SUPREME COURT OF QUEENSLAND

CITATION:	*Zen Foundation One Pty Ltd & Ors v Sippy Downs Group Pty Ltd & Ors* [2010] QCA 232
PARTIES:	**SIPPY DOWNS GROUP PTY LTD** ACN 112 940 860 (first defendant/first appellant) **BARRY KEITH TAYLOR as liquidator of Sippy Downs Group Pty Ltd (ACN 112 940 860)** (second defendant/second appellant) **SYLVERTON PTY LTD** ACN 105 353 820 (third defendant/third appellant) v **ZEN FOUNDATION ONE PTY LTD** ACN 109 254 926 (first plaintiff/first respondent) **ASPIRATIONAL COMMUNITIES PTY LTD** ACN 107 759 875 (second plaintiff/second respondent) **ASTOR FUNDS PTY LTD** ACN 108 355 406 (third plaintiff/third respondent)
FILE NO/S:	Appeal No 12175 of 2009 SC No 8626 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2010
JUDGES:	McMurdo P, Fryberg and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – PRINCIPLE AND AGENT – CREATION OF RELATIONSHIP OF AGENCY – FORMATION AND PROOF OF AGENCY – IMPLICATION OF AGENCY FROM PARTICULAR CIRCUMSTANCES – land was purchased by first appellant, a joint venture vehicle incorporated by the first and second

respondents – before purchase, first and second respondents executed fixed and floating charges over assets in favour of third respondent – directors of first and second respondents held meeting on 29 March 2005 to discuss the role of the first appellant in the joint venture – nature of agreement at meeting disputed – whether the parties at meeting on 29 March resolved to appoint first appellant as agent to conduct joint venture – whether the appointment of agency agreement executed before first appellant's purchase of land – whether third appellant had notice of agency agreement

ESTOPPEL – ESTOPPEL BY DEED – IN GENERAL – whether, by entering into deeds, first and second respondent represented that first appellant entered into contracts in their own right – whether appellants suffered detriment as a result of any representation – whether first and second respondents are estopped from asserting that first appellant entered into contract for lots on their behalf

CORPORATIONS – CHARGES, DEBENTURES AND BORROWINGS – GENERALLY – PROPERTY CHARGED OR CHARGABLE – first and second respondents entered into deeds giving them put and call options over land – first and second respondents unable to settle their own purchase of land and entered into a deed of release and settlement giving third appellant fixed and floating charge over assets and undertakings of the first appellant – whether the first appellant held any interest to which charges held by the third appellant could attach

CORPORATIONS – CHARGES, DEBENTURES AND BORROWINGS – GENERALLY – PRIORITIES – in the event that first appellant acted as agent in purchasing the land, whether the third appellant's charge has priority over the third respondent's earlier charge

Corporations Act 2001 (Cth), s 262

Benjamin v Harding Corporation Pty Ltd & Ors (1995) 16 ACSR 376, cited
Cave v MacKenzie (1877) 46 LJ Ch 564, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Re Goldcorp Exchange Ltd [1995] 1 AC 74; [1995] UKPC 3, cited
Simm v Anglo-American Telegraph Co (1879) 5 QBD 118, cited
Vibex Industries Pty Ltd v Gaylor (1997) 15 ACLC 750, cited

COUNSEL: P J Davis SC, with M R Bland, for the appellants
D A Savage SC, with M J Luchich, for the respondents

SOLICITORS: Irlicht & Broberg for the appellants
Gadens Lawyers for the respondents

[1] **McMURDO P:** This case concerns who should receive the proceeds of sale of land at Sippy Downs on Queensland's Sunshine Coast, described as Lots 8 and 20. The first plaintiff, Zen Foundation One Pty Ltd (which I shall call Zen); the second plaintiff, Aspirational Communities Pty Ltd (which I shall call Aspirational);[1] and the third plaintiff, Astor Funds Pty Ltd (which I shall call Astor Funds), applied to the Trial Division of this Court for declarations and orders that the first defendant, Sippy Downs Group Pty Ltd (In Liq) (which I shall call Sippy Downs Group) entered into contracts for the sale of Lots 8 and 20, as agent for Zen and Aspirational. The second was a declaration that the funds, held in trust by the second defendant, the liquidator of Sippy Downs Group, comprising the proceeds from the sale of Lots 8 and 20, less costs incurred, were held on trust for the plaintiffs. The third was an order that the liquidator pay the plaintiffs the proceeds of the sale, together with interest and/or an order that the liquidator account to the plaintiffs for the proceeds of sale.

[2] Sippy Downs Group, the liquidator and the third defendant, Sylverton Pty Ltd (which I shall call Sylverton), resisted the declarations and orders sought by the plaintiffs and counterclaimed, alleging an entitlement to different declarations and orders. They contended that Sippy Downs Group was acting not as agent, but in its own right in the purchase of Lots 8 and 20. Alternatively, they contended that Zen and Aspirational were estopped from relying on Sippy Downs Group's agency in the purchase of Lots 8 and 20. As a further alternative, they contended that Sippy Downs Group held the proceeds of sale of Lots 8 and 20 on trust and Sylverton's interest under its charge prevailed over both Zen and Aspirational's interest and also Astor Funds' charge over Zen and Aspirational's interest.

[3] The primary judge gave declarations, essentially in terms sought by the plaintiffs; dismissed the defendants' counterclaim; ordered that the liquidator pay Astor Funds the proceeds of the sale of Lots 8 and 20 together with interest; released the plaintiffs' unconditional bank guarantee in favour of the registrar of the Supreme Court as security for costs; and ordered that the defendants pay the plaintiffs' costs of and incidental to the action, including the counterclaim.

[4] All defendants (Sippy Downs Group, the liquidator and Sylverton) have appealed from those orders. Their notice of appeal contains 32 grounds, only four of which[2] have been abandoned. Another ground[3] was not pursued in oral submissions. They contend that the appeal should be allowed, and the primary judge's order set aside. They ask this Court to instead declare that the liquidator holds the funds representing the proceeds of the sale of Lots 8 and 20 on trust for Sylverton; and to order that the liquidator pay those funds (together with accretions and after deduction of reasonably incurred costs) to Sylverton; and to also order that the plaintiffs pay the defendants' costs of and incidental to the proceeding and the appeal, including any reserved costs.

[5] In their oral and written submissions, counsel for the appellants/defendants have compressed the 28 remaining grounds of appeal into eight issues.

[6] The first is that the judge was wrong in finding that, at a meeting on 29 March 2005, the joint venturers (Zen and Aspirational) resolved to appoint an agent to conduct

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1 Formerly Golden Beach Resort Pty Ltd.

2 Grounds 9, 10, 21 and 22.

3 Ground 28.

their joint venture (grounds 1 and 2). The second was that the judge was wrong in finding that a document appointing Sippy Downs Group as agent of the joint venturers was executed before Sippy Downs Group contracted to buy Lots 8 and 20 on or about 3 May 2005 (grounds 3 to 8). The third is that the judge was wrong in finding that a conversation between the directors of Zen and Aspirational on the one hand and those of Sylverton on the other, fixed Sylverton with knowledge that Sippy Downs Group was the agent and trustee of the joint venturers, Zen and Aspirational (grounds 11 and 12). The fourth is that the judge was wrong in holding that no estoppel arose as against Zen and Aspirational preventing them from asserting that Sippy Downs Group entered into the contracts to purchase Lots 8 and 20 as trustee for Zen and Aspirational (grounds 14 to 17, and ground 20). The fifth is that the judge was wrong in holding that any estoppel that could arise against Zen and Aspirational would not affect the assets to which the charges held by Astor Funds attached (grounds 18 and 19). The sixth is that the judge was wrong in holding that Sippy Downs Group had no title in Lots 8 and 20 to which Sylverton's charge could attach (grounds 23 to 26). The seventh is that, even if Sippy Downs Group entered into the relevant transactions as agent of Zen and Aspirational, as Zen and Aspirational consented to the charge, their interests became subject to it (ground 29). The appellants' final contention is that the consent of Zen and Aspirational was not invalidated by the provision in Astor Funds' charge prohibiting any dealing with the secured property without the consent of Astor Funds (grounds 30 to 32).

[7] Before returning to these issues, it is necessary to set out the relevant factual background.

The factual background

[8] The complex factual matrix of this case begins with Sylverton, whose directors were Donald Blanksby and David Murray, entering into contracts to purchase Lot 20 from Rory Graham Quinlan and Mary Beatrice Quinlan for $2,665,450 on 13 November 2003, and Lot 8 from John Albert Terelinck for $3,780,000 on 30 January 2004. Both contracts were subject to various conditions, including Sylverton obtaining local government development approval.

[9] On 29 April 2004, Sylverton and Aspirational entered into deeds giving Aspirational put and call options to purchase from Sylverton Lot 8 for $6,157,833 and Lot 20 for $4,340,167. Clause 17 of each of those deeds prohibited Aspirational from directly or indirectly purchasing Lot 8 from Mr Terelinck or Lot 20 from the Quinlans.

