SUPREME COURT OF QUEENSLAND

CITATION:	*Emanuel Management Pty Ltd & Ors v Foster's Brewing Group Ltd & Ors* [2003] QSC 205
PARTIES:	**EMANUEL MANAGEMENT PTY LTD (IN LIQUIDATION) (ACN 007 840 913) AND OTHERS AS SET OUT IN SCHEDULE 1** (plaintiffs) **v** **FOSTER'S BREWING GROUP LTD** (ACN 007 620 886) (first defendant) **GLENMORE PARK ESTATE LTD** (ACN 007 533 888) (second defendant) **ELFIC LTD** (ACN 007 606 206) (third defendant) **LENSWORTH PROPERTIES PTY LTD (IN LIQUIDATION)** (ACN 007 520 649) (fourth defendant) **KINGLINGSTON PTY LTD** (ACN 068 499 874) (fifth defendant) **CALOUNDRA DOWNS PTY LTD** (ACN 068 356 525) (sixth defendant) **CABOOLTURE WATERS PTY LTD** (ACN 068 499 810) (seventh defendant) **MANGO HILL DEVELOPMENT PTY LTD** (ACN 068 244 762) (eighth defendant) **JOHN FRANCIS O'GRADY** (ninth defendant) **JOHN DANIEL CROSBY** (tenth defendant) **COOPERS & LYBRAND (A Firm)** (eleventh defendant) **MURRAY GOLDIE ANDERSON** (twelfth defendant) AND **TIMOTHY JAMES CUMING** (thirteenth defendant)
FILE NO:	s3723 of 1999
DIVISION:	Trial
PROCEEDING:	Trial

ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	17 July 2003
DELIVERED AT:	Brisbane
HEARING DATES:	19 August 2002 - 23 August 2003; 27 August 2002 – 29 August 2002; 2 September 2002 – 5 September 2002; 10 September 2002 – 13 September 2002; 17 September 2002 – 20 September 2002; 23 September 2002 – 24 September 2002; 30 September 2002 – 4 October 2002; 7 October 2002 – 10 October 2002; 14 October 2002; 17 October- 18 October 2002; 21 October 2002 – 24 October 2002; 28 October 2002 – 31 October 2002; 4 November 2002 – 8 November 2002; 12 November 2002 – 15 November 2002; 18 November 2002 – 20 November 2002; 26 November 2002 – 29 November 2002; 2 December 2002 – 5 December 2002; 16 December 2002 – 20 December 2002; 29 January 2003 –31 January 2003; 3 February 2003 – 7 February 2003; 10 February 1002 – 14 February 2003; 18 february 2003 – 20 February 2003; 24 February 2003 – 28 February 2003; 3 March 2003 – 6 March 2003; 10 March 2003 – 13 March 2003; 10 April 2003 – 11 April 2003; 14 April 2003 – 17 April 2003;
JUDGE:	Chesterman J
ORDER:	**1. Action dismissed. Judgment for all defendants against the plaintiffs** **2. Application by the 1st-10th defendants for leave to counterclaim against the plaintiffs dismissed** **3. Claims by the 1st-10th defendants against the 11th-13th defendants and claims by the 11th -13th defendants against the 1st-10th defendants for contribution dismissed**
CATCHWORDS:	CORPORATIONS – WINDING UP – INSOLVENCY – WHAT CONSTITUTES INSOLVENCY OR DEEMED INSOLVENCY - whether liability for ‘insolvent transactions’ incurred pursuant to the Bankruptcy Act 1966 (Cth), The Companies Code and the Corporations Law CORPORATIONS– MANAGEMENT AND ADMINISTRATION – DIRECTORS AND OTHER OFFICERS – FIDUCIARY POSITION – DE FACTO DIRECTORS – whether the control exercised over company group by officers and employees of financier was to such a degree as to make those officers and employees de facto directors - extended definition of ‘director’ - s5 Companies Code and /s60 (1) & (2) Corporations Law

CORPORATIONS – COMPANIES – WINDING UP – CONDUCT AND INCIDENTS OF LIQUIDATION – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – whether payment of dividends on preference shares contravened s565 Companies Code – where recovery on payment of dividends or redemption of shares is precluded by doctrines of res judicata or Anshun estoppel

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DIRECTORS – FIDUCIARY POSITION – DUTIES TO CREDITORS OF COMPANIES – Breach of fiduciary duty – whether payments made pursuant to deeds constituted bribes to directors and solicitors who acted for the plaintiff companies

CORPORATIONS – CORPORATIONS LAW - Whether profit fees constituted unfair loans pursuant to s588FD and s588FE(6) of the Corporations Law - Whether interest charged on loans was unfair for the purposes of s588FD and s588FE(6) of the Corporations Law – extortionate rates of interest – unfair loans - Whether transaction creating a further advance on an existing mortgage is vulnerable pursuant to s588FB; s588FC and s558FE(4) of the Corporations Law – related entity transactions – definition of related entity for the purposes of s5.7B

CORPORATIONS – WINDING UP – LIQUIDATORS – DUTIES AND LIABILITIES – REPORTS, BOOKS ACCOUNTS AND AUDIT – whether breach of liquidator's fiduciary duty - s232 Corporations Law - whether liquidator failed to exercise the requisite degree of care and diligence in exercise of his powers - Whether breach of Auditor's duties arising under Companies Code - Accessorial liability – negligence – breach of contract - Whether breach of duty causative of loss

BANKRUPTCY - Bankruptcy Act 1966 ss.120 and 121 - Whether transaction was a fraudulent disposition of property voidable against the liquidator pursuant to s121 of the Bankruptcy Act 1966 - Whether transaction incurring an obligation to pay a fee for obtaining further advances of working capital was a settlement of property for the purposes of s120 of the Bankruptcy Act 1966 - Whether indenture was a settlement for the purposes of s120 or a fraudulent disposition of property for the purpose of s121 of the Bankruptcy Act 1966 - Whether profit fees constituted voidable transactions pursuant to s120 and s121 of the Bankruptcy Act 1966

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – setting aside judgment for fraud – whether Supreme Court judgment was obtained fraudulently and/or collusively - whether conspiracy to defeat creditors by fraud – s121 Bankruptcy Act

ESTOPPEL – GENERAL PRINCIPLES – FORMER ADJUDICATION – JUDGMENT INTER PARTES – Res Judicata - Anshun estoppel

BREACH OF STATUTORY DUTY – Corporations Law - Contract - Conspiracy – Duress – Unconscionability and Undue Influence – Whether an agreement can be set aside for conspiracy, unconscionability or undue influence

LIMITATION OF ACTIONS – Limitation of Actions Act 1936 (SA) – whether recovery of dividend payments on preference shares lost by effluxion of time - whether claims against auditor for breach of contract, negligence or assisting in a breach of fiduciary duty are barred by the Limitation Act

COUNSEL:	D Meagher QC, P Morrison QC, R Derrington, J Peden, M Livesey for the plaintiffs
	PA Keane QC, J Sheahan SC, J Bond SC, J McKenna SC, A Pomerenke, P Fox for the 1st-10th of defendants
	B Oslington QC, S Thompson SC, LF Kelly for the 11th – 13th defendants
SOLICITORS:	Bennett & Philp instructed as town agents for Hunt & Hunt, Adelaide for the plaintiffs
	Clayton Utz for the first group of defendants Mallesons Stephen Jaques for the second group of defendants

Cases Cited - The following cases are cited in the judgment:

3M Australia v. Kemish (1986) 10 ACLR 371

Abigroup Ltd v. Abignano (1992) 112 ALR 497

Addstead Pty Ltd (in liq) v. Liddan Pty Ltd [1997] 70 SASR 21

Aequitas v. AEFC (2001) 19 ACLC 1006
Aktieselkabet Dansk Skibsfinansiering v Wheelock Marden & Co (unreported) CA Hong Kong 17 November 1994

Alati v. Kruger (1955) 94 CLR 216
ANZ Executives and Trustee Company Ltd v. Quintex Australia Ltd [1991] 2 Qd R 360

Associated Alloys Pty Ltd v. ACN 001 452 106 Pty Ltd (2000) 74 ALJR 862

Attorney-General for Hong Kong v. Reid [1994] 1 AC 324

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Avon Downs Pty Ltd v. Federal Commissioner of Taxation (1949) 78 CR 353

Baker v. Palm Bay Island Resort Pty Ltd [1970] Qd R 210

Bank Line Ltd v. Arthur Capel & Co [1919] AC 435

Barclays Bank Ltd v. W J Simms Son & Cook (Southern) Ltd [1980] QB 677

Barnes v. Addy (1874) 9 LR Ch App 244

Barton v. Official Receiver (1984) 4 FCR 380

Beach Patroleum NL v. Johnson (1993) 11 ACSR 103

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*BP Refinery (Westernport) Pty Ltd v. Shire of Hasting*s (1977) 180 CLR 266

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Byrne v. Australian Airlines Ltd (1995) 185 CLR 410

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Coomera Resort Pty Ltd v. Kolback Securities Ltd (McKenzie J Supreme Court of Queensland 20 February 1998) at 37

Corporate Affairs Commission v. Drysdale (1978) 141 CLR 236

David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 373

Demondrille Nominees Pty Ltd v. Shirlaw (1997) 25 ACSR 535

Deputy Commissioner of Taxation v. Austin (1998) 28 ACSR 565
Dimskal Shipping Co. SA v. International Transport Workers Federation [1992] 2 AC 152

Economic Life Assurance Society v. Usborne [1902] AC 147
Edison General Electric Co v. Westminster & Vancouver Tramway Co. [1897] AC 193

Edwards v. The Queen (1991-1992) 173 CLR 653

Equiticorp Financial Services Ltd (NSW) v. Equiticorp Financial Services (NZ) (1992) 29 NSWLR 260

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Hamilton v. BHP Steel (JLA) Pty Ltd (1995) 13 ACLC 1548

Hamilton v. Kaljo 1989 17 (NSWLR) 381

Hardie v. Hansen 105 CLR 451

Harlows Nominees Pty Ltd v. Woodside (Lakes Entrance) Oil Co NL (1968) 121 CLR 483

Harris v. S (1971-1976) ACLC 40-263

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Heald v. O'Connor [1971] 1 WLR 497

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Iso Lildow' Aliphumeleli Pty Ltd (in liq.) v. Commissioner of Taxation

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J N Taylor Holdings Ltd (in liq.) (1991) 6 ACSR 187

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Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd [1942] AC 154

Karak Rubber Co Ltd v. Burden (No. 2) [1972] 1 WLR 602

Kostka v. Addison [1986] 1 Qd R 416

Larking v. Great Western (Nepean) Gravel Ltd (1940) 64 CLR 221

Logicrose Ltd v. Southend United Football Club Ltd (1988) 1 WLR 1257

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Marks v. Feldman (1870) LR 5 QB 275

Marra Developments Ltd v. B.W. Rofe Pty Ltd [1977] 2 NSWLR 616

McDonald v. Scobie [1980] Qd R 477

McKernan v. Fraser (1931) 46 CLR 343

McWilliam v. Crescendo Management Pty Ltd v. Westpac Banking Corporation (1988)

McWilliam v. Penthouse Publications Ltd [2001] NSWCA 237

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Melbourne Banking Corporation Ltd v. Brougham (1881-82) 7 App Cas 307 at 315

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Re Bank of Credit & Commerce International S.A. [No. 8] [1998] AC 214

Re Barnes, ex parte Stapleton [1962] Qd R 231

Re Charge Broad v. Commissioner of Stamp Duties (1980)

Re Diplock [1948] 1 Ch 465

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Secretary for the State for Trade and Industry v. Deverell [2001] Ch 340

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South Australia in Jackson v. Esanda Finance Corporation Ltd
[1992] 59 SASR 416
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(2001) 53 NSWLR 213

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Youyang Pty Ltd v. Minter Ellison Morris Fletcher 2003 (HCA) 15

SCHEDULE 1

The Plaintiffs

1st Plaintiff	Emanuel Management Pty Ltd (In Liquidation) (ACN 007 840 913)
2nd Plaintiff	Segacious Pty Ltd (In Liquidation) (ACN 010 748 544)
3rd Plaintiff	Meka Securities Pty Ltd (In Liquidation) (ACN 007 724 629)
4th Plaintiff	Cofordo 251 Pty Ltd (In Liquidation) (ACN 010 683 584)

5th Plaintiff	Grangeville Pty Ltd (In Liquidation) (ACN 008 104 854)
6th Plaintiff	Emanuel (No. 14) Pty Ltd (In Liquidation) (ACN 008 080 206)
7th Plaintiff	P.B.R.S. Pty Ltd (In Liquidation) (ACN 007 799 546)
8th Plaintiff	Paterson & Co Pty Ltd (In Liquidation) (ACN 007 679 763)
9th Plaintiff	Giuseppe Nominees Pty Ltd (In Liquidation) (ACN 007 771 486)
10th Plaintiff	Lonsdale Stage 2 Pty Ltd (In Liquidation) (ACN 007 812 928)
11th Plaintiff	Emanuel Properties Pty Ltd (In Liquidation) (ACN 007 740 123)
12th Plaintiff	Emanuel (No. 4) Pty Ltd (In Liquidation) (ACN 008 036 995)
13th Plaintiff	Emanuel (Rundle Mall) Pty Ltd (In Liquidation) (ACN 007 983 851)
14th Plaintiff	Villa-Cairns Pty Ltd (In Liquidation) (ACN 010 633 459)
15th Plaintiff	Addstone Pty Ltd (In Liquidation) (ACN 010 764 977)
16th Plaintiff	Antlia Pty Ltd (In Liquidation) (ACN 010 688 776)
17th Plaintiff	Centaurus Pty Ltd (In Liquidation) (ACN 010 688 767)
18th Plaintiff	Cloudland Investments Pty Ltd (In Liquidation) (ACN 010 319 730)
19th Plaintiff	Cofordo 260 Pty Ltd (In Liquidation) (ACN 010 685 775)
20th Plaintiff	Derwent Water Pty Ltd (In Liquidation) (ACN 010 688 721)
21st Plaintiff	Emanuel (No. 7) Pty Ltd (In Liquidation) (ACN 008 053 352)
22nd Plaintiff	Lascivious Pty Ltd (In Liquidation) (ACN 010 749 032)
23rd Plaintiff	Leominor Pty Ltd (In Liquidation) (ACN 010 688 758)
24th Plaintiff	Livilla Pty Ltd (In Liquidation) (ACN 010 748 571)
25th Plaintiff	Saroon Pty Ltd (in liquidation) (ACN 010 633 548)
26th Plaintiff	Woodville Industrial Park Pty Ltd (In Liquidation) (ACN 008 037 018)
27th Plaintiff	Airlie Beach Pty Ltd (In Liquidation) (ACN 008 203 218)
28th Plaintiff	Navicio Pty Ltd (ACN 010 616 690)
29th Plaintiff	Airlie Bay Developments Pty Ltd (In Liquidation) (ACN 010 177 232)
30th Plaintiff	Elizabeth House Pty Ltd (In Liquidation) (ACN 007 548 487)
31st Plaintiff	Addstead Pty Ltd (In Liquidation) (ACN 010 764 931)
32nd Plaintiff	Bronstead Pty Ltd (In Liquidation) (ACN 010 906 475)
33rd Plaintiff	Carmina Burana Pty Ltd (In Liquidation) (ACN 010 672 849)
34th Plaintiff	Carsim Pty Ltd (In Liquidation) (ACN 007 760 116)
35th Plaintiff	CC Lot 1 Pty Ltd (In Liquidation) (ACN 008 037 063)
36th Plaintiff	CC Lot 4 Pty Ltd (In Liquidation) (ACN 008 037 036)
37th Plaintiff	Dangier Pty Ltd (In Liquidation) (ACN 010 731 012)
38th Plaintiff	Emanuel (No. 8) Pty Ltd (In Liquidation) (ACN 008 053 343)

39th Plaintiff	Emanuel (No. 9) Pty Ltd (In Liquidation) (ACN 008 053 334)
40th Plaintiff	Emanuel (No. 13) Pty Ltd (In Liquidation) (ACN 008 080 180)
41st Plaintiff	Emanuel (No. 15) Pty Ltd (In Liquidation) (ACN 010 748 606)
42nd Plaintiff	Emanuel (Malltown) Pty Ltd (In Liquidation) (ACN 007 885 403)
43rd Plaintiff	Emanuel (Qld) Pty Ltd (In Liquidation) (ACN 008 100 810)
44th Plaintiff	Emanuel (South Aust) Pty Ltd (In Liquidation) (ACN 007 963 466)
45th Plaintiff	Emanuel Constructions Pty Ltd (In Liquidation) (ACN 007 639 438)
46th Plaintiff	Emanuel Enterprises Pty Ltd (In Liquidation) (ACN 007 838 691)
47th Plaintiff	Emanuel Holdings Pty Ltd (In Liquidation) (ACN 007 653 974)
48th Plaintiff	Emanuel Investments Pty Ltd (In Liquidation) (ACN 007 743 400)
49th Plaintiff	Emanuel Projects Pty Ltd (In Liquidation) (ACN 007 683 418)
50th Plaintiff	Establishment Holdings Pty Ltd (In Liquidation) (ACN 007 736 218)
51st Plaintiff	Etruscan Pty Ltd (In Liquidation) (ACN 010 731 058)
52nd Plaintiff	Havana Pty Ltd (In Liquidation) (ACN 008 119 999)
53rd Plaintiff	Hendon Industrial Park Pty Ltd (In Liquidation) (ACN 007 890 708)
54th Plaintiff	Heriot Pty Ltd (In Liquidation) (ACN 010 731 021)
55th Plaintiff	Hondel Pty Ltd (In Liquidation) (ACN 007 901 144)
56th Plaintiff	Joe Emanuele Pty Ltd (In Liquidation) (ACN 007 623 690)
57th Plaintiff	Libra Pty Ltd (In Liquidation) (ACN 007 588 490)
58th Plaintiff	Marview Pty Ltd (In Liquidation) (ACN 008 272 615)
59th Plaintiff	Molinara Pastoral Company Pty Ltd (In Liquidation) (ACN 007 705 062)
60th Plaintiff	Roclin Enterprises Pty Ltd (In Liquidation) (ACN 007 841 161)
61st Plaintiff	Sayer Properties Pty Ltd (In Liquidation) (ACN 007 714 927)
62nd Plaintiff	South Australian Manufacturing Park Pty Ltd (In Liquidation) (ACN 008 265 058)
63rd Plaintiff	Surent Pty Ltd (In Liquidation) (ACN 008 178 434)
64th Plaintiff	Trombone Pty Ltd (In Liquidation) (ACN 010 633 557)
65th Plaintiff	Worando Trust Pty Ltd (In Liquidation) (ACN 007 511 739)
66th Plaintiff	Peter Ivan Macks

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Introduction

[1] This action is brought at the instigation of the 66th (and last) plaintiff who is the liquidator of the other 65 plaintiffs. They were (with some presently irrelevant exceptions) all wound up in 1995 on the application of the Commissioner of Taxation. The first to eighth defendants are all related companies. The first, second, third, and fourth defendants have undergone a number of changes of name

during the lengthy period in which occurred the events from which this action arises.

Foster's Brewing Group Ltd, the conglomerate which resulted from the acquisition by Elders IXL Ltd of Carlton and United Breweries Ltd had a merchant banking division which has been known in these proceedings as Elders Finance Group or EFG. It consisted of a number of companies which included the second, third and fourth defendants, which are subsidiaries of the first defendant.

[2] Except where it is necessary to identify particular plaintiffs I shall refer to them indistinguishably as "the plaintiffs" or "the plaintiff companies". Guiseppe Nominees Pty Ltd was the ultimate holding company. It was owned by Mr & Mrs Giuseppe Emanuele. The plaintiffs were controlled by Mr Emanuele. When it is necessary to refer to a particular plaintiff or plaintiffs I shall abbreviate the name so that, for example, Emanuel Management Pty Ltd will become "Management"; Paterson Pty Ltd will become "Paterson" and Emanuel (No. 14) Pty Ltd will become "Emanuel 14". It was the first 27 plaintiffs with whom the first to eighth defendants had most, if not all, of their dealings. I shall refer to them as the 'Emanuel group'. It should be noted that a number of documents describe the 'Emanuel group' as the first 27 plaintiffs together with Mr Emanuele. I use the term to describe the companies only.

[3] Similarly, unless it is necessary to identify one of the second to fourth defendants I shall refer to them indistinguishably as "Elders" or "EFG", or "the first defendants".

[4] The ninth defendant, Mr O'Grady, has been the managing director of EFG (but not of its parent company, the first defendant) since 1991. Mr Crosby, the tenth defendant, was for a time a director of the second, third, and fourth defendants. He ceased to hold any directorship in those companies late in 1991. Many years ago, between 1961 and 1966 Mr Crosby was employed by Mr Giuseppe Emanuele.

[5] The eleventh defendant is a well known firm of chartered accountants. The twelfth and thirteenth defendants were at various times members of the partnership who performed professional services for the plaintiffs. Mr Cuming was the liquidator of a small number of the plaintiff companies before the appointment of Mr Macks, the 66th plaintiff. I shall refer to these defendants collectively as 'the second defendants', 'Coopers and Lybrand' or 'C & L'.

[6] It will not be necessary to refer much to the fifth, sixth, seventh, or eighth defendants. They are joined because particular relief is sought against them. They were companies to which were transferred several parcels of land which had been mortgaged by the plaintiffs to Elders to secure substantial amounts of money borrowed by the plaintiffs. After default and in circumstances which it will be necessary to discuss in great detail, the lands were transferred to those companies as part of a compromise between the plaintiffs and Elders. The compromise is attacked by the plaintiffs on a very large number of grounds which all have as an objective the reconveyance of the lands to the plaintiffs. Some of them have become very valuable.

[7] The directors of the plaintiff companies were Mr Giuseppe Emanuele, his son Rocco Emanuele, his daughter Linda and his son Linton, as well as a nephew and a niece, Robert Simionato and Gelinda Simionato. These were called 'the Emanuele

Family Directors' during the trial and again it is convenient to use that terminology. None of them was called as a witness. Mr Emanuele resigned as a director of the Emanuel group in March 1995 and the designation "Emanuel Family Directors" does not include him after that date.

[8] The ultimate holding company for the plaintiffs was Giuseppe Nominees, the only shareholders of which were Mr and Mrs Emanuele. It held its property on trust for Mr Emanuele and members of his family. Giuseppe Nominees was the sole beneficial shareholder of Holdings which was the sole shareholder of Management which owned beneficially all the shares in Paterson. That company then owned, effectively, the shares in the other plaintiff companies which were its subsidiaries. This is an over-simplification but it is sufficient for present purposes. The number of companies is explained by the fact that for taxation purposes they were mostly single purpose companies, each company being acquired for the purpose of owning one property. As the property was sold the company would become dormant. Some companies which traded in properties would own more than the one property but there were only a few such companies. Management was, as its name suggests, the banker and administrator for the plaintiffs. When a company acquired a property Management would borrow for that purpose and on-lend the money. Security would be taken from Management as well as the owning company. When the property was sold, if sold for a profit, the proceeds would go to Management which would then owe the 'profit' as an inter-company loan to the company whose property had been sold. Conversely if the property sold for a loss, that company would owe money to Management.

[9] Mr Emanuele came to South Australia from Italy in 1952. He commenced working as a real estate agent but soon began to develop residential, and then commercial properties. By 1986 he (or more accurately his companies) had become very substantial property owners in Adelaide. They had acquired a considerable part of the commercial centre of that city. Mr Emanuele was obviously a shrewd and astute investor as well as being determined in personality and confident in his ability to detect a good investment and to persuade a financier to lend the money for its acquisition. His group was always highly geared and his borrowings often came close in value to the worth of the properties. Nevertheless he was a self-made man who built his group from nothing to one which held properties worth more than $100,000,000.

[10] In 1986 on a visit to Queensland Mr Emanuele impulsively agreed to buy about 64,000 acres of undeveloped land thickly planted with pine trees ("the APM land"). The vendor was Australian Paper Manufacturers Ltd ("APM"). The purchase price was $48,000,000 and the deposit was $5,000,000. The eventual purchaser was Emanuel 14 and Elders lent all the money to enable the purchase to proceed. At the time he made the agreement with the vendor the plaintiffs did not have available to them sufficient monies to pay the deposit. That amount, too, had to be borrowed. A delay in securing funds led to an additional amount of $811,587.63 being paid to APM by way of interest.

[11] At the time of the purchase the Emanuel group's financial position was far from sound. It had recently defaulted on payments due to mortgagees who had exerted some pressure on the plaintiffs to improve their performance. News that Mr Emanuele had committed his companies to a substantial purchase of broad acres produced anger in some lenders and dismay in others.

[12] Mr Emanuele was undeterred. He persuaded Elders, which up until then had not been the major financier to his group, to advance the money, as I have mentioned. The advance was for a term of four months with interest to be capitalised. Mr Emanuele moved swiftly to find a partner with sufficient capital to allow the development of the land without the need for costly borrowing. He found a manifestation of a Chinese provincial government which indicated it would agree to acquire a half interest in the lands by purchasing shares in Emanuel 14 for about $2,000,000 and by financing the development of the land in return for a share of the profits. This would have allowed the plaintiffs to repay EFG and develop the land without cost. Elated by his success and the prospect of an immediate profit, Mr Emanuele toured Queensland as far north as Cape Tribulation, buying whatever land took his fancy. In February 1988 his Chinese co-venturer withdrew the day before it was due to sign a binding agreement. The plaintiffs were obliged to sell their commercial properties in Adelaide, which produced substantial income, to reduce the level of debt. They were left with large tracts of land producing no income save for the proceeds of the sale of the pine plantations. They had no means of servicing their considerable debt to Elders. Thus began the plaintiffs' troubles and their litigious effort to recover from them.

[13] The loss of his joint venturer was a serious blow for Mr Emanuele and his companies. They were then in a parlous financial position. Indeed, for the purposes of the action, the plaintiffs date their insolvency from this event. Mr Emanuele, however, remained optimistic and endeavoured to find buyers for the larger parcels of land. EFG was sympathetic and indicated that it would advance moneys by way of working capital to allow the plaintiffs to meet their financial obligations until sales could be effected and the proceeds applied to reduce debt and to meet the companies' running costs. The plaintiffs argue that the amounts advanced were insufficient to allow them to pay their debts as they fell due. EFG's motive was not altruism: its witnesses explained that they thought there was a better chance that the lands could be sold and for higher prices if Mr Emanuele was in charge of the selling program. Forced sales by a mortgagee would, it was apprehended, be less successful. This, too, became a subject of debate between the plaintiffs and the first defendants. The plaintiffs claimed that EFG involved itself in the plaintiffs' affairs well beyond supervising the marketing of the properties charged with the payment of their debt. They argue EFG's interest extended to all aspects of the plaintiffs' undertaking so that EFG, by its officers, became *de facto* directors of the companies. When coupled with the allegation that those companies were insolvent from 1988 it is said that EFG incurred liability pursuant to the *Bankruptcy Act (1966)* (Cth) ('*Bankruptcy Act'*), *The Companies Code* and *The Corporations Law* for what may, for convenience, be compendiously described as 'insolvent transactions'.

[14] In 1990 it appeared as though Mr Emanuele had succeeded in extricating his group from its predicament. He negotiated the sale of part of the APM lands, about 1,800 hectares on Bribie Island, to a Japanese investor for a price of $105,000,000. The property the subject of the sale included some land at Kangaroo Point which may, for present purposes, be disregarded. The sale was subject to obtaining approval from the Foreign Investment Review Board ('FIRB'). The plaintiffs, a little carpingly, tended to decry the contract as not being a genuine contract for sale. Certainly some of its terms were unusual but there is nothing in the evidence to show that the purchaser was not willing and able to complete, subject to FIRB approval. Unfortunately for Mr Emanuele the State Government had changed late

in 1989 and the new administration placed more emphasis on protecting the natural environment than on development. In about January 1991 it determined to oppose the grant of FIRB approval and notified Mr Emanuele to that effect. Thereafter, though he remained optimistic that the setback could be overcome, the transaction was in reality doomed from the moment the State Government determined its position.

[15] The first defendants took the same view. They decided to reduce the extent to which they would lend moneys to the plaintiffs to enable them to continue operating. In particular they told the plaintiffs of their decision not to advance moneys for the payment by the plaintiffs of interest due on loans from other financiers.

Mr Emanuele was told to come to whatever arrangements he could with those financiers. EFG itself 'suspended' the interest due to it from the plaintiffs. This meant that interest due from the plaintiffs was not regarded as income for the purposes of EFG's profit and loss account though, as between plaintiffs and first defendants interest was still payable. The decision reflected the fact that the plaintiffs could not pay interest and that EFG's accounts would be inaccurate if they included that interest as income.

[16] The next two years were ones of particular difficulty for the plaintiffs. They attempted in vain to sell sufficient of their landholding to reduce their debt to manageable proportions. A number of contracts for substantial prices were signed but none proceeded to settlement. It would be remembered that 1990 and the years following were ones of economic hardship for the whole country which experienced a deep and prolonged recession. Property values declined and there was little enthusiasm for the large scale development which was necessary for the plaintiffs' purposes. That is not to say that the plaintiffs made no sales. They did sell a number of parcels of land and successfully subdivided other land and sold off the subdivided lots. The overall proceeds, though substantial, were insufficient to make inroads into the debt owed to the first defendants (and other financiers) interest on which was capitalised so that it continued to increase.

[17] Throughout these years the plaintiffs attempted to refinance their borrowings. Interest rates had declined markedly as the effects of the recession were felt but EFG did not reduce the rates agreed with the plaintiffs when the loans were advanced. These rates were quite high: of the order of 20 per cent when prevailing market interest rates in 1990 and 1991 fell to about 15 per cent. The maintenance of high rates is the subject of a particular complaint by the plaintiffs about which it will be necessary to say more later.

[18] In 1992 the plaintiffs commissioned a report from Mr Bruce Wales, a chartered accountant, who had formerly been a partner of Coopers & Lybrand. The Wales Report, as it was called, was paid for by EFG and produced in November 1992. The essence of its conclusions was that if the APM lands were rezoned, or if development approvals could be obtained in respect of them, their saleability and value would increase very greatly. The process of obtaining such approvals would be relatively lengthy and expensive but the moneys expended to achieve that end would result in a hugely increased sale price.

[19] The Wales Report was delivered to Mr O'Grady, the ninth defendant who spoke to Mr Wales about it. Mr O'Grady accepted the thrust of the report, that given time and some more money the plaintiffs could develop some or all of the APM lands to the point where a repayment of EFG's debt was feasible.

[20] In March 1993 the Emanuel group entered into a deed with the second, third and fourth defendants, the Deed of Orderly Realisation ('DOOR'). This deed has already been the subject of litigation between the parties to it in the Federal Court. It is a focus of attack by the plaintiffs in these proceedings. It will be necessary later to consider the detail of its terms and the separate bases for the plaintiffs' complaints about it. For the moment it is enough to explain that it provided for a moratorium of 40 months during which EFG was precluded from demanding repayment of any of its outstanding loans on the condition that the Emanuel group made sales of land within a timeframe and to a value set out in the deed. There were incentives for the plaintiffs to make the sales. Prices obtained in excess of designated amounts would result in additional receipts to the plaintiffs. A recital to DOOR acknowledged the amount of the debt which the Emanuel group owed EFG at the time of execution. It is this recital which is of particular importance to the plaintiffs. They allege that the debt was inflated and that EFG by its officers knew that the deed overstated the amount of the debt. It is also alleged that Mr Emanuele was overborne and coerced into executing the deed. EFG's motives for its conduct are said to be sinister and to form part of an expansive plan implemented over years to obtain freehold title to the APM lands and thereby defraud the plaintiffs and their creditors, particularly their unsecured creditors.

[21] As part of the security for the loan to it, Emanuel 14 gave a mortgage debenture to EFG which, relevantly, charged the trees growing on the APM lands and the proceeds from the sale of the timber. Emanuel 14 had, in fact, made an agreement with Softwoods Queensland Pty Ltd ('Softwoods'), a subsidiary of Colonial Sugar Refineries Ltd ("CSR") for the payment of royalties from the timber which Softwoods cut and removed from the land. The royalties exceeded $1,000,000 per year and were the plaintiffs' only source of income apart from property sales which occurred sporadically. By the terms of the DOOR the receipt of the timber royalties by the Emanuel group was in the discretion of EFG.

[22] In about August of 1993, only five months after the execution of DOOR, Messrs O'Grady and Crosby became convinced that the scheme underlying DOOR would not succeed. There were two reasons for the reassessment. In March 1991 Emanuel 14 signed a contract to sell Parcel 64, the most saleable of the APM lands, to a company, Kartha Pty Ltd ('Kartha") for $30,000,000. Kartha could not perform and the contract was renegotiated in June 1992. Despite extensions of time the contract was not completed and was rescinded by agreement in August 1993. Mr Crosby saw in the failure of the transaction, the third of its kind, an indication that Mr Emanuele was not capable of successfully completing a 'big sale' which was necessary if the moratorium was to achieve its desired end. To Mr O'Grady that was of secondary importance. To him of more significance was a report published by the Regional Planning Advisory Group ('RPAG') set up by the State Government to advise it on overall land use in South East Queensland. The work of this group was complemented by other population and land use studies which it is unnecessary to mention. The result of the report compiled by RPAG was that, with the exception of Parcel 64, also known as Mango Hill, the APM lands were all designated for preservation as open spaces. This meant that the thesis underlying

the Wales Report had become invalid. Those lands would not, certainly for many years, be given approval for development. The prospect of their obtaining enhanced value by reason of such approvals had disappeared, and with it the purpose of the DOOR.

[23] The position as Mr O'Grady saw it at the end of 1993 was that the plaintiffs owed EFG about $160,000,000. The debt was steadily growing. The plaintiffs had been unable, over the course of about five years, to effect any large scale sales of its lands to reduce the debt. The RPAG report cast serious doubts upon the saleability of three of the four large parcels of APM land. The plaintiffs did not have the financial resources to obtain development approval for Parcel 64. Mr O'Grady therefore proposed that the plaintiffs and EFG should sever their relationship. The plaintiffs should transfer to EFG the APM lands which were mortgaged to it so that EFG could develop them as best it could in an endeavour to recover its debt. The other lands should be sold and part of the proceeds paid to the Emanuel group. The size of its share would depend upon the prices obtained.

[24] Mr Crosby, who by this stage was no longer employed by EFG but was a consultant to it and who had had a long and friendly relationship with Mr Emanuele, was commissioned to negotiate the proposal. He was unsuccessful. Mr Emanuele would not accept the loss of the APM lands and their potential. In March 1994 EFG determined to bring matters to a head and exercised its powers under DOOR to direct the payment of timber royalties from Emanuel 14 to itself. The plaintiffs were without an income. In August they commenced proceedings in the Federal Court in Adelaide to challenge EFG's actions. The claim had two bases: first that on its true construction DOOR did not allow EFG to divert timber royalties. The second was that EFG had made representations during the course of negotiations for DOOR to the effect that timber royalties would flow to the plaintiffs. Those representations were said to have been a contravention of the *Trade Practices Act* 1974 (Cth) ('TPA') if DOOR by its terms did not secure the royalties to the plaintiffs. Relief was claimed giving effect to the alleged representations.

[25] In November 1994 Branson J. gave judgment in favour of EFG which then proceeded to exercise its powers as mortgagee. It went into possession of the secured properties and commenced proceedings in this Court to obtain judgment for the outstanding debt. Simultaneously it negotiated with the plaintiffs for a resolution of their differences. An appeal against the judgment of Branson J had been instituted and Mr Emanuele had indicated that he would contest EFG's attempts to realise the secured properties.

[26] On 27 February 1995 summary judgment was entered on the application of the second, third and fourth defendants, in an amount of $186,880,302.71 against the first 27 plaintiffs and Mr Emanuele. On 17 March 1995 a compromise was reached between the Emanuel group, Mr Emanuele, and the second, third and fourth defendants. The compromise was affected by three separate deeds which were intended to be inter-dependant so that none would be effective unless all were executed. The deeds themselves do not contain this term: indeed they do not refer to each other at all. Each contained a clause obliging the respective parties to keep their existence, and their terms, confidential.

[27] The first deed, styled Deed of Forbearance and Release (DOFR), was made between the first 29 plaintiffs and the second, third and fourth defendants. It will be

necessary later to set out its terms in some detail but for the moment it is enough to record that the plaintiff parties agreed to discontinue their appeal to the full Federal Court and agreed to transfer the various parcels of the APM lands to the fifth, sixth, seventh and eighth defendants for prices set out in a schedule the aggregate of which was to be applied to reduce the judgment debt. Further the plaintiff parties agreed not to resist or interfere with the exercise by EFG of its rights as mortgagee; released EFG its employees, agents and solicitors from all causes of action arising out of advances and securities made and taken between the plaintiffs and EFG and admitted indebtedness for the amount of the judgment debt together with interest accruing at 20.5 per cent per annum. For its part EFG agreed to pay $650,000 to the first 29 plaintiffs and to pay a further sum of $50,000 to their solicitors for services rendered and to pay a little over $320,000 to another creditor of the Emanuel group.

[28] The second deed was made between Simionato Holdings Pty Ltd and the second, third and fourth defendants (‘the Simionato deed’). It provided for the payment by EFG to Simionato Holdings Pty Ltd (‘Simionato Holdings’) of $4,600,000. It further provided that the second, third and fourth defendants consented to Simionato Holdings paying Giuseppe Nominees $1,300,000 to allow that company to discharge mortgages it had granted in favour of those defendants over three house properties which were family and/or holiday homes of Mr Emanuele. The express reason for the payment, which was described as gratuitous, was the recognition of the valued commercial relationship between EFG and Mr Emanuele over three decades and the co-operation that Mr Emanuele would extend to the defendants when enforcing their securities.

[29] The third deed was between Mr Emanuele himself and the second, third and fourth defendants. It admitted the enforceability of the judgment obtained against him in this court. It expressed his intention to use his best endeavours to compromise with his creditors other than EFG so as to avoid bankruptcy. Mr Emanuele also released EFG it employees, agents and solicitors in the same terms as the release found in DOFR.

[30] The plaintiffs allege that the three deeds, the entry of judgment and the transfer of the APM lands pursuant to DOFR together constitute what they call ‘the 1995 Scheme’ which is the heart of their case. In the plaintiffs’ eyes it gives rise to a bewildering number of claims and causes of action which it is impossible to summarise. The salient features are that the judgment was obtained by collusion and that the 1995 Scheme was the result of a conspiracy between Mr Emanuele, his son Rocco, Mr Crosby, Mr O’Grady, Mr Elliott (a former partner of EFG’s solicitors), Mr Winter (a solicitor in Adelaide who acted for the Emanuel group) and Mr Ferrugia (who was the solicitor for Mr Emanuele personally) to defraud the plaintiff companies and therefore their creditors. The core of the conspiracy was to obtain for EFG the APM lands and in particular Parcel 64, at a gross undervalue. It is said that the judgment was for a deliberately inflated amount the purpose of which was to enable EFG to vote at meetings of creditors of the plaintiff companies which proposed compromises by means of deeds of company arrangement. The point is said to be that to ensure the conspiracy did not come to light the plaintiff companies had to be prevented from being put into liquidation. A liquidator, it was said, would investigate the affairs of the companies and discover the fraud. The remedy was to appoint an administrator to broker a compromise between the companies and their creditors but from whom would be concealed the existence and

terms of the deeds and the transactions described in them. The amount of EFG's judgment debt when voted at the meetings would ensure the passage of the compromise proposed by the plaintiffs.

[31] An administrator was appointed to 40 of the plaintiff companies, including the Emanuel group, in March 1995. Deeds of company arrangement were proposed utilising part of the money paid by EFG pursuant to the DOFR. The proposal was for payment in full of the employees and trade creditors but of a tiny dividend to other creditors, mainly the Australian Tax Office and financiers. Resolutions supporting the proposal were passed at meetings held late in May 1995 but subsequent litigation in the Federal Court by the Australian Tax Office saw the deeds of company arrangement set aside and Mr Macks appointed as liquidator of the plaintiffs.

[32] The payment of moneys to Simionato Holdings was said to constitute a bribe by EFG to Mr Emanuele. In return for it he was to have his companies transfer the APM lands to the fifth, sixth, seventh and eighth defendants and allow judgment to be entered for an excessive amount. He was to do this to further EFG's ambitions to acquire the APM lands and to prevent detection of what it had done. In so doing he was to abrogate his responsibilities and duties to his companies.

[33] Another event to which the plaintiffs attach great significance is that in 1988 the Australian Tax Office ('ATO') commenced an audit into the affairs of various of the plaintiff companies. The audit proceeded at a leisurely pace but in November 1993 assessments were issued which required various companies to pay primary tax, penalties and interest aggregating about $44,000,000. The plaintiffs' accountants believed the assessments to be based on errors of fact but the plaintiffs were unable through lack of resources to take matters beyond the lodging of objections which the ATO disallowed. The tax audit appears to have two aspects of significance for the plaintiffs. The first relates to the topic of insolvency. The plaintiffs argue that the assessments when issued related to the 1987 and 1988 financial years and that the amount of tax assessed should have been taken into account in the respective companies' profit and loss accounts for those years as a liability. The effect of so doing would have been to reduce profits. The second significance is that the ATO was a creditor whose debt was to go almost entirely unpaid had the proposed compromises with creditors envisaged in the '1995 Scheme' proceeded. Trade creditors were to be paid in full. To the plaintiffs this affords proof of bad faith against those who devised and/or implemented the '1995 Scheme'.

[34] One other matter should be mentioned by way of background. Late in 1989 the first defendants suffered severely as the result of the miscalculations of a Melbourne adventurer. Its share price fell as did its credit rating. To overcome its financial difficulties it resolved to become a single purpose brewing company and changed its name to Fosters Brewing Group Ltd. A consequence was that its subsidiary companies engaged in activities other than brewing were to be sold or, if that proved impossible, were to sell their assets and wind themselves up. The banking and financial services division was amongst those which were to cease operation. They included more than the lending activities of EFG. As part of the process of sale and realisation a committee called Ramco, an acronym for Residual Assets Management Committee, was established in March 1990. It was a committee of the EFG Board responsible for realising the assets of EFG. It met monthly and was

given extremely wide powers to dispose of assets to raise cash for EFG, and its parent, as quickly as possible. Its members came from the Board of EFG Australia Ltd, some members of the Board of the first defendants and some of its senior executives. Mr Crosby and Mr O'Grady attended meetings of Ramco from its inception.

[35] Mr O'Grady explained (T.8164.40-8165.15):

> 'In … the second half of 1989, Elders IXL Ltd … subsequently … Fosters Brewing Group Ltd … got itself into financial difficulties … effectively by a company called Harlin which … acquired 53% of Elders IXL and … was … highly leveraged … and … Elders IXL Ltd became a subsidiary of Harlin … so the rating agencies added the Harlin debt to the Elders IXL Fosters debt and the Elders Finance Group Ltd debt and, as a consequence … the Group was very highly leveraged. The … rating agencies downgraded Elders … and … Elders Finance Group Ltd … and as a consequence … Elders Finance Group paper became non-investment grade paper and we could not refinance the book (which) … had to be liquidated … as quickly as possible … In about March 1990 Elders IXL announced that it was going to become a single purpose brewing company … and all the non-brewing businesses were to be … sold or liquidated … The Ramco committee was established to … self-liquidate the Elders Finance Group Ltd which at that stage stood at over $6 billion with unfunded liabilities of about $1.2 billion. The Ramco committee … effectively became the driving force for the liquidation process …'

[36] The principal relief claimed by the plaintiffs is an order that the judgment be set aside and that the APM lands be reconveyed to the plaintiffs. To the extent that that is impossible they seek an account of the profits made by the first defendants from the development and/or sale of the lands. In addition claims are made for damages at common law and equitable compensation.

[37] As well, the plaintiffs complain about a number of separate transactions between 1988 and 1994, each of which is said to involve unlawful conduct by some or all of the Elders defendants with the result that they are voidable by reason of one or more of the provisions contained in Pt 5.7B of the *Corporations Law* and/or s 120 and s 121 of the *Bankruptcy Act*. It will be necessary to analyse each of the transactions in question. A number of them is attacked on the basis that they occurred when the plaintiffs were insolvent so that the plaintiffs' directors acted in breach of statutory and fiduciary duties with respect to the transactions. None of the Emanuel Family Directors has been made a party but the first four, and the eighth and ninth defendants are said to have become *de facto* directors of the plaintiffs and so liable for their misconduct as directors. The plaintiffs also seek to have the transactions set aside on grounds of duress, undue influence and unconscionability.

[38] Before the acquisition of the APM lands by Emanuel 14, Elders had financed a number of the plaintiffs' properties in Adelaide. It did so in part by subscribing for an issue of preference shares in Management. It was paid dividends on those shares over a number of years until their redemption in December 1990. The plaintiffs claim that when the dividends were paid and the redemption occurred Management

was insolvent and, moreover, there were no profits out of which dividends could lawfully be paid or from which redemption monies could be found. Accordingly it seeks to recover from Elders the amount it received from dividends and the redemption.

[39] Coopers & Lybrand were auditors and tax advisors to the plaintiffs in all relevant years. The late Mr Allen was the principal advisor to Mr Emanuele and auditor of his companies for many years. He died long before the trial commenced. Mr Anderson, the twelfth defendant succeeded him as auditor in 1988. Mr Patterson was a tax advisor in later years. Against them it is alleged that Mr Anderson should have detected Management's insolvency and lack of profits and that all of them should have advised Mr Emanuele of the impossibility of lawfully redeeming the shares.

[40] This aspect of the case took on the utmost complexity. The parties had resort to the most detailed analyses of accounting standards and practice, and subjected the financial accounts of the plaintiff companies to painstaking scrutiny. The parties' contentions do not lend themselves to simplification but, as best I can summarise them, the points are these.

[41] There is no doubt that for most of the years in which dividends were paid on the preference shares there were insufficient trading profits to pay them. The defendants, however, contend that there were capital profits out of which the dividends either were paid or could have been paid. There is also no doubt that the plaintiffs created in their balance sheets an asset revaluation reserve ('ARR') resulting from an upward revaluation of a number of properties owned by companies which were subsidiaries of Paterson and of Management. The first defendants argue that dividends were paid from the capital profits represented by the ARR. The plaintiffs respond by pointing out that the accounts show no indication that the ARR was a source of dividends and that the accounts cannot now be 'rewritten' so as retrospectively to allocate moneys from the ARR to the profit and loss account and thence to dividends.

[42] The eleventh and twelfth defendants who are accused of not advising the plaintiffs that there were no profits from which to pay dividends, argue that any such failure on their part was of no consequence. They argue that had they given such advice Mr Emanuele would have asked how he could lawfully pay dividends, to which there was a simple answer. It was to pay them from the ARR. This would have been exhausted after some years but the eleventh and twelfth defendants point to evidence which would have allowed a further upward revaluation of properties and an augmentation of the ARR to an amount sufficient to pay all the dividends in question.

[43] The plaintiffs seek to meet this argument by contending that the applicable accounting standards prevented the creation of an ARR by means of revaluation of the properties held by subsidiary companies and that a properly constituted ARR would have been in sums insufficient to pay the dividends.

[44] Similar though not identical issues arise with respect to the redemption of the shares. They were issued with a par value of $1 but a premium of $99 each. The *Companies Code* allowed the redemption of the premium from a share premium account which Management appears to have maintained though this is contested by

the plaintiffs. Again the defendants rely upon the existence of the ARR to provide sufficient profits from which to redeem the par value of the shares.

[45] The EFG defendants have a further answer to the claim for the recovery of the dividends and redemption moneys. It is that as a condition of their subscription for the preference shares a number of the plaintiff companies agreed, by deed, to pay amounts equivalent to dividends payable and the value of the shares on redemption in the event that dividends were not or could not be paid or redemption did not or could not occur. Other of the plaintiff companies guaranteed these obligations which were secured by charges over moneys deposited by those companies with EFG. The first defendants therefore argue that if dividends could not have been paid lawfully and/or if redemption could not have occurred lawfully they would have acted under their securities to insist upon payment from the funds over which they had a charge. The result is, it is said, that Management suffered no loss.

[46] The C & L defendants take the same point. Any negligence by them, they argue, had no consequence because had they advised Management that it could not pay dividends and/or redeem the shares EFG would have acted to take the money anyway.

[47] Mr Cuming was a partner of C & L. He was appointed liquidator of eleven of the plaintiffs - Elizabeth House, Emanuel (South Australia), Emanuel Investments, Hondel, Jacost, Joron, Libra, Neromi, Sayer Properties, Emanuel 1, and Worando Trust. All were wound up on 29 January 1991 by way of a members' voluntary winding up. There were said to be solvent, having no liabilities and being owed substantial monies by Management. Seven of them (all but Emanuel 1, Jacost, Joron and Neromi) were issued with assessments following the ATO audit. These seven companies were designated 'the Cuming companies' in the trial and it is convenient to refer to them as such. The claims against Mr Cuming are that he did not recover monies for those companies at a time when they were available.

[48] It is convenient to mention a number of defences which the defendants advance. The writ was issued on 24 December 1996. With one possible exception all of the claims against C & L arising from the payment of dividends are in respect of losses which occurred more than six years prior to that date. The same is true of a number of the claims (though not all) against Elders. Against them the plaintiffs seek to have the limitation period extended pursuant to s.48 of the *Limitation of Actions Act* 1936 (SA). There is no similar relief claimed against the C & L defendants.

[49] Elders rely heavily upon the judgments in its favour in the Federal Court in November 1994 and in this court in February 1995 as raising, either by *res judicata* or by issue estoppel, bars to the claims the plaintiffs now advance. In particular it is said that the plaintiffs' claims to set aside transactions or to recover moneys they say they were not obliged to pay EFG would nullify those judgments, particularly the second, which established as a matter of judicial record the fact of and amount of the indebtedness of those companies who were parties to it. In addition it is argued that to the extent that the plaintiffs had answers to the claim by EFG they were obliged to bring those defences forward in the Supreme Court proceedings and are now precluded from doing so.

[50] The plaintiffs, of course, seek to have the judgment set aside on the ground that it was collusively obtained.

[51] It will be observed that there are many more plaintiffs than comprise the Emanuel group. Those 27 plaintiffs were the ones with whom EFG had had dealings at the time of the events which have given rise to this litigation. They were companies which had borrowed money from EFG or given guarantees or provided security over their property for loans made to other of the plaintiff companies. They were the ones that presumably suffered loss as a result of the defendants' alleged negligence, breach of contract or dishonesty. Nevertheless Mr Macks has chosen to join as plaintiffs all of the Emanuel companies. His purpose may well have been to circumvent the defences of *res judicata* and issue estoppel. The plaintiffs plead that all of the plaintiffs had an interest in the wealth of all of the other plaintiffs so that a loss suffered by one diminishes all. Any plaintiff may recover a loss suffered by another. This is said to be the result of deeds of indemnity given between the plaintiff companies over a number of years, the purpose of which was to allow the group to file consolidated financial statements rather than each company having to prepare and file its own. It was a condition of the regulatory authority's consent to this process that deeds of indemnity be given. The first defendants contend that the deeds do not allow the plaintiffs as a group to sue for losses suffered by some of them.

[52] A striking feature of the plaintiffs' case is the lack of direct, testimonial evidence to support it. None of the principals to the transactions who would know of the alleged fraud and conspiracy were called despite their not being parties and no relief being sought against them. Mr Emanuele was not called as a witness, nor were his children or those closest to him in running his companies, Mr Hartley and Mr Leonardis. The case entirely relies upon documents and the cross-examination of the Elders' witnesses in an attempt to obtain concessions of wrongdoing. It is noteworthy that the documents, on their face, either do not support the plaintiffs' case or are damaging to it. Likewise the cross-examination was of a most curious nature, if its purpose was (as it seems to me it had to be) to elicit admissions of circumstances which would give rise to inferences supporting the conspiracy and dishonesty alleged. No doubt to be effective the cross-examination had to be subtle but it had, at some stage, to approach the points in issue. As well, as a matter of fairness, the witnesses had to be given an opportunity to answer the very serious charges brought against them. As far as I could judge it, the cross-examination did not attempt the task. Indeed with a number of witnesses the cross-examiner appeared to avoid putting his case so as not to give the witness an opportunity to deny wrongdoing or to explain circumstances relied on to suggest it.

[53] Oddly in a case containing allegations of dishonesty liberally strewed throughout the statement of claim there was no conflict of oral testimony to be resolved. The witnesses called by the plaintiffs all gave evidence peripheral to the main issues. With the exception of Mr Furniss whom I thought to be disreputable, I would accept all witnesses as honest and generally reliable. Mr Furniss's evidence has an importance in one respect, which I accept, as will appear. It is corroborated by documents and is against the interests of the plaintiffs. Mr Sara may be another exception but I indicate what evidence of his I accept. I will, of course, make more detailed findings of fact where appropriate. Likewise, except for a reservation about one aspect of Mr Crosby's evidence, I would accept as honest and reliable the evidence given by the witnesses for the defendants. Indeed, as I have mentioned, the first defendants' witnesses were not pressed on the point that they had consciously committed any wrong. The cross-examination of some appeared

deliberately to stop short of putting the occurrence of such misconduct so as to deny the witness a chance to refute the allegation.

[54] There was an air of unreality about much of the plaintiffs' case. At times it appeared as though the litigation were treated, not as a trial, but as a commission of inquiry into all aspects of the commercial dealings between the plaintiffs and EFG. There was little attempt to discard the irrelevant or the ambiguous, and to bring focus to such of the evidence as might support their pleaded case. Nor did the plaintiffs appear to realise that much of what they rely upon was inimical to their interests or is, at best, equivocal.

[55] The plaintiffs presented their case chronologically so that, in sequence, 'the 1995 Scheme' with its allegations of conspiracy, fraud and bribery was considered last. If it should fail and the attack on the judgment should likewise fail, it may not be necessary to consider many of the plaintiffs' claims because they will be answered by the pleas of *res judicata* and issue estoppel. This is particularly true of the claims in respect of the preference shares. To reduce the chance of confusion it is best to adhere substantially to a chronological discussion of the relevant events and the claims said to arise from them. Before dealing with these it is appropriate to consider the evidence and arguments relating to the claims about the plaintiffs' insolvency and whether EFG and its officers became *de facto* directors of Management. Findings on these questions will colour the examination of the 1995 Scheme and be relevant, if not essential, to a determination whether some of the particular transactions should be set aside.

[56] In their presentation of their cases and in their submissions the parties had recourse to a division of subject matter which it is convenient to adopt since the arguments have been organised pursuant to that classification. The judgment will therefore address the issues under the following headings:

Section I	Insolvency
Section II	De Facto Directors
Section III	1988-1994 Transactions
Section IV	The 1995 Scheme
Section V	Claims Arising from the Issue of and Redemption of Preference Shares
Section VI	Miscellaneous Matters
Section VII	Claims Against Coopers & Lybrand, Anderson & Cuming

[57] References to the statement of claim are to the fourth amended consolidated statement of claim.

SECTION I : Insolvency

[58] There are two reasons why proof that the plaintiffs, and in particular Management, were insolvent is important to their case. The first is that a finding that Management was insolvent in 1988 would greatly strengthen the claim that the payment of dividends and the redemption of the preference shares was unlawful. It is common ground and, I think, clear law, that dividends should not have been paid on the preference shares and the shares should not have been redeemed once Management was insolvent. The second reason is that the basis for attacking a

number of the particular transactions is that they were 'insolvent transactions' for the purposes of the *Corporations Law*. It is therefore necessary to prove that the companies who entered into the transaction were insolvent at the time.

[59] The plaintiffs contended that Management and its 'active' subsidiaries, (which may be taken to be the first 27 plaintiffs) were insolvent from 1 July 1988 to March 1995 when most of them were placed into liquidation. By a late amendment the plaintiffs sought to allege that there should be a finding of insolvency from 1 January 1988 but I think their pleading is better understood as fixing 1 July 1988 as the earliest date on which the court should find insolvency. Therefore I do not propose to consider whether Management or any of its subsidiaries were insolvent at any time prior to 1 July 1988.

[60] It was common ground between the plaintiffs and the first defendants that the Emanuel group was insolvent in August 1994, the time of the trial between them in the Federal Court, and had been insolvent 'for some years.' Mr Emanuele, I was told, gave evidence to that effect and, on that point at least, the parties to that litigation accepted his testimony as accurate. The question, of course, is the precise extent of 'some years'.

[61] The second defendants were uninterested in the state of the plaintiffs' solvency after 31 December 1990. They contended that Management was solvent until at least that date by which time the preference shares had been redeemed and all dividends paid (with the possible exception of the late payment of dividend early in 1991). The insolvency of the plaintiffs after 31 December 1990 would not affect any claim against the second defendants. Indeed a finding that Management was insolvent from January 1991 would assist their defence of the claims against Mr Cuming who was said to have been negligent in not obtaining loans due to the Cuming companies from Management. If that company were insolvent any criticism that he did not demand payment from it would become pointless.

[62] The plaintiffs choose 1988 as the year in which insolvency should be found because it was at the beginning of that year that the proposed joint venture with the Chinese enterprise failed. That left Emanuel 14 and Management in particular with a debt of $43,000,000 which was then outstanding. The loan was for four months from June 1987 and the term was not formally extended until September 1988. The loss of the joint venture which would have provided funds to repay the loan to the fourth defendant and money to develop the land was a severe blow to Management's prospects. Contemporaneous memoranda by Mr Crosby showed that to be the fact.

[63] The parties accept that the relevant test is the 'cash flow test', that is, whether the companies in question were able to pay their debts when they fell due. Despite changes to the statutory regimes over the time with which this action is concerned, the test has remained constant.

[64] The plaintiffs do not always pay sufficient regard to the terms of the legislation on which their claims are based. There is, rather, an amorphous plea of insolvency which is said, by vague reference to legislation, to entitle them to recover vast sums of money paid away by the plaintiffs when they were insolvent and for which the defendants are sought to be made liable by reason of their involvement in the dissipation of the assets. Attention has to be focused on the particular terms of the legislation which found the plaintiffs' claims. This, in turn, involves a

consideration of the legislation into two distinct periods: prior to and subsequent to 23 June 1993. In the first period the only provision of relevance appears to be s 556 of the *Companies Code* (s 592 of the *Corporations Law*). The plaintiffs make reference to s 451 of the *Code* (s 565 of the *Law*) but these references appear misconceived. Those sections deal with the recovery of property, the transfer of which is void as against the liquidator where, had the company been a natural person, the transactions would have been void as against a trustee in bankruptcy.

[65] Subsequent to 23 June 1993 one must have regard to the provisions of Part 5.7B of the *Corporations Law* which are more elaborate and which require close attention.

[66] Reverting to the earlier timeframe, s 556 of the *Code* imposes liability on directors of a company to repay a debt which is incurred by the company when there were reasonable grounds to expect that the company would not be able to pay all its debts as and when they became due, or that it would not be so able if it incurred the debt in question.

The Cases

[67] The principles are not in doubt. According to Barwick CJ in *Sandell v Porter* (1966) 115 CLR 666 (at 670)

> 'Insolvency is … an inability to pay debts as they fall due … but the debtor's own monies are not limited to his cash resources immediately available. They extend to monies which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency. Whether that state of his affairs has arrived is a question for the court …'.

[68] Subsequently the principle appears to have become a little clouded. Laxity on the part of creditors to insist upon prompt payment has been, in some cases, taken into account in deciding when debts were due, and that the 'commercial reality' of slow payment had to be recognized in determining whether a company was insolvent. The qualification appears first to have been introduced by McGarvie J in *Taylor v Australia and New Zealand Banking Group* (1988) 13 ACLR 780. His Honour added to Barwick CJ's statement that insolvency was a question of fact the words 'to be decided as a matter of commercial reality in the light of all the circumstances.'

[69] The defendants emphasise the qualification and say that the lack of action, and indeed of complaint, by the plaintiffs' creditors was a commercial reality indicating that there had been substantial if not indefinite extensions of time afforded the plaintiffs for the payment of their debts. They submit that when so viewed the evidence does not show insolvency.

[70] Judging by the number of authorities referred to by each of the parties and the discussion contained in those authorities, the question whether a company was insolvent at a particular time and the criteria to which regard must be had to answer the question, has become the subject of a considerable body of jurisprudence. I would have thought that whether a company was solvent or insolvent was a question of fact calling for the application of principle described in *Sandell* to the evidence in the particular case. That, it will be noted, said nothing about 'commercial reality'.

[71] The relevance of creditors' response to apparently overdue debts as a fact in determining insolvency was discussed by Thomas J in *re Newark Pty Ltd (in liq.)* [1993] 1 Qd R 409 at 413-4. His Honour said

> 'The question of whether a company is unable to pay its debts as they fall due from its own money is a question of fact to be decided as a matter of commercial reality in the light of all the circumstances, and not merely by looking at the accounts and making a mechanical comparison of assets and liabilities …
>
> a debt does not necessarily become "due" … upon the date originally stipulated for its payment. It would be erroneous to adopt inability to pay a debt before it became payable as a criterion of the inability to which s 122 of the Bankruptcy Act refers. If there was a course of dealing whereunder a debt is not payable and the parties do not expect it to be payable until a future time, it should not be reckoned as "due" at an earlier time. … to take such a literal approach is in my view incorrect and contrary to the principles expressed in *Sandell v. Porter*.'

