment of Mr Ebbage as a Secretary of AET and the preparation of ASC Form 304 to record the change in officers of AET had all occurred previously. By voluntarily transferring his share in AET and resigning as director and secretary, Mr Alford lost any interest he may have had in AET. These documents were filed with ASIC and thereafter became a matter of public record. Mr Peters' affidavit gives some insight into the extent of accountancy services performed by the AE practice for AET, particularly by Mr Ebbage.

[277] Mr Alford deposed that Mr Ebbage was at that time preoccupied with the preparation of the XTC vehicle and the OX2 engine in anticipation of that vehicle competing in the 1995 Targa Tasmania Rally to be held in the following month of April, so he assumed responsibility for liaising with Mr Reynolds about the stamp duty issue. Under cross-examination, he said that he effectively ceased having an involvement with the preparation of the documents as early as February 1994, except for a brief period in March/April 1995 when Mr Ebbage was preparing for the Targa Tasmania Rally. He said another reason for his involvement at this time was that he had particular experience in stamp duty.

[278] On 8 March 1995, Mr Reynolds received an opinion from Mr Mann with regard to the stamp duty implications of the agreement to assign intellectual property and the joint venture agreement between AET and AEH. He referred that advice to Mr Alford. Mr Ebbage reviewed documents from Mr Reynolds between 8 and 15 March 1995. In accordance with Mr Mann's advice, Mr Reynolds amended the documents and converted the agreement to assign the intellectual property to an offer to assign it. He also excised the loan provisions from the joint venture agreement and set up a separate loan agreement. On 13 April 1995, Mr Reynolds referred those documents back to Mr Mann for further advice.

April 1995

[279] In early 1995, Mr Ebbage instructed Mr Ahearn to protect the design of the car designed by Mr Manthey known as the XTC. Mr Ahearn received all his instructions from Mr Ebbage and did not speak to Mr Manthey about the XTC at that time. An application was lodged on 13 April 1995 with regard to that automobile design.

[280] Mrs Ebbage gave evidence that prior to the Targa Rally her husband told her that he would be leaving the accountancy practice personally but not leaving the partnership. Mr Ebbage said he would receive a 25 per cent share in the engine for his promotion of it; that Mr Alford would receive 25 per cent although he was running the accountancy practice; funds from the accountancy practice would be funding the promotion and development of the engine; and that Mr Manthey, as inventor, would receive 50 per cent. This evidence was not admissible against Mr Manthey. While it was admissible against Mr Ebbage, its weight was very slight. There are a number of reasons for this. Mr and Mrs Ebbage had been separated, reunited and separated finally towards the end of 1995. There is no

reason to accept that he was being truthful to his wife. Secondly, she was an unsatisfactory witness with a degree of animus towards the Ebbage family which made it difficult to rely on her evidence. Further, nothing in the notes made by Mr Ebbage or his solicitors, Hopgood and Ganim, during the negotiations of the financial settlement with his wife made any reference to any liability to the plaintiffs. Yet, it would surely have been in Mr Ebbage's interest to record such liability in the negotiation of any proposed property settlement with his wife.

[281] Mr Alford said that at the time he had serious concerns about the exposure that the vehicle would receive at the Targa Tasmania Rally and the potential conflict of interest that may have been perceived in relation to his interest with Mr Ebbage in the AET joint venture and its OX2 technology and his investment, and that of Mr Ebbage in SCT Ltd, given Mr Alford's close association with the inventor of that technology, Mr Mayne.

[282] Mr Alford said he discussed his concerns with Mr Hawker in early 1995 and Mr Hawker told him that disclosure of his interest in the AET joint venture would not unduly upset Mr Mayne and that failure to disclose that interest would result in Mr Mayne no longer openly sharing with Mr Alford the development milestones of the split cycle engine or the progression of SCT Ltd towards listing on the Australian Stock Exchange. Mr Alford said he was particularly concerned to maintain his close relationship with Mr Mayne and be kept abreast of whatever developments were taking place with the listing of SCT Ltd given the investment that he and others had made in that company, not the least of which was the substantial investment by Chancetest.

[283] Mr Alford said he called on Mr Mayne and advised him of the status of the development of the AET technology and, in particular, their intention to promote the technology and the engine in an experimental test car. SCT Ltd at this time was also developing a prototype of the split cycle engine to be installed in a motor bike and small vehicle. Mr Alford told Mr Mayne that design and development of the engine was being undertaken by Mr Manthey. Mr Alford says he told Mr Mayne that AET was being supervised and managed by Mr Ebbage. He said that Mr Mayne encouraged their endeavours and in doing so, offered what assistance he could give to their efforts. He said that it was also at about that time that he and Mr Ebbage had discussions in relation to his position as a director of AET on the one hand and his relationship with Mr Mayne and SCT Ltd on the other. Mr Alford did not, however, tell Mr Mayne that he had any interest in AET.

[284] Mr Alford and Mr Ebbage decided to withdraw the XTC from the Targa Tasmania Rally because it was not ready in time, although Mr Alford said that Mr Ebbage and Mr Manthey were still hopeful that they could get the engine to the stage where it could propel the vehicle around the course. The XTC and the OX2 engine were therefore transported to Tasmania for the Targa Tasmania Rally in April 1995. Mr Alford said that although the vehicle was unable to compete in the rally, both it and the engine were successfully promoted during the course of the event and received considerable national television exposure.

[285] Steven Johnson, an automotive engineer who lived in Hobart at that time and who knew Mr Alford, was extremely unimpressed with both the engine and the car, which he considered a death trap. He advised Mr Alford against going to Tasmania to compete in the rally. Mr Johnson told him "not to bother wasting his time".

Mr Alford said he was disappointed about being unable to compete in the rally and did not travel to Tasmania although Mr Manthey and Mr Ebbage did. He was bitterly disappointed. He was and remained an enthusiast for motor vehicle racing, being unavailable during part of the trial of this action while he competed in a motor race at Bathurst.

[286] Throughout 1995, Mr Alford said he continued to visit the SCT Ltd factory, on occasion, telling Mr Mayne how Mr Ebbage and Mr Manthey were going. Mr Alford mentioned problems that they might be having with funding or with the engine itself.

[287] On 27 April 1995, Mr Mann gave further advice to Mr Reynolds making further recommendations as to amendment of the documents so that they would not be dutiable, or would attract less duty. On the same date Mr Reynolds sent a letter to the Southport practice of Alford Ebbage addressed to Mr Ebbage enclosing Mr Mann's advice and enclosing a draft joint venture agreement, draft offer to assign intellectual property and draft loan agreement amended in accordance with Mr Mann's advice.

[288] On 28 April 1995, Mr Ahearn wrote to Mr Ebbage enclosing the official filing receipt for the automobile design application, and on 4 May 1995, Mr Ebbage signed a statement in support of the application for registration of a design which was filed with the Registrar of Designs; attached to that are photographs of the XTC motor vehicle.

May 1995

[289] On 5 May 1995, Mr Peters sent to ASIC two notifications of allotment of shares in AET which recorded the allotment of 1,000 shares to Mr Manthey and 1,002 shares to EOS as trustee for the Ebbco Trust.

[290] The plaintiffs claimed that on 8 May 1995, Mr Ebbage as director of AET purported to cause AET to allot and issue 1,002 further shares in its issued capital to EOS as trustee for the Ebbco Trust and to record that issue in the register of shares maintained by AET. This did occur although not on 8 May. The Alford interests then alleged that Mr Ebbage instructed Reynolds Solicitors to alter the draft documentation to show (falsely in result) EOS as a shareholder in AET without telling Mr Reynolds that those instructions were not given with the knowledge or consent of Mr Alford and without telling Mr Alford that he (Mr Ebbage) had given those instructions to Mr Reynolds. The Ebbage interests admitted that Mr Ebbage instructed Mr Reynolds that EOS was the shareholder in AET but otherwise did not admit those allegations. In my view, for reasons to be discussed, Mr Alford knew that EOS was to be a shareholder in AET.

[291] The Alford interests also alleged that, on 8 May 1995, Mr Ebbage, as director and officer of AEF, by altering the books of AEF purported to show, falsely, that the advances so made by AEF to AET were loans from AEF to the Ebbco Trust and created by journal entry, an entry in the books of EOS purporting to show, falsely, that advances so made by AEF to AET were advances made by AEF to EOS and made by EOS to AET. The Ebbage interests specifically denied that Mr Ebbage altered the books of AEF to show falsely that advances made by AEF were made to EOS. This was in my view a correct attribution to the books of the companies.

EOS, as shareholder in AET and as trustee of the Ebbco Trust and representing Mr Ebbage's interests, was to be responsible for the repayment of any loan from the AE practice which would benefit AET. The moneys were correctly shown as paid to EOS which loaned them to AET.

[292] In paragraph 28 of the statement of claim the plaintiffs alleged that Mr Ebbage took those actions on 8 May 1995 without the consent or knowledge of Mr Alford. The Ebbage interests have denied that the actions were taken on 8 May 1995 or that they were, as pleaded by the plaintiffs, contrary to the Articles of Association of AET and AEH (which articles required board approvals of transfers and allotments of shares); for the improper purpose of altering the interest of Mr Alford and his associates in the joint venture; contrary to the obligations as a director of AET, AEH and AEF; or in breach of the trust upon which AET held the joint venture assets. For the reasons given in this judgment I accept that the transfer and issue of shares was not contrary to Mr Ebbage's duties or obligations. Nor was the inclusion of EOS rather than AEH as the contracting party.

[293] The Ebbage interests have also denied that Mr Ebbage took the actions knowing each of the matters referred to above. Mr Ebbage was alleged to have taken the following actions knowing that he did not have any legal right to do so. This was denied. The actions alleged to have been taken by Mr Ebbage on 8 May 1995 also included that, as director of AEH, he purported to transfer the one share held by AEH in AET to Mr Manthey and as a director of AET purported to record the transfer in the register of shares maintained by AET and procured Mr Manthey to declare Mr Ebbage trustee of that share for Mr Manthey. It was alleged that Mr Ebbage backdated the transfer to make it falsely appear to have taken place on 12 January 1994.

[294] The Ebbage interests admitted that Mr Ebbage as director of AEH executed the transfer, and asserted that Mr Alford had also executed the transfer, backdated 11 January 1994, by May 1995. They also admitted that Mr Ebbage, as trustee for Mr Manthey, was entered in the register of members of AET as the holder of the share the subject of the transfer. The Ebbage interests denied that Mr Ebbage procured Mr Manthey to declare Mr Ebbage trustee of that share.

[295] However, Mr Manthey's interests pleaded that Mr Manthey executed the declaration of trust because Mr Ebbage represented to him, and he believed, that Mr Ebbage would be doing business overseas and that the purpose of the declaration of trust was to avoid Mr Ebbage having to track down Mr Manthey in relation to that business whilst at the same time ensuring that Mr Ebbage would act in Mr Manthey's best interests. Mr Manthey gave evidence consistent with that which I accept.

[296] I do not accept, as pleaded by the plaintiffs in their reply, that it was incumbent on Mr Manthey to obtain legal advice on the meaning and effect of the declaration of trust and that Mr Manthey was negligent, reckless and/or careless without regard to the consequences thereof in failing to seek appropriate legal advice.

[297] The Ebbage interests admitted that AET allotted and issued 1,001 shares in its issued capital to Mr Manthey and that Mr Manthey was entered in the register of members as the holder of those shares. The allotment and issue was backdated to

11 January 1994. The backdating was irregular and improper but it was a practice with which Mr Alford had no problem and was not done to defraud him.

[298] On 8 May 1995, Mr Reynolds again sent a further amended draft joint venture agreement, offer to assign intellectual property, and loan agreement to Mr Ebbage at the Southport practice for execution. Mr Reynolds could not at trial recall what those amendments were except to suggest that they were nominal reflecting possibly a change in corporate entities.

[299] Mr Reynolds identified Exhibit DOR22 to his affidavit as a copy of the offer to assign intellectual property produced on his office word processing system in or about May 1995, on receipt by him of advices from Mallesons Stephen Jacques in respect of potential stamp duty payable on assignment of the intellectual property. The document contains his handwritten amendments which reflect his adoption of the recommendations of Mr Mann, and the fact that an offer to assign intellectual property from Mr Manthey to AET is contemplated by the form of the document. He said he formed his belief based on a recollection of Mr Ebbage's instructions and from the following facts, matters and circumstances: the document reflects title in the intellectual property passing to AET on that company's acceptance of Mr Manthey's offer to assign the intellectual property in the technology to AET; the document reflects allotment of 100 shares in AET to Mr Manthey at a premium of $20,000 a share as opposed to $2,000 a share reflected in an earlier draft; under the terms of the offer, Mr Manthey is appointed as a director of AET and the warranties provided by him are given by AET and AE.

[300] Mr Reynolds said that he continued to communicate with both Mr Alford and Mr Ebbage, and after receipt of draft board resolutions from Mr Mann on 31 May 1995, he forwarded them to Mr Alford and Mr Ebbage on 1 June 1995, together with the advice given by Mr Mann. Mr Reynolds then sought payment for his account and for that of Malleson Stephen Jacques between then and April 1996.

[301] An agenda was drawn up for a meeting between Mr Alford and Mr Ebbage on 12 May 1995. The plaintiffs asserted in their chronology that the agenda was drawn up by Mr Ebbage. However, there was no evidence that this was so or that the meeting took place. Even if it did, it does not assist the plaintiff's case. AET was just one of a large number of agenda items. It rather suggested that the accountancy practice had many critical issues to discuss.

June 1995

[302] Although the statement of claim alleged that the final proposed documentation of the joint venture was not delivered to Mr Manthey and Mr Ebbage until October 1995, Mr Alford's affidavit evidence was that documents in final form were delivered by Mr Reynolds in June 1995. Mr Alford deposed that on 19 June 1995 he met with Mr Ebbage after an approach by Mr Ebbage in relation to Mr Alford's interest in the AET joint venture. Mr Alford said it was no secret that he was disappointed about his inability to compete in the Targa Tasmania Rally and the failure by Mr Ebbage and Mr Manthey, in his view, to advance the engine and the XTC vehicle to a stage where they could compete in the rally notwithstanding their assurances to him that both would be race ready. Mr Alford told Mr Ebbage at this time his view that commercialisation of the OX2 engine might well be as protracted as that of the SCT technology notwithstanding Mr Manthey's position to the

contrary. Conversely, he said, Mr Ebbage was buoyed by the positive public response and the enquiries generated by the promotion of the vehicle and technology during the Targa Tasmania Rally.

[303] Mr Alford however attempted in his evidence to downplay his bitter disappointment about the failure to compete in the Targa Tasmania Rally. He was humiliated and angry. It appeared that he lost interest in Mr Manthey's invention and wanted nothing more to do with it. Mrs Atkinson said that while AET was a very topical subject within the Southport practice particularly while Mr Ebbage continued to attend the practice, the subject became taboo as a topic of conversation particularly in the presence of Mr Alford who expressed the opinion that it was a funding black hole. Although Mrs Atkinson did not put a precise time on this she followed it by saying that in 1996, after the sale of the Beaudesert practice, there was less and less discussion in relation to AET and its technology.

[304] Mr Alford said Mr Ebbage approached him later on 19 June regarding a proposal for the preparation and issue of a prospectus and/or information memorandum for the purpose of attracting potential investors. Mr Ebbage said to Mr Alford that in the circumstances where Mr Alford did not wish to proceed with either the funding or his investment in the AET joint venture then Mr Ebbage was of the opinion that he could raise sufficient funds to acquire Mr Alford's 25 per cent interest in the AET joint venture for an amount of $2,000,000. I do not accept that Mr Ebbage made any such suggestion.

[305] Mr Alford deposed that notwithstanding his disappointment with the outcome of the Targa Tasmania Rally, he told Mr Ebbage that it would only be fair and reasonable for him to be provided with the full details of any potential investor in terms of their proposed investment. He deposed that one of the positive consequences of the exposure generated by the Targa Tasmania Rally was that a substantial number of enquiries were generated. Those enquiries gave rise to Mr Ebbage's travelling extensively following up enquiries and leads and endeavouring to garner financial support from investors to further promote the technology.

[306] I do not accept Mr Alford's version of what occurred. Mr Alford was, by mid-1995, unwilling to commit to any further investment in AET. He wanted to take no further part in it and did not want to formalise any understanding that he would take equity in it. No final agreement for Mr Alford to have an interest in the joint venture was ever reached.

[307] Mr Alford also deposed that since approximately mid-1994, he and Mr Ebbage had discussed a proposal whereby the AE practice would establish an accountancy and business management practice in the United Kingdom. This proposal was developed over the following 12 months to the extent that Mr Alford and Mr Ebbage agreed in principle that Mr Alford would relocate to the United Kingdom with his family in circumstances where suitable business and family visas could be obtained for his family and himself, and where Mr Alford and Mr Ebbage were satisfied that sufficient professional work could be sourced to justify the proposal. In fact, by 1995, the partnership between Mr Alford and Mr Ebbage no longer suited either of them and both were looking for other professional opportunities.

Final documentation of agreements

[308] The documents executed were the Assignment of Intellectual Property from Manthey to AET; Offer to Assign Intellectual Property from Manthey to AET; Advanced Engine Technology Joint Venture Agreement between Mr Manthey, AET and EOS; and an AET loan agreement between AET and EOS ("the final agreements").

[309] In spite of Mr Alford's sworn evidence that the documents were delivered in final form in June 1995, in the plaintiffs' written submissions it was submitted that the agreements were executed in May 1995 as they were stamped on 17 May 1995. The evidence for this is said to be a receipt from the Office of State Revenue dated 17 May 1995. However, this is attached to the transfer form of one share in AET from AEH as trustee for AEH Trust No 5 to Mr Ebbage and a declaration of trust that the share is held on behalf of Mr Manthey rather than to the final agreements. It appears that the final agreements were executed sometime in May or June 1995. The evidence does not allow for a finding as to the precise date.

[310] The deed entitled "Assignment of Intellectual Property" (the "deed of assignment") was executed by Mr Manthey and by Mr Ebbage on behalf of AET. Their signatures were witnessed by Mrs Atkinson. Mr Alford denied ever seeing this document prior to the commencement of this litigation. This deed of assignment reproduces much of the material contained in the rollover agreement drafted by Kenny & Co. It is undated except for the year printed in the document of 1994.

[311] The deed of assignment recited that Mr Manthey had initiated the research in respect of his invention in 1982. I presume this date was chosen to make it appear that capital gains tax would not be payable. I am not in a position to determine whether that date is correct. It was not put in issue in these proceedings. Mr Manthey agreed to assign all the intellectual property in his invention relating to the internal combustion engine ('the technology") to AET. All the issued shares in AET were to be held by Mr Manthey. The deed of assignment also recited that Reynolds Solicitors acted on behalf of AET, and that Mr Manthey had been advised in writing to obtain independent professional advice.

[312] Another document entitled "Offer to Assign Intellectual Property" was in virtually identical terms to the deed of assignment. It was signed by Mr Manthey and also by Mr Ebbage and Mr Manthey on behalf of AET. That document was dated 11 January 1994. Again, the signatures were witnessed by Mrs Atkinson. The seal register of AET records in Mr Ebbage's handwriting that the seal was affixed on 11 January 1994. Mr Alford denied having seen the executed offer to assign intellectual property. Although the document was dated 11 January 1994, it could not have been executed before May/June 1995 because the documents had not been finalised by Mr Reynolds before that date.

[313] Reynolds Solicitors had earlier produced a draft joint venture agreement between Mr Manthey, AET and AEH. The joint venturers were said to be Mr Manthey and AEH. Mr Alford said he had seen that draft joint venture agreement. It was not executed. Mr Alford alleged that the change in parties from AEH to EOS was done secretly by Mr Ebbage.

[314] A joint venture agreement (the "AET joint venture") prepared by Reynolds Solicitors in similar terms was executed and dated. The joint venturers in the

concluded agreement were Mr Manthey, AET and EOS. The joint venture agreement provided that:-

1) The deed was dated 11 January 1994;
2) At the completion of the joint venture agreement, 50 per cent of the issued shares in AET were to be held by Mr Manthey and 50 per cent by EOS;
3) EOS had agreed to provide financial assistance to AET by way of loan funds to assist in the development and commercialisation of the technology;
4) Mr Ebbage was to be appointed as a director and chairman of AET;
5) Mr Manthey and EOS recognised their fiduciary responsibilities to each other in respect of the joint venture;
6) Mr Manthey was to contribute technical research and development of the technology and be paid $600 a week as salary;
7) EOS was to be responsible for the day-to-day administration of AET and for supervising accountancy services provided to AET by AE at AE's normal chargeable rates;
8) The proper expenses of Mr Manthey and EOS would be paid by AET when duly authorised by unanimous resolution of the Board.

[315] The date written on the joint venture agreement was 11 January 1994 although, like the offer to assign, it could not have been executed before May or June 1995. The AET seal register notes 11 January 1994 as the date the seal was affixed to the joint venture agreement. This date must also be incorrect.

[316] The agreement was executed by Mr Manthey, by Mr Ebbage and Mr Manthey on behalf of AET, and by Mr Ebbage and Mrs Ebbage on behalf of EOS. All signatures were witnessed by Mrs Atkinson. Mr Alford denied having seen this document. Mr Alford said he believed that EOS was made the joint venture participant for the purpose of depriving him of his interest in the joint venture. EOS was a company in which Mr Alford had an interest in that Dario was a potential beneficiary under the discretionary trusts of which EOS was the trustee, but the company was under the control of Mr Ebbage.

[317] A third set of documents were produced by Reynolds Solicitors. These were entitled "Advanced Engine Technology Loan Agreement". One draft shows the parties as AET and AEH. Mr Alford said that he suggested to Mr Ebbage that cl 1.6, which entitled AEH to convert loan moneys to equity in certain circumstances, be inserted. However, a clause which envisaged the conversion of the loan to equity had been in the "Subordinated Loan Agreement" originally drafted by Kenny & Co. This clause was substantially reproduced in the loan agreement.

[318] The loan agreement which was executed was between AET and EOS. It was dated 11 January 1994 and executed by Mr Ebbage and Mr Manthey on behalf of AET and by Mr and Mrs Ebbage on behalf of EOS. The signatures were once again witnessed by Mrs Atkinson. The AET seal register records that the AET seal was affixed on 11 January 1994. However, like the other documents, it could not have been executed before May or June 1995. The loan agreement provided that EOS would lend AET up to $50,000 which would not be repayable prior to 30 June 1996

unless AET had profits available to pay the loan. The loan was interest free until 30 April 1995. After 30 June 1995, EOS had the right to convert loans to equity.

[319] The witnessing of the documents by Mrs Atkinson has some significance. She was a trusted employee of Mr Alford and is now an owner of equity in the accountancy practice, Alfords Accountants and Business Advisors. It is most unlikely that she would have been used by Mr Ebbage to witness signatures if there had been any intention to conceal the execution of the documents from Mr Alford or to secretly deprive him of his interest in the joint venture. In addition, the documents were apparently signed at the Southport practice where Mr Alford normally worked. I am not satisfied that Mr Ebbage acted so as to deceive Mr Alford or the other plaintiffs or to keep his actions secret from them.

[320] Mr Alford said it was not until he made investigations after Mr Ebbage's death in December 1998 that he became aware of agreements that reflected an interest in the AET joint venture in favour of parties other than Mr Manthey and AEH, which he said he believed was the only party to the AET joint venture representing the interests of Mr Ebbage and himself. This was untrue.

[321] Mr Alford said in oral evidence that none of the draft agreements nor the signed agreement represented the terms of the agreement between the parties. In answer to questions asked by the court he said:

> "[I]s there one of these documents that best represents what you say was the agreement between the parties?—None of them do, your Honour, because they are working drafts and there would have been further agreements done after this – after the last of these agreements.
> So each of these represents a development in the – what were to be the terms of the agreement?-- Yes, your Honour.
> So I can take it from that that all the terms of the agreement had not been agreed?-- So far as the documentation goes, that would be correct, your Honour."

[322] In re-examination, Mr Alford drew a distinction between being free to withdraw from the documentation, which he said he was, and being free to withdraw from the agreement, which he said he was not. However, in my opinion, the correct interpretation of his evidence during cross-examination was that he felt free to withdraw from the "agreement" which he said he had entered into because, prior to a satisfactory written agreement being entered into, he did not regard himself as bound by any proposal or even agreement in principle he had entered into about the development of Mr Manthey's technology. This is consistent with there being no concluded agreement with Mr Ebbage[5]. There was never any tripartite agreement as alleged in the statement of claim between Mr Alford, Mr Ebbage and Mr Manthey to include Mr Alford in the AET joint venture. Mr Alford chose to withdraw from any final agreement. It follows that no fiduciary duties were owed to him or any of the other plaintiffs in respect of the AET joint venture. There was no misappropriation of assets in respect of the AET joint venture from Mr Alford by Mr Ebbage.

---

[5] *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251 at 273; *Summergreene v Parker* (1950) 80 CLR 304 at 315; *Thorby & Ors v Goldberg & Ors* (1964) 112 CLR 597 at 607; *Australian Broadcasting Commission v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 549.

[323] A deed dated 11 January 1994 where Mr Ebbage's and Mr Manthey's signatures were witnessed by Mrs Atkinson declares that Mr Ebbage as trustee holds his one share in AET on trust for Mr Manthey as beneficiary. That document was not stamped until 17 May 1995 as can be seen from the stamp on the document. Also stamped on the same date, 17 May 1995, is a standard transfer form where one share in AET was transferred from AEH as trustee for AEH Trust No 5 to Mr Ebbage. The signatures on that document are those of Mr Ebbage and Mr Alford as transferors and Mr Ebbage as transferee. That document is dated 11 January 1994. Mr Alford's evidence was that he signed the transfer but does not know whether or not the document had been completed at the time he signed it. The evidence given in his affidavit sworn on 7 September 1999 had merely been that the share transfer was undated when he signed it. Mr Alford had no difficulty with the reason for the documents being backdated. Although he said he had no specific knowledge of the purpose for which it was backdated, he believed that it was backdated for the purpose of transferring to Mr Manthey 100 per cent of the issued shareholding in AET from incorporation of the company such that a transfer of the technology could be effected and leave Mr Manthey with a pre capital gains tax asset. This had been the advice and intention of Mr Alford, and Mr Ebbage, for some time. It was no secret between them. Whatever intention there might have been to defraud the revenue, it does not evidence an intention to defraud Mr Alford.

[324] On 8 May 1995, Mr Ebbage sent these documents to the Commissioner of Stamp Duties saying that a recent review of the statutory records had revealed that they had not been lodged before stamping. He said that in order to assess stamp duty he provided the following "information":

1. The date of incorporation of AET was 11 January 1994;
2. At that date, the standard transfer form and deed of trust were executed and the company had not traded nor had it incurred any liabilities or purchased any assets;
3. The only asset of AET was $2 cash on hand derived through the original issue of shares.

[325] Mr Alford deposed that any purported transfer of the shareholding in AET reflecting a disposal of the interest held by AEH and/or an allotment of an interest in AET to EOS would have potentially given rise to the sale and disposition of an interest in the technology that could have given rise to serious capital gains tax and stamp duty liabilities for AEH. Mr Alford said he would therefore not have and did not consent to such a transfer disposal and/or allotment in favour of EOS. Under cross-examination by Mr Griffin QC, Mr Alford conceded, "since looking at documents after the death of Paul, I accept that I did know that Ebbco Office Services was to be the shareholder of AET". I do not accept that Mr Alford did not know that the agreements had been finalised nor identities of the parties to those agreements. He had lost interest in Mr Manthey's invention and withdrawn from any potential ownership through a joint venture. He knew EOS and Mr Manthey were to be the shareholders in AET and the participants in the joint venture.

July 1995

[326] Mr Ebbage, through Reynolds Solicitors, created a trust for Mr Manthey known as the Manthey Trust No 1. It was created on 13 July 1995 with Mrs Atkinson as settlor. It was a discretionary trust whose beneficiaries included Mr Manthey and his family and EOS.

[327] From this time, Mr Ebbage wrote to a number of potential investors in an attempt to have further money injected into AET. In none of those letters was it suggested that there were any other partners in the business other than Mr Ebbage and Mr Manthey. Mr Manthey left all the business, documentation and accounting matters to Mr Ebbage while he concentrated on the invention itself.

[328] On 3 July 1995, EOS and Dario each sold 49,500 SCT Ltd shares to the Morland Superannuation Fund at $1.00 per share. At some time later that year, Mr Morland was approached by Mr Alford and Mr Ebbage about investing in Mr Manthey's invention. Mr Alford and Mr Ebbage untruthfully told him that they together owned 50 per cent of the business. This may have been to persuade Mr Morland to invest. They did not make any such representation in the presence of Mr Manthey. However, when the engine was demonstrated to Mr Morland it failed to perform well, and he did not make any investment in it.

August 1995

[329] In August 1995, Mr Alford deposed that he had several meetings with Mr Diamond and others in the United Kingdom regarding AET. As was put to Mr Alford by Mr Griffin QC, although denied by Mr Alford, the reason he continued to discuss these matters with Mr Diamond was that he had a continuing obligation to Mr Diamond because of the earlier negotiations.

[330] Concern was expressed by Mr Diamond, according to Mr Alford, regarding the management and direction of AET. However, in another part of his evidence, Mr Alford also said that Chancetest ceased to be a topic of conversation between himself and Mr Diamond from late 1994 or early 1995. Mr Alford said they discussed the two patents which had then been applied for by AET. Mr Alford untruthfully said that even at this late stage, documentation reflecting the respective interests of the joint venture parties had still not been finalised. Mr Alford said that Mr Diamond's preference was that a person be appointed on a full-time basis to manage the development and commercialisation of the AET joint venture and that the obvious appointee for this role was Mr Ebbage. Mr Alford told this to Mr Ebbage in a telephone conversation on 1 August 1995 when Mr Alford was in London. Mr Diamond recalled this conversation with Mr Alford although he does not say that this was his idea. Mr Alford told Mr Diamond that Mr Ebbage was prepared to commit full-time to AET and was no longer interested in continuing with the Beaudesert practice. This was true.

[331] Mr Diamond's recollection was that there were two meetings; the first at Browns Hotel, London between himself, Mr Alford and Mr Morris; and the second at the office of John Landsbury & Associates in London between Mr Diamond, his Hong Kong accountant and former partner, Andrew Paul, Mr Morris, Mr Alford and others. Mr Diamond expressed his annoyance to Mr Alford that the documentation presented by Mr Alford did not address all of his previous criticisms; the $50,000 invested in the joint venture by Chancetest had been dissipated in legal fees; and there was no recognition of the $50,000 paid to the joint venture by Chancetest. The relationship between Mr Alford and Mr Diamond became strained as a result.

[332] Mr Diamond said he recalled having reviewed a joint venture agreement and an agreement for the assignment of intellectual property to the joint venture company. Mr Alford's work sheets showed that he spent time on 1 August 1995 for AET on

what was rather cryptically described as "int, neg, disc". This was not the only client whose work Mr Alford attended to on that day. A file note of the meeting on 1 August 1995 made by Mr Alford referred to a discussion with Mr Diamond with regards to "the agreements as it pertained to Manthey, Advanced Engine Technology Pty Ltd, Ebbco Office Services, Chancetest and A E Holdings Pty Ltd". It is significant that Mr Alford refers to EOS as this was the party with Mr Manthey to the executed joint venture agreement which Mr Alford said he had not seen. EOS was recorded as having agreed to fund AET in a total amount of $50,000, and as having already contributed $150,000. Later in the document, Mr Alford referred differentially to EOS and Dario representing respectively Mr Ebbage's and Mr Alford's interests. I do not accept that references to "Ebbco" in that document are to be understood, as Mr Alford said, as references to Mr Alford and Mr Ebbage. The references to Ebbco are to the company, EOS, which as Mr Alford well knew, contrary to his sworn evidence, had entered into agreements with AET and Mr Manthey.

[333] Various proposals for future funding and ownership were discussed. Mr Diamond asked detailed questions about the agreements including, as recorded by Mr Alford, asking, "Which agreement was executed first?" This is consistent with both Mr Diamond and Mr Alford knowing that the agreements drafted by Mr Kenny and then by Mr Reynolds, had been executed. The question is otherwise nonsensical. Mr Alford nevertheless denied that there were any executed agreements about the joint venture at that time. He was unable to explain why his note referred to documents which had been executed. Mr Alford's file note refers in some detail to a number of matters with regard to the agreements about which Mr Diamond was clearly dissatisfied. Various possibilities for the future were discussed including a rollover of the patents into a newly established separate company referred to as AET2 which would offer shares as follows: Manthey 50 per cent; Ebbco 10 per cent; Dario 10 percent; CT 30 per cent. That did not eventuate. AET received no further funding from Mr Diamond or any interest associated with him.

[334] Mr Alford gave evidence that an undated file note in his handwriting was made at about this time. It referred to EOS, which was incorporated in 1992 approximately; and the Ebbco Trust which was established in April 1993. It also noted that the directors are Mr and Mrs Ebbage. Mr Alford then wrote, "Assume $200,000 will be injected into 2nd tier structure for OX2 Engine", and then, "Note: CTD [Mr Diamond] to have class of shares where no pre-emptive right is required". Below that, Mr Alford drew a diagram followed by seven points. The points are:

> "(i) JV rollsover OX2;
> (ii) JVP [joint venture participants] receive shares [beside this is shown that Mr Manthey is to receive 49 and EOS to receive 51].
> (iii) CTD receives option to allocate pending pay up of cont to JV;
> (iv) CTD disposes of 2% of opt to Investor;
> (v) CTD pays agreed contribution moneys to EOS;
> (vi) CTD receives share allocation from OX2 Co;
> (viii) EOS receives shares in OX2 paying at premium. Invested funds not repaying."

[335] The diagram appears to show a rollover from Mr Manthey to the joint venture for $200,000 and the joint venturers being Mr Manthey and EOS. A second joint

venture shows that EOS's share in the joint venture is to be owned by EOS and by Mr Diamond. Against Mr Diamond's name is written, "200,000 cont. to AET JV has no priority".

[336] Mr Alford denied that EOS in the document referred to Ebbco Office Services Pty Ltd. That denial was false and was made to endeavour to conceal the fact that he knew that the contracts had been executed showing EOS as the other party to Mr Manthey. Further, he knew what the implications of that were for his own potential or proposed interest in AET.

[337] Mr Alford deposed that while in the United Kingdom in August 1995, he held discussions with both Mr Diamond and Mr Morris, an accountant practising in London (trading as John Landsbury and Associates) regarding the amount of professional work potentially available to Mr Alford and any assistance either or both could provide to him. As Mr Alford said, an in principle agreement was negotiated between Mr Diamond, Mr Morris and Mr Alford for the AE practice to establish premises in the West Smithfield area of London, close to the offices of John Landsbury and Associates.

[338] The proposed association between Mr Diamond, John Landsbury and Associates and the AE practice was for the purpose of acting for clients referred by Mr Diamond and others, as well as providing consultancy services to organisations based in the United Kingdom who wished to invest or establish trading operations in Australia. It had, of course, no connection with AET.

[339] Mr Alford deposed that when he returned from the United Kingdom he and his wife had determined to take up this opportunity and had organised visa and residency requirements as well as having identified suitable schooling for their children and accommodation. Mr Alford did not take up the opportunity to establish premises in London. It is another example, if one be needed, of Mr Alford not going on to finalise an agreement in principle.

[340] Mr Alford said that at this time, the matter of his future role and input into AET was discussed at length with Mr Ebbage. He said that Mr Ebbage told him he had considered Mr Diamond's opinion and was in total agreement with the proposition that a person should be appointed on a full-time basis to manage AET. Mr Ebbage said that he welcomed the opportunity to dedicate his full-time energies to AET, given his increasing investment of time in the project and the extent of the funds that had been invested by the AE practice and others to date. Mr Ebbage told Mr Alford that he had no further interest in being involved in public practice, or in continuing to own the Beaudesert practice. He told Mr Alford that his full-time commitment to AET would provide him with the opportunity to pursue a project for which he had a passion and long term interest, to provide an alternative to public practice and to provide the impetus to dispose of the Beaudesert practice. It is interesting to note that at this point in his affidavit Mr Alford did not make any mention of the sale of the Beaudesert practice being, as he had previously deposed, to repay the debt, at least in part, owed to Esanda Finance.

September 1995

[341] On 20 September 1995, Mr Ebbage made a file note of a conversation with Ian Lloyd about fundraising from another source. Mr Lloyd gave evidence of how

impressed he was with the novelty of the engine. Various proposals were raised, including some proposals that appear to suggest, at least in part, a possible sale or transfer of shares in AET from Mr Alford. As Mr Alford had no shares in AET, I can only conclude that these proposals were only one of myriad of ideas conceived by Mr Ebbage only some of which were grounded in reality. Mr Lloyd was not told of Mr Alford's having any interest of any kind in AET.

[342] Mr Ebbage and Mr Manthey met with Mr Lloyd, Chiang Ching Chih (sometimes known as John Chiang) and Mr Chiang's associate, Mr Foong. Mr Manthey explained how the engine worked and Mr Ebbage discussed finance. Mr Manthey was also introduced to Murray Bailey by Mr Ebbage at about this time. Mr Lloyd had recommended Murray Bailey to Mr Ebbage.

October 1995

[343] Mr Alford deposed that during 1995 Mr Ebbage was devoting an ever increasing amount of his time and effort to AET to the detriment of AE practice matters. He said that the allocation of time by Mr Ebbage to the AET joint venture during the 1995 calendar year was not, of itself, a source of contention between them, insofar as they both enjoyed the benefits of not only the AE practice, in terms of chargeable time and billings, but ultimately, an investment in a project which they were hopeful would provide significant financial returns to them both in the future. That is an assertion which I do not accept. The time spent on AET by Mr Ebbage was of great concern to Mr Alford and he wanted to end the partnership.

[344] Mr Alford said that Mr Ebbage's renewed interest in 1995 in disposing of the Beaudesert practice arose as a direct consequence of Mr Ebbage's increasing involvement in the AET joint venture. He said that arose as a consequence of Mr Alford's meetings with Mr Diamond in the United Kingdom in August 1995 and discussions that Mr Alford subsequently had with Mr Ebbage.

[345] Mr Alford decided therefore to re-structure the Southport practice. He said that as a consequence of his discussions with Mr Ebbage they agreed as follows:

1. Mr Ebbage would move with all haste to dispose of the Beaudesert practice;
2. The AE practice would cease upon disposal of the Beaudesert practice;
3. Mr Ebbage would devote his full-time and attention to the AET joint venture;
4. Mr Ebbage would endeavour to secure adequate and sustained funding for the AET joint venture;
5. Mr Alford would continue to own, operate and manage the Southport practice;
6. The AET joint venture would be supported by the Southport practice in circumstances where third party funding was inadequate to support it;
7. Mr Ebbage would be financially supported by the Southport practice;
8. All other ventures which Mr Ebbage and Mr Alford had an interest in would be managed by the Southport practice;
9. Mr Alford would attend upon a re-organisation of the Southport practice to accommodate both Mr Ebbage's full-

time commitment to the AET joint venture and Mr Alford's own aspirations to develop the accounting business;

10. Mr Ebbage would assume management, control and supervision of the venture known as Kwikcab. This was a venture concerned with the commercialisation of an automated taxi booking system which allowed for a customer, from a remote location, to book a taxi by placing a coin into a remote unit.

[346] At the same time, Mr Alford had the intention to work full-time for one of his clients in that client's Southport premises for a period of three months. He said that, as a consequence, he recruited an accountant from Tasmania, Gary Best, and commenced discussions with Mr Best and two other accountants employed in the Southport practice with a view to offering each of them a financial interest in it. Mr Best commenced employment at the Southport practice on 30 October 1995 and each of Mr Best, Mr Farmer and Mrs Atkinson agreed to accept a financial interest in the Southport practice. He said that this was contingent upon Mr Ebbage's sale of the Beaudesert practice and the cessation of the AE practice.

[347] Mr Alford said that, during this period, Mr Ebbage travelled overseas, often being away for weeks at a time. He travelled extensively during the period 13 October 1995 to 27 March 1996. He gave Mr Alford few details of where he was travelling although Mr Alford said he was provided a summary and insight into Mr Ebbage's overseas meetings and dealings upon his return.

[348] Mr Alford said that he was aware from late 1995 that Mr Ebbage was endeavouring to list AET on the NASDAQ stock exchange in the United States.

[349] In the meantime, the protection of AET's intellectual property was proceeding. Mr Ahearn was instructed by Mr Ebbage to file a corresponding design application in the United Kingdom for the XTC motor vehicle and he proceeded accordingly, filing the application on 11 October 1995 and confirming that to Mr Ebbage on 31 October 1995.

November 1995

[350] In November 1995, Mr Alford and Mr Ebbage told Mrs Atkinson that Mr Ebbage would be focusing on the AET business on a full-time basis on behalf of himself and Mr Alford and that he would operate principally from the company's Burleigh Heads factory. Karl Farmer, Gary Best and Mrs Atkinson were then each offered an opportunity to acquire a 10 per cent interest in the Southport practice for the sum of $115,000 each. They accepted Mr Alford's offer and financed the purchase through the National Australia Bank. Mr Alford told them that Mr Ebbage had no interest in the Southport practice and that he had lost interest in his profession and the AE business and that his preference was to concentrate his endeavours on the AET business.

[351] Mrs Atkinson, as I have previously noted, commenced working for Mr Alford as a bookkeeper in 1991. In 1995, she had not qualified as an accountant. Indeed, she did not graduate until April 2001. Her loyalty to Mr Alford meant that her evidence was not independent. I am unable to uncritically accept her evidence as to what Mr Ebbage said to her.

[352] Mr Alford said in cross-examination that Mr Ebbage asked him in December 1995/January 1996 to relinquish his interest in AET for no consideration. What in fact occurred is that Mr Alford had wanted to be released from any potential obligation to AET and effectively had walked away from it when the contracts were signed with EOS as the party representing Mr Ebbage's interest rather than AEH which would have represented the interests of Mr Alford and Mr Ebbage. Although there were subsequent proposals, some of which included Mr Alford, none of the proposals which included him were carried into effect.

December 1995

[353] 4 December 1995 was the international filing date of Patent Application No PCT/AU95/00815 under the Patent Co-operation Treaty ("PCT"). This was the day after Mr Ebbage left Australia. He returned on 13 December 1995 and did not leave again until 16 January 1996 when he went away until 22 January 1996. He again left on 25 February and was away for a month until 20 March 1996.

[354] Mr Alford had a number of meetings from late 1995 to February 1996 between himself, Mr Ebbage and Mr Diamond about incorporating a company to which the patent for the second engine could be transferred so that the interests could be allocated to new investors. Zeroprize Ltd ("Zeroprize") was incorporated in the United Kingdom as a result of those discussions. Mr Diamond said that Zeroprize was specifically incorporated to take the benefit of Mr Manthey's technology to distinguish it from the interest in SCT Ltd held by Chancetest. There were also complex plans for transferring the intellectual property to companies incorporated in various parts of the world. Had Zeroprize paid AET the $3,000,000 it was proposed that it pay for the transfer of the intellectual property from AET, Mr Alford would no doubt have benefited financially as it seems to have been envisaged that the intellectual property could have been transferred from AET to a UK incorporated company to act as bare trustee of a non-resident trust. Royalties would be received from an external entity into the UK company who would pay them to a Netherlands company who would transfer them to the non-resident, a Hong Kong company owned by British Virgin Island companies owned by Mr Alford, Mr Ebbage, Mr Manthey and someone called "Mark". This structure was never implemented.

[355] On 28 December 1995, Mr Diamond and Mr Alford met at Mr Alford's home to discuss an amendment to the "Agreement settled in England Aug 1995 on basis of AE/PGE introducing Foong". Mr Alford said this referred to the investment by Mr Foong and Mr Chiang. A letter from Mr Ebbage to Mr Diamond of 31 January 1996, shows that Mr Ebbage was negotiating for Mr Diamond to on-sell all or part of his client's interest (if and when it was acquired) to Mr Chiang. This was further discussed in February 1996.

[356] On Mr Alford's evidence, the accountancy partnership between himself and Mr Ebbage came to an end on 31 December 1995. However, as previously noted, the AE practice continued to pay a consultancy fee to Mr Ebbage.

AET from 1996 until the death of Paul Ebbage

[357] From 1996 until Mr Ebbage's death in December 1998, Mr Ahearn's firm engaged in extensive correspondence with Mr Ebbage in relation to the various patent applications in Australian and overseas countries, as well as prosecution services

and payment of maintenance fees. AET became a substantial client of his firm requiring many hours of professional services each year.

February 1996

[358] Mr Alford said that in February 1996 he commenced a secondment to a significant client. This secondment took much of his time, attention and energies during 1996 and 1997 and most of 1998 during which time he was physically stationed at his client's premises rather than the offices of the Southport practice. Both he and Mr Ebbage had effectively gone their separate ways although Mr Alford gained a major interest in the accountancy partnership and Mr Ebbage was retained as a consultant.

[359] Mr Alford said that Zeroprize came into existence on Mr Diamond's instructions in early to mid-1996. There was, according to Mr Alford, an agreement whereby Zeroprize took an interest in the second engine ("the Zeroprize agreement") in place of Chancetest's interest in the first engine. There was no consideration for the Zeroprize agreement. Mr Alford said that Mr Ebbage's agreement to this can be deduced from his conduct. The purpose was so that the new investor would hold 12 per cent of the total.

[360] Later, Mr Alford said that he would like to clarify his evidence. Zeroprize was to take an assignment of the technology from AET for AUD$3 million. A new investor, who was a Taiwanese businessman, Chiang Ching Chieh, would then own 12 per cent of the company, half of which would come from Mr Manthey's entitlement, and the other half from Alford and Ebbage's interest (which was 60 per cent owned by Mr Diamond). He said that after the transfer Zeroprize held the technology on trust, as to 12 per cent for Mr Chiang, 44 per cent for Mr Manthey, 22 per cent for Mr Ebbage and 22 per cent for Mr Alford. Mr Ebbage and Mr Alford would be liable to account to Mr Diamond's company, although Mr Alford was unable to say what entity that was. From that money, Mr Diamond would be repaid his $50,000 and Mr Alford and Mr Ebbage would be repaid the money they had invested, which was "perhaps 200,000 dollars".

[361] This arrangement was made, according to Mr Alford's evidence, between Mr Diamond, Mr Alford and Mr Ebbage. Mr Manthey was "advised" of it by Mr Ebbage. Mr Alford gave no credible explanation of how this arrangement could occur without Mr Manthey's agreement. Mr Manthey owned after all, 50 per cent of the shares in AET and was a director, Mr Ebbage being the only other director.

[362] Mr Alford said an agreement was reached in February 1996 although he could not "specifically recall" seeing a document giving effect to any such agreement. The AUD$3 million was, he said, to be paid by instalments but in fact it was never advanced to AET. The best documentation of any such agreement is a note made by Mr Ebbage on 6 February 1996 of discussions he had with Mr Diamond about a fax he sent on 31 January 1996 of proposals for an agreement to be reached between AET, Mr Chiang and Mr Diamond's clients. The note records that "CD advised that in principle his clients did not have a problem with the broad outline given". Mr Diamond expressed concern about one part of the proposal but then Mr Ebbage noted that after his explanation, Mr Diamond agreed with his stance on that issue. What the note demonstrates is that serious negotiations were underway but that there was, as yet, no final agreement.

[363] In the plaintiff's statement of claim, it is alleged that in or about November 1996, Mr Ebbage, with concurrence of Mr Manthey, but without the knowledge or consent of Mr Alford and the other plaintiffs, without consideration purported to procure AET to assign its interest in the joint venture to Zeroprize. That allegation was contrary to Mr Alford's sworn oral evidence. When challenged with the inconsistency, he said that that was not his case. He said that the pleading went on to allege that Mr Ebbage then procured Zeroprize to assign its (purported) interest in the joint venturer to OX2 Intellectual Property Inc ("OX2IP"), then procured OX2IP to (purport to) license the patent to OX2 Engine (Distribution) Limited ('OX2ED") and then procured the issue of shares in OX2IP and OX2ED to interests associated with Mr Manthey (as to 45 per cent) and Mr Ebbage (as to 55 per cent). It was these transactions concerning the OX2 companies which Mr Alford alleged in his oral evidence were done with Mr Manthey's concurrence and without Mr Alford's knowledge and not, as was pleaded, the purported assignment of AET's interest in the joint venture to Zeroprize. I do not accept that Mr Alford's experienced legal team so misunderstood his instructions. This is rather just another example of Mr Alford's lack of candour with the court. Mr Alford was a sophisticated litigant, very well aware of and responsible for what was alleged in the pleadings. This lack of candour, of which this is but one example, underscored the peril of relying on his testimony as to the nature of his alleged interest in the joint venture agreement.

[364] On 21 February 1996, Moores Rowland, chartered accountants in Vanuatu, incorporated OX2ED and OX2IP with their registered offices in Port Vila. The beneficial owners were said in the instructions to Moores Rowland to be Mr Ebbage and Mr Manthey. Moores Rowland supplied two corporate shareholders, which were Vanuatu companies, Equity Holding Limited ("Equity") to hold on behalf of Mr Ebbage and Southpac Nominees Limited ("Southpac") to hold on behalf of Mr Manthey although no declarations of trust regarding the beneficial owners was received before Mr Ebbage's death. This was done pursuant to instructions given on 19 February 1996 by Peter Coombe, a solicitor from Southport who had previously practised in Vanuatu, and an agreement for services signed by Mr Ebbage and Mr Manthey on 21 February 1996.

[365] On 22 February, Mr Coombe sent a facsimile to Zeroprize (marked for the attention of Mr Morris) enclosing "two assignments as per your discussions with Mr Diamond". He requested Mr Morris have the documents executed under the company seal and returned to him.

[366] On 24 February 1996, Mr Alford attended on Mr Ebbage and Mr Diamond with regard to agreements. No further information as to which agreements are referred to was in the documentary material but it appears most likely that it referred to negotiations for agreements made shortly thereafter.

[367] On 26 February 1996, Mr Ebbage noted in his diary that he rang Mr Diamond and that he had discussions with Mr Foong about "OX2". On the same date, an AE file note records a call from Mr Ebbage in Bangkok to Mr Alford.

[368] On 27 February 1996, AET made a conditional written assignment of its interest in patent application no PCT/AU95/00815 to Zeroprize for a payment of $3,000,000. The contract provided that payment was subject to certain conditions being met including a satisfactory report from the University of Queensland. The assignment was signed on behalf of AET by its directors, Mr Ebbage and Mr Manthey. The

common seal of Zeroprize was affixed by Byron Limited, a Liberian company associated with Mr Diamond, and Blomep Holdings Limited, an English company associated with Mr Morris. The authorised signatory for both companies was Mr Paul, an accountant resident in Hong Kong. Zeroprize did not ever make the $3,000,000 payment referred to therein. Mr Diamond said that AET wished to seek a research and development grant under a financial assistance scheme funded by the Australian Government. The grant had to be made to a corporation which had a financial interest in the technology to the exclusion of joint venture partners.

[369] On the same date, 27 February 1996, Zeroprize made an assignment in writing of its interest in patent application number PCT/AU95/00815 in relation to the OX2 engine for US$18,000,000 to OX2IP, a company which, along with OX2ED, had been incorporated in Vanuatu on 21 February 1996. Zeroprize was under the control of Mr Diamond and Mr Morris. Mr Alford nevertheless alleged that the transfer of Zeroprize's interest in the joint venture was in breach of Mr Ebbage's fiduciary duty to Mr Alford as it was procured by Mr Ebbage. Mr Alford testified that this was because Mr Diamond would have acted on Mr Ebbage's instructions to make the transfer. Mr Diamond, however, is a wily and sophisticated investor unlikely to be taken in by any simple ruse. I do not accept, as was submitted, that Mr Ebbage was endeavouring to hide this transaction from Mr Alford.

[370] These executed assignments were faxed by Andrew Paul in Hong Kong on behalf of Zeroprize to Mr Coombe on 27 February 1996. The assignment to OX2IP was not dated by Zeroprize as it had not then been executed by OX2IP. The assignment to OX2IP was then faxed by Mr Coombe to Moores Rowland for execution by OX2IP and for return to Mr Coombe. Moores Rowland faxed the copy executed by OX2IP on the same day.

[371] Mr Diamond's version of events, from his affidavit sworn 28 February 2002, is that he received a telephone call from Mr Morris in the United Kingdom. Mr Morris told him that Mr Ebbage had faxed to him, care of Zeroprize, the execution pages for two agreements which Mr Ebbage required to be executed by the company under seal. Mr Morris told Mr Diamond that the document formed part of the joint venture documentation but that the body of the document, that is, the recitals and operative parts, had been omitted and were not transmitted by Mr Ebbage to Mr Morris. Mr Morris said that he was not prepared to affix the seal of the company, or execute the document on behalf of the company as its authorised representative. Mr Ebbage had requested the urgent execution and return of the document for the purpose of finalising the joint venture with the Chiang syndicate.

[372] Mr Ebbage telephoned Mr Diamond and asked him to have Mr Morris execute the document on behalf of Zeroprize. Mr Diamond understood that Mr Ebbage was overseas at the time and recalled him saying words to the effect that "he had done the deal with the Chiang Syndicate". Mr Diamond accepted Mr Morris' refusal to sign the documents forwarded to him and deposed that, in any event, it was his preferred position that the documents be executed by the non-resident directors of the company who were controlled by Mr Paul in Hong Kong.

[373] Mr Diamond then telephoned Mr Alford who told him that it would be in order for the document to be signed by the company and returned to Mr Ebbage. Mr Alford well knew of this assignment. Indeed, the time sheets of Alford Ebbage showed Mr Alford spent a considerable amount of time on this matter from 27 December 1995.

[374] Mr Diamond said that the document had to be executed out of the jurisdiction of the United Kingdom because it was important that Zeroprize be seen to be managed and controlled (particularly in relation to the ownership of the intellectual property) by entities of a non-resident UK tax treaty participant, for example, the jurisdiction of Hong Kong. Mr Diamond asserted that he assumed (in hindsight, wrongly) that the only parties to these agreements were AET and Zeroprize. He said he was unaware of any involvement by companies incorporated in the Republic of Vanuatu or elsewhere. He had no knowledge, he said, of other companies taking an interest or subsequent assignment of the intellectual property. He deposed that he told Mr Paul to execute the document in his capacity as authorised representative of Zeroprize and to thereafter return it to Mr Ebbage by facsimile. Mr Diamond did not explain why it is that Mr Morris told him that there were two agreements which he was to sign and yet Mr Diamond told Mr Paul to execute "the document". Nor did Mr Diamond explain why he did not take the relatively simple step of having the documents faxed to him so he could see what they were about before he instructed Mr Paul to sign them or it or why he did not ask what the documents contained.

[375] Mr Diamond said from that point on there was limited communication between himself and Mr Ebbage. Both he and Mr Ebbage spent much of their time overseas and there was little contact between them until the Indy car race in March 1997.

[376] In late February 1996, Mr Ebbage told Mr Alford that his commitment to AET prevented him from taking responsibility for the Kwikcab venture. He told Mr Alford that he required financial support to maintain the standard of living to which he was accustomed.

March 1996

[377] On 16 March 1996, heads of agreement were entered into between OX2IP, Mr Chiang and OX2ED. From 25 March until 17 October 1996, Mr Chiang was a director of AET. Mr Manthey's evidence was that Mr Ebbage told him that Mr Chiang was now involved and was funding everything; that a new company, Zeroprize, would replace AET; and that the new company would be owned as to one-third by Mr Ebbage; one-third by Mr Manthey and one-third by Mr Chiang.

[378] Mr Alford said that as a result of the stalled negotiations in respect of the sale of the Beaudesert practice, Mr Best, Mr Farmer and Mrs Atkinson did not obtain a financial interest in the Southport practice until 1 March 1996. In late January 1996, Mr Alford said that he accepted a secondment to his client's premises and arranged with Mr Morris and Mr Diamond to postpone his relocation to the United Kingdom from March to June 1996. He deposed that, as it transpired, the secondment and his personal administration of the client's business affairs took considerably longer than first anticipated and, as a consequence, the United Kingdom office was not established.

[379] The 1996 annual return for AES was filed by Mrs Atkinson. It showed that on 12 March 1996, Gary John Best was appointed a director, and on 15 April 1996, Mrs Atkinson was appointed a director. The 1997 annual return for IPA filed by Mr Alford showed the directors as being Mr Alford and Karl Farmer. The only shareholder was shown as Mr Alford.

[380] Mrs Atkinson said that after the sale of the Beaudesert practice, she became aware that the administration of the AE business had not been maintained by Mr Ebbage and that the records were not up-to-date. She said that upon investigation she discovered that taxation returns had not been lodged other than for the first return for the year ending 30 June 1993.

[381] Mrs Atkinson said that the creation of the new business between Mr Alford, Mr Farmer, Mr Best and herself in March 1996, required a restructure of the companies used to generate the fee base of the practice. The company utilised as the trading entity was AEO, formerly AE, and prior to that, formerly AE Nerang Pty Ltd. That company had previously operated the Nerang practice. She said that Mr Ebbage and Mr Alford were the directors of the company and the shares in it were held by them. That was not of major concern to the incoming partners, according to Mrs Atkinson, given the infancy of the business and the fact that they anticipated the time frame for generation of profits and the accumulation of goodwill to be at least 12 months.

[382] Mrs Atkinson said that notwithstanding the sale of the Beaudesert practice and the fact that Mr Ebbage did not have an interest in the Southport practice, it was agreed that a retainer of $18,000 per annum would be paid to Mr Ebbage in consideration for his ongoing input into the affairs of clients sourced from the Beaudesert practice. There was also a suggestion that Mr Ebbage's services could be used on special projects. Initially a wage was paid in addition to superannuation. Group tax was remitted on his behalf. Mrs Atkinson, Mr Farmer and Mr Best took out insurance which entitled them to a payout on the death of a number of key parties. One of those was Mr Ebbage. On his death, they each received $100,000. They took that insurance because they thought his death might adversely affect the goodwill of the AE practice in which they had invested.

[383] In Mr Farmer's opinion, Mr Ebbage did not provide sufficient services to the Southport practice. That matter was subsequently taken up by Mr Farmer, Mr Best and Mrs Atkinson with Mr Alford and it was agreed that any payments made to Mr Ebbage were to be considered as a part draw down of Mr Alford's entitlement to a share of the profits from the Southport practice as opposed to those payments being treated as an expense. It should be noted that Mr Best, Mr Farmer and Mrs Atkinson did not purchase and were not entitled to any share of work in progress prior to their purchase of a share of the practice in March 1996. Mr Ebbage was entitled to a 50 per cent share for payments made for any work in progress prior to the cessation of his accountancy partnership with Mr Alford.

April 1996

[384] Mr Alford said he only had contact with Mr Ebbage on an irregular basis after April 1996 when the office which had been allocated for Mr Ebbage's use at the Southport practice was allocated to another staff member, when it appeared that it was not being used by Mr Ebbage.

[385] Mr Alford said he became sceptical of the comments Mr Ebbage made to him about funding having been secured from investors interested in the OX2 technology and that commercial development and exploitation of the technology was imminent. He said that on the occasions when Mr Ebbage did contact him there was general discussion in relation to AET, the OX2 technology, the progress, if any, being made

by Mr Manthey in the development of the technology. However, Mr Alford was of the view that the discussion was both superficial and perfunctory. He said that Mr Ebbage had a predisposition to advise him of the developmental challenges purportedly being encountered with the OX2 technology and the problems he was experiencing with satisfying and appeasing those parties who had invested funds in the technology. Mr Alford said that Mr Ebbage would advise of the continuing challenge to keep Mr Manthey focused on the OX2 engine development. He said that Mr Ebbage told him that he had secured investors to assist financially in the research and development of the OX2 engine but that no sale or disposal of the interest had occurred or was proposed in relation to any further funding. He said he understood from Mr Ebbage that investors had been granted conditional licences to exploit the intellectual property either in respect of specific regions or specific products. He said that as he was pre-occupied with the practice and client matters, he had little or no opportunity to follow through with any enquiries he would otherwise have been inclined to make with Mr Ebbage.

[386] Mr Alford said that, over time, Mr Ebbage's reports became more pessimistic in relation to the funding from third parties and the development of the engine itself. Mr Alford gave evidence that on many occasions he asked Mr Ebbage when the loans made to AET would be repaid and accountancy fees paid. These were the matters that concerned him, in my view, as he had no other interest in AET or the exploitation of Mr Manthey's technology.

[387] During this time, Mr Manthey attended to the building and outfitting of a factory in which the OX2 engine would be developed. He said that Mr Ebbage was concerned at the cost of the factory and the time the development of the OX2 engine was likely to take. Mr Manthey stopped doing any other work as he was absorbed in the engine development.

July 1996

[388] Mrs Atkinson gave evidence that she made requests of Mr Ebbage for him to provide information about the AE practice and that as a consequence of those requests, he delivered some files to the Southport practice in June 1996. Queries arising from her investigation of the accounts were provided to Mr Ebbage for his response in July 1996. Mrs Atkinson says she recalls that there were inaccuracies in the accounts. As a consequence, she had to re-construct the accounts that had been prepared (rolled over for finalisation) for each financial year following 1993 and address the inaccuracies found in the treatment of expenses and profit share calculations, for example. She said that she had not yet completed that task by the time of trial and that tax returns in respect of the year subsequent to 1993 had not been finalised and lodged. She said to a large extent that was directly attributable to her inability to locate relevant documentation previously in the possession of Mr Ebbage.

[389] In about July 1996, Mr Ebbage told Mrs Atkinson that he no longer felt the need to pay annual subscriptions to the Institute of Chartered Accountants in Australia. He requested his removal as a director and/or shareholder of all companies associated with the AE business. Mrs Atkinson said that she saw no urgency in the task being completed although it was necessary to be a member of the ICAA to be a director of the companies involved in the AE business.

[390] The matter of payments to Mr Ebbage came to a head finally in July 1997 when Mr Ebbage wrote to the practice requesting group certificates for the years ending 1996 and 1997 together with financial information for the 1995, 1996 and 1997 years. Mrs Atkinson said she made a contemporaneous file note. That file note is undated and says "Letter to PGE. Explain what is going on. Increase – distn - $18,000 – priority profit share. Provide update on AET. Review this revert to AJA". No letter to Mr Ebbage has been produced.

[391] The Southport practice continued to trade under the business name "Alford Ebbage Southport", until approximately March/April 1998 whereupon it commenced trading as "Alfords Accountants and Business Advisers". There was a delay in changing the trading name because of a reluctance expressed by Mr Alford to use his name in the business trading name.

[392] Mrs Atkinson said it was considered inappropriate that Mr Ebbage continue to remain as a shareholder of companies associated with the business now owned and controlled by Mr Alford, Mr Farmer, Mr Best and herself. It was also necessary to seek Mr Ebbage's removal as a shareholder of those companies given that he no longer had an association with the Southport practice. Mr Farmer, Mr Best and Mrs Atkinson expressed a view that there should remain no potential for any future claim to be made by Mr Ebbage against their respective interests in the business of Alfords. Documentation was prepared and provided to Mr Ebbage to effect the transfer of any shares he may have held in those companies. While those documents were signed by Mr Ebbage prior to his death, they were not witnessed and therefore have not been lodged with any relevant authority.

[393] Mrs Atkinson attempted to explain the failure to produce documents in these proceedings by saying that Mr Ebbage had allocated to his sole use an office at the Southport practice until approximately May 1996. From late 1995 to May 1996, he could come and go from that office as he pleased. She said he was not, to her knowledge, ever questioned in relation to any documentation removed from the Southport practice. She said she recalls there were discussions between Mr Ebbage and the partners in relation to the use of the AET factory premises as a storage facility for the records of the Southport practice but she was unaware of what records, if any, might have been removed from the Southport practice and stored at those premises. Until the end of 1997, Mr Ebbage had complete access to the premises of the Southport practice. Thereafter, Mrs Atkinson said, if he required any specific file, the partners determined that it should be reviewed by him at the Southport offices. She said she became aware that Mr Ebbage had to remove certain statutory records associated with the AE business as he told her that he had "about 2 boxes of stuff at the factory and would drop them back". That return did not occur. While she agreed in cross-examination that it appeared that a number of lever arch folders had been returned, she maintained that not all relevant documents had been returned.

[394] Mrs Atkinson said that eventually payments to Mr Ebbage ceased in or about June 1998 at a time when Mr Ebbage was rarely seen and where contact between members of the Southport practice and him had almost ceased in its entirety. She said that eventually any attempt to contact Mr Ebbage was made in writing. She said that Mr Alford told her that he had great difficulty contacting Mr Ebbage to discuss any matter including the fact that the practice would no longer be making

any payments to him. She was unaware at the time that Mr Ebbage was often overseas.

August 1996

[395] On 9 August 1996, pursuant to instructions given to him by Mr Ebbage, Mr Ahearn filed three patent applications in the name of Aust Tech Pty Ltd. These were applications numbered PO1571, PO1572 and PO1573. They were regarding the same technology and entitled "Improvements in cylinder heads and ports thereof and pistons therefor", "New and improved engine cylinder constructions", and "Improvements in axial piston rotary engines". Mr Ahearn did not recall Mr Ebbage providing him with any explanation for why the applications lodged in the name of Aust Tech Pty Ltd were not lodged in the name of AET.

[396] On 23 August 1996, Mr Ebbage noted in his diary, "No pay from AE (AJA $400) only???" It was submitted by the plaintiffs that this connoted that "Ebbage subsequently possibly did become dissatisfied with Alford". However, it was also submitted that Mr Ebbage nevertheless maintained contact with Mr Alford with regard to the joint venture. The basis for this submission was said to have been various notations in Mr Ebbage's diary on 27 and 29 August and 11 September 1996. The notation on 27 August 1996 merely recorded the words, "Tony Alford:- Factory" at 9 am. On 29 August 1996, Mr Ebbage recorded a number of separate meetings with various people interested in the technology. He also recorded a meeting with Mr Alford at 3 pm. On 11 September he recorded "AJA" at about 2.30 pm. These entries support the submission that Mr Ebbage kept in contact with Mr Alford but not that it was about "the joint venture".

September 1996

[397] On 23 September 1996, Advanced Engine Technology Inc ("AET Inc") was incorporated in the State of Colorado in the United States with 50 million authorised shares. Its postal address was in Albuquerque, New Mexico. The incorporator was Gerald A Kaufman of New York. David Travis, the president of a brokerage firm, Patterson Travis, arranged for the incorporation of the company through his attorney, Gerald A Kaufman of New York. Mr Travis was initially the sole director of AET Inc. When he resigned, Murray Bailey took over as director and president of the company. This company was later listed on the NASDAQ exchange. Mr Alford admitted at the trial of this matter that he knew that Murray Bailey and others were "attempting to bring to fruition a NASDAQ listed company".

[398] On 24 September 1996, Mr Alford recorded in his diary a telephone conversation with Mr Ebbage. He said it appeared that Mr Ebbage was in the United States with regard to a "listing matter". Mr Alford conceded this may have concerned AET Inc although he said that the reference in the note to Potter Warberg made that less likely. In fact, Government records show that Mr Ebbage did not leave Australia until 27 September 1996. Mr Ebbage told Mr Alford about the intention to list in the United States.

October 1996

[399] By October 1996, the relationship between AET and Mr Chiang had faltered and through his lawyers, he demanded the return of money paid by his company.

[400] On 18 October 1996, the directors of AET Inc resolved to appoint Murray Bailey as a director and vice-president of AET Inc; to issue 600,000 shares to Mr Travis; to approve a patent sub-license agreement dated 18 October 1996 between OX2ED and AET Inc; to issue 20,000,000 shares to OX2ED in accordance with the sub-licence agreement and that an additional 19,000,000 shares be reserved for issue to OX2ED upon presentation of proper documentation showing that the OX2 engine would pass environmental laws in the United States and that it worked as represented; and that AET Inc proceed with a public offering of 1,000,000 shares at a price of US$1.00 per share in accordance with r 504 of the *Securities Act 1933*. All of the shares except the 1,000,000 shares offered under r 504 were restricted shares which had to be held for a specified period of time before they could be traded freely on the stock exchange. Patterson Travis became the "market maker" for AET Inc shares, being the broker that traded and maintained a market for AET Inc shares, which were traded on the over-the-counter bulletin board, a smaller market than the NASDAQ for companies that do not qualify to trade on the NASDAQ. It appears that the 1,000,000 shares offered publicly were taken up.

[401] On the same date, OX2IP agreed to grant OX2ED an exclusive licence to manufacture, distribute and market the OX2 engine (being the subject of International Patent Application No PCT/AU95/00815) in return for a licence fee and royalty.

[402] The plaintiffs asserted that the assets of the "joint venture" were the patents held by OX2IP and the shares in AET Inc held by OX2ED. It was submitted that "those companies plainly held those assets on trust for the joint venture". However, it does not follow that the assets of the "joint venture" were held on trust as argued. This is because I am not satisfied that the "joint venture" contended for by the plaintiffs in fact existed.

November 1996

[403] On 6 November 1996, AET agreed by deed to assign its interest in Patent Application No PCT/AU95/00815 to OX2IP for US$1,500,000 with $70,000 to be paid on execution and the balance to be paid within 12 months from the date of the agreement.

[404] On 8 November 1996, Moores Rowland incorporated Motor City in Vanuatu. Mr Manthey was its beneficial owner. On the same date, Moores Rowland incorporated Macro Management in Vanuatu which was beneficially owned by Mr Ebbage.

[405] On 13 November 1996, ASIC was notified of a fixed and floating charge over the assets of AET to secure a liability of $1,050,000 in favour of Enburg International Development Co Ltd, a Taiwanese company ("Enburg"). ASIC was notified of the discharge of that liability on 16 February 1999. This liability arose as the result of a deed of agreement entered into on 13 November 1996 between Enburg, Mr Chiang and AET whereby a dispute between Enburg and Mr Chiang, on the one hand, and AET, on the other, was resolved by AET's acknowledging that it was indebted to Enburg in the sum of $A1,200,000 (the "Enburg debt"). AET agreed to pay Enburg $A150,000 on or before 13 November 1996 and the remainder of $A1,050,000 within 8 months to be secured by a mortgage debenture creating a fixed and floating charge over AET's assets. The Enburg debt was also guaranteed by personal

guarantees from Mr Ebbage and Mr Manthey. Mr Ebbage told Mr Manthey that such a guarantee meant that he could lose everything he owned including the engine but that Mr Manthey was obliged to give the guarantee.

[406] On 19 November 1996, Mr Ebbage spoke to Mr Alford by telephone. He said there were problems with the development of the OX2 engine although they did not appear to be terminal. Mr Chiang had funded $1M to date and had stopped funding and wanted to change the agreement. Mr Ebbage and Mr Manthey had provided personal guarantees in relation to the repayment of the moneys paid by Mr Chiang. Mr Alford said however that he did not discover that until December 1997. There were said to be problems with the NASDAQ listing of AET.

[407] On 27 November 1996, OX2ED transferred 1,222,225 shares in AET Inc to Macro Management; 16,000 shares to Julieanne Craig; 3,200 shares to Peter and Jill McDonald; 80,000 shares to Branko Paunovic; a further 600,000 shares to Macro Management; 1,000,000 shares to Motor City; and 82,000 shares to Joncy Inc. On the same date, 250,000 shares held by Motor City in AET Inc were then transferred to Brenda Manthey. Motor City also transferred 10,000 restricted common shares in AET Inc to Mark Norfolk for AUS$0.01 per share.

December 1996

[408] On 4 December 1996, pursuant to Mr Ebbage's instructions, Mr Ahearn filed a patent application in the name of AET which was given number PO4054; in addition PO1571 and PO1572 were re-filed on 25 July 1997.

[409] The plaintiffs submitted that at Christmas 1996, Mr Diamond met Mr Alford and Mr Ebbage to further discuss prosecution of the joint venture. However, it appears reasonably clear that Mr Diamond's affidavit, which was relied upon in support of this submission, in fact referred to meetings which took place in late 1995 and early 1996, not at Christmas 1996.

January 1997

[410] In January 1997, Mr Ebbage instructed Moores Rowland and AET Inc to record the transfer of many shares in AET Inc. Amongst those recorded were the transfer of 1,222,225 from OX2ED to Macro Management (representing Mr Ebbage's interest) and 1,000,000 from OX2ED to Motor City (representing Mr Manthey's interest). This represented a share imbalance of which Mr Manthey would later complain.

February 1997

[411] On 5 February 1997, the registered office of AET was changed to 1 Greg Chappell Drive, Andrews.

[412] On 11 February 1997, Motor City transferred a number of restricted common shares in AET Inc to various persons to pay debts or acquire other assets.

[413] On 14 February 1997, an agreement to assign USA Patent Application Serial No 08/737056; Canadian Patent Application Serial No 2, 188757 and Mexico Patent Application from AET to OX2IP were executed by OX2IP and AET.

[414] On 19 February 1997, Mr Ebbage as director of AET wrote to the directors of Zeroprize saying:

> "We refer to the Deed pertaining to the Assignment of International Patent Application No PCT/AU95/00815 dated 27th February 1996 between Advanced Engine Technology Pty Ltd as the assignor and Zeroprize Ltd as the assignee and note that the condition contained in Recital C therein has not been complied with and as such we hereby formally notify you that the said agreement is at an end".

Mr Diamond denied receiving that letter. However, I accept that it must have been received by Zeroprize.

March 1997

[415] During the 1997 Gold Coast Indy race, Mr Ebbage, according to Mr Alford, conveyed sentiments which reflected ongoing difficulties with the engine technology, lack of financial support and/or difficulties associated with investors and complaints from Mr Ebbage that he was having difficulty making financial ends meet. Notwithstanding all of that, Mr Ebbage conveyed his willingness to persevere with AET and that the problems could be solved, though time and costs were continuing concerns to him.

[416] Mr Diamond recalled having two meetings with Mr Ebbage in March 1997 during the time of the Indy Car Carnival. The first meeting took place at Mr Ebbage's unit at Surfers Paradise. Although the meeting was social, the joint venture was discussed to some extent. The discussion continued that evening at Mr Diamond's residence on the Isle of Capri. Mr Ebbage told Mr Diamond that there was a problem associated with the joint venture technology in that the engine had a major design fault and continued to fail. Mr Ebbage, however, according to Mr Diamond, appeared confident that Mr Manthey could resolve the problems with the engine. Mr Diamond said he recalled Mr Ebbage stating that the mechanical engineering department of the University of Queensland was assisting with those problems. Mr Diamond recalled Mr Ebbage saying that the problem was either a piston or engine warping problem. Mr Ebbage also told Mr Diamond that the joint venture funding had run out and further funds were required. Mr Diamond formed the impression that everything was going badly. He recalled Mr Alford telling him at the time that because of a funding shortfall, Mr Alford was paying Mr Ebbage's credit card liabilities, debts, and maintenance payments and a wage to Mrs Ebbage and that despite those payments, Mr Ebbage continually complained of a lack of funds.

[417] Mr Diamond asked for an accounting of the funds advanced to the joint venture by Chancetest. That accounting was never provided. Mr Diamond said that he never sought an accounting from Mr Ebbage in relation to the funds paid by the Chiang syndicate to AET.

[418] Mr Diamond said he had a discussion with Mr Ebbage about the control of Zeroprize and whether Mr Ebbage should become a resident of another jurisdiction. Mr Diamond said he gave Mr Ebbage specific advice on how he could control Zeroprize as a non-resident of Australia, his belief at the time being that Zeroprize was still involved in the joint venture but without at that time having an obligation to contribute funds payable under the assignment agreement. Mr Diamond

suggested to Mr Ebbage that he should consider either the jurisdictions of Hong Kong or Monaco and told him what he was obliged to do to achieve non-residency status.

[419] In re-examination, Mr Diamond said that any agreement with Zeroprize was abandoned from March 1997.

September 1997

[420] On 5 September 1997, pursuant to Mr Ebbage's instructions, Mr Ahearn filed application number PO90287 on 5 September 1997 entitled "Axial Piston Rotary Engines" on behalf of AET.

[421] On 11 September 1997, Mr Ebbage wrote to Murray Bailey at AET Inc with regard to his anxious wish to have AET Inc listed. The letter identified the beneficial owners of the shares of AET Inc.

October 1997

[422] On 9 October 1997, Motor City transferred 55,597 restricted common shares in AET Inc to Macro Management at US$0.01 per share.

December 1997

[423] Mr Alford said that he and Mr Ebbage met in either December 1997 or January 1998 during which time Mr Ebbage reiterated his previous advices with respect to the perilous financial position of the AET joint venture, litigation commenced by Mr Chiang claiming return of moneys and fraud, terminal design problems associated with the OX2 engine and the continuing difficulties being experienced by Mr Ebbage in co-ordinating the commitment and direction of Mr Manthey. He said in that period he and Mr Ebbage had about four meetings about the AET joint venture.

[424] One of the meetings was on 18 December 1997 at Southport. Mr Alford said he had a detailed recall of what was said in spite of not having taken a note of it. He said that Mr Ebbage did make a note of it. Mr Ebbage told him that the need for alternative funding was imperative for the continued operation of AET, the further development of the OX2 engine technology and the need to repay advances made to AET by Mr Chiang. In circumstances where the advances made by Mr Chiang could not be repaid, then Mr Chiang required an express acknowledgement of those advances made by him to date to AET, Mr Ebbage and Mr Manthey and a personal guarantee from each in support of the repayment of those advances. Mr Chiang had made allegations of impropriety and embezzlement against Mr Ebbage and he was effectively blackmailing Mr Ebbage and Mr Manthey to secure a payment of the funding he had made to date. It was Mr Ebbage's objective to obtain enough funding to repay Mr Chiang and in doing so, to avoid any prospect that either he or Mr Manthey were declared bankrupt or had allegations of misconduct pursued against either of them.

[425] Mr Ebbage told Mr Alford that he did not himself believe that Mr Manthey could resolve the problems with the engine in relation to twisting and warping plates and that Mr Ebbage believed those problems were a terminal design fault. Mr Manthey

had been faced with this design problem for many months and was at a loss to understand the problem or resolve it.

[426] It was Mr Ebbage's intention to obtain sufficient funding to repay some of the advances made by the AE practice and the Southport practice but otherwise there would be no future prospect of a return on the investment made to AET or repayment of any moneys advanced to either it or himself. Mr Ebbage said there was no prospect of any outstanding accountancy fees being paid to the AE practice. Mr Ebbage said he might be able to obtain $160,000 in full settlement of the advances made by the AE practice and the Southport practice to Mr Ebbage and AET and in payment of accountancy fees to the AE practice. Mr Ebbage suggested that payment could be made directly to Mr Alford, or associated entities, in part satisfaction of the advances made by the AE practice and the Southport practice to him personally as opposed to any repayment being made to the AE practice entities.

[427] Mr Alford said that Mr Ebbage asked him if he would be prepared to relinquish his 25 per cent interest in AET if he could effect the payment of the $160,000 and in circumstances where he and Mr Manthey were to assume responsibility for repayment of the funding provided by Mr Chiang. Mr Ebbage told Mr Alford that unless he could obtain that commitment from Mr Alford then there was little prospect of continuing with the AET joint venture and no prospect of Mr Manthey either persevering in his endeavours with the future development of the OX2 engine technology or providing a personal guarantee in support of a liability for repayment to Mr Chiang for the funding he provided to AET. Mr Ebbage told Mr Alford that if he was prepared to accept his proposal then Mr Alford's interest in AET would be allocated to Mr Manthey and Mr Ebbage, but for the most part, to Mr Chiang in consideration for further financial accommodation being provided by Mr Chiang to AET.

[428] Mr Alford said that he told Mr Ebbage that in circumstances where he had reached a financial impasse, irrespective of the circumstances, Mr Alford would assist Mr Ebbage and AET. Mr Ebbage responded that both the Southport practice and Mr Alford had contributed enough financial assistance to both AET and to Mr Ebbage personally and that this funding and financial support might never be repaid let alone any further funding that Mr Alford might have been prepared to provide.

[429] Mr Alford said he became suspicious when this was said. He told Mr Ebbage that he was not prepared to accept any proposal to relinquish his 25 per cent interest in AET and would not accept a "pittance" in payment of the moneys that were owed to him. He did however say he was prepared to consider any reasonable offer in that regard so long as the payment of $160,000 was made in good faith on or before 30 June 1998. Mr Alford said that Mr Ebbage made a diary note of the requirement to make this payment. No payment was ever made and Mr Alford said that Mr Ebbage did not make any further proposals to him in relation to the sale and/or disposal of his interest in AET. At the conclusion of their meeting, Mr Ebbage told Mr Alford that he would discuss further funding of AET's potential investors including Mr Chiang and revert to him shortly thereafter. I do not accept Mr Alford's version of this conversation, unsupported as it is by any objective evidence. At this time, Mr Alford had no interest in AET.

[430] The more likely explanation of what occurred is found in a file note made by Mr Ebbage of a summary of matters to be discussed at a meeting to be held on the following day with regard to the dissolution of "PGE/AJA entities". Mr Ebbage recorded with regard to AET that Mr Chiang was owed $1.2 million. Mr Chiang wanted Mr Manthey and Mr Ebbage to sign personal guarantees but Mr Ebbage said that he was not prepared to do that unless Mr Alford confirmed he had no involvement in AET. If the guarantees were not signed, Mr Chiang had indicated that he would liquidate AET.

[431] Mr Ebbage noted that if he did sign, Mr Chiang would continue to fund for another 12 months. In addition, Mr Chiang wanted more equity, to be negotiated, but he was looking for another 20 per cent. Mr Ebbage said that the engine had development problems and they were having difficulty making it perform properly. He said that the American company, which I take as a reference to AET Inc, was not registered, presumably in Australia, and was being queried by ASIC.

[432] Mr Ebbage proposed that he resign from all AE related entities, but not from AET; his interests in AE entities be assigned to Mr Alford; all loan accounts be forgiven to and from Mr Ebbage and related entities and AET; Mr Ebbage receive group certificates that were outstanding for 1995, 1996, 1997 and 1998; Mr Ebbage and related entities were not to receive distributions from AE entities for 1995, 1996, 1997 and 1998 or be liable for any tax liability incurred through AE entities; Mrs Ebbage was not to be left with any tax liability received from AE entities; Mr Ebbage and related entities were to be given indemnities from AE in relation to any future litigation to cover the commencement of any new AE practice; Mr Ebbage was to be removed as guarantor of AE and AE partners' loans; Mr Alford was to confirm that neither he nor any entity associated with him or Mr Diamond had any interest in AET or any technology developed by AET or the OX2 engine; and finally, that Mr Ebbage would receive consulting fees until the end of December 1998 at $2,083 per month. A go-kart, go-kart gear, ski gear, helmet and gloves would be returned and the ski boat would be signed over to Mr Alford. As it had once been proposed that Mr Alford have an interest in AET, Mr Ebbage would undoubtedly have wanted confirmation from Mr Alford that he would not be making any claim that he had such an interest.

January 1998

[433] In 1998, the chairman of AET Inc was Admiral Horley who was introduced by Murray Bailey during a visit to the Indy Car Race at the Gold Coast in 1997. Auto City (USA) owned 30 per cent of the stock, while Mr Ebbage and Mr Manthey held 70 per cent. The company, AET Inc, was publicly listed in the United States in January of that year.

[434] On 20 January 1998, Mr Ebbage and Mr Alford met at Southport. Mr Ebbage told Mr Alford that he had not had any further discussion with Mr Chiang or Mr Manthey. He told Mr Alford that he was travelling overseas shortly and at that time he would resolve the position with Mr Chiang and other investors and revert to Mr Alford upon his return. The matter was not raised again except at the insistence of Mr Alford in a telephone conversation with Mr Ebbage in April or May 1998. Mr Alford was, no doubt, keen to have the return of any moneys lent to assist AET.

February 1998

[435] On 19 February 1998, just prior to his departure overseas, Mr Ebbage made a new will appointing his father, an experienced and respected accountant, as executor. At around this time, Mr Ebbage told Mr Ebbage Snr that he was involved in three companies in Vanuatu. He said that he owned 100 per cent of one company, Macro Management, and 55 per cent of two other companies, OX2IP and OX2ED. He gave Mr Harrison of Moores Rowland as the contact. At that time, Mr Ebbage Snr believed that Mr Manthey and his son were the parties interested in the OX2 engine.

March 1998

[436] On 1 March 1998, EOS transferred five shares in AES to Mr Alford for $5.00; PPG transferred 1,000 shares in AE to Mr Alford for $1,000; and Mr Ebbage transferred 500 A class shares in AE to Mr Alford for $1,000. I am prepared to accept this was, as was asserted by the plaintiffs in their submissions, because Mr Ebbage was no longer in practice as an accountant.

[437] On 14 March 1998, AET instructed Moores Rowland to transfer US$24,287 to Motor City; US$63,180.69 to Macro Management; and AUS$300,000 to Mrs Ebbage. The instructions were countersigned by Mr Ebbage and Mr Manthey. I accept, however, that Mr Manthey signed whatever he was asked to sign by Mr Ebbage without careful scrutiny because he trusted Mr Ebbage not to act against his interests.

[438] In March 1998, Bruce Jenkins, a client of the Southport practice, had attended upon Mr Alford regarding the imminent listing on the NASDAQ of a company that was to acquire hydrogen fuel/environmental cleansing technology. Mr Jenkins was an investor in that project and was aware that Mr Alford was interested in AET. He told Mr Alford of the United States company, AET Inc, listed on the NASDAQ exchange. Mr Alford asked Mr Jenkins to investigate the matter on his behalf. Mr Alford said in evidence that this was the first time he became aware of AET Inc.

[439] On 27 March 1998, Mr Jenkins provided Mr Alford with a copy of documentation from the US company website and a memorandum setting out information on the company. He told Mr Alford that the current market price of AET Inc shares was $US7.38.

[440] On 28 March 1998, Mr Jenkins provided Mr Alford with information he had obtained from Patterson Travis, Investment Bankers and Brokers of Colorado in respect of AET Inc. He told Mr Alford that it was worth many millions of dollars. About 1,000,000 shares, or 30 per cent of the company, had been sold for about $3,600,000 to fund the repayment of former interested parties and provide initial working capital. Mr Jenkins calculated that the value of shareholding of Mr Ebbage and Mr Manthey was around $US17,500,000 or $AUD26,100,000.

[441] Mr Alford then endeavoured unsuccessfully to contact Mr Ebbage who was overseas at the time. During 1998, Mr Alford said he travelled internationally on an extensive and prolonged basis attending to the affairs of one of Mr Diamond's clients, Michael Hutchence, who had died in December 1997. Mr Alford said that Mr Ebbage also travelled extensively during that year and Mr Alford did not know his exact whereabouts. At this point, Mr Alford knew how valuable the shares in

AET Inc were. It is almost inconceivable that if he in fact had a 25 per cent interest in any joint venture, he would not have taken effective immediate steps to secure his interest. This did not happen.

April 1998

[442] On 7 April 1998, Noel Holmes, a chartered accountant, and principal at that time of the accounting firm Holmes and Partners, received a call from a client, Paul Lingard, who asked him if he would meet Mr Manthey who needed assistance with his business affairs. Mr Holmes then met with Mr Manthey and took instructions from him. He learned that Mr Manthey had been taking accounting advice from Mr Ebbage concerning his personal affairs for a number of years. Mr Manthey explained to Mr Holmes, in very general terms, that he held a 50 per cent interest in the engine he was developing and that Mr Ebbage held the other 50 per cent interest. Mr Manthey explained that his business association with Mr Ebbage involved Mr Manthey providing the technology and doing all the research and development while Mr Ebbage took care of the business side of things and funded the business. Mr Manthey said that Mr Ebbage had never provided him with any documentation regarding how the business relationship was structured. Mr Manthey was confident that Mr Ebbage had attended to all his personal and business financial and legal affairs and did not engage Mr Holmes to act on his behalf at that time.

May 1998

[443] It was not until after Mr Alford's return from overseas on 5 May 1998, he had a telephone conversation with Mr Ebbage about the US company. He said he told Mr Ebbage of the information he had been provided in relation to AET Inc and sought Mr Ebbage's comments in relation to the position of AET, the status of the funding by Mr Chiang and the association, if any, between AET and AET Inc. Mr Alford said Mr Ebbage was evasive and dismissed his enquiries in an off-hand manner. He told Mr Alford that while he was aware of the US company, there was no agreement between that company and AET in relation to the OX2 technology. The funding by Mr Chiang had not been repaid but Mr Ebbage was hopeful of settling the matter in the near future by the introduction of new investors to AET. If Mr Ebbage was dismissive, it is hardly surprising that he did not want to attract the interest of Mr Alford in AET Inc.

[444] On 11 May 1998, Mr Ahearn filed patent application No PP3460, "Improved axial piston rotary engines" on behalf of AET.

June 1998

[445] Mr Ebbage made a note in his notebook diary in early June 1998 which reads,

> "Credit Cards
> …
> SJE, Maintenance
> Ring MB, Joseph and DT
> Residency, AET Tax
> Gym
> …

PGE appoints solicitor
PGE tax
A Alford 160 and release JV
Resign AET
Set up Aust tech
Ring Carroll Shelby
Dentist
Assignments of IP
Check contracts AET
…
OX2 engine to be running
Greg Chamber
Ring Martin New York"

[446] The plaintiffs submitted that on 9 June 1998, Mr Ebbage recorded in his notebook diary "proposed settlement with Alford re AET". That entry does not appear. They then went on to submit that:

> "On that same day, Ebbage contacted Murray Bailey and Travis. He discussed his residency and the AET tax position. The obvious inference is that Ebbage proposed to leave the country which for tax and other purposes must have appeared an attractive idea. Ebbage noted 'A Alford 160 and release joint venture'. Resign from AET and set up AUST TECH Pty Ltd a competing company. Also arrange assignment of intellectual property. No such settlement took place. There is no suggestion that Alford received $160,000 or any other sum. In fact, Ebbage continued to evade Alford."

[447] I am unable to read all of those inferences into the handwritten entries in Mr Ebbage's diary. I agree with the submissions made on behalf of the Ebbage interests that Mr Alford's evidence about Mr Ebbage offering to buy Mr Alford's interest for $160,000 is a confabulation based on the ambiguous diary note by Mr Ebbage. It is more likely that Mr Ebbage was talking about Mr Alford releasing AET from any liability for the moneys lent to AET or accountancy fees that might have accrued.

[448] On 30 June 1998, Mr Ahearn filed two patent applications in similar terms to the two earlier filed and renewed in the name of and on behalf of Aust Tech Pty Ltd titled "Improvements in Cylinder heads and ports thereof and pistons therefore" and "New and improved engine cylinder constructions".

October 1998

[449] On 22 October 1998, Mr Harrison from Moores Rowland received a fax from Mr Ebbage noting that OX2ED had recently received US$215,562.78 and requesting the transfer of AUS$200,000 to Susan Ebbage, AUS$5,000 to himself, AUS$27,500 to OX2ED's current account and the balance to Macro Management. He also requested AUS$20,000 be transferred to AET. The facsimile was countersigned by Mr Manthey.

[450] Mr Alford said that Mr Ebbage telephoned him on 19 October 1998, a day after Mr Ebbage returned to Australia. In fact, Mr Ebbage had returned to Australia on

11 October 1998 after almost four months overseas. Mr Ebbage told him the purpose of the telephone call was to request access to the files of a former client of the Southport practice who was a builder who had constructed Mr and Mrs Ebbage's residence at Monaro Drive, Mudgeeraba. Mr Ebbage had previously told Mr Alford that a dispute had arisen between him and the builder. Mr Alford agreed to give him access and said that at the same time they could discuss AET and the US company as well as the non-payment of moneys previously agreed to be remitted by 30 June 1998. An arrangement was made to meet the next day. That meeting was cancelled by Mr Ebbage.

[451] As a result, Mr Alford formed the view that Mr Ebbage had made a conscious decision to avoid meeting with him and on 23 October 1998, Mr Alford said he made arrangements for investigations to be undertaken in the United States with respect to AET Inc, and in particular, to obtain information from those persons associated with the funding and capital raising of the US company, as well as determining what, if any, intellectual property the US company had obtained in relation to the OX2 engine.

[452] Mr Alford said that Mr Ebbage telephoned him in the early afternoon of 27 October 1998 and once again requested his assistance in relation to the building dispute. Mr Alford told Mr Ebbage he would be prepared to assist in any manner possible and suggested a meeting to discuss the AET joint venture and the US company, and at the same time, he could review the clients' records he had sought access to. Mr Ebbage refused to discuss the AET joint venture and Mr Alford said that Mr Ebbage became agitated. Although Mr Ebbage agreed to meet him on the following day, 28 October 1998, he failed to attend. There was no other conversation between Mr Alford and Mr Ebbage before Mr Ebbage's death in December 1998. I am not prepared to accept Mr Alford's uncorroborated version of these telephone conversations.

December 1998

[453] Mr Ebbage died on 2 December 1998 after being ill for a few weeks. His funeral was held on 8 December and Mr Alford said he was surprised when he heard Mr Manthey say in a eulogy he delivered that "things were really starting to happen". Mrs Ebbage also informed Mr Alford of the commercial success of the OX2 engine technology in the United States at a Christmas party on 12 December 1998. Mr Alford's solicitor, Mr Connors, had discovered by 26 July 1999 that during the previous 12 month period shares in AET Inc had traded between US$4.88 and US$15.25. Mr Alford believed that Mr Manthey and Mr Ebbage had made millions of dollars on the sale of shares.

Mr Manthey's actions after the death of Paul Ebbage

[454] After the death of Mr Ebbage, Mr Manthey was obliged to take a number of urgent steps to protect his own interests as well as the intellectual property and to fund further research and development of the engine and pay employees. Very shortly after Mr Ebbage's death, Mr Manthey retained Mr Holmes to act as his accountant. It is only necessary to make findings as to what occurred after Mr Ebbage's death in the event that, contrary to my findings, there was a joint venture formed by

agreements made by Mr Manthey, Mr Alford and Mr Ebbage on 2 August and 27 October 1993. The parties requested the court to make these findings.

[455] Mr Manthey telephoned Mr Harrison at Moores Rowland to inform him of Mr Ebbage's death. As a result, Mr Harrison convened a meeting of OX2ED and OX2IP where Mr Harrison and Mr Munro agreed that Mr Manthey would now have to be regarded as the authorised representative of the companies. They resolved to seek legal advice.

[456] On 8 December 1998, Moores Rowland sent Mr Manthey a schedule of purchases and sales of shares in AET Inc for both Macro Management and Motor City. They informed him that the usual procedure was that Mr Ebbage would send them partly completed transfer forms which Moores Rowland would then execute on behalf of Macro Management or Motor City. The schedule showed, *inter alia*, the transfer of 1,825,320 shares from OX2ED to Macro Management and 1,000,000 from OX2ED to Motor City. They advised him to contact the registered office of AET Inc in the United States to confirm the balance of the shares held by Macro Management and Motor City. Mr Harrison also sent Mr Manthey bank statements which showed that large amounts of money had been transferred out of OX2ED. Mr Manthey became the secretary of AET on 14 December 1998.

[457] After Mr Ebbage's death in December 1998, Mr Ahearn received instructions directly from Mr Manthey for a period of around four months before AET Inc assumed responsibility for the ongoing maintenance of patents. Mr Ahearn's firm continued to receive instructions from AET Inc.

[458] Murray Bailey brought his brother, Paul Bailey, into Mr Manthey's factory shortly after Mr Ebbage's death, so that Paul Bailey could go through the business records, work out what was going on and "put everything in order". Paul Bailey gave a deposition in the New Mexico proceedings which was admitted as evidence subject to his being cross-examined in this matter. That cross-examination revealed him to be an evasive and unreliable witness. The deposition was therefore virtually worthless.

[459] By facsimile dated 16 December 1998, Mr Manthey asked Mr Harrison for details about OX2IP such as the names of stockholders, the percentage of stock held by each stockholder, a copy of the Articles of Association, and copies of any contracts, assignments or agreements entered into by OX2IP.

[460] Mr Manthey asked Mr Ebbage Snr if some of the money which had been paid from the OX2 companies into Macro Management's bank account, which had been left with a balance of $350,000, could be used to pay $200,000 in maintenance fees on the patents. There was insufficient money available to AET to pay this money. Mr Ebbage Snr refused.

[461] On 21 December 1998, Mr Manthey wrote to Mr Harrison as follows:

> "Please supply copies of any disproportionate fund transfers from OX2 to Paul Ebbage's personal accounts, co-signed by myself, Steven Manathey [*sic*].
> Also any fund transfers from OX2 to Sue Ebbage, and or any other entities other than Advanced Engine Technology, Australia.
> Thanking you
> STEVEN MANTHEY."

[462] The style of this letter is consistent with Mr Manthey's level of formal education and was presumably drafted by him unlike a number of other letters whose style shows they were drafted by others.

[463] On 22 December 1998, Mr Ebbage Snr agreed to countersign a letter enabling AUS$10,000 to be transferred from OX2ED to AET.

[464] On 23 December 1998, Paul Bailey drafted a letter which was signed by Mr Manthey to Mr Harrison with regard to the proceeds of the sale of shares asking Mr Harrison not to release any funds of Mr Ebbage's until the dispute was resolved. The letter contains assertions which were incorrect, for example, that the proceeds of the sale of shares were split into the separate accounts of Mr Ebbage and Mr Manthey once the funds cleared and that an arrangement had been made that Mr Ebbage would borrow the majority of Mr Manthey's share to deal with his personal needs. Mr Manthey readily conceded that this was incorrect. What had in fact happened was that Mr Ebbage took more than the 50 per cent to which he was entitled from the proceeds of the sale of shares. An accounting for that imbalance would have had to be carried out. The letter was therefore incorrect. Although Mr Manthey signed the letter, he did not draft it and its precise expression was not of his choosing. As I have observed, Mr Manthey relied heavily, and often unwisely, on the advice and expertise of others, particularly those with more formal education than himself. I formed the view that he could not be held completely responsible for the incorrect wording of this letter. He was, as he said, not in the habit of changing the wording of documents written for him by others.

[465] On 24 December 1998, Moores Rowland informed Mr Manthey in answer to his letter of 16 December 1998, that OX2IP had two shareholders, Southpac and Equity. Mr Harrison said that normally when they allotted shares to their nominee companies, they prepared declarations of trust between these nominees and the beneficial owners. As they had not received any instructions, they had never prepared declarations of trust in favour of beneficial owners. They enclosed copies of contracts executed by them on instructions from Mr Ebbage.

[466] In order to try to find out what money had been transferred from the OX2 companies, Mr Manthey wrote to Moores Rowland on 4 January 1999 asking for a list of all amounts paid to AET and the reason for each transaction. On 5 January, Mr Harrison sent schedules of movement in the seven bank accounts operated by OX2IP and OX2ED. Mr Manthey grew more concerned about the need to pay patent maintenance costs and so on.

[467] On 5 January 1999, Paul Bailey was appointed a director and secretary of AET. That appointment ceased on 29 October 1999 when Mrs Manthey became a director and the secretary of AET. Paul Bailey provided Mr Holmes with copies of documents he located in Mr Ebbage's office at the factory.

[468] On 13 January 1999, as managing director of AET, Mr Manthey sent a letter to the directors of EOS addressed to its registered office at the AE practice, Southport stating:

> "As you are aware the funding of Advanced Engine Technology Pty Ltd (A.E.T.) Research and Development operations in Australia (R&D), has been, since inception, funded fully by both Steven Manthey and Paul Ebbage on a 50/50 basis.

> Per my many meetings with Ray Ebbage in both December 1998, and January 1999, and meetings with Ray Ebbage, myself and Murray Bailey, CEO (of the American operations) over the same period the subject of the continuing funding needs of A.E.T. have been fully discussed and explained to all parties, specifically the urgent need for funds to pay employee's salary's [*sic*] and the payment of the Patent attorney's billing for patent maintenance due, as was stated at these meetings, on the 15th of January 1999. (Total amount due and payable $179,414.00).
>
> While the meetings between Steven Manthey, Ray Ebbage and Murray Bailey, produced a set of documents as a proposal for the American Company to consider taking an interest in A.E.T. R&D in Australia, in return for funding the Australian operations.
>
> This proposal does not however relieve the stock holders of A.E.T. Australia in anyway from their obligations to sustain the full funding needs, ongoing, of A.E.T. as was done over the passed [*sic*] years.
>
> Therefore as managing director of A.E.T. Australia, it is my duty on behalf of the company, A.E.T., to submit to you the following as an invoice billing; due and payable immediately upon receipt of this document/invoice.
>
> PATENT MAINTENANCE COST = Total to date: 179,414.00
> Your responsibility 89,707.00
> EMPLOYEE'S WAGES AS OF 8/1/99 2,516.70
> Your responsibility 1,258.55
> As of this Date 14/1/99
> AMOUNT NOW DUE AND PAYABLE $90,965.55"

[469] On 19 January, Mr Alford forwarded a copy of this letter to Mr Ebbage Snr in his capacity as a director of EOS.

[470] As a result of written requests from Mr Manthey on 13 and 14 January 1999, on 15 January, Mr Harrison wrote to Mr Manthey confirming that at his request Moores Rowland would prepare financial statements for OX2ED and OX2IP. He also explained the details of the operation of these companies and that Mr Ebbage had been the authorised representative of the companies for share trading purposes. The misspellings and awkwardness of written expression in the faxed request of 13 January 1999, suggest that it was written by Mr Manthey personally. Its language is quite unlike the letter of 23 December 1998 drafted by Paul Bailey.

[471] On 18 January 1999, Mr Manthey again requested payment from EOS to cover moneys owing and outgoings including employees' wages.

[472] Minutes of a meeting of AET held on 22 January 1999 show those present as Mr Manthey and Paul Bailey. The subject of the meeting was said to be:

> "Given the non response to Advanced Engine Technology's registered mail to Ebbco Office Services asking for their assistance to help come up with the funds to maintain both the company's

> survival and obligations of the company, the Directors passed a resolution to use whatever means of availability to achieve funding from any source, be it local or foreign to, a/ maintain the day-to-day operations, b/ to pay for the costs of Patent maintenance by Ahearns".

[473] Mr Manthey became more concerned about maintaining funding for the development of the engine. On 26 January 1999, he requested Mr Harrison to transfer AUD$30,000 from Motor City to AET.

[474] On 28 January 1999, the registered office of AET was transferred to Holmes and Partners Pty Ltd, Level 1, corner Chalk and Dixon Streets, Coolangatta. On the same date, Gregory Howland on behalf of AET Inc provided information to Moores Rowland about the division of OX2ED shares between Macro Management and Motor City. Mr Harrison passed the information on to Mr Manthey which showed that Mr Ebbage's company, Macro Management, had been originally allotted 1,825,320 shares in AET Inc while Mr Manthey's company, Motor City, had originally received only 1,000,000 shares.

[475] On Mr Manthey's instructions, Mr Fox of Ahearns, patent attorneys, wrote to the solicitors for Moores Rowland asking for the urgent payment of $200,000 to prevent the patent lapsing in a number of industrially significant countries around the world.

[476] On 2 February 1999, Mr Manthey and Mr Holmes flew to Vanuatu to see Mr Harrison of Moores Rowland to find out more information about the companies set up in Vanuatu. They met on the next day. Mr Manthey was concerned about whether there were sufficient resources to fund the ongoing research. Mr Manthey obtained powers of attorney to conduct business for OX2ED and OX2IP. After taking legal advice, Mr Harrison envisaged seeking court orders to sanction giving Mr Manthey authority to act on behalf of OX2ED and OX2IP. Mr Manthey signed an indemnity for Moores Rowland, at the request of Mr Harrison who said that this was standard practice. Mr Manthey expressed an interest to Mr Harrison in putting some of the money in Macro Management's account back into OX2ED so some urgent patent fees could be paid. The documents showed that Mr Ebbage had taken 825,320 more shares than Mr Manthey and also that Mr Ebbage had received a disproportionate share of the funds.

[477] As a result of Mr Manthey's instructions, Moores Rowland set up the Reef Family Trust (a Manthey family trust) to be the beneficial owner of his interest in OX2ED. The suggestion had come from Mr Harrison to deal with the problems arising from Mr Ebbage's death. Mr Harrison told Mr Holmes and Mr Manthey that this would add another level of interest for anyone trying to trace the interest in Vanuatu. However, as Mr Holmes said, and I readily accept, Mr Manthey appeared not to understand the detail of these matters.

[478] It is true, as the plaintiffs submitted, that on 27 March 2001, when Mr Manthey's deposition was taken in the New Mexico action, he said that he did not know whether he had a beneficial interest in the Reef Trust. It is also true that on 5 March 2001, Mr Manthey's then solicitor, Charles Wilson, filed an affidavit of information and belief from Mr Manthey in an action in Vanuatu to the effect that Moores Rowland had, on Mr Manthey's instructions, appointed Guardian Trustees Limited

as trustee of the Reef Trust. The Reef Trust was exhibited to Mr Wilson's affidavit. However, I do not agree with the plaintiffs' submissions or the argumentative affidavit of Mr Alford filed by the plaintiffs on 2 October 2002 that it follows that Mr Manthey's assertion in the New Mexico deposition was a lie. Mr Manthey left his financial and legal affairs to others and simply followed their advice. While he understood its general effect, he did not fully understand the details.

[479] Paul Bailey drafted another letter from Mr Manthey to Mr Harrison with instructions to reverse the perceived imbalance in shares and funds and for the urgent transfer of AUD$200,000 from Motor City to Ahearns. The need for these funds was supported by another letter from Ahearns on 4 February 1999.

[480] On 3 February 1999, OX2ED resolved to transfer 825,820 shares in AET Inc to Motor City. The consideration was US$0.01. This was done on Mr Manthey's instructions to correct what was described as the share imbalance which had occurred whereby Mr Ebbage had gained 55 per cent of OX2ED and OX2IP and Mr Manthey had been left, unbeknownst to him, with only 45 per cent. The estate of Mr Ebbage continued to insist on that division of the interest in the OX2 companies in litigation in Vanuatu, New Mexico and Australia. However, this was not reflected in the settlement reached between the parties. Mr Manthey also directed the payment of AUD$200,000 from Motor City to Ahearns for patent fees as a matter of urgency.

[481] On the same date, Tom Sharp, an investment adviser based in Vancouver, Canada sent a facsimile to Paul Bailey at AET which suggested that he had just been engaged to act. Mr Manthey gave evidence, which I accept, that Paul Bailey had recommended Mr Sharp's engagement. Mr Sharp wrote that Neustadt Unternehmen GMBH ("Neustadt") had been incorporated in Niue and held for Mr Manthey. He said that the Sabre Foundation name was available.

[482] On 4 February 1999, Mr Harrison sent a letter to Mr Holmes enclosing four declarations of trust dated 3 February 1999. Southpac declared that the beneficial ownership of the one share it had in OX2IP and in OX2ED was held by Guardian Trustees Limited as trustee for the Reef Trust; and Equity declared that it held its share in OX2IP and OX2ED as trustee for the "estate of late Paul Ebbage".

[483] When Mr Holmes and Mr Manthey returned from Vanuatu, Mr Holmes started going through all of the financial documents of AET and OX2ED and OX2IP to prepare a full report. There were concerns about Mr Ebbage's conduct of the companies. Mr Harrison was asked to prepare financial statements and in the course of doing so, during February 1999, requested information from Paul Bailey about a number of receipts by and payments from OX2IP and OX2ED. A number of the payments from OX2ED appeared on their face to be for personal liabilities of Mr Ebbage.

[484] An initial report prepared by Holmes & Partners on 18 February 1999 showed that no tax returns had ever been lodged for AET. A large number of transactions were identified which required further investigation. Mr Manthey told Mr Holmes that once an accounting of all the discrepancies was complete, Mr Ebbage's estate should receive whatever they were entitled to. Nicholas Suddes, one of Mr Holmes' partners, set about collecting material for this purpose. The first draft of his report was produced in August 1999.

[485] During this time, contact was made by Holmes & Partners with Alfords, as the former accountants of AET. A number of contacts were also made with Moores Rowland but the relationship with them gradually deteriorated. Mr Manthey's solicitors told Mr Harrison that Mrs Ebbage was disputing Mr Ebbage Snr's right to probate and that they should not therefore deal with Mr Ebbage Snr on behalf of Mr Ebbage's estate.

[486] In March 1999, Mr Holmes had a telephone conversation with Paul Bailey about what steps should be taken with regard to the Vanuatu companies, OX2ED and OX2IP. Mr Manthey was also a party to the conversation but the conversation was primarily between Paul Bailey and Mr Holmes. They considered a number of matters including transferring the interests held by OX2ED and OX2IP to AET Inc for $1,500,000. Whatever Paul Bailey's motives, Mr Holmes was not comfortable with structures involving companies incorporated in a jurisdiction like Vanuatu.

[487] On 19 March 1999, Mr Manthey caused Motor City to dispose of shares it held in AET Inc for valuable consideration: 1,250 were transferred to K Cleeland; 625 to R Bibbie; 1,200 to Henderson and 5,000 to Cecil Hunt. He also authorised the transfer of shares he had promised to Murray Bailey. On 19 March 1999, he instructed Moores Rowland to issue 1,460,000 shares in AET Inc held by OX2ED to Murray Bailey. On that day, shares in AET Inc were also transferred to R & M Petersen as trustees. Mr Manthey's evidence about that in his deposition in the New Mexico litigation showed he was confused about whether he had specifically authorised the transactions to the Petersens or whether that was done by Murray Bailey. In his evidence at the trial of this matter, he repeated that Murray Bailey organised the sale of the shares and then said that he, Manthey, arranged for the money from that sale to be paid to Rodney Newman, the principal of Green Fit. Mr Newman became the sole shareholder of Green Fit only days earlier.

[488] Mr Newman was a lawyer from New Zealand with whom Mr Manthey had previously entered into a business agreement for the swap of shares in AET Inc for an interest in Arklow Investments. Mr Newman assisted Mr Manthey after Mr Ebbage's death and Mr Manthey relied upon and trusted him. Unfortunately Mr Manthey, probably because of his lack of business experience, his need to rely on others and the potential to make a great deal of money, attracted a number of people who were not entirely ethical or scrupulous. Mr Newman was one of many in that category. Mr Manthey said he looked for residential property on the Gold Coast for Mr Newman. Property was bought at 533 Bonogin Road, Mudgeeraba (lot 7 on RP 226056, County of Ward Parish of Mudgeeraba) which is registered in Green Fit's name but I am satisfied that is in fact beneficially owned by Mr Manthey (the "Mantheys' home") and was purchased from the sale of shares beneficially held by Mr Manthey, or entities controlled by him, in AET Inc. Mr and Mrs Manthey live there. This ruse did not reflect well on Mr Manthey nor on Mr Newman. However, the reason for it was perhaps understandable.

[489] The plaintiffs' prayer for relief included a claim for a declaration that Green Fit held the Mantheys' home on constructive trust for the plaintiffs. This claim remained in the statement of claim. However, Mr Sofronoff QC correctly conceded that the claim should be that the property was held on trust for the joint venture. If the plaintiffs had been able to prove such a case, then their entitlement could have been no higher than to a 25 per cent interest.

[490] Mr Manthey had become very suspicious and feared attempts to take what he believed to be rightfully his away from him. He therefore accepted advice to ensure that major assets, particularly his home, were difficult to trace to him or his wife. He had had the experience in 1996, when he signed a personal guarantee for the Enburg debt, that he could lose everything. The fact that he was far from candid about the true nature of the ownership showed that he was prepared to be untruthful when he thought his home was under threat. It did not, in my view, make him, however, an entirely unreliable witness.

[491] In mid-1999, Paul Bailey, or, less likely in my view, Mr Manthey, told Mr Holmes that AET Inc, which at that time only held a licence to market the OX2 engine, wanted the OX2 companies in Vanuatu to assign to it ownership of the engine. At that time, Murray Bailey was the CEO of AET Inc. Mr Manthey had resumed work on the engine and spent much of 1999 demonstrating the engine in the United States. Mr Holmes advised in favour of this course of action.

[492] On 31 March 1999, a minute of a meeting of AET Inc records that AET Inc had received an amendment to the patent sub-licence agreement from OX2ED offering AET Inc an opportunity to buy the world rights to the OX2 engine technology for $1,500,000 and upon AET Inc's assuming the responsibility to fund all future research and development and protecting and expanding the patent. In order for AET Inc to accept the amended contract and pay the $1,500,000 commitment, Carroll Shelby proposed a private placement of 400,000 restricted shares in AET Inc stock at $5 per share to Robert Peterson. Two million dollars would be raised, $1,500,000 to OX2ED and $500,000 for working capital to AET Inc. The amendment to the sub-licence agreement was executed by Mr Manthey for OX2ED and Murray Bailey for AET Inc.

[493] A minute of a meeting of AET held on 10 May 1999 of AET records that the directors, Mr Manthey and Paul Bailey, agreed to meet the request of parties involved in the American company, AET Inc, to sign the documentation submitted to them for signing.

[494] On 12 May 1999, Mr Manthey and Paul Bailey signed a deed by which AET and OX2IP assigned to AET Inc all their right, title and interest in the intellectual property, patents and property. The consideration was the payment to OX2IP of US$1,500,000 and AET Inc's assuming the responsibility for the research and development of the engine and all obligations for the patents and intellectual property. This figure was struck because Murray Bailey said that that was the most AET Inc could afford allowing for the fact that it took on responsibility to cover all of the costs of patents and research and development. The head licence agreement between OX2IP and OX2ED and sub-licence agreement between OX2ED and AET Inc were terminated.

[495] Mr Manthey directed Neil Cummings of the firm M Neil Cummings & Associates in Los Angeles to receive $US1,500,000 into his trust account for the benefit of OX2ED. Mr Manthey directed him to then deposit those funds to the Chase Manhattan Bank in New York for the account of the Royal Bank of Scotland (Nassau) Ltd Account no. 544-7-03599 for Bond Mercantile Ltd sub account no. 2779 (which company maintains its offices at Nassau in the Bahamas). Mr Manthey said that he directed the moneys to the Sabre Foundation, a trust of

which he and his family were the sole beneficiaries, to correct what he believed to be the imbalance of moneys paid to or on behalf of Mr Ebbage before his death.

[496] Mr Manthey denied that he knew where the money paid to the Royal Bank of Scotland had gone during his deposition held on 26, 27 and 30 March 2001 in the New Mexico litigation. He also claimed a lack of familiarity with the Sabre Foundation. His ignorance of the Sabre Foundation was quite plausible given Mr Manthey's reliance on others at that time and his lack of understanding when financial matters were explained to him. He was clearly much better informed by the time of trial which is only to be expected given the amount of litigation in which he had by then been involved. He gave evidence which I accept that before the trial he "checked up" on all these matters so that he would be able to answer questions about entities set up and things done by others on his behalf. This was in an entirely different category to the "oral agreements", significant aspects of which Mr Alford was unable to remember before the litigation began but whose memory of them improved as the litigation progressed. Those matters were peculiarly within Mr Alford's memory and knowledge whereas with regard to financial dealings, Mr Manthey relied heavily on the advice and actions of others.

[497] On 11 June 1999, Mr Manthey caused Motor City to transfer 381,714 shares in AET Inc to Glencoe Estates Ltd ("Glencoe"), a Cayman Islands company, free of charge. When he gave his deposition in the New Mexico proceedings, Mr Manthey had difficulty recalling this particular transaction. He said, however, that he thought that he was the beneficial owner of Glencoe and that the likely reason for this transfer was to take them away from the control of Moores Rowland whom he no longer trusted because of the many share transfers of which he had been unaware.

[498] Mr Manthey also directed Gregory Howland to record the cancellation and re-issue of the remaining 11,034,600 AET Inc shares held by OX2ED to three corporations which were established and controlled by Mr Manthey through Mr Sharp: 1,428,000 shares to Carmel International Corp ("Carmel"), a company incorporated in the Bahamas; 4,089,300 to Maverick Associates Inc ("Maverick"), a company incorporated in Nevis; and 5,517,300 to Coach Financial Inc ("Coach"), a company incorporated in Belize. There was no consideration to be paid for these transfers. Mr Manthey gave evidence that the shares were to be held for the benefit of OX2ED. The advantage of holding the shares in those countries was that the identity of the beneficial owners and controllers of the shares would be kept confidential. The shares were bearer shares which were not registered and were therefore transferable by delivery of the stock certificates. Mr Manthey caused 71,362 of the shares held by Coach to be transferred to other persons and entities.

[499] Mr Howland, a resident of New Mexico, at that time performed secretarial and other duties for AET Inc although he was not the company secretary. He provided information to United Stocks Transfer so that the transfers could be effected. He also effected the recording of the transfers of the shares in the register of AET Inc on Mr Manthey's instructions. Mr Travis from the brokerage firm, Patterson Travis, did not know of these transfers at the time that they occurred. He was concerned when he did find out that the shares might flood the market driving the price down. He was also concerned about the failure to file the proper SEC disclosure about the transfer of the shares. Subsequently Mr Manthey provided Mr Howland with instructions to transfer stock out of Maverick to specified individuals. Mr Howland refused to obey that instruction. The plaintiffs submitted that this

demonstrated that the assertion that the shares were still beneficially held by OX2ED was not true at the time they were transferred to Carmel, Coach and Maverick. They further submitted that Mr Manthey's claim that the shares were beneficially held by OX2ED was an opportunistic one to prevent disclosure of his interest in the shares in documents filed with the SEC and to forestall Mr Ebbage's estate.

[500] Mr Manthey gave evidence, however, which on balance I accept, that he transferred the shares in that particular way so that half of them would be in Coach to be held for Mr Ebbage's estate and half into two separate companies so that he could sell them when they progressively became unrestricted shares to raise finance to ensure that the work would continue and he could make some money for himself. This structure had been recommended by Mr Sharp. After the New Mexico litigation commenced, Mr Manthey caused the shares then owned by Coach, Carmel and Maverick to be deposited in a Californian court so that they were able to be transferred pursuant to any judgment in the New Mexico litigation and to rebut accusations that he was trying to hide or steal shares.

[501] In mid-1999, Mr Sharp telephoned Mr Howland to inquire as to the status of AET Inc and what kind of shares were held by Coach, Carmel and Maverick and whether the shares held by Maverick were transferable. He was told there was a legend on the stock which was placed under r 144 of the *Securities and Exchange Commission Act* 1933 (US) which restricted them from being resold to the general public for a period of time.

[502] On 23 July 1999, Mr Ebbage Snr was granted probate of Mr Ebbage's estate. The grant was resealed in Vanuatu on 2 September 1999. In their prayer for relief, the plaintiffs sought, *inter alia*, the revocation of probate with letters of administration being granted to Mr Alford. There is no justification for making such an order. Mr Ebbage Snr appears to have done his best in an extremely difficult situation.

[503] In August 1999, Mr Manthey informed Mr Howland that OX2ED should be shown on the SEC filings as the beneficial owner of the stock which had been transferred to Carmel, Maverick and Coach. This was confirmed by letter dated 23 September 1999.

[504] During August 1999, at Mr Manthey's request, Mr Holmes became a board member of AET Inc. At some time during 1999, All Australian Racing Pty Ltd ("AAR") was set up for Mr Manthey by Mr Holmes. Mr Manthey was its only director. AAR purchased plant and equipment from AET.

[505] On 2 September 1999, in order to advance his claim, Mr Alford telephoned Mr Manthey and secretly tape-recorded the conversation. The first part of the recording captured only that which was said by Mr Alford. In the conversation, Mr Alford said that the initial funding of AET was embezzled by Mr Ebbage from companies associated with Mr Alford. He expressed extreme displeasure at the wealth generated for other people by AET and said he wanted "the 25 per cent which the family is entitled to". He threatened Mr Manthey that if he took action it would destroy AET Inc. Mr Manthey told Mr Alford that he had asked Mr Ebbage if Mr Alford had any interest in AET and Mr Ebbage assured him that he did not. He asked because Mr Alford had rung the factory a couple of times and because

Mr Ebbage had told him at inception that he intended to take Mr Alford in to have half Mr Ebbage's interest.

[506] Mr Manthey said that his original contract was with Mr Ebbage. Mr Manthey did not agree with any proposition that there were two meetings at which any tripartite agreement was made. Mr Manthey's unprompted comments show that he understood that the joint venture was between himself and Mr Ebbage with Mr Ebbage contributing the business know-how and investing money. He was prepared to say that Mr Alford might have or did have an interest in Mr Ebbage's share but he said his only source of knowledge was what Mr Ebbage had told him. Had he been involved in the oral agreements as alleged by Mr Alford, that would not have been his only source of knowledge.

[507] On 10 November 1999, Moores Rowland wrote to Mr Manthey and informed him that, because of allegations that he was using the powers of attorney granted to him by OX2IP and OX2ED in breach of orders made by the Supreme Court of Vanuatu, they were giving him notice that the powers of attorney had been revoked. The attached notices of revocation dated 9 November 1999 revoked the powers of attorney from 27 August 1999.

[508] Mr Harrison and Mr Munro flew to Australia in late December 1999 to try to settle litigation which had been commenced in Vanuatu against them and others by the Ebbage estate. Mr Harrison sent a letter by facsimile transmission to Mr Manthey on 30 December 1999 saying that notwithstanding Mr Manthey's advice that Moores Rowland should not give access to the records of the OX2 companies to the Ebbage estate, Mr Munro and he were of the view that they were obliged to provide such access. Mr Manthey's evidence was that Paul Bailey received and dealt with such letters.

[509] By the end of 1999, Mr Manthey had fallen out with both Paul and Murray Bailey and Mr Manthey dispensed with Paul Bailey's services. Murray Bailey resigned as CEO of AET Inc. Mr Manthey started to rely more heavily on Rodney Newman.

[510] In March 2000, Mr Ebbage Snr commenced proceedings in New Mexico against Mr Manthey. In April 2000, these proceedings were commenced by the plaintiffs against Mr Ebbage Snr and HPM. HPM is now the trustee of the Ebbco Trust.

[511] On 7 July 2000, AET's lawyers issued a notice of demand on OX2IP for $2,223,537. On 31 July 2000, AET in a consent order in this court agreed not to move to wind up OX2IP on the basis of this demand. This was made together with a number of other orders in compromise of a dispute between HPM, AET and Mr Manthey. The plaintiffs sought to make something of the issue of the notice of demand but it was clear in Mr Manthey's evidence that he had no idea what a notice of demand was or meant.

[512] On 10 July 2000, Holmes and Partners produced a financial report which demonstrated that:-

1. Between 21 February 1996 and 2 December 1998, OX2ED maintained a number of Australian dollar and United States dollar accounts at different banks;
2. Between 10 December 1996 and 2 December 1998, the assets of OX2ED comprised shares in AET Inc and cash at bank;

3. As at 2 December 1998, the imbalance in shares in AET Inc held by OX2ED and transferred to Mr Ebbage or associated entities stood at 955,320 shares more than those transferred to Mr Manthey or associated entities;
4. As at 2 December 1998, the funds withdrawn from the OX2ED bank accounts and applied to the benefit of Mr Ebbage or associated entities from the proceeds from sale of shares in AET Inc held by OX2ED and from other sources exceeded sums paid to Mr Manthey from the same sources as follows:-
   (a) in relation to the Australian dollar account, by AUD$127,463;
   (b) in relation to the United States dollar accounts, by US$838,736.

[513] In July 2000, Mr Alford secretly video taped a meeting which was conducted in the boardroom of his accountancy office. Those present were Mr and Mrs Manthey, together with their then lawyers, Michael Small and Charles Wilson, and Mr Alford with John Connor, his solicitor. Mr Manthey's comments on that video tape make it clear that any agreement which he made was made only with Mr Ebbage and that any information he thought he had about Mr Alford's interest was only from Mr Ebbage. As I have said, if he had been present at the meetings in August and October 1993, as alleged by Mr Alford, he would have known of Mr Alford's interest from those meetings not from information or opinions given by someone else. Although he says that Mr Alford "was involved" early on after his trip to Brisbane to see Mr Ahearn with Mr Ebbage, this does not prove or even suggest that there were the enforceable agreements between Mr Alford, Mr Ebbage and Mr Manthey as alleged in the statement of claim. Indeed on Mr Alford's version, any tripartite agreement entered into was before Mr Manthey's trip to Brisbane with Mr Ebbage to see Mr Ahearn. In any event, an involvement is far from an enforceable contractual or equitable right. Mr Alford explained in his evidence that he did not explicitly refer to the two agreements in August and October 1993, because "I [Mr Alford] would have had no recollection at that stage that that was actually the case". Not only did Mr Alford not put those alleged agreements to Mr Manthey during the video taped conversations, the oral agreements on which Mr Alford relied in his statement of claim were not unambiguously put to Mr Manthey during the hearing of this matter for his comment.

[514] The New Mexico litigation, as well as other litigation in the Supreme and District Courts in Queensland, the Superior Court of the State of California and the Supreme Court of Vanuatu, was settled on 19 July 2001. The parties to the settlement were Mr and Mrs Manthey, Mr Ebbage Snr as executor of the estate of Mr Ebbage, AET, OX2ED, OX2IP, Macro Management, Resolution Services Ltd, HPM, Green Fit and Motor City.

[515] As has been shown, various transactions took place and moneys and property were transferred throughout the world to entities registered in many different places. If Mr Alford, or any of the plaintiffs, had had an interest in a joint venture, AET or any other entity associated with the ownership of the intellectual property in Mr Manthey's invention, they would have had a tracing action to recover that

interest[6] but they had no such interest. Accordingly, it is not necessary to consider whether or not the plaintiffs would in any event be defeated because of their initial delay in asserting their rights, because of the operation of the equitable doctrine of laches.[7]

[516] There is no utility in making further detailed findings as to what interest Mr Alford might have had, if a tracing action were open, since such an action is plainly not open to him. While many of his actions reflect no credit on Mr Manthey or his many advisers, many of whom have been solely motivated by greed, Mr Manthey's gullibility and the greed of himself and others does not make Mr Alford's version of the question whether there was ever any enforceable agreement whereby Mr Alford gained an interest in AET or any joint venture any more likely. Mr Alford's only right was to recover repayment of any debt owed to him or one of his corporate entities. Those alleged debts were set out in the annexures to the statement of claim.

Moneys said to be owing from the defendants to the plaintiffs

[517] Mrs Atkinson referred in her affidavit evidence to $6,000 being paid to Mr Manthey for engine development by PPG Trust trading as Ebbage and Co (Beaudesert) but in fact these appear to have been payments for work done on Mr Ebbage's Pantera or other vehicles and as such are irrelevant to any claim made against Mr Manthey in this case. It relates instead to an accounting of the moneys owed by and from Mr Ebbage and Mr Alford to their accountancy partnership as it appears to be a personal expense of Mr Ebbage. The payments total $7,130 and were made on 13 May, 4 June, 9, 15, 16 July and 20 August 1993. No claim was made for the repayment of those moneys in these proceedings.

Annexure A

[518] The plaintiffs alleged that from July 1994 and not withstanding that the joint venture had not been fully documented, AEF advanced funds sourced from the practice to AET for the purposes of the joint venture. In the alternative, they alleged that AEF advanced funds sourced from the practice to EOS for the purposes of enabling EOS to make contributions to the joint venture and the advanced funds were repayable by EOS to AEF upon demand. The particulars were said to be set out in Annexure A to the statement of claim.

[519] In their defence, the Ebbage interests said that Mr Alford and Mr Ebbage agreed in or about May 1995 that funds already advanced by AEF to AET would be treated as a loan by EOS to AET, and as having been loaned by AEF to EOS. Any further funds advanced by AEF to AET would be treated as a loan to EOS from AEF. They did not know on what terms the loan by AEF to EOS was made, and therefore whether or how it was repayable, nor did they or the Manthey interests know whether the funds were sourced from the AE practice.

---

6 *Natural Extracts Pty Ltd v Stotter*; *GG Jay Investments Pty Ltd v Doveka Pty Ltd* (1997) 24 ACSR 110, NG 3192 of 1992 and 3238 of 1992, 16 May 1997 per Hill J; *Nelson v Larholt* [1948] 1 KB 339.

7 *Orr v Ford* (1989) 167 CLR 316; *Allcard v Skinner* [1886-90] All ER 90.

[520] In their defence, the Manthey interests admitted that from July 1994, the funds identified in Annexure "A" were applied to the development of the internal combustion engine. They said that the funds were advanced by AEF to the Ebbage interests who in turn contributed such funds by way of venture capital by the Ebbage interests to Mr Ebbage's partnership with Mr Manthey. As contributions to the partnership, the funds, when paid by the Ebbage interests were not repayable to the Ebbage interests, such funds having been contributed as joint venture capital to the partnership. It is not necessary or even desirable to characterise the nature of the payments by EOS to AET as there was no issue joined between them in these proceedings.

[521] The Manthey interests then alleged that such funds did not constitute either a loan or contribution of joint venture capital by AEF to AET. Rather, they said, the funds constituted a loan from AEF to the Ebbage interests for the purpose of enabling the Ebbage interests to make further contributions of capital to the partnership between Mr Ebbage and Mr Manthey. They alleged that there was no contractual relationship of any kind between the plaintiffs or any of them and the Manthey interests.

[522] Mr Alford estimated in his evidence that in the calendar year of 1994, between $80,000 and $100,000 was paid by AEF, or other companies associated with the AE practice, to AET and in the calendar year of 1995, between $150,000 and $200,000. In para 52(c)(iii) of the statement of claim, the plaintiffs alleged that $A195,966.41 remained payable by AET to AEF.

[523] Annexure A deals with sums found in the annual general ledger of AEF from 7 July 1994 to 30 June 1995 prepared by Mr Ebbage. The entries are shown as payments to Ebbco Holdings Trust and journaled as a loan from Ebbco Holdings Trust to AET. The total amount for that year is $190,332.85, which includes an opening balance of $27,400. On its face, that money would appear to be owing from AET to the Ebbco Holdings Trust. The moneys are then owed by the Ebbco Holdings Trust (or its trustee EOS) to AEF.

[524] Mrs Atkinson said in evidence that she examined the $27,400 and found that those payments were journaled into the ledgers and accounts of AEF. They were sourced from AES and were originally in the 1994 accounts for AE Service Trust under a loan account entitled "loan AET". They were subsequently transferred by journal to AEF. These payments would appear to be repayable on demand from AET to AES. These moneys would appear to include certain sums that Mr Alford knew were to be paid to Mr Manthey or to his benefit, such as $10,000 in late 1993. However, there was no claim in the prayer for relief for moneys said to be owing by the third defendant, AET, to the sixth plaintiff, AES.

[525] Annexure A was amended to include loans allegedly made from 1 July 1995 to 30 June 1996. The ledger records further debts of $39,925.79 and credits of $7,742.69. The last payment is recorded as having occurred on 8 December 1995.

[526] The last two entries in Annexure A are journal entries for $13,338 and $7,000 which Mrs Atkinson said were "just closure of loan accounts in AE Beaudesert and AE Holdings No 6 … and they were just generically transferred in on that 30 June '95. It could just be a data entry". That is an insufficient basis to satisfy the court that those moneys were loans made to AET which are repayable to AEF.

[527] Other entries which are not able to be characterised with certainty as payments made by or on behalf of AEF to AET include items included as travel expenses for the Targa Tasmania rally. These were Mr Ebbage's expenses for attending the Rally in 1995.

[528] The loans to AET were said to have been made by Ebbco Holdings Trust. Mr Alford said, in cross-examination, that this was a fraud by Mr Ebbage. However, as I have earlier noted, Mr Alford gave evidence that this trust was associated with Mr Ebbage. It therefore correctly recorded Mr Ebbage's interests receiving a share of the profits of AEF which were then paid to AET. Whether or not these moneys were part of Mr Ebbage's profit share involves a finalisation of the partnership accounts so that moneys paid to or drawn by both Mr Alford and Mr Ebbage are accounted for and reconciled. This task has not been completed and was not sought in this action.

[529] Mrs Atkinson said in her affidavit that Annexure A sets out an accurate accounting of the funds provided by corporate entities associated with the AE business (AEF, AEB, and AES) directly to AET and Mr Manthey identified as an annual general ledger account "830-loan – Ebbco Holdings Trust". She deposed that the title of the account identified as Ebbco Holdings Trust is incorrect. She said that from the commencement of funding by the AE business to AET, all advances were noted as "Loans – AET". She asserted that the general ledger account 830 was originally entitled AET. She said that Mr Ebbage appeared to have altered that title in or about 1995. She deposed that all entries in the cash books during the years in which the companies made payments to AET recorded advances being made by the companies directly to AET and not to the Ebbco Holdings Trust and/or EOS. Mrs Atkinson referred to the cash sheets and adjustment journal entries to AEF. However, these were removed from the bundle of documents at the end of the trial.

[530] She further deposed that bank statements for accounts maintained on behalf of AEF corroborated and supported entries made into the cash book for AEF as and when cheques were presented on the dates indicated in the cash book. She deposed that AET cash books supported the entries contained in the AEF cash books and in Mr Ebbage's handwriting confirmed the payments being made by AEF and not EOS and/or the Ebbco Holdings Trust or the Ebbco Trust. The AET cash books were, however, also removed from the bundle of documents at the end of the trial.

[531] Mrs Atkinson deposed that funding to AET was sourced from the cash flow of the Beaudesert and Southport practices. She said that the Beaudesert practice funds were paid to AET directly, Mr Ebbage having immediate access to those funds and prior to any funding being provided to the service trust for payment of the operating expenses of the AE business. She said that Mr Ebbage held the cheque book for the bank account maintained by the Beaudesert practice and that Mr Alford did not have access to that account other than with the consent of Mr Ebbage. She deposed that the documents reflected funding by the Southport practice through AEF in respect of the costs incurred by, or on behalf of, AET for the 1995 Targa Tasmania car rally.

[532] Mrs Atkinson also said that Mr Ebbage had incorrectly recorded the advances from AEF, AES and AEB as advances to the Ebbco Holdings Trust. Her evidence was that the advances so recorded were never contemplated as being loans to the Ebbco

Holdings Trust and were at all material times loans to AET and reflected as such in the records of AEF.

[533] Mrs Atkinson said she was unaware of any association or involvement by EOS in its capacity as trustee of either the Ebbco Trust or the Ebbco Holdings Trust with AET until after Mr Ebbage's death and at a time when questions were being raised by Mr Alford in relation to the interest he said he held in the joint venture. Mr Farmer was unable to throw any light on this matter. Although he said he was aware of some funding taking place for the AET project he was not aware of which entity paid for or which entity received the funding.

[534] Mrs Atkinson deposed that Annexure A to the plaintiffs' amended statement of claim recorded payments made by AEF calculated to 23 June 1995 in the total sum of $190,332.85; and that the total sum advanced by AEF to AET as at 30 June 1996 amounted to $222,515.95 in accordance with the figures calculated at page 48 of Volume 14 of the bundle of documents. That page was also removed from the bundle. She said that all source documentation including cheque butts and cash books have recorded the advances as being made to AET and not to the Ebbco Holdings Trust. The prayer for relief claimed that $222,515.95 was due from HPM and AET to AEF or, in the alternative, from EOS to Mr Alford.

[535] Even if what Mrs Atkinson said about the records were to be accepted, this would not mean that the moneys paid to AET were not correctly journaled as being loaned to, or for that matter, paid against moneys to be distributed to or profit share owing to the Ebbco Holdings Trust. Mrs Atkinson conceded that she had no independent recollection or knowledge of why "Loan – Ebbco Holdings Trust" was on that document. She also conceded that if the Ebbco Holdings Trust was responsible for those funds, the accounting treatment would not have been inappropriate. In my view, the books of the AE practice correctly showed these loans as having been made to the Ebbco Holdings Trust and were part of the moneys received from the accountancy partnership to the benefit of Mr Ebbage. Whether or not they were in excess of Mr Ebbage's profit share and are therefore repayable, depends on an account of the Alford Ebbage partnership which has not been done nor sought in this action.

Annexure B

[536] The plaintiffs also alleged that from about July 1994 AEG provided accountancy services to AET in connection with the joint venture particulars of which are found in Annexure B. In paragraph 52(c)(iv) of the amended statement of claim, the plaintiffs alleged that $88,420.04 remained owing to AEG from AET. Annexure B deals with accountancy services said to have been rendered between 10 July 1995 and 15 July 1996. All of the annexures apart from Annexure A were prepared by Mrs Atkinson on instructions from Mr Alford. Mrs Atkinson was unaware at the time the liability was said to have been incurred of whether or not AET was being billed for work done. The Manthey interests admitted that from July 1994, accountancy services were provided to AET but did not admit that the accounts rendered by AEG truly reflected the work completed.

[537] Annexure B includes $72,000 said to be owed by AET on 29 February 1996 for services from 9 September 1994 to the date which is exhibited to Mr Peters' affidavit. The balance unpaid of the billed work is said to be $88,420.04. The

prayer for relief claimed that this is money due from HPM and AET to AEG. AEG was the trading company which operated the Southport practice. The Ebbage interests pleaded that Annexure B was an unintelligible document.

[538] Annexure B sets out the following schedule of invoices:

Date	Invoice No	Amount	Received	Balance
10.07.95	3416	49390.00		49390.00
22.12.95			-10000.00	39390.00
31.01.96	3728	211.24		39601.24
31.01.96	3721	24.00		39625.24
14.02.96			-20000.00	19625.24
15.02.96	CONTRA	18000.00		37625.24
29.02.96	4490	72000.00		109625.24
04.04.96			-7500.00	102125.24
01.05.96	3809	19.80		102145.04
04.07.96			-15000.00	87145.04
15.07.96	4739	1275.00		88420.04

[539] An unexplained aspect of Annexure B is that invoices were said to have been issued on 10 July 1995 for $49,390; 31 January 1996 for $211.24 and $24; CONTRA of $18,000 on 15 February 1996 and for $72,000 on 29 February 1996. Thereafter, invoices were issued on 1 May 1996 for $19.80 and on 15 July 1996 for $1,275. The work in progress of the AE practice shows that $71,860.10 was the total fees and outlays generated by 1 March 1996 which was presumably the $72,000 bill issued on 29 February 1996, which therefore must have incorporated invoices previously issued. It would appear that Annexure B has wrongly added in the $49,390 owing on 10 July 1995 and $211.24 and $24 owing in January 1996 and $18,000 said to be for contra on 15 February 1996. These figures should therefore be deducted from the amount billed said to be still owing. This would mean that under Annexure B $20,794.80 fees invoiced to AET remain unpaid. Even if the $18,000 was, as Mrs Atkinson said at paragraph 186(a) of her affidavit sworn on 28 February 2002, paid by AE to AET to provide sufficient funds to pay the cheque of $20,000 drawn by AET on the previous day, and this is taken from the amounts paid, then $38,794.80 would remain unpaid. However, the source of Mrs Atkinson's information appears to be Mr Alford who gave no evidence on this himself. It appears at least equally likely that the $18,000 said to contra was an incorrect charging to AET of the $18,000 per annum consultancy fee paid to Mr Ebbage by the AE practice and then by Mr Alford.

[540] Appendices 3 and 16 to the report produced by Mr Suddes on 10 July 2000 shows that in addition to the payments made by AET to the AE practice for professional fees which were shown in Annexure B, $10,030 was paid to, or on behalf of, "Alford Ebbage" on 27 October 1994 and $24,000 on 7 December 1994 being a further $34,030 paid. It could not therefore be said with confidence that any accountancy fees remained outstanding.

[541] Annexure B also made a claim for $319,464 for unbilled work in progress. This was said to be 21 days in December 1995 and 240 days from January to November 1996 making a total of 261 days of 8 hours at $153 per hour. Mrs Atkinson deposed that the calculation of unbilled work in progress was calculated correctly and in

accordance with the agreed charge out rate applied on behalf of Mr Ebbage in respect of the number of days he was engaged by AET at the factory premises as at 9 November 1996. However, the partnership was dissolved at the end of 1995 and there seems to be no basis for this claim. It was not claimed in the prayer for relief.

Annexure C

[542] Mr Alford alleged that from 29 November 1995 until 30 June 1996, $139,203.89 was paid from AES as trustee of the AE Service Trust to the benefit of Mr Ebbage. The amended statement of claim alleged that from on or about 29 November 1995, Mr Alford procured the company AES (as trustee for the AE Service Trust) to pay Mr Ebbage to devote his time to administer and further the "joint venture" in the sums as set out in Annexure C. The individual payments were listed in Annexure C to the statement of claim. Mrs Atkinson deposed in her affidavit to various things she had been told by others particularly Mr Alford about the arrangements made between Mr Alford and Mr Ebbage but she had no personal knowledge of this. The date, 29 November 1995, was chosen because Mr Alford told her to use that date. The prayer for relief claimed repayment of $139,203.89 said to be due to AES from HPM and AET.

[543] When the Beaudesert practice was sold, the purchasers, Mr Gillow and Mr Teese, were responsible for the collection of debts for work in progress carried out prior to the sale of the Beaudesert practice. The amount of money collected for the outstanding work in progress was said by Mr Alford to be between $139,000 and $140,000 which was paid to AES. This corresponds to the amount paid out to Mr Ebbage as detailed in Annexure C. It appears that the moneys received by Mr Ebbage which were detailed in Annexure C related to the continuing liability to account for work in progress of the Beaudesert practice while it was owned by Mr Ebbage. These payments would, as Mrs Atkinson conceded, be considered as part of Mr Ebbage's share if there were to be a reconciliation of the accounts of the AE partnership which was not claimed in this action. There is no liability under Annexure C.

Annexure D

[544] Annexure D lists amounts which the plaintiffs alleged were paid between 22 December 1995 and 1 April 1996 from AEF to Crayfield on behalf of Mr Ebbage, totalling $5,633.56. The amounts alleged to be paid from AEF to the benefit of Mr Ebbage are:

"22.12.95	Crayfield – Int Dec 95 to Jan 96	200065	2089.04
15.02.96	Crayfield	200067	1220.89
01.04.96	Crayfield – March	200068	1102.74
01.04.96	Crayfield – April	200069	1220.89
Total payments on behalf of PG Ebbage			$5,633.56"

[545] When Mrs Atkinson was instructed by Mr Alford to prepare this document, she was told to include payments out but not instructed to include payments in. In paragraph 43 of the amended statement of claim, the plaintiffs alleged that from on or about 22 December 1995, Mr Alford procured the company AEF to pay Mr Ebbage to devote his time to administer and further the "joint venture" in the sums set out in Annexure D. The payments in Annexure D made on 1 April 1996 were $1,102.74 and $1,220.89 (a total of $2,323.63). They were debited to AEF's account on 17

April 1996. However, on 3 April 1996, $2,300 had been deposited to AEF's account from EOS, presumably, as Mr Alford accepted might have been the case, in anticipation of those cheques being drawn. The source of those payments was therefore Mr Ebbage. Neither of those payments was therefore owing to Mr Alford or his interests. Whatever the reason for the payments made to Crayfield by AEF, none of them was a payment made to Mr Ebbage to devote his time to administer and further the "joint venture". There was no claim in the prayer for relief for any of the amounts listed in Annexure D.

Annexure E

[546] Annexure E records payments alleged to have been made from IPA as trustee for AE Service Trust No 2 on behalf of Mr Ebbage from 19 April 1996 to 26 June 1998. These payments total $41,058.55. Mr Alford said that the payments were made to support Mr Ebbage whilst he was engaged full-time at AET. He told Mr Farmer at the time that Mr Ebbage was to be paid a consultancy fee because Mr Ebbage needed a wage whilst working for AET. IPA was the successor of AES and was the service company for the Southport practice at this time.

[547] Mr Alford denied that Mr Ebbage was paid a consultancy fee for providing information and assistance to the AE practice in relation to Beaudesert clients after the end of 1995. However, Mr Alford did concede that Mr Ebbage was retained to provide specialist services in respect of clients of the Southport practice and therefore for maintaining the goodwill in respect of the Alford Ebbage name. The Southport practice continued to be known as Alford Ebbage until March or April 1998. Whatever the motive for this consultancy being provided, the fees were payable for the consultancy services provided by Mr Ebbage. He was to be paid $18,000 a year. According to Mrs Atkinson's evidence, he was paid a consultancy fee into 1998. Because of dissatisfaction expressed by Mr Farmer, Mr Best and Mrs Atkinson with the service provided by Mr Ebbage, those payments were journaled as coming from Mr Alford's drawings rather than the practice account except for the payments until the end of June 1996.

[548] The payments from 1996 to 1998 appear to represent the retainer or consultancy fee paid to Mr Ebbage and as such are not repayable.

Conclusion

[549] The plaintiffs have been unsuccessful in their claim that there was $416,714.47, or any other figure, owing from the estate of Mr Ebbage to Mr Alford in respect of Mr Ebbage's alleged liability to pay Mr Alford's Esanda Finance Facility. They have also been unsuccessful in their claim to any beneficial interest in AET, AET Inc, OX2IP, OX2ED or Macro or any assets held by them. They have failed to establish any entitlement to a beneficial interest in any assets including the Mantheys' home or any entitlement to equitable compensation or damages. This is because I am satisfied that there was never any joint venture which would give rise to any such entitlements.

[550] So far as the debt claim is concerned, the prayer for relief claimed $222,515.95 said to be owing by the second and third defendants, HPM and AET, to AEF (Annexure A), or to Mr Alford by EOS, $88,420.44 said to be owing by HPM and AET to AEG (Annexure B), $139,203.89 said to be owing by HPM and AET to

AES (Annexure C), and $41,058.55 said to be owing from HPM and AET to IPA. In addition, interest at the rate of 10 per cent per annum compounding on monthly rests from specified dates was claimed. Of the debt claim, for the reasons given, none of the amounts claimed is repayable in this action.

[551] Judgment should be entered for the defendants.