[10] On 24 June 2004, Zen (whose directors were Matthew Royal, Glenn Anderson and Sharon Smith) and Aspirational (whose sole director and secretary was William Hamilton) entered into a joint venture agreement to develop and sell for commercial and retail purposes land at Sippy Downs, described as Lots 6 to 10 and Lot 20. This was called the Sippy Downs Joint Venture Agreement. When referring to Aspirational and Zen in the context of this joint venture, I shall call them the joint venturers. In the joint venture agreement, "Project" was defined as:

> "(a) obtaining development approvals and development permits under the *Integrated Planning Act* for the Development;
>
> (b) undertaking the Development; and

> (c) turning the Development to account by sales of Lots and/or leases of Lots or parts of Lots or of buildings or parts of buildings on Lots;"

[11] Aspirational purchased Lot 6 with financial backing from Zen. Zen originally borrowed funds for the purchase of Lot 6 from McLauchlan Financial Services Pty Ltd (MFS).[4] There was some tension between the joint venturers because Zen had organised the finance but Aspirational held the registered title of Lot 6, as well as its rights in respect of the purchase of Lots 8 and 20 from Sylverton under the put and call option. As a result, they agreed to transfer Lot 6 from Aspirational to Zen which re-financed its loan in respect of Lot 6 through Astor Funds

[12] On 20 December 2004, Astor Funds entered into a facility deed with Zen under which Astor Funds agreed to lend Zen up to $7,500,000 to purchase Lot 6. Aspirational and the directors of Zen and Aspirational were guarantors and Aspirational and Zen both executed fixed and floating charges over their assets in favour of Astor Funds to secure Zen's obligations under that deed. The terms included:

> "**3. MORTGAGOR'S CONVENANTS**
>
> The Mortgagor during the continuance of this security (and where appropriate from time to time) must comply with the following provisions.
>
> …
>
> (c) **Dealings with Secured Assets**
>
> Not sell, assign, let, part with possession, mortgage, charge, encumber, or otherwise dispose of or deal with the Secured Assets despite any power implied by statute or otherwise without the Mortgagee's prior written consent.
>
> … ."

[13] On 23 February 2005, Aspirational exercised its call options to purchase Lots 8 and 20 from Sylverton for a total of $10,500,000. Neither Aspirational nor Sylverton were able to settle on their respective contractual settlement dates. Consequently the date for settlement of the Aspirational-Sylverton contracts and of Sylverton's contracts with the Quinlans and Mr Terelinck were extended several times.

[14] The transfer of Lot 6 from Aspirational to Zen, despite their joint venture, incurred two lots of stamp duty. It seems this was a factor in the joint venturers incorporating Sippy Downs Group on 14 February 2005 as a vehicle to further their group venture. Zen and Aspirational each had a half interest in Sippy Downs Group.

[15] On 29 March 2005, Ms Smith, Mr Anderson and Mr Royal (directors of Zen) and Mr Hamilton (sole director and secretary of Aspirational) met with solicitor, Allan O'Neill (then effectively an in-house lawyer for Zen). They discussed the role of Sippy Downs Group in the joint venture. The next day, Mr O'Neill sent

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[4] MFS later became Octaviar Ltd.

Mr Anderson (who chaired the meeting) draft minutes of the meeting which Mr Anderson subsequently confirmed.

[16] On 4 April 2005, Mr O'Neill sent a revised version of these minutes by email to Mr Anderson noting: "Should satisfy Peter Schmidt and William". Mr Schmidt was Mr Hamilton and Aspirational's solicitor and "William" was Mr Hamilton. Mr Anderson then confirmed these revised minutes. The relevant original minutes are the unitalicised portions below. The relevant revised minutes included the original unitalicised minutes together with the additional italicised portions:

> "*RESOLVED that Sippy Downs Group … will have no legal standing in terms of Sippy Downs Joint Venture, as described by the Sippy Downs Joint Venture Agreement, executed on 24 June 2004 ('the Agreement'), until all relevant issues are unanimously agreed between the Parties to that Agreement and the intended Variation to that Agreement is executed by both those Parties, being ZEN FOUNDATION ONE PTY LTD AND ASPIRATIONAL COMMUNITIES PTY LTD.*
>
> RESOLVED that *it is the intention of the Joint Venture Committee* that Sippy Downs Group … is to be appointed to act in a variety of different capacities in relation to Sippy Downs Joint Venture, as described by the Sippy Downs Joint Venture Agreement executed on 24 June 2004 ('the Agreement').
>
> RESOLVED that *it is the intention of the Joint Venture* specifically in relation to the holding of the Joint Venture Assets, as defined in the Agreement at sub-clause 20.1, and which is inclusive of all real property acquired by the Joint Venture Participants, that Sippy Downs Group Pty Ltd will be 'registered owner', as defined in Schedule 2 of the *Land Title Act 1994* (Qld) and act as trustee for all real property acquired under the Agreement.
>
> *RESOLVED that all existing rights and benefits attributable to the Joint Venture Participants, including all legal and beneficial interests in the Joint Venture Assets and as provided for by the Agreement, will be preserved.*
>
> RESOLVED that the basis for any change is only to:
>
> . Improve the transparency and efficacy of the existing Joint Venture Project.
>
> . Remove any perceived inconsistencies or ambiguities in the current Agreement.
>
> . Clearly identify the roles of the various parties to the Joint Venture Agreement
>
> [Preserve all existing rights and benefits attributable to the Joint Venture Participants, including all legal and beneficial interests in the Joint Venture Assets.]*

> . Ensure greater efficiencies in the operation of the Joint Venture Project."
>
> * In original minutes but deleted and replaced by last italicised paragraph in revised minutes.

[17] Sippy Downs Group, Zen and Aspirational subsequently executed a document appointing Sippy Downs Group agent of the joint venturers:

> "to act on their behalf and execute contracts for the purchase of Lot 8 … and Lot 20 … (Contracts).
>
> The Agent accepts the appointment to act as agent as the Joint Venturers and acknowledges that they are acting solely in that capacity.
>
> The Joint Venturers, subject to the terms and conditions specified under the Sippy Downs Joint Venture Agreement, executed 24 June 2004, will provide all the consideration, including any deposit paid in relation to the Contracts."

[18] The time of the execution of this document is contested. It was dated 18 May 2005 but it was common ground that the document had been back-dated and was executed at a later time. The primary judge found that it "was not executed until some time considerably later than" 18 May 2005.[5] That finding is not in dispute. The judge found that the agency agreement was signed probably either on 24 or 25 May, or at the latest a day or so later.[6] The judge also found that the joint venturers appointed Sippy Downs Group as agent in the latter part of May for the purposes of acquiring Lots 8 and 20, prior to the execution of the contracts for the purchase of of Lots 8 and 20.[7] Those two findings are disputed in this appeal

[19] On 23 May 2005, Mr Anderson sent an email to Mr Cameron Charlton (Sylverton's solicitor), copied to Ms Smith, Mr Royal and Mr Mark Woolley (at times both Zen and the joint venturers' solicitor) about the joint venturers' negotiation with Sylverton for Sippy Downs Group to purchase Lots 8 and 20. In included the following:

> "This afternoon; myself, Matthew Royal and William Hamilton had a conference call with Tim Murray and Donald Blanksby [directors of Sylverton] to discuss the possibilities of securing their position in the event that we don't settle lots 8 and 20 by EOM and entering into back up contracts with Terelink and Quinlan.
>
> During this call, it was agreed that as an entry point into the JV we are willing to give Sylverton a position on the Joint Venture Committee, which in effect controls the contracting entity, in this case being the Sippy Downs Group … a company owned on a 50/50 basis by Zen … and Aspirational … and has an agreement with the unincorporated joint venture to act solely as an agent for the JV. …"

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5 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [30].
6 Above, [36].
7 Above, [57].

[20] Mr Anderson also sent an email that evening to Mr Woolley, on the "Subject: Agency" asking him to "email a copy of the Appointment of Agent that you prepared for Sippy Downs Group and the JV to Cameron [Charlton] for his perusal…"

[21] Mr Anderson's attempt to send the emailed letter to Mr Charlton referred to in [19] above was not successful and, at Mr Anderson's request, Mr Woolley emailed it to Mr Charlton on 25 May 2005.

[22] On 24 May 2005, Mr Woolley emailed Mr Charlton, Sylverton's solicitor, in terms which included:

> "Further to my clients email to you last night I attach the simple Appointment of Agent intended to be executed by my client prior to the execution of any back up contract.
>
> Please advise if any changes are required…"

[23] The attached agency agreement was not, of course, executed. It was, however, in terms identical to the executed agency agreement wrongly dated 18 May 2005,[8] save that the term in parentheses "(Contracts)" and the last quoted paragraph were not included. This strongly suggests that the agency agreement was executed after 24 May 2005.

[24] There is no evidence that Mr Charlton responded to advise of any changes required to the agency agreement by Sylverton.

[25] In late May 2005, it ultimately became clear that, because of problems obtaining finance, Aspirational was unable to settle its contracts to purchase Lots 8 and 20 from Sylverton, and Sylverton was unable to settle its contracts to purchase Lots 8 and 20 from the Quinlans and Mr Terelinck.