[72] The question has recently been considered by Palmer J in *Southern Cross Interiors Pty Ltd v. Deputy Commissioner of Taxation* (2001) 53 NSWLR 213. His Honour's reasons contain a thorough review of the cases and a penetrating analysis of the principles. His Honour noted a conflict in the authorities as to whether a trading debt is to be regarded as payable when it is required to be paid under the terms of the contract or whether the court can take into account normal or likely indulgences granted by creditors. According to his Honour:

> 'The cases recognised the former proposition may produce a test of unrealistic rigidity while the latter may produce a test which is so imprecise as to be impossible of consistent and principled application.' (p.220)

[73] It was pointed out that insolvency must be determined in two quite different categories of case. The first is where actual insolvency must be proved, as in applications to wind companies up or to recover preferences. The second is where what has to be proved is whether there were reasonable grounds to expect insolvency for the purpose of making directors liable for debts incurred by their companies. It is in the latter class of case that some latitude has been allowed directors when deciding what their reasonable expectation was or should have been. In reviewing a case in this category (*3M Australia v. Kemish* (1986) 10 ACLR 371) Palmer J said (222-223):

> '(The) observation that it is proper to take into account even non-contractual arrangements for extending time for payment of debts is firmly embedded in the context of a consideration of what is a reasonable expectation … it may be admitted at once that the hypothetical director of ordinary competence, acting reasonably, makes decisions on the basis of practical experience and commercial reality. Practical experience teaches that creditors will often allow debtors some indulgence before insisting on payment … in an insolvent trading claim, it will be a question of fact in each case whether such expectation is reasonable or unreasonable in light of the company's position as a whole.'

[74] His Honour then reviewed cases which seemed to apply, or reject that approach without regard to the particular statutory context and asserted (224)

> 'I cannot find any support in the authorities for the proposition that the court ought to take cognisance of what is said to be a common business practice of debtors delaying payment to creditors for as long as possible and of creditors accepting that practice as a fact of commercial life, with the result that no contract debt can be regarded as payable for the purposes of ascertaining a company's solvency unless there is evidence that the creditor has actively pursued payment … if such a proposition were accepted … the consequences in the commercial community would be chaotic … the law of contract would be held up to ridicule.'

[75] His Honour then attempted a summary of the relevant principles:

> 1. Whether or not a company is insolvent … is a question of fact to be ascertained from a consideration of the company's financial position taken as a whole.
>
> 2. In considering the company's financial position as a whole, the court must have regard to commercial realities. These will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable.
>
> 3. In assessing whether a company's position as a whole reveals surmountable temporary illiquidity or insurmountable endemic illiquidity resulting in insolvency, it is proper to have regard to the commercial reality that, in normal circumstances, creditors will not always insist on payment strictly in accordance with the terms of trade but that does not result in the company thereby having a cash or credit resource which can be taken into account in determining solvency.
>
> 4. The commercial reality that creditors will normally allow some latitude in time for payment of their debts does not, of itself, warrant a conclusion that the debts are not payable at

the time contractually stipulated and have become debts payable only upon demand.

5. In assessing solvency the court acts upon the basis that a contract debt is payable at the time stipulated for payment in the contract unless there is evidence proving to the court's satisfaction that:-

   - There has been an express or implied agreement between a company and a creditor for an extension of the time stipulated for payment; or
   - There was a course of conduct between the company and the creditor sufficient to give rise to an estoppel preventing the creditor from relying upon the stipulated time for payment; or
   - There has been a well established and recognised course of conduct … between the company and its creditors as a body, whereby debts are payable at a time other than that stipulated in the creditor's terms of trade or are payable only on demand.

6. It is for the party asserting that a company's contract debts are not payable at the time contractually stipulated to make good that assertion by satisfactory evidence.'

[76] The defendants urge me to adopt the approach taken by the court in *re Newark Pty Ltd (in liq.)* [1993] 1 Qd R 409 which is, in any event, binding upon me. The difficulty, with respect, is in knowing precisely what that case decided. It is all very well to say that it endorsed the principle that courts decide questions of insolvency 'as a matter of commercial reality in the light of all the circumstances' but this principle is no more than an imprecise description of an evasive concept. I do not understand how 'commercial reality' can determine when a debt is due for payment. Indeed I do not understand what 'commercial reality' is, let alone how it may be discovered.

[77] The due date for making payment for goods or services delivered and rendered is fixed by the contract between the parties. In the case of all, or by far the greater number of, the creditors with whom the Emanuel companies dealt, those terms required payment thirty days after delivery of the invoice. If the dates were to be extended pursuant to an 'arrangement', the arrangement must amount to a binding variation to the contract, or there must have been a promissory estoppel, the effect of which was to prevent the creditor asserting that the date for payment had not been postponed. I do not understanding that a bare assertion by a creditor that it would accept payment later than the date stipulated in the contract would have the effect of altering the contracted date.

[78] To give rise to a binding variation the debtor must have provided consideration for the extension of time, at least if the arrangement was made after the creditor had performed its part of the bargain. A promise to pay interest is the most obvious example of consideration.

[79] I do not understand there to be evidence that the Emanuel companies provided any valuable consideration in consequence of which the creditors extended time.

[80] Similarly a promise to extend time unsupported by consideration could give rise to a promissory estoppel but only if the promise were regarded as a representation (which it may well be) on which the Emanuel companies acted to their detriment. There may be such detriment if the companies did not pay on the contracted date because of the representation and were subjected to the institution of legal proceedings or the service of a statutory demand before the arrival of the extended date. In such circumstances it would probably be the case that the creditor would be estopped from proceeding until the extended date arrived and payment were not made.

[81] Again I do not understand there to be evidence of any such representations acted upon to the detriment of the Emanuel companies.

[82] In *Newark* Thomas J. said (414)

> 'A debt does not necessarily become 'due' within the meaning of the section upon the date originally stipulated for its payment. It would be erroneous to adopt inability to pay a debt before it became payable as a criterion of the inability to pay to which section 122 of the *Bankruptcy Act* refers. … If there was a course of dealing whereunder a debt is not payable and the parties to not expect it to be payable until a future time, it should not be reckoned as 'due' at an earlier time.
>
> I do not think that any distinct legal question arises here as to the precise point in which a course of dealing or an understanding between a creditor and debtor allows it to be treated as a realistic basis for holding that a particular debt was not 'due'.'

[83] I do not understand how a course of dealing between the parties can postpone the original date fixed by contract for the payment of the debt unless that course of dealing constitutes a binding variation to the contract or gives rise to an estoppel.

[84] The first defendants submitted that *Newark* is authority for the proposition that 'if creditors are prepared to allow credit to a debtor whilst a debtor continues to trade, moneys owing to those creditors are not due …'. I do not accept this, for the reasons I have endeavoured to express. I am reinforced in my opinion by the judgment of the Full Court of the Supreme Court of South Australia, *Fryer v. Powell* (2001) 159 FLR 433 at 445 where Olssen J (with whom Duggan and Williams JJ agreed) said:

> 'There are numerous authorities … which … establish these propositions:
>
> (3) It is legitimate to take into account any indulgences extended to a company by its creditors as to trading terms … However, absent a firm arrangement with *all* of its creditors for an extension of terms of trade, the court will usually apply the normal terms of trading when assessing solvency. It is not

> normally proper to base an assessment on a mere failure of creditors (or of some creditors) strictly to enforce payment obligations at a given point in time … I do not read re *Newark* … as an authority to the contrary … The point made in the latter case was that, on the facts, there had been a well established pattern of trading indulgences established over a long period and extended by the creditors generally to the point that commercial reality required proper cognisance of it.'

[85] There may be cases in which the evidence may be such as to give rise to an inference, more or less compelling, that there must have been a variation of the contract between the parties, or that the creditor had made a representation and was content to have its representation acted upon. In *Melbase Corporation Pty Ltd v. Segenhoe Ltd* (1995) 17 ACSR 187 Lindgren J. said (199-200):

> 'Statutory provisions of the kind with which this case is concerned require an assessment to be made as to when *all* of a … company's debts "become due and payable", and they require that this assessment be made collaterally, rather than in *inter partes* litigation between debtor and creditor. Where there is evidence of the existence and amounts of those debts … it will ordinarily be appropriate to infer that they have already "become due and payable" unless there is evidence suggesting otherwise. But where some such evidence exists, the "collateral" nature of the assessment called for … by the legislation may make it appropriate to be liberal in the drawing of inferences in support of a conclusion that principles and doctrines of the kind to which I have referred … have been activated.'

The principles referred to by his Honour were those which determine whether a contract date has been varied by express or implied agreement or whether an estoppel has arisen effectively extending time for payment.

[86] It is, I think, essential to bear in mind that the qualification that insolvency is to be determined as a matter of commercial reality was designed to prevent over-hasty adjudications of insolvency in the case of companies suffering a temporary shortage of cash. It was not meant, in my view, to allow companies in a chronic state of illiquidity who evade, by one means or another, determined action by a creditor to wind them up, by that evasion, to be deemed solvent.

[87] There is support in the cases for the view that the question, solvency or not, is one of fact. In *Sycotex Pty Ltd v. Baseler & Ors (No. 2)* (1994) 51 FCR 425 Gummow J. said (434):

> 'There is some dispute in the authorities as to whether a debt falls due when it is legally required for payment or whether the court can take into account normal or likely indulgences granted to the company by its creditors … Any conflict between the authorities may be more illusory than real and factual rather than legal. I would not consider such an issue to be a question of law to be decided by the application of a rigid rule. Rather, the statute appears to focus

> attention upon what it is reasonable to expect in a given set of circumstances, such a consideration necessarily being made by someone operating in a practical business environment. Attention is focused at whether a person would expect that at some point the company would be unable to meet a liability. Such a question is necessarily a factual one to be decided in light of all the circumstances of the case.'

It will be noted that his Honour was concerned with the question whether directors had a reasonable expectation that a company could pay its debts as they fell due; not with whether the company was actually, i.e. in fact, insolvent.

[88] Davies AJ expressed a similar view in *Iso Lildow' Aliphumeleli Pty Ltd (in liq.) v. Commission of Taxation* 42 ACSR 561. The judge, having referred to *Southern Cross Interiors* said he accepted 'gratefully the first three propositions enunciated' by Palmer J, but not the fourth, fifth and sixth principles because 'as enunciated, the principles might imply a legality or inflexibility which is inconsistent with the point that the ultimate issue is a question of fact.' (p.565-6)

[89] The defendants pressed me with the decision of Young J in *Hamilton v. BHP Steel (JLA) Pty Ltd* (1995) 13 ACLC 1548 in which his Honour appeared to emphasise the need to determine insolvency 'as a matter of commercial reality.' His Honour noted that the phrase came from the judgment of McGarvie J. and that the passage in which it occurred 'was taken up … in *re Newark* …'.

[90] Young J went on (1552)

> 'All these cases and the authorities to which they refer emphasise that what has to be done is not a mere accounting exercise, but an appreciation of whether moneys can be readily mustered in order to pay creditors.'

With this I respectfully and entirely agree. However, his Honour continued:

> 'It seems to me that the words "commercial reality" mean that one must look at the circumstances in the light of prevailing business practices. … Now that many businesses are funded on borrowed capital, commercial debtors endeavour to minimise their payment of interest to their own financiers by delaying payment to creditors as long as realistically possible. … A most common strategy is simply to pay the creditor late, putting it onto the creditor to make the choice as to whether to indicate clearly that it is not prepared to trade with a slow payer, or, alternatively, to tolerate what the debtor is doing, or alternatively again, impose interest. … I believe that when one is working out questions of insolvency in the 1990s, one needs to take into account that such happenings are common in the commercial community because this is part of the commercial reality with which the court has to deal.
>
> I also consider … that the court can take into account such practices as a matter of its own knowledge from commercial activities that come before the court.'

[91] Young J then found succinctly that, notwithstanding commercial reality, the company in question was at all relevant times insolvent.

[92] A number of points can be made about the judgment. The first is that commercial reality did not appear to affect the outcome. The evidence established insolvency: the company could not pay its creditors from its own resources 'and it made no real attempt to do so.'

Secondly, if 'commercial reality' means "prevailing business practices" those practices must be proved by admissible evidence, or must be so notorious as to allow judicial notice to be taken of them. As a judge of a trial division with a wide general jurisdiction in no way limited to, or specializing in, commercial disputes, I am not prepared to take judicial notice of that which I am, in fact, ignorant. I do not know whether business practices in Queensland throughout the years 1988 to 1994 were such as described by Young J.

Third, and I think most importantly, what Young J appears to be saying is that there may be reasons, *other than an inability to pay*, why creditors are paid late. If this all his Honour is saying I would, again, respectfully agree with it and think it uncontroversial. The question is not whether debts were paid on time but whether they could have been. Persistent late payment of debts often gives rise to the inference of insolvency, but the inference may be rebutted if there be evidence showing a reason for late payment, other than an incapacity to pay.

[93] This is a different concept to that apparently raised in *Newark*. There, the assumption appears to have been that persistent payment of invoices beyond their stated date indicates that debts were not due on those dates. The debate in that case did not focus on whether debts were paid late because of some prevailing business practice which did not indicate insolvency.

[94] I would accept that, when determining questions of solvency, the answer is not to be found only in the fact that creditors were not paid in accordance with the time stipulated in their invoices. One does not need recourse to notions of 'commercial reality' to reach this conclusion. The question must always be whether a company was able to pay its debts as they fell due or, in Young J's. phrase 'an appreciation of whether moneys can be readily mustered in order to pay creditors.' This investigation may involve a consideration of why debts were not paid on time.

[95] In my opinion the appropriate course is to regard the issue as one of fact and to address the question - when was Management unable to pay its debts as they fell due – by reference to all of the evidence which appears relevant to that question. It is, I think, neither helpful nor necessary separately to ascertain whether some of the evidence may be indicative of 'commercial reality' or 'business practice' for to do so may be to lead to a distraction from the real inquiry.

Expert Evidence

[96] The plaintiffs and both sets of defendants all called eminently qualified accountants to support their respective cases on the question of insolvency. Their approaches were somewhat different, reflecting the different points of concern of the three sets of parties. The plaintiffs' expert was Mr Brian Morris whose approach was to describe what he called 'indicia of insolvency' and then identify them with respect to the activities of the Emanuel group for each of the years 1988 to 1995. He did

not express his own opinion on the issue, leaving that for the court to be guided by his description and commentary. I found this approach helpful.

[97] The financial and accounting records of the plaintiff companies covering, as they do, many years, are voluminous. They appear in the material as annexures to Mr Mack's statement, Exhibit 1, and in the lever arch files of documents referred to in his statement. All of the expert accountants have had recourse to the materials and have based their opinions on it. It is not necessary to reproduce it in any great detail though many days of evidence were devoted to the examination of the accounts. For the purpose of these reasons it is sufficient to set out the experts' analysis of those accounts and their comments upon them.

[98] The first defendants' expert was Mr Boymal who did express an opinion that Management was solvent at various dates relevant to the payment of dividends and redemption of the preference shares. Mr Leppinus, called by C & L, did much the same though with respect to a slightly different date.

[99] Both Mr Boymal and Mr Leppinus took as their point of departure Mr Morris' report so it is convenient to give an account of the evidence found in his report (Exhibit 4).

[100] Mr Morris made the point which, I think, is uncontroversial and may be accepted that

> '… Management was dependant upon its subsidiaries, or some of them, (and vice versa) … The financial relationships between the companies created interdependence upon one another that was not only significant but also of a circular nature. … This interdependence … was most obvious in the role that … Management played as banker to the group, whereby (it) borrowed from financiers, and lent to subsidiaries, to enable subsidiaries to purchase properties. Management usually performed the sale role in providing funds to enable subsidiaries to meet outgoings in respect of properties … It was then necessary for the subsidiaries to generate positive cash flows to enable Management to service the finance facilities … (Because) many subsidiaries were not generating cash flows, it was … necessary for other subsidiaries to provide positive cash flows to support those companies. Any cash within the group was made available to … Management … to meet the group's most pressing obligations. The interdependence may also be seen in the manner in which financiers took security from Management and one or more subsidiaries to secure finance facilities. Often the assets of several subsidiaries were pledged to provide security for financiers.'

[101] Mr Morris concluded on this point

> 'Ultimately … Management was dependant upon its subsidiaries to provide the funds necessary to service its financiers. Management's solvency, therefore, depended almost entirely upon the capacity of its subsidiaries to provide the sufficient cash flows to enable (it) to meet its debts as and when those debts fell due. At the same time, the ability of individual subsidiaries to meet their respective

> commitments depended substantially upon the ability of Management to procure the funds necessary to meet those commitments, either from external sources or from elsewhere in the … group.'

[102] Mr Morris made the following points to provide a background against which the solvency of Management should be judged. I would accept the points as valid and, again, think them uncontroversial though in some aspects they were contested by Mr Boymal. The points were:

(i) From 1987 with the acquisition of the APM lands and the sale of the commercial properties in Adelaide the Emanuel group was almost entirely the holder of broad acre properties which had varying degrees of suitability for future development but which produced no income. The agreement with Softwoods Australia Pty Ltd for the sale of timber was not made until 3 July 1989. Management was therefore dependant upon its subsidiaries selling properties at times and for amounts that would enable debts to be paid.

(ii) Management operated the bank accounts so that the funds of most if not all of the subsidiaries were paid to Management and applied by it to meet its own obligations or those of other subsidiaries.

(iii) In light of these arrangements loans made by Management to its subsidiaries were 'in reality due at all times notwithstanding an absence of formal notices of demand and regardless of how the loans were described in … financial statements'.

(iv) The properties held by Management and its subsidiaries were illiquid; that is they could not readily be converted into cash so that debts due to Management by its subsidiaries were not liquid assets in the hands of Management regardless of whether the loans were described as current in the financial statements.

[103] Mr Morris noted that the Emanuel group incurred losses in each of the years 1988 to 1993. He expressed this in a table which showed both losses and outflows of funds from operations i.e. the balance between money received and money paid away. The table shows:

Financial Year	**Operating Losses (before extraordinary losses) ($m)**	**Operating profit/(loss) after extraordinary items ($m)**	**Outflows of funds from operations ($m)**
1988	(14.9)	(9.3)	(14.4)
1989	(14.8)	(15.7)	(17.0)
1990	(11.6)	(12.2)	(12.8)

1991	(39.2)	(39.2)	(38.1)
1992	(85.8)	(90.8)	Not reported
1993	(22.3)	(28.9)	Not reported

[104] Another table shows the net asset position of Management and of the group for the same years.

Financial Year	**Emanuel Management ($m)**	**Management Group ($m)**
1988	2.8	34.5
1989	(2.5)	43.6
1990	(7.6)	61.4
1991	(67.0)	44.5
1992	(157.6)	(57.0)
1993	(192.3)	(74.6)

These figures were derived from a comparison of all assets with all liabilities, including non-current assets and liabilities. A non-current asset is one which is not expected to be realised within 12 months. A non-current liability is one which is not expected to be due for discharge within 12 months. A more useful comparison is that between current assets and current liabilities, which is normally understood as working capital. This comparison is between debts that have to be paid within 12 months with assets that can be turned into cash within that same time. This analysis shows a deficiency in working capital, i.e. current assets were worth less than the amount of current liabilities for each of the years 1988 to 1993.

Financial Year	**Current Assets ($m)**	**Current Liabilities ($m)**	**Deficiency ($m)**
1988	31.4	125.3	(93.9)
1989	32.0	149.2	(117.2)
1990	258.9	216.7	(42.7)
1991	221.1	225.9	(4)
1992	120.6	267.5	(146.9)
1993	75.6	229.4	(153.8)

The figures reproduced above differ from those in Exhibit 4. They refer to adjustments made in the course of Mr Morris' evidence.

[105] Another point made by Mr Morris was that Management's issued ordinary share capital was only $2. It had of course issued a substantial number of preference shares but these had been redeemed in 1987, 1988 and 1990. Mr Morris thought it relevant that Management had a small permanent capital base so that it had no share capital to rely upon in the event of poor trading or a downturn in the property market.

[106] Mr Morris then set out his 'indicia of insolvency'. The first was non-payment of debts which is, no doubt, obvious enough. He broke the inability into categories:

> The ability to pay trade creditors by the dates upon which their debts were due for payment or within established trading terms;

> The ability to pay interest on finance facilities when interest payments were due or the need to obtain additional borrowing to enable interest to be capitalised;
>
> The ability to repay loans in accordance with their terms originally arranged;
>
> The requirement to seek moratoria with financiers and trade creditors;
>
> The ability to honour contractual obligations such as completing property purchases.

[107] The second indicia was cash flow, namely whether operating cash flows were sufficient to meet obligations. According to Mr Morris:

> ‘The ability to pay debts is determined by the availability of funds to make the necessary payments. Accordingly, an assessment of cash flow is of greater significance than other indications of financial performance, including profitability.’

It was his opinion, which I would accept, that:

> ‘In the case of a company with net operating cash outflows, there is a real likelihood that eventually it will not have sufficient cash resources available to meet its obligations … A company may be able to overcome operating cash flow shortages by:
>
> - Selling assets
> - Arranging … additional capital in the company
> - Borrowing further moneys (which) usually requires available assets to secure the new loans which carry the obligation for repayment which thereby may have the effect of postponing and not solving cash flow problems.’

Mr Morris pointed out that the Emanuel group’s operations resulted in significant cash outflows in every year from 1984: in the three years 1986, 1987 and 1988 the total net outflow of cash was $33,500,000 and in the following three years to 1991 it doubled to $67,900,000. Mr Morris points out that after the plaintiffs had divested themselves of their Adelaide properties and were left with the broad acres in Queensland, there were no substantial sales. Such sales as occurred did not produce a positive cash flow for the Emanuel group. Nor was any new equity invested in the plaintiffs to increase their capital base. The principal source of cash to overcome its operating cash flow deficiency was from additional borrowing. Between 1988 and 1995 the total amount owed by the Emanuel group to external financiers grew from $106,700,000 to $192,500,000.

[108] Mr Morris prepared two graphs which compared the amount of payments which Management was required to make and the funds available to make those payments. The graph shows that ‘with minor exceptions, at all relevant times the payments required to be made exceeded substantially the funds available for their payment …

Management … was suffering from a deficiency in available cash for all of the period with the exception of limited periods in September 1988, December 1988 and April 1989.'

[109] Mr Morris also points to a deficiency in working capital which he believes 'is often an indicator of insolvency (and) is usually associated with

- A high level of reliance on short term debt
- The utilisation of short term borrowing to fund trading losses
- The mismatch caused by using short term loans to acquire long term assets.'

He noted that Management and the Emanuel group reported significant deficiencies of working capital in each year from 1985 to 1993.

[110] The most egregious example of this third indication concerns the APM lands themselves which were clearly non-current assets, not being expected to be realised within 12 months of acquisition, which were financed by a loan initially for four months the term of which was extended for 12 months at a time. Mr Morris makes the point that financiers who lent to Management for 12 months or less, thereby making the liabilities current 'were entitled to decline to continue to extend facilities and instead seek repayment at the expiry of the finance terms. … In the absence of formal agreements to extend times beyond 12 months debts were properly regarded as short term facilities and properly classified as current liabilities.' He questioned whether there were sufficient current assets to meet those liabilities.

[111] Mr Morphett, a manager of Mercantile Credits Ltd, which also lent to the Emanuel group, regarded the mixture of long-term investments financed by short-term debt an indication of insolvency or, as he put it, 'an understanding … that Emanuel would not survive' because of the obligation to pay debts in a short term without assets that could be realised in the short term. T.5232.45.

[112] Mr Morris also points to the fact that the Emanuel group reported significant trading losses in each of the years 1985 to 1993. In each of the years 1985 to 1988 there were losses in excess of $5,000,000 and losses for the four years totalled just under $39,000,000. In each of the years from 1989 to 1993 there were operating losses in excess of $11,000,000 and the total for that period was $173,700,000. While losses are not themselves indicative of insolvency, continuing operating losses erode a company's capital thereby reducing its capacity to pay its debts. If money is borrowed to pay debts the liabilities increase without a corresponding increase in income to service the additional interest so that additional borrowings have a compounding effect on ongoing trading losses resulting in an ever diminishing capacity to pay debts.

[113] Mr Morris then turned to consider separately each year in question by looking at occurrences in the year that indicated insolvency. His analysis commenced with the year ended June 1988 but as indicated, I intend to commence with the year ended June 1989. I will follow Mr Morris' analysis for that year in some detail but not the following years because if Management was insolvent throughout that year it was insolvent in subsequent years. Its financial position deteriorated with each passing year. I see little point and much tedium in setting out the evidence relative to those

subsequent years when I think it clear that if the companies were insolvent for the year ended June 1989 they were insolvent at all times thereafter.

[114] During the year ended June 1989 there were a number of instances in which Management or its subsidiaries failed to pay debts due to financiers. One of the plaintiffs, Villa-Cairns, had bought land across Trinity Inlet from Cairns from CSR for $3,500,000 in 1987. The vendor lent the whole of the purchase price to Villa-Cairns which secured the loan by mortgage over the land. The debt was repayable 12 months after the purchase, in May 1988. Villa-Cairns did not pay the loan but agreed with the CSR to extend its terms for three months, to 15 July 1988. Villa-Cairns did not repay then either and by 30 June 1988 interest of $28,137 was outstanding. On 27 July 1988 interest of $30,234 was outstanding and was accruing at $1,781 per day but was not being paid. On 4 August Villa-Cairns and Management negotiated an extension of the loan for a further three months to 15 October 1988 on terms that an additional sum of $50,000 would be paid when the debt was repaid as a fee for the additional accommodation. Villa-Cairns did not repay the loan as required on 15 October. Management in the end managed to borrow funds to repay CSR from Bill Acceptance Corporation Ltd, a subsidiary of Westpac Banking Corporation. The refinancing occurred on 3 November 1988.

[115] There were as well a number of examples of the plaintiffs failing to pay their trade, professional and statutory creditors. Colliers, Thomson Simmonds & Co, Coopers & Lybrand, Andersons & Co, Bruce & Associates, Vanguard Insurance Co, The Commissioner of Stamp Duties, Mackay City Council, Caloundra City Council and Telecom Australia had all issued invoices for amounts totalling $817,985 all of which had remained unpaid for more than 90 days.

[116] On 6 June 1988 Mr Emanuele agreed to buy a grazing property in North Queensland from Mr & Mrs Bartlett for a price of $6,500,000. Mr Emanuele nominated one of his companies, Segacious, to be the purchaser. Settlement was to occur on 4 December 1988. That did not happen. Instead the contract was varied so that the price was to be paid in instalments: the sum of $250,000 on or before 16 March 1989 and the balance on 16 June 1989 with the proviso that the purchasers might pay a further instalment of $250,000 before then. It did not do so. Settlement did not occur until 19 July 1990, six weeks after another extended date for settlement, 30 June 1990, agreed in December 1989. Just over $2,200,000 of the purchase price was advanced by the vendors. It was due for payment on 8 March 1991 but was never paid.

[117] One of the plaintiffs, Woodville Industrial Park, had sold a property it owned in South Australia. The property was a factory complex and was known as South Australian Manufacturing Park. The vendor had guaranteed that the purchaser would receive a minimum amount by way of rent from the property and promised, in the event rents were lower than the specified figure, that it would pay the shortfall. On 18 August 1988 Colliers, as estate agents, wrote to the Emanuel group to inform it:

> 'Your company is currently and has been since August 1987 in default with the requirements of clause 13 of the contract of sale, in respect to the payment of guaranteed moneys … the default will no longer be tolerated. You are … advised that payment of all moneys due is required forthwith. The total amount due is $256,951.32

which includes the payment due for July 1988 and interest calculated to 18 August 1988.’

[118] On 12 October 1988 Westways Capital Corporation Pty Ltd issued a formal notice of demand to Woodville Industrial Park for an amount of $212,124, presumably for arrears of interest.

[119] During the year the Emanuel group experienced a net outflow of funds from its operations of $17,000,000. That is, its outgoings exceeded its receipts by that amount. In the same year its deficiency in working capital was $117,200,000 as at 30 June 1989. This was an increase of $23,000,000 over the previous year. It made an operating loss of $14,800,000 during the year.

[120] Mr Morris made much of the point that the financial statements of the plaintiff companies which were the subject of the tax audit did not make any provision for liability for the tax ultimately assessed as due as a result of the audit in November 1993. That is that primary tax was assessed in respect of earlier years but for those years for the liability to pay the tax does not appear in the financial statements. Had it done so as a liability, or a contingent liability, the financial position of those companies would have been so much worse.

[121] Although this point was of importance to the plaintiffs I intend to ignore it.

[122] The assessment to pay tax arose from the sale of what may loosely be called the Adelaide properties. They were acquired before September 1985 so that no capital gains tax was payable on the proceeds of sale. Whether income tax was payable depended upon the intention of the owner at the time of acquisition. The Commissioner of Taxation formed the view that they were acquired for resale, not as a long term investment. His principal ground for so thinking appears to have been that Management had insufficient funds to hold them as long term assets so that, by implication, they must have been bought for turning over in the short term.

[123] A number of facts can be set against this. Firstly it is not at all out of keeping with Mr Emanuele’s manner of conducting business that he would intend to hold, and would hold, properties when he did not have sufficient income to meet outgoings in respect of them. He would borrow against increasing value or divert income from other sources to meet outgoings. Moreover the decision to sell the Adelaide properties was only made after the failure of the joint venture when he held vast tracts of vacant land for which he had borrowed $48,000,000. It was the unexpected need to meet that obligation and reduce debt that led to the sale of the Adelaide properties. Their sale and the timing of it is not inconsistent with an intention when they were acquired to hold them for a long term.

[124] Moreover the plaintiff companies had traded at a loss for many years. Depending in what companies the losses had been incurred and which companies had been assessed to tax and the relationship between the companies there was, at the least, a possibility that the tax losses could be offset against any tax payable on the sale of the Adelaide properties.

[125] None of these points was the subject of detailed submission or of evidence. I am not in a position to express any opinion on whether the assessments might have been successfully objected to. What is clear is that the assessments were made at a time when the plaintiffs did not have the resources to contest them effectively. This

point was known to the officers of the Australian Tax Office and their lawyers when they issued the assessments and disallowed the objections lodged against them. There is evidence that the conduct of the audit was unusually severe. Mr Patterson gave evidence to that effect which I accept. He attempted to persuade the officials of the Tax Office to take a different view but they would not discuss the merits of their assessment with him and would not yield their opinion. Mr Emanuele and his companies simply did not have enough money to take matters further once his objections to the assessments were disallowed.

[126] I think there is sufficient doubt about what would have been the outcome of an appeal to the Administrative Appeals Tribunal to disregard this liability when considering the question of the plaintiffs' insolvency. Certainly I do not think that it has been established that the plaintiffs' financial statements should have included the tax ultimately assessed as a liability.

[127] Mr Boymal was asked to express an opinion on the solvency of Management as at:

(i) The date of payment of dividends on the redeemable preference shares which occurred after 1 July 1987
(ii) The dates of redemption of the C class preference shares in the years ending 30 June 1988 and 30 June 1989
(iii) The date of redemption of the A and B class preference shares on 31 December 1990

In approaching his task Mr Boymal made an adjustment to the accounts of Management. He noted that as the holding company of a number of subsidiaries Management reported in its accounts the value of its investment in those subsidiaries but that that value commonly did not reflect the true value i.e. the net asset position of the subsidiary. The most obvious reason is that the subsidiaries' assets, land, may be recorded in the books of account at cost price while their value may have increased since acquisition. Mr Boymal noted that the subsidiaries regularly revised the value of their net assets but that the books of Management were not necessarily amended to reflect those valuations. He thought, except for the year to 30 June 1985, that the carrying amount of investments in the subsidiaries recorded in Management's accounts did not accurately reflect the underlying value of those subsidiaries. Mr Boymal, therefore, had regard to the Emanuel group and its consolidated accounts rather than those of Management itself.

[128] Mr Boymal commenced his assessment of solvency by undertaking an analysis of the Emanuel group's balance sheet, profit and loss statement and its cash flow statements. He did this for the purpose of comparing total assets with total liabilities, the difference between which demonstrates 'the owner's equity in the entity. A surplus or deficiency of net assets is indicative but not necessarily determinative in establishing whether or not an entity is able to pay all its debts as and when they become due and payable.' A comparison of current assets and current liabilities gives an indication of the capacity of an entity to meet short term debt commitments as and well they fall due. Mr Boymal had a third category, that of quick assets compared to current liabilities. "Quick" assets are those which can be readily converted into cash. The comparison gives an indication of the ability of an entity to meet current liabilities from the assets that are most readily convertible into cash.

[129] Mr Boymal expressed himself unable from the information available to undertake an appropriately detailed analysis of solvency on the particular dates on which dividends were paid. His approach therefore was to determine whether Management was solvent at two successive year ends. If it was he thought it probable that it was solvent at all times in between. He was, however, unable to provide a conclusive opinion on the solvency of Management at any of the dates requested of him or at any of the 30 June year ends. What he did, therefore, was to identify 'whether … there are sufficient indicia which could lead to a conclusion of insolvency.' For that purpose he carried out two separate exercises. One was to determine Management's capacity to borrow additional funds in the period 30 June 1988 to 30 June 1991. The second was to consider the historical dealings by Management and its subsidiaries with their trade creditors. In particular he attempted to identify whether there was a pattern of trade creditors being paid outside normal trading terms.

[130] The commencing point for the first exercise was to determine the net asset position (total assets less total liabilities) for the years in question. I reproduce Mr Boymal's table.

	1988 $000	**1989 $000**	**1990 $000**	**1991 $000**	**1992 $000**	**1993 $000**
Emanuel Management	2,769	(2,463)	(7,596)	(67,028)	(157,602)	(192,284)
Emanuel Management and its subsidiaries	34,520	43,592	61,989	44,532	(57,042)	(74,591)

As explained earlier Mr Boymal thought it appropriate to use the consolidated accounts which show a surplus of assets over liabilities until the year 1991.

[131] It was, I thought, implicit in Mr Boymal's approach that his analysis of the relevant financial records tended to show that Management was insolvent from 1988. Its history of losses, deficiencies of working capital and negative cash outflows in excess of cash inflows all point to that conclusion. Accordingly Mr Boymal looked to see whether Management had the capacity to borrow against its assets so as to meet its liabilities and whether paying its creditors beyond normal trading terms indicated that, by arrangement, they were due to be paid later than the stipulated time so that "late payment" was not indicative of an inability to pay.

[132] In assessing whether Management had further borrowing capacity the two issues were the value of the property to secure the loan and the loan to value ratio ("LVR") which would have been applied by a financier. This ratio expresses as a percentage the amount of a loan to the value of the property. Mr Boymal produced a graph comparing the value of the Emanuel group's real properties and LVR's of between 75 to 85 per cent. According to Mr Boymal:

> 'The graph reflects that, based on the property values in the consolidated accounts, the property values were in excess of the existing loans from external financiers up to and including the year ended 30 June 1991 … Therefore there appears to be additional value in the properties against which further loans could be secured.'

There follows a table which I reproduce.

85% LVR	**30 Jun 87**	**30 Jun 88**	**30 Jun 89**	**30 Jun 90**	**30 Jun 91**

	$000	$000	$000	$000	$000
85% LVR	102,688	147,733	174,338	200,199	211,137
Total loans (incl. Redeemable preference shares)	(138,970)	(134,266)	(155,461)	(182,171)	(205,278)
	(36,282)	(13,467)	18,877	18,028	5,859

I have reproduced only the table relevant to an LVR of 85 per cent. This is most favourable to the defendants. It is also the ratio to which EFG was prepared to lend.

The improvement in position after 1988 when there is additional borrowing capacity would seem to reflect the reduction of debt after the sale of the Adelaide properties.

[133] The second exercise was necessary because:

> 'In assessing solvency the entity's history of meeting its debts on the terms originally stated with its creditors needs to be examined. If debts have not been met on the date originally stipulated for payment it is then necessary to examine the history of dealing between creditors and the entity in order to establish whether or not there is a course of dealing that would account for payment on a date other than that originally stated. For example, if a trade account … had been paid regularly beyond the stipulated time period and the creditor has continued to trade with the entity, there is arguably a course of dealing giving rise to an expectation that the creditor will behave in a similar manner in the future. The credit history may provide a reasonable foundation:
>
> (a) To conclude that the debt does not become due immediately upon the expiry of the stipulated … period; and/or
> (b) To draw conclusions as to the extent of the normal or likely indulgences granted to the entity by its creditors.'

[134] From his review of the available information concerning the payment of creditors by the plaintiffs, Mr Boymal concluded:

> '… Management and its subsidiaries have generally consistently paid creditors outside of the stated trading terms; the period of days outstanding was increasing each year. This is despite the occasional issuance of some demand notices and threats to discontinue supply. … The results of my analysis provide a reasonable foundation for the conclusion that many of the debts did not become due immediately upon the expiry of normal commercial trading terms … My analysis suggests that substantial indulgences were in fact granted.'

In evidence Mr Boymal explained that, in his view, if a debt to a trade or professional creditor was not paid on the stipulated date then it was not due and payable at all until the creditor issued a demand or commenced proceedings to recover the debt. Except in this circumstance debts were never overdue because the time for payment never arrived.

[135] A basis for Mr Boymal's conclusion that the date for payment of creditors was extended indefinitely was that 'the creditors were appearing to tolerate the situation by not taking legal proceedings to collect the amounts due and continuing to provide services notwithstanding the fact that more than 30 day terms were being taken.' (T.5683.30-.35) This view is quite erroneous. It is no pre-requisite to a debt falling due for payment that the creditor does not take legal proceedings to enforce payment on or after the contracted date for payment. That point has been made repeatedly in the authorities and is, with respect, obvious.

[136] Mr Boymal conceded that there was nothing temporary about the illiquidity of the Emanuel group between 1 July 1988 and 31 December 1990. During all that time it had a cash flow problem (T.5720.45-.56). He sought to qualify that answer on the basis that there may have been times within that period when on the sale of a property, Management or one of the other companies 'would have been relieved of its cash flow problem' which would, however, 'as time rolled on … would build up again.' Mr Boymal had not looked for and could not identify any such occasion. Elsewhere in his evidence Mr Boymal said that from his examination of the records of the Emanuel group the proceeds of sale of their properties, more often than not, were wholly applied towards the discharge of loans secured on those properties. (T.5701.15-.20)

[137] Mr Sara provided some corroboration for the view that there was no such occasion. He said that the proceeds from the sale of properties was not sufficient to allow Management to pay its debts and it was obliged to rely upon borrowed moneys. (T.3819.55-3820.1)

[138] With respect to particular questions that Mr Boymal had been asked his answer was that he was:

> 'Unable to give a conclusive opinion on whether … Management was solvent or not at 31 December 1990'

but that the information he had reviewed:

> 'Did not indicate or lead to a conclusion of insolvency as at 30 June 1989 and 30 June 1990 respectively … The liquidity position of … Management and its subsidiaries deteriorated in the period 30 June 1990 to 30 June 1991.'

In considering the position as at 31 December 1990 Mr Boymal looked at the net asset position of the Emanuel group as at 30 June 1989, 30 June 1990 and 30 June 1991. There was for each year a surplus of assets over liabilities but a comparison of current assets with current liabilities showed a deficiency for each year. This is a more important comparison for solvency than that of total assets to total liabilities. To address this problem Mr Boymal proposed to reclassify assets in the balance sheet so as to transfer some liabilities from the current category to the non-current category. This has the obvious result of improving the short term financial position by increasing the value of current assets relative to those liabilities which have to be met within 12 months. His rationale for the reclassification was that:

> '… There are certain mismatches between current assets and current liabilities … It is appropriate to match the properties held for resale and the mortgage loans, either both as current, or both as non-current so long as it was reasonable to assume that the loans had a similar longevity as the properties. Given the nature of the business operations, it is most appropriate to treat both properties and mortgage loans as non-current. This is because it will often take more than 12 months for a property to be realised and for loans to be repaid (of which financiers are aware).'

[139] I can understand the theoretical basis for Mr Boymal's exercise but its implementation produces an unrealistic result. The truth is that Management and its subsidiaries owned assets that were almost entirely non-current. Their broad acre lands could not be sold for a number of years. The funds they had borrowed to buy those lands were all short term loans. The financiers might be expected to, and did, from time to time roll over the loans but they had no obligation to do so. By their terms they were repayable within 12 months and were, by definition, current liabilities. The fact that Management might be able to renegotiate an extension of the loans did not mean that their legal nature can be ignored. Mr Morris' point was that it was a sign of financial weakness that assets which could not be and were not expected to be sold for many years were supported by loans payable well before that expected realisation. I agree with that approach. I do not accept that Mr Boymal's notional alteration of the accounts is justified.

[140] Mr Boymal then considered the comparison between total assets and total liabilities; current assets and current liabilities and quick assets and current liabilities expressed as a ratio which gives 'a quantitative assessment of the estimated coverage of an entity's liabilities by its assets. For example, if the ratio is 1.2 this means that for every dollar of liabilities owned by the entity there is $1.20 of assets available to cover these liabilities.' Although Mr Boymal did not say so the converse holds true. If the ratio is less than 1 then for every dollar of liabilities there is less than a dollar worth of assets to meet the liabilities. Mr Boymal then set out in three tables the comparison resulting in the ratios for the years 1989, 1990 and 1991. I set them out below.

	1989 $m	1990 $m	1991 $m
Total Assets	239.2	322.9	315.8
Total Liabilities	195.6	260.9	271.3
Net Assets	**43.6**	**62.0**	**44.5**
Total Assets/Total Liabilities	**Ratio 1.22**	**Ratio 1.24**	**Ratio 1.16**

Current Ratio	1989 $m	1990 $m	1991 $m
Total Current Assets	32.0	43.3	17.7
Total Current Liabilities	16.5	21.6	20.7
Current Assets/Current Liabilities	**Ratio 1.94**	**Ratio 2.00**	**Ratio 0.86**

Quick Asset Ratio	1989 $m	1990 $m	1991 $m
Total Current Assets less stock	28.5	35.6	10.7
Total Current liabilities less overdraft	16.2	20.4	19.3
Current assets (adjusted)/Current liabilities (adjusted)	**Ratio 1.76**	**Ratio 1.75**	**Ratio 0.55**

It will be seen that it is only for the year 1991 that there is a ratio of less that 1 when one compares current assets and quick assets with current liabilities. It must be remember that this result was obtained by Mr Boymal's reclassification of a number of liabilities from current to non-current. Mr Morris undertook the same exercise using the classification of assets and liabilities as they appear in the audited financial accounts of the Emanuel group. His table compares that ratio with those obtained by Mr Boymal. The result is that for current assets as well as quick assets the ratio is less than 1 and most substantially so for each of the years 1987 to 1991. The table is as follows.

	1987 $000,000	1988 $000,000	1989 $000,000	1990 $000,000	1991 $000,000
WORKING CAPITAL					
BOYMAL Total Current Assets	54.2	31.4	32.0	43.3	17.7
Total Current Liabilities	23.8	18.8	16.5	21.6	20.7
Total Current Assets/Total Current Liabilities	**2.27**	**1.67**	**1.94**	**2.00**	**0.86**
REPORTED					
Total Current Assets	54.2	31.4	32.0	68.3	221.1
Total Current Liabilities	99.0	125.4	149.4	239.4	225.9
Total Current Assets/Total Current Liabilities	**0.55**	**0.25**	**0.21**	**0.29**	**0.98**
QUICK RATIO					
BOYMAL Total Current Assets less stock	52.4	24.9	28.5	35.6	10.7
Total Current Liabilities less overdraft	22.6	18.2	16.2	20.4	19.3
Current assets (adjusted)/Current liabilities (adjusted)	**2.32**	**1.37**	**1.76**	**1.75**	**0.55**
REPORTED Total Currents Assets less stock	53.3	28.5	30.5	64.4	43.9
Total Current Liabilities less overdraft	97.8	124.8	149.1	238.2	224.6
Current assets (adjusted)/Current liabilities (adjusted)	**0.55**	**0.23**	**0.20**	**0.27**	**0.20**

[141] Mr Boymal is clearly right to have regard to Management's borrowing capacity when determining whether it had sufficient resources to pay its debts. He is also right to look at the time when debts were payable to determine whether they could be paid on time. For the reasons I have expressed I am sceptical that a pattern of late payment is probative of the fact that dates for payment have been extended or made indefinite. It is, I think, appropriate to look at what happened with respect to borrowings and the payment of creditors to determine whether there was capacity to pay all debts as they fell due and whether debts were paid on the due date. For this purpose it is instructive to consider the evidence of Mr Crighton and of the

cross-examination of Mr Jaenke as to the provision of further loan funds by EFG in 1988.

[142] Mr Boymal appears to disregard the history of operating losses because there were increases in the value of real property owned by the group in the years 1989 to 1991. I do not accept the validity of this exercise. The ability of a company to pay its current debts is not helped by the fact that assets which are unrealisable in the short term increase in value (subject of course to the question of borrowing capacity).

[143] Interestingly Mr Boymal noted that the amount of the debts payable to trade creditors increased from $1,900,000 as at 30 June 1989 to $2,500,000 as at 30 June 1990 though it declined again to $2,000,000 as at 30 June 1991. Significantly an analysis of the invoices to determine the average days that invoices were outstanding showed an increase over the same years:

30 June 1989	102 days on average
30 June 1990	151 days on average
30 June 1991	244 days on average

Mr Boymal thought the table an indication 'that the liquidity of … Management and its subsidiaries had declined or that Management were taking a stronger line in delaying payment.' I do not understand why the two should be alternatives. To my mind the natural inference is that debts were not being paid because Management could not pay them.

[144] Mr Boymal records that on 14 August 1990 Farrow Corporation demanded $2,000,000 from Emanuel 10 which it had borrowed but not repaid. Prior to the formal notice Farrow Corporation had sent several letters intimating that interest payments were in arrears. Mr Boymal concludes that 'the issuing of these demands at this time would have coincided with the liquidation of the Farrow and Pyramid groups … The duties of the liquidator are to recover the value of assets and he is unable to continue funding … The Farrow liquidator therefore would have been required to call up the loans and would be unable to provide ongoing funding.'

[145] No doubt this is right but it entirely misses the point that in August 1990 Emanuel 10 was required to pay $2,000,000 to a creditor and did not do so. Ultimately, years later, in September 1997, judgment was given against Mr Emanuele as guarantor. I would regard the conclusion as inescapable that the debt was not paid when demanded because neither Emanuel 10 nor its holding companies had the ability to do so.

[146] Mr Boymal next observes that in July 1990 a number of financiers lent further moneys to the Emanuel group which would not 'lead to a conclusion of insolvency for … Management and its subsidiaries as at … 30 June 1990 and 30 June 1991.'

[147] The fact that a financier lent money to a company does not seem to me to shed much light on whether the company was able to pay its debts as they fell due. Moreover the three advances referred to were peculiar. Kleinwort Benson Australia and Challenge Bank jointly lent $33,400,000 to one of the Emanuel companies to help it re-purchase the South Australian Manufacturing Park. It will be remembered that that park had been sold. The purchaser who borrowed the price from KPA and Challenge Bank defaulted. A lengthy selling program by the banks resulted in only

one offer, from the Emanuel group. They sought to have their purchase financed by KPA/Challenge Bank which reluctantly and with serious misgivings about the ability of the borrower to perform agreed to do so. The other loan was by the Bank of New York which funded the acquisition from the Bartletts. That bank had financed the Bartlett's purchase of the property and they had evidently defaulted in their obligations. The bank was substituting one doubtful borrower for another.

[148] Mr Boymal thought that at an LVR of 85 per cent there appeared to be borrowing capacity of $18,000,000 at 30 June 1990 and $5,900,000 at 30 June 1991. This ignores the capacity of the borrowing company to pay interest on the loan during this term and does not condescend to the detail of the saleability of the property given as security for the loan in time to meet the due date for repayment. Mr Boymal admitted he did not consider these aspects. Mr McCabe's evidence shows that they are important to a financier who is deciding whether to lend money on the security of property. (T.3010.35)

[149] Mr Boymal's less than confident conclusion was that the information he had did not lead to a conclusion of insolvency as at 30 June 1990 but that the liquidity position of Management and its subsidiaries deteriorated to June 1991 when there were some indicators of insolvency but not sufficient to lead to a conclusion of insolvency. Whether it was or not was 'primarily dependant upon the continuing support of the financiers.' Mr Boymal thought that' in fact major lenders did continue to provide support in the six months post 31 December 1990.' He therefore thought it reasonable 'to assume that the position as at 31 December 1990 was not worse (and may have been better) than the position as at 30 June 1991.'

[150] I am unconvinced by this analysis. It seems to me the evidence of the payment of trade creditors in particular and the rapidity with which borrowings were dissipated that Management was insolvent throughout the year ended June 1989. Its position steadily worsened over the following years.

[151] The third expert, retained by C & L, was Mr Leppinus. He was asked to advise whether Management was insolvent before 31 December 1991. He concluded it was not insolvent for reasons which he summarised:

> '(The Emanuel group) was a property development entity. Due to the nature of its business, its financial performance and cash flow profile was not comparable to that of service or manufacturing entities. The cash flows of property developers (apart from the entity's operating overheads) are sporadic. Purchases of land are substantial and cash generated from sales are significant but infrequent.
>
> By review of the trading performance of Management … noted trading losses and negative cash flows during the period (1 July 1988 to 31 December 1991.) … It is relevant to consider those losses in the context of the industry in which (the Emanuel group) operates. … The nature of the industry and the type of business … would indicate that it is not uncommon that there would be shortages of cash and property transactions not completed.

> The performance of the property industry played a significant role in the performance of the (Emanuel group). The property industry reached a peak in around 1989-1990. It was reported that at that time properties were substantially over valued and excess supply occurred. Together with the recession and economic conditions this led to a severe contraction in the property market …'

[152] Mr Leppinus went on:

> 'The nature of the (Group's) activities … were such that the … assets … necessary for the business to operate were minimal. … The majority of profits … were through the sale of property at a profit. The nature of the business was also such that it was not labour intensive. Accordingly the business could continue operation with minimal overheads during the … downturn in the property market.
>
> It is reasonable to assume that the financiers within the property industry would be aware of the nature of businesses in the industry.
>
> … The (Emanuel group) increased its loans with external financiers from $106,700,000 in 1988 to $205,300,000 in 1991. It is reasonable to assume that external financiers would conduct their own due diligence prior to making a loan, increasing the loan … or extending the loan. In my opinion the ability of the (Emanuel group) to obtain new finance … provides support to the conclusion that Management was not insolvent during the relevant period.'

[153] In particular it was Mr Leppinus's opinion that 'Management was not insolvent between 1 July 1988 and 31 December 1991'. (Exhibit 11 para 34.2.1)

[154] In essence Mr Leppinus' opinion was that Management was not insolvent because it had the support of financiers. That is to say it could borrow sufficient moneys or defer the repayment of loans so that debts that did fall due could be paid.

[155] Mr Leppinus's report does not identify evidence showing whether there was sufficient financial support available to the Emanuel group from financiers to enable it to pay all of their debts as they fell due. Nor does Mr Leppinus identify evidence establishing that the Emanuel group had made agreements with its creditors which deferred the obligation to pay them according to the terms stated on the invoices.

[156] Mr Leppinus had referred in his report to the 'technical insolvency of the Emanuel group'. (Exhibit 11 Annexure 14 para 14.5.8) He was asked (T.5481) if there was a difference between technical insolvency and insolvency. His answer was:

> 'I think when they're talking about technical insolvency is when you go down the financial ratios, instead of financial statements, and when you see the liabilities exceeding the assets and the current liabilities exceeding the current assets. So, you have if you like *prima facia* on the face of that that a company is … technically insolvent without what we call mitigating circumstances.'

The distinction drawn by Mr Leppinus is untenable, as is the differential basis he identifies for determining the existence of technical insolvency and insolvency. His answer makes me reluctant to accept that he has approached his assessment of whether the Emanuel group was insolvent with the requisite understanding.

[157] When addressing the question of late payment of trade creditors and whether that indicated insolvency Mr Leppinus reported (Exhibit 11 para 35.4.2, .3):

> '… (Mr) Morris has focused on identifying those events that may indicate insolvency, and has not considered other factors that provide an insight into the overall commercial relationship between (the Emanuel group) and their unsecured creditors …
>
> I have noted the following additional factors which need to be considered when assessing the insolvency of the (Emanuel group):
>
> - On a number of occasions, creditors continued to provide services … despite their accounts being unpaid;
> - The terms of trade of a number of unsecured creditors was unclear;
> - On occasions creditors agreed to payment plans to reduce debt over time; and
> - On occasions legal action was threatened, however, there was no indication … that legal action was commenced.'

Mr Leppinus really gave away his third point. This exchange occurred:

> 'You are not talking of the unpaid creditor whose debt is matured and is due and payable and the debtor comes and says "Look I'll give you $10 and $10 next week"? – No, but I guess if you're looking at that other area that they'd failed to pay (and) subsequently they entered into … a firm arrangement with their (creditor).
>
> Yes? – And the (creditor) agreed to it.
>
> Well, that would mean the debt hadn't been paid when it fell due? – Yes.
>
> And that's a test of insolvency, isn't it? – Yes.' (T.5492.8-.20)

Mr Leppinus conceded that his first point did not itself prove that debts had not been paid when they fell due. Similarly the fact that a creditor had not commenced legal proceedings did not indicate a debt had not fallen due and gone unpaid. (T.5492.50-5493.12) Likewise, Mr Leppinus agreed that his second point, that terms of trade were unclear, meant no more than invoices did not state a date for payment.

The factors advanced by Mr Leppinus for doubting that payment of creditors after the date stated on invoices indicated insolvency were, to say the least, flimsy.

[158] In relation to the ability of the Emanuel group to borrow sufficient to pay debts as they fell due Mr Leppinus accepted that he had not found anything in the

preparation of his report which demonstrated that EFG was prepared to provide sufficient funding to support all of the Emanuel group's operations. Nor did he find evidence that any other financier would do so (T.5523.10-.20)

[159] The test for the accuracy of the defendants' experts' opinion is what happened in fact. Did Management, from its borrowings or other resources, pay its debts as they fell due? If it did not I think it a safe inference that the reason it did not was that it could not. It would not then matter whatever theoretical justification there may be for presuming it had or could expect the support of its financiers or borrowing capacity to allow it to pay its debts. If, as a matter of fact, borrowing what it could and recovering what it could from sales it did not pay its debts on time I am prepared to conclude that it could not so pay them.

[160] The evidence of Murray Crighton is important. He was an accountant employed by Management for three years, 1987 to 1990. Part of his duties were to organise payment of the company's creditors. It was a burdensome task which occupied about half his time. Except for two months in the whole period there was never enough money to pay the creditors who had rendered invoices. Mr Crighton prepared frequent "funds statements" which set out the funds available to the company to pay its debts and the debts it had to pay. The statements are found in Exhibit 180. They were prepared at least monthly and often weekly or even more frequently. They show a shortfall in every case (except the two I mentioned) in the monies available to pay creditors compared to the creditors to be paid.

[161] Shortly after commencing employment, Mr Chrighton 'took over the negotiations and handling of creditor payments …' (T.3436.6). He prepared what he called 'funds statements for internal management purposes … to establish the balance available in the bank accounts … and then to establish what immediate payments were required.' The format of the statements is that they set out what cash was available to pay debts and then, by category, the group's immediate debts or those which would become payable in the near future. Not all outstanding creditors appear in the statements. The criteria for appearing in the statement were the amount and age of the debt, or some other factor such as the need to retain the goodwill of the creditor. Having prepared the statements, Mr Crighton gave them to Mr Sara who handed them on to Mr Emanuele, with whom Mr Crighton met. During the meeting Mr Emanuele would 'ask … why (Crighton) had nominated the particular creditors for payment and then suggested what would the minimal payments that we could make …' (T.3437.50-60).

[162] Mr Crighton gave evidence that in his time at Management there was never enough cash available to him to pay creditors. He said (T.3438.1-.12):

> 'What was the general position about availability of money to pay all the creditors? – There was, in general, a cash shortage.
>
> And was that from when you first arrived? – Almost immediate, yes.
>
> …
>
> And was there ever enough money to pay all of the creditors? – At no stage, I don't believe so.'

This remark appears amply corroborated by the funds statements themselves. These were prepared so frequently because of the regular need to view the accounts in light of the continuous cash shortage (T.3439.50). A feature of the procedure described by Mr Crighton is that Mr Emanuele would frequently approve payment of part only of an outstanding account, notwithstanding that it was long overdue. Payment was usually made in rounded amounts. Another feature is that the company had no dispute with its creditors. It did not contend that the goods or services invoiced had not been provided or were not of appropriate quality. According to Mr Crighton the only reason they were not paid promptly and in full is that there was no money to do so. Mr Emanuele appears to have been well aware of this. He explained to Mr Chrighton that the reason he selected the creditors to be paid and the amounts allocated to them was that were insufficient funds to pay them in full and 'to keep good faith with the creditors.' (T.3443.9).

[163] As a general rule it seems that creditors would not qualify to be included in the 'urgent' category unless their accounts were more than six months old. Sometimes their inclusion was prompted by intimations from the creditor that further credit would be refused unless payment of outstanding amounts were made. Mr Chrighton would receive complaints or threats to curtail further provision of services from one or two creditors each week. Some examples are quite egregious. Two large insurance policies were issued by Vanguard Insurance, one covering the fleet of cars owned by the companies (mostly for the personal use of Mr Emanuele and his family) and the other for properties owned by the group. Premiums went unpaid for almost a year, notwithstanding that two claims were made, one on each policy, which the insurer refused to meet until the premiums were paid. Despite this obvious need and Mr Emanuele's obvious wish to pay the premium, payment was made by instalments over three months. The only sensible inference is that the company had insufficient money to pay more promptly. There are similar examples involving payments to the Australian Tax Office and the Commissioner of Stamp Duties. Local authority rates went unpaid until they were listed as a separate category of creditor contained in Mr Chrighton's funds statements when the amount of outstanding rates was over $700,000.

[164] On occasions Mr Chrighton made arrangements with 'major creditors' by which he promised 'to make partial payments of the total amount over a number of months.' (T. 3489.55) Sometimes these arrangements were initiated by the creditor making demands and sometimes by Mr Chrighton, no doubt, seeking to deflect anticipated trouble.

[165] The funds statement for 7 July 1988 (Exhibit 180, Document 7) contains, among the creditors listed under the heading 'Urgent Payments', Messrs Flower & Hart who were said to be owed $25,887 less $10,000 which had been paid, leaving a balance of $15,887. A handwritten notation on the statement reads:

> 'Flower & Hart – Mr Alley (partner) requests payment by Friday as it relates back to the APM purchase.'

That transaction had settled in June of 1987, 13 months earlier.

A second creditor listed in the 'Urgent Payments' section was United Cleaning Service who was said to be owed $10,000. Another handwritten notation in respect to this creditor read:

> 'United Cleaning – service to Network House. The manager has warned that service will stop if not paid very soon.'

As to that Mr Crighton said (T.3447.10-3448.10):

> '… The comment by United Cleaning Services manager to cease services … was that sort of comment or threat commonplace? – It did occur on several occasions whilst I was working there. … I'd received several warnings from the cleaners and I did receive other warnings from other creditors, yes.
>
> How regularly did you receive such warnings? – It'd be difficult to put a number on it but probably … one a week or two a week.'

[166] It is instructive to consider some of Mr Chrighton's funds statements. He prepared them on 8, 15, 16, 21 and 29 November 1988. Their frequency tends to suggest a need to monitor closely Management's ability to pay its debts. The statement for 8 November 1988 shows available funds of $110,000, urgent payments of over $600,000, and other payments of about $1,500,000. On 29 November 1988 $164,000 was available to pay $280,000 worth of urgent 'previously passed' payments, just under $500,000 of urgent payments, and $347,000 of other payments due.

[167] On 8 November 1988 Vanguard Insurance Company Ltd ("Vanguard") sent a fax to Mr Hartley 're outstanding account.' It read in part:

> 'Would you please treat urgently the payment of the following two policies
>
> | | |
> |---|---|
> | Motor vehicle fleet due 2.12.87. Premium | $32,400.00 |
> | Industrial risks Market Plaza due 3.12.87 | $16,132.09 |
>
> As you can see both these policies are eleven months overdue and due for renewal next month.
>
> To date we have paid out approximately $42,000 on the motor fleet policy and if the stolen Range Rover is not found … a payout of approximately $70,000 will be required to settle this claim.
>
> With regard to Market Plaza a recent fire claim has been made for … $100,000. Before we can proceed further with either of these claims we require payments of these policies. Please arrange for a cheque to be forwarded by the 15.11.88.'

Mr Chrighton's funds statement of the same date, 8 November 1988, includes under 'Other Payments Due', 'Vanguard $48,532'. The statement for 15 November, the date by which Vanguard had demanded payment, repeats the former entry but the typed figure, $48,532 had been crossed out and in hand the figure $10,000 put beside it. The funds statement for 21 November 1988 contains an entry in the 'Other Payments Due' segment:

'Vanguard ($48,532 less $10,000 paid 17.11.88) $38,532'

[168] The statement for 29 November 1988 has moved the entry for Vanguard from the 'Other Payments Due' segment to the 'Urgent – Previously Passed' category. It showed Vanguard requiring urgently payment of $38,532. The funds statement for 1 December 1988 is in the same terms as regards Vanguard, as is the statement for 8 December 1988. The statement for 15 December 1988 has, against the entry for Vanguard, the handwritten figure $10,000 next to the typed figure of $38,532 and the handwritten notation 'required to be paid if to get payout on Range Rover and claim on MLC fire damage.' Mr Crighton explained that (T.3453.45-3454.8):

> 'On 15 December 1988 … we were overdrawn … to the extent of $590,000 … against … a limit of (half) a million dollars …
>
> So as at 15 December what … money did you have available to pay your $38,000 Vanguard bill? – I had no – none available on the basis that we had to reduce the overdraft to … $500,000.'

