SUPREME COURT OF QUEENSLAND

CITATION:	*Michael Griffin and Raj Khatri as Liquidators of Norman Nominees Pty Ltd (In Liquidation) ACN 106 793 980 and Norman Nominees Pty Ltd (In Liquidation) ACN 106 793 980 v Hot Dev Pty Ltd ACN 103 330 918 and Ors* [2014] QSC 255
PARTIES:	**Michael Griffin and Raj Khatri as Liquidators of Norman Nominees Pty Ltd (In Liquidation) ACN 106 793 980** **(First Plaintiff)** **AND** **Norman Nominees Pty Ltd (In Liquidation) CN 106 793 980** **(Second Plaintiff)** **AND** **Hot Dev Pty Ltd ACN 103 330 918** **(Second Defendant)** **AND** **John Joseph Geaney** **(Fourth Defendant)** **AND** **Lake Morpeth Pty Ltd ACN 057 058 036** **(Fifth Defendant)**
FILE NO/S:	BS10148/2009
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	14 April – 2 May 2014 **Supplementary submissions received** Plaintiff: 23 June 2014; 15 September 2014 Fourth and Fifth Respondent: 16 June 2014; 13 October 2014

JUDGE: Byrne SJA

ORDERS:

CATCHWORDS: CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – OF GOOD FAITH AND PROPER PURPOSE – where a deed of acknowledgement was signed by the director of the first company committing to paying the debts of a second company – where the director is also director of the second company – where the debt was to be paid out of the proceeds of sale of the first company's property – where it is alleged that the first company had made an implied request of the lender that they lend money to the second company – where no such request was made – where the first company had no interest in the second company's debts – whether the director contravened s 181 and s 182 by committing the first company to pay the debts of the second company in circumstances where the first company had no interest in the repayment of the second company's debts – whether the director acted in bad faith

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – OF GOOD FAITH AND PROPER PURPOSE – where the fourth defendant invoiced the second plaintiff for work undertaken - where the second plaintiff would not be liable to pay the invoices until profits were generated from the sale of particular allotments of land – where the contingency never eventuated – where money was paid by the second plaintiff to the fifth defendant at the direction of the fourth defendant anyway - whether the fourth defendant acted in bad faith by directing the second plaintiff to pay money to the fifth defendant

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – OF CARE SKILL AND DILIGENCE – where the fourth defendant directed the second plaintiff to sell allotments of land without obtaining a registered valuation – where the fourth defendant was in the business of buying and selling land for the purpose of subdivision – whether the fourth defendant breached his duties of care a diligence – whether the fourth defendant failed to exercise independent judgment

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND

	RELATED STATUTORY DUTIES – OF GOOD FAITH AND PROPER PURPOSE – where the fourth defendant's knowledge is able to be imputed to the fifth defendant – where the fifth defendant therefore knew of the facts associated with the fourth defendant's breach of directors duties – where the fifth defendant was "knowingly concerned in, or a party to" the fourth defendant's contraventions - whether the plaintiff is also liable to compensate the fifth defendant – whether the plaintiff's damage resulted from the fifth defendant's contravention
	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – DEFENCES TO BREACH OF DUTY – where the fourth defendant argues he is relieved from liability – where the fourth defendant argues he acted honestly in breaching his fiduciary duties – whether the fourth defendant acted honestly in breaching his fiduciary duties
	Corporations Act 2001 (Cth), s 79, s 180, s 181, s182, s 1317H, s 1317S
	Trade Practices Act 1974 (Cth), s 82
	ASIC v Maxwell (2006) 59 ACSR 373, cited
	Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 71 ALR 615, cited
	Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors [2011] QCA 252, cited
COUNSEL:	P A Looney QC, with V G Brennan, for plaintiffs
	I A Erskine, with G W Dietz, for the fourth and fifth defendants
SOLICITORS:	ClarkeKann Lawyers on behalf of the plaintiffs
	Tucker and Cowan for the fourth and fifth defendants

Acquisition at Rockhampton

[1] For more than 30 years, John Geaney has been a property developer, mostly developing vacant land for sale as residential allotments.

[2] Typically, each of those ventures was conducted by a company Mr Geaney acquired for the purpose.

[3] With Mr Geaney as sole director and shareholder, Norman Nominees Pty Ltd ("Norman") was incorporated on 24 October 2003.

[4] That day, Norman contracted to buy vacant land at Norman Road, North Rockhampton ("the Rockhampton land") for a price of $2.95M.

[5] The contract stipulated for the deposit to be paid in two instalments: $1,000 on the day the contract was signed, with a further $146,500 on 30 November 2003.[1]

[6] Norman completed the purchase on 31 May 2004, using funds borrowed from the Bank of Queensland.

Rockhampton land development

[7] Norman had no working capital. The expenses incurred in holding and developing the Rockhampton land for eventual sale as subdivided residential parcels were met by others.

[8] In the mid-1990s, Darryl Fennell was the commercial manager of a suburban branch of a bank. There he came to know Mr Geaney as a customer. Over time, the two men became friends.[2] After Mr Fennell left the bank, he and Mr Geaney became involved in property developments together. Mr Fennell brought his experience in finance to their business relationships.

[9] In October 2004, Norman granted Citimark Properties Pty Ltd ("Citimark") an option to purchase the Rockhampton land for $2.8M.

Park Ridge

[10] By November 2004, Mr Geaney was interested in acquiring three allotments at Park Ridge: Lots 4, 5 and 11. Consistently with his practice of using a different company for a new development, for the Park Ridge land he envisaged using an entity to be incorporated in New Zealand.

[11] Mr Geaney needed money to buy the three lots. He sought to persuade John Harris Securities Pty Ltd ("JHS"), a money lender controlled by John Harris, to join in the Park Ridge acquisitions, proposing that JHS take a 40% stake in the New Zealand corporation as well as lending the funds needed to pay the price.

[12] Mr Harris was interested in buying Lots 4, 5 and 11 and holding them for sale. He was not, however, attracted to the idea of using an overseas corporation to conduct the venture. Nor was he inclined to take a minority stake in the corporate vehicle that acquired the land.

---

1 Mr Geaney testified that Lake Morpeth Pty Ltd paid these deposit instalments. But there is no record tending to support this assertion; and the financial accounts of that company are inconsistent with it.

2 They ceased to be friends by 2010 at the latest.

[13] On 16 November 2004, Whitestar Holdings Pty Ltd ("Whitestar") was incorporated in New Zealand with Alan Lowe as its sole director and shareholder.

[14] The next day, Zervos Pty Ltd ("Zervos") was incorporated. On that day, Zervos contracted to buy Lot 5.

[15] About a week later, Whitestar and JHS purchased Lots 4 and 11, taking as tenants-in-common in the proportion 60:40. Mr Geaney had signed the contracts as "buyer".

[16] In late November 2004, Mr Geaney and Mr Harris became directors of Zervos.

[17] JHS entered into a loan agreement with Zervos to provide the $940,000 that Zervos needed to complete its purchase of Lot 5.

[18] Repayment of the borrowing was guaranteed by Mr Geaney, his wife and Lake Morpeth Pty Ltd ("Morpeth").

[19] Morpeth is the trustee of the Geaney Family Discretionary Trust.

[20] Resale at a substantial profit to result from a rezoning of the three allotments was what Mr Geaney and Mr Harris had in mind when the Park Ridge parcels were acquired. Mr Geaney thought that having Lot 5 acquired by a different entity from the purchaser of Lots 4 and 11 would achieve a higher price.