[26] The parties sought to resolve their difficulties in this way. On 27 May 2005, Aspirational, Zen and Sylverton entered into a deed of release and settlement under which Sippy Downs Group, Zen, and Mr Hamilton, Mr Anderson, Mr Royal and Ms Smith were all guarantors. The deed described Sippy Downs Group as "guarantor" and described its "Capacity" as "in its own right". Under this deed, all existing contracts relating to Lots 8 and 20 were terminated;[9] Sylverton released Aspirational and the guarantors from their previous covenants, including cl 17 of the put and call options of 28 April 2004 which prohibited Aspirational from directly or indirectly purchasing Lots 8 and 20 from the Quinlans and Mr Terelinck; Sylverton consented to Sippy Downs Group entering into new contracts to purchase Lots 8 and 20 from the original owners, the Quinlans and Terelinck;[10] and Aspirational agreed to pay Sylverton $4,100,000[11] plus the profit share amount.[12] The terms of the deed included:

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8 Set out at [17] of these reasons.

9 Clauses 3 and 4.

10 Clause 5.

11 This sum equated to the profit Sylverton would have made by purchasing Lots 8 and 20 from the Quinlans and Terelinck and on-selling to the joint venturers.

12 Clause 2.1.

> "**2.2 Acknowledgment of debt owing**
>
> Aspirational and the Guarantors acknowledge that $4,100,000 of the Settlement Sum is a debt presently due and owing to Sylverton and that such debt together with the balance of the Settlement Sum (namely the Profit Share Amount) is secured or will be secured by the Securities.
>
> **2.3 Exercise of rights**
>
> *Aspirational and the Guarantors each acknowledge and agree that Sylverton is presently entitled* (or will upon the securities being given, be presently entitled) to exercise all of its rights under the Securities subject to issuing any notices required by the Securities by law … " (*my emphasis*)

[27] Additionally, Zen and Sippy Downs Group agreed to guarantee Aspirational's liability to Sylverton for that amount;[13] and Aspirational and Zen acknowledged Sylverton's entitlement to exercise its rights under specified securities, including a fixed and floating charge over the assets and undertakings of Sippy Downs Group.[14]

[28] Sylverton's solicitor, Mr Charlton, gave evidence that, during negotiations preceding the execution of this deed of release and settlement, he informed Mr Woolley that Sylverton required that Sippy Downs Group must act in its own right under the deed. The solicitor acting for the joint venturers, Mr Woolley, could not recall this discussion. But cl 5(c) of the deed of release and settlement was amended prior to execution. The draft cl 5 was in these terms:

> "**5. Release from non-completion covenants**
>
> Sylverton:
>
> … (c) consents to the SDG entering into the new contracts *as agent of the Joint Venturers*." *(my emphasis)*

Clause 5(c) in the executed deed of release and settlement omitted the italicised words.

[29] The joint venture agreement was amended by cl 10 of the deed to provide for a representative of Sylverton to be included with the joint venturers on the joint venture committee,[15] with each member of the committee entitled to cast one vote.[16] The joint venturers were to work with Sylverton to obtain development approval.[17] Sylverton was to be informed of offers for the sale and the progress of the sale of Lots 8 and 20.[18] The joint venturers could not reject any offer[19] or accept any offer[20] without Sylverton's consent. In specified circumstances, including the non-

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13 Clause 2.2.
14 Clause 2.3.
15 Clause 10(b)(i).
16 Clause 10(b)(iii).
17 Clause 10(c).
18 Clause 10(h) and (i).
19 Clause 10(j).
20 Clause 10(l)

payment of Sylverton's $4,100,000 debt, Sylverton was entitled to exercise its rights under the securities described in Sch 1.[21] Schedule 1 securities included guarantees and indemnities from Zen, Sippy Downs Group, Mr Hamilton, Mr Anderson, Mr Royal and Ms Smith; and fixed and floating charges over the assets and undertakings of Aspirational, Zen and Sippy Downs Group.

[30] The deed was prepared and executed with other documents including guarantees and indemnities of Zen, Sippy Downs Group, Mr Hamilton, Mr Anderson, Mr Royal, Ms Smith and Sylverton in favour of Aspirational, and a fixed and floating charge in favour of Sylverton from Zen, Aspirational and Sippy Downs Group.

[31] Under Sylverton's charge over the assets of Sippy Downs Group, "charged property" was defined as meaning:

> "all the property, assets and rights of the Chargor, whether acquired before or after this document is executed and whether situated within or outside Australia. This includes all property, assets and rights held by the Chargor as trustee."[22]

"charge" was a charge over "the benefit of any contract or agreement to which [Sippy Downs Group] is a party"[23] and "trust" was defined as "any trust of which the Chargor is trustee …".[24]

[32] In late May 2005, Sippy Downs Group entered into contracts with Terelinck to purchase Lot 8 for $4,888,888 and with the Quinlans to purchase Lot 20 for $3,222,222.

[33] On 1 June 2005, Sylverton registered its fixed and floating charge dated 27 May 2005 over the assets of Sippy Downs Group.

[34] By 8 September 2005, Sylverton was in dispute with Aspirational and Zen. On 14 October 2005, Zen gave Sylverton notice that it considered that Lots 8 and 20 were secured under a fixed charge to Astor Funds over their assets and that Sippy Downs Group's interest in the contracts for the sale of Lots 8 and 20 was held by Sippy Downs Group only as agent for the joint venturers.[25]

[35] On 15 October 2005, Sylverton appointed voluntary administrators to Sippy Downs Group.[26]

[36] On 11 November 2005, Sippy Downs Group, through its voluntary administrator, entered into contracts to sell Lot 8 for $5,250,000 and Lot 20 for $8,472,222 to Fabcot Pty Ltd. Sippy Downs Group onsold Lots 8 and 20 on 11 November 2005. This resulted in the creation of a fund of about $2,400,000 which is the subject matter of the present dispute. Astor Funds and Sylverton each claim an entitlement to the fund under their respective securities.

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21 Clause 10(r).
22 Clause 1.1.
23 Fixed and floating charge between Sippy Downs Group and Sylverton, cl 2.2(f).
24 Clause 14.
25 Appeal book, 1311.
26 Appeal book, 1355.

The issues at trial

[37] The primary judge found the following matters relevant to the issues raised in this appeal.

[38] On 29 March 2005, the joint venturers resolved to appoint an agent.[27] The document appointing Sippy Downs Group as agent of the joint venture was not executed on the date it contained (18 May 2005).[28] It was probably executed "either on 24 or 25 May or at the latest, a day or so later[29]" and prior to Sippy Downs Group executing the contracts for the purchase of Lots 8 and 20.[30]

[39] The terms of the deed of release and settlement of 27 May 2005 did not provide any real assistance to Sylverton to support its claim that a representation was made that Sippy Downs Group was acquiring the land for the joint venture in its own right.[31] Sylverton had not identified a representation upon which it relied and the detriment which it alleged it suffered as a result of such reliance.[32] A claim of proprietary estoppel could only be maintained as between the parties. In this case, it could not be extended to Astor Funds.[33] As Sippy Downs Group contracted to purchase Lots 8 and 20 as agent for the joint venture, the beneficial interest in the land at all times vested in Aspirational and Zen as joint venturers so that Sippy Downs Group had no interest to which Sylverton's charge could attach.[34]

[40] I turn now to discuss the eight issues raised by the appellants.

What was the effect of the meeting on 29 March 2005?

[41] The appellants' first contention is that the judge erred in finding that at the meeting on 29 March 2005 the joint venturers resolved to appoint an agent to conduct their joint venture.[35] The appellants contend that any resolution of the joint venturers on 29 March 2005 was conditional on certain events taking place, as recorded in the revised minutes of the meeting, and that there was no evidence that those events occurred. As the conditions were not met, there was no agency. They contend that the judge did not give sufficient weight to the differences between the original and the revised minutes of the meeting of the joint venturers of 29 March 2005.[36]

[42] The evidence at trial established the following. By 2005, the relationship between the joint venturers was functional but it had deteriorated. There were delays in obtaining development approval for the joint venture land. The joint venturers incorporated Sippy Downs Group on 14 February 2005 to establish a vehicle jointly controlled by Aspirational and Zen to move the development forward in a way which was satisfactory to institutional development partners. The joint venturers' uneasy relationship had resulted in the incurring of double stamp duty when, in late December 2004, Zen required that Lot 6 be transferred to it from Aspirational.

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27 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [19].
28 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [30].
29 Above, [36], [57].
30 Above, [57].
31 Above, [66].
32 Above, [69], [70].
33 Above, [73]-[75].
34 Above, [79]-[82].
35 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [19].
36 See [18] of these reasons.

[43] Aspirational exercised its call option to purchase Lots 8 and 20 from Sylverton by letter dated 23 February 2005, with settlement originally due in late April 2005. Zen was uneasy about the prospect of Lots 8 and 20 becoming registered in Aspirational's name. Zen director, Mr Anderson, attended a meeting with Zen's lawyers, Mr Woolley and Mr Davis, on 8 March 2005 and obtained advice as to how the joint venture might best proceed. The lawyers suggested three options: an agency option, a "clean skin" company option, or a unit trust option. Mr Woolley gave evidence that the joint venturers instructed him in March 2005 that their desired option was the agency option.