The statement for 20 December 1988 shows that a further $10,000 had been paid, reducing the amount outstanding to $28,352.

The next entry for Vanguard appears in the statement for 11 April 1989 when it is shown to be owed $71,658. I presume this to be the balance of the previous year's premiums which had not been paid and the premiums for the following year. Between 21 April and 12 May 1989 the amount due to Vanguard reduced to $41,658 presumably by the payment of $30,000. In the statement for 30 June 1989 the amount owed to Vanguard was shown to be $57,890 against which the notation '20' appears which would seem to be the amount Mr Emanuele authorised to be paid. In fact only $12,000 could be spared as the funds statement for 10 July shows the amount outstanding to be $45,890.

[169] In the statement for 1 December 1988 there is an entry in the 'Urgent Payments' category for a creditor who had supplied road surfaces who was reported to have stopped supply because it had not been paid. At the end of the month, on 23 December 1988, Management had available to it $3,874,900 with payments due and anticipated for the next month of $4,409,768 leaving a shortfall of about $500,000.

[170] The statement prepared on 14 June 1989 shows no improvement. Available funds were only $265,000 against debts of just over $5,000,000. Of this sum, $2,000,000 was owed to a financier, Oakminster. Ignoring this debt, there still remained over $3,000,000 to be paid and about a twelfth of that sum available for the purpose.

[171] As mentioned the premium due to Vanguard Insurance in 1988 had been paid about a year late, and by instalments in order to recover indemnities under the policies. The following year's premium then fell due. The funds statement for 30 June 1989 shows the amount payable as $57,890. Mr Emanuele authorised the payment of $20,000. That same statement shows payments due of about $4,000,000 as against available funds of $950,000. The statement for 30 October 1989 contains the usual list of 'urgent payments'. Two of these, Cannan & Petersen and the Land Administration Commission are noted 'must pay'. Included in the same category were three amounts of stamp duty and a note that the amount was accruing

penalty interest at 20 per cent. The statement for 20 December 1989 gathers together in a separate category of payments due "council rates". The amount owing was $393,864. At that date the company had available to it $1,574,000 but according to the statement owed over $4,000,000.

[172] The statement for 3 October 1989 shows as an urgent payment:

> 'Aust. Tax Office – Emanuel Holdings (due 8.5.89) $150,738 Prescribed payment tax $114,672'. Against that is written in hand '50'.

Mr Crighton explained (T.3462.30-.42):

> '… That figure … of $50,000, what's that to be allocated towards? – It's allocated to the ATO figures, both figures, the 150 and the 114.
>
> Well, why are you allocating $50,000 only to $165,000 worth of tax due? – That was Mr Emanuele's allocation towards the account.
>
> … Was any reason given to you why you weren't paying the full 265? – A deficiency of funds to meet the other payments listed on the schedule as well.'

[173] An item which appears in most, if not all, of the statements is described as 'blue book payments'. Mr Crighton explained that these items were personal to Mr Emanuele and his family relating to their lifestyle such as the lease of their motor cars. It was customary to pay these in priority to other payments. The statement for 3 October 1989 shows that the September payments of $197,803, had not been made. As well additional payments of just under $400,000 had been incurred in October and were due. There was a shortfall between cash available and outstanding debts of over $3,000,000. The pattern remained the same. At the end of the year, on 20 December 1989 the companies had available to them $1,574,000 and debts of over $3,700,000. Six months later on 20 June 1990 funds available were $761,530. Outstanding creditors were in the sum of over $3,600,000. At year's end when Mr Crighton left, on 10 December 1990, available funds were $1,970,000 but the amount of outstanding creditors was again just over $3,600,000. At this time the amount of outstanding local property rates stood at $707,339.

[174] That pattern existed with respect to statutory creditors as well as trade creditors. The Commissioner of State Revenue accepted, on some occasions at least, the payment of stamp duty by instalments, the Commonwealth Commissioner of Taxation accepted a similar mode of payments for fringe benefit tax and those charged with the responsibility for collecting land tax agreed to its payment from the proceeds of sale of the parcels of land in respect to which the tax was levied.

[175] In surveying these funds statements I have in many cases rounded figures and sometimes approximated the arithmetic. I have also ignored entries relating to expenditure on the acquisition of properties such as the payment of deposits or balance purchase price and listed only non-capital items of expenditure.

[176] Adjustments have to be made to the statements because some of them include payments that were not due at the date of the preparation of the statement. These

future obligations were included to show senior management, Mr Hartley and Mr Emanuele, impending debts for which provision had to be made. They include deposits due on contracts to acquire property or the settlement monies on properties under contract to purchase. As well they include interest payments that would fall due within a short space of time and wages that would have to be paid to the end of the month.

[177] There is also an adjustment to be made, occasionally, for creditors who had rendered invoices but in respect of whom the period allowed for payment had not expired. There appear to be very few of these.

[178] Adjusting for these future obligations, there is still in each case a substantial discrepancy between the amount the creditors were owed and the money available to pay them.

[179] The defendants rely upon facts which were encapsulated in Mr Ziepes' cross-examination (T.4226.20-4227)

> 'And during the period that you … assumed Mr Chrighton's role which … was from the … beginning of 1991 til 1995 … the position is that you were involved in reaching accommodation with … the Emanuel's group's creditors? – That is correct.
>
> And as a general proposition it's true to say that the Emanuel group generally paid its creditors outside the stated trading terms? – Yes.
>
> And, as a general proposition, the group managed – no doubt largely through your efforts – to obtain time from its creditors to pay, and substantial indulgences in terms of times to pay? – Yes.
>
> And while those creditors were willing to grant those indulgences, they also continue to supply good and to continue to supply services? – Correct.
>
> And they were prepared to do that despite the fact that payment was slow? – Yes.
>
> And they were prepared to grant these indulgences? – Yes.'

Exhibit 382 is a collection of further passages of evidence to the same effect.

[180] The defendants argue that the creditors accepted this regime of late part payments and therefore 'commercial reality' shows that the debts were not due in accordance with their normal terms, in most cases, 30 days for payment. It is pointed out that all, or many, of the creditors continued to supply services so that it must be inferred they accepted payment on the plaintiffs' terms.

[181] I am not satisfied that the evidence shows the making or existence of 'arrangements' which were legally efficacious to extend the contractual time for the payment of invoices. The word 'arrangement' has no fixed meaning. It is equally apt to describe a binding contractual variation or a complete estoppel as it is a circumstance in which a creditor whose debt is overdue takes no action because it

has been told the debtor has no money but expects to be able to pay when a sale is made. Mr Crighton was not questioned closely about the terms of the arrangements he made with the Emanuel group's creditors.

[182] The second defendants, in particular, were critical of the plaintiffs for failing to call evidence from any of the trade creditors as to the terms of their arrangements for payment. The criticism applies equally to the defendants: if it were the case that legally effective arrangements had been made evidence could have been called by the defendants to prove the fact. In the end I was not given the assistance of evidence from any of the creditors. I must make the best sense I can of the evidence that was adduced.

[183] It is quite telling that the statements were prepared at all. Their function was to allow the company to make an assessment of who amongst its creditors should be paid from the inadequate resources available. Payees were selected on the basis of the amount outstanding or the age of the debt or the need to preserve relationships with creditors whose services would again be required and, no doubt, to prevent recovery action which may prove fatal to the company's survival.

[184] The statements were shown to Mr Hartley and/or Mr Emanuele who would decide which of the creditors should be paid. Even when authorisation was given to Mr Crighton to pay specified creditors he was often not able to do so because there was no money. In those circumstances he would wait until further funds became available when he would draw a cheque. It is significant that many creditors were paid part only of their debt. This includes creditors who it might be thought essential to pay such as Vanguard Insurance – the premiums on policies to protect the company's properties. These were outstanding for 11 months and when demand was made the premiums had to be paid by three instalments.

[185] The problem with the defendants' argument is that Mr Emanuele, Mr Hartley, and Mr Sara, did not behave as one would have expected if arrangements were in place by which it was in order to pay creditors later than their stipulated terms and/or by instalments. If the plaintiffs were paying in accordance with arrangements Mr Crighton would simply have attended to making a payment that was due in accordance with the arrangements. He would not have had to discuss with his superiors which debts or what parts of debts should be paid. Mr Emanuele would not have had to anguish over the selection of payees. Nor would Mr Crighton have paid smaller amounts than Mr Emanuele had in fact authorised if arrangements were in place and funds were available to make payments in accordance with the arrangements.

[186] While acknowledging the force of the argument it is not, I think, a sensible conclusion that the number and length of indulgences given to the plaintiffs by their creditors meant that they were not insolvent in 1988 as the plaintiffs themselves now submit. The relaxation to the rigour of the requirement that one is insolvent who cannot pay all his debts when they are due demanded by commercial reality is intended for the benefit of those who encounter a period or periods of temporary illiquidity. It is to preserve viable businesses from being unnecessarily wound up to the detriments of owners, creditors, and employees who all suffer if a position is crystalised during a temporary downturn. I cannot accept that its consequence is that a company, like the plaintiffs, who from 1988 onwards could never pay debts in accordance with stated trading terms and whose position deteriorated until their

final demise in 1995 were in fact solvent because no creditor took action against them. Income was always inadequate to pay debts. They made operating losses in each year. Their levels of indebtedness increased as did the deficiency between the value of their assets and the level of their debt.

[187] The evidence shows that arrangements were made with some creditors, though there is no clear evidence that those arrangements were adhered to by the plaintiffs. With respect to others, the situation seems to have been that they were paid part of their debt if money was available to the plaintiffs in the hope, which was obviously realised, that part payment would prevent demand and/or enforcement proceedings. This is not, in my opinion, to say that there was an arrangement binding by contract or estoppel changing the time by which debts were due and payable. There are many instances where creditors were paid only because of their insistence coupled with threats to terminate the supply or goods or services which were essential to the plaintiffs. The evidence does not show the existence of any arrangement between debtor and creditors. Rather it shows unilateral action by Mr Emanuele allocating inadequate resources to delay creditors with most effect. Creditors who were professional people, solicitors, accountants, and engineers, were paid last as a matter of policy. There is no evidence that any arrangements were made with them to extend time for payment. They simply suffered in silence.

[188] There is a good example of an “arrangement” which shows the error in the defendant’s case. Mr Anderson was a partner of C & L in Brisbane who conducted the audit of the plaintiff companies in the financial years 1988 to 1991. It was in 1988 that the plaintiffs moved their registered office to Brisbane and the responsibility for conducting audits was transferred from Adelaide to the Brisbane office of Coopers & Lybrand. Mr Anderson gave evidence that he experienced difficulty in receiving payment from the plaintiffs for his professional audit fees. He said (T.9440.03-10; .45) that invoices rendered for the performance of taxation advice and audit fees were normally ‘paid partially … by Emanuels as and when moneys became available’; and that the non-payment of audit fees ‘was a regular discussion point with the accountant in the Brisbane office.’ The reference to the accountant in the Brisbane office is to Mr Sara in the plaintiffs’ Brisbane office.

[189] There was, according to Mr Anderson, ‘a loose arrangement’ between the Emanuel group and Coopers & Lybrand that the accountants ‘would get money as money was available. We would get some part of our account.’ (T.9441.20-.30) Mr Allen, the tax partner in Adelaide, who performed a great deal of work for the plaintiff companies, approached Mr Anderson to request him to ask Mr Sara to ‘get … something for (him) at the same time’ as Mr Anderson obtained money for the payment of his own fees.

[190] When asked what the arrangement was Mr Anderson said (T.9441.38-.41):

> ‘We would have asked Mr Sara if they were in a position to pay some of our account and … Mr Allen … would ask would we see if we can do something for their outstanding bill as well.’

Mr Anderson summarised his firm’s position in relation to the payment of his fees as being:

> 'I suppose you could say we were always holding our hand out.' (T.9442.14)

[191] Mr Anderson recorded in a note of 18 April 1991 (Exhibit 301) that he had spoken to Mr Sara the previous day, 17 April, 're outstanding account owed by the Emanuel group to C & L for 1990 audit services.' Mr Sara told him that Mr Allen had already spoken to him (Sara) 'on the same question.' Mr Sara apparently said that Mr Jaenke who was 'their principal contact person with Elders Finance' had been on holidays but on his return Mr Sara would speak to him 'with regard to getting money for (C & L).'

It is apparent that Mr Anderson and Mr Allen spoke about obtaining payment for their outstanding invoice. Mr Allen said he would speak to Elders personally, no doubt to urge it to advance moneys to allow Management to pay the invoice. Messrs Anderson and Allen agreed that 'there was no possible security that we could get made available … because all assets … within the group are totally mortgaged …' Mr Allen and Mr Anderson also agreed that there was no point in charging interest to Management 'as all that would do would be to give them the opportunity to delay the cash payment even further.'

It was Mr Anderson's assumption that the account for 1990 audit had not been paid 'because the Emanuel group didn't have the money to pay it.' (T.9445.30)

[192] It is unrealistic to treat the evidence as establishing a variation to the terms of the contract between C & L and the plaintiffs which, according to Mr Patterson, (T. 9552.5) required payment of invoices at the expiration of thirty days. Nor does it show the basis for an estoppel or even a waiver of the term as to payment. Mr Anderson was describing the situation from the time he commenced as audit partner in October 1988 until his last audit in 1991. His evidence shows that the plaintiffs did not honour their contractual terms with C & L. It is noteworthy that Mr Anderson described his accounts as outstanding, i.e. not paid on the due date. It is not to the point that C & L did not issue demands or commence legal proceedings to recover their fees. There was clearly no arrangement by which the date of payment was deferred either indefinitely or to a fixed date. C & L regarded the moneys as due and payable and constantly asked to be paid. Payments were late and in amounts less than what was due.

[193] The second defendants submitted that I should accept Mr Anderson's evidence contained in his statement, Exhibit 481, that C & L were not insisting upon payment of the invoices within 30 days but were willing to accept intermittent payment while continuing to perform work for the Emanuel group. Counsel for the second defendants pointed also to evidence (contained in Exhibit 164, P 1/90) that up until December 1990 C & L were paid their fees more or less regularly.

Accepting both points of fact I am not prepared to conclude that the situation was not as Mr Anderson described in cross-examination. The partners in C & L responsible for rendering fees to Management did expect to be paid eventually. They continued to perform professional services. The fact that they did so and did not demand payment does not indicate that their fees were not payable on the dates indicated by their invoices. Rather they realised Management could not pay them on the due date but would do so when (and if) it had funds in hand.

[194] If there was an arrangement by which the Commissioner for State Revenue agreed to accept part payments of land tax over time in discharge of assessments issued to companies in the Emanuel group it is apparent that the arrangements were not adhered to. There are many examples in the material of the Commissioner demanding payment from mortgagees or from purchasers of the land when sold by companies in the Emanuel group. It is, I think, significant that despite the assertion of the existence of arrangements with the Commissioner the terms of such arrangements were not proved with any precision. One would have expected them to be documented. There is one occasion on which the Commissioner agreed in writing to accept the payment of some sums over time but no evidence of any arrangement with respect to land tax payable overall. Had there been an arrangement to the effect contended for by the defendants and/or had the plaintiffs adhered to the arrangements there would have been no need for the Commissioner to demand payment of the tax from others interested in the land. A file note of Mr McCabe's of 12 November 1991 (Exhibit 249, Volume 1, Tab 19) shows that the Office of State Revenue had demanded that Westpac, as mortgagee, pay land tax owed by Lascivious in an amount just under $55,000.

[195] In a memorandum he sent to Mr Crosby on 10 September 1991, Mr Jaenke recorded a meeting he had had with Messrs Hartley and Ziepes on 9 September 'to review August expenditure and planned drawings for September'. He was apparently told at the meeting that

> 'Land Tax are serving "declaration of agents" on any intending purchasers and are therefore collecting large amounts off any sales ($16,000 for the Regent Arcade settlement and $51,000 of Carinya Park, Gladstone land in the past month) and $170,000 will be deducted from APM sales coming up).'

In a note for file dated 17 October 1991 Messrs Grier and Jaenke recorded the proceedings of a meeting they attended with Mr Crosby and with Mr Rocco Emanuele, Mr Hartley, Mr Ziepes and Mr Johanssen which took place on 10 October 1991. Under the heading "Land Tax" the following appears:

> 'N.J. Jaenke advised Elders had been served with a mortgagee notice to pay land tax on a Gladstone property from 1990.
>
> Also, Land Tax Office is giving declaration of agents to prospective purchasers and already a declaration for $173,000 for the next APM settlement has been given.
>
> Total land tax owing exceeds $600,000 plus in excess of $400,000 for Council rates are now due. These items are not being covered in monthly expenses being paid and any demands for these amounts will affect budget plus reduces settlement proceeds in the event of a sale.'

The fact that the Commissioner for Land Tax was demanding payment of outstanding taxes from the mortgagee of lands owned by the Emanuel group as well as demanding that the tax be paid by purchasers of the lands is quite inconsistent with their being an arrangement between the companies liable to pay the tax and the

Commissioner by instalments or on deferred dates. It is also apparent that some amounts of land tax had been outstanding for 12 months or more.

[196] Mr Jaenke gave evidence that in the years of his involvement, 1988 to 1995, land tax and Council rates were always outstanding and payments were made from settlement moneys when properties were sold (T.8057-8058). He did not say that anyone from the Emanuel group had told him of an arrangement which had been ever come to with the Commissioner's office for the payment of tax over an extended time.

[197] By requisition dated 5 February 1992 the Commissioner of Land Tax required Mercantile Credits to pay $62,141.86 by way of land tax owed in respect of the years 1989 and 1991 by Data Plan on the Spring Hill Quarter. By a letter dated 6 February 1992 Mr Hartley wrote to the Commissioner to propose a reduction of outstanding land tax owed by Lascivious, Addstead, Centaurus, Cofordo 260, Leominor, Meka Securities, Navicio, Segacious, Villa-Cairns, Livilla, Antlia, Emanuel 14 and Airlie Bay Developments as well as Data Plan. The proposal was that some amounts be paid when the property the subject of the assessment was sold and that in respect of three companies monthly instalments of the tax should be paid until their entire debt was satisfied. The total outstanding was $954,168. The amount proposed to be paid by monthly instalments was only about $188,000. The balance was to be paid from sales, when they occurred. By letter of 12 February 1992 the Commissioner purported to accept the proposal but in fact made a counter-proposal: that monthly instalments in the amounts offered by Mr Hartley be continued until the debt of all the companies was discharged. In other words the Commissioner would not accept payment by instalments of the debts of some companies while the others waited until there were proceeds of sale available. The documents are in Exhibit 386, Volume 1, Tabs 66 & 67. There is no indication whether the Commissioner's counter-proposal was accepted.

[198] It is significant that neither Mr Hartley nor the Commissioner made any reference to a pre-existing arrangement for the extended payment of land tax. Had such an arrangement been made earlier it would surely have been mentioned. I conclude this was the first such arrangement so that any assessment of land tax made before February 1992 was payable in accordance with the terms of the assessments. It is clear they were not so paid.

[199] I conclude from this review that Management had insufficient moneys readily available to pay debts as they fell due. I also infer that its borrowing capacity was inadequate to provide it with sufficient money to pay debts as they fell due. Otherwise it would have borrowed the extra money.

[200] Support for this conclusion comes from the evidence of Mr Jaenke who was an officer of EFG between 1972 and 1978 and again between 1983 and 1995. In the relevant years he was a lending manager responsible for overseeing the preparation of loan applications, co-ordinating the preparation of security documents and monitoring the progress of loan accounts after advances had been made. Mr Jaenke was relatively junior: he reported to Mr Grier until 1993 when he retired, and thereafter to Mr Booker. Between 1987 and the end of 1989 Mr Jaenke was responsible for reporting on the status of loans made to the Emanuel group to his superiors and monitoring whether repayment schedules were being adhered to. As well he processed loan applications for further advances requested by the Emanuel

group and he monitored EFG's security position which included obtaining updated valuations of the secured properties. He was more closely connected with the detail of loans and applications for loans between the Emanuel group and EFG than his superiors.

[201] In February 1988 Mr Crosby learnt of GITIC's withdrawal from negotiations to become a joint venturer with Management and Emanuel 14 in the development of the APM lands. The failure of the joint venture had obvious implications for EFG. In a memorandum of 11 February 1988 (Exhibit 16, D8/318) Mr Crosby and Mr MacDonald (who was then the account manager at EFG for the Emanuel group) recommended:

> '(a) That approval be given to fund Emanuel up to a total of $2,500,000 on a needs basis and at the direction of Elders senior management, and
> (b) That approval be given to assist the Emanuel group with the settlement of existing contractual obligations (totalling $8,900,000) during February and March.
>
> - subject in each case to the value being confirmed by Elders … valuers.
> - only those settlements to which the group is absolutely committed are to be considered.
> - all advances, new and existing, to be cross-secured.
> - Emanuel is not to enter any new purchases or commitments.'

[202] The memorandum also contained these remarks:

> 'Like all developers Emanuel is highly dependant on cash flow from property settlements. The loss of a $67,000,000 sale and the substantial profit from that sale has created a more serious than usual liquidity bind.
>
> Due to the size of Emanuel's commitment to us we believe that it is in our interests to assist. Emanuele's track record suggests that he can continue to trade in properties profitably. Sales inquiries are now being vigorously pursued at prices in excess of our valuations and considerable interest is being shown. This factor coupled with Emanuele's ability to purchase from the original landowner … tends to satisfy us that our valuations are conservative.'

[203] The recommendation was accepted by the Board of EFG. Accordingly advances requested by Management were approved from time to time. A letter of 5 April 1988 from Mr Jaenke to Management noted that total approvals to that date came to $7,500,000 and a total of $7,113,104 had been advanced already. About that Mr Jaenke said in cross-examination (T.7996-7):

> 'Now, it would seem, would it not … that the $7,500,000 being advanced was being spent rather quickly, certainly inside 60 days from the time of Mr Crosby's earlier memorandum? – That's apparent from what happened. Yes.

> And was that a feature with respect to the Emanuel group, namely that the group tended to spend money quickly? – Yes.'

[204] A memorandum of 11 April 1988 (Exhibit 421, Volume 9) confirmed that of the $11,400,000 approved by way of further advances, $7,113,104 had been drawn. It also showed that the Emanuel group had provided information about further moneys it wished to borrow to enable the completion of properties it had contracted to buy. The additional amount sought was $3,262,500.

[205] A memorandum of 22 April 1988 from Mr Grier to Mr MacDonald showed that the advances made to the Emanuel group had increased to $8,875,499 and that a request for a further amount of $3,626,825 had been received. If these further requests had been approved the total amount advanced would have been $12,502,324. The memorandum contains a handwritten notation suggesting that EFG had refused to advance moneys to enable two of the proposed purchases to proceed. Mr Grier noted that a further increase in the limit of the loan would be necessary if EFG agreed to provide money to purchase the properties.

[206] As to these memoranda Mr Jaenke agreed that their contents corroborated his recollection 'that the Emanuel group spent money quickly.' (T.7998.50)

[207] Another memorandum of 29 April 1988 from Mr Grier to Mr MacDonald shows that:

> 'Emanuels have requested a further $200,000 working capital out of the requirement of $500,000 previously approved by phone. From this amount they intend to pay Hookers … $98,000 … and the rest for working requirements. This will make $350,000 advanced out of the $500,000 approval. Wilson (an Emanuel employee) advised the rentals for … April will be to hand next week and those receipts should attend to their working requirements in the immediate future.'

[208] A memorandum of 4 May 1988 shows his confidence to have been misplaced and that a further advance (within the approved limit) was required. A further memorandum of 10 May shows that the Emanuel group had requested further advances of working capital of $459,000. The amount drawn to that date was $10,491,029. The limit approved remained at $11,400,000. Mr Jaenke had this to say about the situation:

> 'The drawings were out to just under $10,500,000? – Yes.
> $50,000 working capital had been provided that day? – Yes.
> And there was a request to advise the Emanuel group's immediate requirements and then they appear to be set out down the page? – Yes.
> And all of this is a matter of only three months or so from the time of Mr Crosby's memorandum of 11 February …? – Yes.
> It was the case, wasn't it Mr Jaenke, that the approvals for funding provided by Elders could not keep pace with the Emanuel group's need for cash? – Yes.' (T. 8001.4-.60)

[209] By 6 June 1988 the Emanuel group had exhausted the additional loan capital of the $11,400,000 approved by EFG in February. In a memorandum of that date Mr MacDonald said to the directors of EFG:

> '… Since the Emanuel group lost a $67,000,000 sale of the APM land earlier this year it has been struggling for working capital … over the last several months Management has approved loans within Board limits to assist the group in meeting its settlement obligations for properties that were purchased some time ago and … a total of $11,400,000 has been advanced … the group cannot continue without an injection of working capital … the current proposal therefore recommends the advance of an additional $5,500,000 over two months …' (Exhibit 421 Volume 9A)

Within four days the Emanuel group had borrowed $1,500,000 of the further approved advance. Four days later still a further $500,000 had been advanced. By 20 June 1988 the additional drawings totalled $3,200,000. By 24 June 1988 a further $1,000,000 had been drawn. Mr Jaenke's summary of the situation was:

> 'Less than three weeks after the approval of a $5,500,000 advance to cover 60 days, the Emanuel group has managed to spend $4,200,000? – That's what the records show, yes.' (T.8004.60)

At T.8005.1-.18 Mr Jaenke gave this evidence:

> 'And again I could take you on … the further documents but we would see, wouldn't we, that the Emanuel group has spent all the funds advanced or approved well inside the 60 day period anticipated? – That's what's happened, yes.
>
> And that was a regular feature of this account? – The regular feature was the request for funding often exceeded what was anticipated.
>
> Indeed, the need for funds, as described by the Emanuel group, was greater than the EFG approvals could be made; do you follow? - That's correct.
>
> So, as much as EFG could approve in terms of its funding to the Emanuel group, the Emanuel group could still spend more than those approvals? – That was apparent, yes.'

Mr Jaenke also said (T.8005.45-.50):

> 'His (Mr Emanuele's) need for funds outstripped the EFG group's capacity to make approvals? – That's true, yes.
>
> And it was always a game of catch-up, wasn't it? – It was.
>
> There were more people to be paid than there was money to pay them? – It was a catch-up, yes.'

Mr Jaenke summarised (T.8005.60-8006.1):

> 'The request for funding exceeded … what we could do at all the times …'

[210] A memorandum prepared by Messrs Grier and Jaenke of 5 December 1989 records that Mr Emanuele had estimated his companies' need for working capital at $24,000,000 over the next two years, or $2,000,000 per month. The memorandum analysed the likely income from sales that could be expected within the two year period to be $8,500,000. According to Mr Jaenke the purpose of the memorandum was to assess 'the extent to which EFG would bridge the gap' between the Emanuel group's need for working capital and the anticipated revenue. (T.8007.60)

Mr Jaenke went on (T.8008.10):

> '… Can you recall now that the decision was to advance only $10,000,000 over the next 12 months? – That sounds what did happen, yes.
>
> So on what you knew as at 5 December 1989 Head Office was not prepared to meet all of the Emanuel group's financial requirements? – True.

[211] Exhibit 272 is a budget cash flow report for 5 November 1990 prepared by Mr Hartley and/or Mr Sara setting out the Emanuel group's estimated expenditure and income for the months November 1990 to January 1991. It showed their need for further working capital to be borrowed from EFG for that period. The next day, 6 November 1990, Mr Grier prepared a memorandum (Exhibit 16, D 12/456) for Mr Crosby summarising the information contained in the cash flow report. Excluding projected income from the sales which were regarded as unlikely to proceed the memorandum forecast that the Emanuel group's expenditure exceeded its income, including borrowings from EFG. As to this Mr Jaenke said (T.8050.12-.25):

> 'And in looking at a document such as this you could see what the amounts unpaid by the Emanuel group were and the extent to which EFG might provide money towards paying those amounts? – The ones that they wanted to tell us about, yes.
>
> Even on what you were being told about, not everything was getting paid, was it? – Not … from funds that EFG were advancing.
>
> And in that respect there had been no change since 1988. There was more creditors than there was money available? – Yes. From … money from EFG.'

[212] The first defendants rely upon evidence from their own witnesses to the effect that EFG was willing to provide the Emanuel group with sufficient moneys to enable it to remain solvent, at least until the beginning of 1991. The evidence comes particularly from Mr Crosby and Mr MacDonald. It depends largely upon an analysis of the value of the properties available to secure borrowing and the LVR chosen as the upper limit to which EFG was prepared to lend. While I generally accept the evidence of those witnesses, there is difficulty in concluding from it that

the theoretical or expected capacity to borrow existed in fact. Mr Jaenke's evidence which I have referred to shows that at times EFG's officers became frustrated at Mr Emanuel's incessant requests for additional loan funds and annoyed that he would not adhere to agreed forecasted levels of expenditure with the result that they did not supply all the funds he required. Whatever an analysis of the LVR's might have indicated the fact was that EFG did not lend sufficient money to allow the Emanuel group to pay all their debts as they fell due. It seems to me to follow that there was not the borrowing capacity necessary to make the companies solvent. The evidence relied upon by the first defendants is identified in paragraph 116-124 of the first defendants' submissions, Part 4 Insolvency.

[213] The second defendants also rely upon Mr MacDonald's evidence for the same point. They refer to his statement (Exhibit 434) in which he sets out the LVR's at times between December 1987 and December 1990 showing that there was, if one had regard only to those ratios, further borrowing capacity.

[214] This review has covered separate periods, mid 1988, end 1989, and end 1990, rather than a continuous time frame. However, a pattern emerges from the documents and Mr Jaenke's evidence in relation to these three periods. It shows the Emanuel group's need for working capital exceeded the amounts that EFG was prepared to advance. In my opinion this is cogent evidence that the Emanuel group's borrowing capacity was insufficient to allow it to pay its debts as they fell due. The evidence in relation to December 1989 is explicit. Mr Emanuele estimated his companies' need for cash to pay their debts over a two year period. They could not borrow that amount, at least not from EFG, and there is no evidence that the Emanuel group approached any other lender for advances of working capital. I would presume that Mr Emanuele's assessment of his companies' need for capital took into account arrangements he had made with creditors for deferred payment.

[215] If this approach should be thought wrong and the opinion of the defendants' experts be accepted that Management was solvent until December 1990 it appears to me beyond argument that it became insolvent, if it was not already so, in February 1991 when EFG determined to reduce the extent of its financial support and, in particular, not to advance money to enable Management to pay interest due to other financiers. This followed the failure of the Molinara sale of the land at Bribie Island.

[216] Indeed this point appears to have been eventually conceded by the defendants. At an earlier point in the trial they were prepared to argue that the Emanuel group was solvent until about the beginning of 1994. In closing submissions both sets of defendants accept that the events of February-March 1991 had brought about the result that the Emanuel group had become insolvent. They maintained their submission that the companies were solvent until then.

[217] The minutes of a meeting held on 1 February 1991 (Exhibit 421 Volume 9) attended by Messrs Crosby, Gardiner, Grier and Jaenke on behalf of EFG and Mr Emanuele, his son, Hartley and Sara record that:

> 'The meeting was left with no doubt by … Crosby and … Gardiner that Elders will not be supporting other financiers.'

In a memorandum of 27 February 1991 Mr Crosby reported to Ramco that:

> '… for what appears to be purely political reasons, the Queensland Government has refused to approve the sale of … Molinara … We should immediately suspend the account … Provided that we suspend the account and control outgoings, there is merit in Emanuele continuing to work with us in the dismantling of the debt as he certainly has the greatest motivation to pursue this course of action. … There is probably merit in keeping the group afloat because in these tough times … there is a better chance of achieving reasonable sales proceeds under this scenario than one where the world at large knows of the group's problems. … I contemplated calling the other financiers together and discussing a strategy whereby we all effectively suspended interest … the problem … is that once the subject is broached there really is no turning back …'

On 5 March 1991 Mr Crosby recorded the outcome of a meeting he had had with Mr Emanuele four days earlier. He recorded that:

> 'The following was spelt out:-
>
> (1) We were suspending interest.
> (4) Costs to be tightly controlled by the Emanuel group.
> (6) We would not pay out other financiers and from now on will not allow them to take second mortgage security behind us.
>
> …'

[218] Mr Emanuele held a number of meetings with his other financiers in June 1991. The meetings were attended by EFG officers who, on one view of things, urged the other financiers to hold off taking recovery action. It seems that all financiers agreed, with varying degrees of formality, to a moratorium on the payment of their debts by the plaintiffs. The evidence concerning EFG's actions and its motives will be the subject of more detailed examination later in the reasons. For the moment it is enough to say that EFG's managers took the view that Mr Emanuele would have more success in selling the mortgaged properties than a mortgagee's agent or receiver and that it was in its interests to allow the Emanuel group to continue in business to effect that result. Had another financier moved to exercise powers as mortgagee, or to wind up some or all of the plaintiffs, that process would have to be abandoned. It seems to be the case that all financiers made the same assessment. Certainly the ANZ Bank and Westpac followed the same course of action and for the same reason. The market was depressed and the sale of their secured properties appeared problematic at best. They saw their best chance of recovering their debts to be a marketing program undertaken by Mr Emanuele.

[219] In 1990 Mr McCabe was appointed to lead the section of Westpac charged with managing the bank's exposure to property developers in Queensland who encountered difficulty in meeting their obligations following the recession. There were many of them. One was the Emanuel group which had borrowed from Westpac and its subsidiaries as well as from EFG. In November 1990 Mr McCabe's management team identified the Emanuel group as among the borrowers likely to default. A credit review in that month (Exhibit 249, Volume 1, Tab 1) indicates that Westpac was 'uncomfortable' about its exposure to the Emanuel group because it believed that property values had fallen and realisation of

mortgaged properties might be insufficient to repay the debt. The notes recorded that the sale of properties was essential for the Emanuel group to service its borrowing and that the group had projected a negative cash flow for the calendar year 1991. Mr McCabe explained (T.3007.15) that ‘the property market was going through a downturn … we have an exposure secured by property which doesn’t have any income attaching to it. There would have been some doubt about the value of the assets in the circumstances … at the time.’

[220] Mr McCabe was aware that the Emanuel companies owed Westpac and its subsidiaries about $10,000,000, that the financial accounts of those companies brought into questions the value of the assets taken to secure the loan, and that the companies were not generating sufficient ‘operational cash flow to service the interest on those borrowings.’ (T.3010-3011). Mr McCabe anticipated that the Emanuel group would default on the next payment of interest due on 30 June 1991 but interest had been paid in advance so that, until then, there was no default (e.g. T.3021.18; 3023.32-.45.)

[221] In a credit review of 24 June 1991 (Exhibit 249, Volume 1, Tab 7) Mr McCabe recorded that Mr Emanuele had told him that his companies would not be able to pay the interest which would fall due in July. He said that Elders ‘were no longer going to provide interest to financiers as they had done previously.’ (T.3038.30). See also T.3024.35. The review includes the comment:

> ‘Liquidity is much more clear cut. Group has debt (now we believe) in excess of $190,000,000, with little cash flow. Unless land banks can be sold (and sales have dried up), debt cannot be serviced.’

A file note of 29 July 1991 (Exhibit 249, Volume 1, Tab 12) records that the Emanuel companies had defaulted on the payment of interest due on 30 June 1991 and that the group was ‘not in a position to cover interest arrears or principal repayments of $3,680,000 (Segacious … Meka Securities … Airlie Beach … due on 31 July 1991)’. Mr McCabe explained (T.3026.10, 3036.20-.30) that Westpac was prepared to support the Emanuel group ‘in terms of time’ but that it was ‘preserving (its) defaults’. By this Mr McCabe meant that the bank refrained from taking recovery action to allow the Emanuel group time to sell its assets in order to reduce its debt. He did not, in the meantime, waive the borrowers’ defaults in not paying interest or repaying principal. Westpac could, at any time, act upon the default. It kept its options open. This attitude is made clear in letters of 12 August 1991 (Exhibit 249, Volume 1, Tab 13) addressed to the defaulting companies:

> ‘Your loan facility with BAC … entered into on … 5 February 1990 …
>
> It is noted that the company is in breach … in that the interest payable on 30 June 1991 has not been paid … BAC requires payment of the outstanding amounts forthwith. Please note that BAC has not waived any rights it may have under the terms of the … agreement or any security … In particular you should note that failure to make payments … renders the whole of the principal amount outstanding immediately due and payable at the option of

> BAC. In the event that amounts presently due are not paid forthwith BAC shall take such steps as you may be advised …'

[222] Similar evidence was given by Mr Morphett who was employed as a manager, in various capacities, by Mercantile Credits Ltd, then by Esanda Ltd which acquired Mercantile Credits Ltd, and then by the ANZ Bank which owned Esanda Ltd. Mr Morphett had some dealings with officers of the Emanuel group between late 1985 and October 1989. He was then transferred to other duties but in August 1991 was appointed to an asset management portfolio which was charged with the responsibility of recovering loans from defaulting property developers. Companies in the Emanuel group were amongst them.

[223] The principal borrowing was by Data Plan which borrowed $7,480,000 in about March of 1989 to purchase a retail and commercial building in Spring Hill in Brisbane. The building was known as the 'Spring Hill Quarter'. Other borrowers were Giuseppe Nominees which borrowed $1,100,000 in September 1988 to purchase vacant land in Bardon for development: Lascivious which borrowed $1,750,000 in October 1988 to purchase a retail property in Mackay. Addstead, Segacious and Management were also borrowers.

[224] When Mr Morphett took on his new duties the 'funding arrangements' between Esanda Ltd and the Emanuel group 'had essentially broken down … we were receiving little or no interest payments at all.' (T.5148.25)

In fact a diary note (Exhibit 386, Volume 1, Tab 41) shows that interest due in April 1991 had not been paid and the default in paying interest continued. By a letter of 24 June 1991 from the Emanuel group, signed by Mr Sara, addressed to Esanda, reference was made to an attempt by the Emanuel group to refinance its outstanding debts by borrowing $135,000,000 from Pacific Banking Co Ltd. Mr Sara stated that he was confident the refinancing would proceed and when it did 'the loan of Esanda will be brought up to date.'

By September 1991 $1,700,000 of unpaid interest due from companies in the Emanuel group had been suspended.

On 11 July 1991 Mercantile Credits Ltd issued notices of exercise of power of sale to Segacious and Management in respect of non-payment of monthly interest between April and July 1991. On the same day a notice of demand was served upon Giuseppe Nominees, Emanuel Holdings, Paterson and Mr Emanuele as guarantors of the loan to Management.

[225] The companies which borrowed from Mercantile Credits Ltd and/or Esanda Ltd never repaid the full amount they owed. The lenders did not force a sale of the properties taken by way of security for the loans but allowed Mr Emanuele to market them, and in the case of the Bardon land, develop it by way of rezoning to increase the value. Some parts of the proceeds of sale were paid to Mr Emanuele but the bulk of the proceeds went to the ANZ Bank which, in the end, released Mr Emanuele from his guarantee.

[226] The evidence of Mr McCabe and Mr Morphett show the consequences of EFG's decision not to make funds available to support other financiers. The Emanuel group could not pay the interest debts owed by the companies in the group which

borrowed from Westpac subsidiaries and Mercantile Credits Ltd. Those loans went into default.

[227] It is not necessary to consider the evidence given by Mr Debelak. He performed a role similar to Mr McCabe's but with the ANZ Bank. However, his period of involvement with the plaintiff companies was in the years 1992 and 1993. I am satisfied that by then the Emanuel group was insolvent so to examine in detail the evidence probative of that fact will serve no useful purpose.

[228] The fact that Management was unable to pay its debts as they fell due in the first quarter of 1991, at the latest, is established by the first defendants' own documents and by the evidence of Mr O'Grady and Mr Crosby. They learned on 20 February 1991 that the Molinara sale would be greatly delayed, if it occurred at all. This necessitated a reassessment of 'EFG's strategy for the Emanuel group.' (Exhibit 454, Tab 25). On 27 February 1991 Mr Crosby wrote his memorandum to Ramco which recommended suspending interest owed by the Emanuel group; controlling its outgoings; and keeping the group 'afloat' to have a 'better chance of receiving reasonable sale proceeds.' At about this time the decision was made that amounts advanced to the Emanuel group to keep it 'afloat' would not include amounts necessary to pay debts due to other financiers. The Ramco minutes of 10 May 1991 record that Mr Emanuele had been told of this particular decision and that EFG expected him 'to call his financiers together with the object of coming to an arrangement with them to support him through his cash flow problems.' (Exhibit 454, Para 37).

[229] Companies in the Emanuel group were unable to pay debts due to EFG itself. This was clearly the consequence of EFG's suspending interest. Mr O'Grady said (T.8170.50)

> '… suspending accounts with a discipline … that where an account had an irregularity of any type it had to be … suspended. That meant that interest income on the account was not to be recorded in the profit and loss … and the Management discipline was that until the account was regularised … it had to be continually reviewed …'

At T.8174.35-.50 Mr O'Grady was asked if EFG would claim as part of the debt owed to it the amount of suspended interest when the properties were realised. His answer was

> '… Yes … suspending interest was just an internal, not bringing to account of the profit associated with the interest … with the loan. It was usually not communicated to the borrower.'
>
> So far as the relationship between the Mortgagor and the Mortgagee was concerned the interest was payable? – Yes.'

[230] It is clear from this evidence that interest was payable by the Emanuel group, or some of it, but EFG did not expect it to be paid until properties were sold and that would require an orderly realisation over time (see T.8171.45).

[231] Mr Crosby made it plain (T.6111.35) that interest was suspended because the Emanuel group was unable to pay interest due to EFG 'in the short … to medium term.'

[232] The position was that interest was payable by the Emanuel group to EFG which it did not expect it to be paid until properties were sold, and it adjusted its accounts accordingly.

[233] If, by his evidence at T.8172.10-.20, that Mr O'Grady thought the Emanuel group was capable of paying its debts and that it was a viable organisation, he meant that the group had the capacity to pay debts as they fell due his opinion must be disregarded. His own evidence shows that EFG had determined upon a course of action that would deprive the Emanuel group of the capacity to pay an important class of its creditors. If he intended to convey that he believed that, over time and with the orderly realisation of assets, the Emanuel group would discharge all its debts, such an opinion may have been defensible.

[234] An event to which the plaintiffs attach much importance occurred on 3 August 1990. With a degree of overstatement the plaintiffs described the event in these terms:

> 'Emanuel group collapses; all staff retrenched and offices closed down, albeit reopening within several weeks with further funding from EFG.'

[235] The occasion was regarded as more or less conclusive proof of the plaintiffs' insolvency which obliged them, in the words of their counsel, 'to close the doors'. The evidence does show that the Emanuel group's offices in Brisbane were closed for about three days and its staff was retrenched. However accounts from the plaintiffs' own witnesses show that the decision was not the result of an appreciation that the group was insolvent and should discontinue trading. At the time Mr Emanuele was experiencing matrimonial problems. He and his wife had separated and were arguing about money. Mrs Emanuele was seeking a very substantial settlement. Mr Emanuele was described in the evidence as an emotional man, who did not always exercise complete self-control. Mr Sara's evidence was that Mr Hartley had spoken to Mr Emanuele who told him:

> 'That his wife … wanted half the assets, and he said he was going to close the business down …' (T.3746.40) … from Joe's instructions that what he'd given Brian Hartley he had terminated all the staff that … he'd rather close the business down than give his wife half the money of what he'd earned.' (T3748.1-.10)

It appears that at about the time in question Mr Emanuele was experiencing a great deal of stress. He expressed the opinion that he could see no point in working hard if the fruits of his labour were to go to his wife. His actions were immature and scarcely rational but the evidence does not show that the motive behind them was a realisation of insolvency.

SECTION II - De facto Directorship

[236] The plaintiffs explained this part of their case in their opening address in these terms:

> "40. The plaintiffs allege that the control exercised over Emanuel by the officers and employees of Fosters was to such a degree as to make those officers and employees *de facto* directors of Emanuel, and that since they acted pursuant to the instructions and directions of Fosters given through Ramco, so too are the first four defendants.
>
> 41. The plaintiffs allege that between 1988 to 1995 O'Grady, Crosby, Grier, Jaenke and/or Booker instructed and directed the Emanuel Family Directors (who) … were accustomed to act and did act on those directions or instructions. Reliance is placed on evidence of regular joint meetings between those Fosters' executives and the Emanuel directors between 1990-1994 and to directions given at those meetings. It is alleged at the time of giving those directions the executives were employed by one or other of the Fosters' defendants and that they gave those directions on the instructions of the Fosters' defendants, through Ramco. Consequently, the executives and the first four defendants are directors of Emanuel and subject to fiduciary, statutory and common law duties accordingly.
>
> 42. The plaintiffs rely upon the allegation of *de facto* directorship in support of several alternate claims:
>
> (a) recovery of dividends wrongfully paid pursuant to a statutory remedy permitting recovery from the directors of Management.
>
> (b) compensation for breach of fiduciary, statutory and common law duties as directors in payment of dividends and redemption of preference shares.
>
> (c) compensation and other relief for undue influence in compelling entry into the 1988-1994 transactions.
>
> (d) compensation for breach of fiduciary, statutory and common law duties as directors by entering into the 1988-1994 transactions.
>
> (e) compensation for Emanuel trading whilst insolvent.
>
> (f) liability for debts incurred whilst insolvent trading *post* 23 June 1993.
>
> (g) liability for misfeasance in respect of the 1988-1994 transactions.
>
> (h) compensation for breach of fiduciary, statutory and common law duties as directors by entering into the 1995 Scheme.

> 43. The plaintiffs say that Fosters had a choice in respect of the defaulting Emanuel. It could have followed the perfectly lawful path of entering into possession of the various securities (as … Macquarie Bank recommended). That would have denied the opportunity to hold and develop the securities itself, unless it foreclosed. Even then, it would have been at risk that Emanuel would have demanded an auction of the properties in what it declared to be a deep recession … the alternative was to leave the securities in the hands of Emanuel, but to control the group. That was selected."

[237] The 'regular joint meetings' are particularised in schedule 12 to the statement of claim. That schedule identifies the dates of the meetings and the persons who attended each of them. The directions given at each of those meetings are identified in schedule 13 to the statement of claim. It should be noted that paragraph 63 of the statement of claim alleges that instructions and directions were given by the named EFG officers 'in the conduct of the affairs of members of the Emanuel group'. That term is defined in the pleading to include all of the corporate plaintiffs, rather than the 27 plaintiffs which the parties themselves recognised as constituting the group. Schedule 12 identifies joint management meetings between the years 1990 and 1993 inclusive. Schedule 13, which is said to contain particulars of the directions given at the meetings set out in schedule 12, is divided into two time frames: the years 1980 to 1989, and secondly, the years 1990 to 1995. The earlier time frame in schedule 13 appears to be limited to a case that Mr Crosby was intimately concerned in the affairs of the plaintiff companies, or some of them, and regularly attended meetings of their directors. The significance of this early involvement alleged between Mr Crosby and the plaintiff companies is unclear given the explanation advanced by senior counsel for the plaintiffs in his opening address, namely that the case of *de facto* directorships was to be made out from directions given by EFG officers at the joint meetings between 1990 and 1993.

[238] Also puzzling is the schedule entitled '*Key Events and Documents Evidencing Control*' provided in the opening by the plaintiffs and expanded in their final submissions (Volume 1 '*De facto Directors*' para 62). This schedule contains 19 entries none of which appear related to any of the joint meetings at which it is alleged the EFG officers exercised direction or control over the Emanuel group. Instead, the events contained in the schedule appear to be what the plaintiffs would contend are the consequences of that alleged control or direction. In other words, the plaintiffs appear to set forth a number of events which they assert were brought about by EFG's officers directing or instructing the directors of the Emanuel group as to the conduct of the affairs of their companies. This rather seems to assume that which is to be proved without bothering with the proof. It is by no means self-evident that the events contained in the schedule were, or must have been, the result of *de facto* directorial control by the EFG officers. Moreover the last three items in the schedule describe events which, beyond all doubt, were ones in respect of which EFG was not directing the decision making of the Emanuel group. The schedule can, I think, be ignored for present purposes.

[239] Item 17, '*The decision to remove Emanuel in February-April 1994*' is a reference to EFG's decision to terminate its relationship with the Emanuel group and

Mr Emanuele by depriving Emanuel 14 of the timber royalties. The decision was made because months of negotiation between Mr Crosby and Mr Emanuele had failed to resolve a difference of opinion between mortgagor and mortgagee as to how best to dispose of the secured properties, whether by long term holding or by short term rezoning and sale. Such an impasse would never have been reached if EFG controlled the Emanuel companies.

[240] Item 18 is '*The Federal Court proceedings in August 1994 and the … judgment in November 1994*.' As mentioned earlier Mr Emanuele caused his companies to institute proceedings against EFG to challenge its decision to appropriate the timber royalties. The fact that the Emanuel group resorted to litigation against EFG to vindicate what it believed to be its rights is irreconcilable with the notion that EFG, by its officers, directed the affairs of the Emanuel group.

[241] Item 19 is '*The notices of demand and possession in December 1994*' and refers to EFG's decision, notified in writing, to exercise its powers as mortgagee to go into possession of the APM lands. The point is obvious: it would scarcely have resorted to such a measure if it, by its officers, were directors of the Emanuel companies and could control the manner in which the properties were dealt with.

[242] The plaintiffs refer to minutes of meetings of EFG and of Ramco which are summarised in a chronology appearing at the conclusion of their submissions on *de facto* directorship. Here too, no attempt has been made to relate the contents of the minutes to the joint management meetings which are said to constitute the evidence establishing the *de facto* directorships alleged. Moreover many of the meetings summarised appear to have little to do with this aspect of the case. In my opinion a better indication of whether or not some or all of the named EFG personnel became *de facto* directors of the Emanuel group can be found elsewhere.

[243] Before reviewing the evidence it is appropriate to consider the legal principles.

[244] Section 5(1) of the *Companies Code* defines 'director' in these terms:

> 'director', in relation to a corporation includes –
>
> (a) any person occupying or acting in a position of director of the corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position;
> (b) any person in accordance with whose directions or instructions the directors of the corporation are accustomed to act; and
> (c) …'

Section 5(2) provided:

> 'For the purposes of this Act, a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a body corporate are accustomed to act by reason only that the directors act on advice given by that person in the proper

> performance of the functions attaching to … his business relationship with the directors or the body corporate.'

The definition in the *Corporations Law* is relevantly identical. S 60(1) provides that:

> '… a reference to a director in relation to a body, includes a reference to:
>
> (a) a person occupying or acting in the position of director of the body, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position;
> (b) a person in accordance with whose directions or instructions the directors of the body are accustomed to act;
> (c) …'

Section 60(2) provided:

> 'A person shall not be regarded as a person in accordance with whose directions or instructions:
>
> (a) the body's directors; or
> (b) …
>
> are accustomed to act merely because the directors or members act on advice given by the person in the proper performance of the functions attaching to the person's … business relationship with the directors …'

[245] With the uncharacteristic refusal to focus or limit their case I have described, the plaintiffs rely upon both limbs of the extended definition of director, though their submissions in the opening referred only to the second limb: those persons in accordance with whose directions or instructions the directors of a corporation are accustomed to act. The first defendants certainly contend that the plaintiffs' case in relation to *de facto* directors must depend upon that part of the definition. The plaintiffs, as I have mentioned, refuse to be so constrained. Their closing submissions rely upon both limbs of the extended definition of directors and their pleading extends to both. I shall consider both.

[246] A convenient starting point for discussion is the decision of the Full Court of the Supreme Court of South Australia, *Harris v. S* (1971-1976) ACLC 40-263; (1976) 2 ACLR 51. The statutory definition at the time relevantly provided that, in relation to what has been called the first limb of the definition of a director:

> '… includes any person occupying the position of a director of a corporation by whatever name called.'

Bray CJ said (ACLC 28, 616)

> 'I agree with Sangster J that the first limb is meant to collect those governing officials of the company under its constitution who, for some reason or other, are not called directors but bear some other title such as governor or president, as is the case of some foreign

> corporations, and the second limb to collect those who are the real though not the nominal controllers of the company.'

Sangster J said (ACLC 28, 629)

> 'In my opinion that (statutory) definition adds … to the usual category of directors two classes of persons –
>
> (i) in one sense not really an addition but merely applying the word 'director' to the equivalent 'president', 'governor', 'trustee' or whatever nomenclature may be found …"

[247] Wells J (28, 623) thought that the importance of the first limb of the extended definition:

> 'lies in the last three words. The characteristics of a director … are assumed: what is declared to be immaterial is the name of the office held by one who is, in contemplation of law, such a director. The most likely application of this annexure to the definition is to the director of a foreign company who may, according to the circumstances, be the nominated … 'governor' … or 'commissar''.

[248] This view of the definition was condemned by the High Court in *Corporate Affairs Commission v. Drysdale* (1978) 141 CLR 236 in which it was held that a person appointed by a board to fill a casual vacancy who is not, through oversight, re-elected at the next annual general meeting but who attended board meetings and performed all the usual functions of a director was a *de facto* director and liable for breaches of the equivalent provision in the *Companies Act* (1961) to s 128 of the *Code* and s 232 of the *Law*. Mason J (242-3) took the view that someone who occupied the office of director and discharged the duties attached to that office, whether or not lawfully appointed, was a director. There was no need to rely upon the first limb of the extended definition which, his Honour thought, may apply to such persons. Aickin J was inclined to think that that part of the definition was

> '… directed simply to the question of the name by which a person was known, who in fact occupied a position to which were attached the powers and obligations which the Act attaches to a "director"'. (p.248)

[249] His Honour agreed with Mason J that the definition was not necessary to fix liability on someone who acted as a director but was not lawfully appointed. There was ample earlier authority for that proposition.

The point to emerge from *Drysdale* is that those who occupy the position of and discharge the functions of directors are directors with consequent duties and liabilities. It was not necessary to have recourse to the terms of the legislation. Section 5 of the Code, and s 60 of the Law seems to have provided for the point made in *Drysdale.*

[250] I would, I think, accept as a general rule the statement by Bokhary JA (with whom Mayo J agreed) in *Aktieselskabet Dansk Skibsfinansiering v. Wheelock Marden & Co.* (unreported) CA Hong Kong 17 November 1994 at p.7:

> 'But what makes someone a *de facto* director is his assumption of functions which only a *de jure* director can properly perform. While what makes someone a shadow director is his directing directors, whether a *de jure* or *de facto*, how to act in relation to the company's affairs, so that it becomes their custom so to act in accordance with his direction rather than their own judgment.'

[251] The term 'shadow director' does not appear in the *Code* or *Law*. It is a term defined by the English *Insolvency Act (1986)* which, by s 251, provided

> '"A shadow director" in relation to a company, means a person in accordance with whose directions or instructions the directors of a company are accustomed to act …'

The name is given to someone who fits the description. The Australian legislation provides that such a person is a director without making him a particular type. Nothing seems to turn on the designation and it is probably harmless to use the term which has some convenience.

[252] I would also, I think, tend to accept the opinion of Millett J in *re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 182:

> 'Directors may be of three kinds: *de jure* directors, that is to say, those who have been validly appointed to the office; *de facto* directors, that is to say, directors who assume to act as directors without having been appointed validly or at all; and shadow directors who are persons falling within the definition …'

[253] I think this is a safe working proposition, though there may be cases where the position is blurred and a person's role may change from one to the other and back again over time. What is important is to bear in mind that the terms of the *Code* and Law determine whether, on the facts, the Elders personnel and Elders were, as the plaintiffs allege, directors of some of those companies.

[254] In *Beach Petroleum NL v. Johnson* (1993) 11 ACSR 103 von Doussa J said (at 109):

> '… the (first limb of the) definition covers two situations. The first is where a person occupies an office and is discharging functions attaching to that office of the kind normally performed by a director: cf. … *Drysdale* … the second is where a person acts in a position of a director. It is open to doubt whether Mr Johnson's role falls into either of these situations. At no time did he hold himself out as a director in his dealings either with the management of the companies, or with third parties. His conduct, on which the applicants rely, was to give instructions which the formally appointed directors followed. It is no part of any recognised office in

> a company for one person to dictate how the formally appointed directors of a company will act.

The first defendants rely on this passage to make the point, which I think is valid, that the plaintiffs cannot rely upon both limbs of the extended definition of director: those who act as directors and those who, in effect, command the directors how to act. Control over the company's affairs may be exercised directly by those who perform that role or indirectly by controlling those who are nominally in charge. There is a conceptual difficulty in doing both at once.

[255] It would, of course, be possible for the plaintiffs to argue that some of the named officers were directors under the first limb of the extended definition and others were directors under the second limb (shadow directors) or that the roles of some or all of them changed over time, but no such distinction or analysis has been undertaken. Rather it is said that all of them all of the time were both *de facto* and shadow directors.

[256] In *Deputy Commissioner of Taxation v. Austin* (1998) 28 ACSR 565 Madgwick J said in a passage which I think helpful (569-570):

> 'Thus it seems to be a necessary condition of acting as a director, whether properly appointed or not, that one exercises what might be called the actual (and statutorily extended) top level of management functions. However, that is not necessarily a sufficient condition for such a conclusion, nor is it the same as saying that one must do things which only director can do.
>
> Directors are … entitled to delegate their powers and functions …; in the case of a large company, this would appear inevitable. But that is not to say that those others necessarily then act in the capacity of a director … whether a delegate or intermeddler is acting as a director will depend upon the nature of the functions or powers which are exercised and the extent of their exercise … The variety of commercial and corporate life is such that it seems … unprofitable to attempt a general statement as to what is meant by "acting as a director". Whether a person does so act will often be a question of degree, and requires a consideration of the duties performed by that person in the context of the operations and circumstances of the particular company concerned.'

[257] The first defendants submit that the following propositions emerge from the authorities:

> 1. What is important is whether the alleged director occupied an office of the company and discharged functions attaching to that office of the kind normally performed by a director.
>
> 2. The first limb of the definition also covers the situation where a person performs functions normally attaching to the office of director whether or not the person occupies or purports to occupy such an office.

> 3. A key feature of the application of the first limb of the definition is that a person be properly regarded as part of the corporate governing structure of the company, discharging functions attached to that position of the kind normally performed by a director of the company.

I accept these submissions.

[258] I turn then to consider the second limb of the definition; the so-called 'shadow directors'.

[259] Notwithstanding the criticism to which *Harris* was subjected by the High Court, the treatment in the judgments of the question of the second part of the extended definition continues to be regarded as helpful. The error committed by the judges in *Harris* was not to realise that the extended definition was not necessary to make *de facto* directors liable as directors and, probably, to unduly limit the scope of the first part of the definition. There was no criticism of their treatment of the second part. As to that Wells J said (2 ACLR 63):

> '… the extension has effect only where there are directors who are fulfilling their role and function as directors, but who carry out that role and function in accordance with directions or instructions given by someone *dehors* the directorate, such as the governing director of a holding company, who directs and instructs the directors of the subsidiary what to do. For this provision to apply it must appear, first, that although the outside person calls the tune, it is the directors who dance in their capacity as directors; and second, that the directors perform positive acts …'

Sangster J said (2 ACLR 71)

> '"… for any person to be a director" … by virtue of his control of "the directors" it must be shown … that it was his will, and not the independent will of the appointed directors, which determined the resolutions of the board of directors.'

His Honour also said (72):

> 'So, too … for a person … to control the acts of a managing director, not in relation to his functions as a member of the board of directors but only in relation to his functions as a working executive … is of no moment in an inquiry whether he controls the acts of "the directors".'

[260] Mackenzie J applied these remarks in *Blue Corp Pty Ltd (in liquidation) formerly Lloyds Ships Holdings Pty Ltd (in liquidation) & Ors v. ANZ Executors & Trustee Co Ltd* (1994) 13 ACSR 386. Likewise Finn J in *Australian Securities Commission v. AS Nominees Ltd* (1995) 18 ACSR 459 at 509 adopted Wells J's description 'that the third party calls the tune and the directors dance in their capacity as directors.'

[261] On some occasions a different metaphor has been used. It has been said that the shadow director remains out of sight 'from where he pulls the strings like a puppeteer.' Per Bokhary JA in *Wheelock* at p.7.

[262] Finn J made another point. His Honour said (133 ALR 52-53):

> 'The reference in the section to a person in accordance with whose directions or instructions the directors are 'accustomed to act' does not … require that there be directions or instructions embracing all matters involving the board. Rather it only requires that, as and when the directors are directed or instructed, they are accustomed to act as the section requires.'

The point was accepted as correct by the (English) Court of Appeal in *Secretary for the State for Trade and Industry v. Deverell* [2001] Ch 340 at 354.