[21] On 6 December 2004, Morpeth and JHS became equal shareholders in Zervos. The next day, Zervos was registered as the proprietor of Lot 5.

[22] By mid-January 2005, Mr Geaney had decided to substitute Norman for Whitestar as the purchaser of the $3/5^{th}$ interests in Lots 4 and 11. Later that month, with the consent of the vendor and JHS, new contracts were concluded making that substitution.

[23] Soon afterwards, Norman completed the purchase using $1.4M borrowed from JHS.

Finance

[24] Mr Fennell and Mr Geaney divided their labour in contributing to Norman's Rockhampton land development. Mr Fennell took charge of financial and legal aspects. Mr Geaney worked with local authorities, consultants and in other ways to progress the development.

[25] Mr Fennell conducted his commercial and residential property developments through corporations. His administration company, JAD Projects Pty Ltd ("JAD")[3], funded some of these ventures.

[26] Mr Fennell's responsibilities included arranging payment of:

- interest due to JHS on the Norman Rockhampton line of credit; and
- other expenses, such as rates and fees charged by consultants.

[27] By early 2005, expense continued to be incurred on the Rockhampton development. Norman still lacked working capital. So the expenses were paid by JAD or by other Fennell-controlled corporations.

[28] Mr Geaney opened a bank account in Norman's name in late February 2005. The first transaction on that account was recorded two months later – a deposit of $10,000.

[29] With Mr Fennell's support, JHS was persuaded to refinance the Rockhampton land development.

[30] JHS agreed to lend $3.6M, which was more than enough to discharge Norman's indebtedness to the Bank of Queensland. The loan was to be secured by a mortgage granted by Norman. Repayment was guaranteed by seven companies and individuals, including Morpeth, Mr Geaney, his wife, and Mr Fennell. Another of Mr Fennell's companies, Rosedayl Pty Ltd ("Rosedayl"), became a borrower.[4]

[31] One of Norman's few records was created in connection with the JHS refinancing. Mr Warat, a lawyer[5], created minutes of a shareholder meeting on 29 March 2005 when Mr Geaney, the sole shareholder:

- resolved that Norman agree to the JHS loan; and
- authorised Mr Warat to execute the loan agreement and related documents on Norman's behalf.

[32] On 30 March 2005, when JHS paid out Norman's indebtedness to the Bank of Queensland, Mr Warat, as Norman's attorney, mortgaged the Rockhampton land to JHS and committed Norman to the loan agreement for the $3.6M borrowing.

Caveat and other problems

---

3 JAD stands for John and Darrell.

4 Rosedayl was not to get any money. It became a borrower because of a concern about the enforceability of any guarantee by Rosedayl as no interest of Rosedayl's would be served by its guarantee of Norman's obligations.

5 On 1 August 2005, Mr Warat went to work for Mr Fennell and his companies.

[33] Citimark's option by buy the Rockhampton land had been assigned to Carlyle Villages Pty Ltd ("Carlyle").

[34] In late July 2005, Carlyle exercised the option and lodged a caveat to protect its interests.

[35] Two days after the caveat was lodged, Mr Geaney and Mr Fennell met with David Jenkins, a litigation partner in a firm of solicitors, to discuss Carlyle's exercise of the option. Mr Geaney and Mr Fennell wanted advice on how Norman might resist its enforcement. Strategies were discussed.

[36] In early August, Carlyle commenced proceedings seeking specific performance of Norman's obligation to sell the Rockhampton land.

[37] The Rockhampton development made slow progress.

[38] Part of the Rockhampton land was contaminated. The property could not quickly be subdivided for sale as residential allotments. Outgoings such as rates, fees for consulting engineers and surveyors, and interest on the JHS loan had to be paid. Mr Fennell's companies had met such expenses to that stage. But his enthusiasm for the project was waning.

[39] Carlyle's caveat was impeding the profitable exploitation of the land. For one thing, it adversely affected Mr Fennell's ability to refinance the project.

[40] Mr Fennell[6] and Mr Geaney explored ways to get the caveat removed.

[41] On 21 February 2006, Mr Fennell and Mr Geaney met with Mr Jenkins to discuss the approach to be taken at a meeting that day with Carlyle's representatives.

[42] Soon after that meeting, Mr Fennell told Peter Hanley, a director of JHS, that he would not be able to pay interest on Norman's Rockhampton loan beyond the end of the following month.

[43] Mr Jenkins considered that any application by Norman to remove the caveat would fail. Instead, he worked on the "idea of procuring" JHS to exercise its power of sale "as a way of getting around the caveat."[7]

[44] JHS wrote to Norman in early March asserting that:

- the $3.6M fell due for repayment on 30 April 2006; and

---

6 Mr Jenkins knew that Mr Fennell was not an officer or shareholder of Norman. Mr Geaney had, however, authorised him to take instructions from Mr Fennell about Norman's affairs.

7 As he wrote to Mr Fennell in late February.

- non-payment would constitute a default that could result in the exercise by JHS of its power of sale.

[45] Mr Jenkins wrote to Carlyle's solicitors on 27 March mentioning that JHS might sell "through" the Carlyle caveat, describing that as "presumably an outcome" that Carlyle "would be anxious to avoid".

[46] Negotiations between Mr Jenkins and Carlyle's solicitors continued.

[47] Despite the contamination, Mr Fennell and Mr Geaney believed that the Rockhampton land was worth much more than the price Carlyle would pay were the option enforced by specific performance. And Mr Jenkins had told them that Norman's prospects in the litigation were poor. Against that background, removing the caveat became a commercial imperative.

Strategy

[48] On 5 April 2006, Mr Jenkins and Mr Fennell discussed a strategy to deal with the Carlyle litigation. Mr Jenkins's diary note of this conversation refers to "breaking off discussions" with Carlyle's solicitors and allowing Norman to default, provoking a mortgagee's sale by JHS. That would enable Mr Fennell's "company to buy" the land at auction, leaving "Carlyle with a damages claim only". And, the note records, "by the time trial comes on, sale proceeds will be gone".

[49] That night, Mr Jenkins emailed Mr Fennell. He mentioned that allowing JHS to enforce its security exposed a risk that Carlyle might buy the land at a price higher than Mr Fennell was willing to pay, adding:

> "…if it is necessary to pay a higher price, any surplus over the John Harris debt goes straight into Norman Nominees. Carlyle will have its damages claim against Norman even if the land goes, but by the time they get a judgment the money will be long gone."

[50] Mr Jenkins also mentioned that Carlyle might seek a freezing order to "attach" surplus sale proceeds; but he did not regard that possibility as a "real risk".

[51] On 6 April, Mr Jenkins took senior counsel's advice about strategy. By this time, Mr Fennell had told Mr Jenkins that the Rockhampton land had recently been valued at $8M, and that the JHS debt was $3.8M. If the sale price fetched at auction matched the valuation, there would be a $4.2M surplus for Norman.

[52] That happy prospect was blighted by the expectation that Carlyle would win the litigation and secure a damages award that would exceed Norman's surplus.

[53] According to Mr Jenkins's diary note, he asked senior counsel whether the anticipated surplus "could be paid away by Norman…beyond the reach of Carlyle". The two lawyers discussed obstacles to such a scheme as s.228 of the *Property Law Act*, breach of director's duty in paying away company funds without regard to the interest of creditors, and that distributing the surplus as dividend may be seen as an uncommercial transaction under the *Corporations Act*.