[44] Discussions between Zen and Aspirational culminated in a meeting on 29 March 2005 attended by Messrs Royal, Anderson, Hamilton and O'Neill and Ms Smith. Mr Hamilton and Ms Smith did not give evidence at trial. Mr Royal and Mr Anderson gave evidence that they understood the meeting resolved that Sippy Downs Group would act as agent or trustee for the purposes of future land purchases and that it would not act in its own right. I have set out the minutes of that meeting (both original and revised) earlier.[37]

[45] Mr O'Neill, Zen's in-house lawyer, gave the following relevant evidence. He prepared both sets of minutes of the meeting of 29 March 2005. The original minutes reflected what the parties agreed at the meeting.[38] The later revised minutes were prepared at the request of Aspirational's Mr Hamilton and his lawyers who wanted the changes to protect Mr Hamilton's interests whilst specific terms and conditions were being determined. The joint venturers resolved, however, as the amended minutes noted, that Sippy Downs Group would be the registered owner of joint venture property acquired in the future and would act as trustee of all real property acquired under the joint venture agreement.

[46] It is true that the judge made no specific reference to the differences in the resolutions of the meeting of 29 March 2005 although his reasons demonstrate that he was clearly cognisant of them. The judge referred to the initial resolution of the meeting of 29 March 2005[39] and set out in full the subsequent resolution, so that his Honour was clearly well aware that the appellants placed significance on these differences in presenting their case at trial.

[47] His Honour's finding, that the joint venturers resolved to appoint an agent on 29 March 2005, preceded his Honour's reference to the original and amended resolution. The finding was consistent with the evidence of Messrs Royal, Anderson and Woolley. It was also consistent in a general way with both resolutions. The revised resolution suggested that the joint venturers intended to appoint Sippy Downs Group as their agent or trustee when purchasing future joint venture property. But this was not inconsistent with the judge's finding that, on 29 March 2005, the joint venturers resolved to appoint an agent. His Honour did not find, at this point in his reasons, when that appointment was to take effect.

[48] The evidence of Messrs Royal, Anderson, Woolley and O'Neill, together with the original and revised minutes of the joint venturers' meeting of 29 March 2005, supported the conclusion that the joint venturers resolved to appoint an agent on 29 March 2005. The appellants' first contention is not made out.

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37 See [1] of these reasons.

38 See the unitalicised portions of the minutes set out at [16] of these reasons.

39 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [19].

When was the appointment of agency agreement executed?

[49] The appellants' second contention is that the judge erred in finding that the document appointing Sippy Downs Group as agent of Zen and Aspirational in the purchase of Lots 8 and 20 was executed before Sippy Downs Group entered into contracts to purchase that land.

[50] As I have noted, his Honour's finding, that the agency agreement was not executed until some time considerably later than 18 May 2005, the date handwritten on it,[40] is not in dispute. But his finding that it was probably signed on 24 or 25 May or, at the latest, a day or so later,[41] and prior to Sippy downs Group's execution of the contracts to purchase Lots 8 and 20,[42] is hotly disputed. Those findings are central to this appeal.

[51] His Honour referred to Mr Anderson's email on the evening of 23 May 2005 asking Mr Woolley to send a copy of the agency agreement to Sylverton's lawyer (Mr Charlton) for his perusal. This email, his Honour noted, followed a meeting by conference call between the directors of Sylverton, Mr Royal and Mr Anderson on behalf of Zen, and Mr Hamilton on behalf of Aspirational.[43] Mr Woolley emailed a copy of the draft agency agreement to Mr Charlton on 24 May 2005.[44] Mr Anderson also sent Mr Woolley a copy of a letter he had unsuccessfully attempted to email to Mr Charlton on the evening of 24 May 2005. The next day, Mr Woolley forwarded this letter by email to Mr Charlton. The letter referred to the meeting between the parties by conference call on 23 May 2005 and was in terms which included those set out at [19] of these reasons.[45]

[52] His Honour noted that Sylverton's directors, Mr Blanksby and Mr Murray, gave evidence that they participated in the conference call discussion on 23 May 2005; knew of the possibility of an agent being appointed; but did not understand that an agent had been appointed. Zen directors, Mr Royal and Mr Anderson, gave evidence that they did not recall the specific discussion at the meeting on 23 May 2005 but they did recall that the conversation between the parties was consistent with the subsequent emailed correspondence.[46] The judge noted that, in any case, by 25 May 2005, Sylverton knew, through its solicitor, Mr Charlton, that Sippy Downs Group was to act as agent for Zen and Aspirational; and the notice of appointment of agent had been forwarded to Mr Charlton, specifically referring to the purchase of Lots 8 and 20.[47]

[53] His Honour accepted Mr Anderson's evidence that he was aware that the agency agreement had to be signed before Sippy Downs Group signed the contracts for the purchase of Lots 8 and 20 and was emphatic that he did this.[48] The contract for Sippy Downs Group's purchase of Lot 20 was executed on 30 May 2005. Although the contract for Sippy Downs Group's purchase of Lot 8 was dated 23 May 2005, it

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40 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [30].
41 Above, [36].
42 Above, [57].
43 Above, [31].
44 Above, [32].
45 Above, [33].
46 Above, [34].
47 Above, [35].
48 Above, [37].

was originally prepared for a different purchaser[49] and other correspondence made clear that Sippy Downs Group could not have entered into it before 30 May 2005.[50] The parties entered into a deed of release and settlement on 27 May 2005 so that Sippy Downs Group could purchase Lots 8 and 20 from the Quinlans and Mr Terelinck.[51]

[54] The judge referred to evidence on which Sylverton relied for its contention that the agency agreement was not executed until after the contracts for Sippy Downs Group's purchase of Lots 8 and 20. Sylverton's solicitor, Mr Charlton, gave evidence that he told Mr Woolley that an agency was unacceptable to Sylverton, but acknowledged that Mr Woolley did not accept that proposition. Mr Woolley gave evidence that he could not recall such a conversation. There was no correspondence dealing with the issue. Mr Blanksby gave evidence that he objected to an agency and told Mr Charlton of his objection.[52] The judge noted that cl 5(c) of the deed of release and settlement of 27 May 2005 was amended to delete reference to Sippy Downs Group acting as agent for the joint venturers.[53] The deed recorded Sippy Downs Group as a party, namely, "a Guarantor" and that its "Capacity" was "in its own right".[54] The judge observed that during subsequent negotiations for proposed developments of the joint venture site with Woolworths, heads of agreement were prepared which referred to Sippy Downs Group as agent, but that reference was subsequently deleted. Mr Blanksby gave evidence that the deletion was because the agency clause was unacceptable to Sylverton.[55] On the other hand, the judge noted that in subsequent heads of agreement prepared with another proposed developer, APM, Sippy Downs Group was referred to as the agent of Zen and Aspirational.[56]

[55] The judge concluded that Zen and Aspirational executed an agency agreement in late May, appointing Sippy Downs Group as their agent for the purposes of acquiring Lots 8 and 20, and that this was before Sippy Downs Group's execution of the contracts for the purchase of that land.[57]

[56] The appellants emphasise the falsity of the date on the agency agreement. They contend that the back-dating of the agency agreement, and the signatories knowledge of the need for it to have been signed before Sippy Downs Group entered into the contracts to purchase Lots 8 and 20, should have led the judge to infer that it was back-dated because it was signed after Sippy Downs Group entered into the contracts to purchase Lots 8 and 20. The back-dating was an attempt to belatedly and falsely protect the joint venturers' interests. The respondents' failure to call Mr Hamilton, a signatory of the agency agreement, and also Ms Smith, the appellants contend, supports the drawing of this inference: *Jones v Dunkel*.[58]

[57] They contend that the deteriorating relationship between Mr Hamilton and the directors of Zen made it probable that Mr Hamilton would have deferred signing the agency agreement for as long as possible. This was consistent with his concern that

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49 Contemporary Development Projects Pty Ltd.
50 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [38]-[39].
51 Above, [40]-[42].
52 Above, [46].
53 Above, [45]-[47].
54 Above, [48]-[50].
55 Above, [51].
56 Above, [52].
57 Above, [57].
58 (1959) 101 CLR 298; [1959] HCA 8.

Sippy Downs Group's appointment as agent would undermine his control of the joint venture assets. The appellants urge this Court to draw its own inferences from the evidence and to conclude that the agency agreement was not executed until after Sippy Downs Group entered into contracts to purchase Lots 8 and 20. This conclusion, they submit, is consistent with the late amendment of cl 5(c) of the deed of settlement and release of 27 May 2005[59] and the fact that the deed referred to Sippy Downs Group in the "Capacity" "in its own right". They also emphasise that neither Sippy Downs Group's contracts to purchase Lots 8 and 20, nor the transfers executed under them, referred to any agency or trusteeship on the part of Sippy Downs Group.