[263] The plaintiffs put great reliance on the decision in *Standard Chartered Bank of Australia v. Antico* (1995) 13 ACLC 1381 but that case, it seems to me, is only an illustration of the application of the principle or definition to particular facts. The case was one in which the holding company of a subsidiary appointed three nominees to the board of the subsidiary. The other members of that board deferred to the wishes of the three nominees, who in fact exercised actual control over the rest of the board, so that relevantly its decisions always favoured the interests of the holding company. Hodgson J held that the holding company thereby had become a director of the subsidiary. In reaching that decision his Honour described a number of features by which the nominees' control over the subsidiary board was manifested. The plaintiffs seize upon those features and look to find parallels in the evidence before me. I think, however, that Mr Sheahan's criticism of this process is justified. The plaintiffs' approach has been to fix upon the four factual features relied on by Hodgson J which they then detach from their context and abstract to an impermissible level of generality to arrive at principles said to be of universal application.

[264] It is, I think, significant that there is no reported case in which a secured creditor has been held a *de facto* or shadow director of the borrowing company despite there being innumerable examples over the decades of creditors who have taken a keen interest in, and exercised a marked degree of supervision over, the affairs of their debtors. An example, on which the first defendants rely, is *re PFTZM Ltd (in liquidation)* [1995] 2 BCLC 354. In that case a finance company which had lent money on the security of a lease became concerned when the borrower got into difficulty. It was agreed between the companies that weekly management meetings would be held concerning the trading of the debtor's business which would be attended by a director and/or manager of the financier. All the debtor's income was paid into an account in the name of the financier which released funds to the borrower only for specific items of expenditure which had been identified and approved at management meetings. The financier had the ultimate say over who got paid and how much. The liquidator sought an order examining the financier's officers with a view to making them liable as shadow directors by reason of their involvement in the management of the (by then) insolvent borrower. Judge Baker QC refused the order. His Honour (well known as an editor of the *Law Quarterly Review*) said, having referred to the definition in the *Insolvency Act* of a shadow director (p.367)

> 'This definition is directed to the case where the nominees are put up but in fact behind them strings are being pulled by some other persons who do not put themselves forward as appointed directors.

> In this case the involvement of the applicants … was thrust upon them by the insolvency of the company. They were not accustomed to give directions. The actions they took … were simply directed to try to rescue what they could out of the company using their undoubted rights as secured creditors.'

At 368 his Honour said

> 'The central point … is that they were not acting as directors of the company, they were acting in defence of their own interests. This is not a case where the directors of the company … were accustomed to act in accordance with the directions of others … it is a case where the creditor made terms for the continuation of credit in the light of threatened default. The directors of the company were quite free to take the offer or leave it.'

[265] Attention must focus on the words of the definition, 'in accordance with whose directions or instructions the directors of the corporation are accustomed to act.' It is the directors, that is the board as a whole, who must be accustomed to act in accordance with the directions or instructions of the shadow director. The Oxford Thesaurus suggests as synonyms for 'accustomed', the words 'customary, habitual, usual, regular, routine, common.' For the definition to be satisfied the board must habitually, or routinely, regularly or commonly have acted in accordance with the wishes of the shadow directors.

[266] This point found expression in a passage in a judgment of Harman J in *re Unisoft Group (No. 3)* [1994] 1 BCLC 609 at 620:

> '… Those words … mean … that the shadow director must be, in effect, the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the 'cat's paw' of the shadow director. They must be people who act on the directions or instructions of the shadow director as a matter of regular practice. That last requirement follows from the reference in the subsection to the directors being 'accustomed to act'. That must refer to acts not on one individual occasion but over a period of time and as a regular course of conduct.'

[267] The defendants referred me to an extra-judicial address given by Millett J to a gathering of insolvency practitioners and reproduced in the Winter 1991 publication of '*Insolvency Practitioner*'. The title of the address was '*Shadow Directorship – A Real or Imagined Threat to Banks.*' The judge said:

> '… To become a shadow director the propositus must be a person 'in accordance with whose directions or instructions the *directors of the company* are accustomed to act'. In this context 'the directors' obviously means the board, not just one or two members of the board. … The situation envisaged by the section is one in which the board itself has abandoned its responsibility for making its own decisions and become accustomed instead to follow the directions of a third party.

> The second point to note is that it is a definition of the shadow director himself, not of those who act in accordance with his directions. It is difficult to believe that it is possible for a person to be a shadow director unless he has a conscious intention to control the decisions of the board. There are two paradigm cases:
>
> (i) The bankrupt who installs his wife as sole director; and
> (ii) The fraudster who makes use of nominee companies as his vehicles operated by nominee directors … who simply carry out his instructions.
>
> These are not, of course, the only possible examples; but they are useful to bear in mind, for the further any given situation is from either of them the less likely it is to be a case of shadow directorships. In each case the shadow director is consciously the controlling mind of the company. The appointed directors do as they are told, not because they choose to, but because that is their function. The relationship is that of a puppet–master and his puppets.'

[268] Millett J then noted that when a corporate customer of a bank appears to be in financial difficulty the bank will probably send in an investigator; demand reduction of its debt; demand security or further security; call for information such as valuations, accounts and budgets; request the customer's proposals for the reduction of the debt, including such things as a schedule of proposed sales and will give advice to the customer on ways to improve its position. Millett J went on:

> 'In doing all these things, the bank may well expect its demands to be met, first because they are likely to be commercially sensible, and secondly because the customer has no option if it wants its facility continued. But that is not enough to constitute the bank a shadow director … A bank has no business to be managing its customers' affairs, but it is entitled to attach conditions to the continuation of its support. So long as it does nothing that a bank does not normally do in telling its customer what it requires if it is to continue banking facilities, and leaves the decision to the customer whether it will comply or not, … it cannot be held to have become a shadow director. … Unless the relationship between the bank and its customer is such that the decision to stop trading or go into liquidation is one that the bank, and only the bank, can take then … the bank cannot be liable.'

[269] The decision in *PFTZM* and the article by Millett J do not, of course, establish as a principle of law that mortgagees working with their mortgagors to recover the best they can are incapable of becoming *de facto* directors of the mortgagors. The two examples given by Millett J are not exhaustive, as the facts in *Antico* demonstrate. They do, however, advance substantial considerations indicating why, in the ordinary case, a mortgagee insisting that the mortgagor act to protect the mortgagee's interests will not, for that reason alone, have become *de facto* director of the mortgagor. Every case must depend upon its facts.

[270] Bearing in mind the principles discerned from the cases I have discussed I turn to the facts.

De Facto Directors – The Facts

[271] Before turning to a consideration of proceedings at the meetings at which EFG are said to have controlled the affairs of the Emanuel group it is instructive to consider what the evidence revealed of Mr Emanuele himself. After all, it is he who is said to have been supplanted as the directing will of his companies. As I have already observed he was not called to give evidence in support of his companies' claims which, if successful, would be to his considerable personal financial advantage.

[272] The impression I formed from a reading of the documents and from the descriptions given by a number of witnesses was that Mr Emanuele was independent and tough-minded: confident in his abilities to buy, develop and sell properties; and impatient of restraint. His determination in business affairs is apparent from a cursory acquaintance with the events of this litigation. Although he (or his companies) employed competent managers, and members of his family were directors of those companies, it was apparent that Mr Emanuele was the driving force. Little of importance happened without his involvement. He was, on the assessment on one witness who knew him well, ambitious to succeed in business and, in some senses, even thrusting in his business dealings.

[273] The plaintiffs appear to accept this assessment of Mr Emanuel's character. Mr Livesey accepted that Mr Emanuele 'was an experienced, tough, albeit optimistic, operator who made his own decisions, decided from whom he would obtain finance and from whom he might take advice.' (T.786.40)

[274] Mr Bund who was a chartered accountant and employed as general manager of the plaintiff companies between 1982 and December 1986 said that 'at the end of the day Mr Emanuele "ran the group".' (T.3969.52) He made the 'key decisions' such as buying or selling property and left the 'day to day running' of the companies to Mr Bund. (T.3969.55-3970.1)

This exchange occurred at T.3974.45-3975.2:

> 'Mr Peden – well, I'm happy to say – Mr Bund will say that the APM land purchase was something done by Mr Emanuele off his own bat as opposed to consultation with anybody else.
>
> His Honour – but that doesn't surprise anyone here, I'm sure.
>
> Mr Peden – no.
>
> His Honour – I have the distinct impression that Mr Emanuele ran the companies as his private fiefdom.
>
> Mr Peden – yes.
>
> His Honour – they were his and he repelled all usurpers. Is that not a fair assessment of it?

> Mr Peden – well, to some people, certainly Your Honour …'

Mr Sara, who was employed as an accountant and financial controller by the plaintiffs between 1987 and 1992 said of Mr Emanuele (T.3813.27-.38):

> 'He would probably take advice from very professional people that he had trust and belief in, such as Don Boyd (of Cannan & Peterson) and Coopers & Lybrand and Elders but he was a man of his own spirit. He believed in what he was doing. … (He was) … very strong minded … very determined.'

Mr Bund accepted as an accurate description that the Emanuel group was run as a family company by Mr Emanuele who controlled it 'very tightly' (T.4011.42). However, as the companies grew and its affairs became more complex the tight control was restricted to 'the big picture items' and the detail was left to others. (T.4011.50) This I take to be a depiction of Mr Emanuele making the strategic decisions but leaving the consequential detail to others. Mr Bund confirmed Mr Emanuele's ambition and drive as well as his undoubted ability to detect value in real property. (T.4013.15-.22)

[275] Mr Wales had been a partner with Coopers & Lybrand. He left to set up his own financial consultancy. He was retained in 1992 to provide advice on a business plan for the Emanuel group with a view to persuading its financiers to continue support and not to commence winding up or take possession of secured properties. He continued to advise Mr Emanuele up until the litigation in the Federal Court. That, it will be remembered, followed unsuccessful negotiations between the Emanuel group and EFG to separate their business relationship on an amicable basis. Mr Wales observed Mr Emanuele's strength in adversity as well as his reliance on his own judgment. Mr Wales was acquainted with the terms of an offer made by EFG to fund the Emanuel group 'for the next 12 months so that Joe Emanuele could restart his business and that they would provide to him the unencumbered titles to various … personal properties … and in return they wanted his co-operation in the orderly dealing … with … their securities.' Mr Emanuele's reaction was to become 'very upset'. He wanted the moratorium provided for in the DOOR to continue. Mr Wales described Mr Emanuele's reaction:

> 'We were left to think about it. O'Grady and Crosby went away and I recommended to Mr Emanuele that he accept their offer. I thought it was a generous offer in view of a hopeless alternative. He felt that he was being let down by Elders and he was very angry and he said "I'm going to sue them." I argued that he should accept their offer and we ended our meeting and I came back the next day … and argued … that they should accept the offer … He continued to say that he was just going to sue them, that they'd let him down. And I left and I haven't seen him since.' (T.4079.25-4080.2)

[276] Mr Ziepes was employed by the Emanuel group between 1980 and 1987 as an accounts clerk. He described Mr Emanuele's role in the group as being 'at the helm' and vital to their operation. (T.4224.40) It was he who 'called the shots' (T.4225.20).

[277] Similar assessments of Mr Emanuele's toughness in dealing with financiers who enjoyed potent contractual rights against his companies and him personally, and his ability to exploit a situation to his own advantage appear in the evidence of Mr Morphett (T.5243.8-.40) and Mr McCabe (T.3084.50-.55). Mr Crosby (T.6009.5-.25) and Mr MacDonald (T.6996.29-.35) gave a broadly similar account of Mr Emanuele.

[278] The obvious point which emerges is that Mr Emanuele was a most unlikely candidate for usurpation. The description of his character and his method of operating his companies would appear to make it unlikely that he would share the decision-making role with anyone, so it was unlikely that there could emerge *de facto* directors exercising the powers or the functions of the directorate. It is equally improbable that he would customarily act in accordance with the instructions or directions of others so as to constitute them shadow directors. The 'top level of management' of the Emanuel group appears to have been a most infertile field in which *de facto* or shadow directors could take root.

The Meetings

[279] I turn to consider the meetings particularised in schedule 12 and the evidence given with respect to what happened at them.

[280] By way of background it should be remembered that in December 1989 the Emanuel group had requested an advance of $10,000,000 for working capital for one year. Previously it had made numerous applications for smaller amounts of working capital as the need arose. This topic was touched upon in the previous section of the judgment dealing with insolvency. The meetings appear to have commenced as a convenient means of ascertaining what was the level of projected expenditure by the Emanuel group so that EFG could determine to what extent it would make further advances.

[281] The first meeting was said to be 16 February 1990. As far as I can see there is no documentary record of the meeting and no questions were put to any of the EFG witnesses about it.

[282] The second meeting was 22 March 1990. It was attended by Messrs Crosby, MacDonald, Grier and Jaenke on behalf of EFG and by Messrs Emanuele, Hartley, Sara and Johanssen on behalf of the Emanuel group. Mr Johanssen was employed in a marketing capacity. According to the minutes of the meeting it 'was held to discuss a budget prepared by Elders in conjunction with the Emanuel group for the ongoing financial assistance to the Emanuel group up to the end of the calendar year.'

[283] A budget guideline was '… presented to the meeting, these detailed known income/expenses and anticipated requirements which are to be covered by the $10,000,000 approval. This further advance is to cover interest on both APM and other existing loans.'

[284] The minutes contain no reference to instructions or directions given by the EFG officers to the Emanuel personnel. Under item '*Future Purchases/Settlements/Payments*' Mr Crosby is recorded as 'advising' that the list of intended purchases would have to be curtailed or finance obtained from sources other than EFG. Under general business Messrs Crosby and MacDonald are shown

to have 'conveyed to G Emanuele that interest on APM would no longer be capitalised and that the $10,000,000 had to cover all commitments.' The minutes record that 'future meetings are to take place at least once a month between P Grier and N Jaenke and G Emanuele and his staff … dates to be advised to … Crosby and MacDonald for their attendance where possible.'

[285] The minutes also record that Mr Jaenke and Mr Hartley were to 'follow up' some specific tasks.

[286] Mr Jaenke was the only witness cross-examined about this meeting. The closest the cross-examination came to asserting that an instruction or direction had been given concerned the topic of future meetings. About that Mr Jaenke was asked whether it was:

> '… fair to say that Mr Crosby and Mr MacDonald were telling the people present that these meetings would take place at least once a month? – That was the indication, yes. … Subject to the availability of their presence as well. … So Mr Crosby and Mr MacDonald were saying "we'd prefer to be present but at the very least these meetings will happen once a month"? – Yes.' (T.8017.4-.10)

Even if this be a direction it was not one concerning the management of the Emanuel group. It was the intimation of a condition on which EFG insisted if it was to provide further loans to the Emanuel group.

[287] The next meeting was 19 April 1990. The minutes of the meeting show that Messrs Grier and Jaenke attended for EFG and Messrs Hartley, Sara and Johanssen for the Emanuel group. It will be seen at once that this was a meeting of subordinates. No-one of real seniority or authority from EFG attended and Mr Emanuele was likewise absent.

[288] The minutes recorded that:

> 'The meeting was held to update each party on the current funds position of the Emanuel group in comparison to the cash flow projection plus confirm the status of upcoming settlements.'

The minutes then record 'income from settlements etc.' and advice from Mr Johanssen about the status of various parcels of land which had been sold or were under negotiation for sale. The minutes conclude with items to be attended to by Mr Jaenke and by the Emanuel group.

There is nothing to indicate that any direction or instruction was given by Mr Grier or Mr Jaenke or that the Emanuel personnel complied with them.

[289] Mr Grier was the only witness cross-examined about the meeting (T.7584-7586). It was not put to him that anything said at the meeting amounted to a direction or instruction or that the meeting was a means by which control was exercised over the Emanuel group.

[290] The third meeting was on 3 May 1990. Those present were Messrs Jaenke, Hartley, Buckley and Crighton. I cannot recall any other mention of Buckley in the evidence. According to the minutes of the meeting it was called at Mr Crosby's

request ‘to discuss Joe Emanuele’s request for further funds under the $10,000,000 approval …’. The only mention of a decision reached at the meeting was that:

> ‘Hartley advised their requirement is $2,000,000. A compromise was reached where we would request $1,000,000 from Crosby and the balance would be discussed at the next meeting …’

Mr Jaenke was cross-examined about this meeting but it was not suggested that he gave any directions or instructions to the Emanuel group personnel. Such a suggestion would have been untenable. Mr Jaenke was the most junior of the EFG officers and none of the Emanuel personnel would have done anything without reference to Mr Emanuele. Mr Jaenke said about this meeting in cross-examination that he had been delegated by Mr Crosby or Mr Grier to have the meeting because ‘Mr Emanuele has already asked for more money … and I had to find out certain things before Crosby would say yes or no.’ (T.8017.50-.55)

[291] The next meeting was held on 18 May 1990. Those present were Messrs Grier and Jaenke for EFG and Messrs Hartley, Sara and Johanssen for the Emanuel group. According to the minutes it was held ‘for each party to update themselves on their current positions.’ Mr Grier is reported to have asked for details of Mr Johanssen’s marketing strategy for the APM lands and a list of ‘upcoming sales’ was provided. Apart from this information the only content of the minutes is to record that:

> ‘Messrs Jaenke and Grier stressed the fact that the Elders facility would be drawn over $9,000,000 after May interest was paid and if the funds requirements for June was met, the $10,000,000 approval would be exceeded. This would be unacceptable to Elders and not allowed to happen as the $10,000,000 was to cover requirements for 12 months … this will be pointed out to John Crosby and Rob Macdonald. An updated cash flow chart will be prepared and forwarded to all parties along with a copy of the minutes …’

[292] Mr Grier appeared to have been asked no question relevant to this topic when asked about this meeting.

[293] Mr Jaenke was asked about it (T.8034.20-8035.18). He agreed that it was a matter of real concern to EFG that the Emanuel group might exceed the $10,000,000 approved advance within a few weeks and that he had told the meeting that that would not be allowed to happen. He agreed that one way in which that could be prevented was by limiting the amount advanced. It was then put to him that another way of preventing the outcome:

> ‘Would be to make suggestions about which expenditure items would or would not be paid? – I don’t believe we ever told them … what creditors to pay and what creditors not to pay. We would have stated that there’s only a certain amount available and they were to work it out within that amount.’

Mr Jaenke also agreed that when he had been involved in working out budgets and cash flows for Mr Crosby with the Emanuel group personnel he had gone through items of expenditure ‘line by line’. He denied that decisions were made in the course of those budgetary meetings about which items of expenditure would be paid from the EFG advance. He said:

> 'Decisions weren't made about the individual items … I was very very conscious of the fact that I never told anyone from Emanuel's what they could pay and what they could not pay … I was always very aware of that and I made sure that I never, never directly told them what they could pay and what they couldn't pay.'

He agreed that, at the budget meeting, agreement had been reached about what items were to be included and what excluded, and that the projected expenditure put forward to support the application to EFG for further borrowings was done on the basis of what was included in the budgets.

[294] I cannot conclude from this that Mr Jaenke, or his superiors, were controlling, directing or instructing the Emanuel group management in the selection of invoices to be paid. Mr Jaenke emphatically denied he did any such thing. What he admitted was that projected cash flows for the Emanuel group were prepared by employees of the group in consultation with EFG employees and that the cash flows were to be submitted in support of an application for a further advance. They were designed to show the Emanuel group's need for additional cash to meet expenditure. EFG personnel, notably Messrs Crosby and Jaenke, told their Emanuel counterparts that the cash flows were not to include certain items of expenditure such as the personal expenses of Mr Emanuele and his family. This was, no doubt, because EFG, acting responsibly, could not lend moneys for such a purpose but could lend money for legitimate business purposes. The payment of these expenses would allow the group to continue in business with a view to realising its real assets.

[295] Lending money for one purpose but not for another is scarcely directing or instructing the borrower in the conduct of its business.

[296] Moreover as Mr Jaenke pointed out, it is difficult to see how EFG could have directed the application of moneys lent to the Emanuel group. They did not attend to the payment of invoices.

[297] In any event there is no evidence that the Emanuel group employees selected what invoices to pay on the basis of directions or instructions from EFG.

[298] Mr Grier was cross-examined about an instruction which apparently he gave to Mr Hartley on 24 May 1990 which he passed on to Mr Emanuele and his managers. The instruction was 'that no extensions on any contracts are to be agreed without (Elders) prior consent. This is to apply to all contracts of sale irrespective of whether they have a financial interest.'

[299] It was put to Mr Grier (T.7488.18-.35) that his instruction was:

> '… consistent with the sort of thing that you might have said from you position to the Emanuel group from time to time, isn't it? – No. This was said specifically because of the budgets set. But when we are expecting funds to come in in April and they come in in June or July we want to know if there were any changes in that budget.

> … So in order to meet the budget requirement set by head office, you'd asked Mr Hartley not to grant any extensions? – Yes.
>
> And you asked him not to grant any extensions regardless of whether Elders had a financial interest? – Yes.
>
> So that the EFG set budget could be accommodated? – Yes.'

[300] This event did not relate to a joint management meeting but nevertheless appears to be an instruction or direction with respect to the conduct of the Emanuel group's business. There is no evidence that it was complied with.

[301] The pleaded meeting of 12 June 1990 does not appear to have been the subject of any evidence at all.

[302] The next meeting was on 18 June 1990. It was held 'for each party to update themselves on their current position.' The only matter of possible relevance to this topic is a note that:

> 'Peter Grier suggested Messrs Barrett and Johanssen should advise Hartley by memo of updates on all matters in order for him to be fully conversant of all current matters in their absence.'

This is a matter of eminent commonsense. It relates only to an administrative procedure involving managers and their subordinates. The plaintiffs appear to accept that the minutes correctly categorise Mr Grier's intervention. It was a suggestion, to be accepted or rejected on its merits. It was not advanced as an instruction or direction.

[303] The next meeting was 19 July 1990 attended by Messrs MacDonald, Grier and Jaenke for EFG and Hartley, Sara, Johanssen and Barrett for the Emanuel group. The only entries in the minutes of any possible relevance are:

> 'R A MacDonald has previously given Brian Hartley the name of a lobbyist who may assist (with APM sales).
>
> Rob MacDonald advised Graham Sara that a Bruce Elliott will telephone and negotiate a suitable arrangement for the preference shares facility at Adelaide.'

[304] A lobbyist was eventually employed by the Emanuel group. Mr Jaenke was asked (T.8036.35) if Mr MacDonald had told Mr Hartley 'that it would be necessary to obtain a lobbyist's assistance' but he could not recall anything other than what was in the minutes.

[305] Mr Grier (T.7588.2-.30) was asked about the subject of the second minute I have quoted, but had no recollection of it. The questioning did not get beyond eliciting that the minute recorded no debate about, or opposition to, the intimation that Mr Elliott would call to negotiate a suitable arrangement for the redemption of the preference shares.

This is no evidence that EFG directed or instructed Mr Emanuel (or Mr Hartley or Mr Sara) to instigate their redemption.

[306] There were meetings held between 14 & 16 August 1990 in Cairns between Messrs Crosby, MacDonald and Grier on behalf of EFG and Mr Emanuele. The only written note of the meetings appears to be Mr Grier's file note of 4 September 1990. The note contains no hint of directions or instructions given to Mr Emanuele by EFG. The meetings appear to have discussed sales of property, completed, pending or anticipated. It also records events that had occurred or were to occur. The cross-examination of Mr Crosby about these meetings (T.6925.50-6928.20) did not go beyond putting that there were discussions about the extent of the loans outstanding to the Emanuel group and, in particular, the pending Molinara sale. There is nothing in the cross-examination at all supporting the view that at those meetings directions or instructions were given by EFG to Mr Emanuele, whether about the conduct of his companies' affairs or anything else.

[307] The cross-examination of Mr MacDonald about these meetings (T.7194.30-.45) was restricted to a topic unconnected with establishing *de facto* directorship.

[308] The next pleaded meeting, 21 August 1990, was not the subject of any evidence. The same is true of the last meeting for the year, 6 November 1990.

[309] The first meeting in 1991 was on 1 February. Those representing EFG were Messrs Crosby, Gardiner (who had replaced Mr MacDonald as accounts manager), Grier and Jaenke. On the Emanuel side were Mr Emanuele and his son Rocco, Mr Boyd (a partner of Messrs Cannan & Peterson, solicitors for the Emanuel group), Messrs Hartley, Sara and Johanssen.

The relevant parts of the minutes appear to be:

> 'J D Crosby opened the meeting detailing the need for both organisations to work closely together until future sales of $170,000,000 already in the pipeline are settled and the Emanuel group cash flow is self sufficient.
>
> At P C Grier's instigation G Emanuele agreed Elders would be given a registered first mortgage over the third floor Network House when same becomes available in approximately June 1991.
>
> The meeting was left with no doubt by J D Crosby and I R Gardiner that Elders will not be supporting other financiers.
>
> J D Crosby stressed the need for 'larger' sales.
>
> In summary, it was stated that emphasis must be placed on selling and the co-operation between both companies should continue. G Emanuele is to discuss with his Cairns manager a more active selling role.
>
> I R Gardiner stated it was necessary for the group to meet regularly with Elders, and it was imperative that G Emanuele be present at all meetings.'

[310] The cross-examination of Mr Grier about this meeting (T.7589.55-7592.30) did not address the topic of *de facto* directorships. Nothing was put to Mr Grier suggesting

that at the meeting anything amounting to a direction or an instruction was given. Nor was an attempt made to elicit from Mr Grier that any of the items for discussion, the minutes of which I have just set out, were presented by EFG officers to the Emanuel personnel by way of instruction or direction.

[311] Mr Jaenke was cross-examined about the meeting at T.8050.55-8061.10. It did not elicit anything that went beyond the terms of the minutes. The high point would seem to be:

> '… Did there get to be a sense of camaraderie between you and the Emanuel staff? - … At this time … no … I had a friendship with Hartley … but we got along. We had a … good working relationship, yes.
>
> And the good working relationship was directed to trying to sort out the problems as you saw them? – On both sides … our bosses particular needs, yes.
>
> And there was a free exchange of information between you and the Emanuel staff, to your observation? – In connection with the Emanuel facility, yes.'

A close and friendly working relationship between two subordinates with respect to items of mutual interest between mortgagor and mortgagee does not constitute controlling the directors of the mortgagor company.

[312] Mr Jaenke also agreed that the need for large sales was apparent because 'small sales weren't really going to solve the problem.' (T8053.18) (T8051.20-.40)

[313] The proceedings at this meeting do not advance the plaintiffs' case. The first instance in which there is a record of an EFG officer insisting upon an outcome, namely that Mr Grier required a mortgage over the third floor of Network House was ignored. The mortgage was not given. The second, the insistence of Mr Emanuele's presence at meetings at which his companies request for money was discussed is not surprising and is not self-evidently a result of direction or control.

[314] The only evidence of the next meeting, 1 March 1991 is Mr Crosby's note of it of 5 March 1991. The purpose of the meeting was to inform Mr Emanuele of the results of the Ramco meeting of 28 February 1991. Mr Crosby 'spelt out' to Mr Emanuele that:

- EFG was suspending interest
- EFG would provide support for two months and then conduct a detailed review of its facilities with the Emanuel group
- The Brisbane office would closely monitor receipts and payments and report weekly to head office in Melbourne
- The Emanuel group was to tightly control its costs
- There was to be a vigorous marketing program to reduce borrowings
- EFG would not pay out other financiers.

[315] There is nothing here other than a mortgagee indicating the terms on which it had decided it would continue to provide a level of financial support to its mortgagor. The only communication that could constitute directions were the fourth and fifth, but they are clearly recognisable as conditions imposed by a lender on a borrower in difficulties. They do not amount a usurpation of the role of the directors of the borrower.

[316] Mr Jaenke's note of 12 March 1991 records meetings on 5, 6, 7, and 8 March. On each occasion Mr Jaenke was the only EFG officer present. Mr Emanuele attended the first two meetings but not the others. His son Rocco attended the first two meetings and part of the third. They were called to discuss short term financial assistance required by the Emanuel group from EFG and the marketing of non-core i.e. non APM lands.

The only entry in the memorandum suggestive of a command to the Emanuel group appears at the very end:

> 'Emanuele and his staff are fully aware Elders staff must be consulted before any material changes are made to income/expenditure items and accounting for cash flow items is to be handed to us weekly for forwarding to J D Crosby.'

This appears to follow from Mr Crosby's meeting with Mr Emanuele on 1 March. In the cross-examination of Mr Jaenke (T.8063.20-8066.30) it was established that:

- Mr Jaenke told the Emanuel officers that a weekly summary of income and expenditure was to be provided
- The weekly summaries were to include non-budget items (as to which Mr Jaenke said 'if the advances were being paid to pay items that weren't in the budget we wanted to know about it.')
- That Elders staff were to be consulted before any material changes were made to the budget.

This evidence does not advance the plaintiffs' case. It amounts to no more than a lender who is contemplating advancing further moneys to a borrower in difficulty requiring information about the borrower's position.

[317] There was no meeting on 9 March 1991.

[318] The next meeting was 5 June 1991. Messrs Grier and Jaenke represented EFG. Opposed to them were Mr Emanuele and his son Rocco, Mr Hartley and Mr Ziepes. There is nothing of relevance in the minutes. The cross-examination, of Mr Jaenke, confirmed, as the minutes recorded, that he said at the meeting that there appeared to have been little promotion of a property at Innisfail which was for sale, and that EFG could not refinance a shopping arcade owned by the Emanuel group and mortgaged to EFG because the income from the tenants was not sufficient to meet the repayments under the mortgage. The only other matter put in cross-examination (T.8108.30-.35) was:

> 'Now, throughout 1991 at these sorts of meetings it's true to say, isn't it, that EFG would advise the Emanuel group of any items

> which were unacceptable in the budget and that the Emanuel group would then amend the budgets accordingly and resubmit them? – We were advising you what type of things that we would make our funds available for … if we were giving money we wanted to know where it was going, yes.'

[319] The plaintiffs adduced no evidence in respect of meetings on 5, 17, 19, 24 July 1991 or 12 August 1991 or 9 September 1991. The minutes of the meeting of 24 July are, however, relevant. They include:

> 'In line with J D Crosby's suggestion to ensure early listed auctions are to be successful to set a trend, we endeavoured to have the Gladstone properties listed for 2 October 1991 to be brought forward to 15 September 1991 being before the Hooker auction on 17 September 1991 but Hartley and Joe Emanuele resisted this because of the short timing.'

The evidence established that the auctions occurred in accordance with Mr Emanuele's timetable (Grier T.7398.30-7399.1).

[320] On the topic of budgets, the agenda for the meeting of 12 August 1991 contains a list of 'items paid in July not referred to Elders which were not included or agreed to in previous discussions …' The amount involved was over $225,000. It is apparent that despite 'directions' from Mr Jaenke as to the contents of budgets, Emanuel group staff members chose not to comply.

There was also at that meeting a discussion about the reserve prices to be set at the auction. EFG required lower prices to facilitate sales and recover proceeds to reduce the level of its debt. Mr Emanuele did not wish to sell the properties for less than he believed they were worth. Mr Emanuele emerged victorious from that contest (see Mr Jaenke's evidence T.7981.10-7982.18).

The note of the meeting, Mr Jaenke's memorandum of 15 August 1991 records that he and Mr Rocco Emanuele were 'to get together … and prepare a list of anticipated reserves to be set by Emanuel's on each property.'

[321] Another example of Mr Emanuele's independence in dealing with EFG appears in Mr Rocco Emanuele's letter of 15 October 1991 in which he advised that 'the property holdings in Trinity Beach and Gladstone should be "taken off" the market for the next 6-12 months' because the market was depressed. This was a unilateral decision made by Mr Emanuele. At a previous meeting on 10 October the parties had agreed that these properties should be included in the list of those to be auctioned and for which reserve prices had been set. In accordance with Mr Emanuele's decision these properties were withdrawn from auction.

[322] Mr G Emanuele did not attend the meeting of 10 October 1991, though Rocco Emanuele was there with Hartley, Ziepes and Johanssen. Crosby, Grier and Jaenke attended for EFG. Mr Crosby was not cross-examined about the meeting. The minutes record that Mr Crosby and Mr Grier would 'see Joe on the coast on the evening … to discuss the following … Adelaide staffing and expenses. (Joe and Rocco are to seriously consider retrenching construction staff in Adelaide and are to look at the administration staff position with a view to reducing overheads).' The

cross-examination of Mr Jaenke (T.8116.5) elicited that this point was raised because EFG had decided not to provide funding for construction.

[323] The meetings of 28 October 1991 and that of 3 December 1991 were not made the subject of evidence by the plaintiffs. The minutes of the meeting of 28 October 1991 (found in Mr Grier's memorandum of 30 October 1991) are of some relevance. Those present were Mr Emanuele and his son Rocco and Mr Grier. The minutes record that the Emanueles planned to withdraw all properties from the market, not just those in Cairns and Gladstone. This was contrary to the earlier agreement. Mr Grier minuted that he told Mr Emanuele he would not recommend the abandonment of the auctions.

[324] Mr Emanuele intimated that he had arranged a meeting with a purchaser of lot 64 the next day. Mr Grier minuted that both Mr Emanuele and his son were aware 'Elders is to have the final decision' on the sale price. As to this it was no more than a statement of reality: EFG was the mortgagee which was owed far more than the value of that parcel of land and could refuse to consent to a sale by the mortgagor which it regarded as inimical to its interests.

[325] Mr Grier also noted:

> 'Joe advised strongly he was sick and tired of not being free to handle his affairs and felt the reviews by Elders and the problems with BNY with its floating charge were becoming too much to handle. I sympathised with his plight, mainly due to the floating charge of BNY and the economic climate which has drastically slowed sales.'

The plaintiffs point to this as evidence that Mr Emanuele was not 'free to handle' the affairs of his companies because of EFG's instructions as to those affairs.

The defendants make the point, which I think is valid, that Mr Emanuele's complaint does not indicate supine compliance with the control of a shadow director but rather shows the frustrations of an independent man constrained by the requirements of his financiers in a hostile business environment.

[326] The reference to the Bank of New York ('BNY') should perhaps be explained. It had advanced money to Emanuel 14 on the security of a floating charge over its assets which ranked behind EFG's mortgages and mortgage debentures. EFG had been allowing Emanuel 14 to retain part of the proceeds of sale of APM lands to assist with its cash flow. The sales were by the mortgagor, not EFG as mortgagee. BNY objected to the retention of money by Emanuel 14. It required payment of any proceeds not paid to EFG to go in reduction of its secured debt. This resulted in a depletion of funds flowing to Emanuel 14, adding to Mr Emanuele's problems. Moreover there was a concern that BNY might move under its security to force a sale of the APM lands. This would have disrupted the EFG/Emanuel group strategy of an orderly sale of those properties after the value had been enhanced by rezoning and obtaining development approvals.

[327] The last meeting for 1991 was on 10 December. The written records of this meeting have been the subject of much controversy. The point, shortly put, is that there were two meetings – a preliminary one between Messrs Gardiner, Grier, Jaenke, Crosby and Mr Elliott of Clayton Utz (then Henderson Trout) and a longer meeting

between Gardiner, Grier, Jaenke, Crosby and Mr Emanuele. There are two versions of the minutes of both meetings. Exhibit 16, D12/480 and Exhibit 481 are the versions of the minutes disclosed by the first defendants in the proceedings. The second version, obtained by the plaintiffs by way of third part disclosure from Macquarie Bank Ltd, are respectively Exhibits 58 and 59. The plaintiffs see something gravely sinister in the discrepancies between the two versions and the fact that what they regard as those damaging to EFG were not disclosed by it but were given to the Macquarie Bank. I reject this. I would accept the explanation given by Mr Grier and Mr Jaenke who between them prepared the memoranda of the meetings. The real point is that, to my mind, there is no material difference between the versions. There is nothing which I regard as damaging to the first defendants' case in the document given to Macquarie Bank as opposed to the version kept on EFG's files. Moreover a copy of Exhibit 58 was in fact disclosed by the first defendants in the proceedings, thus making it more likely that inefficiency rather than deceit is the explanation for the different location of the variant minutes.

[328] The plaintiffs rely on two differences between Exhibit 59 and Exhibit 16. Exhibit 59 includes under the heading '*Purchase Burbank, Purchase Antiques*' this passage:

> 'Perusal of cheque payments and forward budgets showed the above items.
>
> Emanuele said the antique items purchased were to better present for sale his Adelaide offices. (Mr Gardiner) informed him this was not on and Emanuele agreed to pass these to his brother for payment.
>
> Also he has contracted to purchase vacant land at Burbank for a future homesite for himself … Told him we would not fund this. He said he will obtain funds from his brother to replace the $20,000 drawn to date.'

This passage does not appear in the version found in Exhibit 16. It is said that it shows EFG's dominion over Mr Emanuele's personal expenditure in that EFG forbade his purchase of antiques and the home site.

The purpose of the meeting as revealed by the minutes was to 'review the cash requirements of the group to 30.6.92 using as a base the cash flow prepared by Emanuels office last month … summarised in the attached schedule showing a requirement of $2,163,000 …'

It is apparent that the cash flow was prepared to support an application for further advances ostensibly for working capital but that Mr Emanuele had included in his expenditure which he wished to pay from the EFG advance the purchase of antique furniture and a block of land for personal use. Mr Gardiner's response is hardly surprising. It does not indicate, to my mind, that Mr Gardiner (who was not one of the officers named as instructing or directing the affairs of the Emanuel group) was intermeddling in top level management. He was telling a prospective borrower, bluntly, that he could not have money for those purposes. Having 'tried it on', Mr Emanuele indicated that he would have a family member buy the antiques and the land.

[329] The second item of importance for the plaintiffs is a note which appears in Exhibit 59 as 'Emanuele reminded non-essential purchases are not on.' In Exhibit 16 the point is rendered less peremptorily as 'Emanuele was reminded that the budget presented by them did not allow for non-essential purchases.'

I can see nothing significant in the diarist's rejection of the uncouth vernacular in favour of an expression closer to the language of sophistication.

Nor can I see any real significance in the omission from one version of the minutes of the exchange concerning the purchase of antiques and a house block. If the motive for the omission was a desire to suppress evidence of EFG's dominance of Mr Emanuele it is more likely that no minute of the exchange would have been put to paper so it would not appear in any version of the minutes.

[330] The minutes do in fact record what appears to be a direction given by an EFG officer. It was, however, given by Mr Gardiner who was not alleged to have been one of those who gave directions to the Emanuel group. His command appeared on page 7 of both Exhibit 59 and Exhibit 16, D12/481. He 'spoke at length about the need for more sales especially the non-core properties and these are all to be marketed and any previous arrangements to withdraw properties from the market are to be changed.' The minute later records in Exhibit 59 but not in Exhibit 16, Mr Emanuele speaking 'about his success in the past of withdrawing properties from sale …' Such response is not indicative of supine compliance with the intimations of a shadow director, but is the expression of a dissenting opinion.

The version of the minutes kept by EFG and disclosed is less favourable than the other in this respect.

[331] The first meeting in 1992 was 10 February. The record of it is Mr Jaenke's memorandum of 11 February. Those present were Messrs Crosby, Grier, Jaenke and Mr Elliott for EFG and Messrs G & R Emanuele, Hartley, Ziepes and Johanssen. There is nothing in the minutes to support the plaintiffs' case. The only cross-examination of any moment appears at T.7496.1-.20 at which Mr Grier denied that he ever believed or recommended that 'if Mr Emanuele didn't comply with (his) suggestions that (he) might recommend to head office that funding be withdrawn …'

The assumption implicit in the question is that Mr Emanuele was not complying with 'suggestions' and that to make him more compliant loans should be withheld. The consequences are obvious and need scarcely be stated. Even the cross-examiner appears to have had no faith in the proposition that Mr Grier was directing or instructing Mr Emanuele whose will in matters of company governance yielded to Grier's.

[332] The next meeting, 28 February 1992, cannot be categorised as a 'joint management meeting.' It was, rather, a meeting between Mr Emanuele and his two sons together with Messrs Hartley, Ziepes, Johanssen, Caruso, Boyd and Ferrugia on the one hand and representatives of Westpac, Esanda and EFG. (Mr Ferrugia was a partner in Thomson Simmonds, Mr Emanuele's Adelaide solicitors) The purpose of the meeting appears from Mr Jaenke's file note of 28 February 1992:

> 'Joe detailed his group's position and said his ability to keep the doors open depended on his ability to keep selling and if this was the

> case he needed incentives to sell and requested on the settlement of any property, the financier only take the amount of their original loan and outstanding interest plus a 25% premium with any surplus going back to Emanuel for working capital.'

According to the note, which purports to be a verbatim record, Mr McCabe of Westpac 'asked is Elders managing the company' to which Mr Boyd, Mr Rocco Emanuele and Mr Grier all answered 'emphatically no but were providing assistance not hindrance.'

[333] The next meetings, 9 March, 6 April and 21 May 1992 were not the subject of cross-examination. The written records of these meetings (Mr Jaenke's memoranda of 16 March 1992, 7 April 1992 and 1 June 1992) provide no support for the case that EFG personnel were directing the affairs of the Emanuel group. The memoranda, taken at face value, show the Emanuel group officers attending to various items of business on behalf of the group companies. There is no indication of intermeddling by EFG. The last memorandum, that of 1 June 1992, is significant. Under the heading 'Marketing' it records:

> 'Joe advised he no longer wished to deal with Ray White Marketing. Apparently litigation has commenced over non-payment of a full commission on the … deal. A meeting will be arranged with PRD Realty next week to discuss marketing all Queensland properties. … Grier and Jaenke were invited to attend …'

This is important because the plaintiffs make an assertion that it was the first defendants who insisted that PRD be engaged as real estate agents to find buyers for Emanuel group properties. This is said to be indicative of decision making by EFG on behalf of the Emanuel group. The memorandum, which does not appear to have been referred to in evidence, (although I cannot be sure of this because so many copies of the same document were tendered in evidence) and was not the subject of cross-examination, disproves the assertion.

[334] The next meeting of 2 June 1992 was attended by Messrs Grier and Jaenke on behalf of EFG, three members of PRD Real Estate Agents, and 'G, R and L Emanuele and male staff.' The memorandum of the meeting shows no more than that there were discussions about selling the APM lands. The memorandum provides no support for a case of *de facto* directorship. It is impossible to see how anyone could think it might.

[335] The next meetings of 3 June, 19 July, 21 July and 14 August 1992 did not figure in the plaintiffs' cross-examination. The first of these, 3 June, involved representatives of Kartha Pty Ltd ('Kartha') as well as Mr Jaenke and Messrs Emanuele and Johanssen. According to the note the meeting was 'held for (Kartha) to update all parties on … progress … under his purchase contract for Parcel 64.'

When dealing with the question of valuation later in the reasons I discuss the (uncompleted) contract for purchase by Kartha of Parcel 64. For present purposes it is sufficient to say that the note of the meeting provides no support for the case of *de facto* directorship.

[336] I cannot see any evidence of a meeting on 19 July. The meeting of 21 July again concerned delays in the performance by Kartha of its contract. There is no evidence of directions or instructions being given by EFG to the Emanuel group.

[337] The meeting of 14 August is of some interest. It was attended by representatives from EFG, PRD and the Emanuel group. According to Mr Jaenke's memorandum of it (20 August 1992) it 'was held to inform Elders of the marketing strategies being employed by PRD to reduce the property holdings throughout the State and the rationale behind these strategies.' The memorandum contains no hint of directions or instructions being given by EFG to the Emanuel group, but attached to it are two documents, one compiled by EFG and the other by the Emanuel group, each setting out what the respective authors understood to be the 'command structure' for the selling program. The EFG document contains the following:

> 'Marketing – Emanuel group
> Joe and Rocco
> Instruct staff and consultants on how the group sees their role
> …'

The document emanating from the Emanuel group contains the following:

> 'Joe Emanuele – Chairman
> Decision maker
> Rocco Emanuele – Director
> Sales (non APM) (larger APM)
> …
> Negotiations with PRD …
> Linda Emanuele – Town planning
> …'

Taking this document at face value, and in the absence of any evidence from any of the Emanueles I think I should, Mr Emanuele did not see himself as dancing to EFG's tune, at least in relation to selling his companies' assets which was then the most critical of their business activities.

Mr Grier was asked about the document (T.7422.40). He said that he understood that Messrs G & R Emanuele 'were in control of the marketing of the Emanuel group assets.'

[338] The next meeting was on 24 August 1992 but, as it is not alleged that anyone from EFG attended, it may be ignored.

[339] The next meetings, 6 October, 12 October and 18 December 1992 were not the subject of any questions in cross-examination by the plaintiffs. The meeting of 6 October was held to discuss marketing strategies with PRD. There is no suggestion of directions or instructions being given by EFG to the Emanuel group. The meeting of 14 October involved Kartha's representatives and according to Mr Jaenke's note of it was taken up entirely with a report from Kartha as to the progress of its contract. The meeting of 18 December was in the same category.

[340] In the year 1993 the meetings of 3 February, 9 February, 10 February, 10 March, 18 March, 29 March, 27 April, 27 May and 16 June do not appear to have been the subject of any questions asked by the plaintiffs in cross-examination. The first

meeting, that of 3 February, can scarcely be categorised as a 'joint management meeting'. It was attended only by EFG employees. It afforded no opportunity to direct or instruct the Emanuel group. The minutes of the meeting do contain a resolution that Mr Crosby was to advise:

> 'The group (that) excessive expenditure by daughters overseas will not be tolerated (family component package … is directed at reducing exorbitant excesses and form perhaps part of Joe's remuneration) (unlimited drawings by family members which contribute to group liability are to cease)).'

This relates to the fact that part of the loan moneys from EFG, meant to be by way of working capital to the Emanuel group, were being expended on items of a personal nature by Mr Emanuele and members of his family including, it appears, his daughters who were on an extended holiday overseas. Not surprisingly EFG took exception to this conduct, no doubt thinking that its advances should be utilised to achieve sales of its secured properties, or at least to increase their value.

The event affords no proof that Mr Crosby was a *de facto* director of the Emanuel group.

[341] The meeting of 9 February appears to have been called to discuss progress in the marketing of the APM lands. The only note of anything resembling an instruction or direction arose in the discussion of the proposal by the Caboolture Shire Council to resume Parcel 62. The minutes record that Mr Grier:

> 'Advised the meeting that B Gardiner was engaged by EFG and was to take a leading role in the resumption. Tony Schutz not to arrange or attend meetings without Bill Gardiner being present.'

Mr Gardiner was a valuer of recognised experience and competence who had been engaged by EFG. Mr Schutz was an accountant who gave advice on several occasions to Mr Emanuel to support is negotiations with EFG in circumstances which give rise to a suspicion that Mr Schutz was untrustworthy.

EFG was the mortgagee of Parcel 62. The debt secured by it exceeded its value. It was entitled to 'take a leading role' in negotiations with the Caboolture Shire Council with respect to the proposed resumption of the land.

[342] The meeting of 10 February 1993 was concerned with an application for further financial accommodation to be provided by EFG to the Emanuel group. There is no evidence in the minutes of instructions or directions being given.

[343] The meeting of 10 March is recorded in a memorandum of that date which appears to show no more than there were discussions between Messrs Grier, Emanuele and Rocco Emanuele on a number of topics all related to financial accommodation from EFG and properties secured to EFG.

[344] The meeting of 18 March was called to discuss Kartha's lack of performance in completing its contract and the interest of a development company, Delfin, in joining Kartha as a joint venturer, or in supplanting it as purchaser. The meeting has significance later in these reasons which deal with the valuation of the APM

land. For present purposes it is enough to say that there is no indication whatsoever of an instruction or direction given by EFG to the Emanuel group.

[345] The month of March 1993 saw a change in the arrangement of meetings between EFG and the Emanuel group. On 11 March 1993 they executed the DOOR and on 20 May 1993 the Deposit Account Agreement. I describe the effect and operation of these agreements in more detail in the next section of the reasons. For the moment it is sufficient to say that the agreement embodied in DOOR was sought by Mr Emanuele to give his companies time to recover from their parlous position. In essence it granted a moratorium of 40 months, until June 1996, for the payment of the debt owed to EFG, provided that sales of properties occurred during that time and that the proceeds equalled or exceeded values set out in the DOOR. The hope was that with time and the expenditure of some money the APM lands could be enhanced in value and sold, thereby alleviating the Emanuel group's debt position. As Mr O'Grady pointed out the sale of one of the APM parcels, if completed, would be enough to restore the Emanuel group to profitability. Mr Emanuele explained to Mr Grier that if EFG agreed to a moratorium, as it did, he would inform his other financiers of that fact and endeavour to persuade them to come to a similar arrangement.

[346] DOOR did not itself provide for regular meetings between EFG and the Emanuel group, but clause 3.1(d) contained an agreement by the Emanuel group to:

> 'Provide true and correct monthly marketing reports … of the sale and development of the security property to … EFG … and without limiting the generality of the foregoing, such reports shall include:
>
> (i) details of all offers made by prospective purchasers …
> (ii) all plans of subdivision, re-subdivision and town planning applications lodged … in respect of the secured property.'

By clause 5.1(d)(ii) the Emanuel group promised to produce monthly accounts including income and expenditure accounts of each company in the Emanuel group to EFG.

The parties regarded these clauses as authorising, if not requiring, regular monthly meetings which did, in fact, occur.

[347] It is, I think, difficult for the plaintiffs to categorise these meetings as 'joint management meetings' at which EFG personnel interested themselves in the 'top level' management of the Emanuel group. They were what they purported to be: meetings held pursuant to DOOR to monitor the progress of sales which were required by DOOR if the moratorium were to continue.

[348] The Deposit Account Agreement, which was executed as an adjunct to DOOR, required the payment of the timber royalties from Softwoods to be paid to EFG which then transferred the payments to the Emanuel group. The royalties were the subject of a company charge but prior to this time EFG had permitted the income from the sale of the timber to go directly to the Emanuel group. The new arrangement saw a change in that moneys were paid initially to EFG but then released by it to the Emanuel group so that it could meet operating expenses. The

result was that EFG had a considerable degree of control over the application of the timber income.

[349] The first meeting after the execution of DOOR occurred on 29 March 1993. It was chaired by Mr Grier. Those attending were Messrs Grier, Jaenke, Crosby and G & R Emanuele. The minutes contain a note that Mr Grier insisted upon the execution by the Emanuel group of the Deposit Account Agreement. This cannot be categorised as a direction. It was an intimation that it was a condition of the moratorium which Mr Emanuele desired that the timber royalties be dealt with in the manner described. The term was non-negotiable from EFG's point of view, but Mr Emanuele had a choice. He could accept the moratorium with that term, or refuse it, with the consequence that his companies would be in continuous default under their loan agreements and the mortgagee could act at any time.

Mr Grier explained that EFG's solicitors had advised that the agreement was necessary 'to negate any questions of preference from other creditors.' It is, I think, abundantly clear that the concern was not with preferences but with the priority of securities. There were subsequent mortgages and if the timber royalties had not been made the subject of EFG's securities, their application directly to the Emanuel group could have been to the benefit of those subsequent mortgagees.

[350] The next meeting was 27 April 1993 and was again attended by Messrs Grier, Crosby, Jaenke and G, R & L Emanuele. The minutes are cryptic and contain no record of directions or instructions given by EFG to the Emanuel group. The meeting appears to have been concerned with the provision of information required by DOOR.

[351] There were two meetings on 27 May 1993. One (the minutes of which are Mr Jaenke's note of 4 June 1993, Exhibit 16, D13/525) was attended by Messrs G, R & L Emanuele, representatives of Kartha, Delfin as well as Messrs Grier and Jaenke. It appears to have been a meeting to discuss what progress, if any, was being made by Kartha in the performance with its contract or in its negotiations with Delfin. This meeting is the subject of comment elsewhere in my reasons.

The second meeting is recorded in Mr Jaenke's file note of 7 June 1993 (Exhibit 421 Volume 28). This meeting was attended by Messrs Grier, Jaenke and Elliott (of Clayton Utz), Messrs G, R & L Emanuele, together with Mr Brannock, town planner and Mr Boyd. The topic of this meeting was also the status of the Kartha contract and what action the Emanuel group should take with respect to it. This meeting in fact preceded the other and was held so the parties could agree what action they would take at it. There is no indication of any instruction or direction given by EFG to the Emanuel group.

[352] The next meeting was 6 July 1993 (Exhibit 16, D13/530). Again the minutes contain nothing suggestive of an instruction or direction given by EFG to the Emanuel group. Mr Booker was cross-examined about this meeting. This was the first meeting he attended after he had taken over management of the account from Mr Grier. He was critical of Mr Grier's management of the account. He believed that:

> '… Mr Emanuele … had had too much latitude … He could spend the money wherever he wished out of the … Softwood funds …

> There was just no control put in place … to ensure that the moneys expended were expended for the benefit of EFG security.' (T.7709.5-.20)

[353] July also saw another change in procedure. The regular monthly meeting between EFG and the Emanuel group was preceded by a meeting involving EFG personnel only. Both meetings were chaired by Mr O'Grady. The earlier meeting was for EFG to agree upon the position it should adopt with respect to various items on the agenda for the joint meeting.

According to Mr Booker the first meetings would 'discuss … openly … what I was recommending or what I wasn't recommending … John O'Grady had a clearer vision. (We) would go into the client meeting … and then there would be a discussion.' There were many times when the EFG position was adopted by the Emanuel group representatives but there were times when 'they weren't'. (T.7712.1-.20)

The minutes of the meeting of 6 July do not support a case that instructions or directions were given to the Emanuel group. It does not appear to have been suggested to Mr Booker that that occurred.

[354] The next meeting was 24 August 1993 (Exhibit 16, D13/539). The minutes record an exchange of information but nothing supportive of a case that EFG was instructing or directing the Emanuel group. The closest the cross-examination came to that point is at T.7743.50-7744.20:

> '… On page 2 (of the minutes) there is reference to the budget and the fact that it was stressed that it must be met … It wasn't an optional thing was it? – Because it must be maintained and … EFG would only fund matters to maintain the security position, yes, that was discussed.
>
> But it wasn't optional was it? … Under the Deed of Orderly Realisation … EFG had at its total discretion the ability to release funds or not to release funds. And in this instance they were … informed that … we would only be maintaining our security position.
> …
> His Honour: What Mr Booker is saying, as I understand it, is that the budget identified certain items of expenditure which were approved by EFG and money would be released only for those approved purposes? – Yes, they would.'

Some questions were asked about the Kartha contract. The minutes record:

> 'Emanuele is to contact Wadley to ascertain Wadley's intention into the status of the Kartha contract as EFG requires it resolved. If it can be resolved up to $360,000 could be made available by EFG.'

The point asserted was that EFG directed the Emanuel group to 'resolve' the Kartha contract. Mr Booker said (T.7745.20-.38):

> '… I believed that Emanueles were in the process of negotiating with Mr Wadley and Joe was doing that himself and had almost brought that to fruition. I believed it was put in the context that it gave Joe a little bit more credibility to say EFG wished it to be resolved and the funds would be made available by EFG.
>
> But not wished it, required it to be resolved? – Well, the parties had agreed, as in Emanuel and EFG, that it was certainly in everybody's best interests for that contract to be rescinded.
>
> And you are saying to him he could go and use that form of words, not because they were wrong but because it might give him a little more ………… power? – I believe that was the case, yes.'

I accept the evidence of Mr Booker. He impressed me as an intelligent and a forthright man. The evidence otherwise indicates that Kartha was incapable of performing its contract and that all concerned, EFG and the Emanuel group, realised Kartha's interest in Parcel 64, given by the contract, had to be brought to an end.

[355] The third meeting convened pursuant to DOOR was held on 14 September 1993. The minutes are Exhibit 16, D13/543. There is no indication of an instruction or direction from EFG to the Emanuel group. This meeting does not appear to have been the subject of cross-examination.

[356] The same is true of the meetings of 15 September, 18 October, 24 November and 7 December 1993.

[357] This should be the end of this aspect of the case. The pleaded basis for the allegation that EFG was a *de facto* director of the Emanuel group was that by the conduct of its officers at the meetings just reviewed those officers acted as directors, or instructed and directed the nominal directors of the Emanuel group as to the conduct of the business of their companies.

There is, in my opinion, no support at all for that case in the evidence of the meetings. What emerges is a small number of instances when an EFG officer did issue what might be called a command to Mr Emanuele. There is no other evidence that those commands were, in fact, complied with. There is evidence that on occasions EFG's directions were ignored. There is certainly no evidence of a regular, or common, or habitual deference to EFG's instructions with respect to matters involving the 'top level management' of the Emanuel group. Several instances relied upon by the plaintiffs are in fact harmful to their case.

[358] It is instructive that Messrs Jaenke, Grier and Booker denied that they directed Mr Emanuele on how to conduct his companies' affairs. Mr Jaenke (T.7977.7-.15) denied ever directing or instructing the Emanuel group as to which creditors to pay or not to pay or as to how they should conduct their business. Mr Grier gave a similar denial (T.7403.4-.10). Mr MacDonald, who knew Mr Emanuele well and was sympathetic to him, explained that he:

> '… wasn't the sort of individual who could be easily managed and we really couldn't control what commitments or what new projects

> he would take on at any time. We could certainly voice a strong view as to what the extent of our support was going to be limited to but we couldn't really manage his day to day operational cash requirements.' (T.6996.30)

[359] I saw nothing in the cross-examination of these witnesses which would make me doubt their evidence. I thought they were all credible and, subject of course to the effect of time on their memories, reliable. I was particularly impressed by Mr Booker.

[360] It is pointed out (in paragraph's 42-54 in the first defendant's submissions) that attendance at the 'joint management meetings' which is put forward as the basis for EFG becoming a *de facto* director was not a requirement for the *de jure* directors of the Emanuel group; in other words these were not meetings at which the directors of the Emanuel group came together to determine the business activities of the companies. They were not, therefore, meetings at which those directors could be 'instructed or directed' by outsiders.

[361] It needs to be understood that the business interests of the plaintiff companies were very extensive and very complicated. They borrowed from a variety of financial institutions, not just EFG. Their property holdings were vast and varied. In addition to the APM lands various of the plaintiff companies bought cattle properties, commercial/residential properties on the outskirts of the Brisbane CBD, hotels and shopping arcades, residential subdivisions, houses and beach resorts. Many acquisitions were financed, in part, by loans from a vendor supported by a mortgage. When the recession hit and sales were difficult to effect Mr Emanuele engaged in exchanges of property as an adjunct to sales. Most of his properties were charged to more than one financier. The process of selling his property portfolio involved:

- subdivision with concomitant negotiations with valuers, town planners, engineers and local authorities;
- refurbishment with consequent involvement with architects and contractors;
- with respect to the APM lands in particular rezoning and applying for development approval with involvement with town planners, engineers, State and local government officials and valuers.

After 1988 the Emanuel group's only income (ignoring small amounts of rent) were the timber royalties and what it could borrow from EFG or other financiers. Money was necessary to fund the subdivisions, refurbishments and applications for development approval. These occurred with respect to properties mortgaged to EFG and other financiers.

[362] There was a great deal to attract the attention of EFG's officers as well, of course, as the employees of the Emanuel group. It is not surprising that EFG, by its employees, would take particular interest and require substantial amounts of information about the properties to which it would look for the repayment of its debt. Extensive as that interest was it did not extend to the whole of the Emanuel group's business interests. As I have said although EFG was the principal financier

the Emanuel group had a substantial property portfolio financed by and mortgaged to other financiers. Schedule Part B to the first defendants' submissions is a list of meetings between members of the Emanuel group and those other financiers, Westpac, BAC (Bill Acceptance Corporation Ltd, a Westpac subsidiary), ANZ, Mercantile Credits and KBA (Kleinwort Benson Australia, a merchant bank). None of these involved EFG. Speaking quite generally they involved the kinds of topics which were the subject of the joint meetings between EFG and the Emanuel group.

[363] Between 1988 and 1995 the plaintiffs appointed and retained bankers, accountants, auditors, lawyers, town planners and engineers. The plaintiffs had three banks, other than EFG, two firms of solicitors, several firms of architects and valuers and at least four sets of engineers/town planners. EFG was not involved in the decision to engage any of these. On the evidence there was frequent contact between the Emanuel group and Coopers & Lybrand, none of which involved EFG (save for one meeting in connection with the redemption of the preference shares). The plaintiffs emphasise the fact that Mr Wales who was retained to prepare a business plan for the Emanuel group declined to accept the retainer until EFG agreed to be responsible for his fees should the Emanuel group be unable to pay them. Mr Wales had been an advisor to Mr Emanuele prior to the request made to him, in mid-1992, to prepare the 'Wales Report'. There was no suggestion that EFG influenced Mr Emanuele's choice of Mr Wales as a suitable advisor. His fees were paid by the Emanuel group though from moneys advanced by EFG. The reason for EFG's advance was that there appeared a good prospect that he could devise a strategy for improving the APM land and attaining a better recovery from their sale.

If this be an exception to the situation just described, it is one which 'proves the rule' that it was Mr Emanuele who decided what professional consultants to retain.

[364] What I have already written should be enough to dispose of the case for *de facto* directorship based upon the second limb of the definition. It is perhaps appropriate to say something more. There is, importantly, evidence that on occasions when a distinct instruction from EFG can be identified there was disobedience to it. The implication for the need to prove habitual or customary obedience is obvious.

[365] On 5 April 1991 Mr Hartley wrote to Messrs Leonardis and Moyle:

> 'From the date of this memorandum you are instructed that no cheques are to be issued from your office IRRESPECTIVE of value without the prior approval of the Brisbane office.
>
> A list of accounts requiring approval … will need to be faxed to this office before commencing to draw the cheques.
>
> Please note this requirement is an instruction from Elders Finance Ltd and is to be strictly adhered to.'

