SUPREME COURT OF QUEENSLAND

CITATION: *Alford & Ors v Ebbage & Ors* [2004] QCA 283

PARTIES:
ANTHONY JAMES ALFORD
(first plaintiff/first appellant)
DARIO PTY LTD ACN 051 964 697
(second plaintiff/second appellant)
AE HOLDINGS PTY LTD ACN 010 697 266
(third plaintiff/third appellant)
AE FINANCE CO PTY LTD ACN 010 766 775
(fourth plaintiff/fourth appellant)
IPA (QLD) PTY LTD ACN 074 450 089
(fifth plaintiff/fifth appellant)
ALFORD EBBAGE SERVICES PTY LTD
ACN 059 651 286
(sixth plaintiff/sixth appellant)
AE GROUP PTY LTD ACN 059 315 178
(seventh plaintiff/seventh appellant)
v
RAYMOND JOSEPH EBBAGE for himself and as executor of the estate of **PAUL GERRARD EBBAGE** deceased
(first defendant/first respondent)
HPM INVESTMENTS PTY LTD ACN 083 664 680
(second defendant/second respondent)
ADVANCED ENGINE TECHNOLOGY PTY LTD
ACN 063 092 759
(third defendant/third respondent)
STEVEN CHARLES MANTHEY
(fourth defendant/fourth respondent)
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/fifth respondent)
BRENDA MARY MANTHEY
(tenth defendant/sixth respondent)
GREEN FIT N.Z. LIMITED ACN 088 084 673
(eleventh defendant/seventh respondent)
MOTOR CITY INC
(twelfth defendant/eighth respondent)
EBBCO OFFICE SERVICES PTY LTD
ACN 053 769 789

	(thirteenth defendant/ninth respondent)
FILE NO/S:	Appeal No 8863 of 2003 SC No 3677 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 August 2004
DELIVERED AT:	Brisbane
HEARING DATES:	5 May 2004; 6 May 2004
JUDGES:	de Jersey CJ, Jerrard JA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the appeal by the fourth appellant, AE Finance Pty Ltd, be allowed as against the ninth respondent, Ebbco Office Services Pty Ltd, and that it be ordered that respondent pay AE Finance Pty Ltd the amount of $384,396.00, being $222,516 claimed together with $161,880 interest thereon calculated at the rate of nine per cent per annum from 30 June 1996;** **2. that Ebbco Office Services Pty Ltd pay the costs of AE Finance Pty Ltd of the trial and the appeal, to be assessed on the standard basis;** **3. and otherwise that the appeals by the first to seventh appellants inclusive be dismissed against all respondents, with costs, calculated on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – IN GENERAL – where appellants unsuccessfully claimed a 25% interest in a tripartite joint venture allegedly entered into between the appellants and respondents – whether trial judge erred in finding that there was no tripartite joint venture entered into – where that finding amply supported by the evidence at trial APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES - POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – QUESTIONS NOT RAISED IN PLEADINGS OR IN ARGUMENT – GENERALLY – where appellants made application to amend pleadings so as to raise an argument not made below – whether leave should be granted

– where application to amend was made at close of the appellant's submissions on the hearing of the appeal – where the case below would have been differently conducted by the respondents had the appellant's case included the amended pleadings – where appellants would fail on the amended pleadings on the evidence led at the trial

CONTRACTS – OFFER AND ACCEPTANCE – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – whether the existence of a joint venture agreement can be inferred from the overall conduct of the parties

Browne v Dunn [1893] 6 R 67, cited
Fox v Percy (2003) 197 ALR 201, cited
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110 cited
Pagnan S.p.A v Feed Products Ltd [1987] 2 Loyd's Rep 601, considered
Perry v Suffields Ltd [1916] 2 Ch 187, cited
Nescor Industries Group Pty Ltd v MIBA Pty Ltd (1997) 150 ALR 633, considered
Ravinder Rohini Pty Ltd v Krizaic (1991) 30 FCR 300, cited
Sinclair, Scott & Co Ltd v Naughton (1929) 43 CLR 310, considered
Vroon BV v Foster's Brewing Group Ltd [1994] 2 VR 32, cited
White Industries (Qld) Pty Ltd v Flower & Hart (1998) 156 ALR 169, cited

COUNSEL:
D A Savage SC, with M Hoch, for the appellants
D J S Jackson QC for the first, second and fifth respondents
J A Griffin QC, with J H Bryson, for the third, fourth, sixth and eighth respondents
G M Egan for the seventh respondent

SOLICITORS:
J F Connors & Associates for the appellants
Minter Ellison for the first, second, fifth and ninth respondents
Johnston Lawyers for the third, fourth, sixth and eighth respondents
Rostron Carlyle for the seventh respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Jerrard JA and Muir J. For the reasons expressed by their Honours, I agree that the substantial challenge to the primary judgment must fail.

[2] As presented orally at the hearing of the appeal, the appellants' case did not cavil with the learned trial Judge's rejection of the credibility of Mr Alford. Mr Savage SC, who appeared for the appellants, submitted however that what he styled the "uncontroverted evidence" compelled a finding that a tripartite joint venture agreement had been reached.

[3] The learned Judge dealt with that evidence, and while, on one view, it would lend support to such a finding, that is not the only, or a necessarily compelling, interpretation of the evidence. In the end, I see no sufficient reason to reject the explanations put forward by Her Honour.

[4] In the absence of evidence from Mr Ebbage, and acknowledging the mass of documentation in the case and the twists and turns in the negotiations proceeding over some years, it would perhaps be surprising were a completely satisfactory explanation available to account for all its wrinkles.

[5] It is also significant, to my mind, that the case ultimately pursued for the appellants at the appeal stage was one which had been unequivocally rejected by Mr Alford in his evidence at the trial. Notwithstanding the comprehensive rejection of Mr Alford's credibility, it would be at least odd were the result to mirror a scenario he so plainly disavowed.

[6] The difficulty of the appellants' position on appeal was additionally reflected by their inability to promote a case which was pleaded, and their inability to formulate with precision the result for which they contended.

[7] This is not a case where application of the principles and approach discussed in *Fox v Percy* (2003) 197 ALR 201 would warrant disturbing the findings made by the learned Judge.

[8] As to what may be considered the subsidiary aspect of the appeal, the claim by AE Finance Pty Ltd against Ebbco Office Services Pty Ltd, I agree with the orders proposed by Jerrard JA (para [84] (a) and (b) of his reasons), for the reasons expressed in paras [80]-[83] of his reasons for judgment.

[9] **JERRARD JA:** This appeal is from a lengthy and careful judgment of this court delivered on 8 September 2003. The significant appellants are Mr Alford, Dario Pty Ltd, AE Holdings Pty Ltd ("AEH") and AE Finance Pty Ltd ("AEF"), respectively the first to fourth appellants. The significant respondents are Raymond Ebbage (one of "the Ebbage respondents"), Advanced Engine Technology Pty Ltd ("AET"), Steven Manthey, and Ebbco Office Services Pty Ltd ("EOS"), who are respectively the first, third, fourth, and ninth respondents. Raymond Ebbage was a party both personally and as executor of the estate of Paul Ebbage. AET and Steven Manthey were two of "the Manthey respondents". EOS did not put in a defence in the proceedings and was not represented in either the trial or on the appeal.[1] The nub of the appeal was the appellants' contention that the learned trial judge ought to have found that Mr Alford, Mr Manthey and Paul Ebbage had agreed among themselves that all three would be parties to a joint venture, either in person or by companies and trusts under their control, for the financing, development, and marketing of an engine invented and designed by Mr Manthey. Subsidiary to that appeal is the appellants' contention that the learned judge should have ordered that EOS repay AE Finance $190,332.85, together with interest thereon calculated at the rate of 9% per annum from 30 June 1995.

[10] The appellants' case in this appeal is that an agreement was made among the three men, probably but not necessarily on 27 October 1993, to investigate that joint

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1 The outline of argument on appeal for the first respondent describes that outline as filed on behalf of *inter alia* the ninth respondent

venture; and that the documentary and other evidence incontrovertibly established[2] that an action plan agreed upon that day was embarked upon or put into effect and became their joint venture; demonstrably so in 1994 and 1995. The appellants submitted that the ultimate terms of that earlier agreed joint venture were those recorded in written agreements made between Mr Manthey, AET, and EOS, and executed on a date not established by the evidence, but found by the learned trial judge to have been in May or June 1995. That last finding was unchallenged. The appellants contended on the appeal that the evidence accepted by the learned judge established, and the judge should have so found, that in executing the formal documents embodying the joint venture in May or June 1995, EOS had acted as the trustee of the interest of Mr Alford and his nominee company, as well as trustee of those of Mr Paul Ebbage and his nominee company or companies. Mr Paul Ebbage and his wife had executed the documents as directors of EOS. Paul Ebbage and Mr Manthey executed them on behalf of AET.

[11] The case so put on appeal differed significantly from the appellants' case at the trial. Put simply, this was that by an oral agreement originally made on or about 2 August 1993, and varied on 27 October 1993, the three men had entered into an agreement for a joint venture which had been carried into execution in 1994, but broken in 1995 and thereafter by the execution of those formal joint venture documents executed by Mr Manthey, AET and EOS in May or June of 1995. The appellants' pleaded case, and Mr Alford's evidence, was that execution of the documents by those three parties was done without Mr Alford's knowledge or consent, and in breach of fiduciary duties owed to him and his nominees as agreed joint venturer,[3] and otherwise wrongfully.

Background History

Accounting practices

[12] Mr Alford is an accountant and a motor car racing enthusiast, who began work in 1984 at the Gold Coast in an accounting firm in which Mr Paul Ebbage, also an accountant, held a 10% interest as a partner. In 1986 Paul Ebbage bought an accountancy practice in Beaudesert, and also opened one at 17 Short Street, Southport. Mr Alford was employed at that Southport practice with a 40% profit share, and in 1987 he purchased a 40% interest in that practice. In 1989 he bought out all of Paul Ebbage's interest in it. In late 1992 he relocated the Southport practice to Hicks Street, Southport. In January 1993 he opened a second accountancy practice at 30 Price Street, Nerang.

[13] In early 1993 Mr Alford and Paul Ebbage agreed to conduct their accountancy practices as partners, trading as Alford Ebbage. They agreed Mr Alford would remain owner of the Southport practice, Mr Paul Ebbage owner of the Beaudesert practice, and the Nerang practice would be owned by AE Holdings Pty Ltd, a company whose shareholders were Dario and EOS, companies respectively controlled by Mr Alford and Paul Ebbage. Mr Alford and Mr Paul Ebbage were the two directors of AE Holdings. That company was the trustee of six trusts, of which one was the AEH Trust No 5, a discretionary trust of which both Dario and EOS were beneficiaries. Mr Alford and Paul Ebbage could appoint and remove the

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2 *Fox v Percy* (2003) 197 ALR 201 at [66], citing from *Devries v Australian National Railways Commission* (1983) 177 CLR 472 at 479

3 *United Dominion Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11, 12, and 16

Trustee of the AEH Trust No 5, and conducted those accountancy practices as partners until the Beaudesert practice was sold in December 1995 and the partnership was then severed in January 1996.

The split cycle engine

[14] In early 1993 Mr Alford told Paul Ebbage about SCT Ltd. This was an unlisted public company incorporated in New South Wales in March 1988 to research, develop, and commercially exploit an invention of Richard Mayne, which was a patented adaptation of the internal combustion engine. Mr Alford controlled a substantial investment in SCT Ltd. He took Mr Paul Ebbage to the Gold Coast Indy Car Race in March 1993 as a guest in the SCT Ltd corporate box and introduced him to Mr Mayne, the inventor of the split cycle engine, and others involved in SCT Ltd. On 26 March 1993 Paul Ebbage bought a $40,000.00 share and option holding in SCT Ltd. Another share holder was a Mr Colin Diamond who through his clients and associates held SCT Ltd shares through Chancetest Ltd, a company incorporated in the United Kingdom specifically for that investment. Dario sold 145,000 shares in SCT Ltd to Mr Diamond on 14 December 1993 for $149,350.00.

[15] Paul Ebbage was a car enthusiast too. That interest had led to his meeting Steven Manthey, then working as a mechanic on the Gold Coast. Mr Manthey was described by the learned trial judge as an intelligent person, with literacy problems, but with an obvious inventive insight with regard to machinery. Mr Manthey had developed ideas for internal combustion engines while working as a mechanic, and spent a number of years from time to time engaged in rebuilding a Pantera de Tomaso motor vehicle owned by Mr Ebbage. Over time the relationship involved Mr Manthey repairing Mr Ebbage's car and Paul Ebbage working on Mr Manthey's books of his business.