[58] Determining when the agency agreement was executed is not a straightforward task. In my view, it is significant that in 2004, the joint venturers were required to pay double stamp duty when Lot 6 was transferred from Aspirational to Zen. This was a persuasive reason for them to appoint their jointly owned company, Sippy Downs Group, as agent prior to the joint venturers entering into future contracts to purchase land. This was also consistent with the joint venturers' meeting and resolution of 29 March 2005.[60]

[59] The joint venturers had not obtained development approval before the execution of the deed of release and settlement on 27 May 2005, so that financing the purchase of Lots 8 and 20 was difficult. Aspirational could not settle its contracts with Sylverton, and Sylverton could not settle its contracts with the Quinlans and Mr Terelinck. Mr Hamilton was considering by-passing Sylverton and dealing directly with the Quinlans and Mr Terelinck, contrary to Aspirational's contractual and tortious obligations and Mr Woolley's strong advice. Mr Hamilton had proposed that another company, Contemporary Development Projects Pty Ltd, purchase Lots 8 and 20. Documents involving that company had been executed on 19 May 2005. The evidence of the emails exchanged on 24 and 25 May 2005 between the joint venturers' solicitor, Mr Woolley, and Sylverton's solicitor, Mr Charlton,[61] are consistent with the joint venturers wishing to appoint Sippy Downs Group as agent before it contracted to purchase Lots 8 and 20. The evidence suggests that the contracts for the sale of Lots 8 and 20 were not signed until at least 30 May 2005.

[60] Mr Anderson gave evidence that the handwriting, falsely dating the execution of the agency agreement 18 May 2005, was not his and looked very much like Mr Hamilton's. On the evidence, it seems probable that Mr Hamilton back-dated the agency agreement to 18 May 2005, a date which had no relevance to the contracts for the purchase of Lots 8 and 20, other than it preceded it. It seems likely Mr Hamilton chose this date, not because the execution of the agency agreement post-dated the execution of the contracts to purchase Lots 8 and 20, but so that it pre-dated the documents, dated 19 May 2005, concerning Contemporary Development Projects Pty Ltd with which he was involved.

[61] I do not accept the appellants' contention that I should draw the inference from the respondents' failure to call Mr Hamilton and Ms Smith that their evidence would have been that the agency agreement was signed after the contracts for the sale of Lots 8 and 20. It is doubtful that Ms Smith could add to the evidence of

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59 Set out at [28] of these reasons.

60 See these reasons [17] and [18].

61 See these reasons [23]-[28].

Mr Anderson and Mr Royal. She was less involved than they were in the business dealings generally and was not a signatory to the agency agreement.

[62] Mr Woolley's evidence was that Mr Hamilton was considering breaching his contractual and tortious obligations in pursuing avenues to directly purchase Lots 8 and 20 from the Quinlans and Mr Terelinck, contrary to cl 17 of Aspirational's put and call options. This, together with Mr Hamilton's apparent back-dating of the agency agreement, suggests that the respondents had good reason to be concerned about whether Mr Hamilton's poor credibility as a witness generally would damage their case. I consider that this is the more likely reason why the respondents did not call him at trial.

[63] The reference in the deed of release and settlement to Sippy Downs Group being a party in its own right is not a factor which assists the appellants. Sippy Downs Group's only role was as a guarantor under the deed. It was in that capacity that it was acting "in its own right", not in its capacity as purchaser of Lots 8 and 20. Nor does the fact that the contracts for the transfer and sale of Lots 8 and 20 did not disclose that Sippy Downs Group was an agent mean that the joint venturers did not appoint it as agent before it entered into those agreements.

[64] The primary judge accepted Mr Anderson's emphatic evidence that both he and Mr Royal signed the agency agreement in Zen's Spring Hill offices prior to Sippy Downs Group's contracts for the purchase of Lots 8 and 20. Some weight must be given to the fact that the judge, unlike this Court, saw the witnesses give their evidence. The judge's acceptance of Mr Anderson's evidence, that he and Mr Royal signed the agency agreement before the contracts to purchase Lots 8 and 20, is not "glaringly improbable" or "contrary to compelling inferences".[62] His Honour's conclusion was a logical step in the narrative and was consistent with available documentary evidence. Although there was other evidence from which a competing inference in favour of the appellants could have been drawn, I agree with his Honour's findings of fact in this respect.

[65] It follows that the appellants' second contention is not made out.

Did Sylverton have notice of Sippy Downs Group's agency?

[66] The appellants' third contention is that the judge erred in finding that the joint venturers gave Sylverton notice that Sippy Downs Group was their agent and trustee in the purchase of Lots 8 and 20. They particularly challenge the primary judge's finding that:

> "The conversation [of 23 May 2005] which was held between the directors of [Sylverton] and the directors of [Sippy Downs Group] subsequently confirmed by email sent at the time Woolley forwarded to the solicitors for [Sylverton] the notice of appointment of an agent, must be taken as fixing [Sylverton] with knowledge of the existence of [Sippy Downs Group's] agency. The evidence does not justify a conclusion that this situation ever altered."[63]

[67] The appellants emphasise many of the points already made in their first two contentions, including the uncertainty about when the agency agreement was signed

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62 *Fox v Percy* (2003) 214 CLR 118; Gleeson CJ, Gummow and Kirby JJ 124-129; [2003] HCA 22.

63 Above, [68].

and that, as the primary judge accepted,[64] it could not have been signed before 24 May 2005. They argue the evidence did not establish that the conditions attached to the revised resolution of 29 March 2005[65] were fulfilled by the time of Mr Anderson's email of 23 May 2005.[66] They contend that Mr Anderson made those emailed assertions without any basis. They were merely a proposal which was not subsequently accepted by Sylverton. The change to cl 5 of the deed of release and settlement and the reference in the deed to Sippy Downs Group as a party "in its own right", together with the absence of any reference to Sippy Downs Group's agency in its contracts for the purchase of Lots 8 and 20, did not support the judge's finding as to notice. The evidence favoured the contrary finding, that Sylverton was never informed by the joint venturers that Sippy Downs Group would be their agent in the purchase of Lots 8 and 20.

[68] For the reasons already given, I have accepted that the joint venturers appointed Sippy Downs Group as their agent in the purchase of Lots 8 and 20 prior to the execution of those contracts. The evidence was capable of supporting competing inferences as to whether Sylverton had notice of this agency beforehand. There was certainly a body of evidence from Sylverton's directors (Mr Murray and Mr Blanksby) and its solicitor (Mr Charlton) which suggested that Sylverton was not in favour of Sippy Downs Group acting as agent. But as the primary judge noted, if this was so important to them at this time, it is strange that they made no clear written request to that effect.[67]

[69] The evidence suggests to me that it remained in Sylverton's interest for the deed of release and settlement to be signed by all parties on 27 May 2005. It seems likely that Sylverton was not able to meet its obligations under its contracts with the Quinlans and Mr Terelinck. The agency agreement meant that Sylverton's charge over Sippy Downs Group's assets was worthless but Sylverton also had fixed and floating charges over Zen and Aspirational's assets, and guarantees from Zen, its directors, Mr Anderson, Mr Royal and Ms Smith, and Aspirational's director, Mr Hamilton. The deed of release and settlement may have been an imperfect arrangement as far as Sylverton was concerned, but it was probably the best Sylverton could negotiate in the circumstances.

[70] The appellants' contention, that the evidence did not establish that the conditions attached to the revised resolution of 29 March 2005 were fulfilled by 23 May 2005, is inconsistent with Mr Anderson's evidence that the joint venturers resolved to appoint Sippy Downs Group as agent and did so before it purchased Lots 8 and 20. Mr Anderson and Mr Royal also gave evidence, contrary to the evidence of Mr Murray and Mr Blanksby, that the email of 23 May 2005 reflected the joint venturers' negotiations with Sylverton. Had Mr Murray or Mr Blanksby disagreed with the agency, it seems likely that they or their solicitor, Mr Charlton, would have sent correspondence noting their objections. They did not, despite Mr Woolley's specific invitation to do so. The judge's conclusion as to notice was therefore supported by the documentary evidence of the emails on and following 23 May 2005.[68] It is significant that Sylverton did not take issue with the statement in the email sent to Sylverton's solicitor, Mr Charlton, on 23 May 2005, agreed that "Sippy

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64 Above, [36].
65 Set out in [18] of these reasons.
66 Set out at [23] of these reasons.
67 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [63].
68 Set out at [23] of these reasons.

Downs Group … a company owned on a 50/50 basis by [the joint venturers] … has an agreement with the unincorporated joint venture to act solely as an agent for the JV." It is even more significant that Sylverton did not take issue with the draft agency agreement sent to Mr Charlton by Mr Woolley on 24 May 2005 under which the joint venturers appointed Sippy Downs Group as their agent in the purchases of Lots 8 and 20. Mr Woolley specifically invited Mr Charlton to "advise if any changes are required". It seems that Sylverton did not respond.

[71] The alteration to cl 5 of the draft deed of release and settlement is a factor supporting the appellants' contention but, as I have explained, I do not consider it compelling when contrasted with the email correspondence (and lack of it) on 24 May 2005 and following. The alteration to cl 5 was most likely to meet Sylverton's concern that, out of an abundance of caution, Sippy Downs Group not be an agent in its capacity under the deed as guarantor. For the reasons that I have given in rejecting the appellants' second contention, I do not consider that the reference in the deed to Sippy Downs Group as a party "in its own right" or that Sippy Downs Group's contracts concerning Lots 8 and 20 did not disclose its agency, are factors which assist the appellants.