A copy of the memorandum was sent to Mr Jaenke who wrote on it:

> 'Rang Hartley and Ziepes. This memo is too strong. We "requested" information on accounts not in budget before payment but information is to be provided.'

Mr Grier countermanded his comment. He wrote on the memorandum:

> 'Not too strong. In terms of arrangement between G (Emanuele) & J D (Crosby).'

Notwithstanding this peremptory instruction the conduct of its account by the Emanuel group did not change. (see Grier's evidence at T.7393.10-.51)

[366] On 28 May 1987 Mr MacDonald and Mr Crosby met with Mr Emanuele who was told that EFG 'would not consider advancing any additional funds whilst exposure remained in the current position' and that 'we would expect that the group does not enter into new purchases without consultation.' (Exhibit 434, para 110)

Mr MacDonald said that Mr Emanuele did 'not really' comply with that information.

> 'When you say "no, not really"? – Oh, Emanuele … was a compulsive buyer of property. … If he saw … what he deemed to be a very good proposition he … was his own man in that regard. He wasn't going to be controlled by anyone. … No he … didn't comply, as is evident from the later purchases in North Queensland when … the Chinese transaction fell through and he revealed future purchases or additional purchases in North Queensland that we had not been aware of, and they were substantial.' (T.6974.45-.55)

[367] Another matter of relevance in this context is that Mr Emanuele was prepared to have his companies act to the detriment of EFG's interests and, in the process, attempt to deceive EFG. In February 1994 Livilla agreed to sell land in Brendale to Budcorp Pty Ltd for $300,000. That amount would only discharge the first mortgage to Westpac. EFG had a second mortgage. The value of the land was more than $300,000. Indeed it was probably worth about $800,000. Mr Emanuele seems to have conceded that it was worth between $500,000 and $600,000. Budcorp Pty Ltd was a company associated with Mr Schutz, Mr Emanuele's disreputable consultant for all seasons. Mr Booker suspected that there was an arrangement pursuant to which Budcorp, having bought the land for $300,000, would sell it for more and distribute the profit to Mr Emanuele, no doubt after retaining some recompense. The evidence supports this suspicion. It is collected in paragraph 84 of the first defendants' submissions.

[368] Following Mr Booker's intervention Mr Emanuele wrote to Mr O'Grady complaining in bitter terms about Mr Booker. The letter is dated 18 March 1994. It is long and deals with a number of topics. Mr Emanuele would appear to have had help in composing it. It read in part:

> '… I now would like to turn to the mandate of Mr Booker and co. Mr Booker as I have been informed was a debt collector, "eliminator" or "head kicker" for want of a better word with the State Bank of South Australia.
>
> I have no doubt that he has embarked upon eliminating my group and endeavouring to rezone all of the business securities to produce Elders/Fosters an unbelievable result. … It has been principally the

> work of my son and our consultants that we have a good hearing with the office of the Co-ordinator General, not Mr Booker …
>
> Recently, on the Brendale … matter Mr Booker again is trying very hard to put me in a position of default. I have explained the position a number of times … I will not account for the $5,000,000 to BNY back in early 1992 …
>
> John, I have and will continue to do everything which is fair and legal with Elders. However, I will not tolerate the way in which these consultants are forcing my group to abide by. … I believe for no other apparent reason for Elders change of heart on this deed is Mr Booker's … doing.'

[369] Following upon the decision to terminate the payment of timber royalties to the Emanuel group Mr Emanuele protested by boycotting the monthly meetings which had been held pursuant to the DOOR. At the meeting of 15 April 1994, which was the first following the decision, Mr Linton and Ms Linda Emanuele attended as observers. Neither Mr Giuseppe Emanuele nor his son Rocco attended. Thereafter none of the Emanueles attended any of the meetings.

[370] Mr Emanuele refused to correspond with EFG's Brisbane office where Mr Booker was the manager. Instead he insisted upon corresponding on matters of detail with Mr O'Grady who was obliged to redirect the correspondence to Mr Booker. Mr Emanuele refused requests that he correspond directly with Brisbane. See paras 336-338 of Mr O'Grady's statement, Exhibit 454.

[371] Mr Emanuele's behaviour cannot fit the plaintiffs' description of the relationship between him and EFG. It shows him not to be receptive to requests from EFG and prepared to argue with its senior officers when he thought that his companies' interests were being affected. This conduct is the antithesis of the relationship denoted by the description 'shadow directorship'. Mr Emanuele was confronting the entity with whose directions or instructions he was supposedly accustomed to act. He was, on occasions, actively if surreptitiously, working against the interests of that entity.

[372] As well there is evidence that Mr Emanuele extracted and sold gravel from one of the APM parcels without accounting to EFG for the proceeds or even disclosing the fact that he had made a royalty agreement in respect of the gravel. EFG, of course, as mortgagee had a right to the proceeds. In the end Mr Emanuele accepted that he was obliged to account for the royalties.

[373] The last point to be made is the most significant. It has already been touched on. I have previously described how the Emanuel group and EFG came to litigate in the Federal Court. There were negotiations between the two companies which commenced in about September 1993 which EFG hoped would lead to an amicable cessation of the relationship between them. It will be necessary later, when dealing with the 1995 Scheme, to look in some detail at the negotiations. For the moment it is enough to say that EFG proposed, in essence, that the APM lands should be transferred to it to enable it to have them rezoned or approved for development and then sold while the other lands mortgaged to EFG would be sold by Emanuel and the proceeds divided according to a formula which gave Mr Emanuele an incentive

to obtain high prices. Mr Emanuele refused to contemplate the loss of the APM lands from the Emanuel group. He saw they had long term potential for development which would ultimately yield a substantial return. He was oblivious to the fact that his companies could not afford to pay interest on the debt owing on the land until such time as they could be developed and sold. He refused to recognise EFG's right to have interest paid and to take action if it was not. The negotiations came to an end in about February or March of 1994. Thereafter in an endeavour to bring things to a head and to convince Mr Emanuele to face reality EFG decided not to release the timber royalties from the deposit account to the Emanuel group. It lost its only source of income. The consequence was that Mr Emanuele had his companies commence legal proceedings in the Federal Court challenging EFG's right to retain the timber royalties.

[374] These facts, which are not in dispute, give rise to a number of consequences. The first is that, if EFG by its officers were the *de facto* directors of the Emanuel group whose *de jure* directors accepted its direction, there would have been no need for the negotiations. EFG would simply have directed the *de jure* directors to accept its proposal and to transfer the lands to it. The negotiations would obviously not have failed if EFG were in a position to control or direct Mr Emanuele. Thirdly it is not credible that litigation would have been commenced against EFG if its officers controlled the directors of the companies which became applicants. It is not to be thought that EFG would permit a company it controlled to sue it. Fourthly, if EFG controlled the Emanuel group via directions or instructions given by its officers it would not have been necessary to cut off the Emanuel group's income in order to induce Mr Emanuele to come to terms.

[375] The fact is, and I so find, that Mr Emanuele and not EFG controlled the Emanuel group when he negotiated with Mr Crosby (who represented EFG) and when he commenced the litigation. At all times thereafter the Emanuel group and EFG were engaged in arms-length negotiation involving solicitors and in litigation in the Supreme Court of Queensland. There can be no suggestion that EFG in any way controlled or directed the directors of the Emanuel group after March 1994. One looks then to see whether at that time there was a change in circumstances by which Mr Emanuele was able to, and did, reassert control over his companies. One looks in vain. There is nothing in the evidence indicative of any such change. The clear implication is that Mr Emanuele at all times controlled his companies and was not subject to EFG's hegemony.

[376] Another point of significance is that EFG's conduct in relation to the Emanuel group is no different from the conduct of the other financiers towards companies in the group. They too had loans on which their borrower had defaulted and they too had assessed that the best prospect of a return was to have Mr Emanuele sell the mortgaged properties.

[377] Once a borrower was in "Asset Management" or "Loans Management" lenders such as ANZ, Mercantile Credits, Esanda, Westpac would typically:

(a) require a much higher degree of control by the bank over the operation of the account (see Debelak T2949.02);

(b) require a much higher degree of administration and management (see Debelak T2949.05)

(c) require frequent meetings with the borrower (see Debelak T.2949 .08) or more frequent contact between the bank staff and management of the borrower (McCabe T.3080.44) or regular discussions about management and operations (Morphett T.5224.04);

(d) require visits by bank staff to the borrower's premises to assist to get information for the bank (see Debelak T.2950.01, McCabe T.3080 .08)

(e) require a much higher level of reporting and provision of information by the borrower than would normally be the case (Debelak T.2950 .04; Durack T.3141.43-55)

(f) require a very high degree of disclosure of information from the customer (McCabe T.3080.012)

(g) require information as to:

(i) the borrower's overall financial position (Debelak T.2950 .08; Morphett T.5199.13-18);

(ii) the borrower's total cash flow position (Debelak T.2950 .12; McCabe T.3080.25; Morphett T.5201.07) and projected cash flow position (McCabe T.3080.25);

(iii) the borrower's position *vis a vis* other financiers (Debelak T.2950.13; Morphett T.5200.01-08) and with regard to <u>all</u> its lenders (McCabe T.3080.22)

(iv) all the assets available to the borrower (McCabe T.3080 .17) whether or not they were secured to the bank (McCabe T.3080.20; Morphett T.5298.56-T.5299.11; T.5205.01-14, T.5232.04ff);

(v) the borrower's progress about the sale of property (Debelak T.2950.15; Morphett T.5201.02) whether those property sales were secured to the bank or not (Debelak T.2950 .18);

(vi) the borrower's sales and marketing strategies (Debelak T.2950.20, McCabe T.3080.38) Morphett T.5201.10);

(vii) the borrower's business plans (Debelak T.2950.22, McCabe T.3080.38; Morphett T.5201.13);

(viii) past financial performance and anticipated future financial performance (McCabe T.5202.26)

(ix) any information that might affect the ability of the borrower to repay (Morphett T.5202.26)

(h) might insist on the borrower obtaining advice or independent expert assistance (Debelak T.2950.24);

(i) might insist on reserve prices for sales to be set by the financier (Morphett T.5225.38-46)

(j) require the borrower, or put pressure on the borrower, to obtain professional advice (McCabe T.3080.49-57);

(k) monitor the pace and direction of the borrower's performance of its asset realisation strategies, and if necessary indicate what they wanted to occur (McCabe T.3081.09-013);

(l) leave the borrower in no doubt as to what the lender required of the borrower as to these matters if the lender's forebearance was to continue (Debelak T.2957.25-32; T.2950.30ff; McCabe T.3081 .01-03; McCabe T.3081.15-17, Morphett T.5227.06-18));

(m) if further advances were made, the purposes for which they might be used were strictly controlled (McCabe T.3092).

[378] With respect to providing further accommodation to the Emanuel group:

(a) both ANZ and Mercantile Credits took the view that the best course was to leave the Emanuel group in control of the realisation of its assets (Debelak T.2955.30-32; T.2961.49-T.2962.35; Morphett T.5202.39-43, T.5241.40-47);

(b) this was seen as being in the interests of the Emanuel group as well as the lender;

(c) to that end the lenders were prepared to give the Emanuel group time to realise their assets and not to insist on immediate repayment;

(d) Mercantile Credits/ANZ formally extended all the Emanuel facilities from time to time (T.2955, 2960, 2964);

(e) Even when they believed Emanuel was unable to repay them other lenders were prepared to make and did make further advances where the advance went to support the value or realisation of property secured to them (BAC: T.3091, 3092, 3094, Ex.249 Tab.47, 11.9.92) (Mercantile Credits: T.2962; Ex. 247 Tab 71, 78, Morphett T.5207 .22-33) (McCabe T.3086-7, 3092)

(f) BAC took the view that it was desirable for Elders to continue to provide working capital for the Emanuel group, so that Emanuel could remain in control of its own assets (T.3092.50).

[379] As for "control":

(a) Esanda did not see its level of involvement as "supervision" or "close supervision" but rather co-operation with the borrower' this was not "control" (Morphett T.5202.45-56);

(b) Mercantile Credits (see Morphett T.5207.22-T.5208.09), when providing finance to improve the value of an existing asset would:

(i) Want to be sure that the money was being used for that purpose;

(ii) Set in place mechanisms to monitor whether money is being used for these purposes;

(iii) Make sure that the work was actually being done;

(iv) Obtain the relevant invoices and pay the service provider directly;

(c) A working capital facility might raise the same issues as these for Mercantile Credits (Morphett T.5208.15);

(d) During asset management Esanda would:

(i) make suggestions about Emanuel group operations relating to Esanda properties. This would involve Esanda indicating what they thought was the best course for the Emanuel group in respect of those properties (Morphett T.5223.09-22);

(ii) regularly discuss suggestions made by either Esanda or Emanuel group about the management of the Emanuel properties (Morphett T.5224.04);

(iii) suggest particular courses of action if Esanda perceived it was better than what was being pursued by the Emanuel group (Morphett T.5224.10), for the most part these suggestions would be complied with by the Emanuel group, but the Emanuel group would sometimes have a different view to the extent that there would be a fight, but Esanda would always win because they held security (Morphett T.5227.04)

(iv) if Esanda had a strong view about a proposed course that was undesirable then that view would be put forcefully to the Emanuel group and this form of vigorous expression was a normal part of a healthy banker customer relationship (Morphett T.5224.18-36);

(v) reserve prices might be insisted upon if those prices were supported by a valuation or where it was perceived that the

Emanuel group was setting too high a reserve (Morphett T.5224.38-T.5225.26);

(vi) monitor advertising and promotion campaigns, limiting the amount of funds available for such purposes ad such conduct was normal in a work out (Morphett T.5226.19-58);

(vii) have no occasion to request monthly budgets in respect of properties Spring Hill Quarter as all nett income from those properties were paid to Esanda and a managing agent monitored the properties, but monthly budgets would be required if there was working capital funding being provided (Morphett T.5235.16-49);

(e) Both lenders' policy was to leave Emanuel group assets in Emanuele control;

(f) BAC addressed management of the Emanuel group in all its reviews. Management is consistently identified with Emanuel personnel. EFG is not mentioned (Exhibit 249).

[380] This is not to say, of course, that a mortgagee can never come to the situation where it is controlling so much of the activities of a mortgagor company that it becomes *de facto* director. The reasons described by Millett J in his article show that that situation will not ordinarily arise where the mortgagee is engaged in a 'workout' with its mortgagor with a view to maximising the return on mortgaged property for the mutual benefit of both. The point presently to be made is that if EFG's conduct amounted to instructing or directing the board of the Emanuel group then so did those other financiers whose conduct with respect to their mortgaged properties was not qualitatively different. It is an unlikely result that the board of the Emanuel group was subject to the simultaneous direction and instruction of three or four separate lenders.

[381] A close analysis of the evidence would show the unlikelihood of the plaintiffs' central tenet that between 1988 and 1995 'Messrs O'Grady, Crosby, Grier, Jaenke and/or Booker instructed and directed … Emanuele family directors …' Mr O'Grady only attended seven meetings between July 1992 and December 1993. Mr Grier was present only between February 1990 and May 1993. Mr Jaenke attended between February 1990 and November 1993. Booker was only present between July 1993 and December 1993. The limitation that directions were given only to the Emanuele family directors is curious given that members of Mr Emanuele's family were not the only directors of the Emanuel group. The plaintiffs do not explain why it should be supposed that those directors took no interest in the performance of their duties so that they may be ignored when one considers who controlled the Emanuel group, nor why they thought it was not necessary to attempt to prove that EFG also instructed or directed them. The reality is, of course, that Mr Emanuele was the dominating and dominant mind and will in his companies and, despite the fact that EFG paid the piper, Mr Emanuele called the tune to which his companies danced.

Occupying Position of Director

[382] It should be noted that on the pleadings there is no claim against the first four (corporate) defendants that they were directors of the Emanuel group pursuant to the first limb of the extended definition i.e. a person occupying or acting in a position of a director. The first four defendants are sought to be made directors because their officers on their behalf gave directions and instructions to the Emanuel group. There is no allegation that Messrs O'Grady, Crosby, Grier, Jaenke or Booker 'occupied or acted in the position of a director' in their capacity as officers of EFG.

[383] It should be noted also that Messrs O'Grady and Crosby are sought to be made personally liable for losses sustained by the Emanuel group by reason of their having been *de facto* directors, but the plaintiffs opening (T.780.46-.55) expressly concedes that Mr O'Grady and Mr Crosby (as well as Messrs Grier, Jaenke and Booker) 'in their dealings with Emanuel acted solely in their capacity as officers of EFG (and … were seeking to advance EFG's interests not the interest of Emanuel or their own.'

[384] It is to be remembered that the opening was limited to a case of 'second limb' *de facto* directorship. On the basis of this concession the only finding contended for is that EFG (or more properly the first four defendants) were *de facto* directors of the Emanuel group. Their individual agents through whom the instructions or directions were given could not properly be so regarded because the directions which the Emanuel group was accustomed to act on were those of EFG.

The shifting nature of the plaintiffs case makes it necessary, however, to consider whether Mr O'Grady and/or Mr Crosby became *de facto* directors of the Emanuel group on the basis that they occupied the position of director or acted as such. The case that EFG or its officers became 'first limb' directors can be fairly shortly disposed of. It was a late inclusion by the plaintiffs. The first defendants have compiled a schedule, Part A, to the volume of their submissions on *de facto* directorship which lists the meetings of directors of all companies in the Emanuel group between 11 July 1990 and 9 September 1993. None of the EFG officers attended any of them. Moreover the directors were not limited to Mr Emanuele and members of his family. Messrs Ziepes, Sara, Leonardis, Hartley and Simionato were directors of various companies at various times. There is no suggestion that any direction or instruction was ever given to any of them. There was no evidence that any of the EFG officers signed documents of any kind (contracts, accounts, cheques or letters) on behalf of any of the plaintiff companies. There is the point that there was no evidence that any of the lawfully appointed directors of the Emanuel group ever recognised any of the EFG officers as fellow directors. It would be difficult to accept that one could act in the position of director or discharge the functions of a director without the approval, express or tacit, of the *de jure* directors. There is no evidence of such recognition by those *de jure* directors.

[385] Similarly there is no evidence that EFG was involved in any way in the choice of senior management staff employed by the Emanuel group. This is normally a function of the board.

[386] Of significance are the dealings between the Emanuel group and the ATO. It was common ground that between 1988 and 1995 the plaintiff companies dealt with the ATO about their tax affairs quite independently of EFG. This was a matter of great importance to the Emanuel group. It was, in the end, the ATO who moved to have the plaintiffs wound up. A tax audit undertaken between 1988 and 1993 was of enormous potential significance. EFG was not involved in any way in the dealings between the Emanuel group and ATO. The first defendants in their submissions put the matter thus:

> 'In circumstances where no EFG officer:
>
> (a) was consulted about Emanuel tax affairs
> (b) was informed about them except so far as financial statements made reference to them;
> (c) asserted any right to be consulted or informed;
> (d) asserted any interest in being so consulted or informed;
>
> it is difficult to see how any of them could be characterised as having acted in or occupied the office of director of Emanuel companies.'

I tend to agree.

[387] Moreover the first defendants refer to the evidence adduced by the plaintiffs concerning the tax audit to emphasise that Mr Emanuele was the decision maker for the Emanuel group. Exhibit 253, Tab 2 contains a note of the initial tax audit meeting of 10 September 1987 which Mr Leonardis attended on behalf of the Emanuel companies. He was then a director of them. In answer to the question 'what are the procedures for making major decisions in the group?' Mr Leonardis replied 'Major decisions originate from Joe Emanuele as director of the companies.' The Coopers & Lybrand file note of the same meeting confirms that that answer was given. Exhibit 253, Tab 38 is a letter from the ATO to Mr Cuming of 21 August 1992, five years later, advising him of its proposed action with respect to the companies of which he was liquidator. In a section headed 'Ownership and Control of the Emanuel group' the ATO wrote:

> 'Giuseppe Emanuele and his family have ultimate control of the Emanuel group of Companies through a trustee company of which Giuseppe Emanuele is the chairman. This trustee company performs an important role in the group's financing arrangements acting as guarantor and obtaining loans as agent for other companies in the group.
>
> Since a company is an abstraction … its state of mind must be found in a person … who is … the directing mind … of a company … ultimate ownership of the group by Giuseppe Emanuele has been clearly established.'

This premise was the basis for the tax assessments later issued. The ATO determined that it had been Mr Emanuele's intention to acquire the properties for resale at a profit. If he were not, or had ceased to be, the controlling mind of the company there would have been an answer to the ATO's contention. The ATO proposition was never challenged whether by Coopers & Lybrand, Mr Emanuele or his solicitors.

This evidence is not of real assistance to the first defendants. It relates to a time too early to be of real utility. The answer to the question was given in September 1987 when the important time frame is that between 1990 and 1995. It is true that the letter from the ATO was dated August 1992 but I would understand it as relating to the earlier time when the decision was made to acquire the properties, the sale of which resulted in the assessment.

The evidence has some relevance to the allegations against Mr Crosby. It indicates that he was not, as alleged, influential in the decision-making processes of the Emanuele group. That role was reserved for Mr Emanuele.

[388] I do not think it necessary to say any more on this point. The case, such as it is, is of EFG's officers giving instructions to Emanuel group directors. It is not a case of those EFG officers themselves doing things which directors normally do. There is no evidence at all of that.

The Case Against Mr Crosby

[389] The case against Mr Crosby, that he was part of Mr Emanuele's 'kitchen cabinet' and so acted as a director of the Emanuel group, which is apparently the purpose of Part 1 of Schedule 13 to the statement of claim, is shown by the evidence to be misconceived. The testimony comes from Mr Bund who said, in effect (T.3976.38):

> 'The timeframe during which Mr Crosby attended "cabinet meetings" was between 1983 and 1986.'

This is too early even for the plaintiffs. Their case was that de facto directorship is to be made out for the years 1988 to 1995. Moreover it emerged in cross-examination that Mr Crosby's presence was as a representative of the financier who was to be asked to fund acquisitions decided upon at the meetings. (See T.4011.20-.36)

Plaintiffs' Written Submissions

[390] I have, I think, sufficiently dealt with the relevant points raised and relied upon by both sides. I have not dealt specifically with the plaintiffs' submissions. I suppose I should. The difficulty is in knowing how. Coming to terms with the plaintiffs' submissions is like grappling with a ghost. The submissions consist, in large part, of exaggeration, generalisation and error. There is a heading:

> 'Far Beyond the Usual Conduct of a Secured Creditor'

[391] which is followed by about 15 assertions of equal breadth. In fact EFG's involvement in the affairs of the Emanuel group appears very similar to that of the other financiers which I recently summarised. There was a difference in extent explained by the fact that EFG had lent larger amounts secured over more properties with more diverse characteristics thus giving rise to more problems.

[392] There is then the pronouncement that EFG:

> 'influenced and directed key operations, strategies and policies of the Emanuel group … including … marketing strategies and the retention and use of EFG's preferred consultants, PRD Realty.'

I have already dealt with the detail of this topic. The appointment of PRD followed Mr Emanuele's dissatisfaction with his previous real estate agents and it was he who suggested he might approach PRD. The footnote to this submission states 'Mr Grier suggested or instigated consultation with PRD Realty and the Emanuel group by and large followed the strategy recommended by PRD.' The plaintiffs ignore the possibility that PRD's recommendation might have been followed because of its intrinsic merit.

[393] Another 'key operation, strategy or policy' directed by EFG was 'sales strategies and decisions about whether Emanuel group properties would or would not be available to the market.'

[394] I have dealt with evidence showing that Mr Emanuele and his son withdrew a number of properties from auction which had been arranged and advertised in defiance of EFG's expressed wish to have them sold. There is also the evidence that Mr Emanuel set reserve prices higher than those advocated by EFG, thereby making sales less likely.

[395] The plaintiffs submit that:

> 'The pattern of Emanuel group's decision making consistently prefer the interests of Foster's and … Mr Emanuele (where that was thought to be consistent with Foster's objectives) at the expense of the Emanuel group as a whole, including Emanuel group creditors other than Foster's. This pattern reflects Foster's close involvement and influence as a directing mind of the Emanuel group; in, for example:-
>
> 2.20.1 The way in which the incentive deed was kept from other creditors;
>
> 2.20.2 The maintenance of high rates of interest to dissuade other creditors;
>
> 2.20.3 The 'splitting' of the Emanuel group property portfolio;
>
> …'

[396] The first two examples are inter-related. They are dealt with in the next section of the reasons under a separate heading, 'Debt Incentive Agreement'. I have concluded that there was no agreement which could have been concealed from other financiers and which reduced the rates of interest charged in the various loan agreements. There was, consequently, no agreement or conduct by which the rate of interest being charged to the Emanuel group was misrepresented to other financiers to dissuade them from taking action under their securities.

[397] The third example, the 'splitting' of the Emanuel group property portfolio provides no support for the thesis for which it is advanced and misstates the evidence. The portfolio was not 'split'. EFG's proposal that it be so treated was rejected by Mr Emanuele, effectively proving he was not 'dancing to EFG's tune'. There was in the end a different treatment of the APM land from the other mortgaged properties but that occurred in 1995 after months of negotiation conducted at arms-length between EFG and the Emanuel group, both of whom were represented in the negotiations by solicitors.

[398] One last point made by the plaintiffs needs to be mentioned. On 16 October 1991 Mr Jaenke wrote to Mr Elliott of Henderson Trout requiring his opinion 'if any action taken by Elders representatives could be taken or inferred or interpreted as acting in a capacity of quasi director of any companies in the Emanuel group.' (Exhibit 60)

Mr Elliott gave his advice by letter of 18 October 1991 (Exhibit 61). Mr Elliott wrote:

> 'On the information provided, being minutes ranging from February 1990 … to September 1991, it would seem that the role of Elders Finance and its officers has been that of a financier seeking regular reports and information as to the … financial position of the borrower and the realisation of assets, the subject of the security … an advisory role has been taken and in some instances there has been an involvement in reaching a decision as to whether a particular offer relating to real estate should be accepted. The officers of Elders have also been involved in the preparation of cash flow predictions and the prioritisation of expenditure.
>
> The financial control … exhibited by the minutes can be clearly related to whether or not funds would be continued and … whether funds would be released from sale proceeds rather than being applied in reduction of the mortgage debt. …
>
> On balance it would seem … that the actions to date would not amount to control but have been legitimate involvement in the monitoring of the borrower's financial position relative to the security position of Elders and the recovery of its debt, rather than extending to the point of controlling the Company.
>
> It would seem that the position may become more difficult as time passes if there are not substantial sales of assets. If this arises care should be taken to ensure that the activities of Elders and its officers does not amount to conduct which crosses the fine line from monitoring to control.'

[399] A further advice on the same topic was sought from Mr Elliott and given by him by letter of 19 February 1992 (Exhibit 13). Mr Elliott wrote:

> 'Clayton Utz has been involved in ongoing documentation in relation to the Emanuel group of companies for and on behalf of Elders and the writer has had the opportunity of revisiting the internal files and

the diary notes of the monthly review meetings held with the directors and employees of the Emanuel group through to January 1992.

The writer has also been involved in 3 meetings with the Directors and employees of the Emanuel group with the Elders representatives. On each occasion it has been clearly stressed … that involvement of Elders representatives … has been in their capacity as … financier and it has been the objective of Elders to support the Emanuel group in continuing in control of its own business and that all decisions in relation to the conduct of the companies within the group are the decisions of the directors …

It may be of assistance to record the following observations:-

1. A commercial decision has been taken by Elders to support the continuation of the Emanuel group, based upon a judgment … that it is in the best interests of Elders in the orderly realisation of its security property, that the marketing … be conducted by the Emanuel group … It is our understanding … that a long association with Mr Emanuele … has established a record and capacity to make sales and profits …

2. To support the commercial decision, proceeds of the sale of timber … which are secured in terms of a mortgage debenture over all the assets and undertaking of Emanuel (No. 14) have been permitted to flow to the Emanuel group … in the normal course of business … Elders has the capacity, by fixing its charge, to collect those moneys. It has been reinforced on a number of occasions that Elders will not make further advances to the Emanuel group and while the security properties are being properly managed by the group, Elders will not exercise its power of sale …'

Mr Elliott concluded:

'In our letter of 18 October we outlined the difficulties of reaching a conclusion as to when the fine line is crossed from a proper exercise of the limited interests of the financier to the position of pseudo Director. After careful assessment and many hours of review, we have reached the conclusion that on balance this fine line has not been crossed …

We express a concern … that as time progresses it will be more difficult to make a judgment upon the action of the Elders representatives particularly in view of the nature of the business of the Emanuel group. If there is a further deterioration in the financial status of the Emanuel group, we form the view that it would be most dangerous to extend the current regime without the imposition of an

> agent for the mortgagee as referred to in our advice of 18 October, 1991.'

[400] In a diary note of 31 August 1992 Mr Elliott recorded that he had discussed with Mr Grier a number of topics including that of pseudo-directors. He:

> '… indicated that (he) was confident on the basis of the information provided by Peter Grier that the fine line … between the proper administration where a mortgagee is exercising power of sale and/or monitoring a default account and the position of directing the company was still able to be defined, however … this line was getting greyer and there was some concern …'

[401] Macquarie Bank Ltd which was retained by EFG early in 1992 to advise it on the best means of realising its assets and/or selling its business also expressed concern. In its report of March 1992 (Exhibit 16, D9/348 at p.31) it reported:

> 'Macquarie Bank is seriously concerned that the actions of Elders executives may be construed as acting as pseudo-directors of Emanuel. Having spoken to Elders executives and read both Henderson Trout's legal advice and the relevant correspondence and minutes … it is believed that the view could be taken that the directors of the borrower may be accustomed to act in accordance with the directions or instructions of the lender.'

It recommended that EFG seek detailed legal advice as to its current legal position with respect to liability.

[402] Mr Elliott's second letter is probably the advice that Macquarie Bank Ltd recommended be obtained. A draft of its report was submitted to EFG some time late in January or early in February 1992 which is likely to have contained the same passage.

[403] The opinions of Mr Elliott and Macquarie Bank Ltd are irrelevant and, indeed, inadmissible, on the point of fact whether EFG by its officers became *de facto* directors of the Emanuel group. Nevertheless the plaintiffs perversely rely upon them to argue that because EFG allowed the Emanuel group to remain in possession of the secured properties it must have become *de facto* director despite the advice that it had not theretofore been such, and the character of its conduct did not alter.

For the reasons I have given I do not believe that to have been the case.

[404] I conclude that the plaintiffs have not made out their case on *de facto* directorship and that the evidence establishes that none of the first, second, third, fourth, ninth or tenth defendants were at any time a director of any of the companies in the Emanuel group.

SECTION III : 1988-1994 Transactions

[405] These transactions fall naturally into two categories because of the statutory provisions which are relied upon to attack them. In the first category are those entered into before 23 June 1993 for which recourse is had to s 120 and s 121 of the *Bankruptcy Act 1966 (Cth)*. The second category is of those which occurred after that date where reliance is placed upon various provisions of part 5.7B of the *Corporations Law*.

[406] Section 120 as it was at times relevant to the action provided:

> '1. A settlement of property, whether made before or after the commencement of this Act, not being –
>
> (a) a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; or
> (b) a settlement made on or for the spouse or children of the settlor …
>
> is, if the settlor becomes a bankrupt and the settlement came into operation after, or within two years before, the commencement of the bankruptcy, void as against the trustee in the bankruptcy.
>
> 2. A settlement of property, whether made before or after the commencement of this Act, not being a settlement referred to in paragraph 1(a) or (b) or a settlement that is void as against a trustee by reason of the operation of that subsection, is, if the settlor becomes a bankrupt and the settlement came into operation after, or within five years before, the commencement of the bankruptcy, void as against the trustee in the bankruptcy, unless the parties claiming under the settlement prove –
>
> (a) that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement; and
> (b) that the settlor's interest in the property passed to the trustee of the settlement or to the donee under the settlement on its execution.
>
> 3. …
>
> 4. …
> 5. …
> 6. …
> 7. …

> 8. In this section, "settlement of property" includes any disposition of property.'

[407] By its terms the section made void as against a trustee in bankruptcy, voluntary settlements, other than of the types described in subsection 1(a) and (b), made within two years of the bankruptcy, and voluntary settlement made within five years of bankruptcy unless the settlor was at the time of the settlement able to pay his debts without the aid of the settled property. A 'settlement' in this context means the divesting of beneficial ownership in property. See *Williams v Lloyd* (1933-1944) 50 CLR 341 at 373. In addition a settlement of property for the purposes of section 120 is a disposition of property which contemplates its retention in some form by the donee rather than immediate consumption or dissipation by the donee. See *re La Rosa and Ors; Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 270; *re Kastropil; Ex parte Official Trustee in Bankruptcy v Kastropil* (1991-1992) 33 FCR 135. No doubt the term is wide enough to accommodate many ways of dealing with property, and a variety of kinds of transactions.

[408] Section 121 provides:

> '(1) Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.
>
> (2) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property.
>
> (3) In this section "disposition of property" includes a mortgage of property or a charge on or in respect of property.'

In *Cannane v. J Cannane Pty Ltd* (1998) 192 CLR 557 Brennan CJ and McHugh J said at 567:

> 'If property be disposed of by sale and the sale price received by the disponor is equal to the true value of the property at the time of the disposition, the creditors have an undepleted fund against which to prove their debts. But if property is sold for an undervalue or is given away, that fact is relevant to the intent to be attributed to the disponor in disposing of the property … Section 121 is not enlivened merely by showing that the disposition has reduced the assets available to the creditors when the disponor is adjudicated bankrupt. It is the disponor's intent to deprive creditors of assets against which (or against the proceeds of which) they would otherwise be entitled to prove their debts that enlivens the operation of section 121. As Dixon CJ said in *Hardie v. Hansen* (105 CLR 451 at 456)

> "The phrase "intent to defraud creditors of a company" suggests that present or future creditors of the company will, if the intent is effectuated, be cheated of their rights."'

[409] Gummow J also referred approvingly to *Hardie*. At 578 his Honour set out the passage from the judgment of Dixon CJ which was referred to in the joint judgment of Brennan CJ and McHugh J but included the following passage:

> 'An intent to defraud creditors has been described, for the purposes of bankruptcy legislation, as an intent by deceit to deprive creditors of something to which they are entitled.'

Gummow J also quoted a passage from the judgment of Kitto J in the same case, saying that the onus lay on a liquidator

> 'to prove affirmatively that the carrying on of the company's business during the relevant 15 months was characterised by an intent – which in the circumstances means an intent on the part of [the director] – to defraud creditors of the company. An actual purpose, consciously pursued, of swindling creditors out of their money had to be established against [the director] before a declaration under the section could be made.' (105 CLR at 463; 192 CLR at 578)

[410] Section 451 of the *Companies Code* provided

> 'A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, by a company that, if it had been made or incurred by a natural person, would, in the event of his becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound up, void as against the liquidator.'

[411] Between 1 January 1991 and 23 June 1993 the relevant statutory provision was s 565 of the *Corporations Law* which was in identical terms to s 451 of the Code.

[412] Another matter should be mentioned. These proceedings were commenced when the *Corporations Law* was the applicable legislation but, by virtue of s 1383 of the *Corporations Act 2001* the proceedings are taken to be new and to have been brought into the court exercising federal jurisdiction under the provisions of the new legislation that corresponds to the relevant provisions of the *Corporations Law*.

Deed of Master Agreement

[413] The primary loan agreement governing the advance for the acquisition of the APM lands is a Deed of Master Agreement of 12 June 1987 (Exhibit 106, Volume 14/1351). It is not one of the transactions which the plaintiffs attack but it is relevant to set out its salient terms because they are relevant to other transactions which are attacked.

[414] The deed was made between the fourth defendant (then known as Arrow Properties Pty Ltd) which was described as mortgagee, Management which was described as

mortgagor, and Mr & Mrs Emanuele, Emanuel 14, PBRS, Paterson, Giuseppe Nominees, Lonsdale Stage 2, Emanuel Properties, Emanuel 4, Meka Securities, Rundle Mall, Grangeville, Villa-Cairns and Cofordo 251, all of which were described as guarantors. It will be remembered that the APM lands were purchased by Emanuel 14 pursuant to a contract with APM Forests Pty Ltd dated 9 May 1986. Settlement occurred on 12 June 1987. The deed recited that Management had requested the fourth defendant to agree to make advances from time to time, which it had agreed to do as long as the amount outstanding at any one time did not exceed the agreed limit of $43,000,000. There was a further recital that Management might in the future request further advances in excess of that limit.

[415] By Clause 2, Management acknowledged receipt of the initial advance of $43,000,000 which it undertook to repay in accordance with the terms of the deed. By Clause 3 the fourth defendant agreed, upon application by Management and subject to Clause 3(b), to make an additional advance if the amount of moneys secured by the deed would not exceed the agreed limit of $43,000,000 and on the condition that Management had at all times complied with and observed the terms and conditions of the deed.

[416] By Clause 4 Management was allowed to apply for, and the fourth defendant agreed ‘in its discretion’ to make further advances which it was not obliged to make pursuant to Clause 3. By Clause 5 Management covenanted to repay the whole of the moneys secured by the deed at the expiration of the fixed period (which was four months) and to pay any further advance in accordance with any written agreement ‘in respect of the same or in the absence of any such agreement … on demand …’.

[417] There was a definition of what moneys were secured by the deed. It included an ‘all moneys’ clause:

> ‘All moneys now or hereafter owing or payable to the mortgagee by the mortgagor or any related corporation of the mortgagor within the meaning of the Companies … Code either alone or in conjunction with any other person whether directly or indirectly or contingently under this agreement or on any other account whatsoever including (without limitation) all costs, charges and expenses the mortgagee may incur or become liable for in connection with this agreement or any security.’

[418] By a combination of Clauses 5(d) and 12 Management promised to pay interest on the advance at 18.25 per cent per annum if payments were made punctually but 20.25 per cent otherwise. The interest was to be ‘capitalised and compounded on monthly rests and (to) form part of the principal sum and shall be paid on the date for payment of the principal sum.’

[419] By Clause 14 Management agreed to pay, in addition to all other moneys payable pursuant to the deed, a further sum of $2,000,000 provided that if the principal sum were repaid within four months that figure should be reduced to $1,000,000.

[420] By Clause 11 the guarantors ‘in consideration of the mortgagee at the request of the guarantors agreeing to enter into this agreement … jointly and each of them

severally … unconditionally and irrevocably guaranteed to the mortgagee the due and punctual payment by the mortgagor … of the moneys … secured …'

[421] To secure the advance Emanuel 14 gave a first registered mortgage over the individual parcels of land which collectively have been called the APM lands. A description of them can be found in Exhibit 106, Volume 14/1356. In addition Emanuel 14 executed a mortgage debenture (Exhibit 106, Volume 14/1357) in favour of the fourth defendant which charged with the payment of all money secured by the mortgage debenture:

> 'All and singular its undertaking and all its property and assets real and personal whatsoever and wheresoever both present and future … or any business carried on now or hereinafter … its goodwill, its business name, its leases and tenancies and unsold shares and uncalled capital … and all present and future cash in hand, credit balances, book debts and other debts (both present and future) and, choses in action … all … motor … vehicles, stock-in-trade, building, erections, plant, machinery, equipment, installations … and all other contracts, mortgages, deeds, certificates of title … and all the rights and benefits of the mortgagor … into and under all contracts whatsoever now or at any time hereafter entered into by the mortgagor … including the interest … of the mortgagor in all moneys from time to time now or hereafter payable thereunder …'

[422] By Clause 8 the charge thereby created was to be a first charge on the mortgaged premises and was to operate as a fixed and specific charge as regards all stands of timber and trees including felled trees and logs, (Schedule 7), but a floating charge as regards all other property and assets. By Clause 9 the fourth defendant could at any time by written notice convert the floating charge into a fixed one with respect to all or any part of the charged property.

[423] It was pursuant to this mortgage debenture that the fourth defendant had a charge over the timber growing on the APM lands once it had been felled and so severed from the realty, as well as a charge over the payments made by Softwoods pursuant to its harvest and royalty agreement with Emanuel 14.

[424] The real mortgage property is found in Exhibit 106, Volume 15/1359.

Deed of Variation - 2 September 1988

[425] The first transaction which is the subject of attack is a Deed of Variation dated 2 September 1988 (Exhibit 106, Volume 15/1362) made between the same parties as the Deed of Master Agreement. The operative part of the Deed of Variation is to delete Clause 4 of the earlier deed and replace it 'by the following':

> '4(a) The Mortgagor may apply for and the Mortgagee may at its sole and absolute discretion make further advances and/or readvances … which it is not obliged to make pursuant to Clause 3. Each further advance and/or readvance (if any) shall be secured by each security and any security collateral hereto and shall be subject to the terms and conditions of this Agreement … Any performance bond or guarantee

> given by the Mortgagee to any local authority … on behalf of the Mortgagor shall be deemed to be a further advance hereunder.
>
> (b) Notwithstanding the provisions of Clause 4(a) … the aggregate of the moneys advanced … shall not exceed the amount of the Agreed Limit …'

[426] The plaintiffs say of this transaction in their submission:

> '(iv) It provided for a profit fee of $2,000,000 …
> (v) It was a disposition of property (which includes a mortgage or charge …)
> (vi) It was made with intent to defraud creditors … because it involved a "subtraction of assets which, but for the impugned disposition, would be available to meet the claims of present and future creditors", the Emanuel group knowing that Lensworth was being preferred
> (vii) It was made in favour of Lensworth, who was not acting in good faith …
> (ix) It is a particular of duress and unconscionability and/or undue influence because … these securities were merely required by Fosters … from an insolvent Emanuel group … led by directors who thought themselves to be in no position to refuse Fosters' requests …'

[427] The authority for proposition (iv) is Exhibit 1, Mr Macks' statement, annexure 21.16 and the plaintiffs' own opening. The proposition is wrong insofar as it relates to the deed which does not provide for a profit fee or indeed any payment by the Emanuel group.

The authority for proposition (v) is said to be the plaintiffs' own opening and some paragraphs in the statement of claim. This proposition, too, is wrong. The deed does not, as I read it, dispose of any property. It only varies in a minor particular the objects on which the advance provided for by the deed of master agreement may be used.

The authority for proposition (vi), the serious submission that the transaction was made with intent to defraud creditors has as its authority no reference to evidence but only to the judgment of the High Court in *Cannane*.

The authority for proposition (vii) is not any part of the evidence but the dissenting judgment of Kirby J in *Cannane*.

The authority for proposition (ix) are paragraphs in the statement of claim and in the plaintiffs' own opening.

[428] It is unsatisfactory that the court should be asked to deal with claims of the utmost seriousness having enormous financial consequences for the parties on the basis of submissions made in reliance only on the plaintiffs own assertions and not by reference to evidence. I fear that the plaintiffs' conviction in the justice of their cause has lead them to assume what they had the burden of proving. One hesitates to rely upon submissions, whether of fact or of law, made by the plaintiffs.

[429] The terms of the Deed of Variation other than Clause (4) do not appear to be of any moment. This transaction was not, as far as I can recall, referred to at all in the oral testimony. This is, perhaps, surprising given that the transaction is attacked in the statement of claim on the grounds of duress, unconscionability, undue influence, breaches of fiduciary and statutory duty by EFG as *de facto* director of the Emanuel group and knowing participating by EFG in a breach of fiduciary duty by the Emanuele family directors. Being unsupported by evidence these grounds for challenge may be disregarded. Some of them are met by my findings that EFG did not become a *de facto* director of the Emanuel group.

[430] The plaintiffs' real point seems to be that the transaction was a fraudulent disposition of property which is voidable against the liquidator pursuant to s 121 of the *Bankruptcy Act*.

[431] For the section to be applicable there must be evidence of an intent, on the part of the person disposing of property, to defraud that person's creditors. Apart from the complete lack of evidence of any such fraudulent intention the deed did not itself dispose of any property or evidence the disposal of any property. The complaint seems to be that the deed contemplated that the fourth defendant might make payments to local authorities or other government bodies of performance bonds or the like at a time when Management was insolvent. But no money changed hands pursuant to the deed. Whether further advances or readvances or the payment of performance bonds were made was a matter of discretion for the fourth defendant. It was not obliged by the Deed of Variation to make any such payment. Moreover the deed did not increase the limit of the advance which might be made pursuant to the earlier deed. That deed, in any event, provided that further advances might be made even in excess of the agreed limit.

[432] The plaintiffs rely upon *World Expo Park Pty Ltd v. EFG Australia Ltd* (1995) 129 ALR 685 for the proposition that a transaction will be treated as fraudulent irrespective of the presence or absence of an actual fraudulent intention if the result of the dealing is to put property beyond the reach of creditors. This reliance appears misplaced. It was that view which was adopted by the full Federal Court in *Cannane*, (1996) 65 FCR 453. It was on that point that the High Court reversed the Federal Court and, as shown by the passages I have quoted, insisted upon the existence of an actual dishonest intention before the section can operate. Although the decision of *World Expo Park* does not appear to have been adversely commented upon by the High Court, its approach is inconsistent with the majority reasoning of the High Court in *Cannane* and must be taken to have been rejected.

[433] The attack on this deed is without substance.

[434] The plaintiffs include in their attack on the deed of 2 September 1988 an assault upon a transaction evidenced by a letter of 26 September 1988 (Exhibit 106 15/1363) from EFG to Management which was signed by those two parties as well as all the guarantors to the Deed of Master Agreement. The plaintiffs' submissions in relation to the deed of 2 September 1988 proceed as though it incorporated the terms of the letter of 26 September 1988. There appears to be no justification for this treatment of the deed and the letter. There is a reference to the deed in the letter the terms of which indicate that the transactions in each transaction are separate and distinct. There is, obviously, no reference to the letter in the (earlier) deed. As far as I can recall there was no evidence at all from any witness which might link the

two transactions so as to make them one. The deed was not, as far as I can see, referred to at all. The letter was referred to in very brief terms and in passing by Mr MacDonald (T.7250.40) and Mr Grier (T.7366.5).

[435] The letter extended the terms of the loan made in June 1987. That, it will be recalled, was for four months only and was not repaid at the expiration of that term. The letter of 26 September 1988 was the first formal extension of the loan. The letter read, in part,

> '… the (fourth defendant) is pleased to extend and vary your loan in accordance with your joint and several requests … on the following terms and in consideration of the following special conditions:-
>
> Mortgagors: … Management
> Guarantors: … Emanuel 4 … Emanuel 14 …
> Total Amount of Loan: $43,000,000
> Amount of Rearrangement/Loan: $43,000,000 being the amount secured or to be secured by the securities referred to hereunder.
> Balance: $53,823,964.15 as at 12 September 1988
> Interest rate: 18.25% per annum simple on monthly balance outstanding reducible to 16.25% per annum in accordance with the terms of the security (variable by notice).
> Term of Loan Extension: 12 months … to 12 June 1989
> Instalments: Monthly instalments of interest only will be calculated on the invoice sent to you each month.
> Security:
> (a) Existing Master Mortgage Agreement dated the 12th day of June 1987 and Deed of Variation dated the 2nd day of September 1988.
> (b) All bills of mortgage given by the mortgagee and guarantors …
> (c) Mortgage debenture given by Emanuel 14
> (d) Bill of Mortgage …
> (e) Additional: written acceptance of the amended terms of the loan …
>
> Special Conditions:
> In consideration of (the fourth defendant) agreeing to this extension the borrower agrees to pay … a profit share fee of an additional $2,000,000 making a total fee of $4,000,000 no later than the expiry of the extended term provided that the fee shall be reduced by $166,666.66 … for each full month of payment in full before 12 June 1989 …'

[436] The real basis for the plaintiffs' complaint about the letter is the 'imposition' of the further profit fee of $2,000,000. I deal with this complaint later in the section of the reasons when considering the topic of profit fees. For the reasons given there I consider there is no substance in the complaint about the fee charged by the fourth defendant for extending the loan in September 1988. For a start it cannot be an unfair loan because it pre-dates the enactment of Part 5.7B of the *Corporations Law*. Equally importantly one can see, even in the absence of any evidence adduced by the parties in respect of the transaction, reasons why the profit

should not be regarded as extortionate. It was the price Management and Emanuel 14 had to pay to avoid the loan becoming overdue and immediately repayable. The initial term was short indicating Mr Emanuele's confidence that his Chinese co-venturer would provide sufficient capital as notional loan funds to repay EFG. The fee, though substantial, reflected the risk to the lender that the borrower might not be able to repay on time or in full. The risk had taken on a new dimension with the failure of the joint venture. The fee would be reduced substantially should Mr Emanuele find a replacement for the co-venturer, or effect a sale of the land or find another financier on better terms.

[437] As I say, I discuss these points in more detail when dealing later with the question of profit fees and interest. The only statutory bases for attacking the transaction is found in the *Bankruptcy Act* which do not assist the plaintiffs. The payment of the fee was not a settlement and there is no evidence of an intent to cheat or defraud creditors.

Indenture and Guarantee - 16 January 1990

[438] The next transaction attacked is an Indenture and Guarantee dated 16 January 1990 (Exhibit 106, Volume 15/1364) which is attacked on the same bases as the first transaction. The plaintiffs' submissions are substantially the same. The indenture was made between Addstone, Antlia, Centaurus, Cloudland Investments, Cofordo 260, Derwentwater, Emanuel 7, Lascivious, Leominor, Livilla, Saroon, Segacious, and Woodville Industrial Park. The purpose of the indenture appears to have been to add those companies to the number of guarantors to the initial Deed of Master Agreement. It recites that those additional guarantors had requested the fourth defendant to lend to Management the sum of $43,000,000 on the terms set out in the Deed of Master Agreement. The additional guarantors guaranteed 'the payment by (Management) to (the fourth defendant) of any or all money payable by Management' under the agreement.

[439] The plaintiffs submit that the indenture does not purport to make any new advance and that it wrongly provided that the guarantors had requested the fourth defendant to lend $43,000,000, because that advance had been made two years earlier. The complaint is that additional companies became liable as guarantors for an existing debt. However the evidence does establish that the guarantee was given at a time when the Emanuel group sought and was granted an additional advance of $2,500,000. This is conceded by the plaintiffs at T.1944.20-.30. Exhibit 137 is a memorandum from Mr MacDonald to Mr Crosby of 16 October 1989 summarising the Emanuel group's financial position and noting that it had applied for $2,500,000 of working capital which Mr MacDonald recommended.

[440] Earlier in the year EFG had sought advice from Mylonas & Associates about the state of their security documentation. By letter of 22 May 1989 Mylonas & Associates advised:

> '… It is apparent that all securities held can no longer be relied on to secure all loans.
>
> The result of the use of the "all accounts" clause in each bill of mortgage is that any bill of mortgage given by a registered proprietor will secure any loan to which that registered proprietor is a party

> either as borrower or guarantor. Thus in a group that is expanding by the use of new companies as owners of land there is a real danger that loans in existence before the use of these new companies would not have been guaranteed by them … To overcome this problem … we recommend that all loans to the (Emanuel) group:-
>
> (a) Be consolidated …
> (b) That each company in the group be made a party to each consolidation either as borrower or guarantor. …'

Mr Jaenke replied to Mylonas in a letter of 22 December 1989 saying that:

> 'In order to ensure our loans are fully cross-secured and due to the changing structure of Emanuel companies since our first loan documentation, we require all accounts to be guaranteed by all the other companies in the group … To achieve this we list below the principle documentation for each loan along with the principal amount …'

[441] The inclusion of the additional guarantors by the indenture of 16 January 1990 would seem to reflect the advice from Mylonas. There was evidence from Mr Morphett that it was common for financiers to improve their security position by cross-collateralisation by guarantors and other obligors when extending loans or making fresh advances. Speaking of an occasion when Esanda extended a loan on 4 October 1991 Mr Morphett was referred to a term of the approval (T.5204.5-.35):

> 'This is a letter of 4 October 1991 extending the Giuseppe Nominees facility … to 30 April 1992 … Additional security including guarantees by companies which were not already tied to this advance. Is that right? – That's correct.
>
> … An acknowledgment that all securities would be interlocking and so on? – Correct.
>
> … You indicated that "the abovementioned securities will be in a form that is cross-collateralised both as regards to the borrowers and as regards all the companies that are within the ANZ, Esanda … group"? – Correct.
>
> So you were taking the opportunity while you were extending the loan to improve so far as you could your security position for the loan? – Correct.
>
> And as far as the cross-collateralisation goes that was something you tried to do in the ordinary course of your business wherever you could? – Correct.'

[442] The only oral testimony touching the transaction came from Mr Crosby who could not recall anything about it.

[443] The essence of the plaintiffs' complaint seems to be the addition of the further guarantors for no reciprocal benefit to the Emanuel group. The consideration was

probably the further advance of $2,500,000 but whether that be correct or not the guarantors added to this indenture were already bound by existing deeds in respect of the liability they undertook by the new indenture.

By a 'Primary Loan Deed' dated 7 April 1989 (part of Exhibit 476) Management agreed to borrow $2,000,000 from Elders Finance Ltd, the second defendant, on terms set out in the deed. Management's obligations were guaranteed by all of the Emanuel group of companies save for Lascivious. By Clause 5(a) Management covenanted with the second defendant to repay the whole of 'the moneys hereby secured …'. By Clause 5(c) Management covenanted to pay 'any other moneys forming part of the moneys hereby secured … in accordance with any written agreement between the borrower and the lender …' By Clause 11 each of the guarantors jointly, severally, unconditionally and irrevocably guaranteed the due and punctual payment of 'the moneys hereby secured.' That term was defined to include:

> 'All moneys now or hereafter owing or payable to the lender by the borrower (or any related corporation of the borrower within the meaning of the Companies … Code) … under this agreement or on any other account whatsoever …'

The guarantors were therefore liable for the debts of Management to the second defendant whether payable pursuant to that agreement or any other.

[444] By another Primary Loan Deed made on 2 June 1989 between Management as borrower, Lascivious as mortgagor and all the other companies in the Emanuel group as guarantors, Management borrowed $630,000 from the second defendant on terms and conditions set out in the deed. It is in similar terms to the deed of 7 April 1989 with the exception that by clause 6 Lascivious covenanted to give a first registered bill of mortgage over specified real estate to secure payment by Management of all moneys which were 'from time to time owing by the borrower …'

[445] A further Primary Loan Deed on 20 August 1990 is in relatively identical terms to the deed of 2 June 1989 save that Lascivious appears as guarantor rather than mortgagor. Two other guarantors, Airlie Bay Developments and Antlia provided security by way of real property mortgage to secure their guarantees.

[446] By Deed of Master Loan Agreement made 9 June 1988 Management borrowed $5,500,000 from the fourth defendant in terms identical to those appearing in the other primary loan deed, that of 7 April 1989. In this deed, too, all members of the Emanuel group apart from Lascivious (and Management which was the borrower) guaranteed Management's promises to repay the sums as defined in the deed.

[447] The result is that by the two Deeds of Master Loan Agreement all of the Emanuel group save for Lascivious were liable to pay all debts of Management on any account and pursuant to any agreement to the fourth defendant. By the Primary Loan Deeds of 2 June 1989 and 20 August 1990 all of the Emanuel group of companies were liable to pay all debts of Management on any account and pursuant to any agreement to the second defendant. None of the Primary Loan Deeds or Deeds of Master Loan Agreement are impugned in any way in these proceedings. The only additional obligation obtained by the 16 January 1990 guarantee is that of

Lascivious which became liable for the debts of Management to the fourth defendant as well as to Elders Finance Ltd. With that exception the obligations on the Emanuel group as guarantors provided in the indenture and guarantee of 16 January 1990 were already in existence and those guarantors would have been liable for the debts of Management whether or not they became parties to the indenture and guarantee.

[448] The indenture did not effect a settlement of property. The challenge based upon s 121 also fails. There is no basis for inferring an intent to defraud creditors. Rather the explanation for the deed appears the ordinary practice of bankers when making fresh advances. There is no need to search for a sinister motive. Moreover the indenture does not dispose of any property. The parties to the indenture assume a personal contingent liability but that is not a disposition of property.

[449] The attack on this document too, is fanciful.

Deed of Variation - 4 May 1990

[450] The next transaction is dated 4 May 1990 and is another Deed of Variation between the fourth defendant, Management and the guarantors, including those who had been added on 16 January 1990 (Exhibit 106, Volume 15/1365). This deed varied the Deed of Master Agreement by adding to Clause 4(b) a proviso

> '… that the Mortgagee may at its discretion and as from 11 March 1990 make advances for the purpose of meeting working capital requirements of the Mortgagor or paying interest on moneys due by the Mortgagor which advances together with any interest which the mortgagee may permit the Mortgagor to capitalise hereunder shall not exceed in the aggregate the sum of $10,000,000.00'

[451] By Clause 12 the mortgagee might, at its absolute discretion, permit the mortgagor to capitalise interest payable under the Deed of Master Agreement 'for such a period and at such times as the mortgagee may at its discretion agree …'. By Clause 2 of the Deed Management agreed to pay to the fourth defendant a fee of $6,000,000 'at such a time or times as the mortgagee may demand but … no later than 31 March 1991 provided that if the mortgagor pays the mortgagee the whole of the moneys hereby secured … prior to 1 March 1991 the amount of such fee shall be reduced by … $500,000 for each whole month following such payment commencing on the first … of the month following such payment and expiring on 31 March 1991 provided further that the amount of such reduction shall not exceed … $2,000,000.'

[452] The plaintiffs' attack on this transaction again relies principally upon s 120 and s 121 of the *Bankruptcy Act* 'insofar as it imposed the $6,000,000 fee, it being a fee imposed on an advance which was inadequate to render solvent the insolvent (plaintiffs), the full payment of which was inevitable in that there was no realistic prospect of its diminution by reason of earlier repayment of the loan …'

[453] To incur an obligation to pay a fee as the price of obtaining further advances of working capital which the plaintiffs desperately needed if they were to remain in business and effect sales of their assets does not appear to be a settlement of property for the purposes of s 120. There is no reason to think that EFG was to retain the fee, if it were paid. It would have been dissipated as part of ordinary

revenue. The agreement to pay the fee (it was never paid) is probably not a disposition of property for the purposes of s 121. There is nothing in the evidence to support an inference that it was intended to defraud Management's creditors. There is no evidence from anyone as to the state of mind of those directing Management with respect to the agreement, but it seems a safe inference that Management needed money and the best terms on which it could be obtained were those offered by EFG, which, it is true, drove a hard bargain. The acceptance of the offer was the price Management had to pay to borrow the further, desperately needed, working capital. I would have thought it likely that Mr Emanuele intended by the transaction to obtain money which would enable his companies to survive and prosper and thereby to eventually pay their creditors rather than to defraud them. Whether there is sufficient evidence to draw the inference or not it is the fact that there is no evidence that he agreed to pay the fee so as to defraud creditors. Moreover this transaction occurred at about the time the Molinara sale was being negotiated. It was hoped that this sale would overcome the plaintiffs' financial difficulties. Mr Emanuele was keen for his companies to survive long enough for that happy outcome to be realised.

[454] The first defendants advance several reasons in their submissions why the fee should not be regarded as excessive.

The fee was not referrable only to the further advance of $10,000,000. It was, according to Mr MacDonald, imposed in part because of EFG's past financial support for the Emanuel group and its intended future support. EFG had lent altogether in excess of $100,000,000. Mr MacDonald explained that the advance, and the proposed fee, had been discussed between him, Mr Crosby and Mr Emanuele and that:

> '… It was understood that the only way this facility was ever going to have a chance was if it was priced in a way that gave the Elders credit committee an incentive to make another advance of this nature … We deemed it attributable in exchange for the group advancing $10,000,000 on what was already advanced of some hundred … plus million dollars so … in the context of that exposure and ongoing support we were all relatively relaxed … about the future prospects … of sales being able to cover the debt …' (T.7012.40-7013.4)

Mr MacDonald is a witness whose evidence I accepted. He does not appear to have been cross-examined on this part of his evidence in chief.

[455] The extent of anticipated future support was not limited to the advance of $10,000,000. In addition EFG proposed to have allowed payment to the Emanuel group of another $18,000,000 by way of release of the proceeds of sale of properties which were mortgaged to EFG. See Exhibit 421, Volume 13 – the cash flow statement for 5 April 1990 enclosed with Mr Grier's memorandum of 9 April 1990 and the evidence of Mr MacDonald at T.7016.5-.20.

[456] The size of the fee reflected, in addition, the amount of profit it was anticipated Emanuel 14 would make from sales of the APM land. The reasoning appears in a memorandum to the Board of Credit Committee of EFG dated 7 March 1990 from Mr Crosby and Mr MacDonald which recommended the loan, and the fee. They wrote (Exhibit 421, Volume 12):

> 'With respect to the future strategy of the portfolio, Emanuel [*sic*] intends to continue his gradual development and sales program of certain parcels. So far land of a total value of $43.8m (or 13.6% of the original land area) has been sold. $23m sales proceeds have already been received. The future program is for sales of another $29.5m (approximately 9% of the land area) in 1990, $3m (or 10% of the land area) in 1991, $31m (approximately 10% of the land area) in 1992 and $18.5m (or 6% of the land area) in 1993. The total value of sales budgeted is therefore $155.8m and Emanuel estimates the valuation of the balance area unsold to be $166m (51% of the original land area).
>
> The sales to date indicate that Emnauel has bought very well. Our current valuation of $104m is conservative … compared to the sales achieved for individual parcels to date. The sales targets indicated are subject to the confirmation of an orderly marketing program over at least four years. The track record of sales over the last three years would suggest that Emanuele is capable of achieving his target.
>
> This application proposes to advance … an additional $10m on a progressive basis to a maximum of $77m. The funds would be used to meet the operating expenses of the group over the next six-twelve months until cash is generated from the sales receipts …'

[457] The next consideration advanced by the first defendants is that the fee reflected the fact that EFG was in the process of winding up its business and liquidating its assets. It was no longer in the business of money lending. The fee was the price charged by EFG for this disruption to its own realisation program.