An agreement about Mr Manthey's engine

[16] At Mr Ebbage's request, Mr Manthey and Mr Ebbage met at the SCT factory at Arundel on the Gold Coast, on a date the learned trial judge thought likely to have been 27 October 1993. Mr Mayne demonstrated the engine to Mr Manthey, who later criticised the split cycle engine technology to Mr Ebbage. Mr Alford's evidence, not accepted by the learned judge, was that that inspection occurred on 14 July 1993; and while he did not attend it, Mr Alford did produce an undated three page note itemising 28 criticisms which he said Mr Manthey made, at a subsequent meeting of himself, Mr Manthey and Mr Paul Ebbage on the day of the inspection. The note is in Mr Alford's hand writing, and although undated does read like notes taken recording criticisms of the technology of a proposed engine.[4] The appellants did not challenge the finding that Mr Manthey and Mr Paul Ebbage inspected the SCT engine on 27 October 1993, but complained the learned judge had dealt inadequately with the fact that the contents of the file note suggested Mr Alford had heard criticisms first hand of the split cycle technology from an apparently informed person, albeit not on 14 July 1993 as Mr Alford said.

[17] The case for the Manthey respondents was that on 27 October and after the visit to SCT Mr Manthey explained some of his own ideas for an improved internal combustion engine to Paul Ebbage. Mr Alford was not there. Mr Paul Ebbage died

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[4] They are reproduced as exhibit "AJA 1" to Mr Alford's affidavit sworn 20 March 2002, at AR 1638-40

on 2 December 1998, and some of the important evidence consisted of his diary and file notes. A critical issue of fact at the trial was whether Paul Ebbage and Mr Manthey met with Mr Alford on 27 October and discussed among them a proposal for a joint venture to pursue and develop Mr Manthey's original ideas, or whether only Mr Paul Ebbage and Mr Manthey met. It appears undisputed that events of that day sparked proposals for a joint venture, recorded in a file note dated "27/10/93" by Paul Ebbage. It shows the client as "Proposed Name Advanced Engine Technology P/L", and the matter as "Patent Engine Technology", and the contents read:

> "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."

[18] On or about 8 November 1993 Paul Ebbage and Mr Manthey attended at the office of Mr Ahearn, a registered patent attorney. On Mr Manthey's account of events, accepted by the learned trial judge, Mr Manthey and Mr Ebbage actually agreed to enter into a joint venture together on the drive from Mr Manthey's workshop in Burleigh Heads to Mr Ahearn's office in Brisbane. Mr Manthey's account was that

during that drive he asked Paul Ebbage what role he wanted to have, Mr Ebbage having offered to drive Mr Manthey to Brisbane to meet a patent attorney he knew. Mr Ebbage responded by telling Mr Manthey that they had entered a type of partnership, that all Mr Manthey had to do was work on the invention, and that the proceeds would be split 50/50. If Mr Manthey did not agree, then Mr Ebbage would simply turn his vehicle around and return to the Gold Coast. Mr Manthey did agree, and they continued on to the office of Mr Ahearn. Mr Ahearn recalled that first meeting, in which Mr Manthey was introduced as the inventor and Mr Ebbage as his accountant. Mr Ahearn had not previously met either man, and believed that Mr Alford had referred Mr Ebbage to him. Mr Ahearn knew Mr Alford, who had referred other inventors to Mr Ahearn during the late 1980s and early 1990s. Mr Ahearn's affidavit did not describe any reference in that visit to Mr Alford as an involved joint venturer. Mr Manthey explained to Mr Ahearn how his invention would work, using sketches and notes, and Mr Ahearn agreed to file an application for a provisional patent, which was filed on 11 January 1994.

[19] On that same date AET was incorporated with Mr Manthey and Mr Alford its directors, and the latter the secretary of the company. Mr Manthey held one share and the other was held by AE Holdings as trustee for the AEH Trust No 5. Paul Ebbage advised Mr Ahearn that same day that AET was "registered" and would be the applicant for the patent, and that occurred.

[20] Mr Ebbage made a file note that day at 2.25 p.m. recording that the patent would be in the name of AET, noting that the shareholding was to be AEH Trust No 5 and a trust for Mr Manthey, that funds were to be provided on a loan basis to be first priority on excess cash flow, that the accountancy partnership between himself and Mr Alford was to time charge the joint venture at normal rates, that a licensing agreement was to be granted to an overseas company and the production phase was to be 12 weeks with a payment to Mr Manthey of $500.00 per week. Ten thousand dollars was paid to AET "in January 1994 or thereabouts"[5], paid perhaps by AE Finance. AE Finance was the internal and external finance company of the accountancy partnership.

[21] Still on 11 January 1994, Mr Ebbage recorded an interview he had with Mr Manthey at 2.30 p.m. that day. That file note specifically records himself and Mr Manthey as present; there is no mention of Mr Alford. The client is described as "Advanced Engine Technology P/L" and the matter as an interview "PE/SM." It records their reviewing the correspondence from Mr Ahearn and amending the draft patent application "as per SM advice" and that the following other matters were discussed with Mr Manthey.

(1) Patent to be requested in company name AET. (It appears that later, probably after the meeting, Mr Ebbage had 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;

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5 AR 371, evidence of Mr Alford

(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."

[22] The learned judge accepted that Mr Manthey, Mr Paul Ebbage and Mr Alford did all meet on 21 January 1994. Mr Alford deposed that that meeting lasted about two and a half hours, and that 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 commitments of Mr Alford and Mr Paul Ebbage to Mr Manthey to fund the AET joint venture. Paul Ebbage's staff diary note for that date refers to a "meeting SM and AJA re: structure etc" and his time-sheet shows time spent on that date on AET "re: business structure".

[23] On 22 March 1994 Mr Ebbage consulted John Kenny, the principal of Kenny & Co, he being an experienced solicitor, whose primary area of practice was company structuring of businesses associated with technology and in anticipation of the investments of such companies of venture capital. Mr Kenny's file note of that first visit records:

> "Paul described a business venture he wishes to embark on with his friend and current partner Tony Alford. The basis for the business is a new style of engine. The mechanic involved in the invention is Stephen Charles Manthey. Tony and Paul have agreed to help with the funding of the new engine "Advance Engine Technology". It is owned by Stephen Manthey and Trust associated with Tony and Paul."

The file note recorded discussion about "the sorts of agreement relating to the transfer of technology and employment of Manthey", and Mr Kenny suggested it would be appropriate to set up a separate entity to accommodate the involvement of Mr Ebbage and Mr Alford. Mr Kenny prepared a diagram in April 1999 setting out his proposed joint venture structure[6] and that diagram shows he proposed that Mr Ebbage and Mr Alford lend the money they would advance to the joint venture, (as opposed to contributing equity to it), to a unit trust, which would make what Mr Kenny described as a subordinated loan to AET, repayable from net profits only.

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[6] It is exhibit "JWK2" to the affidavit of Mr Kenny sworn 19 March 2002, and reproduced at AR 7/1974

[24] Mr Kenny wrote on occasions to the accountancy partnership, and addressed at least one letter to "Dear Paul and Tony – **joint venture**"**,** a point the appellants make in their argument that these events in 1994 evidence, and unquestionably so, the execution of a three party joint venture. No submissions were made by any party about the implications of the diagram prepared in April 1999 by Mr Kenny showing the proposed structure, which diagram I understand to suggest there be two different joint venture agreements. One would be between Mr Manthey and a unit trust, and the second between Mr Ebbage and Mr Alford, respecting their involvement in that unit trust.

[25] Mr Kenny was replaced as the solicitor for the venture by a Mr Donald Reynolds. He was first given instructions by Mr Alford, on a date prior to 24 May 1994, and those instructions were given during a telephone call made to arrange a meeting between Mr Reynolds and Mr Ebbage. Mr Reynolds recalled that Mr Alford said the purpose of the meeting was to discuss legal documentation to reflect Mr Alford and Mr Ebbage's interest in a proposed joint venture. He met with Mr Ebbage on 24 May 1994. His file note[7] records instructions to draft *inter alia* a joint venture agreement between Stephen Charles Manthey and "AE entity" with AET as the joint venture entity. His affidavit evidence was he was aware the joint venture was between Mr Manthey on the one part and "the practice of Alford Ebbage" on the other. The appellants' submission on the appeal is that the instructions recorded and recalled by Mr Kenny and Mr Reynolds demonstrate that a joint venture was then being prosecuted by the three men.

Mr Manthey's ideas about a different engine

[26] In May 1994 Mr Manthey conceived an entirely different concept again for a new variety of internal combustion engine, which came to be called the OX2. Around that same time Mr Ahearn had advised of problems with originality in the application for a patent submitted in January 1994. Perhaps coincidentally with Mr Ahearn's advice about apparent lack of originality of the earlier idea, Mr Alford signed a resignation of his position as director and as secretary of AET. That document was dated 12 January 1994; it was received by ASIC on 2 June 1994, and the learned trial judge found it was likely to have been signed at some time between 12 January and 2 June 1994. Mr Alford did not swear as to the date on which he signed those resignations, but admitted doing so. He agreed one reason was because he had a concern about a perceived conflict of interest with his financial interest in SCT Ltd; he continued to visit the factory and discuss the progress of that project. Paul Ebbage replaced him as director and the secretary of AET.

[27] Mr Ahearn was given instructions to apply for a patent for Mr Manthey's OX2 concept. A patent application for that engine was registered on 2 December 1994. Mr Manthey worked on a prototype of that engine, completed in late 1994, which took him three months. AET had been receiving sums of money, recorded in the general ledger of AE Finance as loans to the Ebbco Holding Trust, which money was used to support Mr Manthey. Annexure A to the appellant's fifth amended statement of claim[8] records that from 7 July 1994 to 30 June 1995 those payments by AE Finance to Ebbco Holdings Trust, "journaled"[9] as a loan from that trust to AET, totalled $190,332.85. As the learned trial judge recorded, that money is now

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7 Reproduced at AR 7/2050

8 Reproduced at AR 14/4375

9 Reasons at [523]

owing from AET to the Ebbco Holdings Trust, and owed by that trust (or its trustee EOS) to AE Finance.[10]

Mr Alford lost control

[28] In April 1995 a car rally was held in Tasmania, which Mr Alford had intended to attend, and at which it had been proposed that the OX2 engine would be demonstrated, in a car body built by Mr Manthey specifically for that rally. As it turned out the car body was not finished but the engine itself was demonstrated there. The learned trial judge recorded, in a finding unchallenged on appeal, that Mr Alford was bitterly disappointed at his being unable to compete in that car rally[11], and Mr Alford's evidence was that it was no secret he was disappointed at that, and with the failure by Mr Ebbage and Mr Manthey to advance the engine and the vehicle to a stage where they could compete. The trial judge found[12] Mr Alford was humiliated and angry and that it appeared he then lost interest in Mr Manthey's invention and wanted nothing more to do with it.

[29] On 2 March 1995 Mr Ebbage had given instructions to a Damien Peters, employed by the accountancy practice, to prepare the following sets of documents. One was for the transfer of one share in AET from AE Holdings as trustee for the AEH Trust No 5 to Mr Ebbage, one for a Declaration by Mr Ebbage as trustee of one share in AET in favour of Mr Manthey, and another lot for the allotment of 1,000 ordinary shares in AET to Mr Manthey and 1,002 to EOS as trustee for the Ebbco Trust. Mr Peters was also instructed to prepare minutes of meetings of the directors of AET considering appointment and resignations of officers to the company and the allotment of shares. The documents he prepared included minutes of meetings of AET purportedly held on 11 and 12 January 1994. Mr Alford's resignation as director and secretary of AET and the appointment of Mr Ebbage instead had occurred prior to those instructions being given. On a date not made clear by the evidence or the findings of the learned judge, but which would have been on or before 17 May 1995[13], Mr Alford signed the form transferring the one share in AET from AEH as trustee for the AEH trust No 5 to Mr Ebbage. That transfer was back dated to 11 January 1994.

[30] The appellants' pleadings alleged that on the same date as that transfer was executed Mr Ebbage, as a director of AET, caused it to issue the 1,002 shares in AET to EOS as trustee for the Ebbco Trust and 1,000 shares to Mr Manthey. Participation in control of AET, and the capacity for equal control of one half of the issued shares in AET, thus passed from Mr Alford by his own actions in executing that share transfer and his earlier resignation as a director. Thereafter Mr Alford's only possibility of receiving a benefit from the joint venture derived from the fact that Dario was one of the beneficiaries of the Ebbco Trust. Notifications of the allotment of the shares to EOS and further shares to Mr Manthey was sent on 5 May 1995 by Mr Peters to the ASIC. It seems likely, and the way the appellants put their case on the appeal supports the proposition, that the change in share ownership in AET, and thus in beneficial control of it, passing away from Mr Alford and Dario,

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10 Reasons [523]

11 In Reasons [285]

12 At Reasons [260] and [303]

13 This date is on a receipt from the Office State Revenue, attached to the share transfer form of the one share in AET

occurred as part and parcel of the general restructuring in which the allotment of those further shares took place.

[31] On the appellants' argument on appeal it can also be accepted that this happened as part of the process in which the joint venture agreement documents were executed in May or June 1995 by Mr Manthey, AET, and EOS. In fine disregard of the truth the dates appearing on those documents were also back dated to 11 January 1994. The documents executed were an Assignment of Intellectual Property from Mr Manthey to AET; an Offer to Assign Intellectual Property from Mr Manthey to AET; an Advanced Engine Technology Venture Agreement between Mr Manthey, AET and EOS; and an AET loan agreement between AET and EOS.

Evidence about EOS

[32] It is relevant to record Mr Alford's descriptions of EOS. In his first affidavit, sworn 7 September 1999, when describing the share holdings in AE Holdings, he said only that EOS was a company associated with Mr Ebbage's family.[14] Annexed to that affidavit was a copy of the then ASIC records relating to EOS, recording the appointment of Paul Ebbage, his wife Susan Ebbage, his father Raymond Ebbage, and Mr Alford himself, as its directors. Mr Alford became one on 20 June 1995. The last three were all still its only directors as at the trial. The share holders recorded were Raymond and Susan Ebbage, holding one share each.[15] Mr Alford's second affidavit, sworn 20 March 2002, also merely described EOS as a company associated with Mr Ebbage's family.[16] Mr Alford's evidence at the trial in cross-examination was that EOS "was a company under the control of Paul"[17], and there was no challenge on this appeal to either the description of EOS given by the learned trial judge, as a company related to Mr Ebbage as that term is used in the *Corporations Law*[18], or the further description that EOS was a company in which Mr Alford had an interest, in that Dario was a potential beneficiary under the discretionary trust of which EOS was a trustee, but the company was under the control of Mr Ebbage.[19]

[33] Instead, the appellants' own pleadings alleged at paragraph 18 that at all material times Ebbco was "related" to Paul Ebbage, and that the Ebbco Trust is and was a trust the beneficiaries of which were Paul Ebbage, corporations related to him, and members of his family.[20] Those pleadings, affidavit, and oral evidence make clear that Mr Alford regarded EOS as a company controlled by Paul Ebbage and conducted by the latter for the benefit of trusts of which Paul Ebbage, his family, and corporations controlled by Paul Ebbage, were the beneficiaries. In fact, and as the appellants now stress and upon which fact their argument in this appeal entirely relies, the discretionary beneficiaries of the Ebbco Trust include Dario both by itself and as a trustee for the Dario Practice Trust. They are however only two of the 15 nominated "specified primary" beneficiaries[21], those primary beneficiaries also including as non-specified beneficiaries Paul Ebbage's children, Susan Ebbage's

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14 At AR 5/1189 in [32]
15 The relevant records are at AR 5-1247-9; the pages are printed out of sequence
16 At AR 6/1576, [356]
17 At AR 1/64 line 53
18 At Reasons [28]
19 At Reasons [316]
20 At AR 14/4338
21 At AR 5/1275

children, Raymond Ebbage's children, Barbara Ebbage's children, the children of one Gordon Rolinson, the children of Gladys Rolinson, and the children of all those children, such children to be born before the Vesting Day. The identical potential named and unnamed beneficiaries are described also as the residuary beneficiaries of that trust. It thus appears realistic for Mr Alford to have described EOS and the Ebbco Trust as he did in his evidence and pleadings. The Ebbco trust deed records that the appointor is Tunleigh Investments Pty Ltd, and that appointor has the power granted by clause 22 to remove and appoint trustees. In paragraph [18] of the reasons for judgment the learned judge described a company "Tunleigh Pty Ltd" as a company associated with Mr Ebbage; the supplementary submissions of the Ebbage respondents included the uncontradicted submission that was actually a reference to Tunleigh Investments Pty Ltd, and further that the appellants had never asserted that they controlled or owned the appointor of the Ebbco Trust.

[34] The appellants' explanation on the appeal for the changes in control of AET was summarised[22] as being that on 11 January 1994 when AET was incorporated AE Holdings, as trustee for the AE Holdings Trust No 5, was one of the two share holders in it. When the joint venture agreements were executed later, in May or June 1995, and executed bearing a date 11 January 1994, the company executing it was EOS as trustee, and that by the date when those documents had to be executed the share holding in AET had necessarily been altered to ensure that the executing parties were shareholders in it. Senior counsel for the appellants submitted that whether or not Mr Alford had been aware of this occurring it was necessary that it did happen and that one trustee, namely EOS, be substituted for the other, namely AE Holdings. That submission did not refer to the change thereby effected in Mr Alford's position from his being in actual and equal control of the rights attaching to one half of the share(s) in AET, as well as earlier being its director and secretary, to his simply becoming one of the potential discretionary beneficiaries of a trust controlled by Paul Ebbage.

Events after Mr Alford lost control

[35] Continuing the narrative, in August 1995 Mr Alford was in the United Kingdom, and while there had several meetings with Mr Diamond and others, attempting to raise funds for AET and interest them in investing in it and the joint venture. When he returned to Australia he at first intended going back to the UK with his wife and family to live there, but did not. Instead, he stayed in Australia and Paul Ebbage began devoting himself full time to AET, with Paul Ebbage being active in fund seeking and raising. That involved conversations between Mr Paul Ebbage and Mr Lloyd in September 1995 about sources of funds; and Paul Ebbage and Mr Manthey meeting with Mr Lloyd, a Mr John Chiang, and Mr Chiang's associate Mr Foong. Paul Ebbage also endeavoured to list AET on the NASDAQ Stock Exchange in the in the United States. The learned trial judge made a finding, not challenged on appeal, that by November 1995 the time Mr Ebbage spent on AET was of great concern to Mr Alford, who wanted to end the partnership. It did end after the sale of the Beaudesert practice in December 1995.

[36] In December 1995 through to February 1996 there were meetings involving Mr Alford, Mr Paul Ebbage, and Mr Diamond, regarding incorporation of a company to which the patent for the second engine could be transferred, so that an interest in it

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22 At transcript 73

could be allocated to new investors. With that in mind a company "ZeroPrize" was incorporated in the United Kingdom. There were also proposals involving Mr Ebbage, Mr Diamond, and Mr Chiang.

[37] From early 1996 onwards Mr Alford appears to have had nothing to do with any further fund raising efforts or any steps taken to protect, develop, or market the intellectual property in the engine. Mr Ebbage and Mr Manthey were active in these. Senior counsel for the appellants submitted on the appeal that after 1995 Mr Alford had little to do because an impasse had been reached by April 1995, in that the second engine had been developed but had technical problems and did not seem to be going anywhere much, and neither Mr Alford nor Paul Ebbage were actually planning to put any further funds of their own into it.[23]

[38] Mr Alford's evidence was that he only had contact with Paul Ebbage on an irregular basis after April 1996, and the contact he did describe was desultory. Events of which he may have been unaware included the incorporation of Advanced Engine Technology Inc in Colorado, which company was later listed on the NASDAQ Exchange. His evidence was that he was not aware at the time of the fact, established in evidence, that both Mr Paul Ebbage and Mr Manthey had provided personal guarantees to Mr Chiang, for the repayment of $1 million which Mr Chiang had provided by November 1996 for the development of the OX2 engine. No party referred at the appeal, and there is no reference in the very detailed reasons for judgment, to any correspondence at all between Mr Alford or his nominee companies on the one hand, and Paul Ebbage and his nominee companies on the other hand, about AET, EOS, or the joint venture; nor any correspondence before Paul Ebbage's death in 1998 between Mr Alford or his companies on the one hand, and either EOS or AET on the other. There was no suggestion on the appeal of evidence of any contact of any kind, oral or written, between Mr Alford and Mr Manthey from mid 1995 until Mr Manthey saw Mr Alford at Paul Ebbage's funeral, and no suggestion of any conversation on that day between Mr Manthey and Mr Alford about the OX2 engine and its progress.

[39] Mr Alford had learnt by 27 March 1998, by his own enquiries from a source independent of Paul Ebbage and Mr Manthey, that investment in the United States in Advanced Engine Technology Inc, and in an associated company formed to further Mr Manthey's invention, had resulted in those two men controlling shares worth $26,100,000.00[24] in the United States as at that day. That information did not result in Mr Alford immediately making any contact with either man or any written contract with either or with any company. His first contact with Paul Ebbage's estate was on 13 January 1999, when he wrote to Raymond Ebbage as executor regarding the sale of a jointly owned boat which Mr Alford proposed to sell and forward half the net proceeds.[25]

[40] On 19 January 1999 Mr Alford forwarded to Raymond Ebbage correspondence received from AET under Mr Manthey's hand as its Managing Director, addressed to the director of EOS as trustee for the Ebbco Trust, and forwarded by Mr Alford to Raymond Ebbage "in your capacity as a Director of Ebbco Office Services Pty Ltd". That letter from AET wanted EOS to contribute funds to the ongoing needs of AET as a "stock holder" of AET, $90,965.55 was sought.

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23 At transcript 69

24 The correspondence is AR 13/4170-3

25 The letter is at AR 8/2574

[41] On 5 February 1999 Mr Alford made what was his first assertion in a document to a third party of any interest held by him in AET or a joint venture. Mr Alford's letter to Mr Raymond Ebbage enclosed a letter from Mr Alford's solicitors to AET, in which it was asserted that Dario was a principal beneficiary under the Ebbco Trust, as was the company Professional Practice Group Pty Ltd (as trustee for the benefit for Mr Ebbage's interest) and that:

> "Each of the last two mentioned trusts has an equal beneficial interest in the Ebbco Office Services Pty Ltd in its nominee capacity as trustee of the Ebbco Trust which equates to a 25% interest each in Advance Engine Technology Pty Ltd."[26]

The legal concepts are incoherently expressed, but it is upon those concepts that the appellants ultimately advanced their case on appeal.

The appellants' pleaded case

[42] It was different, and did not rely on Dario being a beneficiary of a trust with EOS as trustee. In its final form the pleading alleged that in or about early August 1993 at the office of Alford Ebbage in Price Street, Nerang, Mr Ebbage and Mr Alford had agreed with Mr Manthey to form a joint venture to investigate the possibility of developing variations and adaptations of the internal combustion engine. That agreement included that Mr Alford and Ebbage would contribute $10,000.00 to Mr Manthey to develop a working prototype of it, and that the parties would share the benefits arising from the joint activity equally as between Manthey on the one hand and Alford and Ebbage on the other. It was pleaded that pursuant to that initial joint venture they had advanced him $10,000.00 and he had continued with his research. The pleadings further contended on or about 27 October 1993 at the accountancy office at Price Street, Nerang the three men had orally agreed that Mr Ebbage and Mr Alford would contribute a further $25,000.00 to continue that funding, a joint venture company would be established, that Mr Manthey would hold 50% and that and Mr Alford and Mr Ebbage would hold the other 50% and that the joint venture company would have the opportunity to take intellectual property and other property from Mr Manthey and would commercially exploit any invention by Mr Manthey made in the course of his research which had been funded as described in that pleadings. The pleading also asserted an agreement that the accountancy practice would provide accountancy services to that joint venture for which the practice would be paid if and when the venture was successful.

[43] The pleading contended that AET was incorporated to hold as trustee the interest of the joint venturers, that one share in AET was issued to Mr Manthey with the other being issued to AEH as trustee for the AE Holdings Trust No 5; and the share holding in AEH was described in the pleading as held by Dario as trustee for the Dario management trust and EOS as trustee of the Ebbco Holdings Trust. The pleadings described Dario as related to Mr Alford as the term was used in the *Corporations Law*, and EOS related to Mr Ebbage as that term was so used. It was also pleaded that the AE Holdings Trust No 5 was a discretionary trust in respect of which Dario and Ebbco were the trustees and that Mr Alford and Mr Ebbage jointly held the power to remove and appoint the trustee. The object of that pleading appears to have been to demonstrate the equal right and power in Mr Alford and

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[26] The letter is attached to the supplementary submissions dated 10 May 2004 received from the solicitors for the Ebbage respondents

Paul Ebbage to control and exercise the rights attaching the share in AET held by AE Holdings Pty Ltd, which pleading necessarily distinguished between Dario and EOS as respectively representing the different interests of each man.

[44] The pleading alleged that the transfer of that share in AET from AEH to Mr Ebbage as trustee for Mr Manthey, the allocation of further shares in AET to Mr Manthey and to EOS, the back dating of various documents to January 1994, and the recording in the books of AE Finance that advances made by it to AET were loans from AE Finance to EOS, were all acts done without Mr Alford's knowledge or consent, committed for the improper purpose of altering the interest of Mr Alford and his associates in the joint venture, and done to deceive the appellants and misappropriate the assets and future assets of that joint venture. The pleadings contended that both Mr Ebbage and Mr Manthey had acted in breach of fiduciary obligations and duties to the appellants by that conduct. (The pleaded case also alleged other matters, not relevant to this appeal).

Another version of events

[45] Mr Manthey's affidavit evidence was that in late August and early September 1999 Mr Alford started ringing the AET factory. He had not heard personally from Mr Alford since early January 1999, when on his account Mr Alford had telephoned him and invited him for a cup of coffee. In that January conversation Mr Alford had asked what Mr Manthey knew of the relationship between Paul Ebbage and Mr Alford, and had told Mr Manthey that Paul Ebbage had embezzled money from Mr Alford and the accounting firm, and had put it into AET. Mr Manthey's affidavit evidence was that Mr Alford returned to that theme in those August and September 1999 telephone conversations; and that unknown to Mr Manthey Mr Alford tape recorded one of those. Mr Manthey's affidavit describes the contents of a transcript of that tape recorded conversation[27], in which Mr Alford was recorded repeating the assertion of embezzlement by Paul Ebbage and that the embezzled money was put into AET; and it records Mr Manthey telling Mr Alford of Paul Ebbage having told Mr Manthey at some time in the past that Paul Ebbage had given Mr Alford a share of Paul Ebbage's interest (in the joint venture) "for a little while but we worked that all out".

[46] Ultimately on 7 July 2000 Mr Alford secretly video taped a meeting of Mr Manthey, Mr Alford, and Mr Alford's solicitor. Both the appellants and the Manthey respondents pointed to differing portions of the transcript of that conversation as supporting their respective cases.[28] That transcript records Mr Manthey describing himself as having formed an arrangement with Mr Ebbage and being told "at some stage later" that Mr Ebbage was bringing Mr Alford in as a "half owner of his half". Mr Manthey was also recorded saying that Mr Alford was involved very early on, before Mr Manthey had finished the first prototype which had taken him three months. (That was no doubt a reference to the OX2 engine). He described having spoken to Mr Alford on occasions when Mr Manthey had come into "the office" and when Mr Ebbage was not there. He described having shown or told Mr Alford on those occasions "what I'd done to the engine, patents and various things". He added "there is no doubt about his involvement at that stage."

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27 At AR 9/2629. His description seems unchallenged

28 The relevant extracts from the transcript are at AR 13/4125 et seq

[47] One of the significant matters in the conversation is that Mr Alford did not remind Mr Manthey of any occasion when the three men had spoken together of their becoming partners in a joint venture. That is, Mr Alford did not remind Mr Manthey of the pleaded meetings and agreements entered into on 2 August and 27 October 1993, or any other three person meeting. Nor does the transcript record Mr Alford expressly asserting to Mr Manthey that Mr Alford and Mr Manthey had been partners or participants between themselves in a joint venture. Rather, it records him saying that "Paul was a master at keeping Steven and I apart, and Steven will agree with this, that virtually I never discussed anything of the financial matters with Steven and um Steven never discussed it with me." Indeed, there is no evidence, other than Mr Alford's account of the 2 August 1993 and 27 October 1993 meetings, of any occasion on which Mr Alford ever suggested or remarked to Mr Manthey or in his presence that they were co-venturers. Mr Manthey's responses in the video taped conversation included the observations that when he had originally gone into "this deal" he had only spoken to Mr Ebbage and that he and Mr Ebbage had formed an arrangement, which Mr Manthey described in that conversation – as did his subsequent affidavit evidence – as being settled upon between them in that drive from Burleigh Heads to Brisbane to see Mr Ahern.

Mr Alford's evidence

[48] This was that all three men had met on or about 2 August 1993, when it was agreed to form a joint venture to exploit Mr Manthey's engine technology. Ten thousand dollars was promised at that meeting, which meeting he agreed in cross-examination was essential to the formation of the joint venture.[29] The second meeting, which he also said was essential to the formation of the joint venture, had occurred on 27 October 1993, when the three men met again and agreed to modify or vary their earlier agreement, and that Mr Alford and Mr Ebbage would contribute $25,000.00, not $10,000.00.

[49] Mr Alford was cross-examined, particularly by Mr Griffin QC, who appeared at trial and on appeal for the Manthey respondents, about variations in his description of the formation of the joint venture. His first statement of claim in the proceedings filed 26 April 2000 alleged one agreement only, made in or about September 1993.[30] It only alleged one meeting. The next versions of the statement of claim filed 5 October 2000, 31 May 2001, and 9 October 2001, all alleged an agreement between the three men made in late 1992 to form a joint venture to investigate the possibility of developing variations and adaptations of Mr Manthey's internal combustion engine, with Mr Ebbage and Mr Alford to contribute $10,000.00 to develop the working prototype. Benefits from the joint venture would be equally shared between Manthey on the one hand and Mr Alford and Mr Ebbage on the other. Those statements of claim further alleged that in September 1993 at the Hicks Street, Southport office of the accounting partnership it had been agreed a further $40,000.00 would be contributed by Mr Ebbage and Mr Alford, a joint venture company would be established, have the opportunity to take the intellectual property, commercially exploit any invention by Mr Manthey, and that the practice would provide it with accountancy services. It was only in the fifth amended statement of claim filed 14 November 2002, on the 16th day of the trial, that the allegations in it matched Mr Alford's evidence, namely of a meeting in August and

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29 AR 2/331

30 That pleading is at AR 14/4185

on 27 October 1993, both held at the partnership office in Price Street, Nerang (and not the Southport office as repeatedly pleaded). Also, the sums described as promised at the second meeting were different.

[50] Mr Alford's first affidavit had sworn of a meeting at the Southport practice in September 1993, and had described only one meeting which formed the joint venture, that being a meeting where $40,000.00 was promised. Mr Alford was cross-examined about the variations in the promised sum, as well as the location of the critical meeting or meetings, and the dates. For the 27 October 1993 date he relied upon Paul Ebbage's file note, contending that although his presence was not recorded in it, this was explained by the file note being an agenda prepared for a meeting rather than a record of it. No documentary record existed anywhere for the August meeting. The case for the Ebbage respondents was specifically put to him in cross-examination[31], namely that there had been no three person meeting as alleged in either August of 1993 or 27 October 1993; the case for the Manthey respondents was put slightly more broadly, namely that he and Mr Manthey had never had any discussions, whether in 1993 or at any other time, in which those two men has spoken of going into a business relationship together.[32]

[51] Mr Alford was cross-examined about an undated file note which he said he had probably made in August 1995 during or reflecting his conversations with Mr Diamond in the UK.[33] That file note reflects a possible investment of $200,000.00, and its contents demonstrate knowledge that the then joint venture parties were Mr Manthey and EOS. Mr Alford disagreed that EOS meant Ebbco Office Services Pty Ltd,[34] contending that he had used the note "EOS" to refer to himself and Mr Ebbage. He specifically denied that the document demonstrated that he then knew that EOS was the party which held the non-Manthey interest in the joint venture. He argued in the witness box that another file note of his, incorrectly dated 1 August 1994 (it should have read 1 August 1995) and recording his interview with Mr Diamond, implied that he had used the term "Ebbco" to refer to Paul Ebbage, and Dario to refer to himself.[35] The learned trial judge rejected Mr Alford's evidence about both those documents, observing that the incorrectly dated file note unquestionably referred to the documents which had actually been executed in May or June 1995, and holding that the reference to EOS in the undated document, and "Ebbco" in the wrongly dated one, were references to the company EOS which the learned judge found Mr Alford then well knew, contrary to his pleadings and sworn evidence, had entered into the executed joint venture agreement with AET and Mr Manthey.[36] The judge was satisfied that Mr Alford's denial that EOS in the undated document referred to Ebbco Office Services Pty Ltd was false and had been made in an endeavour by him to conceal the fact that he knew the contracts had been executed showing EOS as the other party to Mr Manthey.

Matters the appellants rely upon

[52] In this appeal the appellants' senior counsel embraced those findings, and positively advanced the case that Mr Paul Ebbage had executed the joint venture agreement on

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31 At AR 1/63
32 At AR 2/351
33 It is reproduced at 13/4091
34 At AR 2/442-443
35 The incorrectly dated file note is reproduced at AR 12/3854
36 Reasons [332] and [336]

behalf of EOS as trustee for himself and for Mr Alford, and that Mr Alford correctly so understood that in August 1995.[37] The appellants supported that argument by reference to file notes Paul Ebbage had made both before and after the formal joint venture documents were executed. Senior counsel submitted a note dated before those events demonstrated that Paul Ebbage intended that EOS would be a vehicle protecting the 25% beneficial interest in the joint venture enjoyed by each of Paul Ebbage and Mr Alford, and that file notes he made in 1995 after EOS acquired its half share showed that he recognised that was the position. The appellants referred the court to three documents in support of the submissions, and also to oral statements of Paul Ebbage, said to reflect the same facts.

[53] The first document was a computer file which it was common ground Paul Ebbage had created, although it was shown as "Last Saved By tony alford". Its creation date was 15/05/94, and it was last saved on 24/12/94. Its contents were a business plan for AET, and the requirements noted by Paul Ebbage included that that plan:

> "Recognise original share holdings of –
>
> S Manthey or nominee - 45%
> Professional Practice Groups Pty Ltd - 30%
>
> Ebbco Office Services P/L ATF Alford - 25%."

The same share holdings were also noted by Paul Ebbage for the "Joint Venture/ Share Holding."[38] The respondents did not suggest the file note was not genuine; it is consistent with part of the case the appellants make on the appeal, namely that EOS was a trustee for Mr Alford's interests when the joint venture documents were executed. The document is inconsistent to the extent that it assumes that EOS would be a trustee for his interest only; the share holdings recorded are also inconsistent with Mr Manthey's 50% holding in AET and what the appellants argue was an earlier agreement that Paul Ebbage and Mr Alford would beneficially own one half each of the other 50%.

[54] The business plans suggested in that file refer to the OX2 engine, which was under development in the latter half of 1994. Another version of that same business plan was recorded in a different computer file of Paul Ebbage's, showing a creation date of 11/10/94, and last saved on 18/10/94. It is also recorded as last saved by "tony alford", and again it appeared accepted on appeal that it was nevertheless a genuine document of Paul Ebbage. The hard copy reproduced in the appeal record[39] suggests by its content that it was an earlier document than the one just described, in that there is no reference to that OX2 engine. This earlier version is more consistent with Paul Ebbage's file note of 27 October 1993 and his instructions to Mr Kenny and Mr Reynolds respectively. This version includes as a requirement for a business plan that it:

> "Recognise original share holdings of
>
> S Manthey or nominee - 50%
> P Ebbage or nominee - 25%
> A Alford or nominee - 25%"

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37 Transcript page 49

38 The document is reproduced at AR 12/3853(a) et seq

39 At AR 13/3940 et seq

The copy reproduced in the appeal record has the references to Mr Ebbage or nominee, and Mr Alford and nominee, ruled or struck through in pen, and opposite those names is written "AE Holdings", whose share holding is "50%". The two references to "25%" are both struck through. The contents of that document are consistent with the appellants' case for a three person joint venture being carried on from 1994.

[55] The appellants then point to another file note of Paul Ebbage, recording his telephone conversations with Mr Lloyd on 19 September 1995, about a "C.P. Group proposal". Mr Lloyd was negotiating on behalf of a party Paul Ebbage then recorded as "Mr Fong". An investment of some millions of dollars was contemplated. Paul Ebbage's notes at sheet four of that file[40] reflect the clear assumption that the then shareholding in AET was by Mr Manthey as to 50% and Mr Alford and Paul Ebbage as to 25% each. Mr Ebbage's calculations reflect a possible reduction in those shareholdings, to allow for the allotment of shares to the investing parties and to a "Mark" (unidentified in the evidence). The assumption in that file note that Mr Alford had a 25% share holding in AET is consistent with the appellants' case at trial and appeal. The file note assumes an existing right in Mr Alford to that 25%, which would be reduced when others acquired rights by investment.

[56] In similar vein there is a note dated 11 December 1995 concerning "Foong Investment"[41]. Those hand written notes contemplate an investment by ZeroPrize Limited, and assume that the then existing share holding in AET was 45% by S Manthey and 55% by the Ebbco Holdings Trust. It contemplates that the intellectual property in the OX2 would become owned by Mr Manthey as to 44%, Mr Ebbage and Mr Alford as to 22% each, and by Mark as to 12%. The assumption in the note, of apparently existing rights in Mr Alford, held through a trust with EOS as the trustee, supports Mr Alford's case on the appeal. Once again the shareholdings percentages in AET are inconsistent with those the appellants say were agreed upon in 1993 and formally declared in 1995.

[57] The appellants also relied on statements made by Paul Ebbage both before and after the joint venture documents were executed, which statements described Mr Alford having an existing share in the joint venture. One was a statement made to his wife Susan Ebbage prior to the Targa Tasmania Car Rally, to the effect that Mr Ebbage would be leaving the accountancy practice personally, though not leaving the partnership, and would receive a 25% share in the engine for his promotion of it. Mr Alford would receive 25%, although he was going to be running the accountancy practice. Mr Manthey as the inventor of the engine would receive 50%, and funds from the accountancy practice would fund the promotion and development of the engine. The Ebbages had separated prior Paul Ebbage's death and there were proceedings on foot regarding their matrimonial property; to the extent that her evidence diminished Paul Ebbage's assets, it was against Susan Ebbage's interest to give it.

[58] Finally, the appellants also relied on statements made to a Mr Morland, when Mr Alford and Paul Ebbage approached him to invest in the OX2 engine. Paul Ebbage had earlier persuaded Mr Morland to invest $100,000.00 of the funds of the

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40 At AR 13/3945

41 Reproduced at AR 13 3948(a) et seq

Morland Superannuation fund in SCT shares. It bought one half of those shares from Dario and the other half from EOS. That happened in July 1995. Mr Morland's recollection that "in late 1995" Mr Ebbage and Mr Alford had met with him and "they told me that they owned the other 50% interest" in Mr Manthey's OX2 engine, and that "Mr Manthey owned 50% of the business and Paul and Tony had equal shares in the balance 50%".[42] That representation was consistent with the appellants' case. It seems to have been the only explicit oral assertion of part ownership or a proprietal interest in the "business", the technology, or AET, made by Mr Alford to any third person, other than Mrs Atkinson, the bookkeeper working under this supervision at the Alford Ebbage Accountancy Practice.

Findings of the learned trial judge

[59] The essential findings of the learned judge rejected the appellants' pleaded case, and Mr Alford's evidence, that there were agreements made on 2 August 1993 and 27 October 1993 by the three men.[43] The learned judge noted that the pleaded case stood or fell on whether the appellants were able to prove on the balance of probabilities that the claimed interest in Mr Manthey's invention arose from agreements made on those two dates. As to the latter date, Mr Alford was not recorded as being present, and while the time sheets of the AE Practice recorded a long meeting between Mr Ebbage and Mr Manthey, Mr Alford did not record himself spending time at that meeting. He had no file note of it. The learned judge rejected Mr Alford's explanation that the note Mr Manthey produced, recorded at [17] herein, was an agenda note prepared before the three men met. On this appeal the appellants still advanced that suggestion, stressing that the first line recorded that Mr Ebbage "advise him", when telling Mr Manthey not to discuss his engine with anyone, and thus consistent with Mr Ebbage reminding himself of what he was to do. The appellants did concede that at least the latter portion of the note is expressed in both the past and the present tense, consistent with it recording events that were occurring.

[60] Further, the file recorded a diagram of a centrifugal engine which the judge thought it unlikely Mr Ebbage could have drawn without Mr Manthey being present, since there was no evidence of Mr Ebbage having any technical expertise. The learned judge also referred to Mr Alford's inconsistent accounts of when and where that meeting occurred, and what was agreed at it, when rejecting his claim to have been present that day. The judge declared that "I gained a poor opinion of his credibility from his oral evidence" when holding the appellants had not proved the existence of either oral agreement alleged.[44] The learned judge also noted that there was no mention of any meeting with Mr Manthey or Mr Ebbage in Mr Alford's diary for 1993, for either 2 August or 27 October 1993, and concluded that Mr Alford's explanation of the form of the diary note made by Mr Ebbage was simply an opportunistic and adventitious explanation which the learned judge rejected, holding that the more compelling explanation, accepted by the learned judge, for the fact that Mr Alford was not mentioned in Mr Ebbage's notes of 27 October was that he was not there.

[61] Rather, the judge thought that Mr Alford appeared to have pored over the books and records in an endeavour to construct a case that made it appear that there were oral

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42 At AR 2296

43 Reasons [169]

44 At Reasons [168]

agreements entitling him to a share in the current proceeds of the development of Mr Manthey's technology; and that there was no convincing reason why in October or November 2002, when in the witness box, Mr Alford would be able to recall the contents of two meetings and that they occurred in August and October 1993, when he was unable to recall that in his affidavit of September 1999.[45] Finally, the judge concluded that 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.[46]

[62] The judge was 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. For the reasons repeated herein, the judge held Mr Alford's evidence as to those two dates on which he alleged agreements were made was not uncontroversial, was not supported by evidence from a reliable independent source, and was not inherently credible. The judge remarked that it had not been forthrightly suggested to Mr Manthey in cross-examination that there were any such meetings.

[63] Mr Manthey had not been cross-examined at all about the contents of Paul Ebbage's file note of 27 October 1993, or as to whether those jogged his memory of a meeting that was held with at least Paul Ebbage. He was also not cross-examined at all about Mr Alford's undated file note of the criticisms Mr Alford said he heard Mr Manthey make of the split cycle engine technology, which on the available evidence – if a genuine note – would have been made on 27 October 1993. Thus the learned judge was not assisted by cross-examination which may have shown by necessary implication that Mr Alford did speak that day with Mr Manthey. On the appeal senior counsel for the appellants, who was not the senior counsel conducting that cross-examination, defended the decision not to cross-examine Mr Manthey on those matters, by reference to the observations of Goldberg J in *White v Flower & Hart* at first instance.[47] Senior counsel submitted the decision not to cross-examine did not contravene the rule in *Browne v Dunn*,[48] because Mr Manthey was on notice that his version of events denying any meetings with Mr Alford or discussions with him of a joint venture was challenged, such challenge being found in the appellants' pleadings and Mr Alford's affidavit evidence.[49] I accept that Goldberg J cited authority for the view that the rule in *Browne v Dunn* is not transgressed in such circumstances, but respectfully observe that a party with a genuine challenge to the significant evidence in chief of the other party usually makes one, in cross-examination on the topic. Mr Alford was extensively challenged in cross-examination on his account of 27 October. The fact Mr Manthey was not cross-examined about the contents of those documents the appellants relied on had two consequences. One was to reduce the possible matters the appellants could point to in asking the judge to reject Mr Manthey's description of how he said he came to enter into an agreement he considered binding with Mr Ebbage, and only Mr Ebbage, namely in that car trip to Brisbane. The second was to deprive the appellants of answers from Mr Manthey which may have supported the appellants' case.

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45 At Reasons [158] and [162]

46 Reasons [166]

47 (1998) 156 ALR 169, particularly at 211, 217-9.

48 [1893] 6 R 67 at 70.

49 Goldberg J cited authority at 218.

[64] The learned judge accepted that Mr Alford and Mr Ebbage had discussed with each other the formation of a joint venture agreement with Mr Manthey, and that Mr Ebbage and Mr Manthey separately discussed the formation of a joint venture, but found that there was no meeting among all three at which there was an agreement to form a joint venture. The judge also found that Paul Ebbage had an intention to invite Mr Alford to share Mr Ebbage's half interest in a joint venture, which the judge concluded had been agreed upon between Mr Manthey and Paul Ebbage, and that various proposals were drawn up to carry out both intentions, but that it had never become the subject of formal agreement with Mr Alford or any entity representing his interest.[50] The judge held that Mr Ebbage's file notes of 11 January 1994 and staff diary note of 21 January 1994 was evidence that Mr Alford was then still interested in becoming part of a joint venture[51] but not that that had occurred. Likewise the judge held that what Mr Ebbage told Mr Kenny merely reflected Paul 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[52], and that whatever Mr Reynolds was told, it did not appear to the judge that Mr Alford's proposed interest was ever finalised.[53]

[65] The learned judge concluded that after his failure to compete in the Targa Rally Mr Alford both lost actual interest in Mr Manthey's work, and also did not want to become part of the concluded joint venture which was formalized by the written agreements.[54] The judge held that by voluntarily transferring his share in AET and resigning as director and secretary, Mr Alford lost any financial or proprietal interest he may have had in it.[55] The judge was satisfied that by mid-1995 Mr Alford was unwilling to commit to any further investment in AET, and for that reason no final agreement for him to have a part in the joint venture was ever executed.[56] The learned judge expressed what occurred as being that Mr Alford chose to withdraw from any final agreement,[57] and did so knowing that EOS and Mr Manthey were to be the shareholders in AET and the participants in the joint venture.

[66] The judge treated Mr Ebbage's file note of his conversations with Mr Lloyd as being merely one of a myriad of ideas conceived by Mr Ebbage, only some of which were ground in reality. The learned judge did not specifically comment in that regard on Mr Alford's file note of his conversations a month earlier with Mr Diamond, in which Mr Alford was found by the learned judge to have plainly demonstrated the knowledge EOS had agreed with Mr Manthey to be a joint venturer. The judge generally remarked that although there were subsequent proposals of which some included Mr Alford, none of them which had included him were carried into effect.[58] Those observations would have applied to Mr Ebbage's file note about Mr Foong's investment.

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50 At Reasons [170]
51 Reasons [199]
52 At Reasons [206]
53 At [239]; matters which needed to be finalized are listed in reasons [229]
54 At Reasons [260]
55 At Reasons [276]
56 At Reasons [306]
57 At Reasons [322]
58 At Reasons [352]

[67] The learned judge discounted the value the appellants could derive from Susan Ebbage's evidence, on the basis of hostility the judge assumed she had towards Paul Ebbage. The judge also dismissed any force deriving from Mr Morland's evidence, by the observation that Paul Ebbage and Mr Alford misled Mr Morland in speaking to him as they did in late 1995. This observation was made because of the clear view to which the learned judge had come, namely that Mr Alford did not hold shares in AET or an interest in the joint venture at that time.

Conclusions on the main appeal

[68] The appellants' written outline of argument in the appeal contended that the learned trial judge had erred, by overly relying on the rejection of Mr Alford as a witness of truth, when making the critical findings of fact. The appellants pointed to the finding that Mr Manthey had likewise been untruthful, in evidence he gave attempting falsely to conceal his beneficial ownership of his residential home. His presumed object was to protect that interest against the reach of any process of execution. In their written argument, the appellants claimed that the documentary and other evidence strongly supported Mr Alford's claim to have been present at a meeting of the three men on 27 October 1993. Accordingly, the learned judge, accepting that Mr Alford was a witness of little credit, nevertheless should have found that an agreement had been reached in 1993 and carried into execution in 1994.

[69] Senior counsel for each of the Ebbage respondents and the Manthey respondents made the point that that written outline did not advance submissions on the fact or consequence of the 1995 joint venture agreement being only between EOS and Mr Manthey. Nor did that written argument respond to or meet the finding by the learned judge that Mr Alford had withdrawn from the position of a joint venturer willing to commit funds and take a financial risk. The appellants' oral argument likewise was essentially silent on that important finding, but did deal with the fact of the formal joint venture documents being between Mr Manthey and EOS, by the earlier described argument that this demonstrated how the joint venture was being carried into effect. Just as the appellants' written argument had not suggested that the learned judge ought to have found that the 2 August 1993 meeting occurred, so also their oral argument both expressly abandoned any suggestion that they attacked the finding there was no such meeting, and also claimed that while a three person meeting may have occurred on 27 October 1993, it was not essential for their success for the appellants to challenge the finding it had not. This was because, so the appellants' argument ran, it was sufficient that the documents to which the appellants referred and acts and words of the parties, particularly Paul Ebbage, incontrovertibly established that an agreement by the three men had been made to develop the relevant technology.

[70] Thus the appellants ultimately challenged only two of the findings of fact by the learned judge, one being that Mr Alford and Mr Manthey had hardly ever met together in the early years (1993-95) and the other that there was no three person agreement; and their submissions on appeal advanced a conclusion for an agreement made otherwise than as they had pleaded. Their case on appeal was still that there was a three person joint venture, and their senior counsel expressly continued on appeal what had been their position below, namely that the appellants did not argue for a finding that there had been a joint venture between Mr Paul Ebbage and Mr

Manthey, and a second joint venture or partnership between Mr Alford and Paul Ebbage as to Paul Ebbage's half share in his joint venture with Mr Manthey.

[71] I respectfully consider that to be one of the fundamental defects in the appellants' case on appeal and at trial. The documents, acts, and statements upon which the appellants rely appear to me if anything more consistent with there having been an agreement that Mr Alford would share equally Mr Ebbage's half share in his joint venture with Mr Manthey, than they do with the claimed three person agreement. A joint venture restricted to Paul Ebbage and Mr Manthey as co-venturers is more consistent with the complete lack of discussion about financial matters between Mr Manthey and Mr Alford, their very limited communications at all times, the fact that each dealt much more with Paul Ebbage than with each other, the fact that there were only two shareholders in AET at all relevant times, and the fact that when Mr Alford and Mr Manthey spoke in Paul Ebbage's absence, they did not ever speak of the fact of their being in a joint venture together. That was just never suggested.

[72] The learned trial judge did exactly as asked by the appellants in the pleadings, namely decide whether or not they had established agreements formed on the specified dates among the specified participants. The finding that the appellants had not proved that pleaded case was supported by the evidence. I respectfully consider that the evidence strongly supports a finding that, rejecting Mr Alford's own evidence as the learned judge did, there was an agreement between himself and Paul Ebbage that they would be partners in his venture with Mr Manthey. I acknowledge that is not a finding the appellants want, but there is a good case for it, particularly because of the instructions Mr Ebbage gave to Mr Kenny and Mr Reynolds, and the file notes Mr Ebbage made in 1994. That is, I agree with the learned trial judge that Paul Ebbage intended to make Mr Alford a half owner of Paul Ebbage's share, but differ from the learned judge in that I consider the evidence shows an agreement between them to that effect was being carried out in 1994, and which went beyond mere intent. The existence of that agreement is of course a matter of inference, and it would follow that Mr Alford had declined to give any evidence of its formation, preferring to go for bigger fish.

[73] I also consider the appellants have never dealt satisfactorily in any way with either the finding by the learned trial judge that Mr Alford had lost interest in the joint venture and withdrawn from it, or the evidence on which that finding was based. It included the simple fact that Mr Alford did not insist when the formal joint venture documents were executed in a nominee company of his being a shareholder in AET and a joint venturer, and the fact that whereas thereafter Paul Ebbage and Mr Manthey each guaranteed a debt of $1 million deriving from that joint venture, Mr Alford was not asked to do that and never asked thereafter to contribute personally to the joint venture. Instead, Mr Alford made an agreement with Paul Ebbage, not challenged on the appeal, that money already advanced by mid-1995 to the joint venture and money advanced thereafter would be treated as loans by AE Finance to EOS and repayable to AE Finance. That agreement, Mr Alford's non-execution of the formal joint venture documents, and the simple absence of dealings after that between himself on the one hand and either Paul Ebbage or Mr Manthey on the other about the joint venture, all have the unmistakeable flavour of the finding the learned judge made, namely his voluntary withdrawal from that venture by no later than when those documents were signed by the other two.

[74] In support of that view, I observe that the documents exhibited, and the words and acts of the parties established in evidence, are both less consistent with the existence of a three person agreement than a two person one, and also inconsistent with Mr Alford having remained a party to such agreement, if a three person one. Those acts include his own conduct constituted by his inactivity from late 1995 onwards, his conduct in pleading that the formal joint venture documents were executed without his knowledge, and his denying that his August 1995 file note showed his knowledge of those joint venture documents being executed. All of that conduct was an implicit acknowledgement that the significant change in his status, at the time those documents were executed, was inconsistent with his remaining as a joint venture participant. His pleadings and his evidence regarding EOS show his knowledge and acceptance that EOS was a company which would exercise its powers as trustee for the benefit of Paul Ebbage, not Mr Alford.

[75] The possibility was always open that those powers would be exercised in Mr Alford's favour. That is a sufficient explanation for the file notes Paul Ebbage made in the latter part of 1995 when significant other investment was being sought. Those file notes show Mr Ebbage was prepared at that time to reward Mr Alford handsomely if those other investors produced the millions of dollars Paul Ebbage privately contemplated they might, but Mr Alford's benefiting depended entirely upon discretionary decisions Paul Ebbage would make. The appellants' submissions on the appeal do not acknowledge the critical change that did occur, to Mr Alford's knowledge, when the executed agreement and share transfers took away his previous capacity to share in the control of events and benefits. Accordingly, I am satisfied the learned trial judge was entitled, if not bound, to find that Mr Alford withdrew from whatever joint venture in which he was a party. Thereafter he was no more a joint venturer than Susan Ebbage or any other discretionary beneficiary, and the main appeals should be dismissed.

Amendments to the pleadings

[76] The appellants made a late application for leave to amend their pleading to allege that Paul Ebbage acted as Mr Alford's agent when making the initial joint venture agreement with Mr Manthey on 27 October 1993.[59] The appellants' senior counsel submitted that the cross-examination of the parties, and the evidence generally, was sufficiently extensive that it was inconceivable any other evidence could have been led, had the appellants pleaded agency by Paul Ebbage. The appellants urged the Court to treat the proceedings below as an example of a case where the facts which ought to have been found by the learned trial judge, and on this appeal, did not accord with the pleadings, but where the Court in the interests of justice should proceed to give judgment on those facts as found.

[77] The appellants principally relied upon *Ravinder Rohini Pty Ltd v Krizaic*[60] where Wilcox J (with whom Davies J agreed) wrote at 314:

> "The purpose of a pleadings is to disclose the facts upon which a party relies. If a pleading discloses facts, proved at the trial, which enable a party to succeed, it does not matter that the pleader did not realise that those facts disclosed a cause of action or defence other than the one to which they were directed. The principle is illustrated

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59 Transcript 166.

60 (1991) 30 FCR 300, 315.

> by the old case of *Swinfen v Lord Chelmsford* [1860] 5 H&N 890; 157 ER 1346."

The appellants also referred to the passage in the judgment of Wilcox J which reads, citing from the judgment of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh*,[61] that:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

They relied on the further observation by Wilcox J that that approach had been applied in Australia; the learned judge cited *Suttor v Gundowda Pty Ltd*,[62] *Green v Sommerville*[63] and *Wayde v New South Wales Rugby League Limited*.[64] The appellants also referred to the judgment in *Nesco Industries Group Pty Ltd v MIBA Pty Ltd*,[65] and the remarks therein of Davies J (with whom Tamberlin J agreed). In particular, the appellants relied on the observations by Davies J, written following a citation from *Banque Commerciale SA (In Liq) v Akhil Holdings Ltd*,[66] that pleadings, however expressed, cannot require a judge to decide a case otherwise than in accordance with the law. The appellants point to remarks, cited by Davies J in *Nesco Industries*, of the decision of the High Court in *Water Board v Moustakas*[67] to the effect that failure to amend pleadings will not necessarily preclude a verdict upon the facts as they have emerged in a trial. As Davies J observed in *Nesco Industries*, what is important is that the parties were afforded a fair trial and the principles of natural justice were complied with.

[78] In the trial proceedings, senior counsel for the Manthey respondents specifically established in cross-examination that Mr Alford's evidence was that in the years 1993-1996 there was not a joint venture between himself and Mr Ebbage, it was a joint venture between himself, Paul Ebbage and Mr Manthey; and that the appellants were suing Mr Manthey on the basis that they had a tripartite joint venture with Paul Ebbage and him.[68] Senior counsel also established with clarity that the agreement or agreements upon which Mr Alford relied were made personally between Mr Alford, Mr Manthey and Paul Ebbage at meetings attended by all three.[69] In those circumstances senior counsel's submission on appeal for the Manthey respondents must be accepted, namely that there would have been different cross-examination of Mr Alford had the appellants' case been pleaded to include agency. Senior counsel for the Manthey respondents submitted that had those been the pleadings, Mr Alford would have been cross-examined to ascertain the nature of the pleaded agency, when it was alleged to have been made, and matters such as whether it was alleged that Mr Alford was an undisclosed principal (to whom, being unknown, Mr Manthey may not have owed any fiduciary duties).[70]

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61 [1892] AC 473
62 (1950) 81 CLR 418, 438
63 (1979) 141 CLR 594
64 (1985) 59 ALJR 798
65 (1997) 150 ALR 633, 638-640
66 (1990) 169 CLR 279, 286-7
67 (1988) 180 CLR 491, 497.
68 AR 2/325.
69 AR 2/328.
70 At transcript 164.

Mr Alford would also have been cross-examined as to whether he contended he did personally attend the critical meetings, as well as having his agent present.

[79] I consider the appellants' application should also be refused on the ground that if the submission of the appellants that the evidence would have been the same in any event means no more than that Mr Alford would have given the same (disbelieved) evidence, the unpleaded agency would not have been established by the evidence led. That is, the facts proved at the trial do not establish on the balance of probabilities that Paul Ebbage acted as Mr Alford's agent in making a tripartite agreement with Mr Manthey in October and early November 1993, and thus do not entitle the appellants to succeed on that ground not raised in the pleadings and not in fact litigated. The application to amend was made at the close of the appellants' submissions in the appeal; it was made too late, the case below would have been differently conducted, and the appellants would fail on the amended pleadings on the evidence led.

Appeal by AE Finance against EOS

[80] The learned judge found that the AE accountancy practice provided the accountancy services of Paul Ebbage to the joint venture the judge found to exist between Paul Ebbage and Mr Manthey, and also that money was lent by the AE practice to that joint venture.[71] The evidence led was that annexure A to the appellants' amended statement of claim recorded payments made by AE Finance calculated to 23 June 1995 in the total sum of $190,332.85. The total sum advanced by AE Finance as at 30 June 1996 was $222,515.95.[72] The appellants asked only for an order for the first amount on this appeal, but that seems an oversight.

[81] The learned trial judge held that the moneys from AE Finance were lent to EOS rather than directly to AET, and that it was EOS to whom AE Finance should look for repayment of those moneys.[73] That is the order the appellant AE Finance seeks. The learned judge did not make it, because the judge held that 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 had been sought in the proceedings, and the judge accordingly declined to make the order, holding that whether or not the payments made by AE Finance were in excess of Mr Ebbage's profit share and therefore repayable was not established.

[82] EOS did not file any pleading, and the point raised by the learned judge was not pleaded by either the Ebbage or Manthey respondents. The appellants complained on the appeal that it had not been raised in cross-examination of either Mr Alford or the practice bookkeeper. Their senior counsel also submitted that there was no evidence that there was a profit share to be distributed, or in any way linked with the amounts of money being advanced by AE Finance to EOS. Senior counsel also argued that partnership obligations between Mr Alford and Mr Ebbage could not be a defence to the action by one corporate litigant for the repayment of a debt due by another. I respectfully consider those submissions are valid, and they reflect an agreement between Mr Alford and Paul Ebbage that EOS would repay the money advanced by AE Finance. There was no evidence of any limiting condition. The

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71 At reasons [170]

72 At reasons [534]

73 At reasons [254]

agreement to repay is consistent with the fact that the money from AE Finance was being expended with the agreement of Mr Alford, because it was repayable; and the agreement to repay is itself consistent with it being Paul Ebbage – as between the two partners to the accounting practice – upon whom the whole risk of the joint venture would fall and to whose company the accounting practice could look for the repayment of that money. Accordingly, I would order as the appellant asks, except that I would order repayment of the amount of $222,515.95 proved by the evidence rather than the lesser amount requested.

[83] This leaves the question of costs. The appellants' statement of claim had not actually asked for an order that EOS repay those moneys to AE Finance, but it seems to have been accepted by all parties on the appeal that that was only a drafting error or oversight, since the pleading itself did allege the funds being advanced by EOS to AE Finance. Accordingly, there should be an order for costs against EOS. The appellants supplied a draft order in which they asked for interest at nine per cent per annum from 30 June 1995, and the respondents did not particularly challenge either the claimed percentage or the date. If, as I consider, the larger is appropriate, then the earliest date claimable would be from 30 June 1996.

[84] I would order

(a) that the appeal by the fourth appellant, AE Finance Pty Ltd, be allowed as against the ninth respondent, Ebbco Office Services Pty Ltd, and that it be ordered that respondent pay AE Finance Pty Ltd the amount of $384,396.00, being $222,516 claimed together with $161,880 interest thereon calculated at the rate of nine per cent per annum from 30 June 1996;

(b) that Ebbco Office Services Pty Ltd pay the costs of AE Finance Pty Ltd of the trial and the appeal, to be assessed on the standard basis;

(c) and otherwise that the appeals by the first to seventh appellants inclusive be dismissed against all respondents, with costs, calculated on the standard basis.

[85] **MUIR J:** I am in general agreement with the conclusions reached by Jerrard JA and with his reasons for those conclusions. I propose however to make some additional observations on a number of aspects of the appellant's case. The plaintiff appellants went to trial on the issues raised in their 5th amended statement of claim, a document of some 90 paragraphs and 44 pages, excluding annexures. The trial was heard over 26 sitting days. The primary judge's reasons for judgment comprise more than 100 pages.

[86] In order to determine the issues raised on appeal, however, it is necessary to have regard to only a relatively small part of the evidence. It is convenient, at the outset, to outline in broad terms the core of the appellants' case at first instance.

Summary of allegations in the 5th amended statement of claim

[87] The first plaintiff, Anthony James Alford, had been associated with Paul Gerrard Ebbage in three accounting practices, one of which, Alford Ebbage, carried on business from offices in Price Street, Nerang.

[88] In about early August 1993 at the Alford Ebbage office in Nerang, Ebbage and Alford met with the fourth defendant, Steven Manthey, and agreed to form a joint venture to investigate the possibility of developing variations and adaptations of an internal combustion engine, designed by Manthey.

[89] Earlier that year, Alford and Ebbage had come to an agreement whereby Ebbage was to be the sole proprietor of the Beaudesert accountancy practice and Alford the sole proprietor of the Southport and Nerang accountancy practices. Alford and Ebbage, through companies and trusts controlled by them, would share the profits of the practices equally with some adjustment to take into account the higher fees generated by the Southport and Nerang practices. The three practices, with the superimposed profit sharing arrangement, are referred to compendiously as "the Practice".

[90] On or about 27 October 1993, at the offices of Alford Ebbage Nerang, Manthey, Ebbage and Alford orally agreed that:

(a) Ebbage and Alford would procure a company associated with them to contribute $25,000 to continue funding Manthey's research into variations and adaptations of the internal combustion engine;
(b) a joint venture company would be established;
(c) Manthey would hold a 50% interest in the joint venture company and persons or companies associated with Alford and Ebbage would hold the balance equally;
(d) the joint venture company would thereafter have the opportunity to take intellectual and other property from Manthey as appropriate for the purposes of the joint venture;
(e) the joint venture company would commercially exploit any invention by Manthey made in the course of Manthey's funded research;
(f) the Practice would provide accountancy services to the joint venture for which the Practice would be paid if, and when, the joint venture was successful.

[91] On 11 January 1994, Advanced Engine Technology Pty Ltd ("AET") was incorporated to hold, as bare trustee, the interest of the venturers in the joint venture. One of the two shares in the capital of AET was issued to Manthey and the other share was issued to AE Holdings Pty Ltd ("AEH"), the proprietor of the business names used in the Practice. It held that share as trustee for the AE Holdings Trust No 5 ("AEHT5").

[92] Ebbage was a director of AEH and there existed an agreement that Ebbage would "assume management and control" of AEH and other companies involved in the conduct of the Practice.

[93] Manthey assigned to AET his intellectual property in the relevant technology and continued with his research.

[94] On 11 January 1994, the shareholders of AEH were Dario Pty Ltd, as trustee of the Dario Management Trust, and Ebbco Office Services Pty Ltd as trustee of the Ebbco Holdings Trust. Ebbage and Alford were AEH's directors. Dario was a company controlled by Alford or interests associated with him and Ebbco was a company controlled by Ebbage or companies associated with him.

[95] AEHT5 was a discretionary trust in respect of which –

(a) Dario and Ebbco "for themselves and as trustees respectively of the Dario Practice Trust … and the Ebbco Trust" were beneficiaries;
(b) Alford and Ebbage jointly held the power to remove and appoint the trustees.

[96] The beneficiaries of the Dario Trust were Alford, companies associated with him and members of his family. The beneficiaries of the Ebbco Trust were Ebbage, corporations associated with him and members of his family.

[97] Pursuant to the August 1993 and October 1993 agreements -
(a) AE Finance ("AEF") advanced the funds from the Practice to AET for the purposes of the joint venture as set out in Annexure A to the statement of claim;
(b) The Practice provided accountancy services to AET in connection with the joint venture;
(c) Manthey used such funds for his research and was assisted by the provision of accountancy services.

[98] In the alternative to the allegations in the preceding paragraph, AEF advanced funds from the Practice to Ebbco to enable Ebbco to make contributions to the joint venture as particularised in Annexure A to the statement of claim. Those funds were payable by Ebbco to AEF on demand.

[99] AET applied for and obtained a provisional patent in respect of the technology held by it under the joint venture.

[100] On 8 May 1995 Ebbage –
(a) without the knowledge or consent of Alford, for the improper purpose of altering the interest of Alford and his associates in the joint venture, contrary to his director's duties and in breach of trust –
(i) transferred the share held by AEH in AET to Manthey;
(ii) procured Manthey to declare Ebbage trustee of that share for Manthey;
(iii) purported to cause AET to allot and issue 1001 further shares in its issued capital to Manthey;
(iv) purported to cause AET to allot and issue 1002 further shares in its issued capital to Ebbco as trustee for the Ebbco Trust;
(v) backdated the transfers and allotments so as to make it appear, falsely, that they had taken place on 12 January 1994;
(vi) falsely altered the books of AEF to show that the advances made by AEF to AET were loans from AEF to the Ebbco Trust;
(vii) instructed Reynolds, solicitors, to alter draft documentation in relation to the joint venture to show Ebbco as a shareholder in AET without telling Alford that he had given such instructions to Reynolds.

[101] These transactions were deliberately kept hidden from Alford.

[102] Manthey participated in the dealings referred to in paragraph [100] (which will be referred to as "the May 1995 transactions") knowing that Alford continued to have an interest in the joint venture and made no reasonable enquiries concerning such

transactions. In the premises, Manthey was in breach of his fiduciary duties to Alford and the Alford interests "to the same extent as was Ebbage".

[103] In about early December 1995 it was agreed between Alford and Ebbage to the knowledge of Manthey that –

(a) the Practice would cease as at 31 December 1995;
(b) Ebbage would devote his full time and energies to the joint venture for the benefit of his, Alford's and Manthey's interests;
(c) Alford would conduct the Southport practice, into which the Nerang practice had been incorporated; and
(d) Alford would procure the Practice entities to pay Ebbage for Ebbage's services to the joint venture.

[104] From on or about 4 December 1995, Ebbage commenced working full-time for AET and Alford and Ebbage agreed that Alford would continue to procure the advance of moneys from the Practice to AET for the purposes of the joint venture and to procure the Practice to provide accountancy services to AET for the purposes of the joint venture.

[105] From on or about 29 November 1995, Alford procured AES as trustee for the AE Services Trust to pay Ebbage to devote his time to administer and further the interests of the joint venture.

[106] Each of Ebbage, Manthey and AET "implicitly or tacitly" invited Alford and his associated companies to continue to deal with AET as if AET held the joint venture business as to 25% for Alford or his associates.

[107] In or about November 1996, Ebbage, with the concurrence of Manthey and without the knowledge of Alford and the Alford interests, procured AET to assign its interest in the joint venture to another company and procured it to engage in further dealings in respect of the property of the joint venture.

[108] As a result of such dealings, the assets of the joint venture are now held by companies in which Alford has no interest.

[109] Ebbage died on 2 December 1998.

The defences

[110] The respondents denied that there had been meetings between Alford, Ebbage and Manthey as alleged and denied further that any joint venture had been formed in which Alford or the Alford interests were participants. The defence of the first defendant, Raymond Joseph Ebbage (the executor of Ebbage's estate), and of the other Ebbage interests alleged also that Alford resigned as director and secretary of AET on 12 January 1994 and executed the transfer of the share in AET from AE Holdings to Ebbage knowing that he was thereby surrendering any legal or beneficial interest he may have had in AET. It is further alleged that Alford knew, by virtue of his participation in the preparation of the joint venture documentation, of their content and understood that he had no interest in the joint venture.

The primary judge's findings

[111] On the trial the appellants failed in all of their claims. The critical findings were:

(a) The learned primary judge was not satisfied that the pleaded agreements were made.

(b) There was no meeting between Alford, Ebbage and Manthey in which an agreement was arrived at to form a joint venture. The alleged August 1993 and 27 October 1993 meetings did not take place.

(c) Alford was not a credible witness.

(d) Manthey and Ebbage entered into a joint venture agreement on 8 November 1993 in the course of a conversation which took place on the Pacific Highway in a car driven by Ebbage en route to Brisbane to consult with a patent attorney, Mr Ahearn, about documenting a joint venture between the two of them or their respective nominees. Ebbage and Manthey were to hold equal shares in the venture.

(e) Ebbage intended that there be an agreement between his interests and Alford's interests under which they would share Ebbage's 50% interest in the Manthey Ebbage joint venture. He had discussions with Alford to that end, but no agreement was finalised. In particular, no agreement was reached as to the entities which would participate in the joint venture and the general contractual details of it were never resolved. Such details were of significance because, amongst other things, there was an expectation that "tax ramifications of any agreement" be considered "before they reach final agreement".

(f) By mid-1995 Alford had lost interest in the joint venture - "He wanted to take no further part in it and did not want to formalise any understanding that he would take equity in it."

(g) The primary judge was not satisfied that Ebbage procured the May 1995 transactions so as to deceive Alford or the Alford interests.

(h) In May or June 1995, Manthey and Ebbage executed the following documents prepared by Reynolds, a solicitor retained by Alford and Ebbage: an assignment of intellectual property from Manthey to AET; a joint venture agreement between Manthey, AET and EOS and a loan agreement between AET and EOS.

(i) Alford was aware of the disposal of the interest in the joint venture held by AEH and the new role taken by EOS and that EOS and Manthey were to be the shareholders in AET and the participants in the joint venture.

The grounds of appeal and the case advanced on appeal

[112] In their notice of appeal, the appellant plaintiffs baldly assert that the primary judge erred in fact and in law in the findings made in respect of, the alleged joint venture, the advance of money to the joint venture and the appellants' entitlement to relief in that regard.

[113] In their written outline of argument, Mr Savage SC and Ms Hoch who appeared for the appellants, contended, in substance, that the primary judge erred in allowing her poor opinion of Alford's credibility to lead her, erroneously, to accept the evidence of Manthey. It was submitted that Manthey had been shown to have given dishonest evidence in an important respect and that Alford's evidence was corroborated by

objectively ascertainable facts, the evidence of independent witnesses and by admissions of both Ebbage and Manthey. The outline specifically challenged a number of the primary judge's central findings.

[114] In oral submissions the appellants accepted that the primary judge's finding that Alford was not a credible witness was not susceptible to successful challenge. Nevertheless, Mr Savage continued to argue that the primary judge's findings were unsupportable having regard to the weight of evidence and, in particular, objectively ascertained fact.

[115] He also continued to contend for the agreements alleged in the statement of claim, but submitted that such agreements could be upheld even if it was not accepted that Alford had been present at the meetings. In other words, it was submitted that it was open on the evidence for the inference to be drawn that Ebbage was acting as Alford's agent in reaching agreement with Manthey. The other major change in approach was to embrace the findings concerning Alford's awareness of, and even participation in, the May 1995 transactions and the new joint venture documentation. This was on the basis that, having regard to contemporary file notes and documents produced by Alford and Ebbage, it should be found, contrary to the case pleaded and advanced on trial, that Ebbage did not set out to defraud Alford after all. EOS was the trustee of a trust in which Alford was a beneficiary and it was asserted that the May 1995 transactions and the joint venture documentation were consistent with Alford's interest in the joint venture being maintained.

[116] It was submitted also that, particularly having regard to other records of Alford and Ebbage after the May 1995 transactions and the execution of the joint venture documentation, it was established on the balance of probabilities that Alford's participation in the joint venture continued. Consequently, the primary judge should have relied on this evidence in preference to the oral evidence of witnesses, including Alford, whose credibility had been impugned.

Was there any joint venture agreement and, if so, who were the parties?

[117] The evidence to which the appellants point, suggests the existence of an agreement between Alford and Ebbage that the former would assign one half of his interest in his joint venture with Manthey to Alford or Alford's nominee. That agreement appears to have been given effect by the incorporation of AET and the transfer of property to it. The fact that the parties contemplated that a more elaborate legal structure be set up in relation to the joint venture is not fatal to this conclusion.

[118] Parties to negotiations may, by their words and conduct, make it clear that they do intend to be bound even though there are other terms yet to be agreed,[74] provided of course, that all essential terms of their bargain are agreed.[75] In this context "essential" is not synonymous with "significant", "usual" or "important" as the following observations of Lloyd LJ (with whose reasons Stocker and O'Connor LJJ agreed) in *Pagnan S.p.A. v Feed Products Ltd* [76] assist in demonstrating –

> "(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further

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74 *Storer v Manchester City Council* [1974] 1 WLR 1403 at 1408.

75 *Thorby v Goldberg* (1964) 112 CLR 597.

76 [1987] 2 Lloyd's Rep 601 at 619.

> formality to be fulfilled (see *Love and Stewart v Instone* per Lord Loreburn at p. 476).
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the master of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

[119] At first instance, Bingham J addressed the question of parties to negotiations agreeing to be bound, notwithstanding the continuation of negotiations on an important point, in these terms -

> "Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms: see *Rossiter v Miller* (1878) 3 App. Cas. 1124 at p. 1151 per Lord Blackburn. But just as it is open to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made: see *Love and Stewart, sup,.* per Lord Loreburn LC at p. 476."[77]

[120] The circumstances addressed in paragraph (6) of the above passage from Lloyd LJ's reasons in *Pagnan* is similar to the class of case recognised in *Sinclair, Scott & Co Ltd v Naughton*[78] as one in which –

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77 *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 611.

78 (1929) 43 CLR 310 at 317.

> "The parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms."

[121] The existence of continuing negotiations, particularly if they concern matters of substance, will tend to suggest that no contract was formed.[79] But the mere fact that negotiations continue after the point at which an agreement is alleged to have come into existence does not lead, necessarily, to the conclusion that no binding agreement was reached.[80]

[122] As Cozens-Hardy MR said in *Perry v Suffields Ltd*[81] -

> "Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at."

[123] The existence of an agreement may be inferred from the subsequent conduct of the parties[82] and the existence of a contract may be proved by admissions.[83]

[124] In cases like this the determination of the existence of an agreement is to be determined more by examination of the overall conduct of the parties than by seeking to identify the legal indicia of a valid contract such as offer and acceptance.

[125] Why this is so is explained by the following passage from the reasons of McHugh JA, with whose reasons Hope and Mahoney JJA agreed, in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* [84] :

> "It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship ...

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79 *Bellamy v Debenham* (1890) 45 Ch D 481.

80 Cf *Pagnan S.p.A v Feed Products Ltd* [1987] 2 Lloyd's Rep 601.

81 [1916] 2 Ch 187 at 192.

82 *Haynes v McNeil* (1906) 8 WALR 186; *Glass v Pioneer Rubber Works of Australia Ltd* [1906] VLR 754; *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666; *Australian Energy Ltd v Lennard Oil NL* [1986] 2 Qd R 216; *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147 and *The Commercial Bank of Australia Ltd v G H Dean & Co Pty Ltd* [1983] 2 Qd R 204.

83 *Australian Energy Ltd v Lennard Oil NL (supra).*

84 (1988) 5 BPR 11,110 at 11,117-11,118.

> Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed."

[126] In *Vroon BV v Foster's Brewing Group Ltd*,[85] Ormiston J referred to the following passage from the judgment of Cooke J in *Meates v Attorney-General (Customs Department)*[86] with approval –

> "I would not treat difficulties in analysing the dealings into a strict classification of offer and acceptance as necessarily decisive in this field, although any difficulty on that head is a factor telling against a contract. The acid test in the case like the present is whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain."

[127] Ebbage's file note of 27 October 1993 of his meeting with Manthey records, inter alia –

> "3. If idea is patentable and works in theory establish structural with 50% o/ship PE & AJA.
> 50% SM
> ∴ is Comp best ??"

[128] The primary judge observed in relation to this diary note that it recorded a joint intention to establish a joint venture agreement but that it was a plan of action rather than a concluded agreement. That may well be correct but, when placed together with the other matters to which reference is about to be made, it compels the conclusion that an agreement was in fact entered into.

[129] Mr Kenny, a solicitor, gave evidence that on his initial consultation with Mr Ebbage on 22 March 1994, when Ebbage sought his advice in relation to the documentation of a joint venture, Mr Ebbage outlined a business venture which he wished to embark upon with Alford and Manthey. Mr Kenny's minutes of the meeting record:

> "Paul described a business venture he wishes to embark on with his friend and current partner Tony Alford. The basis for the business is a new style of engine. The mechanic involved in the invention is Steven Charles Manthey. Tony and Paul have agreed to help with the funding of this new engine 'Advanced engine technology.' It is owned by Steven Manthey and a trust associated with Tony and Paul."

This notation is strongly suggestive of the existence of a joint venture between Ebbage and Alford which they have commenced to put into effect.

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85 [1994] 2 VR 32 at 82-3.

86 [1982] NZLR 308 at 337.

[130] Mr Kenny, in a diagram representation of the structure, showed equal holdings in a joint venture company of Mr Manthey and a unit trust of which Ebbage and Alford were shareholders. In advising in relation to the matter he corresponded with both Alford and Ebbage.

[131] Mr Reynolds, the solicitor later consulted by Alford and Ebbage in relation to the documentation of a joint venture, was told on being contacted initially by Alford prior to May 1994 that he wished to arrange a meeting to discuss legal documentation "to reflect Mr Alford and Mr Ebbage's interest in a proposed joint venture". He recalls being told by Ebbage on a subsequent occasion that Alford and Ebbage had paid moneys to Manthey or to the joint venture vehicle AET. He understood from his conversation with Ebbage and Alford that both Alford and Ebbage maintained an interest in the joint venture.

[132] In a diary note of a meeting with Mr Manthey on 11 January 1994, Mr Ebbage records –

> "Other matters discussed with SM.
> (i) Patent to be registered in coy name Advanced Engine Technology
> P/L as trustee for a joint venture.
> (ii) S/h of coy
> PE/AJA or nominee 50%
> SM or nominee 50%"

[133] A computer generated document of Ebbage's dated 19 December 1994 shows "shareholdings" in the joint venture as being Manthey or nominee 50%, Ebbage or nominee 25% and Alford or nominee 25%. A line has been written through Ebbage or nominee and Alford or nominee and the words AE Holdings 50% substituted. Another file note of Ebbage's of 11 December 1995 in relation to the structure of the joint venture attributes shareholdings or interests to AJA, PE and SM.

[134] There are also admissions of the existence of a joint venture made by Ebbage to other persons including his then wife.

[135] In a meeting attended by Manthey and Alford on 2 July 2000, secretly videotaped by Alford, of Manthey admitting being told by Ebbage that Ebbage was bringing Alford in as his partner: "with a 25% interest". He admitted also that "Tony was involved very early on, before I finished the first prototype which only took me like 3 months". A little later he said that "… and then you were brought into it before I had the first prototype running… that was in 1993 … and what I am trying to say is, you know, you are absolutely involved – there is no doubt about that." Significantly, it was not suggested by Alford to Manthey in the course of the meeting that he Manthey and Ebbage had participated in the meetings alleged in the 5th amended statement of claim, or even that there was a tripartite partnership or joint venture. Nor was Manthey cross-examined about those meetings.

[136] The primary judge accepted that a legally binding joint venture agreement had been concluded between Ebbage and Manthey in the space of a brief conversation despite it being contemplated that legal advice be obtained about the joint venture's ultimate structure and the expectation of Manthey and Ebbage that appropriate documentation be prepared. That approach, with respect, was correct. They agreed on the fundamentals; their respective interests, how initial funding would be provided, the technology to be developed and Manthey's responsibility in that

regard. There is no good reason for not adopting the same approach in relation to the Alford/Ebbage arrangements. In fact, their prior association and the funding arrangements through the Practice made it, if anything, easier to conclude that a binding agreement between them had come into existence.

The consequences of a finding of an agreement between Alford and Ebbage

[137] The finding of such an agreement between Alford and Ebbage, however, does not entitle the appellants to succeed. Their pleaded case is quite specific. It is based on oral agreements between three people at specified places and times. There is no allegation that the agreements were entered into over time, that Ebbage was Alford's agent for the purpose of agreeing with Manthey or that the existence of the alleged agreements may be inferred from conduct.

[138] Manthey and other witnesses called on behalf of the respondents gave their evidence in response to the appellants' pleadings and in order to meet the evidence addressed by the applicants as proof of the pleaded case. There was no cross-examination directed to any question of agency as no allegations of agency were made.

[139] Mr Griffin QC for the Manthey interests submits that the case would have been conducted differently had agency been pleaded. This submission should be accepted for the reasons given by Jerrard JA. To permit the appellants to advance this new case on appeal would result in irretrievable prejudice to the respondents. Consequently, the appellants are unable to succeed on their agency argument.

Did Alford cease to have a continuing interest in the joint venture?

[140] The finding that there was no tripartite joint venture agreement entered into, as alleged by the appellants, is amply supported by the evidence.

[141] But even if the appellants were able to surmount this hurdle they would need to show that the findings in relation to Alford's abandonment of the joint venture cannot stand. This they are unable to do.

[142] The appellants rely on a number of pieces of evidence after the May 1995 transactions which are consistent with the continuation of an agreement in respect of the joint venture between the Alford interests and the Ebbage interests. That evidence is discussed in some detail in Jerrard JA's reasons. There is, however, evidence to the contrary which is at least equally as cogent, particularly when viewed against the background of the now unchallenged fact of Alford's knowledge of and even participation in the May 1995 transactions. No plausible explanation has been advanced for Alford's conduct in that regard or for the May 1995 transactions themselves. And, as Alford's evidence was that those transactions were implemented without his knowledge in order to defraud him, an adequate explanation is called for.

[143] The appellants were not entitled to have the primary judge place on the contemporaneous documents an *ex post facto* construction most favourable to them, which construction, for the most part, is unsupportable or even contradicted by oral evidence. Other matters favouring the respondents' case were:

(a) The paucity of documents supporting the conclusion that Alford had a continuing interest, let alone equity in the joint venture.

(b) The evidence supporting the conclusion that Alford's interest in the joint venture had waned by the time of the May 1995 transactions.

(c) The lack of likelihood that Alford would not have taken prompt steps to protect his alleged interests on finding out, according to him, on 28 March 1998 that Manthey and Ebbage held shares in AET Inc worth many millions of dollars. Curiously, there is not even an email, fax, letter or diary note from then until after Ebbage's death which asserts Alford's equity.

(d) The giving of personal guarantees by Ebbage and Manthey to a creditor of AET in respect of a debt of over $1,000,000 without there being any suggestion or even discussion about Alford's participation or lack of participation in this liability.

(e) The evidence which shows that Alford's interest in the joint venture business after May 1995 appears to have been limited to one or two attempts to procure funding for the joint venture.

[144] When regard is had to these and the other matters to which Jerrard JA has made reference it is impossible to resist the conclusion that the primary judge's finding, in effect, of abandonment accords with the weight of evidence.