[72] I consider the better view on the evidence is that taken by the primary judge. It was probable that, from at least 24 May 2005, Sylverton had notice of Sippy Downs Group's role as agent of the joint venture and certainly before the deed of release and settlement was executed and before Sippy Downs Group executed the contracts for the purchase of Lots 8 and 20. It follows that the appellants' third contention is not made out.

Was an estoppel created?

[73] The appellants' fourth and fifth contentions may be dealt with together. The fourth contention is that the judge erred in holding that Zen and Aspirational were not estopped from asserting that Sippy Downs Group entered into the contracts for the purchase of Lots 8 and 20 as trustee or agent on behalf of the joint venture. The fifth contention is that the judge erred in holding that any estoppel which could arise against Zen and Aspirational would not affect the assets to which the charges held by Astor Funds attached.

[74] The appellants challenge the judge's findings that:

> "The terms of the deed do not provide any real assistance to [Sylverton] … in support of its claim that a representation was made that [Sippy Downs Group] was acquiring [Lots 8 and 20] in its own right.[69]
>
> …
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> [69] It is incumbent upon a person claiming an estoppel to identify the representation relied upon and the detriment which it is alleged was suffered as a result of such reliance.
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> [70] I do not think [Zen] has been able to do that in this case. Had [Sylverton] not entered into the deed of release with [Aspirational]

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69 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [66].

> thus bringing the contract between [Aspirational] and [Sylverton] to an end, [Sylverton] would probably have remained liable to the vendors of Lots 8 and 20. The evidence does not suggest that [Sylverton] would have been capable of completing any such agreement.
>
> [71] A further and perhaps more fundamental obstacle lies in the path of [Sylverton]. The estoppel alleged is one which would have the result that [Zen] and [Aspirational] would be precluded from asserting a claim to any beneficial interest in the contractual rights held by Sippy Downs.
>
> [72] The apparent aim of such a claim is to deny [Astor Funds] its security rights over the contractual interest which [Zen] and [Aspirational] held by virtue of their agent having entered into the contracts with the owners of Lots 8 and 20. [Sylverton's] security over [Sippy Downs Group] would thus be the effective security on this scenario.
>
> [73] A claim of proprietary estoppel can only be maintained as between the parties to it namely the person to whom the representation was made and who acted to his or her detriment and the person estopped and his or her successors. As Farwell LJ said in *Bank of England v Cutler* [1908] 2 KB 208 at p 234:
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> '*It is true that a title by estoppel is only good against the person estopped, and imports from its very existence the idea of no real title at all, yet against the person estopped it has all the elements of a real title.*'
>
> [74] In *Re Goldcorp Exchange Ltd (in receivership)* [[1995] 1 AC 74] the Privy Council at p 94G & H said:
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> *'Valuable as it may be where one party to the estoppel asserts as against the other a proprietary cause of action such as trover, this cannot avail the purchaser in a contest with a third party creditor possessing a real proprietary interest in a real subject matter, whereas the purchaser has no more than a pretence of a title to a subject matter which does not actually exis*t.'
>
> [75] An estoppel cannot operate to deny the security rights of [Astor Funds] in a case such as this. The claim based on estoppel must fail."

[75] The appellants pleaded that, in entering into the deed of release and settlement, each of the appellants, Sippy Downs Group, and its directors, held out and represented to Sylverton that Sippy Downs Group did and would enter into the contracts for the purchase of Lots 8 and 20 in its own right.[70] The appellants again emphasise the terms of the deed, that Sippy Downs Group entered into it "in its own right"; the removal from an earlier draft of cl 5 of the deed (which released the joint venturers from previous covenants including those prohibiting them from contracting directly to purchase Lots 8 and 20) of the words "as agent of the joint venturers";[71] the

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70 Further amended defence and counterclaim, para 20.

71 Set out at [28] of these reasons.

related evidence of Mr Charlton, Mr Murray and Mr Blanksby; and the absence of any reference to Sippy Downs Group's agency in the contracts concerning Lots 8 and 20. The appellants also contend that as Sippy Downs Group entered into the deed, the charge and the contracts relating to Lots 8 and 20 in pursuance of the joint venture, Sippy Downs Group must have entered into all those transactions in the same capacity, that is, in its own right in pursuance of the joint venture, and not as agent for the joint venturers.

[76] I have already given my reasons for rejecting the appellants' contention that the primary judge wrongly concluded that the appellants had notice of Sippy Downs Group's agency on behalf of the joint venturers when Sippy Downs Group entered into contracts concerning Lots 8 and 20. Once it is accepted, as I do, that by 24 May 2005, three days before the execution of the deed of release and settlement, Sylverton had notice of Sippy Downs Group's agency on behalf of the joint venturers in purchasing Lots 8 and 20, it does not matter that at an earlier time the joint venturers may have envisaged a slightly different role for Sippy Downs Group. For those reasons, it follows that the appellants did not establish at trial a representation of the kind pleaded. As the operation of the doctrine of estoppel first requires a representation of fact leading another to alter their position, this conclusion is fatal to the appellants' remaining contentions. But in case I am wrong and there was such a representation, I will briefly deal with the appellants' further contentions.

[77] The appellants next contend that the judge erred in finding that Sylverton did not act to its detriment when it relied on the joint venturers' representation that Sippy Downs Group was not their agent in the contracts relating to Lots 8 and 20. They contend that Sylverton need only show that its action in entering into the deed as a result of the representation will cause it detriment in the sense that its assumption or expectation that Sippy Downs Group was acting in its own right was not fulfilled. If the joint venturers are able to assert that Sippy Downs Group entered into the contracts as agent, the effectiveness of Sylverton's charge over Sippy Downs Group's assets was subverted and Sylverton suffered detriment.

[78] They emphasise in their written submissions the evidence at trial, that on 22 March 2005 Sylverton had approval in principle for a loan facility from Colonial First State Mortgage Lending of $7,300,000, to be secured by Lots 8 and 20, conditional upon a valuation report. Although the submission was not made in terms, it seems the appellants invite this Court to infer that Sylverton suffered detriment in that it lost the chance of pursuing this loan and completing its contracts in respect of Lots 8 and 20. This detriment, they contend, can only be avoided by holding the joint venturers to Sylverton's assumption, that Sippy Downs Group was acting in its own right under the contracts relating to Lots 8 and 20, and by permitting Sylverton to enforce its charge against the profits resulting from those contracts.

[79] There are difficulties with that contention. Sylverton led no evidence to establish that it suffered detriment equal to the amount to be paid to it under the deed of release and settlement which it expected to be secured by way of its charges, including its charge over the property of Sippy Downs Group. Sylverton abandoned its claim under the *Trade Practices Act* 1974 (Cth) for this amount. Mr Charlton, Sylverton's solicitor, gave uncontradicted evidence that Sylverton would have had difficulty in completing its obligations to the Quinlans and Mr Terelinck if Aspirational had not settled its contract with Sylverton. Sylverton's in principle

approval for a loan from Colonial First State Mortgage Lending to purchase Lots 8 and 20 was conditional upon payment of fees of over $130,000 and a satisfactory valuation. Sylverton did not lead evidence of its capacity to pay those fees or whether any valuation at that time would have satisfied the proposed lender. To the contrary, the evidence at trial strongly suggested that Sylverton could not have purchased Lots 8 and 20 and, for that reason, the deed of release and settlement was clearly in its interest.

[80] Had the pleaded representation been made, however, it is arguable that the inference could reasonably have been drawn that Sylverton would not have entered into the deed of release and settlement but for that representation; that Sylverton gave up its rights under its contracts with the Quinlans and Mr Terelinck by entering into the deed of settlement; and subsequently suffered detriment in the sense of the loss of a chance of exercising its rights under those contracts.

[81] But it is unnecessary to express a concluded view as to whether detriment was established on the evidence. That is because I am unpersuaded of the appellants' fifth contention: that an estoppel in favour of Sylverton could operate to deny the security rights of Astor Funds, which was not a party to any relevant representation creating an estoppel in favour of Sylverton binding on the joint venturers.

[82] As I apprehend it, the appellants submit the following in support of their fifth contention. As Astor Funds' charges can only attach to property owned by Aspirational or Zen, the effect of estopping Aspirational and Zen from relying on Sippy Downs Group's agency in the contracts concerning Lots 8 and 20, is that the proceeds from those contracts did not pass to Aspirational or Zen but remained with Sippy Downs Group. It follows that the proceeds were not and never became subject to Astor Funds' charge.

[83] The appellants' fifth contention gives effect neither to the law relating to agency nor to the essence of the doctrine of estoppel. The pleaded estoppel is against those who made the representation (the joint venturers) leading another (Sylverton) to alter its position, from denying the facts as represented by the joint venturers. But such an estoppel does not extend to those, like Astor Funds, who were not a party to the joint venturers' representation. Astor Funds is not precluded from relying on the true facts and the real legal position by any estoppel operating on the joint venturers. As far as Astor Funds is concerned, regardless of any estoppel operating between Sylverton and the joint venturers, the real factual and legal position is that the profit arising from the contracts relating to Lots 8 and 20 does not and never belonged to Sippy Downs Group which received it as the joint venturers' agent; the profit was always the property of the joint venturers. In the present circumstances, Sylverton's plea of estoppel cannot operate to deprive Astor Funds of its rights under its charge over the joint venturers' assets, including the joint venturers' profit under the contracts for Lots 8 and 20: *Simm v Anglo-American Telegraph Co*;[72] *Re Goldcorp Exchange Ltd*;[73] and *Benjamin v Harding Corporation Pty Ltd and Others*.[74]

[84] It follows that the appellants' fourth and fifth contentions also fail.

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72 (1879) 5 QBD 188, 206-207.

73 [1995] 1 AC 74, 94; [1994] UKPC 3.

74 (1995) 16 ACSR 376, 382.

Did Sippy Downs Group have title to property to which Sylverton's charge could attach?

[85] The appellants' sixth contention is that the primary judge wrongly held that Sippy Downs Group had no title to which Sylverton's charge could attach.

[86] The primary judge, relying on Jessell MR's observations in *Cave v MacKenzie*,[75] considered that cl 14 of Sylverton's fixed and floating charge[76] did not assist Sylverton as Sippy Downs Group was an agent of Zen and Aspirational when contracting to buy and sell Lots 8 and 20, and did not receive any title in Lots 8 and 20. His Honour considered that this was therefore not a case where Sippy Downs Group held the land as trustee on trust for the joint venturers.[77]

[87] On the primary judge's findings, which the appellants have unsuccessfully disputed in this appeal, Zen and Aspirational appointed Sippy Downs Group as their agent before it contracted to purchase and later onsell Lots 8 and 20 on behalf of the joint venturers. It is of no consequence that the agency was not disclosed to the sellers or subsequent purchasers of Lots 8 and 20: *Cave v MacKenzie*.[78] As agent, Sippy Downs Group did not acquire any beneficial interest under the contracts to purchase and later onsell Lots 8 and 20. Those beneficial interests and the profit ultimately resulting from these contracts always belonged to Sippy Downs Group's principals, the joint venturers. In this case, title to Lots 8 and 20 did not pass to Sippy Downs Group before the land was onsold so that, as the primary judge explained, this was not a case where Sippy Downs Group had legal title to the land which it held as trustee on trust for the joint venturers: *Cave v MacKenzie*.[79]

[88] The appellants' sixth contention, in my view, misstates the ultimate effect of the contractual arrangements between the parties. Both Zen and Aspirational's assets were charged to Astor Funds on 20 December 2004.[80] Zen and Aspirational were prohibited from dealing with their charged assets without Astor Funds prior written consent.[81] Sylverton's charges over the assets of the joint venturers and Sippy Downs Group were dated 27 May 2005, over five months later than Astor Funds' charge over the joint venturers' assets. On my view, nothing in the conduct of the joint venturers could diminish the worth of Astor Funds' charge. The joint venturers, not Sippy Downs Group as agent of the joint venturers, acquired property resulting from the purchase and onsale of Lots 8 and 20, relevantly the profit from those transactions. Sylverton's charge over the joint venturers' assets attached to the joint venturers' property, but only after Astor Funds' earlier charge was satisfied. The judge was right to conclude that Sippy Downs Group did not have title to any property to which Sylverton's charge could attach.

[89] It follows that in my view the appellants' sixth contention is not made out.

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75 (1877) 46 LJ Ch 564, 567.

76 See [31] of these reasons.

77 *Zen Foundation One P/L & Anor v Sippy Downs Group P/L & Ors* [2009] QSC 334 [79]-[81].

78 (1877) 46 LJ Ch 564, 567. See also *Jacobs On Trust*, 7th ed, para 210.

79 (1877) 46 LJ Ch 564, 567.

80 Clause 2.2(a) of the fixed and floating charges between Astor Funds and Zen Foundation One, and Astor Funds and Aspirational.

81 Clause 3(c).

Did the joint venturers consent to Sylverton's charge and was that consent valid despite Astor Funds' charge?

[90] The appellants' final two contentions are closely related and are best dealt with together. They are as follows. Astor Funds' charge did not prohibit Zen and Aspirational from dealing with the charged assets without Astor Funds' prior written consent. The appellants contend that under the deed of release and settlement of 27 May 2005, Aspirational and Zen consented to Sippy Downs Group giving a charge in favour of Sylverton. That consent was not invalidated by cl 3(c) of Astor Funds' charge[82] which prohibited the joint venturers from dealing with Astor Funds' secured assets: *Vibex Industries Pty Ltd v Gaylor*.[83] It follows under cl 2.2 and cl 2.3 of the deed of release and settlement[84] that the joint venturers' equitable interests in Sippy Downs Group's contractual rights and the resulting profit were and are subject to Sylverton's charge. Astor Funds' charge also attaches to those equitable interests but only subject to Sylverton's charge.

[91] The facts of *Vibex* are quite different to the present case. The National Australia Bank was granted a fixed and floating charge over Vibex's assets under which charged property could not be disposed of without the bank's consent. Vibex sold two of its businesses to its directors who later onsold those businesses to other parties. The bank appointed receivers and applied for orders setting aside the contract of sale between Vibex and its directors, or a declaration that the interests of the directors in the businesses sold were subject to the bank's equitable rights. The court found that although the bank's charge did not affect legal title to the property to which it attached, the property, when transferred, remained subject to the charge. The court did not set aside the contracts of sale but instead gave the declaration sought by the bank and upheld its equitable rights. I do not consider that *Vibex* supports the appellants' seventh and eighth contentions.

[92] These contentions are extraordinary. The joint venturers, in entering into the deed of release and settlement of 27 May 2005 to which Astor Funds was not a party, did not consent to making Astor Funds' charge over their assets subject to Sylverton's later charge. Nor could they. The appellants' seventh and eighth contentions also fail.

Ground 28

[93] Although not addressed in the appellants' lengthy written and oral arguments, ground 28 of the appeal was not specifically abandoned and the appellants at times seemed to place some general reliance on it. It is a contention that the trial judge ought to have found that the commercial purpose of Sylverton's charge over Sippy Downs Group would be defeated if it were construed to apply only to assets held by Sippy Downs Group in its own right.

[94] The appellants contend that the commercial intention behind the dealings between all parties to the deed of release and settlement of 27 May 2005 was as follows. Sylverton, which had acquired the right to purchase Lots 8 and 20 at a favourable price from the Quinlans and Mr Terelinck, gave up that right to the joint venturers in exchange for payment of the difference between the price for which Sylverton

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82 Set out at [12] of these reasons.

83 (1997) 15 ACLC 750.

84 Set out at [26] of these reasons.

was to purchase Lots 8 and 20 and the price for which it was to sell those lots to Aspirational ($4.1 million). Sylverton was to secure this amount of $4.1 million by mortgage debenture over Sippy Downs Group which was to hold Lots 8 and 20 for the joint venture. This commercial intention was frustrated by Astor Funds opportunistic assertion of its earlier security, obtained only in respect of the purchase of Lot 6. As there was a shortfall after Lot 6 was sold, Astor Funds claimed under its earlier security the joint venture profits from the sale of Lots 8 and 20 to make good this shortfall. The contractual arrangements between Zen Aspirational, Sippy Downs Group and Sylverton intended that Lots 8 and 20 be secured to protect Sylverton's position and not that Astor Funds, which had not provided finance to purchase Lots 8 and 20, have that security.

[95] The obvious answer to the appellants' contention is that the commercial purpose of these transactions cannot be looked at in isolation from Astor Funds' earlier transactions with the joint venturers. The commercial purpose of all transactions, including Astor Funds' earlier charge over the joint venturers' assets, must be determined in context. The primary judge's decision allows Astor Funds to exercise its rights under its charge which preceded Sylverton's charge over the joint venturers and Sippy Downs Group's assets by over five months. The decision at first instance is consistent with the commercial purpose of all transactions between the parties.

[96] The outcome of this unhappy joint venture is that it resulted in an overall loss, which one or more entities associated with the joint venture had to bear. Astor Funds was protected by its charge over the joint venturers' assets, which preceded Sylverton's charge over those and Sippy Downs Group's assets by over five months. It was of no consequence to the commercial purpose and legal effect of the transactions that Astor Funds' charge arose out of joint venturer borrowings in respect of Lot 6 and that the assets to which its charge attached included profit arising from the purchase and onsale of Lots 8 and 20.

[97] It follows that, as the appellants have not demonstrated that any of the many issues they have raised warrant allowing this appeal, it must be dismissed.

ORDER:

Appeal dismissed with costs.

[98] **FRYBERG J:** I agree that this appeal should be dismissed, for the reasons expressed by the President.

[99] I supplement those reasons in relation to what the President has described as the appellants' sixth contention namely, did Sippy Downs Group have title to property to which Sylverton's charge could attach. There was a degree of argy-bargy between the parties over how this aspect of the case was dealt with at first instance. The appellants suggested that Cullinane J had departed from the pleadings in basing his findings on *Cave v McKenzie*[85] and each party suggested that the other's arguments on appeal to some degree represented a further departure from the way the case was conducted below. In my opinion it is not necessary to resolve these quarrels. The issues are solely matters of law and neither side suggests that any re-formulation of them would have led to some change in the conduct of the case below.