[458] There was, from EFG's point of view, a good case to be made out for the profit share, or fee, of $6,000,000. The APM lands had cost $48,000,000 which had been entirely funded by EFG. There was a recognised element of risk in the loan (see Mr Crosby's memorandum of 15 May 1987, Exhibit 421, Volume 6) but Mr Emanuele had been able to sell 13 per cent of the land for about half the total price, $23,000,000. Anticipated sales of the next 38 per cent were expected to realise another $112,000,000. EFG saw the fee as 'an excellent opportunity to gain additional value from (its) exposure … not by simply lending more money at a narrow margin but … engaging in … profit sharing arrangements …' (T.2004.30-.45)

According to Mr MacDonald Mr Emanuele was prepared to pay the fee in return for an advance of a sufficient sum to enable him to conduct the operations of his company for about a year without having to make frequent requests to EFG to cover particular items of expenditure. See T.7012.10-.30 (MacDonald).

[459] The plaintiffs contend that to agree to the fee was a breach by the Emanuele family directors of their fiduciary and statutory duties to their companies and that EFG, by its officers, was aware of and participated in the breaches. Although they asked for findings along these lines the plaintiffs led no evidence in support of them and it is not sensible to entertain the argument. I deal in the next section of the judgment with the principles relevant to the statutory duties of honesty and diligence and the fiduciary duty of acting honestly in the best interests of the company. The courts, as

I point out, are reluctant to substitute their own views about matters calling for business judgment for that of directors of the companies transacting of business. I can see, as I have explained, why the directors of the Emanuel group would agree to pay the fee, in accordance with sound business judgment.

[460] There is no evidence that the agreement of the Emanuel group to pay the fee in return for the further advance was a result of duress, unconscionability or undue influence.

[461] I do not understand the express basis for the attack on this transaction, namely that the fee was imposed on an advance which was inadequate to render solvent the insolvent plaintiffs. The further advance was agreed to on the basis that it would provide sufficient funds to enable the Emanuel group to continue in business, i.e. paying debts as they fell due for a period of between six and twelve months by which time it was hoped that further sales would have alleviated their liquidity problem. The advance was intended to provide solvency to the group.

[462] But if the matter were otherwise and the plaintiffs assertion were factually correct I cannot see how it would make s 120 or s 121 applicable. If the plaintiffs intend to make a case that EFG was a party to a fraud by the Emanuel group on its creditors the case would fail because no such fraud had been shown. Indeed it would be impossible to show that by borrowing money for the purpose of paying creditors and in continuing in business the Emanuel group was intending to defraud its creditors.

[463] I have found that the Emanuel group was insolvent from July 1988 onwards but it does not follow that their continued business operations were intended to defraud creditors. On the contrary I would think it most likely that Mr Emanuele believed that, given time, he would effect sales and restore his companies to both solvency and profitability. Moreover there is no convincing evidence that EFG, by its officers, knew that the Emanuel group was insolvent. I do not intend to review the evidence with any particularity but I would find, if it were necessary, that EFG believed that it was making sufficient funds available to the Emanuel group to allow it to continue in business which would include paying their creditors. Mr MacDonald gave express evidence to that effect (T.7231.50-.60). The whole rationale for the frequent further advances made by EFG to the Emanuel group was to allow it to continue in business so as to effect sales and reduce its debt to EFG. I suspect EFG's officers did not turn their minds to the particular requirement that debts be paid on time but they were aware that companies like the Emanuel group had a 'lumpy cash flow' because income depended upon sales, and they expected that those who dealt with the Emanuel group would also appreciate that fact and be prepared to wait until proceeds of sales became available. There is not on the evidence any basis for concluding that EFG knew of, or took part in, a fraud by the Emanuel group on its creditors by remaining in business.

Indenture - 4 September 1990

[464] The next transaction attacked is an Indenture of 4 September 1990 (Exhibit 106, Volume 15/1366) which, by Clause 15, was made 'collateral to and … (was) intended to secure all moneys now or hereafter secured by the documents' identified in the fifth appendix to the Indenture. They included the Deed of Master Agreement and its variation of 2 September 1988, the extension agreement of

26 September 1988 and the variation of 4 May 1990. The operative clause appears to be 1, which provided:

> 'The Mortgagee may at its absolute discretion lend advance and provide to the Mortgagor the principal sum in such amount or amounts and at such time or times as the Mortgagor shall from time to time request provided always that the Mortgagee may at any time or times and without assigning any reason … decline to lend and advance any amount … so requested … unless otherwise agreed … and subject to … Clause 5, the Mortgagor shall repay the whole of the principal sum on or before (31 March 1991)'.

[465] Interest was fixed at 22.5 per cent per annum reducible to 20.5 per cent per annum if payment were made promptly.

[466] The effect of the agreement appears to have been twofold. The first effect was to remove the limit on the amount which might be advanced to Management, $43,000,000, without committing the fourth defendant to lend any amount. Whether further advances were made were left entirely to the discretion of the fourth defendant. The second effect was to cross-collateralise the obligations of all the Emanuel group companies to Lensworth (the fourth defendant) and any related corporation of the fourth defendant's. This result was brought about by the definition in clause 27(b) of 'mortgagee' to 'mean and include any corporation which is a related corporation of the mortgagee within the meaning of … the Companies … Code.' And by clause 27(h)(xii) which defined 'principal sum' to include:

> 'All moneys now or hereafter to become owing or payable to the mortgagee on any account whatsoever by any corporation which is a related corporation to the mortgagor within the meaning of the term as defined in the Companies … Code.'

[467] To the extent that the complaint is that the deed had the effect of making each of the Emanuel group of companies liable for debts of any of them to any EFG company it is met by the point that collateralisation of obligations had already been achieved by the primary loan deeds and Deed of Master Loan Agreement of 7 April 1989, 2 June 1989, 20 August 1990 and 9 June 1988, considered when discussing the attack on the guarantee of 16 January 1990. Those four deeds are not challenged in these proceedings.

A perusal of the loan documentation will show that for the relevant period the EFG lenders to the Emanuel group had been the second and fourth defendants. Later the third defendant became a creditor of the Emanuel group by assignment from the fourth defendant of the loans and security instruments pursuant to which the fourth defendant had made advances to Management. The assignment was by deed of 11 April 1991 (Exhibit 106 16/1354). The explanation for the assignment was given by Mr O'Grady (T.8170.30-.40). It followed the suspension of interest on the Emanuel group account. Because of prudential requirements the loans could not appear in the balance sheet of the fourth defendant. The assignment did not result in any increase in the debt of any of the Emanuel group of companies. Nor did the debt of any such company increase by virtue of the 4 September 1990 deed.

Further advances made to the Emanuel group pursuant to this further deed were not settlements of property *by* the Emanuel group or dispositions of property by the group. No doubt upon receipt of the advance the companies owed a further debt but that liability was offset by the amount of the advance.

[468] This deed is attacked pursuant to s. 120 and s. 121 of the *Bankruptcy Act* 'on the ground that it charged the assets of Emanuel companies for improper purposes, namely the continuation of insolvent trading.' A more relevant analysis might have considered whether the indenture was a settlement for the purposes of s 120 or a fraudulent disposition of property by Management for the purpose of s 121. It does not appear to have been either. It disposed of no property and it did not charge any assets that were not already the subject of mortgages or mortgage debentures effected by earlier securities.

[469] The deed was apparently executed in contemplation of a further advance of $3,100,000 to enable the Emanuel group to pay out some mortgages and to complete the purchase of a property. Mr Grier's memorandum of 20 August 1990 (Exhibit 421, Volume 14) contains the reference. See also Mr MacDonald's statement, Exhibit 434 para 499. At the time the sale of Parcel 53 to Molinara was on foot and the proceeds were anticipated to restore the Emanuel group's fortunes.

Messrs Crosby and MacDonald reported to Mr Biggins, chairman of Ramco, in a memorandum of 29 August 1990: (Exhibit 421, Volume 14)

> 'The Emanuel group's borrowings are currently … $117.724m which … represents a 78.7% advance.
>
> Of these balances $79.100m relates to the APM securities … Virtually all loans are cross-secured.
>
> We have undertaken a review of the Emanuel group's … current financial position and in particular its cash flow requirements to November 30th.
>
> Cash from known sales for the period will yield $12.05m and outgoings are $10.6m… Other sales not due for settlement until after November are considerable.
>
> Apart from the sales referred to above we are encouraged that Emanuele is continuing to receive excellent inquiries on major parcels … Negotiations are currently underway on parcel 64 and 8 totalling approximately $30m. Our debt on these parcels is $16m.
>
> CSR has now successfully obtained an export licence for wood chipping and harvesting of the trees … is now to commence in earnest. Emanuele's cash flow from royalties will be at least $3m per annum.
>
> However the most important sale currently being brought to … contract stage … is the sale of land on Bribie Island to a Japanese purchaser for $105m. … Consultants acting for both Emanuele and

> the purchaser are confident that FIRB approval can be obtained. Our mortgage is $20m.
>
> The combination of this sale together with other … sales … should ensure the group’s financial position. However we must acknowledge that conditions have to be met for settlements to proceed.
>
> In the meantime … we estimate that although total sales revenue should exceed total outgoings in the next few months we have nevertheless identified periods when settlements will not match cash flow requirements.
>
> We believe that it is unwise to risk precipitous action from other creditors in the short term and see a distinct advantage in Emanuele being able to continue trading from an apparent position of strength.
>
> It is therefore recommended that Management be given discretion to make temporary advances … up to $4m to meet commitments …’

[470] Mr MacDonald’s evidence was that he anticipated that the further advances would be repaid (T.7022.55). He was not cross-examined about his assessment. That apart the document clearly explains EFG’s reason for making the further advance. It was to enable the Emanuel group to carry on business in the expectation that very substantial sales would be made in the near future. It is a complete answer to any assertion that the advance was intended to defraud creditors even if the terms of the deed in question gave scope for the operation of s 120 and s 121. They do not.

Profit Fees

[471] The plaintiffs next focus upon the imposition, on four separate occasions, of profit fees, the liability to pay which was incurred when loans were made. $2,000,000 became payable on 21 December 1988; a further $2,000,000 on 30 June 1989; $1,000,000 on 31 December 1989 and the $6,000,000 already mentioned on 12 January 1991.

[472] The plaintiffs seek an order ‘avoiding these “profit fees” on two bases: one as unfair loans pursuant to s 588FD and s 588FE(6) of the *Corporations Law*, and two as voidable transactions pursuant to s 120 and s 121 of the *Bankruptcy Act*.’

[473] Exhibit 140, Mr Mack’s supplementary statement, paragraph 33, shows that if the profit fees were excluded from the debt owed by the plaintiffs to the first defendants as at 23 March 1995 the total would be reduced by $31,442,402. The reduction, of course, takes into account interest at the rates charged by EFG from the date of the imposition of the fees to 23 March 1995, compounded monthly.

[474] Section 588FD provides

> (1) ‘Unfair loans to a company
>
> (i) A loan to a company is unfair if, and only if:

(a) The interest on the loan was extortionate when the loan was made, or has since become extortionate because of a variation; or

(b) The charges in relation to the loan were extortionate when the loan was made, or have since become extortionate because of a variation;

even if the interest is, or the charges are, no longer extortionate.

(2) In determining:

(a) Whether interest … was or became extortionate …

(b) Where the charges … were or became extortionate …

regard is to be had to the following matters as at that time:

(c) The risk to which the lender was exposed; and

(d) The value of any security in respect of the loan; and

(e) The term of the loan; and

(f) The schedule for payments of interest and charges and for repayments of principal; and

(g) The amount of the loan; and

(h) Any other relevant matter.'

[475] Section 588FE provides:

'(1) Where a company is being wound up, a transaction of the company that was entered into at or after the commencement of this Part may be voidable because of any one or more of the following subsections.

(2) …

(3) …

(4) …

(5) …

(6) The transaction is voidable if it is an unfair loan to the company made at any time on or before the day when the winding up began.'

Section 588FF provides that where, on the application of a liquidator, the court is satisfied that a transaction of the company is voidable because of s 588FE the court may make orders providing appropriate redress. These include orders setting aside the transaction or, in the case of unfair loans, directing an indemnity to the company for its loss.

[476] The plaintiffs' argument is that when s 588FE(6) applies to an unfair loan 'made at any time' so as to make it voidable, the subsection overrides the temporal limitation appearing in s 588FE(1) which appears to limit the section to transactions made on or after 23 June 1993.

[477] Sections 558FD, 558FE and 558FF are all found in part 5.7B of the *Corporations Law* which came into effect on 23 June 1993, after the transactions which are presently the subject of attack were made, and after Management became liable for the fees. I accept as accurate the first defendants' submission, relying upon *Rodway v R* (1990) 169 CLR 515 at 518:

> 'A statute ought not to be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such a construction.'

[478] I can see no such expression or necessary implication in the sections in question. On the contrary they seem to me to operate to affect only transactions of the requisite kind 'entered into at or after 23 June 1993, the commencement of part 5.7B.' I would read "at or after" as identical with "on or after".

[479] I do not accept that there is any inconsistency between the two subsections. If there were, one would have expected the draftsman to provide in subsection 6 words to the effect that it operated notwithstanding the requirement in subsection 1 that the transaction be made at or after 23 June 1993, or by providing in subsection 1 that it was subject to subsection 6.

[480] The two subsections can be read harmoniously. An unfair loan made at any time on or after 23 June 1993 may be set aside. There is no time limit other than that the loan must have been made at or after 23 June 1993.

[481] It may be noted that in each of subsections 2, 3, 4 and 5 of s 588FE the transactions referred to may be set aside subject to a particular time limit, but it is clear that the transactions described in each of those subsections must have been entered into at or after 23 June 1993. By contrast subsection 6 does not itself contain any particular temporal limit. The general limit found in subsection 1 still applies.

[482] The attack on the imposition of fees as unfair loans must therefore fail.

[483] The claim that the profit fees may be avoided pursuant to the *Bankruptcy Act* is also untenable. It is predicated upon the fees being settlements and/or dispositions of property made with the intention of defrauding creditors. There is an immediate problem. The fees do not appear ever to have been paid. Amounts equal to the fees were debited to the account of the borrower and interest was charged on that debit as part of the principal sum but the fees themselves were not paid. There was no transfer of funds from Management or Emanuel 14 to EFG which can be identified as the payment of the profit fees. They cannot therefore be a settlement. In any event payment of interest or fees would have been ordinary revenue for EFG and would have been applied by it in the ordinary course of its business. They were not a fund to be retained by EFG.

I do not see how incurring a liability can be a disposition of property. Giving a mortgage or charge to support a liability may be a disposition of property for the purposes of the section but that did not happen here. The liability was already secured by existing mortgages and charges. Another difficulty is that the plaintiffs rely upon the view as to what constitutes a fraudulent intention which was discarded by the High Court in *Cannane*. The plaintiffs argue they have to show no more than the company parted with assets which thereby diminished its ability to pay creditors, but it is clear that to set aside a transaction pursuant to s 121 an act or intention to cheat or defraud must be established. The plaintiffs did not essay that task.

[484] The plaintiffs also rely for their attack upon the profit fees on the same combination of complaints advanced for the other transactions: duress etc., breach of statutory and fiduciary duty and knowing involvement therein by EFG. The only support advanced by the plaintiffs for these complaints is their own allegation of them in the statement of claim.

These are serious charges and if they are to be persisted in should have been the subject of particular evidence.

It is no doubt true that the profit fees charged by EFG were substantial and were greater than the margins charged by other financiers. This evidence is of little relevance because those financiers did not operate in the particular market in which the Emanuel group was borrowing and EFG was lending. The loans were to a company with little or no net worth, an income insufficient to meet interest commitments and large parcels of *en globo* land as security. On the evidence very few, if any, financiers would engage in lending to such a customer on such security and those that did were the 'entrepreneurial' lender who would require a commensurate return for risk. Neither Westpac (or its merchant banking subsidiaries) nor Esanda made such loans. Mr McCabe's evidence, (at T.3100-3101) is to the effect that Westpac would not have lent to the Emanuel group as EFG did. Nor would Esanda, according to Mr Morphett, (T.5213-5217) Esanda would not have made further advances to provide working capital for the borrower. (T.5222.4-.35) According to Mr Morphett a lender interested in a transaction such as the APM loan 'could charge what he wanted to' (T.5217.50). This should not be taken as a justification for charging extortionate rates of interest or fees but rather as an indication that there were no market 'norms' against which to assess the reasonableness of the charge. The evidence did not suggest that any financier other than EFG would have made the loan. There is evidence that Mr Emanuele made repeated efforts to refinance the loan from EFG at better rates of interest. He was unsuccessful. No doubt such considerations played a part in his decision to agree to the profit fees put forward by EFG as a condition of further advances.

Interest

[485] The plaintiffs' next complaint is about interest rates charged on their loans. With four late exceptions the complaint is not that the rates were excessive when the loans were made, but that EFG did not adjust the rate of interest payable on the loans when, because of the recession, interest rates generally fell. The result was that the plaintiffs continued to pay, or be liable to pay, interest rates fixed at an earlier time when prevailing rates were higher. From the time of the Deed of Master Agreement of June 1987 the interest rates charged by EFG were 18.25 per cent if paid promptly otherwise 20.25 per cent. The letter of 26 September 1988 which extended the loan on the APM lands reduced rates by two per cent. The rate thereafter varied between 19.5 per cent and 21.5 per cent but for most of the period, 1 April 1990 to 27 February 1995, it was 20.5 per cent.

[486] From about 1990 interest rates generally fell significantly though, of course, rates charged by particular lenders to particular borrowers for particular purposes would have varied considerably. Taking the 180 day bank bill rates as a guide and speaking generally, interest rates fell to about 16 per cent in 1990, about 12 per cent in 1991, about eight per cent in 1992, about seven per cent in 1993, about nine per cent in 1994 and about 10 per cent in 1995. Throughout this time EFG was charging the Emanuel group 20.5 per cent. Annexure 31.4 to Mr Mack's second statement, Exhibit 140, is a graphical representation of the movement of interest rates charged by EFG; interest rates charged by financiers other than EFG; and the 180 day bank bill rate. The movement in rates is charted from 1 July 1987 to 1 January 1995. The graph shows that the decline in rates charged by other financiers began in about September 1989. At its greatest the difference between rates was about nine per cent at the end of 1993. Between September 1989 and September 1991 the difference ranged between half a per cent and about five per cent. Mr Grier gave evidence that the 'market rate' for interest in October 1991 was about 16 per cent (T.7531.12). Mr Debelak gave evidence that between September 1988 and October 1991 interest rates declined from about 22.75 per cent to 18.5 per cent and had fallen to about 14 per cent in 1992. (T.2925.8; 2926.10) Mr Morphett's evidence (T.5169-5170) was that interest rates fell from about 18.5 per cent in April 1990 to 16.5 per cent in October 1991 and fell further to about 14 per cent in October 1992.

[487] Judgment against the Emanuel group and Mr Emanuele was entered on 27 February 1995 for $186,880,302.71. Mr Macks has calculated that an average interest rate reduction of two per cent from September 1989 would have reduced the debt to $156,876,510. If the interest rate reduction had been on average five per cent from September 1989 the debt would have been reduced to $121,285,024. Had interest rates been decreased to the average rate charged by financiers other than EFG the debt would have reduced to $104,222,188.

[488] The amounts at issue are therefore very substantial, in the last instance being of the order of $82,000,000.

[489] Mr Macks seeks 'an order avoiding these interest rates as unfair loans pursuant to s 588FD and s 588FE(6) of the *Corporations Law* and seeks orders pursuant to s 588FF effecting their reduction to market rates.'

[490] Section 588FD speaks of loans which are unfair by reason of interest being extortionate or becoming extortionate by reason of a variation to the loan. It is therefore necessary to identify the loans which are said to be unfair. It is the loans which are voidable pursuant to s 588FE(6). Therein lies a problem for the plaintiffs because as noticed with respect to the fees charged by EFG these sections of the *Corporations Law* apply only to transactions entered into at or before 23 June 1993.

[491] Section 588FD looks to the time at which the loan was made or a variation to the loan was made. If the interest at either of those times was extortionate, and those times post date 23 June 1993 then the sections are applicable. The only loans in this category appear to be:

- An advance of $350,000 on 16 August 1993
- An advance of $80,000 on 9 September 1993
- An advance of $237,000 on 23 September 1993

- An advance of $1,857,500 on 16 November 1993

The other advances were all made before June 1993.

[492] The rates of interest on each of the four loans just identified was that applicable generally to the APM advance, 20.5 per cent. By this time the average interest rate charged by non-EFG financiers was about 12 per cent.

[493] The plaintiffs face another problem with respect to the earlier loans. Their complaint is not that the interest rates charged by EFG were excessive, or extortionate, when the loans were made. Their complaint is that during the currency of the loans interest rates generally declined but EFG did not adjust their rates. This does not seem to be a circumstance within the purview of s.588FD. It speaks of interest being extortionate when the loan was made or when a variation to the loan agreement was made. That is not the situation about which the plaintiffs complain. They are upset because there was no variation to effect a reduction in interest rates to reflect the market trend. This section does not apply to such a circumstance.

[494] The plaintiffs point to some evidence given by Mr Grier in cross-examination as indicating that EFG's motivation to keep rates high was the desire to minimise what was available to other creditors. The evidence is at T.7608.12-.30:

> 'Over 8 percentage points higher than the market rate doesn't indicate greed to you, Mr Grier? - No, it doesn't. Interest was being suspended over the account and it mattered not. … It did as far as the second mortgagees and the priorities.
>
> It did didn't it, Mr Grier? – Yes, it did.
>
> The higher the rate the less they got? – That's true.
>
> And that was the motivation to keep the rate high, wasn't it? – It may have been, yes.'

The point was not taken up with any EFG officer more senior than Mr Grier. He was the Queensland manager but the real decisions concerning the Emanuel group account were made in Melbourne by Mr O'Grady or Mr Crosby or Mr MacDonald. Mr Grier may have known about the reason for a decision to keep interest rates at the rate initially agreed but it is unlikely he would have been consulted about it. His admission is equivocal and probably does not justify a finding that EFG made a deliberate decision not to reduce interest rates because of the advantage that it would give to subsequent mortgagees.

[495] Even if such a finding were made it would have no significance. EFG was entitled to have regard to its own interests. It cannot legitimately be criticised for not reducing interest rates when the only recipient of such a move might be a subsequent mortgagee. There was no prospect that a reduction in rate would benefit the borrowers in the Emanuel group. By the time interest rates had begun to fall the Emanuel group had lost its equity in the mortgaged lands. Their value was less than the debt to the first mortgagee, EFG, let alone the subsequent ones. There were in some instances, notably with respect to Parcel 64, a priority agreement between EFG and KBA, the second mortgagee, restricting EFG's priority to $19,000,000.

Reducing interest rates charged to Emanuel 14 might have a consequence that the second mortgagee could recover something on a sale of the property but would not benefit Emanuel 14.

There is no substance in the point.

[496] The plaintiffs include in their complaints about interest rates the usual claims under the *Bankruptcy Act*. These can be ignored. The submissions are predicated upon there having been variations to the agreement which constituted dispositions of property made with the intent to defraud creditors. There were no relevant variations. The whole point of this part of the plaintiffs' case is that EFG *refused* to vary the agreement by reducing interest rates. I cannot conceive that interest payable (though not paid) at a certain rate amounts to a disposition of property because the lender might have, but did not, agree to accept interest at a lower rate.

Deed of Collateralisation – 5 March 1992

[497] The next transaction under attack is a Deed of Collateralisation dated 5 March 1992 (Exhibit 106, Volume 16/1372). It was made between the first 27 plaintiffs and Mr Emanuele and the second, third and fourth defendants. By it:

> '2.1 Each of the Collateral Agreements is declared to be collateral to each other of the Collateral Agreements and in any case in which a Customer by a Collateral Agreement has created or creates a security in favour of any Elders Company each such security is declared to be a security to each other Elders Company all of the obligations of that Customer and of each other Customer.
>
> 3.3 Each Customer irrevocably agrees in respect of any Security provided by that Customer to any Elders Company which is a Collateral Agreement that:
>
> (a) The covenants given in any Collateral Agreement may be enforced by any Elders Company (even though that Elders company is not party to that Collateral Agreement) in that Elders company's own and sole name without that Elders Company being obliged to take an assignment from or otherwise join the Elders Company named therein; and
>
> (b) The Collateral Liability shall, as from time to time they become owing and regardless of when they may be due for ascertainment and/or payment, be secured by each security held by Elders Company (regardless of its terms).'

[498] The deed defined Elders Company to mean any of the second, third and fourth defendants. "Collateral Agreement" was defined to mean any agreement or security relating to or creating or securing any collateral liability existing at any time between any of the Elders Companies and any of the first 27 plaintiffs and Mr Emanuele. "Collateral Agreements" were more specifically defined to include

the agreements listed in item 3 of the schedule to the Deed of Collateralisation in which are set out the Deeds of Master Agreement, the variations thereto and the specific mortgages, charges and debentures given by various of the first 27 plaintiffs to secure loans made by EFG.

"Customer" was defined to mean the first 27 plaintiffs and Mr Emanuele. "Collateral Liabilities" were defined to be all liabilities and obligations of any of the customers to any one or more of the Elders Companies.

[499] The result of this deed was that each of the Emanuel group who had borrowed money from the second and/or third and/or fourth defendants, or who had guaranteed the repayment of loans to other of those plaintiff companies became liable to each of the second, third and fourth defendants for all the debts and obligations of all those 27 plaintiff companies. The securities given by any of those plaintiff companies to any of the second, third or fourth defendants became available to secure the repayment of the debts of all and any of those plaintiffs.

[500] The plaintiffs' complaint about this deed is that, by it, 'Management and the guarantors became liable (to the second, third and fourth defendants). That was later to prove most useful as it led to judgment in favour of the three companies, proofs of debt lodged by the three, and an increased weight of vote at meetings of creditors. Presumably that was its purpose, for it is difficult to see any other.'

The circumstances in which each of the second, third and fourth defendants voted the full amount of the judgment debt at creditors meetings are set out in Section IV of the reasons.

[501] Mr Macks seeks to have the deed set aside pursuant to s 120 and s 121 of the *Bankruptcy Act* because 'there was no benefit to the Emanuel companies in increasing their indebtedness by imposing liability to three rather than one creditor, it has served no purpose other than to give the Fosters' creditors greater opportunity to enforce their wishes on other creditors should there be meetings of creditors.'

[502] The first defendants point out that the deed of 5 March 1992 was not innovative in that previous instruments made between various of the second, third and fourth defendants and the plaintiffs had already effected in large part the cross collaterialisation of securities which was the subject of the later deed. Clause 27(b) of the 4 September 1990 Deed defined "Mortgagee" to include:

> '… Any corporation which is a related corporation to the Mortgagee (fourth defendant) within the meaning of s.7(5) of the Companies … Code.'

The first four defendants are, and always have been, related companies. Clause 27(h) defined 'Principal Sum' in a most compendious manner. Subclause (xii) included in the definition:

> 'All moneys now or hereinafter to become owing or payable to the Mortgagee on any account whatsoever by any corporation which is a related corporation to the Mortgagor within the meaning of the term as defined in the Companies … Code.'

This deed, therefore, went some way towards making debts payable to the fourth defendant by Management and all its related companies named in that deed payable to the second and third defendants as well as the fourth.

The deed of 4 September 1990 effected substantially the same collateralisation of liabilities as the deed of 5 March 1992.

[503] The first defendants also contest the imputed motive for the deed. They point to Mr Elliott's evidence (Exhibit 463 paras 20-31) that he advised the execution of such a deed so that there could be no doubt about the efficacy of any of the securities granted by any of the Emanuel group to secure the debts of any of them. This had largely, if not entirely, been achieved by the existing interlocking mortgages, charges and debentures but he thought it preferable to have a single document which would collect all the obligations into one document and supplement them if there were gaps between existing documents which meant that not all securities were available for all debts. The motive was to improve EFG's security position at a time when it was still lending to the plaintiffs whose position was doubtful.

[504] Mr Elliott explained orally why the deed defined the three EFG companies as lenders. He said (T.8666.44-8667.45):

> 'There had been some restructuring with the EFG group … There had also been an assignment of securities as part of the restructuring and also … the winding down of the Elders Finance Group and … ELFIC became the recipient of all the securities but there had been loans previously made through other lending companies within the group. So I felt it was appropriate to bring all of those parties into the document because it was my understanding that in some instances there were arguments that mortgages contained personal covenants that may not be assigned … and I wanted to preserve any of those personal covenants that may not have been effectively taken over by Elfic in the course of the transfer of securities … The types of covenants I was thinking of were those such as powers of attorney … It was a fairly academic argument but it was one that I was aware of and I was concerned to … make sure that we had all of the parties all locked up. The borrower was Emanuel Management … under a master deed and all of the other companies were members of the group. This was a method whereby you would have a master deed for stamp duty purposes and then borrowings by particular purchasers. So you might have properties owned by a number of companies … and it seemed prudent and it wasn't unusual for me to recommend this type of practice to lenders.'

[505] I accept Mr Elliott's evidence. There was a sensible and immediate motive for the execution of the deed. There is no need to impute a motive that depends upon foresight in 1992 of events that did not occur until 1995 and do not appear to have been in contemplation before they occurred. That is to say there is no evidence that in March 1992 anyone thought that there might be meetings of the plaintiffs' creditors at which EFG would wish to cast three votes in respect of the debt. Mr Winter's use of EFG's proxy to achieve that end was not something authorised,

or even contemplated by EFG. See also Mr O'Grady's evidence at T.8378.50-8379.20.

Mr Elliott gave evidence (T.8667.25-.35) that he never intended the Deed of Collateralisation to permit EFG to vote its debt three times rather than once at meetings of creditors. He thought the proposition 'a novel concept … there was a debt and it was owed by the borrower to the lender.' He did not advise EFG that the deed permitted the debt to be voted three times.

[506] Sections 120 and 121 can have no application. There was no fraudulent disposition of property. Indeed there was no disposition of property because the Deed of Collateralisation dealt only with existing securities already given to secure existing debts. There was no settlement of property. The earlier transactions which have been noted and which culminated in the 4 September 1990 deed had the effect that each of the 27 companies in the Emanuel group was indebted to the second and fourth defendants in respect of the debts of each of the companies. The 5 March 1992 Deed of Collateralisation did not increase this burden by adding a third EFG company as the lender. The debt was not increased. No new securities were taken or fresh charges imposed.

[507] For this deed, too, the plaintiffs call in aid duress, unconscionability, undue influence, breach of statutory and fiduciary duties and the knowing involvement therein of EFG. It is pointed out by the first defendants in their submissions that none of Messrs Crosby, Elliott, Grier or Jaenke were cross-examined about the deed or EFG's motive for proffering it to the Emanuel group for execution. Mr O'Grady was asked about it but had no recollection of it. He believed it to have been a matter handled within the Brisbane office. He denied in the passage I recently referred to that the deed was intended to allow EFG to vote three times in respect of its debt. I accept his denial. It is, in my view, fanciful to think that the events of March 1995 were in contemplation three years earlier. A much more likely explanation for the deed is Mr Elliott's cautious approach to his client's affairs and the advice he gave, almost a year before he was instructed to prepare the deed. As well, the circumstances in which Mr Winter came to be appointed proxy for EFG at the creditors' meetings documented in correspondence between Mr Perrett and Mr O'Grady do not support the plaintiffs' theory.

There is no evidence of any impropriety connected with the execution of the March deed. The only evidence as to an approach to the Emanuel group and Mr Emanuele concerning it is in Exhibit 16 (12/491) which is the minutes of one of the regular meetings between EFG and the Emanuel group on 1 June 1992. According to the note the deed was handed to Mr Emanuele with a request from Mr Jaenke that 'it be considered …' and Mr Emanuele 'undertook to have same signed and returned.'

Mr Grier could not recall the occasion and Mr Jaenke was not asked about it.

Debt Incentive Agreement

[508] This agreement is alleged by the plaintiffs to have been made in October 1991 and that its terms effected an immediate reduction of about $10,000,000 of the debt owed by the Emanuel group as well as a reduction in interest rate from 20.5 per cent to 16 per cent. EFG contends that the debt incentive agreement never became binding upon the parties. The computation of the debt which appears as a recital in

DOOR and the subsequent calculation of the debt which was claimed in proceedings in this court which resulted in judgment being entered on 27 February 1995 proceeded without reference to the terms of the debt incentive agreement. That is to say the reduction in principal and interest rate which was the subject of the debt incentive agreement were ignored by EFG when it demanded payment of its debt and sued to recover it. The plaintiffs place much emphasis on the agreement. They argue:

> 'Disregard of the incentive scheme … the introduction of DOOR (and particularly the acknowledgment of debt), the deposit agreement, and finally the Queensland judgment, were each part of a scheme to defraud creditors, especially the secured creditors.
>
> Whilst each may be considered individually they must also be viewed collectively as steps towards the culmination of an insolvent transaction, liable to be set aside under s 588 of the *Corporations Law*.
>
> The scheme was to remove any equity that the Emanuel group held in the secured properties from the reach of the creditors, with Kleinwort Benson being a prime example …'

[509] The terms of DOOR and the deposit agreement are discussed next in this section of the judgment.

[510] Although the plaintiffs include the debt incentive agreement among the '1988-1994 transactions', it is in a different category to the others. It is not a transaction which the plaintiffs seek to set aside. Their complaint is that EFG disregarded its terms. However, no claim is apparently made in the statement of claim for relief pursuant to the debt incentive agreement. The plaintiffs real point seems to be two-fold: firstly that the computation of the debt in DOOR and for the purposes of the Supreme Court litigation was inflated as I have indicated. This is seen as something as more sinister than a mere breach of contract. As the plaintiffs' submissions make plain they regard it as an integral part of a broader scheme to defraud creditors. A proposition put to Mr Grier in cross-examination (T.7562-64) was that the debt incentive agreement was not given effect to in order to discourage other secured lenders from taking action against the Emanuel group by winding up or litigation. The notion was that if those other lenders saw a very substantial debt, one exceeding the value of the lands, there would be no point in their moving because there would be no equity to apply in reduction of their mortgages. If, however, EFG's debt were reduced the equation might change.

[511] The second basis for asserting that the debt incentive agreement is relevant to the action is that by disregarding its term the amount of the debt stated to be due in DOOR, and for which judgment was obtained, was inflated and the exaggeration of the amount was deliberate by EFG.

This deception, of obvious seriousness, was not put to any of EFG's witnesses save Mr Grier. He denied it. Nor was it put to Mr O'Grady that the acknowledgment of debt in DOOR was false and was known to be so.

[512] There are two difficulties. The first is that this case has not been pleaded. The second is that it relies upon acts done in furtherance of an intention to defraud, not the Emanuel group, but its secured creditors. The plaintiffs do not complain that they have suffered loss by reason of EFG's mendacity towards other secured lenders.

[513] The suggested basis for the deception of other financiers founders on the evidence. Mr McCabe, when speaking of the position of BAC, said that its assessment of its position would not have changed had the level of debt been reduced, in accordance with the debt incentive agreement, by an amount of as much as $27,000,000. See T.3050.8-.40. It is, perhaps, significant that the cross-examiner was reluctant to put the question directly to Mr McCabe. When he did the answer was destructive of his proposition.

I cannot recall any other financier being asked about the point.

[514] The idea to include an acknowledgment of debt in DOOR originated with Mr Elliott, not with EFG. Mr Elliott explained (T.8685.35-8686.15) that it was his idea to include the recital of debt 'but it would be considered as being a boiler plate type approach to drafting of securities at Clayton Utz security group. An acknowledgment of debt whenever one can get one was always considered as prudent in trying to establish an estoppel from deed …'. Moreover the calculation of the debt was undertaken by a solicitor employed by Clayton Utz 'who had done a lot of work on the rebating of lease agreements with finance companies and he was a very very clever bloke with figures and was very studious and … diligent … The solicitor worked with Mr Jaenke … going through ledgers and all those types of things that are necessary to establish an amount.'

This evidence, which I accept, disproves the notion that EFG arbitrarily fixed upon an amount for inclusion in the DOOR so large that it would dissuade other financiers from seeking to enforce their securities.

[515] As with so much of the plaintiffs' case, this aspect of it is built upon documents (most of which are included in Exhibit 139) which are at best ambiguous and which lack the strength necessary to support the elaborate edifice the plaintiffs attempt to construct. The foundation collapsed under the weight of the testimony of witnesses called by the first defendants who gave first-hand accounts of the negotiations and their termination which the plaintiffs simply did not answer. No witness was called in the plaintiffs' case to testify that the debt incentive agreement was actually made.

[516] The agreement had its origin in a letter from Mr Emanuele to Mr Crosby of 14 October 1991. In it Mr Emanuele proposed 'restructuring … the Elders facility' by reducing the debt to $120,000,000 and reducing interest to 15 per cent 'to be capitalised and repaid from proceeds of sale.' In addition, interest was to be reduced by a further one per cent for every $10,000,000 paid to Elders in reduction of the principal sum. There were other conditions which are not presently relevant. Mr Crosby sought from Mr Grier information as to the then amount of the debt. Mr Grier advised by a memorandum of 15 October 1991 that the debt as at the end of that month would be $140,500,000 and that, on the basis that the debt remained constant, interest payable for 12 months would be $27,500,000. He also advised that interest on that debt for 12 months at 16 per cent would be of the order of $20,000,000.

[517] A key document for the plaintiffs is Mr Crosby's memorandum of 18 October 1991 to Mr Gardiner, Mr O'Grady and Mr Biggins (who chaired Ramco). The memorandum reads:

> 'The following points were agreed in discussions between (Messrs O'Grady, Biggins, Gardner & Crosby)
>
> 1. The Emanuel debt is agreed at $130,000,000.
> 2. In the event that $30,000,000 is paid off the debt within six months a $5,000,000 rebate will apply, i.e. the starting point will be $125,000,000 and not $130,000,000.
> 3. Interest from now on to be charged at 16 per cent.
> 4. For every $10,000,000 paid off the debt during the next 12 months, a 1 per cent rebate shall apply on the basis that the rate will not drop below 10 per cent.
>
> …
>
> As far as the Emanuel group is concerned, it is important that we make sure that all of the legalities are properly covered before entering into this new arrangement and in doing this, Brisbane branch should point out to our solicitors that we should not ignore the possibility that this Group could still 'tip over'. With this in mind any concessions would cease if this eventuality occurred. It is also important to stress that these new arrangements must not in any way jeopardise our existing security position.'

[518] On 21 October 1991 Mr Gardiner, the account manager, wrote to Mr Grier to direct him to 'implement changes to the accounts' of the plaintiffs consequent upon the agreement recorded by Mr Crosby. Mr Jaenke noted in hand on the letter: 'whatever is debt in six months is less $10 million'. (Exhibit 139 Tab 6) Mr Grier wrote on another copy of the memo (Tab 4): 'effective from 1/11/91' and, opposite the statement that the debt was agreed at $130 million, 'was $140 million – treat as a $10,000,000 rebate'.

[519] The strongest point for the plaintiffs is that EFG admitted, in a number of documented instances, that the incentive agreement had been made. For example the board papers for the meeting of directors of Fosters' Brewing Group on 30 November 1991 contained in appendix B6 the advice that:

> 'We have just entered into an incentive agreement with Emanuel under which the debt is discounted by an attractive sum if it is reduced within set parameters.'

[520] Similarly the minutes of Ramco on 30 October 1991 include this:

> '… in respect to the Emanuel group it has been agreed:
>
> The total debt is agreed at $130,000,000. In the event that $30,000,000 is paid off within six months, a $5,000,000 rebate will

> apply i.e. the starting point will be $125,000,000 and not $130,000,000. From today interest will be charged at 16 per cent.
>
> For every $10,000,000 paid off the debt during the next 12 months, a one per cent interest rebate shall apply except that the rate will not drop below 10 per cent.'

[521] Early in 1992 EFG sought the advice of Macquarie Bank Ltd about its program for winding down its business and recovering its assets. Employees of Macquarie Bank Ltd spoke to EFG officers and inspected EFG files. A draft report was prepared which was submitted to Mr O'Grady for comment. Section 3 of the report dealt with the Emanuel group. Paragraph 3.4.2 contains a reference to the incentive agreement. It was said:

> 'Elders has advised that an incentive agreement exists between Emanuel and Elders to encourage the sales but, given the likely current position regarding debt versus value, it is understood that this incentive agreement will not provide sufficient encouragement to Emanuele.'

[522] In a letter of 7 February 1992 to the executive director of Macquarie Bank Ltd, Mr O'Grady took issue with the second part of that statement. Having referred to it he went on:

> 'We are not aware that Emanuele believes this, and we would be very reluctant to make the incentive plan any more attractive to him.'

[523] These admissions apart, the plaintiffs' documentary case is far from clear. Clayton Utz were retained to prepare a document giving effect to the incentive agreement. Mr Jaenke was sent a draft under cover of a letter of 15 November 1991 which drew attention to some difficulties to which the agreement might give rise. A further draft was prepared and sent by letter of 28 November 1991 which reiterated the earlier concerns. It noted that the proposed deed had been drafted in an attempt to overcome the problems.

[524] On 10 December 1991 Mr Gardiner directed Mr Jaenke that the second draft 'accurately reflects the arrangement with Emanuel group and may be executed.' On that day, however, Mr Elliott met Messrs Gardner, Grier, Jaenke & Crosby to advise them on a number of topics. One of them was the form of the deed which was to constitute the debt incentive agreement. According to Mr Jaenke's note of the meeting dated 13 December 1991 (Exhibit 139, Tab 16):

> 'It was agreed the incentive deed document would not be signed at this time but held by ourselves as a reference document.'

[525] There is another note of the meeting, also dated 13 December 1991, which has a fuller account of this topic (Exhibit 139, Tab 17; also Exhibit 58). It, too, is signed by Mr Jaenke but is probably partly Mr Grier's work. It is likely that he expanded Mr Jaenke's first note to make a fuller record. The longer version is:

> 'Discussion took place on the incentive deed as while I.R. Gardner agreed it reflected the agreement reached, J.D. Elliott felt that all contingencies could not be covered as future developments could not all be contemplated. J.D. Elliott felt it could be used against us if litigation took place in the future – section 52A *Trade Practices Act* regarding misrepresentation.
>
> It was agreed, the document would not be signed at this time but held by ourselves as a reference document.'

[526] There is also a handwritten note of the 10 December meeting made by Mr Jaenke dated 12 December 1991 written on the letter of 28 November 1991 from Henderson Trout which enclosed the second draft. It recorded cryptically that Mr Elliott had met Messrs Crosby, Gardner & Grier and that the draft deed was:

> 'To be used for internal references only and will not be signed by either parties. It is a clear understanding of agreement reached but the full provisions cannot be described to cover all future events.'

[527] The plaintiffs see something deeply suspicious in the existence of the two typed memoranda, only the shorter of which was held in EFG's files. The longer document which contains the reference to the TPA was discovered by the plaintiffs in the files of Macquarie Bank Ltd. By the plaintiffs' reckoning Messrs Grier and/or Jaenke were involved in concealing relevant evidence by attempting to suppress one of the memoranda and by retaining the one which gave a false account of this part of the meeting.

[528] The plaintiffs also rely upon a memorandum to Mr O'Grady from Mr Grier dated 20 July 1992. Relevantly it reads:

> 'Joe Emanuele has requested Elders consider the following:-
>
> 1. Reduce present liability of about $150,000,000 to $120,000,000 and cap until 1/7/93.
>
>   A market interest rate to apply from 1/7/93.
>   … Emanuel is desperate for us to enter into his simple arrangement; it may be an incentive for him but I believe it will be a disincentive for us.
>   …
>
>   In October 1991 the following incentive was agreed to:-
>
>   1. $10,000,000 to be immediately rebated.
>   2. Should $30,000,000 be repaid within six months a further $5,000,000 was to be rebated.
>   3. Interest 16 per cent.
>   4. For every $10,000,000 during the following 12 months a further one per cent reduction would apply – interest rate not to go below 10 per cent.

A suggested incentive which is simple as of below …

2. Interest rate currently applied at 15 per cent to be reduced by one per cent for every $10,000,000 reduction in debt – minimum interest rate of 10 per cent to apply …'

[529] The plaintiffs seize upon Mr Grier's note that 'interest rate currently applied at 15 per cent' as an admission that the incentive agreement had been implemented by EFG and was then (i.e. July 1992) in force. It is impossible to put this construction on the document. For a start the interest rate, had the incentive agreement been implemented, would have been 16 per cent, not 15 per cent. As a matter of fact the interest rate being applied by EFG was not 15 per cent but in excess of 20 per cent. It is evident that Mr Grier's note reflected an hypothesis: if the 'suggested incentive' had been adopted interest would have been 15 per cent. He was not asserting as a fact that it was 15 per cent. Moreover the plaintiffs overlook the commencement of the memorandum. Mr Emanuele had approached Mr Grier, in July 1992, to consider an incentive arrangement broadly similar to that discussed months earlier. It is inconceivable that Mr Emanuele would have proposed such an incentive if he believed the earlier agreement had been finalised and was in force between the plaintiffs and EFG.

[530] Lastly, the plaintiffs rely upon a memorandum of 4 August 1992 from Mr Burns to Mr Grier in which he instructed the latter

(a) To write-off $10,000,000 from the balance of accrued interest.
(b) To adjust interest being charged to 16 per cent on and from 1 November 1991 which would give rise to a reduction of the interest bill to 30 June 1992 of $3,950,000.
(c) To make a further reduction in the interest rate to 15 per cent on and from 1 July 1992 if the plaintiffs had paid at least $10,000,000 off their debt since 1 November 1991.

[531] Mr Burns was a senior accounting officer employed by EFG in Melbourne. His instruction appears to have been obeyed. Exhibit 431 is part of the plaintiffs' statement of account which shows that debt and interest reductions were made but almost immediately reversed with effect from 1 August 1991. It is not possible to date precisely when the reversal occurred but it must have been no later than the end of that month.

[532] The argument that Mr Grier or Mr Jaenke concealed the longer 13 December note is entirely fanciful. Both Mr Grier and Mr Jaenke had a completely plausible explanation for the differing versions. Moreover, and far more importantly, there is no material difference in the three written reports of the discussion which led to the decision not to proceed with the deed. They vary in detail but there is no inconsistency between them and there is nothing in any of them that could possibly embarrass EFG or give rise to a desire to suppress it.

[533] None of the witnesses present at the meeting of 10 December 1991 had any real recollection of what was said at it. This is scarcely surprising given the lapse of time. Mr Grier was firm in his evidence that the incentive agreement was not entered into because of legal advice (T. 7542.10-28; 7544.40-50; 7544.1; 7564.35). Mr Jaenke thought that the conditions precedent had not been satisfied

(T. 8075.25-35; 8078.45). He is partly wrong about this in the sense that, as proposed, the agreement would have resulted in an immediate reduction in principal and interest and further reductions depending upon the success of the plaintiffs' realisation program. Nevertheless, he too, was adamant that the incentive agreement did not become operative. Mr Crosby, likewise, believed the agreement had not been finally entered into (T. 6906.15).

[534] Mr Elliott had no recollection of the meeting of 10 December 1991. It is clear from his evidence that he disliked the idea of secured lenders entering into incentive agreements with their borrowers because of the potential such agreements had to compromise lenders' rights, or at least to give rise to arguments that rights had been surrendered. For this reason he took no part in the drafting of the incentive agreement deeds but passed the task onto an employed solicitor. Mr Elliott was a very experienced solicitor with particular knowledge and expertise in the law and practice of securities. He was clearly a cautious practitioner who advised his clients, including EFG, to avoid any conduct that might give rise to difficulties in the enforcement of their rights. He was generally averse to incentive schemes given by lenders to defaulting borrowers. Generally his concerns were that they might be construed as a waiver of past defaults or as having the potential to give rise to arguments between lender and borrower about the amount of the debt.

[535] Although Mr Elliott cannot recall the meeting, an indication of his opinion about incentive arrangements may be seen in his letter of advice of 23 July 1992 to EFG. He expressed:

> 'A further concern … that any agreement reached with the Emanuel group may be utilised … by the directors … to make representations to their other financiers … if any prospective equity return is pledged to the other financiers but is not available in the event the incentive is not forthcoming. There is always the possibility … of the other financiers encouraging or even financing the Emanuel group in mounting an action against Elders.'

Mr Elliott explained his thinking to be that the borrower might, on the strength of the incentive arrangement, represent to its other financiers that the prior debt was at a certain level but in the event that conditions precedent to the debt reduction were not satisfied, the debt would not be reduced. In that circumstance the borrowers' dissatisfaction could give rise to allegations of misrepresentation amounting to contraventions of s 52 and/or s 52A of the *Trade Practices Act* which may lead to litigation funded by the subsequent mortgagees.

[536] Such an eventuality might be thought remote but I accept that Mr Elliott saw it as a possibility which should be avoided, and he so advised his clients.

[537] Another concern which Mr Elliott entertained was that the incentive agreement proposed for the plaintiffs was to come to an end in the event that the plaintiffs went into receivership or liquidation. Mr Elliott saw obvious difficulties in drafting terms which would enable a debt which had been reduced to increase retrospectively in circumstances which had to be foreseen and provided for.

[538] It is, I think, inconceivable that Mr Elliott would not have raised his concerns about these matters at the meeting of 10 December 1991, and would not have advised the

EFG managers present about the difficulties. The notes made by Mr Grier and Mr Jaenke suggest that he did.

[539] The plaintiffs insinuate from the terms of Mr Jaenke's correspondence that an agreement was made between EFG and the plaintiffs to the effect that the incentive agreement would be binding between them but that its existence would be concealed from other financiers who would be told that the amount of the debt and rate of interest was as specified in the loan documents. The purpose of this was that which I have mentioned: to persuade them that their securities were worthless in order to enable EFG to take an assignment of them for a minimal consideration.

[540] These are serious allegations. The support for them is said to lie in Mr Jaenke's notation of 12 December 1991 that the incentive agreement was 'a clear understanding of agreement reached' which was 'to be used for internal references only', as well as his letter to Messrs Clayton Utz of 18 March 1992 in which he said:

> 'It was mutually agreed the document would not be executed … but record an accurate understanding of the agreement.'

[541] Allegations as serious as these require cogent evidence. I cannot see it in Mr Jaenke's communications. It is clear from his testimony that he is not a man to whom clarity of expression comes easily. He was not an articulate witness and found it hard to say clearly what he meant. I did not think him dishonest or evasive. I thought only that his evidence suffered the drawback I have described. I would not ascribe to his words the mendacity which the plaintiffs do.

[542] Another difficulty for the plaintiffs is that Mr Elliott was present at the meeting during which, according to the plaintiffs' understanding of Mr Jaenke's note, EFG decided to embark upon this course of duplicity. Mr Elliott has no recollection of it. I cannot believe he would have forgotten it or condoned it to any extent. I would have expected that he would immediately have written a stern letter of advice and disapproval of such a course.

[543] What happened instead is that both the plaintiffs and EFG acted as though the incentive agreement were not in place. This conforms to what one would expect to happen if Mr Elliott advised the incentive agreement should not be made because of legal difficulties and EFG accepted his advice, as Mr O'Grady said it did.

[544] The plaintiffs seemed to argue that the reference to s 52A of the *Trade Practices Act* in the longer memorandum of 13 December 1991 (which was not held on the EFG files) signified that Mr Elliott advised that if the incentive agreement were made but subsequent financiers were told that the debt was at its original levels, EFG could incur liability for a contravention of the Act. It was for this reason, so the argument runs, the incentive agreement was concealed.

[545] I cannot accept the argument. It would involve disbelieving Mr Elliott's explanation of why he was concerned about s 52. I accept his explanation. Moreover it overlooks the point that Mr Elliott advanced the possibility of liability under s 52 as providing a reason for *not* making the incentive agreement. If the incentive agreement were not made there could never be a misrepresentation about the level of debt.

[546] It is noteworthy that no executed copy of the deed has been produced. Mr O'Grady said he would have signed the deed on behalf of EFG, and he did not. It is evident that for whatever reason the parties did not proceed to sign the agreement which both clearly intended to be reduced to writing. Moreover, Mr Emanuele was not called as a witness. He did not testify that he had come to a concluded agreement with EFG for the reduction of principal and interest.

[547] Equally significant is that no contemporary correspondence was produced in which Mr Emanuele asserted that he had made such an agreement. Indeed, letters were produced in which Mr Emanuele asserted a position inconsistent with existence of such an agreement. Exhibit 154 is a letter of 5 December 1994 from Mr Emanuele in which he complains about what he regarded as the excessive amount of the debt set out in the DOOR. The letter was written at a time when the Emanuel group had lost its action in the Federal Court and when the parties were negotiating for a resolution of their differences. In the course of making many points Mr Emanuele wrote:

> 'As you know when the deed was entered into both Bruce Wales and I expressed a great deal of concern about the level of the debt which then existed and which has continued to "balloon" at high interest rates (20% plus for most of the period) capitalised throughout the period. You will recall the view which was expressed at the time by EFG namely that an adjustment of the debt would take place at an appropriate time once the position with the other creditors had been resolved.'

It is significant that Mr Emanuele did not assert the existence of the antecedent incentive agreement but relied upon an unparticularised representation that an 'adjustment' of some sort would take place at some time.

[548] Indeed, this apparent attitude on Mr Emanuele's part conforms to his companies' pleading in the Federal Court proceedings. Paragraph 34 of the statement of claim filed 15 July 1994 pleads that by reason of their becoming parties to the DOOR they suffered detriment. This was relevant to the case of misrepresentation. One particular of detriment was that:

> 'The Emanuel group has incurred liability to the EFG group for interest on the debt at the EFG interest rates during the deed moratorium period which interest rate has for all of that time substantially exceeded the prevailing commercial market interest rates for finance facilities equivalent or similar to the Finance Facilities.'

It is evident that Mr Emanuele did not think to tell his lawyers when litigating against EFG that, on behalf of his companies, he had made an agreement to reduce the rate of interest they had to pay.

[549] Likewise, Exhibit 453 is a letter from Mr Emanuele to Coopers & Lybrand in which he provided information for the 1992 audit. A schedule enclosed with the letter shows the rate of interest being paid on the loans from EFG to vary between 20 per cent and 21.5 per cent, well above the rate which the plaintiffs contend they had agreed to in 1991.

[550] To the same effect is a letter dated 18 March 1994 which Mr Emanuele wrote to Mr O'Grady to complain about Mr Booker's handling of the Emanuel group account. As a justification for his companies' inability to develop the APM lands, Mr Emanuele complained that:

> '… (the) Group cannot be expected to rezone these parcels without significant funds in place to do so. Further, my Group is kept on interest rates of 22% and compounded monthly …'

Although unhappy with the rate there is no hint of dissatisfaction by Mr Emanuele that the debt incentive agreement had been made but not honoured. (This letter is to be found in Volume 33 of Exhibit 421)

[551] On 8 April 1994 Mr Emanuele and his son Rocco met with Mr O'Grady and Mr Benskin in Melbourne as part of the negotiations to settle their dispute. Mr Benskin made a note of the meeting which records Mr Rocco Emanuele as having said:

> 'We talked 18-24 months ago about an interest rate reduction. A large part of (the) $150,000,000 debt is interest accruing at 22 per cent …'

Neither he nor his father, who was present, asserted that an incentive agreement had been made and that the debt and rate of interest were both less than EFG claimed.

[552] Moreover, in the directors' report accompanying the financial statements for Management in the year ended June 1991, the directors stated that, after years end, Management had:

> 'Entered into an agreement with (EFG) whereby their debt was reduced by approximately $19,000,000 to $138,000,000 and the interest rate on that debt was reduced from rates varying between 18 per cent and 22 per cent to a rate of 15 per cent with an incentive agreement whereby that rate would be reduced further as the company reduces its debt.'

It will be noted that the terms of this incentive agreement differs materially from that advanced by the plaintiffs. Be that as it may, this report was read by Mr McCabe of Westpac who brought it to Mr Grier's attention. Mr McCabe's interest was, of course, that a reduction in Emanuele's debt to EFG might provide hope for a recovery of sorts by other lenders such as Westpac. According to Mr McCabe's note of his conversation with Mr Grier, the latter denied the existence of a binding incentive agreement.

[553] Having had their attention drawn to what it regarded as a misstatement in the directors' report, EFG, by Mr Jaenke, wrote to Clayton Utz on 18 March 1992 requesting Mr Elliott to draft a letter to go from EFG to Emanuel demanding it retract the statement. In his letter to Mr Elliott, Mr Jaenke wrote:

> 'The agreement was prepared by yourselves but it was mutually agreed the document would not be executed by either party but

> record an accurate understanding of the agreement. … The statement is in contrast to Elders' verbal agreement with Emanuel group and materially affects the amount of interest recoverable by ourselves on the properties over which we have consented to a second mortgage. …'

The letter drafted by Mr Elliott and signed by Mr Grier was addressed to the directors of Emanuel Holdings. Dated 1 April 1992, it referred to the directors' report of Management and went on:

> 'It is acknowledged that there have been discussions in relation to some form of incentive to encourage the early retirement of debt which has taken place between representatives of our respective companies, however such incentive … is clearly dependant upon documentation and performance criteria. The performance criteria have not been met and there has been no documentation entered into between Emanuel Management … and (EFG).'

The letter went on to demand a retraction.

[554] The response was the preparation of a further directors' report which omitted all reference to the incentive agreement. There is no record of any protest from the Emanuel group. The only possible conclusion is that Mr Emanuele, on behalf of his companies, accepted that there was no such agreement.

[555] Whatever mystery the documents might have given rise to was dissipated by Mr O'Grady's evidence. He explained (T. 8178) that the incentive agreement had to be satisfactorily documented by EFG's solicitors (as the memorandum of 18 October 1991 itself makes explicit). Mr O'Grady was advised 'at a point in time' that the agreement 'could not be documented legally without jeopardising or position *vis-a-vis* other lenders … as a consequence this … was just killed off.'

A copy of Mr Burns' memorandum was sent to Mr O'Grady. Having read it he spoke to Mr Burns 'and told him that the interest rate arrangement with Emanuels had not been implemented because of legal reasons and that it was a dead issue …' (T. 8202.55). This no doubt explains the initial reduction implemented in response to Mr Burns' instruction which was then countermanded after Mr O'Grady had spoken to him.

[556] The riddle of the admissions was also solved by Mr O'Grady. He kept the minutes for the Ramco meetings and he, of course, wrote to Macquarie Bank Ltd. The minutes were written before Mr Elliott gave his advice on 10 December 1991. The likelihood is that Mr O'Grady wrote to Macquarie Bank before he had been informed of the outcome of the meeting of 10 December 1991. The minutes and the letter were written in the belief, subsequently shown to be wrong, that the agreement had been made.

[557] Apart from Mr Burns' memorandum of 4 August 1992, the documents on which the plaintiffs rely as providing evidence of EFG's officers acting to implement the 'agreement' all pre-date the meeting on 10 December 1991 with Mr Elliott. Up until then EFG had proceeded on the basis that there would be an agreement, though it had to be fully documented and signed before it would come into effect. Nevertheless steps were taken in anticipation of agreement. Following the meeting

of 10 December and Mr Elliott’s advice EFG no longer proceeded on that basis. No further attempts were made to draft the document giving effect to the agreement which was effectively at an end. When Mr Elliott’s advice went to Mr O’Grady he ‘killed off’ the prospect of the agreement. Mr Burns apparently was not informed of the decision but Mr O’Grady acted when he received notice of Mr Burns’ actions.

[558] I am satisfied the debt incentive agreement never became a binding contract between the plaintiffs and EFG.

DOOR

[559] The Deed of Orderly Realisation was executed by the Emanuel group, Mr Emanuele and the second, third and fourth defendants on 11 March 1993.

[560] The plaintiffs submit that the deed contained three critical elements:

> ‘(a) It contained an acknowledgment of debt.
> (b) It provided for a period of time in which the Emanuel group was to market and value-add, under the strict supervision … of EFG.
> (c) It gave no assurance that funds would be made available, and in this respect maintained the pattern of inadequate assistance.
>
> The acknowledgment of debt was the platform for the Queensland judgment of February 1995. It was calculated on the basis of rates which exceeded those agreed under the (debt incentive agreement) and which were extortionate. The rates were levied upon an insolvent group of companies unable to source funding elsewhere …
>
> The acknowledgment of debt was … a settlement of property (and … a disposition of property …)’

[561] By the recitals to DOOR the Emanuel group admitted that the loans from EFG were due and payable and that EFG was entitled to exercise its powers of sale as mortgagee. As well, they acknowledged that instruments of security for the loans consisted substantially of vacant land in varying stages of development and/or rezoning and had not been listed for sale for some time. All parties acknowledged that EFG ‘considered that the management, marketing and sale of the land is more effective and commercially viable if continued by the Emanuel group subject … to the terms and conditions’ of DOOR. The final recital was that those plaintiffs had requested EFG to grant a period of grace during which the plaintiffs would proceed with the marketing and realisation of the property subject to the securities, and that EFG had agreed to the request for the moratorium ‘subject to the execution of this deed and upon the terms and conditions hereinafter appearing …’ By Clause 2.1 the Emanuel group acknowledged that an amount of $155,144,910.58 was due and owing to EFG and that they were in default under their securities.