[54] On 10 April 2006, Mr Jenkins wrote a comprehensive letter of advice to both Mr Fennell and Mr Geaney recording that:

- Norman owed JHS about $4,179,262, with the debt secured by a mortgage to JHS over the Rockhampton land;
- Carlyle's caveat was in place and its litigation on foot;
- The price payable by Carlyle under the option was $3.6M, "and the land has recently been valued at approximately" $8M;
- Mr Fennell contemplated that a company associated with him would bid at the mortgagee's auction and buy at market value;
- JHS would exercise its power of sale and, if need be, litigate to secure removal of the caveat;
- The "balance proceeds" after discharging Norman's liability under the JHS loan agreement "will be paid to Norman" but Carlyle "may enforce any judgment against any assets…vested in Norman at the end of the litigation";
- If Norman "pays away the Surplus, the issue arises as to whether such payments" could be "unwound" if Carlyle "winds up Norman and has a liquidator appointed to examine those payments";
- The damages would be an amount equal to the difference between current market value of the land ($8M) and the price which Carlyle would have had to pay if the option contract had proceeded ($3.6M): that is, $4.4M;
- Carlyle would seek to enforce a judgment in that amount against the surplus sale proceeds in the hands of Norman.

[55] Under the heading "What can or should Norman Nominees do with the surplus sale proceeds", Mr Jenkins wrote:

> "We have made the point several times to you that we see significant risk for Norman Nominees in proceeding with the Option Proceedings. We do not think that its prospects of success in defending Carlyle Villages' claim are very good. If it lost those proceedings, it would have to pay damages to Carlyle Villages. If it had no assets or money, then Carlyle Villages would wind Norman Nominees up, the company would be deregistered and there would be an end to the matter. Carlyle Villages' judgment would be unsatisfied.

> On the other hand, if the liquidator appointed to Norman Nominees became aware of transactions by which the surplus sale proceeds were disbursed by Norman Nominees, then it is likely that the liquidator would seek to investigate these transactions to see if they could be undone (that is, the money clawed back from the party receiving it).
>
> The law in relation to uncommercial transactions, voidable preferences and alienations of property for the purpose of frustrating creditors is complex and we need further information from you before we could express a view.
>
> For example, section 228 of the *Property Law Act* 1974 (Qld) provides that an alienation of property (ie payment of money) made with the intent to defraud creditors, is voidable. Payments to creditors themselves which are "uncommercial" or which provide one or more creditors with priority or preference over other creditors can in some circumstances be clawed back by a liquidator. The relevant issue is the intent with which the payment was made.
>
> For example, if the surplus sale proceeds in the hands of Norman Nominees were simply paid to the shareholders as a dividend, shareholders are creditors of the company and a liquidator would make enquiries into what motivated the dividend. Acting in good faith, a company would presumably not declare a dividend in circumstances where it knew that the payment would leave it with insufficient funds to pay creditors. It would be difficult to justify the payment of a dividend in those circumstances. The shareholders would then stand at risk of having the money clawed back later by a liquidator.
>
> The law of insolvency is a complex area and I would like Paul Evans (my insolvency partner) to look at this issue. There may be a way of structuring the payment of the surplus sale proceeds out of Norman Nominees in such a way that it would be "liquidator proof". We will need to discuss this with you in more detail. At this stage though, this is, in our view, the most significant "downside" to the entire proposal."

[56] Mr Jenkins was aware of a potential conflict of Mr Fennell's interest and Norman's. His letter concluded on this note:

> "To date in this matter, we have acted on the basis that the interests of Norman Nominees and you, coincide perfectly. We know that you are not a director or principal of Norman Nominees. Therefore, strictly speaking, it is conceivable that at some point, the interests of Norman Nominees and you will diverge. In that case, we would not be able to advise both Norman Nominees and you. Norman Nominees' interest is in a sale of the Land at the maximum price, so that it has sufficient funds to clear the John Harris debt and have the

maximum possible surplus sale proceeds in its hands. Its interests would be served by securing those funds and preventing them from being available to satisfy any judgment which Carlyle Villages obtained against it.

Presumably, your interests are served by securing the Land for a Fennell Entity and you have no particular interest in maximising the surplus sale proceeds in the hands of Norman Nominees. You have no liability for (and therefore no interest in) the size of any damages award against Norman Nominees and you have no interest in whether Norman Nominees' assets are at risk in the Option Proceedings.

For these reasons, we will need to provide a copy of this advice to John Geaney and we will need to explain carefully to him the risks and benefits in the various courses available in dealing with this matter. We will need to advise Norman Nominees separately about strategies that may be available to it in securing any surplus sale proceeds against any judgment which Carlyle Villages may obtain. There are a variety of course available in this respect. It must be remembered that any action on behalf of Carlyle Villages (assuming that it obtain a judgment against Norman Nominees in the Option Proceedings) will be conducted by a liquidator of Norman Nominees. If, at the time of its liquidation, Norman Nominees owns no assets (because the surplus sale proceeds have been dissipated or paid away), the liquidator will need to be funded in any recovery action. The liquidator will look to the creditors of Norman Nominees (that is, Carlyle Villages) to fund any recovery action. Therefore, Carlyle Villages will have incurred significant cost in obtaining the judgment and then it will have to make a decision about whether to incur further significant cost in funding litigation by the liquidator against the recipient of the surplus sale proceeds from Norman Nominees (necessary in order to enable the liquidator to recover any wrongful payments by Norman Nominees).

Liquidators generally take a very pragmatic view in relation to recovery proceedings and creditors are typically reluctant to fund such action by a liquidator. Therefore, if Norman Nominees defended Carlyle Villages' claim, lost and creditors were faced with funding the liquidator in further recovery action, there is some prospect that a compromise could be reached with the creditors (through the liquidator).

If payments of the surplus sale proceeds were made by Norman Nominees (say, in an amount of $4.4 Million), it may be that a liquidator could be persuaded to accept a smaller amount, rather than litigate to recover the full $4.4 Million. The extent to which a liquidator would be prepared to do so would depend on how difficult recovery action by the liquidator would be. That question depends on how difficult Norman Nominees can make that litigation and that in turn depends on what structure or arrangements Norman

> Nominees can put in place to put the surplus sale proceeds beyond the reach of a liquidator. It is in relation to these issues that I would like input from Paul Evans.
>
> Conclusion
>
> These are the issues as we see them. Having regard to your interests only (that is, the interests of Daryl Fennell), the commercial objective over riding all else is the Land. On the other hand, the interest of Norman Nominees is in securing the maximum possible price for the Land and putting the surplus sale proceeds beyond the reach of Carlyle Nominees in the event that it is successful in the Option Proceedings.
>
> We need to talk these issues through with you very carefully and in particular, we need to carefully think about what arrangements can be put in place to secure the surplus sale proceeds.
>
> Once you have had the opportunity to read this advice and consider it properly, we would like to meet with you to discuss the matter further."

[57] As Mr Jenkins's letter reveals, even with the benefit of senior counsel's advice, he had not discovered a lawful way in which Norman, were it to receive the surplus sale proceeds, could put that money beyond the reach of Carlyle or a liquidator of Norman. In his letter, Mr Jenkins twice sought instructions to ask his insolvency partner for advice on that topic. No such instructions were ever forthcoming.

[58] The day after Mr Jenkins's letter was communicated to Mr Fennell and Mr Geaney, they and Mr Jenkins met with John Shand, JHS's solicitor, and Mr Hanley to discuss the exercise by JHS of its power of sale. Mr Fennell mentioned that, after a mortgagee's sale, Norman would be left with "a wad of cash in its account" but that the pace of Carlyle's litigation left "plenty of time for Norman…to use the surplus…for legitimate purposes."[8]

[59] At that meeting, Mr Jenkins told Mr Geaney and Mr Fennell that he did not think that Norman could resist Carlyle's damages claim.