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[85] (1877) 46 LJ Ch 564.

[100] The appellants contend that even if the equitable title to the land vested in Aspirational and Zen from the time the new contracts were made, Sylverton's charge, which predated the contracts by three days, attached to Sippy Downs' contractual rights against the vendors. I take that to refer to Sippy's chose in action founded on the contract. I accept that submission. That chose in action was a legal chose in action and while the beneficial interest in it was probably in Aspirational and Zen, the legal interest vested in Sippy. The terms of Sylverton's charge were in equity apt to cover it (they conferred a fixed charge over future property, including property held on trust), although to the extent that the charge applied to a future chose in action it was not registrable under s 262 of the *Corporations Act 2001* (Cth).[86] Upon completion of the contracts by transfer of the land to a nominated third party and receipt by Sippy of its share of the price paid by the transferee, the charge attached to those moneys. As between Aspirational, Zen and Sippy it made no difference that Sylverton's charge may have been given in breach of the agreement with Astor.

[101] However what was true of Sylverton's charge was also true of Astor's charge. It conferred similar rights on Astor and it was the first in time. As between Astor and Sylverton, Astor's charge therefore ranked ahead of Sylverton's on ordinary principles of equity, in the absence of some circumstance which would displace those principles. No such circumstance has been identified.

[102] It may well be that the commercial intention of the complex transactions among the joint venturers has not been carried into effect. It certainly seems that Sylverton's intention suffered that fate. But Astor was not a party to those transactions and it had legally enforceable rights. Commercial transactions are not governed by intentions. They are governed by law. The law provides the certainty and security necessary to found commercial relationships. Astor must prevail.

[103] **APPLEGARTH J**: I have had the advantage of reading the reasons of the President, and agree with them.

[104] I add some additional reasons as to why the trial judge was correct to reject the estoppel that was pleaded by the appellants. As the President has explained, the issue of estoppel arises for consideration in circumstances in which the appellants knew that Sippy Downs Group was agent of the joint venturers. The appellants knew that the joint venturers had decided to conduct their joint venture with Sippy Downs Group as their agent, and the Deed of Release and Settlement did not represent otherwise.

[105] The appellants point to the fact that on the pages of the Deed in which the parties are named, the "Capacity" of each party, including Sippy Downs Group, is stated to be "in its own right". However, this statement must be read in the context of the substantive provisions of the Deed, and served to clarify that each party was not executing the Deed in the capacity of a trustee.

[106] The Deed did not oblige Sippy Downs Group to enter into contracts. Instead, Sippy Downs Group and other parties described in the Deed as a Guarantor acknowledged

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[86] Aspirational and Zen had agreed to the charge in the deed of 27 May 2005 and their directors in their capacity as directors of Sippy executed it. Consequently, their beneficial interest in the chose in action (and probably their interest in the land, although this was not addressed in argument) was probably also subject to the charge as soon as it came into existence.

that $4.1 million was a debt presently due and owing to Sylverton and that such debt and certain other sums were secured or would be secured by "the Securities". The Securities included a Guarantee and Indemnity given by Sippy Downs Group. In essence, and so far as Sippy Downs Group was concerned, the Deed identified moneys that Sippy Downs Group and other guarantors agreed to pay pursuant to a Guarantee and Indemnity executed on the same day as the Deed of Release and Settlement.

[107] Clause 5 of the Deed ("Release from Non-Completion Covenants") released Aspirational and the Guarantors from certain covenants and stated that Sylverton "consents to the SDG entering into the New Contracts". An earlier draft of the Deed included the additional words "as agent of the Joint Venturers". The removal of these words from the final document did not provide any real assistance to the appellants in support of the contention that the execution of the Deed was a representation to Sylverton that Sippy Downs Group would enter into the new contracts in its own right, rather than as agent for the joint venturers.

[108] The Deed did not address whether Sippy Downs Group would enter into new contracts as agent for the joint venturers or otherwise. At best for the appellants the position was left unstated, or at least unclear by the terms of the Deed. In circumstances in which the appellants were on notice that Sippy Downs Group had been appointed as agents of the joint venturers, a clear statement would be required in the Deed before it could be concluded that the terms of the Deed represented that Sippy Downs Group would enter into new contracts as principal.

[109] The Deed in clause 10 addressed the joint venturers' obligations, but imposed no obligations on Sippy Downs Group. Clause 10 provided for Sylverton to participate in the Joint Venture Committee, for the joint venturers to work with Sylverton in respect of the development approval for the site, for the setting of a reserve price, for the joint venturers to keep Sylverton fully informed as to the progress of the sale and for them to only accept an offer to purchase the site or any properties making up the site if instructed by Sylverton or Sylverton's solicitors. These and other provisions are consistent with an understanding that the joint venturers would have the interest in Lots 8 and 20. The Deed did not provide for Sippy Downs Group to play any role in respect of the Joint Venture Committee or the development of the site. It did not give Sylverton any seat on the board of Sippy Downs Group or direct control over its activities in respect of the land. These are things that might have been expected if Sippy Downs Group was to acquire the land in its own right. The Deed is consistent with Sippy Downs Group playing the role that the appellants had earlier been informed it would play: agent of the joint venturers.

[110] At best for the appellants, the deletion of the words "as agent of the Joint Venturers" from the draft of clause 5(c) left the issue of whether Sippy Downs Group would enter into the new contracts as agent for the joint venturers as a matter for further discussion. The Deed did not oblige Sippy Downs Group to enter the contracts as principal, or provide that it would not enter the contracts as agent for the joint venturers. The capacity in which it would enter into future contracts was not addressed by the Deed. The terms of the Deed did not convey, let alone clearly convey, the representation that is pleaded to found an estoppel.

[111] The fact that the Deed did not convey the pleaded representation, and was not understood by the appellants as doing so, appears from the conduct of

representatives of Sylverton after 27 May 2005. This included the involvement of Mr Blanksby in the preparation and lodgement with the Australian Taxation Office of an application for a GST Private Ruling which stated that Sippy Downs Group would acquire the two parcels of land on behalf of the joint venture. Representatives of Sylverton were aware of the fact that a Heads of Agreement dated 5 August 2005 between Woolworths Ltd, the joint venturers and Sippy Downs Group described Sippy Downs Group as "the Agent" and as having executed contracts for Lots 8 and 20 on behalf of the joint venture. In late August another Heads of Agreement was negotiated with a developer. The draft Heads of Agreement recorded that Sippy Downs Group had contracted to purchase Lots 8 and 20 for the purposes of the joint venture and would enter into any agreements with the developer as agent for Zen and Aspirational. A copy of the draft Heads of Agreement was sent to Mr Blanksby and Mr Murray on 26 August 2005. Neither commented on the fact that the document recited that the joint venturers had agreed that Sippy Downs Group would enter into any agreements with the developer as their agent. The absence of complaint or even comment that Sippy Downs Group would enter into agreements as agent for the joint venturers rather than in its own right is significant, and is consistent with Sylverton having known that Sippy Downs Group would act as agent for the joint venturers in respect of the relevant lots.

[112] The conduct of Sylverton's representatives after the Deed of Release and Settlement was executed is not consistent with Sylverton having relied upon a representation that Sippy Downs would enter into new contracts as principal, and not as agent. Sylverton's subsequent conduct is inconsistent with the pleaded representation having been conveyed by the entry of the joint venturers and Sippy Downs Group into the Deed of Release and Settlement, and of Sylverton having relied on that representation.

[113] In summary, the appellants knew that Sippy Downs Group was to act as agent of the joint venturers in respect of the relevant land, did not make provision in the Deed that precluded Sippy Downs Group from entering into contracts as agent for the joint venturers and by their subsequent conduct accepted that Sippy Downs Group was acting as agent of the joint venturers. For these additional reasons, I agree with the President's conclusion that the appellants failed to establish a representation of the kind pleaded.

[114] As to the issue of detriment, the conclusion of the learned trial judge that the appellants had failed to prove that Sylverton suffered detriment as a result of any reliance upon the alleged representation[87] was well-founded. The President has outlined the evidence that indicated that the appellants were not capable of completing the prior contracts. The loss of the chance to complete the prior contracts and thereafter to sell Lots 8 and 20 for Sylverton's own benefit was not proven to have had any real value. The appellants have not called into question the trial judge's finding that the evidence did not suggest that Sylverton would have been capable of completing any agreement to purchase Lots 8 and 20.

[115] The evidence did not establish that any detriment suffered as a result of reliance on the alleged representation was of a kind that supported an estoppel that precluded the respondents from asserting that Sippy Downs Group entered into the contracts for Lot 8 and Lot 20 as agent for the joint venturers.

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87 *Zen Foundation One Pty Ltd v Sippy Downs Group Pty Ltd* [2009] QSC 334 at [69] – [70].

[116] The learned trial judge did not err in holding that the pleaded estoppel was not proven.

[117] For the reasons given by the President, the appellants have not established their contentions in relation to the issue of estoppel or the other contentions raised on appeal. I agree with the order proposed by the President that the appeal be dismissed with costs.