[562] By Clause 3.1 the Emanuel group agreed to enter into a marketing and sales program for the secured property with a marketing group approved by EFG. It further agreed it would pay the full net proceeds of sales to EFG and would make specified minimum repayments as well as providing accurate monthly marketing reports.

[563] By Clause 4.1 the Emanuel group acknowledged that in the course of realising the secured properties it would be necessary to make applications for rezoning or other forms of approval from local governments in order to enhance the value of the land and/or to make it saleable. It promised to provide EFG with all information relating to applications of that kind.

[564] By Clause 4.2 the Emanuel group authorised EFG to negotiate with local authorities, consultants and real estate agents in connection with the marketing, sale and development of the properties and to negotiate with prospective purchasers of the properties.

[565] By Clause 4.3 it was to be a breach of the terms of DOOR should EFG 'in its absolute discretion form the view that the Emanuel group's negotiation and decision making in relation to such matters (dealings with local authorities and purchasers) is not *bona fide* in the interests of orderly realisation … and is considered … to be unreasonable.'

[566] By Clause 5.1 the Emanuel group agreed to comply with all the covenants contained in the instruments of security identified in item 3 of the schedule; to diligently realise the secured property; and to pay net proceeds to EFG and to supply EFG with detailed financial report relevant to their efforts.

[567] By Clause 6 the cost of implementing and operating the Emanuel group was to be its responsibility but 'the EFG group shall permit at its absolute discretion the flow of funds from the Softwoods agreement to the Emanuel group to assist in the funding of the orderly marketing of the land … subject always to the Emanuel group providing satisfactory financial information … EFG … reserves its right to fix the mortgage debenture charge over Emanuel 14 … so far as the Softwoods agreement is concerned at any time.'

[568] By Clause 7 EFG agreed not to enforce the securities against the Emanuel group during the moratorium period, which was defined to be 40 months from 1 March 1993 ending 30 June 1996, on the condition that the Emanuel group complied strictly with the terms of the DOOR and all terms, covenants and conditions of the securities other than the obligation to pay principal and interest.

[569] By Clause 7.2 in the event that the Emanuel group defaulted in the performance of any term under any of the securities save for the payment of principal and interest, and in the event that the Emanuel group did not strictly comply with the terms of the DOOR 'then the balance of the principal sum and interest shall become forthwith due and payable … upon demand … and … EFG … shall be entitled to enforce all its rights pursuant to the … securities and restrictions of this deed as to enforcement … shall be at an end.'

[570] By Clause 12.1 the Emanuel group agreed not to disclose any of the terms of the DOOR to any person without the prior consent of EFG, except for the purposes of enforcing the deed.

[571] The plaintiffs' submission is misconceived. It is made without any regard to the terms of the legislation. For a transaction to be vulnerable pursuant to s 120 it must be a settlement of property. The whole purpose of DOOR was to allow the Emanuel group time to recover from their financial misfortunes. The obligation to pay interest and to repay principal on their loans was suspended for 40 months

while it attended to the sale of properties. No property was disposed of by DOOR: it effected no settlement. I do not understand how an acknowledgement of debt could be said to be a settlement or disposition of property. It is no more than an admission of fact.

[572] The first defendants' submission, which I accept, bears setting out:

> 'This transaction did no harm to Emanuel at all. On the contrary it gave it the benefit of the moratorium it had been seeking. Interest rates were not increased. No burdens were imposed. No guarantors were added. No extra security was taken.'

[573] It is impossible to understand how it might be thought to be a device to defraud the creditors of the Emanuel group. The properties which were to be sold by way of orderly realisation, which was the objective of DOOR, were all mortgaged to EFG. It had a right to the proceeds of sale of those properties. The payment of the proceeds to EFG would not have defrauded creditors. It would have, *pro tanto*, paid the secured creditor what it had a right to receive.

It might be different if DOOR sought to apply to EFG proceeds of sale in excess of the amount of its debt, but it did no such thing.

[574] The plaintiffs seek to link DOOR with the debt incentive agreement, the deposit agreement and the judgment of February 1995 to form a scheme 'to defraud creditors' of the Emanuel group not, it will be noted, the Emanuel group itself.

If one were to rely upon the plaintiffs' submission one would understand that they rely upon the usual litany of coercive conduct and breach of directors' duties to attack DOOR, as well as the *Bankruptcy Act*, but they do not rely upon its inclusion in a fraudulent scheme as a basis for seeking relief in respect of it. This may be because the scheme conferred benefits without corresponding detriments on the Emanuel group. It may also be because events have bypassed the provisions of the deed. It is, I think, necessary to address the submission, not developed, that DOOR was part of an elaborate fraudulent devise.

[575] The evidence is overwhelming that the initiative for a moratorium came from Mr Emanuele and not from EFG. Mr Crosby gave evidence (T.6870.40-6871.5):

> 'Well, to the best of my knowledge the deed was something that the Emanuel group wanted … Elders were prepared to consider that approach so … a certain amount of work would have to be done by Mr Elliott and then this preliminary … meeting took place … My best recollection of it was that Mr Emanuele wanted to have some sort of the issues spelt out with EFG and was going to attempt to deal in a similar fashion with other financiers …'

Mr Crosby was cross-examined at T.6873.20-.30 in which it was apparent that his recollection of the meetings in January was far from clear.

Although I do not have quite the same confidence in Mr Crosby's evidence as I do in that of the other EFG witnesses, his statement appears right. It is corroborated by Mr Crosby's own note of a meeting with Mr Emanuele on 4 January 1993 and the minute of a more formal meeting on 22 January. The first note (Exhibit 421, Volume 26) is in handwriting. It reads:

> 'Joe queries value of PRD – discuss with (Grier) and (O'Grady) – wants to work on sales himself with advertising budget work with agents.
>
> * Wants three years – with annual targets'

The minutes of the meeting of 22 January 1993 (also Exhibit 421, Volume 26) show that Messrs O'Grady, Crosby and Grier met with Mr Elliott in the absence of any representatives of the Emanuel group. Mr Elliott gave some preliminary advice on a deed of orderly realisation and was instructed to prepare a draft. Mr Emanuele and his sons Rocco and Linton then joined the meeting. Mr Emanuele reported that he had raised the question of an orderly disposal of assets with his other financiers, BAC, Mercantile Credits and Kleinwort Benson, with mixed reactions. The minutes record:

> 'Joe believes he should arrange an orderly realisation with his other financiers and come to an understanding with his creditors before executing the proposed EFG deed.'

[576] Mr O'Grady confirmed the provenance of the moratorium:

> 'Now, let me ask you about DOOR. Whose idea was that? – Well, it came from the Emanuel side, effectively in response to Mr Wales' business plan where he was requesting a moratorium to enable the group to realise the major land parcels and to have something that could be shown to the other lenders of the Emanuel group.
>
> Is that an honest answer, Mr O'Grady, that it came from the Emanuel side? – It is, Mr Meagher. …
>
> See I suggest it … came from Mr Elliott? – The legal documentation came from Mr Elliott but the thrust of the documentation, the commercial thrust of the documentation came from the Emanueles, from Bruce Wales, principally … I was surprised at the document itself and I haven't heard of a document like a deed of orderly realisation so I was surprised to that extent, but the principle of it, a moratorium with creditors and giving them deadlines … that was something that I wasn't unsurprised with …' (T.8591.25-.50)

[577] Mr O'Grady was pressed in cross-examination with the point that the DOOR had originated from Mr Elliott and not Mr Emanuele. Mr O'Grady rejected the suggestion:

> 'The framework that the Emanueles and Bruce Wales put the DOOR to us was that they needed a moratorium and they needed it documented in some form … that they could show to their other lenders …

> Can I suggest to you that the deed of orderly realisation was first mentioned to you on 22 January 1993 by Mr Elliott? – As a document, yes.’ (T.8593.30-.40)

[578] Mr O’Grady was taxed with an answer he had given in evidence in the Federal Court proceedings. He had said that Mr Elliott ‘went through the concept’ of the DOOR and that that was the first time that Mr O’Grady knew ‘such a thing could be done’. When it was put to him that his answer indicated that Mr Elliott had proposed the DOOR he said:

> ‘… I meant in terms of an overall deed of orderly realisation. … I had had some other thoughts in my mind in terms of a moratorium and targets. Mr Elliott managed to pull all of this together in one major document which … was the first time I had seen it done … That’s what I’m referring to.’

A little earlier he had said that ‘the concept of a moratorium I certainly understood and the concept of giving them targets which they could achieve I certainly understood but the concept of how all that could be then bound together in a legal document … was … news to me when Mr Elliott produced it. …’ (T.8593.39-.45; 8595.12-.18)

[579] There is some further documentary support for a finding that Mr Emanuele initiated the basic propositions later found in DOOR. In his memorandum of December 1992 which followed delivery of the Wales report Mr Emanuele outlined a program by which the Emanuel group might continue to operate despite being unable to pay its way. The document commenced:

> ‘EFG will not pay
>
> 1. Rates and taxes of other financiers, and
> 5. Insurances of other financiers.
>
> Identify the amounts payable for 92/93 by property by financier.
>
> Meet with each financier in January 93 to advise them of the extra costs which they will incur in servicing their securities.
>
> At meeting with each financier, also present to them a selling program for their properties and inform them that Elders have agreed in principle to fund the Emanuel group’s administrative overhead and certain costs for the purpose of “adding value” to the group’s properties in the Brisbane northern corridor …’

[580] The plaintiffs appeared ultimately to accept the point that the concept underlying DOOR was Mr Emanuele’s idea:

> ‘Mr Meagher: You have set out – if you want to see it I’ll have it shown to you. You say, “Mr Emanuele stated if he could reach some arrangement with the EFG group who was by far his major secured creditor he believed that he would increase his prospects of coming

> to arrangements with his other creditors," do you recall saying that? – Yes.
>
> And that was the situation wasn't it? – Yes.' (T.8597.4-.10)

[581] Mr Elliott freely admitted that by early 1993 he had been concerned for some time that EFG's 'workout' relationship with the Emanuel group had not been adequately structured or documented. His letters of advice which were mentioned in Section II of these reasons show that concern. Mr Elliott said:

> 'What was concerning me is that the Emanuel group … were in a position of technical insolvency and … the debt was continuing to increase by capitalisation of interest. The secured creditor was discussing matters with the Emanuel group or its directors … from time to time and it seemed to me that their conduct in this regard … to lack the type of discipline that, as a legal advisor, I would have preferred … I was alluding to the fact that if there was an ongoing unofficial undisciplined type of arrangement without having a definitive workout terms and conditions … the blurring between being a secured creditor and entering into proper negotiations with your borrower to try and realise securities … as opposed to being an intermeddler … and giving some direction to members of the Emanuel group … it would be harder to ward off an allegation. I wasn't particularly concerned of any particular action but it was just a general concept … that I should be drawing this to the attention of the client. My objective was to try and encourage them to formalise their relationship and work towards a documented workout rather than a loose situation …' (T.8674.55-8675.20)

A little later he said:

> 'My view (was) that … a formal workout arrangement with the consensus of the borrower and the lender setting out terms and conditions of timeframes of objectives and methods of realisation of property … should take place … In due course there was a document … called the DOOR … and with the DOOR was another mechanism which was a reserved deposit account. And the two of those, at a later stage did start to meet my ideas of a regulated and proper workout.' (T.8676.5-.20)

[582] Both Mr Grier and Mr Jaenke testified that it was Mr Emanuele who wanted and who asked for a moratorium on his debt which forms the principal part of DOOR. They confirmed that Mr Emanuele's purpose was two-fold: to obtain time to sell his properties at an improved price to reduce the EFG debt and to show to his other financiers to persuade them to come to a similar arrangement. Mr Grier's evidence is at T.7540.35-.45; at 7571.33; at 7573.25-.30. Mr Jaenke's evidence is at T.8110.40-.45.

[583] EFG's motive for agreeing to the DOOR appears in the minutes of the meeting of Ramco of 23 February 1993 at which Messrs O'Grady and Crosby:

> 'Reported that the purpose of the deed or orderly realisation was to:

- Formalise the existing strategy … in respect of the orderly realisation of assets in the Emanuel group.

- Obtain acknowledgments from the Emanuel group

  - Of all the debts owing by the various companies in the Emanuel group to EFG
  - That EFG has the authority to deal and negotiate with parties in respect of the … sale of the properties.
  - That EFG has the authority to set and establish a pricing program.

- Under the deed EFG has protected its existing rights … In addition should any other lender take action against the Emanuel group … EFG's security position is crystallised.

- A favourable by-product of the … deed … is expected to be that other lenders will fall into line with similar arrangements, and that the Emanuel group will be able to concentrate on orderly realisation in a controlled environment …'

[584] The document effectively disproves the plaintiffs' theory that DOOR was intended to form part of a complicated scheme to defraud the Emanuel group and its other secured creditors. The minute shows a legitimate commercial reason for the moratorium. It gave the mortgagor a chance to increase the proceeds of realisation of the secured properties while protecting the mortgagee's position should events not transpire as hoped. Neither Mr Crosby nor Mr O'Grady were cross-examined in an endeavour to show that their report to Ramco was false and that they intended quite different consequences from DOOR.

[585] EFG's approach to the Emanuel group was identical to that of its other secured creditors, BAC and Esanda. Both of those lenders took the view that their interests were best served by leaving the Emanuel group in charge of the realisation of assets secured to those lenders (T.2955; 2963). Both lenders gave the Emanuel group time to realise assets and did not insist on immediate repayment. Nor did they exercise their powers of mortgagee. Indeed ANZ formally extended all of the Emanuel loans from time to time to avoid formal default. As well both lenders made further advances for the purpose of increasing the value of their secured property or more effectively realising them. (T.3091; 3092; 3094; Exhibit 249, Tab 47; T.2962; T. 3086-7; Exhibit 247, Tab 71, 78)

[586] There is no reason to doubt the accuracy of the amount of the debt acknowledged by the Emanuel group and Mr Emanuele to be due and owing as at 11 March 1993. Save for the effect of the debt incentive agreement, which I have concluded never reached the stage of being a concluded contract, there is no complaint about the calculation of the debt. The plaintiffs seek a recalculation of the debt should their claims in this action proceed, but that is a different point. The complaint that DOOR contained an acknowledgment of debt therefore has no significance. It may be true that the acknowledgment of debt 'was the platform for the Queensland

judgment of February 1995' but that is to say no more than that judgment was entered on a debt which actually existed in an amount which was honestly believed by all parties to be correct. The suspicion that DOOR was intended as an instrument of fraud has been disproved by the evidence.

Deposit Account Agreement

[587] An agreement made ancillary to DOOR, the Deposit Account Agreement (Exhibit 83, also found in Exhibit 421) of 20 May 1993, is also impugned. It was this agreement by which the proceeds of the sale of timber to Softwoods were to be paid into an account controlled by EFG from which money was released to the Emanuel group to allow it to perform its part of DOOR.

[588] The Deposit Account Agreement was made between Elfic Ltd and Emanuel 14. By clause 1 Elfic was obliged to open a deposit account in the name of Emanuel 14 styled 'Emanuel group deposit account' into which moneys were to be deposited by Emanuel 14. By Clause 2 the deposit account was to be under the control of Elfic and was to be maintained until there had been 'due performance and observance of all liabilities and obligations of Emanuel 14, Management, Navicio, Segacious, Meka Securities, Grangeville and Cofordo 251 pursuant to the terms of agreements made between them and all securities collateral thereto'. Further 'until the time of due performance … of all … liabilities and obligations … (Emanuel 14) shall have no right to call for the payment of any amount outstanding to the credit of the deposit account …'

Credit balances in the deposit account were to attract interest. By Clause 5 Elfic was to make funds available to Emanuel 14 'upon request in accordance with the terms of paragraph 6 of DOOR'.

Emanuel 14 authorised Elfic to make payments from the account to it or to Management at Elfic's 'absolute discretion'.

[589] By Clause 7 so long as any moneys were payable by Emanuel 14 or the other companies named in Clause 2 Elfic was entitled to pay itself from the deposit account any amount that it 'in its absolute discretion may think fit and to apply or set off that amount in or towards satisfaction of all or any of the liabilities' of those Emanuel companies.

[590] By an irrevocable authority in writing dated 26 May 1993 Emanuel 14 authorised and directed Softwoods to pay all moneys that were to become due and payable to it pursuant to the terms of their agreement into the deposit account created pursuant to the Deposit Account Agreement.

[591] This transaction is impugned upon the same grounds, mechanically reproduced, as the other transactions. The principal source of complaint is that it offends s 120 or s 121 of the *Bankruptcy Act*.

[592] The basis for the plaintiffs' complaint is not apparent. EFG had a mortgage debenture over Emanuel 14's property, and the charge created by it was fixed over the standing timber. (See Exhibit 106, C14/1357 Clause 8 and Schedule 7. This has been referred to earlier) EFG had allowed Emanuel 14 to fell the timber and sell it but the unfelled standing timber remained subject to the fixed charge. The charge over the contract and moneys paid pursuant to it from Softwoods had not been fixed

and the money was allowed to flow to Emanuel 14. However, EFG could have fixed the charge over the sale proceeds at any time (Clause 9 of the debenture). The right to fix that charge was specifically preserved to EFG in DOOR, by Clause 6 which I have set out.

[593] The result is that the Deposit Account Agreement and the irrevocable authority together brought about a situation which, from the point of view of the Emanuel group, was no different from that which would exist had EFG exercised its right to fix the charge over the Softwoods agreement about which the Emanuel group could not have complained.

[594] There was a benefit to EFG in the arrangement. Mr Elliott explained it. In his advice of 10 September 1992 he had pointed out that receipt of the timber royalties by the Emanuel group posed a dilemma for EFG. Had it fixed its charge EFG would have received the proceeds in reduction of its debt but if it returned the money to the Emanuel group it would thereby make further advances. In the event that the companies in the Emanuel group were wound up EFG would be unable to recover interest. As well there might be, in some circumstances a loss of priority to subsequent mortgagees. (T.8682.1-8683.35) By contrast allowing the moneys to be paid to the Emanuel group directly removed those problems but increased the risk of a finding that EFG had become *de facto* director of the Emanuel group if it controlled the manner in which the money was spent. (T.8683.40-8684.20)

Mr Elliott said:-

> '… The (dilemma) was resolved in that when (DOOR) was put in place with the deposit … account the effect … was to make the funds available for utilisation in accordance with the contractual arrangements that the Emanuel group had agreed to in terms of … DOOR … The moneys that were released … were in accordance with the terms of that agreement and therefore … were not decisions … made by EFG in the sense of controlling the funds but purely using a discretion they had to release the funds for specific purposes which the Emanuel group had contracted to undertake and EFG in terms of … DOOR had agreed to allow funds to flow through to meet those contractual obligations, for example … marketing agents, advertising costs … They weren't advances because the moneys arose from the sale of assets …'

[595] The first defendants' analysis of the transaction, which I accept, is that the deposits into the account from the proceeds of the sale of timber were loans by Emanuel 14 to EFG. Interest was payable by EFG, as I have pointed out. The term of the loan could not have exceeded the life of DOOR, 40 months. The transaction contemplated that moneys would be paid from the account to Emanuel 14 to allow it to perform its obligations under DOOR. Any credit balance in the account at the termination of DOOR would have been paid to Emanuel 14 or appropriated by EFG by way of set off in reduction of the debt owed by Emanuel 14. The loans (deposits) made by Emanuel 14 cannot, therefore, be regarded as a settlement. It is true that a loan for a very long term during which no repayments of principal are required may constitute a settlement (*Barton v. Official Receiver* (1984) 4 FCR 380 affirmed 161 CLR 75) but this is not such a case.

[596] It is impossible to see in the agreement an intention to defraud creditors. The deposit of the timber proceeds did not alter the assets of the Emanuel group or, more particularly, Emanuel 14. Instead of receiving cash in hand it had a chose in action of identical value being the loan to EFG which attracted interest. While EFG refrained from exercising its rights to fix its charge over the money it had no proprietary right in it and could not prevent Emanuel 14 from calling for repayment. EFG had a right of set off with respect to the deposits but had that been exercised it would have benefited Emanuel 14 by the reduction, *pro tanto*, of the debt.

[597] There was a rational commercial basis for the transaction of which both DOOR and the deposit account agreement formed part. It was intended to benefit both the Emanuel group and EFG. It was not intended to defraud creditors.

Deed – 16 August 1993

[598] The plaintiffs next complain about a deed of 16 August 1993 which provided for a further advance of $350,000 to form part of the moneys lent pursuant to the Deed of Master Agreement. The deed is found in Exhibit 106, Volume 15/1637. It was made between Elfic (the third defendant) as mortgagee, Management as mortgagor and the Emanuel group (excluding Management) as guarantors. It recited that the mortgagor and guarantors had requested the mortgagee to lend a further sum of $350,000 which the mortgagee had agreed to do, upon conditions.

[599] Clause 1 provided that the mortgagee may 'in its absolute discretion lend … the mortgagor the further sum of $350,000 … in such amount … and at such time … as the mortgagee (*sic* mortgagor) shall … request provided always that the mortgagee may … decline to lend …'.

[600] Clause 2 provided that any amounts advanced pursuant to clause 1 should form part of the money owing to the mortgagee under the Deed of Master Agreement as varied, and should be repaid on the same terms and conditions. By Clause 4 the mortgagor agreed to pay interest on the further advances at the rate applicable to moneys owing under the Deed of Master Agreement as varied from time to time.

[601] The further advances were made to allow Emanuel 14 to discharge mortgages over three parcels of land which adjoined, and indeed were surrounded by, parcels of the APM lands which were mortgaged to EFG. Clause 5 of the deed provided that those three parcels would then become subject to a registered bill of mortgage in favour of the second defendant as additional security for the further advance.

[602] The three parcels had been mortgaged to BAC and to ANZ. What happened was that Emanuel 14 borrowed $350,000 from EFG to discharge the secured loans from those other financiers. EFG then took a mortgage over the three parcels to secure its further advance.

[603] It seems that on 20 August 1993 the sum of $250,000 was advanced to discharge the mortgage to BAC and on 25 August the sum of $100,000 was advanced to discharge the mortgage in favour of ANZ.

[604] Mr Macks attacks the agreement because its purpose 'was to benefit (EFG). Its effect was to exchange existing mortgage facilities for new facilities … at high rates of interest and to charge more of the Emanuel companies with liability for the facility than was previously the case …'.

[605] The basis of the attack is said to be s 558FB, s 558FC and s 558FE(4) of the *Corporations Law*. It will be recalled that this is one of the transactions that post- date 23 June 1993 and in respect to which it is said that the loan was unfair because of an extortionate rate of interest.

[606] Section 588FB provides that:

> ‘1. A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company’s circumstances would not have entered into the transaction, having regard to:
>
> (a) The benefits (if any) to the company of entering into the transaction; and
> (b) The detriment to the company of entering into the transaction; and
> (c) The respective benefits to other parties to the transaction of entering into it; and
> (d) Any other relevant matter.’

[607] Section 588FC provides:

> ‘A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:
>
> (a) Any of the following happens at a time when the company is solvent:
>
> (i) The transaction is entered into;
> (ii) An act is done, or an omission is made, for the purpose of giving effect to the transaction; or
>
> (b) The company becomes insolvent because of, or because of matters including:
>
> (i) Entering into the transaction; or
> (ii) A person doing an act, or making an omission, for the purpose of giving effect to the transaction.’

[608] The liquidator claims that the transaction is voidable by reason of s 588FE(4) which provides:

> ‘The transaction is voidable if:
>
> (a) It is an insolvent transaction of the company; and
> (b) A related entity of the company is a party to it; and
> (c) It was entered into, or an act was done for the purpose of giving effect to it, during the four years ending on the relation-back day.’

[609] Reliance is placed on subsection (4) because EFG had been a shareholder in Management by reason of the issue of preference shares to it in 1983. Most of the shares had been redeemed in December 1990 but a small parcel of the shares remained with EFG so that Management could truly say it had remained continuously under the same ownership and was therefore eligible for income tax concessions. The detail does not matter for the moment. The point is that by reason of the small shareholding EFG was a related corporation to Management and its subsidiaries. On its face subsection (4) would appear to be aimed at transactions by which an insolvent company transacted business with a related entity for the benefit of that entity. This is said to be its function in the Explanatory Memorandum to the *Corporate Law Reform Bill* 1992 which introduced the section. Paragraph 358 of the memorandum said:

> 'The extensive definition of 'related entity' … is for the purpose of widening the application of provisions allowing a liquidator greater capacity to recover assets which have been disposed of to persons who are related entities, such as where an action is brought to recover the benefit of reviewable transactions under proposed s.588FE …'

Paragraph 359 said:

> 'The consequence of being a related entity in connection with a reviewable transaction is that instead of a 6 month time zone prior to the relation-back day in which transactions may be reviewed, transactions in which one of the parties is a related entity attract a time zone of four years …'

[610] Professor Keay thought the meaning of subsection (4) clear enough. In an article 'Relation-backed Day and Related Entity: New Key Terms in Liquidation Law' 1994 vol. 2 *Insolvency Law Journal* p.126, he wrote (129):

> '… One of the two major aims of Part 5.7B was to strengthen the antecedent transaction provisions concerning related persons with the goal of ensuring that property disposed of to favoured creditors shortly before the commencement of winding up will be more readily available for distribution among the general body of unsecured creditors … For instance, an unfair preference can only be set aside, normally, if it occurred within the six months immediately preceding the relation-back day. However, if one of the parties to a transaction … is a related entity of the company in liquidation, the unfair preference could be set aside … within four years …'

[611] This is not a transaction by which a benefit passed from an insolvent Management to related companies. This is what appears to be the subject of the subsection's operation. This conclusion is suggested by the terms of s 588FF which is predicated upon the recovery of benefits or property that passed from an insolvent company. For example the first two types of order that may be made are those directing a person to pay to the company an amount equal to the money that the company paid under the transaction, or the re-transfer of property that the company transferred under the transaction.

Under the transaction in question Management did not pay money or transfer property. It received money, by way of loan. It assigned mortgages over the lands in question from one financier to another. Its asset position did not change.

Even if s 588FE(4) is literally applicable to this transaction there would not seem to be any scope for relief under s 588FF.

[612] In any event subsection (4) only applies to an insolvent transaction, which means in this context an uncommercial transaction which Management entered into when it was insolvent. Management and the other companies in the Emanuel group were insolvent in August 1993. Was the transaction an uncommercial one?

[613] The only evidence concerning what lay behind the transaction – the further advance – is documentary and rather sketchy. The plaintiffs did not call any witness who could speak about it. Only Mr Grier of the first defendants' witnesses was questioned about it. There are some documents which throw some light on it. It will be recalled that this transaction occurred some months after DOOR had been executed and the Emanuel group were attempting the orderly realisation of the secured properties. Part of that process was to improve the value and/or saleability of properties. That, in turn, necessitated the occasional expenditure of money. It will also be remembered that the plaintiffs had borrowed from BAC and were in default under those loans. That bank, too, was looking anxiously at its position and had arranged with Mr Emanuele for an orderly strategy of selling properties over which it held security. According to a diary note (Exhibit 5, Volume 7/328) Mr Emanuele and his son called upon the account manager at BAC, Mr Durack on 15 July 1993 to discuss 'a system of reporting in respect of the group's property activity …'. At the meeting Mr Emanuele raised the prospect of BAC releasing its mortgage over two parcels of land at Beachmere in return for payment, to be borrowed from EFG, of $250,000. According to Mr Durack's assistant's diary note:

> 'This land … represents a small but strategic pocket in what is almost the centre of approximately 2314 hectares mortgaged to … Elders … Mr Emanuele has persuaded Elders that the land will be of strategic importance to any future developer. As a consequence of Mr Emanuele's discussions on the matter, Elders have agreed to fund the property at a negotiated level, enabling the total land package to be offered to the market at the appropriate time. … Mr Emanuele has negotiated with Elders for a payment to us of $250,000 in release of our mortgages over lots 16 and 380 … The properties will then go to Elders as security. … Mr Emanuele is convinced that Elders would not provide further funding and … representations for a higher amount would very likely result in Elders deciding not to do the deal at all.'

[614] The two parcels mentioned are two of the three which were mortgaged to EFG in accordance with the deed of 16 August. The third parcel was presumably mortgaged to ANZ with whom a similar arrangement was made.

[615] EFG's view of the matter may be seen from the report to Ramco on 24 August 1993:

> 'A further advance of $350,000 has been made to pay out ANZ and Westpac in relation to land adjacent to parcel 10 in Caboolture. Purchase of these small areas of land is considered necessary to maintain good main road frontage. On a stand alone basis, the valuations of the properties exceeded the amount advanced.'

[616] It is difficult to accept the submission that the transaction was of no benefit to the plaintiffs. The evidence, unsatisfactory as it is, suggests that it was Mr Emanuele who proposed the substitution of mortgagee. The parcels were said to be of strategic importance by improving the road frontage of the adjacent APM land. By effecting the substitution of mortgagee the Emanuel group obtained the benefit of the moratorium provided for by the DOOR. The risk that BAC and/or ANZ might exercise their powers of mortgagee to sell the land was removed. Had that happened the enhancement of value to the adjacent APM land by having the better road frontage would have been lost.

[617] There was one disadvantage to the Emanuel group following the assignment of mortgages. EFG charged a higher rate of interest than had been due to ANZ and BAC. This is not enough, in my view, to make the transaction an uncommercial one. The transaction was clearly regarded by Mr Emanuele as being in the best interests of the companies. The land had significance from the point of view of a strategic landholding and the increased interest obligation appeared to be a worthwhile price to pay for the benefits obtained from the transaction. In any event the obligation was more academic than actual. The Emanuel group were not paying interest and had the benefit of the moratorium.

[618] The evidence is scant but such as it is it does not support a finding that the transaction was such that a reasonable person would not have entered into it.

[619] Although the interest rate was higher than that charged by other lenders I am not prepared to find that the rate was extortionate and that the loan was consequently unfair, because of the peculiar circumstances of the parties. The transaction added value to the adjoining APM land owned by Emanuel 14. Had EFG not made the advance there was a real risk that the existing mortgagees would have forced a sale of the properties. The Emanuel group had no other source of funds available. No other financier would lend them money. Moreover interest was not being paid but capitalised and there was a real prospect that it would never be paid.

[620] The considerations discussed earlier when considering the complaint about profit fees is relevant to the complaint about extortionate rates of interest. The rate charged in any given set of circumstances will reflect the risk to the lender, the ability of the borrower to repay the principal and to service the loan in the interim, the value of the property taken to secure the loan and the cost and difficulty involved in selling the property if the lender is obliged to act in that regard. The rate will also reflect competition between lenders for business and the attractiveness of a borrower to lenders. Mr MacDonald explained that EFG was a 'lender of last resort' (T.7087.20). It is to be expected that borrowers who have recourse to such lenders will pay a higher rate of interest than if they were wealthy customers of first class institutions. Other factors of relevance have been mentioned. Emanuel was insolvent. Its only prospect of paying interest was from the sale of land which by reason of its size and zoning would be attractive only to a small class of discerning buyer and much effort and time would be required to make the land saleable at all.

EFG at the time was not in the business of money lending.

All in all the situation was one in which the rational objective observer would expect a lender to impose a rate of interest higher than the prevailing market rate charged to borrowers in ordinary circumstances.

[621] Section 588FD uses strong words when describing when a loan will be unfair. The interest rate must be 'extortionate'. This means it must be exorbitant, or grossly excessive, or characterised by extortion. This latter term is the act of extorting, i.e. wresting or wringing something from a person by violence, intimidation or abuse of authority, or obtaining money etc. by force, torture, threats or the like. See the Macquarie Dictionary. It is not enough to make a loan unfair for the purposes of s 588FD that the interest rate charged is higher, even substantially higher, than the market rate for similar transactions. There must be something in the fixing of the rate which brings to mind the concepts implicit in the word I have just identified. There is a particular difficulty when there are no similar transactions and one is forced to compare interest rates charged on 'ordinary' transactions with those which are unusual and which by their nature would attract a higher rate of interest.

[622] Given the circumstances of the Emanuel group and the nature of the transaction I do not believe the rate can be regarded as 'extortionate'.

Deed of Variation – 9 September 1993

[623] The next transaction attacked is a Deed of Variation of 9 September 1993 (Exhibit 106, Volume 15/1368). This was the deed by which mortgages granted by Giuseppe Nominees over a number of residences to a number of private individuals were assigned by the original mortgagees to EFG which advanced moneys to those mortgagees to effect the assignment. A further sum of $80,000 was advanced to allow building work on one of the houses to be completed. They were a house property in suburban Brisbane; a beach home at Cape Jervis south of Adelaide which was the home under construction; two homes in suburban Adelaide and a fifth home in the Adelaide hills. The interest rate charged on the assigned mortgages and the additional advance was that applicable under the Deed of Master Agreement. It will be recalled that this further advance is one of the loans which is attacked as being unfair by reason of the extortionate interest rate.

[624] The transfer of the homes figures in the plaintiffs' case about the 1995 Scheme and I deal with the evidence relating to it later in these reasons. The transfer of the mortgages is separately attacked pursuant to s 588FB, s 588FC and s 588FE(4) on the grounds that the transaction was uncommercial, insolvent and was between related parties.

[625] The deed was made between Elfic Ltd as mortgagee, Management as mortgagor and the other companies in the Emanuel group as guarantors. By Recital B it was acknowledged that the mortgagee would take an assignment of the mortgages listed in the third schedule to the deed under which various of the companies in the Emanuel group had incurred liability to repay loans. By recital C Management and the other companies in the Emanuel group acknowledged their request to Elfic to vary the existing securities between them, and the further mortgages to be assigned, and to lend a further sum of $80,000 to both Management and the Emanuel group.

[626] By Clause 1 the parties agreed that all money owing under the assigned mortgages would form part of the money owing to Elfic under the Deed of Master Agreement as varied. By Clause 2 the Emanuel group agreed that the interest rate applicable to the moneys owing under the assigned mortgages were to be varied to the rates of interest applicable to the sum owing under the Deed of Master Agreement. By Clause 4 Elfic was given an absolute discretion whether or not to advance the requested sum of $80,000. If the advance were made the money was to be paid to building contractors when they completed the work. The money advanced was to form part of the principal advanced under the Deed of Master Agreement. By Clause 5 Giuseppe Nominees was not to execute further mortgages over the properties the subject of the assigned mortgages.

[627] Mr Emanuele was one of the guarantors. He was also the mortgagor of the home in Brisbane. Giuseppe Nominees was the mortgagor of the four South Australian properties. Management, Holdings, Giuseppe Nominees and Paterson were guarantors of various of the assigned securities.

[628] Giuseppe Nominees and Cofordo 251, both of whom were guarantors to the deed of 9 September, were parties to it in their own right and as trustee of the Emanuel Family Trust and the Earl Hill Unit Trust respectively. It was in that same capacity that Giuseppe Nominees had been mortgagor and guarantor of the assigned mortgages.

[629] The plaintiffs’ complaints about this transaction are that it was the ‘first step in implementation of a scheme proposed by Mr O’Grady on 7 September 1993’ by which I take it the plaintiffs mean the 1995 Scheme; and it had the effect of making all of the companies in the Emanuel group liable as guarantors for the obligations of the mortgagor under the assigned mortgages whereas formerly only a few of those companies were so liable.

[630] The second point can be disposed of shortly. The fact that additional companies in the Emanuel group became guarantors for the mortgage debts is not a relevant disadvantage to those companies in circumstances where the security for the debt was adequate to discharge it. Valuations of the property (Exhibit 421, Volume 26 and minutes of 3 February 1993) show that the properties had a combined value of $1,580,000 whereas the debt owed against the properties was $1,205,000 (Exhibit 421, Volume 28, Memo Mr Grier to Mr O’Grady 29 April 1993). Had the guarantors been called upon to pay the debt they had a right of indemnity from the principal debtor, including a right to have the principal debtor pay the debt before the guarantor. See *Abigroup Ltd v. Abignano* (1992) 112 ALR 497. As well the guarantors had a right to be subrogated to the security if they paid the debt. *Scholefield Goodman & Sons Ltd v. Zyngier* [1986] AC 562. On the evidence the additional guarantors suffered no diminution in their asset position by reason of their becoming guarantors.

[631] The other ground of objection disappears with the finding, which I make in the next section, that there was no 1995 Scheme and no conspiracy or plan involving EFG to defraud the Emanuel group or anyone else. The plaintiffs do, however, rely upon their repeated grounds for impugning this transaction. I suppose I must deal with the evidence.

[632] The proposal that EFG take an assignment of the mortgages over the residential properties was an initiative of Mr Emanuele. Mr Crosby had a recollection to that effect (T.6376.20) as did Mr O'Grady (T.8224.30-.40.) This evidence appears to be corroborated by a document dated September 1993 prepared by the Emanuel group and headed '*Summary of Liabilities Owing to Non-Institutional Lenders*'. Under the heading '*Private Mortgages*' there is an entry:

> 'Elders requested to pay out third party mortgages securing the four personal use properties.'

Mr Crosby also had a recollection that EFG was lending money to the Emanuel group to enable it to pay interest on the private mortgages but was reluctant to continue that arrangement without additional security. Mr O'Grady explained that he saw a benefit to EFG in taking an assignment of the mortgages as their value was believed to exceed the amount of the mortgage debts. This was borne out by the valuation as I have mentioned. Mr Grier explained in his memorandum of 29 April 1993 which enclosed the valuations:

> 'At the present time Emanuele has encumbrances on his family residential properties and each month interest is paid to the mortgagees with funds made available by EFG through the cash flow budget approved half yearly. It was recently agreed that if there is an equity in these properties it would be in EFG's interest to clear liability and be in a position to enjoy a capital appreciation in the future.'

[633] A substantial delay occurred between approval in principle for the assignment of the mortgages and the completion of that agreement. A memorandum of 15 June 1993 to Mr Crosby refers to approval for the assignment and also to delays 'as existing mortgagees have not provided copies of their documents to our solicitors.' By 24 August 1993 the assignments had still not been effected. It is, therefore, apparent that the assignment was unrelated to Mr O'Grady's initiative in September 1993 to bring about a 'clean break' with the Emanuel group, which is the subject of discussion in the next section of the judgment.

[634] By the time the assignment did take place Mr O'Grady had added reason for proceeding with it. He had experienced Mr Emanuele's resistance to his proposals and thought that if EFG were mortgagee of those residential properties, its bargaining position in the negotiations might be improved. See T.8273.50-8274.10.

[635] It is difficult to understand quite what is the basis for attacking this transaction. The circumstances giving rise to it have already been discussed. Given that the request for the assignment came from Mr Emanuele who could not pay interest without EFG's support and that by the assignment interest was capitalised and could not be demanded until the expiration of the moratorium period, it does not seem possible to regard it as an uncommercial transaction. Unless it is it is not amenable to attack pursuant to s 588FE(4).

[636] The Emanuel group does not appear to have suffered any detriment by reason of the transaction. To the extent that the assignment made additional equity available to secure their debts they were better off.

[637] Although this transaction involved the Emanuel group becoming liable to pay interest at the higher rate fixed by the deed of master agreement, the plaintiffs' submissions do not refer to s 588FD as a basis for attacking it. In any event for the reasons advanced with respect to the last transaction I would not find that the loan was unfair for the purposes of the section.

Deed – 23 September 1993

[638] The penultimate transaction which the plaintiffs seek to have set aside is a Deed of 23 September 1993 (Exhibit 106, Volume 15/1369). It was pursuant to this deed that Management was advanced the sum of $237,000 which was paid to Kartha pursuant to the agreement between those two companies for the recission of the contract for the sale and purchase of Parcel 64. The parties to the deed are the same as for the previous Deed of Variation and the terms are essentially the same. Elfic was given the discretion whether or not to advance the moneys but, if advanced, they were to form part of the principal due under the Deed of Master Agreement and were to bear interest at the rate set under that agreement.

[639] The statutory basis for the attack is the same as for the previous deeds of 16 August and 9 September. The factual basis of the attack is said to be that the deed 'served no useful purpose for the Emanuel companies. It was done solely for the benefit of (EFG) and … resulted in the loss of the Kartha contract and the prospects of a valuable development …'.

[640] There is brief reference in the Introduction to these reasons to the contract by which Kartha agreed to purchase Parcel 64. It is mentioned at more length in that part of Section IV of the judgment which deals with the valuation of the APM land. For present purposes it is enough to say that Kartha did not complete the contract of purchase despite a number of extensions of time to do so, and the contract was eventually rescinded by Emanuel 14. The plaintiffs appear to contend that the decision to bring the contract to an end was EFG's and was made for an ulterior purpose. That purpose is identified as EFG's desire to obtain title to Parcel 64 itself. It could not hope to do so while the contract with Kartha persisted. The payment of $237,000 to Kartha is said to be the price EFG was prepared to pay, at the expense of Emanuel 14, to persuade Kartha not to contest the recission.

[641] The evidence is overwhelmingly against this theory. Everyone concerned shared the view that Kartha could not complete the contract because it did not have the financial resources. Mr Wadley, Kartha's principal, was said to be a speculator without financial substance who needed the involvement of a wealthy joint venturer to be able to proceed with the purchase of Parcel 64 (T.4268.50). The evidence of his solicitor, Mr Purvis, demonstrated convincingly that Kartha was unable to attract a suitable partner. (T.3634.10-.60) This was evidence adduced in chief by the plaintiffs who called Mr Purvis. At T.3643.30 Mr Purvis confirmed that Mr Emanuele expressed doubt about Kartha's ability to complete the contract. Mr Crosby (T.6207.20-.23) and Mr Grier (T.7402.10-.20) both testified that they had doubts about Kartha's ability to complete the contract. Mr Booker (T.7637.35-.40; 7643.30; 7646.35-.45; 7739.24) gave evidence that Mr Emanuele wanted the Kartha contract to be rescinded because while it subsisted he could not proceed to have Parcel 64 rezoned and Kartha had demonstrated an inability to proceed with the contract.

[642] The payment made to Kartha was the product of a 'reluctant decision' made by EFG when the contract was entered into (T.6211.10) to pay Kartha the expense incurred in attempting to have Parcel 64 rezoned. It had made endeavours in that regard and $237,000 was the negotiated amount to reimburse Kartha. In return for the payment Emanuel 14 received the results of the work done by consultants in preparation for the rezoning application. There was no evidence that the amount paid was not fair consideration.

[643] In follows, and I find, that Emanuel 14 wished to terminate Kartha's contract for sound commercial reasons and, with EFG's assistance, negotiated a fair price for the recission. It was reasonable for Emanuel 14 to borrow the money necessary to pay out Kartha as it enabled Emanuel 14 to proceed with applications to rezone the land utilising the benefits of work done by Kartha's consultants. The terms on which the money was borrowed was not extortionate in the circumstances in which Emanuel 14 found itself and which have been discussed earlier.

[644] The plaintiffs' contention that the contract was brought to an end as part of 'the O'Grady scheme' is untenable. There is no doubt that Kartha could not perform its contract which, while it remained on foot, prevented the sale of Mango Hill to any other party and precluded both the Emanuel group and EFG from proceeding to have the land rezoned or obtaining development approvals. In return for the payment of the $237,000 the Emanuel group, and EFG, obtained the benefit of the work done by Kartha's consultants with respect to obtaining development approval. The negotiations for the recission occurred between parties at arms length and there is no evidence that the amount paid was not an appropriate price. It cannot be said that the transaction was uncommercial so that the attack based upon s 588FE(4) fails.

Deed of Variation – 16 November 1993

[645] The last transaction in this category is the sixth Deed of Variation of 16 November 1993 (Exhibit 106, Volume 15/1370). The parties are the same as for the previous Deeds of Variation and the terms are substantially the same.

[646] By Clause 2 Elfic agreed to vary the existing loan agreements by advancing two further sums of money (together totalling $1,857,500) to enable work to be carried ot on two of the APM parcels. $540,000 was to assist with works on Parcel 52 and $1,317,500 was to permit work to occur on Parcel 53.

[647] Parcel 52 comprised Caloundra Downs. The Deed of Variation set out a brief description of the items of work to be done and the price for each which totalled the amount of the advance of $540,000. The work was the construction of an access road. The advance was described as a progress payment to subcontractors which was to be paid upon the receipt of a certificate from the consulting engineers that work to the requisite value had been performed. It is evident that the work was meant to enhance the value of Caloundra Downs to the benefit of both the Emanuel group and EFG.

[648] Similarly the advance for Parcel 53, Bribie Island, was to pay for the construction of the haul road to allow stands of timber to be felled and removed. This is discussed in the next section of the judgment. Without that expenditure the haul road would not have been built and without the road the timber could not have been harvested and sold. The proceeds of sale went in reduction of the Emanuel group's debt.

[649] This is one of the transactions which is said to be an unfair loan by reason of the imposition of the interest rate applicable to the Deed of Master Agreement. As well, it is attacked on the usual bases relying upon s 588FB, s 588FC and s 588FE(4).

[650] The basis for the complaint is that 'there was no benefit to (the Emanuel group) in … provision of these funds. To the contrary, the deed had encouraged trading whilst insolvent, incurring expenses in a considerable amount. … This imposition provided no commercial benefit to (the Emanuel group) for by this time Fosters had determined to take the APM lands for itself.' These contentions are wrong as a matter of fact. The facts relevant to it are set out in the next section of the judgment. It is true that by this time Mr O'Grady had proposed to Mr Emanuele that the APM lands be transferred to EFG as a means of allowing EFG to recover its loss and on terms that provided some succour to the plaintiffs, but it is not right that Mr O'Grady had 'determined to take the APM lands'. Mr Emanuele had not accepted his proposal and in November 1993 the matter was still under negotiation.

[651] Nor is it right that the advance conferred no benefit on the Emanuel group. It allowed it to recover about $10,000,000 worth of timber sales which were credited to its account. The money spent on Parcel 52 might reasonably be thought to have improved its value which was of benefit to both mortgagor and mortgagee. Apart from the bare, erroneous, assertion that the transaction conferred no benefit on the Emanuel group, the plaintiffs supply no basis for a finding that the transaction was uncommercial. The other bases are likewise without substance for the reasons given with respect to the previous transactions. The attack on it therefore fails.

[652] The deeds of 16 August 1993, 9 September 1993, 23 September 1993 and 16 November 1993 are all those in respect of which it is said the advances made pursuant to them were unfair loans. I have dealt with the argument when considering the first of those loans but not the other three. With respect to them I consider that the loans were not unfair for the reasons I expressed when considering the 16 August 1993 transaction. They were not relevantly different.

[653] The plaintiffs' habit of advancing precisely the same grounds for attacking the transactions repeated in the same terms without endeavouring to apply the legal bases of complaint to the facts of the particular transactions makes it difficult to understand what, in reality, the plaintiffs contended were the grounds for impugning the transactions. I have therefore had recourse to what was said about the transactions in the opening in an endeavour to understand and to deal with the points of substance in contention.

[654] One of the grounds repeated throughout the submissions as a basis for seeking to have transactions set aside is that they constituted unfair preferences pursuant to s 451 of the *Companies Code* or s 588FA of the *Corporations Law*. No detailed submissions are advanced in respect of this contention which cannot have been intended. S 451 speaks of payments made by a company which is later wound up, and s 588FA refers to a creditor receiving payment from the company which is wound up. The transactions here called in question are those in which payments were made to Management by EFG by way of loans. It is not my understanding that a payment made *to* an insolvent company can be a preference.

[655] These are all of the transactions which figure in the plaintiffs' submissions as those which are sought to be set aside or in respect to which some relief is asked for. There were one or two other transactions referred to in the statement of claim but as they had not been the subject of submission I take them to have been abandoned.

SECTION IV : The 1995 Scheme

[656] Reduced to its simplest the 1995 Scheme had three components:

(a) Obtaining a judgment in the Supreme Court of Queensland by collusion for a debt in an amount much in excess of what was 'truly' owed by the Emanuel group to EFG.

(b) The execution of the DOFR, the Simionato deed and the Giuseppe Emanuele deed which diverted $4,600,000 from the Emanuel group to a trust and thence to Mr Emanuele personally and which released EFG from claims arising out of its relationship as mortgagee with the Emanuel group as mortgagor.

(c) A transfer of the APM lands for an arbitrarily fixed amount which was less than the true value of those properties.

The scheme is said to have involved a conspiracy between: Giuseppe and Rocco Emanuele, Mr Ferrugia and Mr Purcell, their solicitors, Mr Winter (who became the solicitor for the Emanuel group in February 1995), Mr Elliott (a partner in EFG's solicitors, Messrs Clayton Utz) and Mr O'Grady and Mr Crosby. It was alleged to have begun in July 1993 and ended in March 1995 with the execution of the three deeds.

[657] Paragraph 214 of the statement of claim sets out the full detail of what was said to constitute the scheme, the three essential components of which I have summarised. Paragraph 215 pleads the scheme was implemented by:

(i) The entry of judgment on 27 February 1995
(ii) A letter of 16 March 1995 written by Mr Winter to Clayton Utz
(iii) The execution of the three deeds
(iv) Payment of $400,000 to Thomsons (of which Messrs Ferrugia and Purcell were partners)

By paragraph 263 it is pleaded that the 1995 Scheme:

> 'Was conceived … and implemented for the purpose of dividing the assets of the Emanuel group between the (first defendants) and the Emanuel Family Directors and their legal advisors, leaving $650,000 to be divided between the remaining creditors whose debts exceeded $120,000,000 which purposes were … unlawful and dishonest …'

[658] By paragraph 264 it is said that the 1995 Scheme was unlawfully and dishonestly executed:

(a) By the corruption and subornation of the Emanuel Family Directors and their legal advisors.

(b) By the first defendants exercising its dominance at meetings of creditors of the Emanuel group to compel the acceptance of deeds of company arrangement in order to suppress investigation by external controllers of the Emanuel group.

(c) By the first defendants concealing the fact and terms of the 1995 Scheme from the Emanuel group's external controllers.

(d) By depriving the Emanuel group of assets, thereby removing its capacity to fund an investigation by the external controllers of the Emanuel group into the affairs of the group and funding litigation 'to bring to account those responsible for the execution and implementation of the 1995 Scheme and the recovery of any and all losses thereby suffered.'

[659] A recurring theme in the plaintiffs' submissions, indeed a note sounded constantly, is that throughout the negotiations and discussions which led to the 1995 Scheme the Emanuel group was insolvent. Often it is said that those companies were 'utterly' insolvent. I have no doubt this was so. I have found that the Emanuel group was insolvent from 1 July 1988 and its position deteriorated year by year.

Against this recurring theme the plaintiffs describe the transfer of properties from Emanuel 14 to the first defendants as being, for various reasons, a wrongful act of great seriousness. The submissions must be dealt with in detail but it is as well to remember that the properties which were transferred were all secured by real property mortgage and company charge to EFG and that the amount of the debt owed by the mortgagor, Emanuel 14, was far greater than the value of the lands transferred. The debt was even greater than the value which the plaintiffs ascribe to the land.

[660] This had been the case since at least August 1993. The debt was, of course, increasing while interest was capitalised and added to the principal sum. There was no commensurate, or any, increase in the value of the secured properties.

The August 1993 Security Executive Summary, which, as its name suggests, was a condensed report of EFG's security position in relation to the Emanuel group prepared monthly by the account manager and his staff for submission to his superiors, shows that the estimated realisable value of properties securing EFG's loans totalled $99,915,000 as against a debt of $144,780,000. In January 1995 the Security Executive Summary for the previous month showed that the estimated realisable value of EFG's securities was $99,281,000. The debt was then $132,365,000.

It is apparent that Mr Emanuele and his co-directors had come to accept this reality by April 1994. A meeting was held that day between Mr Emanuele, his son Rocco, Mr O'Grady and Mr Benskin who attended only as a witness. According to the transcript of the meeting Mr Rocco Emanuele acknowledged that 'they' were 'under water'. This was said in the context of statements by Mr O'Grady that EFG would be unable to recover the whole of its debts from the Emanuel group because of the deficiency in value of the secured assets compared to the loan.

[661] The point which is obvious, but which should nevertheless be stated because it is so frequently ignored by the plaintiffs, is that neither the companies in the Emanuel group nor their unsecured creditors could ever have expected to receive any benefit from the sale of those properties or their continued ownership by the Emanuel group.

[662] One of the more curious aspects about the way in which the plaintiffs presented their case is their ambivalence towards the allegations made in the statement of claim, and repeated in the written submissions, about the dishonesty of EFG's officers, its solicitors, Messrs G & R Emanuele, and their solicitors. Having read the pleadings one expects to encounter a case in which proof of wide-ranging, serious fraud and dishonesty is to be offered against those who are said to have conspired to defraud the Emanuel group and its creditors, and to have bribed directors of the Emanuel group companies to achieve their ends. The pleading seems to raise a case of deliberate, personal mendacity on the part of those who are said to have come together to deprive a company of its property for the benefit of their employer and client respectively, and to have deliberately corrupted by bribery those whose co-operation they needed to achieve their purpose.

[663] The plaintiffs' written submissions (Part 6.1 page 28) state in categorical terms that 'THE SCHEME WAS FRAUDULENT.' In subsequent paragraphs it is, however, submitted that it is not necessary for the plaintiffs to prove dishonesty on the part of Messrs Emanuele or the EFG officers, and that the fraud alleged was 'of the same variety as that required under the *Bankruptcy Act* when provisions are attack [*sic*] as offending s.121 (dispositions with intent to defraud creditors). Fraud for that purpose involves the notion of detrimentally affecting or risking the property of others … The situation is akin to equitable fraud, where the fraud consists in the abuse of the fiduciary duties … in the sense of abusing the position occupied by the fiduciary …' (para. 89, 91 of the submissions)

[664] Leading counsel for the plaintiffs made the same point in oral submissions. He said theirs was not a case of deliberate, subjective dishonesty against EFG (and Mr Elliott) but rather it was a case where those gentlemen had blundered into transactions without, regrettably, understanding that the law did not permit them. (T.9904-6) If the plaintiffs' case truly were of that character so that the impugned transactions may be set aside because the law forbids them, one wonders why it was thought necessary to publicly accuse senior officers of a public company, and a solicitor of impeccable reputation, of such iniquities as conspiracy, dishonesty and corruption when the case against them does not involve assertions of moral turpitude and the plaintiffs are entitled to relief regardless of the intentions or state of mind of the officers of EFG and the Emanuel group. One wonders, as well, why the word 'dishonestly' should appear so frequently in the statement of claim.

[665] I listened attentively to the cross-examination of Messrs O'Grady, Crosby, Elliott, Perrett and Byrne for indications in their answers that there may have been a conspiracy to defraud along the lines pleaded, or that the judgment was obtained by collusion, or that there was dishonesty involved in the agreement reached between EFG and the Emanuel group. I did not detect any suggestion of any of these things. I did not detect any attempt to elicit any of them. So remarkable was its absence that at the conclusion of the cross-examination of Mr Perrett I asked Mr Morrison QC:

> '… Should I conclude from a remark you made a moment ago that in due course you will ask me to conclude that Mr Perrett engaged in some conscious wrongdoing on behalf of EFG or himself?
>
> Mr Morrison: That question's too wide. No, your Honour, no need to conclude that.
>
> His Honour: Well, I tell you now distinctly, that I have attended to your cross-examination quite carefully. I have not in it detected a suggestion he acted dishonestly. … If you want to contend that he has in some way I think you should put it to him directly.
>
> Mr Morrison: No, no. Your Honour's apprehended it correctly.' (T.9288.1-.20)

[666] Mr Perrett was not alleged to have been a conspirator but his partner, Mr Elliott was. Mr Perrett conducted the litigation for EFG in the Federal Court and in this court in 1995. He, as well as Mr Elliott, advised Mr O'Grady during the negotiations which led to the execution of DOFR and the other deeds and he negotiated on EFG's behalf to bring about that agreement. I do not really understand how EFG can be accused of dishonesty if its officers acted in accordance with legal advice and it is not said the solicitor acted dishonestly in any way.

[667] Something similar happened in the cross-examination of Mr Byrne. As will emerge Mr Byrne gave advice to Mr Perrett that to pay money to Simionato Holdings rather than the Emanuel group was not unlawful. This payment is the foundation stone of the plaintiffs' case. It is said to constitute the bribe which corrupted the directors of the Emanuel group and induced them to defraud their companies. Mr Byrne saw it very differently and so advised Mr Perrett. Whether his advice was right or wrong if it was his honestly held opinion that, as a matter of law, the payment was lawful it seems hard to castigate EFG for engaging in conspiracy to defraud if it acted in accordance with that advice. I asked Mr Meagher QC whether he was 'going to submit that I should find Mr Byrne did not believe in the accuracy of the advice he gave' to which Mr Meagher replied 'I don't think I have to go that far.' (T.8994.50)

[668] I formed the distinct impression during the cross-examination of Mr Elliott that all allegations of impropriety against him had been abandoned: that it was not to be argued that he conspired with others to defraud the Emanuel group or that he personally had behaved in any way dishonestly or knew of any dishonesty in the conduct of those with whom he was negotiating on behalf of EFG. Any attempt now to submit that Mr Elliott acted dishonestly would involve the grossest dereliction of the cross-examiner's duty in not fairly allowing the witness an opportunity to answer the charge against him. I put it more strongly. Any submission now of dishonesty by Mr Elliott would give rise to a distinct suspicion that there was hypocrisy in the cross-examination.

[669] Contrary to the plaintiffs' submissions, it is, of course, the case that fraud of the kind referred to in s 121 of the *Bankruptcy Act* does involve an actual intention to deprive a creditor of the benefit of an asset to which it would have been entitled but for the challenged disposition. *Re Barnes, ex parte Stapleton* [1962] Qd R 231 to which the plaintiffs refer does not assist them. In that case Gibbs J (237-8) insisted upon actual fraud, 'an actual intention to defeat or defraud creditors', being

established before statutory provisions to a like effect of s 121 could operate. It is to miss the point to say that the courts determine the existence of the intention as a matter of inference from facts objectively proved. What has to be proved, by whatever means, is the actual, subjective, intention to cheat. The plaintiffs' submission is defeated by *Cannane* to which reference was made in the previous section of the judgment.

[670] The conspiracy had as its object the transfer of the APM land to EFG's subsidiaries at an undervalue to allow EFG to develop the land, or part of it, for its own benefit. A convenient place to begin an examination into the 1995 Scheme is that third component: the undervalue of the consideration for which the land was transferred.

Valuation of the APM Land

[671] An integral part of the 1995 Scheme, as defined, was that the APM lands should be transferred from Emanuel 14 to nominees of the first named defendant by contract of sale and that:

> 'An arbitrary and improper value of less than market value would be fixed as the consideration for the transfer of the lands and applied in reduction of the debt, leaving a significant debt outstanding.' (para 214.7.5 of the statement of claim)

[672] There are, therefore, two issues to be addressed with respect to the amount of the consideration for which the APM land was transferred. One is whether the stated amount was in fact less than the true value of the land at the time. The second is whether the amount was fixed arbitrarily at an undervalue so as to benefit EFG at the expense of Emanuel 14.

[673] It is convenient to deal with the second point first, because it is shorter.

[674] After the Emanuel group's failure in the Federal Court EFG considered how best to achieve the highest return possible from its secured properties. It anticipated exercising some or all of its rights as mortgagee and chargee. Part of Mr Jaenke's role in this assessment was to obtain valuations of the real properties secured by mortgage. He did this because he:

> 'Fully expected that Joe Emanuele would take any point he could in relation to EFG's enforcement action and … wanted to make sure EFG's interests were protected … by getting valuations in advance of any sale.' (Exhibit 457 para 406(e))

[675] Accordingly, and probably because he was told to instruct valuers by Mr Booker, (T.7694.40) by letter of 19 December 1994 Mr Jaenke instructed Jones Lang Wooten (JLW) to value a number of properties. Mr Jaenke wrote:

> 'Under its securities … EFG is mortgagee in possession of the majority of the properties listed in the letter dated 5 December 1994 from the writer to … Clayton Utz – copy attached …
>
> Current valuations on a "forced sale" basis are required on the individual properties.

> While we are in possession of current market valuations on all the properties, we require reports from a third party valuer.
>
> "Forced sale" valuations are defined as what a prudent purchaser would pay for a property in the existing current market conditions, given a professional marketing promotion in a 3-6 month period by a reputable sales organisation.
>
> …
>
> Please do not hesitate to contact this office should you have any queries.
>
> …'

[676] By letter dated 31 January 1995 Mr Gregory of JLW replied:

> 'We refer to your letter dated 19 December 1994 … We advise that we have inspected the properties, undertaken local research, prepared our calculations and now provide this brief letter, pending finalisation and issue of our full and formal report documents.
>
> …
>
> Subject to the issue of our formal valuation reports we are of the opinion that the "forced sale" values of the properties forming part of the Emanuel group are as follows:
>
> …
>
> APM portfolio
>
> …
>
> Parcel 52 $5,700,000
>
> Parcel 53 $5,100,000
>
> Parcel 62 $4,500,000
>
> …
>
> Parcel 64 to be advised
>
> Our formal valuation reports are being prepared and we undertake to forward three unbound copies … by the end of this week. … Should you require any further information in respect of the valuations … please do not hesitate to contact the undersigned.'

[677] A valuation in respect to Parcel 64 was delivered a little later. It valued the land at $26,000,000.

[678] Mr Elliott said that when he met Mr Ferrugia on 10 February 1995 the latter asked for a copy of the valuations of the APM land which it was proposed would be transferred pursuant to the DOFR which was then being negotiated. Mr Elliott said he would seek instructions from EFG about releasing the valuations (Exhibit 463, para 527). The evidence does not appear to show whether the valuations were ever supplied.

[679] Mr Jaenke's description of how the valuations were obtained and the instructions which were given to the valuers in respect of them was not the subject of any question from the plaintiffs. Mr Gregory himself valued Parcel 64, the most significant. It was not suggested to him that the opinion he gave as to the value of that parcel was not his honestly held opinion. It was not suggested that he did not value the properties in accordance with the instructions given on 19 December 1994. These, it would be understood, asked for no more than the value of a large number of parcels of land, only some of which became the subject of the transfers pursuant to DOFR, on the basis set out in the letter. There was no hint in the cross-examination that Mr Gregory had been asked to, or had, valued those four parcels arbitrarily or so as to produce a figure less than his opinion as to their true value.

[680] The only possible conclusion is that the ascertainment of the consideration for the transfer of the APM land was not arbitrary or designed to secure their transfer at an undervalue, where the only evidence relevant to the topic shows that a valuer of accepted skill and reputation was asked to value the lands on a basis made manifest in correspondence, when he purported to do so, and there was no challenge to any aspect of the instructions issued or manner in which the valuation was performed. The plaintiffs dispute the correctness of the valuation opinion, but that is a different question.

[681] Moreover there was no evidence that any officer of EFG believed the APM land to be worth more than the JLW valuation. None of them was asked about his belief in that regard.

[682] This part of the plaintiffs' case therefore fails. The APM lands were transferred by Emanuel 14 to the fifth, sixth, seventh and eighth defendants for a consideration equal to their valuation determined by a reputable and competent valuer in the conscientious exercise of his profession.

[683] I turn then to consider the evidence as to the worth of the APM land in March 1995.

[684] There were four parcels of land which have been the subject of valuations. It is convenient to refer to them by the designations used by the parties. These were:

Parcel 64 known as Mango Hill
Parcel 52 known as Caloundra Downs
Parcel 53 at Bribie Island
Parcel 62 at Caboolture

[685] I take the following descriptions of each parcel essentially from Mr Slater's valuations. There is no controversy about the physical characteristics or zoning of the lands. Debate centred on the development potential of each parcel.

[686] Parcel 64 had an area of 1,071 hectares comprising 109 separate lots. All but 54.75 hectares were in the local authority area of the Pine Rivers Shire Council ("PRSC"). The balance was within the Caboolture Shire Council area. The southern boundary of the property is 26 kilometres north of Brisbane. Its western boundary is the Bruce Highway. The south and east are bounded by Anzac Avenue which connects the Bruce Highway to Redcliffe. The northern boundary is formed by Boundary Road, adjacent to which is the part of the land in Caboolture Shire. Boundary Road connects the Bruce Highway to Deception Bay which lies to the north of Mango Hill. There were no water supply or sewerage connections in the locality, though electricity and telephone services were available. The country was undulating coastal forest and generally of good elevation. Its topography made it well suited for urban development. The land had been used as a pine plantation but the trees had been cleared by the end of 1994. The land was in the 'Rural' zone, which forbade any form of residential development or subdivision into lots smaller than 16 hectares.

[687] Parcel 52 consists of five separate lots with a total area of 4,023 hectares. It is about 10 kilometres long, north to south, and between four and six kilometres wide, from east to west. The land is low-lying, generally level but some is gently undulating. Much of it is swampy and prone to flooding. The parcel lies to the south-west of Caloundra, its nearest point being about four kilometres from the central business district. Surrounding localities to the north include some residential and rural residential developments. The Caloundra aerodrome lies to the east of the parcel towards its northern end.

[688] The greatest part of the land is zoned rural. At the northernmost end 100 hectares were sold off to a developer, Mr Harrison, for $2,500,000 subject to conditions as to rezoning to allow residential development. The conditions were not satisfied within the times allowed by the contract. The Elders defendants, having decided to exercise their powers as mortgagee, were not bound by the contract and refused to honour it. Instead, they paid the purchaser an agreed sum, the reasonableness of which was not in doubt, for his considerable efforts in attempting to obtain rezoning. In fact he had been very substantially successful despite the opposition of the Caloundra City Council so that the Elders defendants obtained the benefits of the rezoning which occurred shortly after the termination of the contract. The result is that the valuers were prepared to accept the contract price of $2,500,000 as indicative of the value of that area of land despite the contract being conditional and not proceeding to settlement. The area which had been the subject of Mr Harrison's endeavours, was known as Caloundra Downs 1. The balance of Parcel 52 was known as Caloundra Downs 2. It was vastly bigger in area, was more remote from Caloundra City and contained large areas of flood-prone, environmentally sensitive, land.

[689] The next parcel to describe is 53, the land at Bribie Island. It too, is vast in extent, comprising 1,826 hectares which had been utilised as a pine plantation. The parcel lies centrally on Bribie Island being an elongated area parallel to but separated from both the ocean and Pumicestone Passage by national parks and natural vegetation. The southern boundary adjoins a residential canal development known as Pacific Harbour. It is planned to include a golf course which is to be located on land formerly comprising part of Parcel 53. Some was acquired prior to and some subsequent to the events in question in this litigation. The land is completely

unserviced and has no conventional means of access apart from a road which terminates at the southern boundary.

[690] The fourth Parcel, 62, consists of seven lots aggregating 1,226 hectares. It is situated about 38 kilometres north of Brisbane and six kilometres south-east of the township of Caboolture. Its northern boundary is the Caboolture River and it is north of Mango Hill. It is irregular in shape and is generally low-lying, falling away from higher ground in the south and west to lower undulations of the Caboolture River basin. Less than a third of it, about 363 hectares, is above the Q100 flood-line. Apart from the higher land near the southern and western boundaries, there are only isolated portions of flood-free land. It was initially used as a pine plantation. There are a number of swamps and creeks within the parcel. Most of the land is in the rural zone while the strategic land use plan map shows that its preferred uses are open space, sewerage disposal, rural and rural residential. This last designation relates to a small part only. On 18 September 1992 the Caboolture Shire Council issued a notice of intention to resume the land to put it to use as a sewerage treatment and disposal facility. The notice expired but in 1995 it was still a distinct possibility that the land would be acquired for that purpose. It would appear to be eminently suitable for it.

[691] When expressing their opinions about the value the valuers were obliged to make assumptions about the use to which the land might be put. More accurately, because the valuations were retrospective and looked to the value as at March 1995, the valuers were obliged to make assumptions as to what would then have been the likely use to which the land could be put. The assumptions made by the valuers differed. The difference is explained partly by the instructions given to them by the parties who retained them. In coming to a judgment about value I have had the advantage of hearing evidence from a number of witnesses involved in attempts to develop Parcel 64, the most valuable of the four parcels. This evidence is of considerable importance in assessing which of the opinions as to valuation should be accepted. It imposes a degree of reality into the valuations to replace the assumptions.

[692] It is convenient to deal with this evidence which was adduced in the plaintiffs' case from witnesses called by them before discussing the valuation opinions.

[693] In order to improve the prospects of obtaining some form of development approval for Parcel 64, EFG entered into a joint venture agreement with Lendlease Developments Pty Ltd ("Lendlease") a large, experienced and reputable commercial developer. It was thought that PRSC would treat a development application more seriously if it were made by such a company rather than by a mortgagee in possession whose evident interest would be to effect a quick sale with approvals rather than to develop the land.

[694] Past events had shown that it would not be easy to obtain development approval. Some work had been done by PRSC and its officers in 1991 and 1993 to prepare a plan for the orderly development of the shire in the vicinity of Mango Hill but it had not progressed very far despite some prompting from the Emanuel group. However, on 11 March 1994 the director of the Department of Development and Environment of PRSC recommended to its Planning and Development Committee that he be authorised to advertise for a senior planning officer to work on a 'Mango Hill DCP' and that the PRSC accept Elders' offer to pay for consultants

involved in developing the DCP and that Mr Brannock be appointed the town planner responsible to PRSC for the preparation of the DCP. The director also recommended Elders, Emanuel and Mr Brannock be included in the consultation steering group involved in the preparation of the DCP and further recommended if the DCP preparation included an environmental impact assessment that further such assessments would not be required for subsequent rezonings or development applications on Mango Hill.

[695] A "DCP" is, of course, a development control plan.

[696] These recommendations marked a substantial victory for Emanuel 14 and Elders. The recommendations were for the preparation of a DCP for Mango Hill in which the owners and mortgagees of the land would be involved and their preferred town planner would be largely responsible for its terms.

[697] The local authority elections held in March 1994 saw a change to the composition of PRSC. A number of councillors were elected who were opposed to any, or any substantial, development in the area of Mango Hill. Their declared desire was to retain as much of the natural environment in the shire as possible. At a meeting of the Council on 18 April 1994 the recommendations of the director were rescinded and the question of the DCP was referred back to the Planning and Environment Committee 'for further consideration.' That committee met on 22 April 1994 and recommended that PRSC:

- 'Conduct an environmental impact study ("EIS") on the Mango Hill … area before any further action be taken regarding the preparation of a DCP
- Council write to the adjoining authorities, Redcliffe City Council and Caboolture Shire Council inviting expressions of interest on the preparation of an environmental impact study for the Mango Hill region
- That an environmental impact study for the region be prepared 'based on the principle of low density urban development linked to and by open space links which would provide the protection of watercourses and vegetation and natural farmland.'

Such a proposal would have severely curtailed development in Parcel 64.

[698] On 16 May 1994 PRSC resolved to establish a special committee, the aim of which was to implement a DCP for a large part of the shire including Mango Hill, to implement an EIS of the Mango Hill, to review a DCP for Kallangur and to prepare a commercial area DCP for Petrie.

[699] The result of this was that a DCP for Mango Hill was to form part of a much wider planning study to consider commercial and urban development for the whole of the shire. It was likely to delay the preparation of the DCP considerably.

[700] The Planning and Environment Committee met on 19 May 1994. It concluded that 'existing and approved floor space levels represent a serious over-supply of retail floor space, even with anticipated growth,' in the shire. The committee recommended that PRSC consider including as an aim of the proposed DCP for Mango Hill the following:

> 'In respect to the localities of Mango Hill and Griffin it is not Council's intention to permit central shopping facilities, commercial facilities, local shopping facilities and neighbouring facilities to be established east of the Bruce Highway other than precincts 8 and 11 … until it has completed an environmental impact study and development control plan for these localities.'

The relevant parts of Parcel 64 lay outside precincts 8 and 11. On 9 June 1994 a special committee endorsed the recommendation that no development be allowed 'east of the Bruce Highway' until a DCP was prepared. PRSC duly resolved to accept the recommendation at its meeting on 18 July 1994, thus effectively delaying any new development approval on Parcel 64 until the entire planning study was complete.

[701] The State Government Department of Housing and Local Government was also taking some interest in Parcel 64. Because of its size, single ownership, topography and locality, it was seen to be suitable for housing development. RPAG recommended that a major centre be established at Strathpine or Caboolture or a new site, one possibility for which was Mango Hill. PRSC rejected the planning group's premise that closer development should occur in its area. The special committee recommended on 17 August 1994 that Council should, in the preparation of its new planning documents, 'severely limit the intrusion of urban development into environmentally sensitive areas … and to encourage new and innovative land development techniques which will protect the natural landscape. These broad principles would achieve much lower population projections than those forecast in the (planning group) report.'

[702] On 26 August 1994 the special committee recommended that any contact Mr Brannock might have with the Council concerning the content of the DCP should be restricted to its manager of strategic planning and economic development. The recommendation appears to have been designed to reduce Mr Brannock's influence. On 13 September 1994 the special committee noted that a brief for the planning study had been adopted by PRSC on 5 September but that no timetable for the study had been prepared. At its meeting of 23 February 1995 PRSC approved the Planning and Environment Committee's recommendation that 'no application for rezoning, subdivision or town planning consent in respect to any land located within the localities of Mango Hill and Griffin shall be approved …'.

[703] Mr Guy Gibson is a town planner, holding a degree in that discipline from the University of Queensland. He was enticed to leave his employment with the Brisbane City Council in May 1996 by Lendlease for the express purpose of obtaining planning approvals for the joint venture development of Mango Hill .

[704] In order to maximise return from the development of the land, Elders and Lendlease proposed what has been called a master planned community development, which is to say that from its inception the development was to be subject to an overall plan to produce a socially and geographically coherent neighbourhood which would include residential housing of various densities; parks and other open spaces; schools; local shopping centres; commercial buildings and a sub-regional shopping centre. The last of these had proved the most troublesome. A number of sites within the PRSC boundaries were competing for that centre. Only one was to be

allowed. The construction of such a centre would attract people and money, thereby adding considerably to the value of the successful site and its surroundings. As noted the Council was opposed to large scale development on Parcel 64.

[705] Merely rezoning the land would have been insufficient because of the mix of uses which were proposed for the master planned community and the difficulty inherent in identifying the precise location on a large broad acre site of the particular position of the various facilities, each of which would require a particular zone. The only realistic procedure was a DCP unique to the site.

[706] In the end, three years were required to obtain the DCP. The original rezoning application was lodged in December 1995 and the plan was gazetted in November 1998. It cost the joint venture parties $18,000,000. A large part of the time was taken in negotiations with Westfield and PRSC to have the sub-regional shopping centre located in Parcel 64. It was Mr Gibson's opinion that the expenditure of that entire sum was necessary to achieve the development approvals needed for the development. It was by no means certain that the sub-regional shopping centre would be located in Parcel 64. There was a rival site, Tulip Town only a few kilometres to the west which had the advantage of appropriate zoning and of already having on it a large neighbourhood-sized shopping centre. It could have conveniently been extended to become the sub-regional centre. It was, obviously, in an area already serviced by water, power and sewerage. Parcel 64 was unserviced. The value of the development without the sub-regional centre would have been considerably less. Without it, according to Mr Gibson:

> '… it would have effectively reverted to a being a large residential subdivision … without all of the … non-residential component and indeed without probably a large proportion of the medium density housing …' (T. 3343.10)

[707] It was Mr Gibson's opinion, based upon his experience of dealing with PRSC, that in March 1995 a town planner could not have been confident that a development of the type now approved, would ever have been allowed. He said:

> 'It was identified as a future urban area on the strategic plan but it was outside the headworks areas. Council had effectively expressed a view that density ought to be … restricted so as to give greater weight to environmental and open space aspects so one … might have been very confident that some form of development would ultimately be approved, one couldn't be confident that it would be for a master planned community. It could well have been for a much lower density of development.' (T.3378.40-50)

By this he meant an ordinary suburban development supported by local convenience shopping centres and an overall population of between twelve and fifteen thousand people rather than the proposed population of about 25,000.

[708] Mr John Brannock is a town planner of considerable experience. He was engaged by Emanuel 14, with Elders' approval, to assist in obtaining rezoning approvals for the promulgation of a DCP for Mango Hill. His services were terminated in December 1995 when his application was lodged with PRSC. Mr Brannock was

retained by the plaintiffs to provide four reports – one with respect to each of the four parcels of land setting out his opinion as to their highest and best use from a town planning perspective as at March 1995. His reports were provided to Mr Slater, the valuer engaged by the plaintiffs and formed an important basis for the valuation.

[709] In each case Mr Brannock's opinions were optimistic and portray an expectation that the lands could have been developed substantially from their raw state.

[710] Mr Brannock expressed these conclusions for Parcel 64:

> '… a rezoning proposal for a master planned community which included a sub-regional centre would have been approved on the subject site in February 1995. A DCP including such development would also have been successful. It was only a matter of time before either or both of these mechanisms would come to fruition.
>
> There was extensive market interest (at the relevant date) in the development of a large scale residential estate anchored by a sub-regional centre. … the market place was anticipating this kind of development.
>
> It was widely recognised that the 1988 PRSC strategic plan was outdated, having been based on much earlier planning studies which had not anticipated the higher population growth in Brisbane's northern corridor. Consequently, there was support from both Government officials and the private sector for a well planned major residential and sub-regional centre development.
>
> In February 1995 the vast majority of the subject site was designated urban areas on the PRSC's strategic plan and would have had the following development potential:
>
> (1) Urban development would have been approved as a master planned or integrated mixed use development proposal providing all the necessary community, open space and commercial needs to support the proposed resident population.
>
> (2) The developable area of the … site was approximately 900 hectares and would have been able to accommodate an urban residential population in the order 25,330 to 33,000. A diversity of accommodation types would have been likely with the predominant form being conventional detached dwellings …
>
> (3) There were good prospects for the approval of a sub-regional centre …
>
> In conclusion given the State Government's recognition of the site as lying along the Bruce Highway in the midst of a growth corridor and the market place's acceptance of a large scale development the logical development outcome for the subject site was for a master planned community anchored by a sub-regional centre.'

This opinion encouraged Mr Slater to value the land as though it were 'as good as rezoned' in March 1995.

[711] I cannot accept Mr Brannock's opinion. It does not take account of the expressed views of PRSC which I have set out. It is also contrary to the opinions he himself expressed when given the task of endeavouring to obtain planning approval. On 26 May 1994 Mr Brannock's firm wrote to EFG. The letter noted that EFG had requested further advice regarding the procedure to secure rezoning of Parcel 64 'having regard to … the apparent reluctance of Council to enter into an agreement with Emanuel/EFG …'. The writer noted that the DCP 'could reasonably be expected to be gazetted up to thirty-one months hence …'. On 15 July 1995 Mr Brannock himself wrote to EFG on the same topic. He wrote:

> '… there are only three options which are able to be considered to facilitate development of the land:
>
> (a) the DCP process
> (b) the rezoning process
> (c) "special legislation"
>
> This letter sets out the time and cost implications for each process …
>
> Background
>
> The former Council had resolved to prepare a DCP for the Mango Hill area … Furthermore numerous meetings with the former Council initiated a process which was intended to result in a DCP being by Brannock Humphrey and gazetted by the Government by July 1995 … On 26 March 1994 a substantially new Council was elected and since this time the above process initiated with the former Council has been effectively discarded … We … do not consider that the DCP route is a viable option to pursue with the current Council. They have shown no commitment to proceed toward the preparation of the previously agreed DCP … They have failed to liaise with their own staff and State Government. They have cancelled an important meeting scheduled with EFG. … We now believe there to be no acceptable degree of certainty that Council has the commitment or resources to pursue a Mango Hill DCP in a timely fashion, if at all.
>
> The main uncertainties common to each process are whether Emanuel/EFG will succeed in securing the best future development potential of the land and how long this will take.'

[712] In a further letter to EFG dated 20 July 1994 Mr Brannock identified a risk to the development posed by the fact that the sub-regional centre proposed for the PRSC area may be situated at Strathpine or Caboolture rather than in the vicinity of Mango Hill. Even if it were in the last of those three places it may have been sited at the rival Tulip Town. This doubt continued. In a letter dated 3 August 1994 to Mr Rocco Emanuele, Mr Brannock wrote:

> 'The most recent event concerning Mango Hill occurred on 18 July 1994 when … Council adopted a notice of motion … to the effect that Mango Hill should not be considered as a possible site for a future sub-regional retail centre, but rather that the area west of the Bruce Highway is now Council's preferred location for core retail services at the sub-regional centre in this vicinity … We are also aware that Tulip Town Shopping Centre may soon be the subject of a major expansion …'

[713] On 27 September 1994 Mr Brannock reported to both the Emanuel group and EFG that:

> '… Some councillors … are being deliberately obstructive. I recommend we seek a meeting with the Redcliffe City Council mayor to suggest that Mango Hill be considered as part of a boundary realignment by the local Government Commissioner in a boundary review.'

[714] Although in cross-examination Mr Brannock sought to downplay the significance of this recommendation, it seems a clear indication that he thought at the time that the prospects of obtaining worthwhile development approvals from PRSC were slight indeed. He agreed that it is difficult to obtain boundary realignments between local authorities. The fact that he suggested such a course indicates, in my view, a degree of desperation.

[715] Finally, on 2 February 1995, Mr Brannock wrote to EFG to provide advice 'as to a recommended course of action … to take with respect to various strategic issues relating to the Mango Hill land.'

[716] There followed a detailed list of recommendations included in which was pursuing all legal avenues available to 'keep Council honest – particularly the political arm.' As well, Mr Brannock recommended appointing a public relations consultant with the aim of demonstrating to PRSC and its ratepayers that the development was in the best interests of their community. He repeated the advice to pursue a transfer of the land to the Redcliffe City Council area and to undertake political meetings with senior Government planning officials to secure their support for the development. The letter identified that PRSC might seek to withhold services from the land even in the event that rezoning was obtained from State Government or the Planning and Environment Court.

[717] I cannot reconcile Mr Brannock's sanguine but retrospective assessment which appears in his report with the very real difficulties he encountered with PRSC in 1994. His report is unduly favourable to the plaintiffs and supports a degree of confidence in the development potential of the land which one does not find in a perusal of his contemporaneous correspondence. He has, in my opinion, overstated the position. I prefer Mr Gibson's assessment that in March 1995 one could feel confident that some development would ultimately be approved but that one could not have confidence that it would include approval for a sub-regional retail centre and the higher density development that it would support.

[718] Mr Brannock's opinion about Parcel 52 was, in summary:

> 'At February 1995 the majority of the land was identified as rural on Council's zoning and strategic plan maps. The pine plantation and cultivation of same on the site has altered the natural characteristics of the land.
>
> The residential development of Caloundra Downs 1 is located in the northern part of the subject land, and comprises 147 hectares. Special residential rezoning has been approved for the majority of that land (100 hectares) in December 1994 and the remainder was approved in March 1995.
>
> Caloundra Downs 1 represented a logical extension of existing urban residential development.
>
> The balance of the 4,023 hectares of the land is known as Caloundra Downs 2.
>
> In February 1995 the land was under single ownership, and being a large strategically located parcel, Caloundra Downs 2 would have been suitable for development as a master planned community. The master planned community would have predominantly included urban residential development, as well as commensurately scaled open space, retail and community facilities. The master plan would have included a buffer to Pumicestone Passage.
>
> The land would have been substantially improved by a future connection between Caloundra and the Bruce Highway …
>
> There were environmental considerations which affected sections of the site … it is understood that some of the land may have been subject to flooding, however detailed investigations would have been required on this issue, and the other environmental matters prior to a detailed determination of the ultimate use of all portions of the land. These considerations could have been accommodated through master planning for the site.'

This opinion formed part of Mr Slater's instructions for his evaluation of Parcel 52. As with Parcel 64 I am satisfied that Mr Brannock's opinion was far too optimistic in terms of the development potential of the land. The result is of little significance because for reasons which will appear later, I am prepared to accept much of Mr Slater's valuation of this parcel. I will, however, indicate briefly why I reject Mr Brannocks' opinion.

[719] Had the whole of the land been rezoned to allow an integrated residential community to be developed, it would have housed a population of between 70,000 and 80,000 people. The entire population of Caloundra in 1995 was only about 50,000. Rezoning to allow such development was contrary to the strategic plan developed by the Caloundra City Council. That plan was current. The land had been designated by the Council for open space and as a 'green belt' buffer to the south. Parts of the land were environmentally sensitive. Development was contrary to the objective of State Government planning studies.

It is, I think, fanciful to believe that any more than a small part at the northern end of the parcel was suitable for rezoning in the first half of 1995.

[720] Of Parcel 53 Mr Brannock said:

> 'The site immediately adjoined urban residential development to its south, and open space joined its other boundaries. Bribie Island was highly accessible and was an attractive location for permanent residents and holiday makers alike.
>
> From a town planning viewpoint, the subject site offered the potential for urban residential development as a logical extension of the urban development which adjoined to the south.
>
> I am of the opinion that there were good prospects for approval of tourist accommodation and related facilities on the land. Access to the island and the presence of existing services and social infrastructure, made the land highly suitable for large scale tourist development.
>
> The land could have been developed for urban residential purposes alone, or a combination of urban residential and tourist accommodation facilities.'

His opinion could justifiably be held only with respect to a small part of the land adjacent to its southern boundary. The proposed use was contrary to its zoning and no support for a rezoning could be found in the State Government plans for the region. Any such development would have been opposed by the active and vociferous environmental protection group on Bribie Island.

[721] In relation to the fourth parcel, Parcel 62, Mr Brannock noted that seventy-five per cent of it had been designated as a possible sewerage effluent disposal area but that a 1992 notice of intention to resume had expired and no fresh notices had been issued. Mr Brannock concluded:

> 'It is reasonable from a town planning viewpoint to consider in February 1995 that the sewage disposal area was no longer required.
>
> … Whilst regard must be had to the strategic plan designation of the land, in my opinion an application to rezone all of the land from rural to rural residential to permit rural residential land use … would have gained approval. This would have been subject to consideration of any environmentally sensitive parts of the site and any buffering requirements to the Caboolture River.
>
> My conclusion is that the site would have been developed for rural residential land use purposes on allotments ranging in size from 3,000 square metres to 2 hectares as permitted in accordance with the rural residential allotment size provisions that applied at the relevant date.'

The difficulty with this opinion is that most of the land lies below the Q100 flood line in which building is prohibited. In fact most of the land forms a flood plain to the south of the Caboolture River. The small portions of the land above the flood line on which a home might be constructed if the land were rezoned to rural residential are separated by flood-prone land and cannot be cheaply or conveniently joined or given access to a road system. Moreover there was no identified market interest in such a rezoning. Such a change would have been contrary to the strategic plan and the local authority's designation of the land as rural.

[722] I am satisfied that Mr Brannock's opinions which were supplied to Mr Slater were unduly optimistic for Parcel 53 and well as for Parcel 62. In my judgment they do not form a sound basis for approaching the valuation of the land.

[723] Mr Rowan Slect was the general manager of Delfin Property Group Ltd ("Delfin") which was, at relevant times, a large and successful property development company. It had planned and developed the suburb known as Forest Lakes on Brisbane's southern outskirts. Delfin was strongly interested in developing a similar project on the city's north. It looked at Parcel 64 but things were complicated because Emanuel 14 had made a contract with Kartha Pty Ltd ("Kartha") for the conditional sale of the land. That company was an insubstantial speculator which could not fulfil the terms of its contract. To avoid defaulting it sought a joint venture partner and Delfin became a candidate.

[724] The contract was made on 25 March 1991 and was varied on 2 June 1992. The purchase price was $30,000,000 if settlement were effected on or before 31 July 1993. If the purchaser extended settlement (which it could until 29 December 1995) the price increased each month by which settlement was deferred. The increase was $600,000 per calendar month until 31 December 1993, $700,000 per month until 30 June 1994, $800,000 per month to December 1994 and by $900,000 per month if settlement occurred between 1 January and 31 June 1995. The price increase escalated to $1,000,000 per month for the second half of 1995.

[725] The contract was subject to the land being rezoned appropriately to allow development by end December 1995. The result was that Kartha was obliged to obtain rezonings of the land by 31 July 1993 if it was to avoid severe increases in price. It was to pay dearly for any delay in obtaining rezoning. At best the contract obliged it to pay $30,000,000 if the land were rezoned at the earliest possible date.

[726] Mr Slect's terse comment upon reading the contract was that Mr Wadley, Kartha's principal, was 'crazy'.

[727] Delfin's interest in Parcel 64 remained unsatisfied. Mr Slect's assessment was that Kartha had promised to pay too much for the land and that the timeframe for obtaining rezoning approval was unachievable. It was unwilling to participate in a joint venture based upon those terms. He approached Elders directly to express Delfin's interest in the land but there was an obvious difficulty in that Emanuel 14 was the registered proprietor and it had a contract with Kartha. Mr Emanuele was reluctant to accept that Kartha would not pay the full contract price. Mr Wadley too, protested that his company would perform. In those circumstances it was impossible for Delfin to buy the land.

[728] Nevertheless Mr Slect and his officers did a considerable amount of work to assess what price they could offer for Parcel 64. He explained that companies like Delfin do not buy land for its inherent value but for the profit they can generate from its improvement and development. Their assessment of land value is therefore predicated upon the projected cash flows, income and expenditure, which will be involved in the development. The anticipated surplus generated over the life of the project, discounted to present value, after allowing for an adequate profit, yields an amount which the developer is prepared to pay for the land.

[729] One such analysis undertaken by Delfin in February 1993 showed that the value of the land, that is the amount Delfin was prepared to pay to buy the anticipated future positive cash flow, was $9,750,000. A value so arrived at is dependant upon the assumptions made as to level of risk, likely returns and likely costs of development. An adjustment to any of the components in the cash flow analysis will produce a different result. Such a thing happened the following month when some adjustments were made to anticipated costs and return. The analysis then showed that Delfin could make an acceptable profit from the project if it paid $14,600,000 for the land.

[730] In fact it appears to have been prepared to offer more. At a meeting held on 27 May 1993 attended by Mr Emanuele and his sons Rocco and Linton, Messrs Grier and Jaenke from Elders, Mr Wadley, Mr Slect and his superior, Mr Bird, Delfin indicated that it would not pay $30,000,000 for the land but would pay $15,000,000 on gazettal of rezoning approvals and three equal annual payments of $5,000,000 free of interest. This may not have been a firm offer because the minutes of the meeting record that Mr Bird also said that

> '… $26,000,000 is the price today … schools, parks etc. could reduce this figure further.'

And that

> 'he could settle for $15,000,000 on DCP gazettal in 6-9 months …'

[731] In any event the greatest figure mentioned by Delfin as a price it would or might pay was $30,000,000, half of which was to be paid over three years by instalments interest free and then only after appropriate rezonings had been obtained.

[732] Mr Purvis was the solicitor for Mr Wadley and his company Kartha. He was actively involved in advising Mr Wadley with respect to Kartha's performance of its contract with Emanuel 14. He put together a group of consultants whose task was to obtain the planning approvals on which the contract was conditional. The process was expensive and Mr Wadley became increasingly concerned about his level of expenditure which might produce no return, in the sense that he would not obtain approvals or not obtain them in time to save his contract. Mr Purvis, a very experienced solicitor, expressed his candid opinion that the time allowed by the contract to obtain rezoning was 'almost impossible'. He confirmed Mr Gibson's evidence that PRSC was dubious about the development, deeming it to be premature because the land was too far removed from existing Council infrastructure and services. Mr Purvis testified that by November or December of 1991 Mr Wadley had realised that he had run out of money and time. According to Mr Purvis:

> ‘We realised … that we needed more time to achieve the planning objectives and we would need a financial partner to assist in financing the planning and the ultimate development.’ (T.3623.10)

To that end he contacted a number of reputable and substantial developers, amongst whom were Delfin and Mirvac. The problem was, as Mr Purvis frankly said, that representatives of those developers all thought that the price of $30,000,000 which Kartha had promised to pay for the land was too high. According to Mr Purvis

> ‘Once they learnt it was $30,000,000 virtually up front or in very short term instalment plan, they were very quickly disinterested.’ (T.3634.25)

[733] One of the potential joint venturers, a company described as Amex from Western Australia were ‘very interested but when they saw the $30,000,000 they decided that they would … go back west.’

[734] Mr Purvis also confirmed that Delfin would not proceed in a joint venture with Kartha unless the price were less than $30,000,000 because ‘… their own cash flows or feasibilities couldn’t justify that sort of exposure.’ (T.3642.10)

[735] To much the same effect is the evidence of Mr Booker, which I accept. He was not a valuer, but he was an experienced and obviously intelligent bank manager whose particular expertise was in realising mortgaged realty on behalf of lenders when borrowers got into difficulty. He became responsible for the Emanuel companies’ account in June 1993 and oversaw attempts to prepare their properties for sale. He was particularly involved with Mango Hill which occupied much of his time and effort. I formed a most favourable impression of Mr Booker’s testimony. He seemed to be honest, direct and dependable and I would assess him to be extremely competent in his work. His opinion, borne of experience with the property and the economic circumstances of the early 1990s, was that Parcel 64 was virtually “unsaleable” without re-zoning or the approval of a DCP. He thought there was no market for it in its then state and that developers would only agree to buy conditional upon re-zoning or development approvals being obtained. (T 7656.1-.30; 7732.30-.50).

[736] The difficulty of the task in arriving at a value of Parcel 64 was recognised by Mr Slater, the plaintiffs’ valuer. He reported that because of the size of the parcel and the uncertainty as to its potential for development, it was ‘unrealistic to attempt to arrive at a definitive value of the land’ as at March 1995. He pointed out that had the property been put on the market prospective purchasers would have had different views about the most appropriate form of development and the amount they would have been prepared to pay would vary with the estimated profitability of the particular development they favoured. Because of this uncertainty Mr Slater valued the parcel by the method of direct comparison, though conceding that there was no directly comparable sales evidence because ‘the property could be fairly described as unique.’

[737] Having reviewed the most comparable sales evidence he could find, Mr Slater valued Parcel 64 in three portions: a sub-regional centre; residential land including commercial development other than at the sub-regional centre, and the smaller part within the Caboolture Shire Council area.

[738] Acting upon Mr Brannock's opinion, Mr Slater thought that a purchaser of the land in 1995 would anticipate the inclusion within it of a sub-regional centre. He thought the value of that part of the land was $3,100,000. The second part he thought should be valued at between $40,000 and $50,000 per hectare yielding a range of values between $35,400,000 and $44,250,000. The balance of the land he thought was less valuable. He ascribed to it a value of $1,368,000. In total his valuation ranged between $40,000,000 and $48,000,000.

[739] A number of criticisms were made of Mr Slater's approach, all of which have some validity. The first has already been mentioned. There was no probability in 1995 that any development at Mango Hill would include a sub-regional shopping centre. Although the amount allowed by Mr Slater for the centre itself is relatively modest, its presumed inclusion has affected the value he ascribes to the balance of the developable area. Mr Slater proceeded on the basis that the parcel had immediate potential for development as a master planned community offering a high level of amenity and the increases in value that such amenities command, as well as a population-based need for retail and other commercial services which in turn would enhance the value of the development. The result has been that Mr Slater has ascribed a very high value, on a per hectare basis, notwithstanding the very large size of the parcel. That rate of between $40,000 and $50,000 per hectare may be justified by reference to Mr Slater's comparable sales, though the rate appears a little high. However none of his comparable sales was of an area anything like 900 hectares in extent. It is notorious that the larger the parcel the lower the per area rate of value. Mr Slater could not point to any sale of land of anything like a comparable size where such a rate had been paid. A number of the comparable sales relied on by Mr Slater were transactions which were completed pursuant to contracts, the terms of which made them conditional upon achieving rezoning from rural to another zone which would allow development. The nature of these contracts was such that the prices reflected the removal of risk that the land could not be developed. The values derived from these sales must be adjusted if they are to be used to derive a value for Parcel 64 which was, on the hypothesis under consideration, to be sold with its original zoning.

[740] Mr Slater was critical of the hypothetical development method of valuation utilising a cash flow model because it requires a reasonably high level of prior planning for a proposed development so that the likely costs over time, the timeframe in which those costs would be incurred and the likely returns over time can be ascertained. The outcome can vary significantly with minor variations to the estimated cost components, or prices or times when money will be spent or received so he believed the method to be too uncertain to be worthwhile.

[741] This criticism relates only to Mr Kendall's valuation of Parcel 64. He was retained by EFG and valued the parcel by means of a discounted cash flow analysis. Mr Slater asserts that this is not a recognized method of valuation endorsed by any recognised textbook and, to his knowledge, has not been accepted by the Land Court. That may be so but as the method was explained it differs only in its degree of sophistication from the hypothetical development method of valuation which has been in use for decades. Moreover I was impressed by the evidence of Mr Southwell who, as a valuer, specialises in advising the larger development companies on the value of parcels of land seen to be likely development sites. His evidence is that such companies, experienced in this market insist upon a discounted cash flow analysis on which to base their decisions on whether to

purchase and at what price. This, I am satisfied, is the reality and it would be foolish for the court to ignore it. It must be admitted that the method is susceptible to error and requires constant updating and revision as more information about the likely scale of costs and prices becomes available or needs amendment. Nevertheless as a method it is what is used in the market place for prospective purchasers on sites such as Parcel 64. Mr Kendall cannot be criticised for using it though the precise exercise he performed can be amended, as happened in cross-examination. The evidence of Mr Slect and Mr Purvis corroborate what Mr Southwell said.

[742] Mr Southwell's evidence in chief is found in Exhibit 162. As I say, I accept what he had to say. In particular I accept his evidence that the experienced commercial developers who form the only likely class of purchaser for Parcel 64 would only value the land by means of a discounted cash flow. As he explained, they are in the business of making profits from development and any acquisition of land is based upon an investigation and analysis of what profit they can make from it. This entails assessing the projected costs of development, the times at which the expenditure would occur as well as assessments of revenue from the sales including the time at which it will be earned. He explained that the direct comparison method 'only yields a wide range of possible values for a site. To obtain a more detailed and reliable understanding of the value of a particular parcel of land, it is necessary to use the discounted cash flow method to analyse the features of the … land.'

He went on:

> 'Although the discounted cash flow method does have difficulties of its own (because of the need to make the numerous judgments (as to costs, revenue etc)) it is ultimately more reliable than the direct comparison method because it focuses upon the characteristics and potential of the particular land in question.'

He explained that in his experience the discounted cash flow method is the primary method actually used by developers and that:

> 'The advantage of the method is that it actually requires a valuer … to give consideration to any issues which affect how to make best use of the land and requires judgment to be made about these matters.'

[743] Mr Southwell's practice is to advise the large developers and their financiers, the major banks. He has provided valuations for developers for such projects as Pelican Waters, Pacific Harbour, Kawana Estates, Noosa Waters, Noosa Springs, Chancellor Park and Twin Waters. Most of these are well known. He performs his valuations by the discounted cash flow method because his clients demand it.

[744] Mr Slater points out that using a method for valuing land which will be developed over decades produces a totally inadequate value for the land which will be last developed. For example, the analysis used by Mr Kendall would produce a value for the commercial segment of the development actually being undertaken of some tens of thousands of dollars only whereas in reality it will change hands for millions of dollars. This may be so, but as Mr Southwell explained, what the method does is to value cash flow, not land as such.

[745] Mr Slater's criticism is really of theoretical interest only, and does not affect the outcome of this aspect of the litigation for reasons which will emerge. The criticism does have some force. Because the cash flow analysis is sensitive to variations in estimates of cost and revenue, a valuer using it would not perform one analysis only. As information becomes available, either from fresh estimates of costs from engineers or contractors or new information on sales of comparable developments, or when development commences and actual costs or revenues are known, the analysis would be repeated using the updated information. As I understood Mr Southwell's evidence the cash flow analysis is performed repeatedly with updated information. Mr Kendall essentially performed it once, with variations to the IRR component, taking as his other inputs the figures used by Delfin for their assessment. It is not surprising that he derived much the same value as Mr Slect and his valuation cannot be seen to be a truly independent exercise.

[746] The real point is that Mr Slater's opinion is shown to be wrong by what actually happened in the market place for Parcel 64. I have already set out the details. No experienced developer was prepared to pay $30,000,000 for the land in March 1995. The best that might have been obtained was something less, probably very substantially less, than $30,000,000 when the land was zoned to allow development satisfactory to Delfin. A valuation of $40,000,000 is unacceptable when the land was still zoned 'Rural' with all the attendant uncertainty about what development might be permitted or achievable.

[747] Mr Kendall thought that 'the highest and best use for the land was that of a development site for a master planned community, although (he) took into account the fact that it did not have approvals for such a use and that there were risks associated with obtaining … approvals.' Mr Kendall thought, unlike Mr Slater, that the direct comparison method was inappropriate because 'with large development parcels, there are so many variables involved which led to a decision to pay a particular amount for the property that a reliable clarification of the sale is not possible.' As well he noted the difficulty of finding suitable comparisons. Because of the size of Parcel 64 and the very long period which could be expected for it to become fully developed it was inappropriate to adopt 'a simplified approach which merely applies a dollar rate per hectare to the entire holding based on rates paid per hectare for properties which are substantially smaller in size.' Where there are sales of large parcels they were sufficiently different from each other and Parcel 64 'for comparisons to be perplexing.'

[748] Mr Kendall therefore thought it appropriate to value the land by means of a discounted cash flow residual land analysis. He said:

> 'The types of buyers for the subject land … capable of taking it to my considered highest and best use as a master planned community are not to be found from within the public at large. They include major sophisticated developers … these … players typically embark upon a series of feasibility analyses prior to making their acquisition.'

Mr Kendall thought from his instructions that there was a sufficient factual basis to justify the preparation of a feasibility analysis of Parcel 64 as at 1995. He thought it was appropriate to undertake the analysis 'given the fact that this is typically the approach embarked upon by purchasers in the market place for such a property.'

[749] Mr Kendall based his discounted cash flow analysis upon the Delfin feasibility study which Mr Slect had had prepared for his negotiations with Emanuel 14 and Elders. An integral factor in the analysis is the choice of an internal rate of return ("IRR") which the measure of the level of profit a developer expects from the project. The required IRR reflects the risks inherent in achieving a profitable result. The greater the uncertainties associated with the project (i.e. the higher the risk) the higher will be the required IRR. The point of the discounted cash flow analysis is, for present purposes, to arrive at a residual land value analysis which comes when estimated amounts for income, expenses and risk (IRR) are analysed in accordance with the model to determine the amount a developer is prepared to pay for land.

[750] The results of Mr Kendall's analysis shows a variability of result which supports Mr Slater's criticism of the method and shows the uncertainty to which it is prone. What Mr Kendall did was to 'try' different land component prices for the project up to a figure of $25,000,000 to see what IRR was reflected in the project with those land values. They showed that above $15,000,000 the IRR was too low to justify the development. Having got so far Mr Kendall was then supplied with further information about the likely price of individual developed lots and the rate at which they might be sold over time. Making adjustments to his analysis it 'was then able to support a land value more towards the upper end of the initial range of $10,000,000 to $15,000,000.' Mr Kendall adopted a value of $15,000,000. In evidence he conceded it should be increased to $16,000,000 because he had overstated the cost of unit sites in the development.

[751] As a check to his valuation he undertook a comparison of comparable sales which he thought showed that $15,000,000 was too high. Nevertheless he maintained his opinion that Parcel 64 should be valued on the basis that cash flow analysis was the most appropriate method of valuation.

[752] I would find it difficult to determine the value of the parcel if the only materials which I could have regard were the forensic reports of these two valuers. I would be satisfied that Mr Slater's figure was too high but would not be confident what the real figure should be. Although in my judgment Mr Kendall's method is the more appropriate the uncertainty of the exercise he undertook shows the unreliability of the outcome. It is dependant upon the particular type and cost of the project the purchaser has in mind.

[753] Happily the court does not have to choose between these two competing valuations. Three other valuations of Parcel 64 were undertaken close to the time in issue but before litigation was in prospect. One of the valuations was to become the basis for a commercial transaction and the valuer knew that to be its purpose. The valuation was not a hypothetical forensic exercise but was performed in a commercial context to form the basis of an exchange between parties at arm's length. For that reason the valuation calls for particular mention.

[754] The valuer was Mr Christopher Shaw whose career specialised in the valuation of land for residential subdivision. He advised major land developers and major lenders to such developers. His experience of such valuations extended across all the eastern states of Australia.

[755] By letter dated 24 January 1996 Lendlease and EFG retained Mr Shaw to value Parcel 64 for the purposes of those companies entering into a joint venture.

Mr Shaw understood that his valuation would determine the price which Lendlease would pay to acquire its interest in the joint venture. His two clients therefore had conflicting interests: Lendlease would benefit from a low valuation while EFG would benefit from a high one. Mr Shaw rightly interpreted his role to be akin to that of an arbiter. His opinion would become the price to be paid for a half interest in the land.

[756] Mr Shaw valued the land as at 27 February 1995. He explained that of the two generally accepted methods of valuing for subdivision, discounted cash flow and comparable sales, the former was inapplicable because of the absence of any detailed feasibility study as to the particular development that might be undertaken. He was to value the land by reference to its highest and best use, which he believed to be subdivision and residential development but without any particular knowledge as to the type or content of the development. He determined to value the land by reference to comparable sales despite the significant difficulties in such an approach. They were that there were no directly comparable sales, primarily because of the very large size of Parcel 64. All comparable sales were of much smaller area. A larger area takes longer to develop and return a profit so that the developer is exposed to a considerable risk of holding the land for many years without a return. The third difficulty was that the land was not zoned for development and Mr Shaw believed there was a substantial expense and risk involved in obtaining approval. The particular difficulty for a valuer is that land is 'almost never' purchased on an unconditional basis. Rather, developers secure options over the land or contract to purchase conditional upon rezoning being achieved. There were no comparable unconditional sales of large parcels of subdivisional land.

[757] Mr Shaw said in his valuation:

> 'The *en globo* land market … has been quiet for some time … despite the somewhat subdued nature of the … market at the present time (which has become more noticeable in the past 12 months) demand for key landholdings still exists. Mango Hill represents one of the better opportunities and if offered on the open market, we expect it would generate considerable interest. However, because of the price category, the market would be tight with purchasers keen to structure delayed settlement terms and/or joint ventures to minimise the burden of holding long-term development debt. Given a fairly pessimistic short-term outlook (one to two years) for the residential land market, we would expect that a cash buyer would want a discount substantially to compensate for a lengthy approval process and what is expected to be a drawn out recovery in the property market. We also believe that there is a price threshold at which the market thins out dramatically with sales above $10,000,000 being fairly uncommon; and more importantly at the present time, where genuine inquiry is patchy.'

[758] Mr Shaw then analysed the sales he believed to be comparable and thought that the land in its then state with a rural zoning was worth $11,000,000 but that taking into account its potential for rezoning and development it was worth $14,000,000. He adopted the average of those two figures, $12,500,000 which the joint venture partners accepted.

[759] In 1995 Mr Ian Gregory was a valuer employed by JLW Advisory in Brisbane. He was widely experienced in valuing commercial, industrial and residential properties. In December 1994 his employer was retained to value a number of properties owned by the Emanuel group. The task of valuing them fell to a number of JLW Advisory employees. Mr Gregory completed the valuations of Parcels 64 and 53.

[760] EFG's letter of retainer required valuations to be prepared on a 'forced sale' basis which was defined to be 'what a prudent purchaser would pay for a property in the existing current market conditions, given a professional marketing promotion in a 3-6 month period by a reputable sales organisation.'

[761] The only information which EFG provided to Mr Gregory was the address and real property description of the land, the identity of the relevant local authorities and details of its securities. He was not given information relevant to any history of attempts to sell the parcels nor copies of any consultants' reports or feasibility studies relevant to the development of the lands and no narrative of dealings with the local authorities' attempts to obtain development approvals. For this reason Mr Gregory thought it was not possible to undertake the valuation on a hypothetical development basis. He therefore adopted the method of direct comparison. However, Mr Gregory noted:

> 'Given the property's large size, 'Greenfield' site status, its inherent unique features and location, we have been unable to identify a directly comparable sale from which to deduce an appropriate rate to adopt for valuation purposes. Accordingly, we have adopted a degree of professional judgment in arriving at our determination.'

[762] Mr Gregory then referred to a number of sales of *en globo* parcels of land, none exceeding 100 hectares in extent, at prices which ranged between $68,000 and $100,000 per hectare. Mr Gregory also referred to sales of parts of Parcel 64 which had been effected by Emanuel 14 in the years 1989 – 1992. These showed a rate per hectare of between $30,000 and $60,000. Assessing things as best he could, Mr Gregory applied a rate of $45,000 per hectare to the southern portion of Parcel 64 which had access to the Bruce Highway and Anzac Avenue. This part had more immediate development potential. For the balance of the property he applied a rate of $28,250 per hectare to arrive at an overall rate which gave 'an open market value' of $37,000,000.

[763] Mr Gregory then noted

> 'We have been required to provide an assessment of the property on a "forced sale" basis. In normal circumstances and particularly so in the current market, we believe a selling period of up to 12-18 months may be required to achieve our open market value and therefore, to achieve a sale within a limited time period, a vendor may well have to accept a discounted value …'

[764] Adopting a degree of 'professional judgment' he discounted the value to $26,000,000.

[765] Mr Gregory's opinion was that the highest and best use of Parcel 64 was as an integrated dormitory development comprising separate suburbs together with

schools, shopping centres, community facilities and recreational spaces. He thought that a development of that type would occupy about 30 years and involve large initial capital outlays for the development. The overall magnitude of the development severely restricted the number of potential purchasers so that the parcel had limited market appeal. Those who might be interested would all be experienced and sophisticated developers with extensive expertise or retained consultants to assist in the planning, costing and marketing of any development undertaken.

Mr Gregory would not expect any such purchaser to consider buying Parcel 64 without undertaking feasibility studies and at least preliminary hypothetical development analyses.

[766] According to Mr Gregory such purchasers will not themselves assume the risks associated with obtaining development approvals. They will not buy land outright before those approvals are obtained. Rather, they will purchase on contracts conditional upon obtaining rezoning or other development approval. The contract price will reflect the avoidance of risk.

[767] The last valuer whose evidence needs to be rehearsed is Mr Gardiner who, during the years in question, was a senior partner of Herron Todd White. Since 1987 a significant part of his practice has involved the valuation of development land. According to Mr Gardiner the valuation of such land gives rise to particular difficulties, especially for large parcels, the market for which is confined to experienced developers because of the extensive resources required to develop the land and the high level of skill and experience necessary to do it profitably. Their interest in the land lies only in its capacity to produce a profit. When deciding whether to buy and how much to pay developers form an opinion about profitability by conducting a hypothetical development analysis with regard to the particular risks involved and whether the projected profit is sufficient to justify undertaking the risk. Often the exercise is undertaken elaborately through the use of a discounted cash flow model.

[768] Mr Gardiner and his firm developed a program utilising information obtained from developments undertaken by clients of his firm to allow them to approach the valuation of broad acre land in the same way the developers did. Because reliable data for a discounted cash flow analysis such as the plans for the developments, its costs and likely returns may not be readily available to a valuer, a number of judgments or assumptions must be made which may cast doubt upon the accuracy of the analysis. A large element of judgment comes into play.

[769] In November 1992 Mr Gardiner was instructed by EFG to provide a valuation for Parcel 64 as part of a review of its securities. He valued the parcel at $20,000,000. He did so on the basis that the land provided a major development opportunity, though to a limited number of purchasers because of its size and the costs involved with development. Mr Gardiner's opinion was influenced by the PRSC's then support for the development of the site pursuant to a DCP and his belief that market conditions were likely to improve over the ensuing few years. His method was that of direct comparison though, he too, noted the difficulty of finding any truly comparable sales.

[770] The plaintiffs seek to make much of the fact that in his valuation Mr Gardiner recorded that he had been ask to comment on the possible escalation in the value of Parcel 64 by the year 1995. He said:

> 'It is almost impossible to provide such an estimate, however, based upon the assumption that future real estate cycles will follow past cycles, it is fair to assume that 1995 should experience very buoyant real estate market conditions and the peak of a boom period should be imminent. Given the circumstances and assuming that the DCP and rezoning are in place, a value of between $40,000,000 to $50,000,000 could be possible.'

[771] In June 1994 Mr Gardiner was again instructed by EFG to value Parcel 64. His opinion was that its value had not changed from the $20,000,000 he had advised at the end of 1992.

[772] There is another aspect of Mr Gardiner's evidence. In November 1993 EFG wrote to Mr Gardiner enclosing a draft concept master plan for Parcel 64 prepared by Mr Brannock. The letter stated:

> 'This plan has not standing in current planning ordinances and has been prepared solely as a working report for our purposes.
>
> From the limited information shown on the plan, we require an estimate of value of the site, not for mortgage purposes but as an "owner/developer" of the property.
>
> …
>
> The model set up can be used for future purposes as it is anticipated the project will be ongoing.'

[773] As requested Mr Gardiner prepared a 'Feasibility Analysis and Indicative Value Assessment' based upon Mr Brannock's concept master plan. Mr Gardiner's report noted that:

> 'Planning is at a very early stage and therefore any feasibility analysis completed at this stage can only be of an indicative nature, however such feasibility is of considerable use as a guide to value and in identifying the key components within the proposed project and quantifying the effect of any change in those key components on value.'

[774] Mr Brannock's plan showed different components of development. It contained an estimate of the number of residential property sites which could be developed and sold. Mr Gardiner prepared a cash flow analysis model basing his costings on the amounts and timing on the analysis which had been prepared by Delfin and given to EFG. The analysis was difficult because the proposed development was very large and was proposed to occur over 20 years. No planning approvals had been obtained so the cost of meeting conditions of rezoning were unknown. The information as to costings was imprecise. Despite these difficulties Mr Gardiner was asked to

prepare the analysis, making such judgments and assumptions as he thought reasonable.

[775] His conclusion was:

> 'The … parcel is a large strategically located piece of land which is ripe for development.
>
> It is unfortunate that the rezoning … process is not further progressed … as the time … in obtaining … approvals … is considerable.
>
> If rezonings and development approvals are not in place before the next peak market period (anticipated to be around 1995) the value and viability of the project will be considerably reduced.
>
> Analysis of the cash flows prepared for this project revealed that is has the potential given good project management to be an extremely viable venture. The key component is the regional … retail site … which generates a considerable inflow of capital with which to reduce exposure at a fairly early stage of the development.
>
> This feasibility is based upon a concept master plan with little available information on development requirements and accurate costings and should be treated as a guide to value and viability at this early stage. The model attached to this report does however indicate that the project is viable at a current land component of $35,000,000.'

[776] In this confusing welter of opinions and arguments, two factors stand out which, in my judgment, indicate what was the value of Parcel 64 in March 1995 in its then state. The first is the evidence of Mr Purvis and Mr Slect. I accept their testimony that no developer of the kind who formed the only likely class of purchaser for the land would pay $30,000,000 to acquire it. Their evidence, which I accept, is that such a developer would not pay $30,000,000 even if the land had been given zonings or approvals which would allow residential development.

[777] The second factor is that a half interest in the land was transferred from EFG to Lendlease on the basis that the whole was worth $12,500,000. The price was arrived at by accepting Mr Shaw's valuation but he had the task of deriving the immediate value of the land, as it was, to allow the sale of the half interest in it. He advised both vendor and purchaser and he was forced to confront the reality of market value more than any other valuer who had expressed an opinion free of the immediate threat of being proved wrong by the conduct of those in the market place.

[778] Mr Shaw's valuation, taking into consideration the potential of Parcel 64 for development, was $14,000,000. I am satisfied for the reasons I have given that Parcel 64 was worth less than $30,000,000 rezoned and much less while still included in the "Rural" zone.

[779] I think the best that one can do is to say that the land at the time was worth about $14,000,000.

[780] It may be objected that this finding unreasonably departs from the figure which Emanuel 14 and EFG agreed should be the consideration, $26,000,000, at which the land was transferred. That figure came from Mr Gregory's valuation which was commissioned for the purpose of determining the value of the land for the purposes of transfer.

[781] I have no doubt that the evidence of Mr Purvis and Mr Slect, as well as Mr Shaw's valuation, acted on as it was by Lendlease and EFG, show Mr Gregory's valuation to be wrong. Had he known when he prepared his valuation what the court was subsequently told he could not reasonably have thought the land was worth $26,000,000.

[782] Another factor which should not be overlooked is that the value of the land has to be determined by reference to what a willing but not anxious purchaser would have paid for it as it was in March 1995, before it had been rezoned or made the subject of a DCP. On the evidence the only prospective buyers were large, shrewd, developers who did not buy land in that state. If it was to be sold unconditionally on the basis that the purchaser took on the risk of obtaining development approval of some sort, the price would be very modest compared to what would be paid for it on the basis that there was a right to develop it with a view to profit. The risk was substantial and the prospect of any return, even with approvals, was to be deferred for a decade or more.

[783] The plaintiffs rely upon several points but none of them, individually or collectively, makes me doubt the conclusion to which I have come on the question of value.

[784] Firstly it is pointed out that Mr Gregory's valuation was predicated upon there being a forced sale rather than by adopting the traditional test set out in *Spencer v. The Commonwealth of Australia* (1907) 5 CLR 418, by reference to the willing but not anxious buyer and seller 'cognisant of all circumstances which might affect … value.' There are two answers. The first is that, on whatever basis Mr Gregory valued the land, his figure was too high. He arrived at that figure by discounting his valuation of $37,000,000, which he would have obtained by the application of the *Spencer* test, by 30 per cent. The plaintiffs argue that this is Mr Gregory's 'real' valuation and that his discount should be ignored. It is impossible to accept that the land was worth $37,000,000 when on the clear evidence in the case no developer would pay as much as $30,000,000 for the land, even with development approval.

[785] The second answer is that the term 'forced sale' does not have the connotations the plaintiffs believe it has. All that was meant by it was the value of the land was to be assessed in its then state after a marketing program of between three and six months. The term was coined to make it clear that the valuer was not to approach his task on the basis that, with the effluxion of time and expenditure of money, the land may be rezoned and so become more valuable. No doubt a vendor would, if at all possible, seek to enhance the value of the land before putting it on the market, but the question in this part of the case is what the land was worth as it was, not as it might have become.

[786] Next the plaintiffs point to Mr Gardiner's opinion expressed in November 1992 that within about three years the land might be worth between $40,000,000 and $50,000,000. This is relied upon as showing both that the value of the land in 1995 was of that order and that the Elders defendants knew it to be so when they accepted a transfer for $26,000,000.

[787] The refutation need not be long. For the reasons I have mentioned too often already, the land was not worth as much as $30,000,000. Mr Gardiner never said it did have a value of between $40,000,000 and $50,000,000.

[788] The third point is similar to the last. It is that Mr Gardiner's feasibility analysis showed the land to be worth $35,000,000 late in 1993 and that the Elders defendants, knowing of that value, took unconscionable advantage of Emanuel 14 to acquire the land at a known under-value.

[789] Again, the refutation can be short. The feasibility analysis was not a valuation of the land. At most it indicated what value the land might have upon a given set of assumptions as to type of development, cost of development and rate of return. Even if it were an expression of opinion the evidence shows it to have been wrong.

[790] All valuers found the task difficult. With the exception of Parcel 64 none of the parcels had a clearly discernible end use. Their value, such as it was, lay in some potential for future development which was in the nature of things, conjectural and almost impossible to quantify. All parcels are huge with restrictive zonings and were environmentally important because of their proximity to Moreton Bay or the waterways that lead into it. All of them were too big to develop in the foreseeable future. A large variation in opinions as to value was to be expected. That being the case it is even more difficult to make out a case of dishonesty.

[791] The finding I have made with respect to the value of Parcel 64 has the consequence that the plaintiffs have not made out their premise that the APM lands were transferred to Elders at an under-value. Even if the three other parcels were worth the amounts ascribed to them by Mr Slater, their aggregate value, combined with what I find to have been the value of Parcel 64 would not exceed the value given to Emanuel 14 by Elders for their transfer.

[792] It is therefore possible and, in the interests of brevity, desirable that the competing opinions and arguments as to the value of those other parcels be dealt with shortly.

[793] I am prepared to accept much of Mr Slater's opinion about the value of Caloundra Downs, Parcel 52. For this parcel there are transactions which would seems to fix its value with something approaching precision. Not all the transactions are of the type on which valuers prefer to rely, but given the paucity of such evidence, the transactions in question are the best available evidence.

[794] For ease of analysis and discussion, Parcel 52 has been divided into two: Caloundra Downs 1 and Caloundra Downs 2. The former comprises an area of 147 hectares carved out of a larger portion, lot 648 on RP 838059 which formed part of the aggregation. 100 hectares of the sub-division was contracted to be sold on conditions to Harrison. I have set out a brief history of this transaction. The approvals which were obtained by Harrison did not apply to the whole of

Caloundra Downs 1, but their gazettal for part of the land enhanced the balance which could be seen as a natural extension of the development which was approved.

[795] What happened in fact was that the fourth defendant, Lensworth, entered into a joint venture arrangement with Prudential Finance Holdings Ltd ("Prudential") to undertake the residential development of the whole of Caloundra Downs 1. According to Mr Slater's synopsis of the contract, which he did not have in its entirety, Lensworth was to provide the land and Prudential was to develop it. 15 per cent of the gross sales of the developed land was to be paid to Lensworth as the cost of the land. The division of the other returns from the project was complicated and depended upon the actual performance of the project. According to Mr Slater's report:

> '… a summary of a commercial assessment … shows a total projected land payment to Lensworth of $13,492,000 over … nine years … this is 15 per cent of the assessment's anticipated gross sales of $90,632,600.'

[796] Mr Slater attempted to value the land from the joint venture agreement but he noted that the documents were incomplete and gave no indication as to the timing of the payments so it was impossible to arrive at a discounted residual land value. He noted that 'it appears that Lensworth's assessment of the value of this land was approximately $4,000,000 …' which he "adopted", though in part of his report he seems to adopt a value of $4,500,000.

[797] Mr Kendall's approach was simpler and, I think, more persuasive. He accepted the contract between EFG and Harrison as providing cogent evidence of the value of the 100 hectares of Caloundra Downs 1 which obtained development approval. