

SUPREME COURT OF QUEENSLAND

CITATION: *Alborn & Ors v Stephens & Ors* [2009] QCA 384

PARTIES: **RICHARD MOLLISON ALBORN**
(first plaintiff/first appellant)
ALBORN FAMILY CORPORATION PTY LTD
ACN 080 955 595
(second plaintiff/second appellant)
SHAYKAR PTY LTD
ACN 076 868 552
(third plaintiff/third appellant)
v
RAY STEPHENS
(first defendant/first respondent)
GLENYS MARGARET STEPHENS
(second defendant/second respondent)
AS&L PTY LTD
ACN 087 729 048
(third defendant/third respondent)

FILE NO/S: Appeal No 9392 of 2009
SC No 7795 of 2006

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 25 November 2009

JUDGES: Holmes and Muir JJA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Appeal allowed;**
2. Orders of the primary judge made on 29 July 2009 set aside;
3. On or before 1 February 2010 the appellants and the respondents file and serve on the others of them a document which states the factual findings which have not been made which it is contended should be made as relevant to the order for account and related directions and which identifies precisely the evidence relied on to support each such finding;
4. The proceeding, including the counter-claim, be remitted to the primary judge for hearing and determination in accordance with these reasons; and

5. The parties provide written submissions on costs within 28 days of today's date.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – where primary judge found an agreement was reached in October 2001 between the first appellant and first respondent as to how the beneficial ownership of certain franchised stores was to be paid out to give effect to the severing of the contractual arrangements between the parties – where primary judge dismissed the first and second appellants' claims and declared the third appellant was entitled to payment of the remainder, if any, of the consideration owing once the value of the third respondent's payment of the third appellant's liability under its bill of sale and its trade debts were deducted from an agreed price – where appellants submitted that by finding such an agreement the primary judge made a critical finding inconsistent with the parties' pleaded cases, their conduct, the evidence and in denial of natural justice – whether the primary judge so erred

Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61, cited

Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd (1988) 5 BPR 11,110, cited
Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 2 Lloyd's Rep 5, cited

COUNSEL: A J H Morris QC, with K A M Greenwood, for the appellants
P J Dunning SC, with L J Nevison, for the respondents

SOLICITORS: Londy Lawyers for the appellants
Gateway Lawyers for the respondents

- [1] **HOLMES JA:** I agree with the reasons and conclusions of Muir JA and with the orders he proposes.
- [2] **MUIR JA:** The first, second and third appellant plaintiffs appeal against a decision of a judge of the trial division of this Court, dismissing the first and second appellants' claims and declaring that the third appellant was entitled to payment of the remainder, if any, of the consideration owing as at 10 October 2001 once the value of the third respondent's payment of the third appellant's liability under its bill of sale to the Australian Guarantee Corporation ("AGC") and the third appellant's trade debts were deducted from an agreed price of \$100,000, together with interest, on any such amount.
- [3] The primary grounds of appeal are that by finding an agreement between the appellants on the one hand and the respondents on the other ("the diary note agreement"), the primary judge made a critical finding:
- (a) inconsistent with both sides' pleaded cases;
 - (b) inconsistent with the evidence;
 - (c) inconsistent with the conduct of all parties; and
 - (d) in denial of natural justice.

- [4] In order to assess the validity of these complaints, it is necessary to analyse the pleaded cases and the reasons for judgment.

The statement of claim

- [5] The following allegations are made in the statement of claim.
- [6] The first appellant, Mr Alborn, since about 30 September 1999, has been the sole director and secretary of the third appellant, Shaykar Pty Ltd ("Shaykar"), and was at all material times a director of the second appellant, Alborn Family Corporation Pty Ltd ("AFC"). He is the brother of the second respondent, Mrs Stephens, and the brother-in-law of the first respondent, Mr Stephens. At material times, the shares in Shaykar were held as follows:
- (a) the trustee for the time being of the Alborn Family Trust – 25 "C" class shares and 100 ordinary shares;
 - (b) Mr Brendan Alborn (Mr Alborn's nephew) and Ms McLintock – 24 "C" class shares and 100 ordinary shares;
 - (c) Mr and Mrs Stephens as trustee of a trust for the benefit of members of their family – 51 "C" class shares and 100 ordinary shares.
- [7] Mr Alborn, Mr Stephens and Ms McLintock were directors of Shaykar from 8 January 1997 until 30 September 1999.
- [8] Shaykar was acquired by:
- (a) Mr Alborn and his former wife as trustees of the Alborn Family Trust;
 - (b) Mr Brendan Alborn and Ms McLintock; and
 - (c) Mr and Mrs Stephens, as trustees for the Stephens Family Trust
- in or about early January 1997 for the purpose of acquiring and operating franchised "Subway" stores by way of incorporated partnership or joint venture. (For convenience these three groups will be referred to as "the co-venturers", which expression will encompass AFC, which replaced Mr Alborn and his former wife as trustee of the Alborn Family Trust, and AS&L Pty Ltd ("AS&L"), a company controlled by Mr and Mrs Stephens.)
- [9] Mr Stephens was the sole director, secretary and shareholder of the third respondent, AS&L. Pursuant to a deed entered into on or about 11 September 2006, Mr Brendan Alborn and Ms McLintock agreed to transfer their shares in Shaykar and assign their causes of action pleaded in this proceeding to Mr Alborn.
- [10] In and between December 1996 and January 1997 the co-venturers entered into an agreement ("the Shaykar Agreement") to carry on the business of acquiring and operating franchised Subway stores within the Redcliffe and Caboolture Shires by way of an incorporated partnership or joint venture.
- [11] Pursuant to the terms of the Shaykar Agreement, Shaykar was to acquire a Subway store at Clontarf and one at Morayfield and the parties to the Shaykar Agreement were to lend moneys to Shaykar as follows:
- (a) Mr and Mrs Alborn as trustees of the Alborn Family Trust - \$180,000;
 - (b) Mr Brendan Alborn and Ms McLintock - \$40,000; and
 - (c) Mr and Mrs Stephens as trustees for the Stephens Family Trust - \$40,000.
- [12] At a meeting on 18 December 1996 it was agreed between the co-venturers that the profits of Shaykar's business were to be distributed equally between the co-venturers.

- [13] At a meeting on 4 January 1997 it was agreed between the co-venturers that Mr and Mrs Stephens would enter into any necessary franchise agreements and leases in respect of the stores to be acquired and operated by Shaykar and would do so for the benefit of Shaykar.
- [14] It was a term of the Shaykar Agreement that Mr and Mrs Stephens would be employed by Shaykar as general manager and assistant general manager respectively.
- [15] On or about 27 January 1998, Mr and Mrs Alborn were replaced as trustees of the Alborn Family Trust by AFC and their shares in Shaykar were transferred to AFC. The remaining members of the partnership or joint venture constituted by the Shaykar Agreement were then:
- (a) AFC;
 - (b) Mr Brendan Alborn and Ms McLintock; and
 - (c) Mr and Mrs Stephens.
- [16] In and between January 1997 and June 1998, Mr Alborn and/or AFC caused \$196,033 to be advanced to Shaykar pursuant to the Shaykar Agreement.
- [17] Between January and August 1997, Mr and Mrs Stephens advanced approximately \$40,000 to Shaykar pursuant to the Shaykar Agreement, and between February and April 1997, Mr Brendan Alborn and Ms McLintock advanced \$40,000 to Shaykar pursuant to the Shaykar Agreement.
- [18] From January 1997, Mr and Mrs Stephens managed the fitout of the Morayfield and Clontarf stores and on completion of the fitouts managed the operation of those stores.
- [19] In about March 1997, it was agreed between Mr Stephens (acting on his own behalf and on behalf of Mrs Stephens) and Mr Alborn (acting on his own behalf, and on behalf of AFC, Mr Brendan Alborn and Ms McLintock), that Shaykar's business would include Baskin-Robbins ice cream stores, which would be run as part of the Subway stores at Morayfield and Clontarf.
- [20] On or about 30 September 1999, Mr Alborn commenced managing the Clontarf store in lieu of Mr and Mrs Stephens.
- [21] In or about August 2000:
- (a) the Clontarf store was experiencing financial difficulties;
 - (b) an accountant advised the closure of the Clontarf store; and
 - (c) after discussion between Mr Alborn and Mr Stephens, Mr and Mrs Stephens recommenced managing the Clontarf store on behalf of Shaykar.
- [22] Mr and Mrs Stephens were in a fiduciary relationship with Shaykar and the other co-venturers at relevant times and owed fiduciary duties to Shaykar.
- [23] From about 14 February 2002, or, alternatively, from about 20 December 2002, Mr and Mrs Stephens have contended that they and/or AS&L own, or are beneficially entitled to, Shaykar's business, including the Morayfield and Clontarf stores and have:
- (a) conducted Shaykar's business for their own benefit;

- (b) appropriated to themselves or AS&L, the benefit of each of the Morayfield Franchise Agreement, the Morayfield Sub-Lease, the Clontarf Franchise Agreement and the Clontarf Sub-Lease;
 - (c) failed to account to the other co-venturers or Shaykar for profits and income derived from the operation of Shaykar's business;
 - (d) purported to appropriate the goodwill of Shaykar's business to themselves; and
 - (e) appropriated to themselves or to AS&L the assets of Shaykar's business.
- [24] Mr and Mrs Stephens unlawfully used information obtained by them as employees of Shaykar and in so doing breached the Shaykar Agreement and their fiduciary duties to Shaykar.
- [25] AS&L was knowingly concerned in and benefited from such breaches and is liable as an accessory.
- [26] By reason of the above matters, the appellants have suffered loss and damage, including:
- (a) the loss by Shaykar of the benefit of its business, its assets, goodwill and income;
 - (b) the loss by AFC and Mr Brendan Alborn of the value of their shareholdings in Shaykar; and
 - (c) the loss by Mr Alborn, AFC, Mr Brendan Alborn and Ms McLintock of their initial investments in Shaykar.

The defence

- [27] The defence is to the following effect. Shaykar was acquired, as the appellants allege, for the purpose of managing Subway stores by way of incorporated partnership or joint venture but not for the purpose of acquiring "Subway" stores.
- [28] There was no Shaykar Agreement and to the extent that Mr Alborn and/or AFC advanced moneys to Shaykar, they were advanced to provide capital in the implementation of Shaykar's business plan to manage Subway stores. All moneys advanced by Mr and Mrs Stephens, Mr Brendan Alborn and Ms McLintock were advanced to provide capital for such purposes.
- [29] The Morayfield and Clontarf franchise agreements and sub-leases were executed by Mr and Mrs Stephens in their own right for their benefit with the intention that they would hold legal and equitable interests therein absolutely and without notice of any other interest.
- [30] Mr and Mrs Stephens entered into a franchise agreement and sub-lease agreement with respect to the Baskin-Robbins ice cream store at Clontarf in their own right and held any relevant interests on their own behalf. It was agreed between Mr and Mrs Stephens and Mr Alborn that the Baskin-Robbins store at Clontarf would be managed by Shaykar on the same terms as those agreed in respect of the Subway store at Clontarf.
- [31] Mr Alborn commenced managing the Clontarf store in lieu of Mr and Mrs Stephens on or about 30 September 1999 and:
- "... it was agreed between Mr Alborn (representing his own interests and the interests of Shaykar, including the interests of AFC, Mr Brendan Alborn and Ms McLintock) and Mr and Mrs Stephens,

that AS & L would assume the management role of the Morayfield store in lieu of Shaykar and in consideration of AS & L assuming all liabilities outstanding in relation to management of the Morayfield store on any account whatsoever and that Shaykar would be released from and indemnified against any further liability or obligation arising with respect to the Morayfield store with the intention that Shaykar would have no further interest in the Morayfield store on any account whatsoever ('the Morayfield Management Agreement')."

- [32] On or about 13 August 2000, Mr Alborn decided that Shaykar could no longer afford to manage the Clontarf store and that the Clontarf store was unable to pay its debts:

"Mr Alborn (representing his own interests and the interests of Shaykar, including the interests of AFC, Mr Brendan Alborn and Ms McLintock) and Mr Stephens agreed that AS & L would assume the management role of the Clontarf store in lieu of Shaykar and in consideration of AS & L assuming all liabilities outstanding in relation to management of the Clontarf store on any account whatsoever and that Shaykar would be released from and indemnified against any further liability or obligation arising with respect to the Clontarf store with the intention that Shaykar would have no further interest in the Clontarf store on any account whatsoever ('the Clontarf Management Agreement')."

- [33] AS&L commenced management of the Clontarf store on 14 August 2000 with the consent of and in lieu of Shaykar.

- [34] By virtue of the foregoing, if Mr and Mrs Stephens had fiduciary duties as alleged by the appellants, such duties did not continue after 30 September 1999 in relation to the Morayfield store or after 13 August 2000 in relation to the Clontarf store.

- [35] The Morayfield Management Agreement and the Clontarf Management Agreement discharged any obligation of the respondents with respect to any moneys advanced by Shaykar to Mr and Mrs Stephens to purchase the Morayfield or Clontarf stores.

- [36] Alternatively, the appellants derived a benefit to the detriment of the respondents and the appellants would be unjustly enriched if the relief sought by the appellants in the statement of claim was granted.

- [37] In the further alternative, the respondents relied on the Morayfield Management Agreement and the Clontarf Management Agreement and:

"... altered their position in reliance thereon and the [appellants] are estopped from denying that the [respondents] are now entitled to benefit absolutely from the Morayfield and Clontarf stores."

- [38] In answer to a request for further and better particulars, the respondents stated that:

"(a) Management of the Morayfield store was assigned by Shaykar to [AS&L] as a consequence of the Morayfield Management Agreement made between [Mr Alborn] and [Mr Stephens] and [Mrs Stephens] on or about 1 October 1999 in consideration of the [respondents] assuming all liabilities outstanding with respect to the Morayfield store;

- (b) Management of the Clontarf store was assigned by Shaykar to [AS&L] as a consequence of the Clontarf Management Agreement made between [Mr Alborn] and [Mr Stephens] on or about 14 August 2000 in consideration of the [respondents] assuming all liabilities outstanding with respect to the Clontarf store;
- (c) [AS&L] assumed all liabilities outstanding with respect to the Morayfield store on and from 1 October 1999;
- (d) [AS&L] assumed all liabilities outstanding with respect to the Clontarf store on and from 14 August 2000;
- (e) The liabilities assumed by [AS&L] with respect to the Morayfield store and the Clontarf store are more particularly set out in the attached document titled '*Shaykar's Debts Paid by AS & L Pty Ltd.*' "

[39] In a reply and answer, the appellants:

- (a) denied that AS&L commenced management of the Clontarf store on 14 August 2000 with the consent of, and in lieu of, Shaykar, on the grounds that Shaykar gave express consent to Mr and Mrs Stephens re-commencing management of the Clontarf store, and did not give such express consent to AS&L;
- (b) denied that AS&L commenced such management 'in lieu of' Shaykar, on the grounds that:
 - (i) Shaykar never managed the Clontarf store; and
 - (ii) in fact, the Clontarf store was at all times when it was managed by Mr and Mrs Stephens, managed by them on behalf of, and for the benefit of, Shaykar.
- (c) did not admit that such management commenced (or re-commenced) on 14 August 2000, on the grounds that having made such inquiries as were reasonable in respect of such allegation within the meaning of r 166 of the *Uniform Civil Procedure Rules 1999* (Qld) the appellants remained uncertain as to the truth or falsity of such allegation and therefore could neither admit or deny such allegation; and
- (d) denied that the Morayfield Management Agreement and the Clontarf Management Agreement were entered into and alleged in the alternative that if the agreements were entered into they did not discharge the obligations of the respondents with respect to any moneys advanced by Shaykar to Mr and Mrs Stephens to purchase the Morayfield and Clontarf stores.

Relevant findings of the primary judge

[40] The critical findings of the primary judge for present purposes are now identified. The co-venturers agreed that although Mr and Mrs Stephens were to be Subway franchisees and sub-lessees, Shaykar would beneficially own and operate the franchises and the franchise businesses. Mr and Mrs Stephens were to be the franchisees and sub-lessees because of the franchisor's requirement that the franchisees and sub-lessees be natural persons. Shaykar was the beneficial owner of

the franchises and of the Clontarf and Morayfield businesses and it received the income and paid all of the expenses of the franchise businesses including the costs of purchase. Mr and Mrs Stephens received consultancy fees for their work in respect of each franchise, which fees were paid by Shaykar to a company owned and controlled by the Stephens.

[41] Before the Clontarf store was opened it was agreed between the co-venturers that Mr and Mrs Stephens would enter into a Baskin-Robbins franchise in respect of that store on behalf of Shaykar.

[42] Moneys were lent to Shaykar by or on behalf of the co-venturers but there was no express agreement as to the terms upon which the moneys were lent "except that it was an interest only loan for a minimum of two years."

[43] Mr Alborn opened and operated a number of other franchised stores which did not prosper and Clontarf failed to trade profitably. Mr Alborn experienced financial difficulties and Shaykar also had financial problems. An agreement was reached between Mr Alborn and Mr and Mrs Stephens:¹

- "(1) That Mr Stephens would resign as a director of Shaykar;
- (2) That Mr Alborn would take over the day to day responsibility for the management of the Clontarf store on behalf of Shaykar;
- (3) That Mr and Mrs Stephens, or their company, would take over the day to day management of the Morayfield store;
- (4) That Mr and Mrs Stephens' company would become the beneficial owner of the Morayfield store in place of Shaykar in exchange for foregoing any right to the \$40,000 Mr and Mrs Stephens had invested to Shaykar and taking on the responsibility of meeting Shaykar's debt to AGC in respect of the equipment in the Morayfield store and other debts owing by Shaykar in respect of the Morayfield store."

[44] The above terms were the consideration for the transfer of the beneficial ownership of the Morayfield franchise from Shaykar to AS&L and the parties agreed to endeavour to extricate Mr and Mrs Stephens from Shaykar's liabilities for which they were personally responsible.

[45] As it happened, the legal liabilities of Mr and Mrs Stephens under the franchise agreements and sub-leases remained unchanged in many respects:²

"... Shaykar remained the beneficial owner of the franchise business operated at Clontarf by Mr Alborn and AS&L became the beneficial owner of the franchise business operated at Morayfield by Mr and Mrs Stephens. Mr and Mrs Stephens no longer had any contractual or fiduciary duty to pay the income from the operation of the business of Morayfield to Shaykar and they no longer operated the business at Clontarf.

...

From that time, the parties acted in accordance with the agreement that had been made. Mr and Mrs Stephens continued to operate the

¹ *Alborn & Ors v Stephens & Ors* [2009] QSC 198 at [60].

² *Alborn & Ors v Stephens & Ors* [2009] QSC 198 at [62] – [63].

Morayfield store and the Clontarf store was run by a management team put in by Mr Alborn. At Mr Alborn's request, Mr Stephens called in once a week to liaise with the managers and report back to Mr Alborn. A communication from Mr Alborn to Mr Stephens on 2 November 1999 makes reference to the manager at Morayfield, 'Leanne', asking if she had been taken off Shaykar's books. Mr Stephens said that her wages were by then being paid by his company, AS&L, rather than by Shaykar. AS&L also took over all of the Morayfield store's debts after 1 October 1999."

[46] On 10 February 2000, Mr and Mrs Stephens received a notice from Subway terminating the Clontarf franchise for failure to pay royalties and moneys on account of advertising. Mr Stephens entered into a repayment plan dated 21 February 2000 with a view to having the notice withdrawn. This was done without the consent or knowledge of Shaykar. Mr Alborn, after hearing of Mr and Mrs Stephens' course of action in this regard, did not agree with it, as he had suspended payment of royalties to Subway on account of a claim which he maintained Shaykar had against Subway.

[47] After Mr Stephens received a notice on 28 April 2000 from the franchisor of the Baskin-Robbins franchise at Clontarf that the franchise would be terminated on 31 May 2000 unless all outstanding royalties and advertising moneys were paid, Mr Stephens contacted Mr Alborn. Mr Alborn said he would take care of negotiations for a repayment plan. In mid July 2000, Mr Alborn told Mr Stephens that he would have to close the Clontarf store as it was uneconomical to run. Mr Stephens told Mr Alborn that if the store was closed he would have to re-open it because, as franchisee, he was legally and financially exposed.

[48] On 31 July 2000, Mr Alborn drafted letters to Subway and Baskin-Robbins for Mr Stephens to send. The letters stated that, "Mr Alborn, as director of Shaykar, had said that his company could no longer operate the Clontarf store and asked if he could hand over the keys to Subway Systems on about 14 August ...". The Clontarf store closed on 13 August 2000 and was then re-opened by Mr Stephens over the opposition of Mr Alborn, who wanted the store to remain closed in order to crystallise his losses and those of the interests represented by him. Mr and Mrs Stephens did not make any payment to Shaykar for the value of the plant, equipment, fixtures and fittings or goodwill (if any) of the Clontarf store.

[49] Paragraphs [80] - [84] of the reasons state:

"On 10 October 2001, Mr Stephens' diary records:

'Had a meeting with Rick [Mr Alborn] last night over prices for Morayfield and Clontarf stores. After discussion we all agreed on \$100,000 price for each store, even though to us we own Morayfield anyway since we split of (sic) stores on 1/10/99. All of us stated it was a fair price and we would sort out the details after mediation.'

This diary note records an agreement reached between Mr Alborn and Mr Stephens as to how the beneficial ownership of Shaykar of the franchised stores was to be paid out to give effect to the severing of the contractual arrangements between the parties to this litigation.

It is evidence that they agreed that Mr and Mrs Stephens (or a company [on] their behalf) would purchase the beneficial entitlement to the Clontarf store for \$100,000. The agreement was made on 10 October 2001 and records an agreement that would operate from the time of the takeover of the Clontarf store by AS&L after it was abandoned by Shaykar.

Shaykar's ABN, GST registration and PAYG withholding registration were cancelled from 1 October 2001. Mr and Mrs Stephens (or their company AS&L) had already effectively given \$100,000 consideration for the Morayfield store made up of forgiveness of their \$40,000 loan to Shaykar and taking on Shaykar's (sic) liabilities to AGC and its other trade debts. In the case of the Clontarf store, Mr and Mrs Stephens did not pay \$100,000 but they did take on Shaykar's debt to AGC and its other trade debts.

Thereafter, the parties used outside advisers to try to sort out the legal effect of the events that had occurred. Unfortunately the effect was to confuse rather than elucidate. Whether because of inadequate instructions by the clients or incorrect advice by the advisers both took positions that were not in accordance with the facts. Mr Stephens insisted there had never been an agreement by which Shaykar was the beneficial owner of the franchises. Mr Alborn insisted that Shaykar remained the beneficial owner of the franchises. Both were wrong.

While it was true that Shaykar was originally the beneficial owner, the legal arrangements between the parties had altered so that Shaykar was no longer the beneficial owner of the stores."

[50] The primary judge explained:³

"The legal effect of what transpired was that by 10 October 2001:

1. Mr and Mrs Stephens remained as franchisees and sub-lessees of the Subway store at Morayfield and the Subway/Baskin-Robbins store at Clontarf;
2. AS&L had been the beneficial owner of the Subway franchise at Morayfield from 9 October 1999;
3. AS&L was the beneficial owner of the Subway/Baskin-Robbins franchise at Clontarf from 14 August 2000;
4. The consideration for the transfer of the beneficial interest in the Morayfield store from Shaykar to AS&L was agreed at \$100,000;
5. Mr and Mrs Stephens had no claim to repayment of the loan of \$40,000 to Shaykar which they relinquished in part payment for the transfer of the beneficial interest in the Morayfield store;

³ *Alborn & Ors v Stephens & Ors* [2009] QSC 198 at [87].

6. Mr and Mrs Stephens (or their nominee company) took on responsibility for repaying the part of the loan from AGC to Shaykar in relation to the bill of sale over the equipment in the Morayfield store and Shaykar's other trade debts to complete payment for the transfer of the beneficial ownership of the interest in the Morayfield store from Shaykar to AS&L;
7. The consideration for the transfer of the beneficial interest in the Clontarf store from Shaykar to Mr and Mrs Stephens' company, AS&L, was agreed at \$100,000;
8. Mr and Mrs Stephens (or their nominee company) took on responsibility for repaying the rest of the loan from AGC to Shaykar (in relation to the bill of sale over the equipment in the Clontarf store) and Shaykar's trade debts in relation to the Clontarf store in part payment for the transfer of the beneficial ownership of the interest in the Clontarf store from Shaykar to AS&L;
9. The remainder of the consideration, if any, for the transfer of the beneficial interest in the Clontarf store from Shaykar to AS&L remained unpaid;
10. Shaykar had no interest in any Subway store operated by Mr and Mrs Stephens, or any company nominated by them at Kallangur or Bribie Island." (footnote deleted)

[51] The primary judge arrived at her conclusion that there was no binding agreement in respect of the Clontarf store arrived at about the time alleged by the respondents and that an agreement was reached on October 2001 by reference to the principles referred to by Heydon JA in the following passage from his reasons in *Brambles Holdings Ltd v Bathurst City Council*:⁴

"While the process by which many contracts are arrived at is reducible to an analysis turning on the making of an offer, the rejection of the offer by a counter-offer and so on until the last counter-offer is accepted, that analysis is neither sufficient to explain all cases nor necessary to explain all cases. Offer and acceptance analysis does not work well in various circumstances... despite that Lord Greene MR observed of the practice: 'Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts in each case...'*(Eccles v Bryant and Pollock [1948] Ch 93 at 104).*"

[52] Of similar effect are the principles articulated in 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 Corporation (Aust) Pty Ltd*:⁵

⁴ (2001) 53 NSWLR 153 at [71].

⁵ (1998) 5 BPR 11,110 at 11,117 – 11,118.

"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 ...

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."

- [53] There is no particular novelty in the approach to the determination of the existence of a binding agreement considered in the above passages. Lord Denning MR said in *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons*:⁶

"... I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards. That is, I think, the result of *Brogden v Metropolitan Rly.* (1877) App. Cas. 666 ..."

- [54] Neither counsel took issue with the legal principles to which the primary judge had resort in arriving at her conclusions as to the existence of binding agreements. Counsel for the appellants' complaints, which are discussed in more detail shortly, were to the effect that the primary judge's findings in relation to the October 2001 agreement were outside the scope of the pleadings and were not supported by and inconsistent with the evidence.

Summary of the primary judge's conclusions

- [55] In summary, the primary judge found that the co-venturers had entered into an agreement in September/October 1999 in which it was agreed that Mr and Mrs Stephens or AS&L would become the beneficial owner of the Morayfield store business and related assets in consideration of assuming legal responsibility for the liabilities relating to such business and assets. Under the agreement, Shaykar remained the beneficial owner of the Clontarf business and the assets associated with it and Mr Alborn was to manage that business.
- [56] No express finding in favour of the Clontarf Management Agreement was made and the existence of that agreement was implicitly rejected. The primary judge found that there was a second agreement in respect of the Clontarf store and business

⁶ [1977] 2 Lloyd's Rep 5 at 10.

made much later than the Clontarf Management Agreement: on or about 10 October 2001. This agreement ("the October 2001 Agreement") was recorded in Mr Stephen's diary. The agreement was that the Stephens' interests would acquire the Clontarf store and business for \$100,000. The agreement was "as to how the beneficial ownership of Shaykar of the franchised stores was to be paid out to give effect to the severing of the contractual arrangements between the parties" and it was to "operate from the time of the takeover of the Clontarf store by AS&L".

The appellants' contentions

[57] The arguments of counsel for the appellants concentrated on what senior counsel for the appellants described as "the 10 October 2001 diary note agreement". It was submitted that this agreement:

- "(a) is neither reflected in, nor consistent with, either side's pleaded case;
- (b) was not the subject of any evidence, at least in the form of direct evidence, from any of the parties;
- (c) is, both as to its overall nature, and as to its details, utterly inconsistent with both the oral and the documentary evidence; and
- (d) in the context of the evidence as a whole, is demonstrably inconsistent with the conduct of all parties."

[58] Those submissions were expanded as follows:

- (a) Even on its face, the diary note reflects no more than an "agreement" regarding the proposed sale price of two stores, as constituting a "fair price"... the 'details' regarding any sale ... remained for the parties to 'sort out ... after mediation.'"
- (b) Mr Stephens "plainly had no present intention of being bound by the 'postulated' agreement, as any consensus regarding the fairness of the \$100,000 price was subject to the respondents' continuing ... erroneous ... view" that the respondents owned Morayfield.
- (c) Even on the respondents' evidence concerning the oral discussions between the parties, it could not be concluded that an "agreement" of any kind was actually reached, let alone that all parties intended immediately to be bound.

[59] The existence of the October 2001 Agreement, determined by the primary judge, was not apparent to the parties or their legal advisors. It was neither pleaded nor contended for in submissions on trial. The primary judge's finding was inconsistent with the October 2001 Agreement as expressed in the diary note, which evidenced agreement of a payment of \$100,000 for each store as a going concern. The primary judge translated this into an agreement:

"... [containing] a process whereby a nett value for each store would be ascertained, beginning with a nominal figure of \$100,000, and then deducting amounts which the Respondents had either:

- (i) already paid; or
- (ii) advanced to Shaykar, and then forgiven; or
- (iii) 'taken on the responsibility for' paying (whatever that means in the context).

... That this outcome is utterly inconsistent with the case pleaded by either party – or the case conducted by either party at trial – is

reflected in the fact that the primary Judge was plainly unable to determine the ultimate consequences of the reasoning explicated in the Reasons for Judgment. Instead, the primary Judge left matters on the footing that the Appellants are entitled to something which:

- (a) the Appellants did not claim; and
- (b) the Respondents never asserted, or conceded, that the Appellants were entitled to receive."

Was the Morayfield Management Agreement established?

[60] The agreement found by the primary judge to have been entered into on or about 30 September 1999 in respect of the Morayfield store was substantially in accordance with the respondents' pleaded case in that regard. There was evidence to support the primary judge's findings in the oral evidence of Mr and Mrs Stephens, in emails and in a letter dated 28 October 1999 to Mr Alborn from his solicitors. The cross-examination of Mr Stephens in relation to the Morayfield Management Agreement was not directed to controverting the account given by him in evidence-in-chief of his relevant conversations with Mr Alborn. Mr Alborn did not give evidence and no-one gave oral evidence in the appellants' case.

[61] Counsel for the appellants challenged the primary judge's finding that Mr Alborn was acting on behalf of Shaykar, Mr Brendan Alborn and Ms McLintock in his negotiations with Mr and Mrs Stephens. He pointed to the oral evidence of Mr and Mrs Stephens to the effect that at a meeting on 9 October 1999 where there was discussion in relation to the Morayfield Management Agreement, the need to obtain the concurrence of Mr Brendan Alborn and Ms McLintock was expressly raised. It was submitted that each of them understood that Mr Alborn was to contact Mr Brendan Alborn and Ms McLintock for that purpose. Also relied on were two pieces of correspondence in which Mr Brendan Alborn stated that he and Ms McLintock had "not been consulted on any of the changes made to the structure of Shaykar" and that he had "... no clue about the discussion between yourselves and [Mr Stephens] regarding the stores being valued at \$100K each ... [Ms McLintock] and I would have never agreed to this if we had ever been consulted about it."

[62] It is far from clear what agreement or alleged agreement is being addressed by Mr Brendan Alborn in these documents which came into existence after the commencement of the subject dispute. The correspondence relied on by the respondents plainly establishes that Mr Alborn was acting on behalf of Ms McLintock and Mr Brendan Alborn in entering into the Morayfield Management Agreement. In emails to them of 16, 18 and 22 September 1999, he discussed in detail his proposals for the Morayfield and Clontarf stores. The emails were couched in terms of changes which Mr Alborn was intending to implement and it was implicit in them that he regarded himself as having authority to bind Mr Brendan Alborn and Ms McLintock. In implementation of the Morayfield Agreement and the related and contemporaneous agreement in respect of the Clontarf store, Mr Stephens and Ms McLintock did resign as directors of Shaykar on 30 September 1999. On 20 September 1999, Mr Alborn stated in an email to Ms McLintock:⁷

"I will keep you informed as to what is happening and when, how & why. As regards the Resignation I need you to just write a letter to

⁷ *Alborn & Ors v Stephens & Ors* [2009] QSC 198 at [45].

me Stating you resign as a Director of Shaykar effective from the date of the letter.

...

Ray and Glen (Ray more so) feel they can make it work with what (sic) experience and the system cleaned up. I have divorced myself from that decision and wish (sic) them luck and love.

All I want to do is to get us all clear."

[63] The fact that Mr and Mrs Stephens may have thought that Mr Alborn needed to get the consent of Mr Brendan Alborn and Ms McLintock to any agreement in respect of the Morayfield and Clontarf stores, if that was the case, does not cast doubt on the primary judge's relevant findings. There is no evidence that the Stephens were privy to the communications between Mr Alborn, Mr Brendan Alborn and Ms McLintock.

[64] Of particular significance to the conclusion that Mr Alborn had authority to act on behalf of Mr Brendan Alborn, Ms McLintock and Shaykar, is the fact that the Morayfield Management Agreement was implemented. The evidence suggests that Mr Brendan Alborn and Ms McLintock were kept well informed by Mr Alborn and did not demur in any way from Mr Alborn's statements to them concerning what was to happen in respect of the Morayfield and Clontarf stores. For example, in a letter to Mr Stephens of 20 March 2002, Mr Alborn asserted he had had "written authority to act on behalf of both" Mr Brendan Alborn and Ms McLintock. On the face of it, a copy of the letter was sent to them.

[65] Consequently the appellants' challenge to the primary judge's findings in this regard fails.

Was the Clontarf Management Agreement established?

[66] The respondents pleaded that the Clontarf Management Agreement was entered into on or about 13 August 2000. The primary judge found that the Clontarf store closed on 13 August 2000 and that the entering into possession of the Clontarf store and the taking over of its management were matters to which Mr Alborn "was absolutely opposed" to the knowledge of Mr Stephens. There is no finding by the primary judge of any agreement having been entered into prior to 10 October 2001 of the nature of or consistent with the Clontarf Management Agreement. The correspondence, in my view, is inconsistent with the existence of any such agreement.

[67] In an email of 29 August 2000 from Mr Alborn to Mr Stephens, Mr Alborn, after referring to the takeover of the business, listed points that the parties "should be addressing". They include:

"

- Stock take figures and value at time of take over.
- Cash on hand at time of take over.
- Profit. If any is it (sic) going towards the outstanding Shaykar accounts?
- QFFS outstanding account that is on \$250 per week repayment schedule?
- Baskins Dry Goods that we had on repayment schedule as we ordered we repaid \$250.
- Payments for AGC need to be ongoing.

- Rent is it being paid? If not what is the arrangement because it is a building cost against Shaykar.
- Is it possible for a weekly report on the profit/losses so I can ascertain the exposure Shaykar could be incurring?"

[68] The respondents submit that the first two of these points support the respondents' proposition. To my mind, they are neutral. It would have been sensible to establish the cash and stock figures whether the Stephens' interests were acquiring the business beneficially or merely taking over the management. And the import of the first two points cannot be understood in isolation from the rest of the document.

[69] In his email of 2 September 2000 to Mr Stephens, Mr Albarn complained about the respondents "continuing to keep the store open". He commented:

"All it is doing is continuing to grow debt for yourself **and for Shaykar.**

It is NOT making any money and is only *Possibly* going to breakeven with a rent reduction.

This you are unable to do or haven't done at this stage so **this rent is still building against Shaykar.**

We went to the trouble to try and isolate you from Shaykar 12 months ago BUT NOW the perception by Grahams AND Subway (Who were treating it as an illegal transfer) will be that you were always involved.

...

So out of all of this I think we should talk about the best for ALL of us and NOT just take protection for individuals and I still think the BEST option is to close the store. IT has proved to be uneconomic.

I am very concerned that my thoughts and reason are NOT being taken into account and that **Shaykar and ME as a director are being subject to further expenses when the store should be closed.**" (emphasis added)

[70] Mr Albarn's email to Mr Stephens of 2 January 2001 commenced as follows:

"Now that the claims have been separated I feel that the shareholders should have an opportunity to voice their concerns therefore, I would like to talk to you about the following points as you are the representative for the Shaykar Company as the companies (sic) franchisee ...

- At least twice RS has gone against the wishes of RA. EG: Stepping back into Clontarf and not allowing it to close to consolidate the losses ..."

[71] On 20 March 2002 Mr Albarn sent an email to Mr Stephens with copies to Mr Brendan Albarn and Ms McLintock in which he asserted that there was no agreement for the Stephens' interests to buy the stores at \$100,000. In response, Mr Stephens wrote on 4 April 2002:

"

- I never said I was going to 'stop' the closing of the Clontarf store. I stated I was going to step in and manage it due to:

- a) AGC lease thereby protecting Joy Stainers (sic) loan to Shaykar.
- b) to protect us due to Glen and I having signed guarantees for the Subway lease.
- c) to follow the advice from your lawyer at the time, who said it was in the best interest of the claim against Subway to keep the store trading.

...

- We are both surprised by your perception of the meeting held with us on or about 17th April. The discussion was about the price of the stores. After some discussion you came up with the \$100 000 per store. You asked us if we thought that figure was fair. Glen remembers asking you that shouldn't Brendan and Karen (sic) be part of the discussion and you replied that they had given you written authority to act on their behalf. We said that we thought the price was fair and Glen then asked you if you thought it was fair. You stated you couldn't care less about the stores and didn't want to have them. We were of the firm belief that this discussion was an agreement to fix the price of the stores when the mediation had been completed.

...

- **We acknowledge that assets of Shaykar are still in the Clontarf store. We are only managing it.**

...

We agree that we need to formalise the arrangements between AS&L and Shaykar." (emphasis added)

[72] By the end of the year, after the dispute between the parties intensified and lawyers became involved, Mr Stephens' position changed. In a letter to Mr Alborn of 8 December 2002, he wrote:

"On behalf of Shaykar you verbally agreed the company would cease to have any financial interest in either the Morayfield or Clontarf stores. This was on the basis that Glen and I first apply profits to payment of accumulated debts. As this was clearly a major benefit to Shaykar it was further agreed that I would be paid a consultancy fee for the continued trading of the stores as if Shaykar still had a direct financial interest until all the debts were repaid."

[73] It is apparent that the agreement asserted by Mr Stephens above differed markedly from the Clontarf Management Agreement and the October 2001 Agreement. In oral evidence Mr Stephens did not refer to any such agreement which contained terms that he be paid a consultancy fee or that the profits (seemingly of both Morayfield and Clontarf) be "applied to payment of accumulated debts."

[74] Mr Stephens' admission against interest, made on behalf of himself and AS&L, should have been given considerable weight. The admission was part of a considered response to a formal letter or email from Mr Alborn which plainly denied that Shaykar had transferred any beneficial interest in the Clontarf and Morayfield stores. It also gains weight from the paucity of the evidence supporting the existence of the October 2001 Agreement. No doubt an expression of opinion on questions of law or mixed fact and law does not establish the correctness of the

opinion. However, it is implicit in the emphasised passage from the 4 April 2002 email that Mr Stephens had no recollection of discussions with Mr Alborn in which he and Mr Alborn reached a consensus about the sale of the Clontarf store and the disposition of the assets relating to it.

- [75] In a valiant attempt to support the primary judge's finding of an agreement in respect of the Clontarf business overlooked by the respondents and their legal advisers, counsel for the respondents relied principally on: Mr Stephens' diary note of 10 October 2001; the first two items listed in paragraph [67] above and a notice of cancellation of Shaykar's Australian Business Number as of 1 October 2001. The notice was issued on 9 July 2002. The reason for the cancellation does not appear from the evidence. The two items were discussed earlier.
- [76] Counsel for the respondents also pointed to the background of the Morayfield Management Agreement and the contemporaneous agreement in respect of the Clontarf store, as well as the discussions which had taken place between Mr Alborn and Mr and Mrs Stephens over a lengthy period after the entering into of those agreements. The thrust of the contention in this regard was that having regard to those discussions and the earlier agreements, there was really very little to be decided between the parties.
- [77] The discussions which took place in October 2001, however, were markedly different in nature from those which led to the Morayfield Management Agreement and the related agreement in respect of the Clontarf store in 1999. These agreements took effect from the time at which they were reached and there was consensus as to all significant financial aspects of the change of ownership and/or management. By October 2001, the Stephens' interests had been operating the Clontarf store without the consent of the other co-venturers and Shaykar for over a year. The financial consequences of that conduct were something which the parties would wish to address in any final resolution of their relationship and the discussions were designed to bring about such a resolution.
- [78] The primary judge found that the October 2001 Agreement was "to give effect to the severing of the contractual arrangements between the parties to this litigation." That being the case, it was also obvious that the shares held by the Stephens' interests in Shaykar would need to be transferred and that further consideration would need to be given for indemnities against past and future liabilities incurred and to be incurred in respect of the Clontarf and Morayfield stores.
- [79] Against this background, Mr Stephens' diary note of 10 October 2001 is a very slender peg on which to hang an agreement. Reference to the diary note shows that the discussions had a broader scope than the mere disposition of the Clontarf store. The meeting was said to be merely "over prices for Morayfield and Clontarf stores." Counsel for the appellants submits that this is evidence that there was no Morayfield Management Agreement. That submission would have had more force were it not for the fact that the evidence discussed earlier plainly establishes the existence of such an agreement. In the light of that evidence, the more obvious explanation for bringing the Morayfield store into the discussion is that it was relevant to look at its price in conjunction with the price of the Clontarf store in considering the appropriate consideration for the Clontarf store in the context of severing the overall contractual relationships between the Stephens' interests and the other co-venturers.

- [80] On the face of the diary note, all that was agreed upon was that \$100,000 be the price for each store and that the parties would go to a mediation which, hopefully, would "sort out the details". What had to be sorted out was rather more than details.
- [81] There are other reasons why the finding of the October 2001 Agreement cannot stand. Whether Mr Alborn had authority to bind Mr Brendan Alborn and Ms McLintock in respect of any discussions and negotiations in 2001 is far from clear. Mr Alborn's authority in respect of the Morayfield Management Agreement derives strong support from the contemporaneous correspondence. That is not the case with the Clontarf Management Agreement.
- [82] The October 2001 Agreement, as found by the primary judge, differed markedly from the diary note which was thought by the primary judge to evidence it. The diary note contemplated a sale price for each business of \$100,000. It made no mention of any ability to take into account in satisfaction of the purchase price any liabilities in respect of the businesses assumed by the respondents. As counsel for the appellants submitted, in the agreement found by the primary judge the extent of the liabilities became highly significant because, if they exceeded \$200,000, the respondents would have had no obligation to Shaykar to make any payment.
- [83] The diary note made no mention of any retrospective operation in respect of the Clontarf store and nor did it contemplate that the amount of the Stephens' \$40,000 loan to Shaykar would be treated as part payment of the \$100,000 purchase price for Morayfield.
- [84] For the above reasons it is my respectful opinion that the primary judge erred in finding the October 2001 Agreement and in not finding that the co-venturers had not arrived at any binding agreement for the disposition by Shaykar of the Clontarf store, the related business or businesses or of any interest therein.
- [85] At first instance, the respondents at no time alleged or argued for the October 2001 Agreement. There is substance in the submission by counsel for the appellants that if such an unpleaded agreement was to be found, the parties should have been afforded the opportunity to make submissions on whether there should be such a finding and on the consequences of any such finding. However, in view of my conclusion that the primary judge erred in finding the October 2001 Agreement, it is unnecessary to pursue the appellants' natural justice argument.

The appropriate relief

- [86] Counsel for the appellants submitted that if this Court were to find that there was no October 2001 Agreement and no Clontarf Management Agreement, as alleged by the respondents, there should be a declaration that Shaykar was the beneficial owner of the Clontarf store and the franchise in respect of it and that an account should be ordered of what was due from AS&L, Mr Stephens and Mrs Stephens to the appellants. Counsel for the respondents argued that such a course was not feasible and that the matter should be remitted to the primary judge or to the trial division in order to determine pleaded matters not resolved by the primary judge. This submission placed particular emphasis on the fact that, because of her findings, the primary judge had dismissed a counter-claim rather than deciding it on its merits.
- [87] I have concluded that it is neither open to this Court nor desirable to make the orders requested by counsel for the appellants.

- [88] Because of her finding that Shaykar has disposed of its beneficial interests in the Morayfield and Clontarf franchises and businesses, her Honour found it unnecessary to consider the merits of the counter-claim and ordered that it be dismissed. In the counter-claim the respondents alleged that:
- (a) The appellants compromised certain Supreme Court proceedings and failed to account for the "benefit of the proceeds of the compromise for the benefit of Shaykar";
 - (b) Mr Alborn caused shares to be issued in Shaykar for the sole purpose of funding this proceeding; and
 - (c) The share issue was oppressive to, unfairly prejudicial to, or unfairly discriminatory against the first and second respondents within the meaning of s 232 of the *Corporations Act* 2001 (Cth).
- [89] There was also an unjust enrichment claim but that claim in respect of the Clontarf store depended on a finding in favour of the Clontarf Management Agreement and had there had been such a finding there would have been no point in advancing the unjust enrichment claim: the respondents would not have suffered any alleged loss or prejudice.
- [90] Accordingly, the only relief sought in the counter-claim which continues to have relevance for the present purposes is the claim for an account of the proceeds of the settlement of other Supreme Court proceedings and the claim for an order that Shaykar be wound up: the relevance being that the respondents may have claims which give rise to a set-off.
- [91] Counsel for the appellants submitted that if the respondents wished to raise the counter-claim or rely on it in any way they should have appealed against the order dismissing it or filed and served a notice of contention. But there was no point in the respondents appealing against an order which was not adverse to their interests until other orders in their interests were set aside. And it was inappropriate for the respondents to file and serve a notice of contention. A notice of contention is required to be filed and served by r 757 of the *Uniform Civil Procedure Rules* 1999 (Qld) where "... a respondent intends to contend a decision should be affirmed on a ground other than a ground relied on by the court that made the decision ...".
- [92] The respondents' outline of submissions should have contained submissions on the course to be taken in respect of the counter-claim in the event that the respondents were not wholly successful on the appeal. That would have put the appellants on notice. Counsel for the appellants, however, did not suggest that he was unable to deal with the matter on short notice.
- [93] Counsel for the respondents also submitted that there were many other matters raised in the defence and counter-claim which were not resolved because of the primary judge's findings. These matters, he submitted, needed to be referred to the primary judge for determination. The matters identified were: the terms on which the Clontarf store was taken over by the respondents or the relevant respondent; the fiduciary and other duties owed by the respondents or some of them (statement of claim paragraphs 22, 23, 24); whether the respondents or some of them engaged in the unlawful conduct as alleged and if so, how and when (statement of claim

paragraphs 28 and 29); whether the respondents or some of them breached fiduciary and other duties in the manner alleged in paragraph 30 of the statement of claim and the question of AS&L's liability (statement of claim paragraph 31).

- [94] The first of these matters has been disposed of by the finding that there was no agreement for the assignment of the Clontarf store and associated franchises and businesses to the respondents or any of them. I suspect that most of the other matters raised will not prove to be issues having regard to the relief which counsel for the appellants informed the Court that the appellants requested in the event that the Court found for the Morayfield Management Agreement but against the Clontarf Management Agreement, namely a declaration that Shaykar has been the beneficial owner of the Clontarf business since 14 August 2000 and an order that the respondents account for the profits received by them in conducting such business.
- [95] On the above findings the appellants would appear to be entitled to a declaration and order along the lines of that requested. But in my view it is desirable that before any such declaration and order is made, the parties be required to: make submissions on the form of the orders; precisely state the factual findings which have not been made and which they contend are relevant to the content of the proposed orders and to the taking of accounts and identify the evidence relied on to support each such finding.
- [96] Matters which occur to me as being in need of addressing in respect of the taking of accounts are the contractual entitlement of Mr and Mrs Stephens and/or AS&L to consultancy fees, their entitlement (if any) to just allowances for their work and the entitlement, if any, of the parties to interest (if any) on their respective loans.
- [97] My tentative conclusion as to the appropriate orders for costs is that the respondents should pay the appellants' costs of the appeal but that the respondents pay one-third of the appellants' costs of the trial. That is because each side appears to have had a roughly equal measure of success, apart from the success of the appellants in relation to the underlying contractual relationship before the further agreements in respect of the Clontarf and Morayfield stores.
- [98] A complicating factor is the costs orders made by the primary judge on 20 November 2009 which were not appealed against and which were not formally before this Court on the appeal. It is convenient that they be dealt with by the orders made on the appeal but, plainly, the parties should have the opportunity of making submissions on the costs of the trial as well as the appeal.
- [99] Finally I mention that it seems to be appropriate, consistently with the primary judge's orders of 20 November 2009, to order that the respondents pay the appellants' costs of the trial to the extent that they were increased by the seeking and obtaining of supplementary disclosure by and from the appellants. No submission was made which casts doubt on the appropriateness of that order.
- [100] Accordingly, I would order that:
- (a) The appeal be allowed;
 - (b) The orders of the primary judge made on 29 July 2009 be set aside;
 - (c) On or before 1 February 2010 the appellants and the respondents file and serve on the others of them a document which states the factual findings which have not been made which it is contended should be made as

relevant to the order for account and related directions and which identifies precisely the evidence relied on to support each such finding;

- (d) The proceeding, including the counter-claim, be remitted to the primary judge for hearing and determination in accordance with these reasons; and
- (e) The parties provide written submissions on costs within 28 days of today's date.

[101] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Muir JA, and with the orders he proposes. The parties should, as his Honour proposes, make further submissions on costs.