[60] On 19 April, Mr Jenkins wrote to Mr Fennell and Mr Geaney confirming the outcome of the 11 April meeting. His letter mentioned a "possible timetable" that included default by Norman on 30 April, followed by a mortgagee's auction of the Rockhampton land in mid-August.

[61] That same day, Norman granted a charge in favour of Hot Dev Pty Ltd ("Hot Dev"). Mr Geaney executed the charge. Hot Dev, another of Mr Fennell's companies, had met some expenses of the Rockhampton project.

---

[8] As the diary note of Mr Jenkins records things.

[62] On 28 April, JHS, Norman and Rosedayl entered into a loan variation deed. The deed recited that:

- the 31 March 2005 loan agreement had stipulated for repayment on 30 March 2007;
- the parties had agreed to bring the repayment date forward to 30 April 2006.

[63] An operative provision of the deed substituted 30 April as the repayment date.

[64] As all involved expected, the JHS loan was not repaid on 30 April. That default set the stage for JHS to sell the Rockhampton land.

Default aftermath

[65] On 5 May, Mr Fennell told Mr Jenkins that notice of exercise of the power of sale would issue three days later. Mr Jenkins mentioned that Carlyle's claim would necessarily become one for damages in the event that JHS sold. His diary note concludes:

> "Must get assets out of Norman…legitimately."

[66] On 9 May, Mr Jenkins wrote again to Mr Fennell. His letter enclosed a draft defence in response to Carlyle's amended statement of claim. In the context of discussing means by which the proceedings could be delayed, "We will take every point we can" concerning Carlyle's pleading, Mr Jenkins wrote. He identified "plenty of scope" to argue about disclosure, adding "again, we will take every point we can". His letter concluded on this note:

> "If arrangements can be made to legitimately move funds out of Norman…after the auction occurs (assuming there is a surplus…), every effort should be made to do this."

[67] Two days later, Mr Fennell told Mr Jenkins that he needed to delay the Carlyle litigation by three months.

[68] At this stage, like Mr Fennell, Mr Jenkins was approaching the surplus dilemma by thinking about how Norman might rid itself of the surplus once it had received the money. Eventually, however, Mr Fennell and Mr Geaney solved the problem in another way: by ensuring that Norman never got any of the surplus.

[69] JHS gave notice of exercise of power of sale on 15 May.

[70] Mr Fennell emailed Mr Jenkins on 24 May. This communication, which was copied to Mr Geaney, mentioned:

- a strategy to persuade Carlyle not to bid more than $4M at the JHS sale - to enhance Mr Fennell's prospects of acquiring the Rockhampton land for one of his entities;

- his concern that Carlyle should not "win a claim to preserve funds" payable to Norman as the surplus on sale;

- the Park Ridge land, saying that it was a "mortgage arrangement…also in default, and Norman" is "selling out of this transaction".

[71] On 24 May, Carlyle's solicitors wrote to Mr Jenkins saying that a damages claim would be pursued in the event of a sale by JHS. The letter also expressed concern that Mr Fennell or Mr Geaney intended to enter into arrangements designed to defeat Carlyle's interests.

[72] Five days later, in a letter apparently intended to diminish Carlyle's chances of securing a freezing order over the surplus, Mr Jenkins wrote to Mr Shand:

- arguing that there was no evidence to support an assertion by Carlyle that Norman would disburse the surplus funds to place them beyond Carlyle's reach; and

- asking that Mr Shand confirm that JHS would account to Norman "for all of the surplus sale proceeds".

[73] Mr Shand's reply confirmed that JHS would pay the surplus to Norman.

Other Initiatives

[74] With Norman looking to dispose of the Rockhampton land as well as its interests at Park Ridge, Mr Geaney pursued other corporate ventures.

[75] On 1 June, Forward Pass Pty Ltd, another of Mr Geaney's companies, contracted to buy the Stag Tavern at Babinda. The price was $1.3M. Westpac was to provide finance to the extent of $900,000. Mr Geaney had to find the rest of the money.

[76] Also on 1 June, Mr Geaney executed a Deed of Charge by Norman to secure money asserted to be owing to Morpeth. He did that to secure for his family trust the kind of advantage that Fennell had obtained for Hot Dev when, six weeks earlier, Norman had charged its assets in favour of that corporation.

[77] In early July, Mr Shand informed Mr Jenkins that the auction was set for 1 September.

[78] An email from Mr Jenkins on 26 July informed Mr Fennell that Carlyle was "very worried" that Norman would dissipate the "surplus sale proceeds" before it could get a judgment for damages.

[79] Carlyle's apprehension would prove to be well-founded.

[80] On 1 August, Mr Jenkins made a diary note of a conference with Mr Fennell which, among other things, records:

- that Mr Fennell had said that the Rockhampton land was worth up to $12.5M;
- this plan:

> "Delay litigation to enable Norman to shed sale proceeds."

[81] In August, Norman's charge in favour of Morpeth was stamped to $150,000.

Rockhampton Sale

[82] On 1 September, at auction, the Rockhampton land was sold to Quarterback Group Pty Ltd ("Quarterback"), which Mr Fennell controlled. The price was $7M (plus GST). The stipulated date for settlement was 5 December 2006.

Park Ridge

[83] By this time, Mr Harris wanted to extract JHS from all involvement with Mr Geaney. To do so meant severing the association with Lots 4, 5 and 11 at Park Ridge. Now that the Rockhampton land connection was about to be terminated, a complete parting of the ways required repayment of the Zervos loan, sale of JHS's 2/5th's interests in Lots 4 and 11, and sale of its 50% shareholding in Zervos.

[84] Mr Fennell thought the Park Ridge land valuable. He wanted Quarterback to buy JHS's shares in Zervos and for Zervos, with borrowed funds, to acquire JHS's interests in Lots 4 and 11. Westpac was approached to be the financier.

[85] On 3 October, Silas Croucher, a valuer employed by Savills, prepared his valuation of the three Park Ridge properties. He valued Lot 11 at $1.5M, Lot 4 at $1,150,000 and Lot 5 at $850,000.

[86] That valuation was made available to Westpac. It was also shown to Mr Geaney before 31 October 2006.[9]

Surplus looms

---

[9] It is not shown whether Mr Geaney saw the valuation before 18 October.

[87] By early October, almost six months had elapsed since Mr Jenkins had given Mr Fennell and Mr Geaney his pessimistic assessment of Norman's prospects of resisting Carlyle's damages claim and acknowledged that he had not found a "liquidator-proof" way of disbursing the surplus "out of Norman Nominees". Mr Jenkin's request of Mr Geaney and Mr Fennell for instructions to ask his insolvency partner whether Norman could lawfully rid itself of the surplus had gone unanswered.

[88] Then, on 4 October, in a telephone conversation, Mr Fennell confirmed to Mr Jenkins a "strategy to do nothing". Events later that month show why that strategy was adopted.

[89] Documents to facilitate JHS's extraction from involvement with Mr Geaney at Park Ridge were executed on 18 October 2006 when:

- Norman contracted to sell its interests in Lots 4 and 11 to Zervos for $1,323,918, with Mr Geaney signing for both vendor and purchaser;
- JHS contracted to sell its interests in Lots 4 and 11 to Zervos for $882,612;
- JHS contracted to sell its shareholding in Zervos to Quarterback for $1.00.

[90] Those transactions were to be completed on 31 October, which was five weeks before completion was due on Quarterback's purchase of the Rockhampton land. That interval was avoided when a consensus was reached to advance completion of the Rockhampton land sale to 31 October.

[91] In preparation for settlement, on 30 October, Mr Geaney, for Norman, invited JHS to act on Mr Warat's instructions concerning "how settlement cheques payable to Norman…should be tendered at…settlement."[10]

[92] By then, Mr Fennell and Mr Geaney intended, and Mr Warat expected, that Norman would receive nothing at settlement.

[93] In view of the anticipated, adverse outcome of the Carlyle litigation, leaving a $3M surplus in Norman lacked appeal to Mr Geaney. But his lawyers had not identified a means by which the surplus could be got out of Norman once it received the money from JHS. The solution to this vexing problem, as Mr Geaney and Mr Fennell saw things, was to see to it that Norman got nothing. So the settlements were structured to avoid the embarrassment of riches that a substantial surplus in Norman's hands would have presented.

No surplus eventuates

---

10 As Mr Warat testified.

[94] On settlement of the Rockhampton land sale, out of the purchase price[11] paid by Quarterback[12]:

- JHS retained about $4.2M to satisfy Norman's debt in connection with Rockhampton land loan;
- Norman's $1.6M liability under the Park Ridge loan agreement and mortgage was discharged;
- About $1.12M was paid to JHS to discharge Zervos's liability under its loan agreement and mortgage even though Norman was not, in any capacity, a party to either of those transactions;
- JHS received about $200,000 for legal costs and an allowance for GST;
- the remaining $57,273.92 was paid to Morpeth.[13]

[95] Norman received nothing.

[96] As part of the arrangements for settlement, JHS, Norman[14] and Mr Geaney executed a Deed of Acknowledgement.

[97] The Deed obliged Norman to pay Zervos's debt under its Park Ridge loan agreement. That meant that JHS would retain about $1.12M that would otherwise have been payable to Norman as surplus on the sale.

[98] Settlement of the Park Ridge sales also took place on 31 October.

[99] Norman had sold its 3/5^{ths} interests in Lots 4 and 11 for $1,323,918. The company's Park Ridge borrowing was repaid from the proceeds of the Rockhampton land sale. Consistently with Zervos's contractual obligations, Norman should have received more than $1M at settlement.

[100] Mr Geaney, however, had no further use for Norman after the 31 October settlements. It had no cash, no other assets, and no prospect of acquiring any.

[101] It did, however, potentially, confront:

- two large judgment debts: one for Carlyle, when its damages claim succeeded; another for tax on the profit arising on sale of the Rockhampton land;

---

11 The adjusted Rockhampton land sale price, plus GST, less a $500,000 deposit, amounted to about $7.2M.

12 With funding from JHS.

13 Mr Warat received Mr Geaney's written authority to receive, at settlement, a cheque for $57,273.92 in favour of Morpeth.

14 Mr Geaney signed for Norman.

- liability to reimburse others[15] for expenses paid or liabilities incurred on behalf of Norman at its request in connection with the Rockhampton development.

[102] On 31 October, Mr Fennell replaced Mr Harris as a director of Zervos.

[103] Before settlement, Mr Geaney and Mr Fennell had agreed upon, and set about implementing, arrangements that would ensure that Norman received nothing on the disposition of its assets.[16]

[104] As part of that scheme, Norman received nothing for its interests in the Park Ridge land.

[105] Mr Geaney and Mr Fennell had agreed that Morpeth would take $520,000 from Norman's entitlements in two tranches:

- the entire surplus on the Rockhampton sale;[17] and
- funds that Norman should have received for its Park Ridge interests.

[106] Zervos had drawn $1,864,096.31 from its Westpac finance facility. Those funds were applied to pay:

- $970,873.20[18] to buy JHS's 2/5ths interests in Lots 4 and 11;
- $160,000 to Quarterback;[19]
- $270,497.03 to Quarterback;[20]
- $462,726.08 to Morpeth.

[107] The payment to Morpeth of $462,726.08 was, as Mr Fennell testified, "directed" by Mr Geaney "on behalf of Norman…", which meant that the payment reduced Norman's entitlement to payment of the price to that extent.

[108] Deducting the Morpeth $462,726.08 left a balance of $861,191.90 payable to Norman.

[109] Consistently with the sale contract, that sum should have been paid by Zervos on 31 October.

---

15 Mr Geaney and Morpeth accept that debts owing to Hot Dev and other creditors exceed $50,000.
16 This may comfortably be inferred from their conduct.
17 Which proved to be less than $58,000.
18 The contract price, plus GST.
19 As a brokerage fee for attracting the Westpac finance.
20 Apparently to assist Quarterback to discharge its obligations in connection with its purchase.

[110] The strategy, however, was to avoid money reaching Norman. Still, Mr Fennell and Mr Geaney needed Norman's interests in the Park Ridge land to pass to Zervos.

[111] Mr Geaney achieved both those goals by having Norman convey title without requiring Zervos to pay the price.

[112] Mr Fennell characterises Zervos's $861,191.90 outstanding liability to Norman as "unsecured" "vendor finance". He and Mr Geaney agreed that Zervos would pay the $861,191.90 within six months, which eventually happened, in accordance with Mr Geaney's instructions, as Mr Fennell testified.

[113] Although the money was payable to Norman, not a cent reached Norman.

Post-settlement transactions

[114] On 15 November, the Morpeth charge was registered.

[115] In January 2007, Mr Geaney learned that Forward Pass had to find about $450,000 to complete its purchase of the Stag Tavern. More than $150,000 was likely to be required to buy stock and for other purposes related to the tavern. Mr Geaney told Mr Fennell to find the $600,000.

[116] The Zervos debt to Norman was reduced by $600,000 when Zervos, through Mr Fennell, complied with a direction of Norman, by Mr Geaney,[21] to pay that sum to the trust account of The Law Place, a firm of solicitors, in partial satisfaction of the outstanding liability in respect of the price.

[117] Zervos did not have $600,000. Mr Fennell procured another of his companies, Grosvenor Investments George and Ann Pty Ltd ("Grosvenor"), to pay the money.

[118] Under those arrangements:

- Zervos owed Grosvenor the $600,000 that Grosvenor had paid at its request;
- Norman's entitlement to the balance of the sale price was reduced to that extent.

[119] The payments to Morpeth and The Law Place left Zervos owing $261,190.90 to Norman. That liability was extinguished; but not by any payment to Norman.

[120] Mr Geaney, on behalf of Norman, requested Zervos to make payments aggregating $280,000 to himself and others, in effect, in satisfaction of Zervos's liability to

---

[21] At his public examination, Mr Geaney was asked whether he directed that the $600,000 was to be paid by Zervos to the Law Place. He agreed, adding, "the money was mine", which, being Norman's, it was not.

Norman. Zervos did not have the cash. So Mr Fennell caused other entities he controlled to attend to the payments, thereby creating a corresponding liability in Zervos to repay those corporations. Moreover, as the $280,000 expended exceeded Zervos's outstanding liability to Norman, those payments completely discharged that obligation.[22]

[121] By the end of April 2007, the last of the Fennell-controlled payments made at Mr Geaney's request that affected Zervos's liability to Norman had been made.

[122] Three weeks later, Mr Geaney sold[23] his shareholding in Norman for $1.00 and resigned as a director.

Statutory Duties

[123] Mr Geaney is alleged to have contravened these provisions of the *Corporations Act* 2001:

> **180 (1) Care and diligence – directors and other officers**
>
> A director…must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director…of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director...
>
> (2) **Business judgment rule**
>
> A director…who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's…belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
>
> **181 (1) Good faith – directors and other officers**
>
> A director or other officer of a corporation must exercise their powers and discharge their duties:

---

22 That was reflected in Zervos's financial statements created while Mr Geaney remained a director of Zervos.

23 The purchaser of the Geaney share, Mr Quince, became the sole director.

(a) in good faith in the best interests of the corporation…

182 (1) Use of position – directors, other officers and employees

A director…must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Deed of Acknowledgement

[124] The Deed, which had been prepared by Mr Shand, acting in JHS's interests, recited that:

- JHS had lent Zervos money on the security of Lot 5 at Park Ridge;
- Norman, "through" Mr Geaney, had "procured JHS to advance the money to…Zervos …";
- an "all monies advanced" clause in Norman's Rockhampton land mortgage meant that money lent at Norman's request was immediately payable because of Norman's default under that mortgage.

[125] Operative terms provided that:

- the amount JHS had lent to Zervos was "due and payable in addition to the loan made for which the Rockhampton mortgage was security";
- Mr Geaney, as Norman's sole director and shareholder, agreed that the Zervos loan and interest should "be repaid from the proceeds of sale of the Rockhampton land".

[126] It is said for Mr Geaney that the Deed acknowledged what had occurred on the basis that Norman had made an "implied" request of JHS for the Zervos loan, with the request to be implied from such circumstances as that:

- Zervos had not been incorporated when the prospect of a loan to facilitate acquisition of Lot 5 was first broached by Mr Geaney with Mr Harris; and
- acquiring Lot 5 was integral to Norman's plan to buy Lots 4 and 11 for eventual resale as a three allotment parcel.

[127] There was no such request, express or implied.

[128] The assertion in the Deed that Norman had procured the Zervos loan was false.

[129] Norman had not asked JHS to lend to Zervos, as several considerations combine to establish:

- Norman had nothing to gain from some request by it of JHS to make the Zervos loan. Norman was neither co-borrower nor surety. A request from it could not have enhanced Zervos's prospects of securing the loan or influenced its terms. In short, there was no reason for Norman to have made such a request;

- In testifying, Mr Geaney twice[24] acknowledged that Norman had not made such a request;

- The Zervos loan agreement includes a recital which identifies the parties requesting the loan: Zervos itself, and the guarantors, Mr Geaney, his wife and Morpeth: not Norman.

[130] At his public examination, Mr Geaney testified that he acted on Mr Fennell's suggestion when he executed the Deed and did not read the document before signing it. More probably than not, that is true. Mr Geaney, however, must have realised that the Deed was:

- required at settlement of the Rockhampton land sale to sustain the withholding of more than $1M that Norman ought to have received as surplus; and

- integral to his and Mr Fennell's strategy to prevent Norman from receiving the funds properly payable to it on the sale of the Rockhampton land and its Park Ridge interests.

[131] By executing the Deed, Mr Geaney committed Norman to paying Zervos's debt. Doing so served no interest or purpose of Norman's. Instead, Mr Geaney was implementing his plan to denude Norman of its assets before he disposed of the company. And the Deed gave Mr Geaney a collateral advantage: it meant that he and Morpeth would not be called upon to honour their guarantees of the Zervos loan.

[132] Norman was disadvantaged when it paid the Zervos debt. Zervos has not asked Norman to do that. So Zervos was not liable to pay Norman the $1.12M that JHS retained at settlement.[25]

[133] Moreover, Norman was deprived of funds with which to pay its creditors.[26] Mr Geaney knew that. His strategy meant that Norman would have no assets after 31 October, and no realistic prospect of acquiring any.

---

[24] In cross-examination, at T9-41 ll41-42; in re-examination, at T10-51 at ll 8-9. That evidence accords with testimony of John Harris at his public examination to the effect that any entity other than Zervos which had been involved in procuring the loan would have been included as a guarantor: Ex 57, 5-13, 5-15.

[25] Even if Norman, having paid a debt also payable by Zervos, as a co-obligor, could claim contribution, Zervos did not have the money to satisfy any such liability at the time, might well never have been in a position to do so, and, apparently has not done so. In any event, no issue is raised on the pleadings about the amount of Norman's loss in this respect.

[26] On 18 and 31 October 2006, there were creditors of Norman whose debts could never be satisfied from Norman's resources: see paras [52]-[55] of the submissions for Mr Geaney and Morpeth. Mr Geaney knew that there were accrued liabilities. And he realised that the implementation of his and Mr Fennell's strategy meant that Norman would never receive the funds with which to defray those

[134] Mr Geaney's conduct involved contraventions of the duties imposed on him by s.181 and s.182.

[135] He committed Norman to the Deed in implementation of his and Mr Fennell's strategy to deprive Norman of funds to which they knew Norman to be entitled, and did so with the object of defeating claims by creditors, present and prospective.

[136] In doing so, Mr Geaney acted:

- in bad faith, contrary to Norman's best interests;
- to gain an advantage for Zervos and himself; and
- to cause detriment to Norman.

[137] The damage that resulted from the contraventions[27] is the loss of $1,119,509.10 that JHS retained pursuant to the Deed.

[138] There should be an order that Mr Geaney pay compensation in that amount.

Morpeth's $520,000

[139] Mr Geaney and Morpeth contend, in effect, that:

- Norman engaged Morpeth to secure the services of Mr Geaney for the Rockhampton development;
- such services were provided at rates fixed by Mr Geaney;
- on Mr Geaney's calculations, by 31 October 2006, more than $600,000 was owed by Norman to Morpeth for his efforts;
- Morpeth, by Mr Geaney, took $520,000 at the 31 October 2006 settlements.

[140] Mr Geaney was not a director of Morpeth: his wife was. But Mr Geaney was "the effective director of Morpeth"[28] and controlled its operations. As sole director and shareholder of Norman, he also controlled Norman. He was the guiding mind of, and had the authority to contract for, both companies: this meant that he could, easily and informally, have bound Norman to pay Morpeth for his services.

[141] Not long before 31 October 2006, Mr Geaney and Mr Fennell discussed diverting to Morpeth $520,000 of the money Norman should have received at the settlements. Mr Geaney told Mr Fennell that he was owed money by Norman for services

---

debts, let alone meet prospective liabilities such as a Carlyle judgment for damages. See also T11-81.

27 See 1317H(1)(b) *Corporations Act*.

28 To adopt the submissions for Mr Geaney and Morpeth, at para 15.

rendered. Mr Fennell was content to accept the assurance even though, as he testified, Mr Geaney had not furnished any evidence to support the claim.

[142] Mr Geaney had contributed to the project at Rockhampton hoping to profit through sales of subdivided allotments. For Morpeth,[29] he created documents that relate to a potential claim for his efforts.

[143] In August 2003, two months before Norman was incorporated, Mr Geaney completed a "Tax Invoice/Time Sheet" form, headed with Morpeth's name. The "client" was shown as "Norman Rd". Mr Geaney wrote in by hand the hours he attributed to his work on the project, recording a total of 64 hours over identified days during the month. His efforts were charged out at a rate he wrote on the form: $220 per hour, including GST.

[144] Mr Geaney periodically completed such forms.[30] The January 2005 form included a reference to a "progressive accumulative cost" of about $317,000.

[145] In February 2005, the charge out rate changed. Instead of the $220 hourly rate, the form for that month mentioned a monthly rate of $13,200, including GST, to be applicable for that month and for the future.

[146] Nothing was being paid.

[147] Mr Fennell was responsible for arranging payment of the expenses for the project. It might, therefore, have been expected that Mr Geaney would have sent him the invoices. And Mr Geaney testified that he did deliver copies of the invoices to Mr Fennell's office. Mr Fennell, however, denies receiving any of them; and his evidence is preferable.

[148] Mr Geaney's evidence is, in many respects, unreliable. He testified with an eye to his interests rather than with an anxiety to speak the truth. Apart from my reservations about his credibility generally, there is a particular reason to reject his claim that copies of the invoices were given to Mr Fennell "intermittently as they were completed".

[149] At his public examination,[31] Mr Geaney said that he gave all relevant invoices to Mr Fennell and did not retain copies. But he kept the originals. They were found with Morpeth's accounting records,[32] which Mr Geaney had retained.

[150] Withholding the invoices was consistent with an understanding that they were not due for payment.

---

29 Norman did not create any record relating to Mr Geaney's contributions.

30 In the form for November 2003, the client was identified as "Norman Nominees P/L".

31 Mr Geaney's testimony is inconsistent with evidence he gave at his public examination in several respects.

32 They eventually reached Norman's liquidators.

[151] There is a good reason why Mr Geaney would not have submitted the invoices to Mr Fennell: he had no expectation of payment except from any profit Norman might realise on sale of subdivided allotments. And the land was sold to Quarterback before any such allotment was sold.

[152] Mr Geaney's practice with subdivisional development was to charge progressively for his efforts. He did so, he testified, on the basis that any right to payment depended upon a profit being realised after subdivision "as land sales were achieved".[33]

[153] When Mr Geaney fixed the hourly, and later monthly rates, he had decided that Morpeth's charges would not become payable unless and until the Rockhampton project yielded profit through sale of subdivided lots.

[154] That resolution accords with draft accounts of Morpeth that were created for a period during which Mr Geaney brought the invoices into existence. Had the invoices evidenced a liability in Norman to pay, the financial statements should have disclosed the billings. They did not.[34]

[155] In view of Mr Geaney's intentions, it may be taken that Norman impliedly requested Morpeth, and Morpeth agreed, to provide his services on a shared understanding that Norman would not become liable to pay before profit was generated through sales of the subdivided allotments.

[156] The contingency upon which a right to payment accrued never eventuated.

[157] On this basis,[35] nothing was due to Morpeth when, at Norman's direction, by Mr Geaney, the $520,000 was paid away.

[158] Mr Geaney realised that the critical contingency had not happened. So he knew facts that obviously meant that Morpeth had no right to Norman's $520,000 when he played a central role in directing the money to Morpeth.

[159] In all the circumstances, in causing Norman's $520,000 to be paid away to the trustee of his family trust, Mr Geaney acted:

- in bad faith, contrary to Norman's best interests;

---

33 Mrs Geaney's evidence is to much the same effect. Her husband, she said, completed the invoices expecting that "the money was to come back…eventually…through some other way", meaning, as it put in submissions for Morpeth and Mr Geaney (para 29), that "she had no expectation that they would be paid until some point in the future".

34 The invoices were available to the accountant, Ms Rodgers-Mahon, when she created the draft accounts.

35 The case for Morpeth and Mr Geaney is confined. It is not suggested, for example, that he decided to vary the understanding or else somehow created a new legal relationship in a way that would confer a right to payment before sale of a subdivided lot.

- to gain an advantage for Morpeth; and
- to cause detriment to Norman.

[160] Mr Geaney should, therefore, compensate for the $520,000 damage that he caused Norman by breach of his director's duties.

Payment to The Law Place

[161] Mr Geaney directed that $600,000 of the Zervos debt to Norman on the sale of its Park Ridge interests be paid to The Law Place. That was done to facilitate the acquisition by Forward Pass of the Stag Tavern.

[162] Mr Geaney acknowledged as much at his public examination. That concession is consistent with evidence of Mr Fennell. He testified that Mr Geaney, in effect, directed that the $600,000 be:

- paid to The Law Place; and
- treated as going in partial discharge of Zervos's liability for the vendor finance balance on its acquisition of Norman's Park Ridge interests.

[163] Those directions were complied with.

[164] As a result, Norman's entitlement to the outstanding balance was reduced by $600,000.

[165] Ultimately, there was no opposition to an order requiring Mr Geaney to compensate Norman for that $600,000 loss.[36]

Sale at undervalue

[166] The plaintiffs contend that, in causing Norman to sell its Park Ridge interests to Zervos, Mr Geaney:

- breached his director's duties; and
- thereby caused Norman detriment consisting of the difference between the real value of those interests and the sale price.

[167] The plaintiffs contend that Mr Geaney breached his s.180 statutory duties by committing Norman to the sale of Lots 4 and 11 without obtaining a registered

---

[36] That position is understandable. In causing Norman to be deprived of its right to payment of that sum by Zervos, Mr Geaney, in pursuit of his strategy, acted in bad faith, contrary to Norman's best interests; to gain an advantage for Zervos and himself, and to cause detriment to Norman.

valuer's valuation or otherwise making reasonable inquiries to ascertain the value of its interests.

[168] Norman's interests, as vendor, were opposed to those of Zervos, as purchaser.

[169] When the contract was made and completed:

- Mr Geaney was a shareholder in Morpeth;
- Morpeth held 50% of the issued capital of Zervos;
- Mr Geaney was sole shareholder and director of Norman.

[170] In those circumstances, it would have been prudent for Mr Geaney to have obtained a valuation.

[171] That, however, does not mean that the omission contravened the care and diligence duties.

[172] Mr Geaney's business expertise was in residential subdivisional projects.

[173] Lots 4, 5 and 11 at Park Ridge were destined for such development and would have been valued accordingly.

[174] Mr Geaney's own highly relevant, long experience, taken with his knowledge of the prices paid to acquire Lots 4 and 11, their characteristics and subdivisional potential, adequately equipped him to make a suitably informed assessment of the value of Norman's interests.

[175] Mr Geaney did not need a registered valuer's report to perform his s.180 duties in connection with the sale.

[176] Nor it is shown that he ought to have made some other inquiry.

[177] It is next suggested that Mr Geaney contravened the s.180 duty on the basis that he acted in accordance with Mr Fennell's directions in disposing of Norman's interests, without exercising an independent judgment that it was in Norman's interests to sell at the price fixed by the Zervos contract.

[178] In testifying, Mr Geaney was at pains to claim that financial decisions concerning Norman were made not by him but instead by Mr Fennell.

[179] The sale of the Park Ridge interests is an illustration of Mr Fennell's influence.

[180] At his public examination, Mr Geaney said that:

- Mr Fennell would have formed a view about value of Norman's interests in Lots 4 and 11;
- he imagined that Mr Fennell's impression of the value of those interests would have been influenced by the price Norman paid to acquire them;
- although he relied on Mr Fennell's view of values in committing Norman to sell, the price achieved did appear to him to be a "fair amount";
- he signed the sale contract without reading it;
- by the date for completion, he was aware that Savill's valuation was available but, unimpressed by such valuations, decided not to obtain a copy or to ascertain the values adopted in that report.

[181] In this Court, Mr Geaney testified that he was content with the price Norman obtained for its interests, having "assessed everything", when he committed Norman to the sale.

[182] As with much of his evidence, Mr Geaney's claim to have believed that the price was "fair" value needs to be scrutinised with care and approached with a measure of scepticism.

[183] For one thing, the strategy was a sufficient reason for Mr Geaney to have been indifferent to the price: it did not matter how much Zervos agreed to pay, nothing would reach Norman.

[184] Moreover, it would have been out of character for Mr Geaney to have considered Norman's interests when making decisions affecting the company. In his conception, what was Norman's was his, to deal with as he pleased.[37] And by mid-October 2006, he was expecting soon to dispose of the company.

[185] All considered, however, it is not proved that Mr Geaney simply acted on Mr Fennell's advice concerning the price.

[186] Rather, it is more likely that he did:

- reflect on the value of what Zervos was to acquire; and
- arrive at his own view about that.

[187] But even if Mr Geaney had, without independent thought, relied on Mr Fennell's opinion, that would not have involved a breach of his s.180 duty.

---

[37] Mr Geaney was the sole director and shareholder of Norman – a consideration with potential to affect the content of the statutory duties: *ASIC v Maxwell* (2006) 59 ACSR 373, [100]-[103]. But Mr Geaney also had Norman's creditors to consider.

[188] There is no suggestion that Mr Fennell was a poor choice as an adviser on the value of Norman's interests or concerning the most advantageous way of realising them. Nor did Mr Geaney have reason to doubt Mr Fennell's suitability to give him advice or the quality of the advice he received.

[189] In the circumstances, Mr Geaney would have acted with appropriate care and diligence in acting on Mr Fennell's opinion of values.

[190] The claim founded on s.180 fails.

[191] The alleged contraventions of s.181 and s.182 depend upon proof that when Mr Geaney caused Norman to make the Zervos contract he:

- was aware that Norman's interests had a market value materially in excess of $1,323,918;
- intended that Zervos would benefit from the contract to the detriment of Norman; and
- was aware that Norman was unable to pay its debts as and when they fell due.

[192] The first of those contentions is not established.

[193] Accordingly, this claim fails.

[194] The plaintiffs contend that the sale of Norman's interests at an undervalue was part of the strategy.

[195] That is improbable.

[196] No matter how much Zervos agreed to pay, Mr Geaney intended to see to it that nothing reached Norman.

[197] So the strategy did not require that Norman's interests be sold at less than market value.

[198] Other considerations matter.

[199] The price for which JHS and Norman sold Lots 4 and 11 was about 5% higher than the price paid to buy the land 20 months earlier.

[200] Even allowing for Mr Geaney's uncorroborated claim that many thousand of dollars had been spent on clearing the land, the price Norman achieved is not obviously way too low when compared to the price Norman paid to acquire its interests.

[201] Next, there is the circumstance that the prices at which JHS and Norman contracted to sell reflected their proportionate interests in Lots 4 and 11; and JHS, presumably, aimed to get the highest price it could for its interests.

[202] JHS, it is true, was keen to disassociate from Mr Geaney.

[203] That anxiety looks to have affected its bargaining position as JHS hoped for more than the $882,612 stipulated by Mr Fennell.[38]

[204] But there is no sufficient reason to conclude that:

- Mr Geaney knew that JHS was very keen to part company with him let alone that JHS's anxiety had diminished its ambitions concerning the sale price;
- JHS was willing to sell for less than 40% of the price that the lots would have fetched if sold by the one owner.

[205] As tending to show that Mr Geaney knew that the price was too little, the plaintiffs point to a decision by the local authority concerning the future use of the lots as showing that Mr Geaney believed that Norman was disposing of its interests at well below true worth.

[206] In March 2006, the local authority announced that Lots 4 and 11 were subject to an "investigation" whether to rezone the properties to residential.

[207] Mr Geaney knew this at the time.

[208] That announcement had some potential to increase the value of the land.

[209] But it is difficult to assess its dollar significance.

[210] That step had been anticipated much earlier – by Mr Geaney and Mr Harris at any rate.

[211] Their companies bought because they anticipated an eventual rezoning to permit residential subdivision.

[212] Presumably, the vendor took that prospect into account when negotiating the price in arm's length sales to JHS and Norman.

---

[38] At his public examination, Mr Hanley testified that JHS believed the market value of its interests was $920,000. JHS was willing to accept about $34,000 less as the price to be paid to sever its involvement with Mr Geaney.

[213] In those circumstances, the post-acquisition investigation status does not tend to prove that Mr Geaney realised that the price was materially below market value.

Morpeth liability

[214] Mr Geaney's knowledge of the circumstances pertaining to the $520,000 diversion to Morpeth is also Morpeth's knowledge.[39]

[215] On this basis, Morpeth received the money in circumstances where it knew the facts constituting Mr Geaney's contraventions of ss. 181 and 182.

[216] Morpeth was, therefore, "knowingly concerned in, or party to" those contraventions of Mr Geaney's statutory duties as a director of Norman, which means that Morpeth was involved in his contraventions.[40]

[217] As a "person…involved" in such contraventions, Morpeth is deemed to have contravened the s. 181 and s. 182 duties.[41]

[218] Section 1317H of the *Corporations Act* allows the Court to "order" Morpeth "to compensate" Norman for damage suffered by Norman if two conditions are satisfied:

- Morpeth contravened the s. 181(1) or s. 182(1) duties;[42] and
- Norman's "damage resulted from the contravention".[43]

[219] Norman suffered damage – the loss of $520,000 – as a result of Morpeth's conduct in receiving that money.

[220] So Morpeth looks to be liable to compensate Norman for that damage.[44]

[221] The plaintiffs, however:

- have expressly refrained from pleading[45] a case that Norman suffered damage resulting from Morpeth's "contravention";

---

39 It is not in contest that Mr Geaney was a de facto director of Morpeth. His knowledge is therefore to be imputed to Morpeth. See also para [140].

40 See s.79(c) *Corporations Act*.

41 See ss. 181(2) and 182(2).

42 See s. 1317H(1)(a).

43 See s. 1317H(1)(b).

44 s.1317H(1).

45 Indeed, a proposal to seek to amend the statement of claim to allege that Morpeth caused the damage has been abandoned. As to the need to plead causation of damage, cf *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 71 ALR 615, 621; *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors* [2011] QCA 252 [43].

- contend that Morpeth is liable if the "damage" resulted from Mr Geaney's contravention rather than Morpeth's own.

[222] Section 1317H(1)(b) conditions the liability to compensate on the damage having "resulted from the contravention".

[223] "The contravention" is a reference to the contravention mentioned in the preceding sub-paragraph.

[224] "The person" who "has contravened…", mentioned in sub-paragraph (a), must be the person referred to in the opening words of sub-section (1) as the person who may be ordered to compensate.[46]

[225] This interpretation means that Morpeth's liability depends upon making out a case that Norman's damage resulted from Morpeth's own contravention.

[226] The plaintiffs have chosen not to propound such a case.

[227] In the way in which the litigation has been conducted, therefore, the claim against Morpeth fails.

Relief from liability

[228] Mr Geaney claims to be relieved from liability on the footing that he acted honestly and ought fairly to be excused from the contraventions.[47]

[229] Mr Geaney's contravening conduct was not in Norman's interests. He knew that. And, if it matters, no one in his position could reasonably have believed otherwise.

[230] His contraventions were committed in implementation of his and Mr Fennell's strategy.

[231] Given the purpose of the strategy – in a phrase, to defeat creditors – Mr Geaney did not act honestly when breaching his statutory duties.

---

46 Contrast the different provision in s. 82(1) of the former *Trade Practices Act* 1974, which allowed a person suffering damage by contravening conduct to recover the amount of it from "that other person or against any person involved in the contravention".

47 s.1317S(2)(b) *Corporations Act*.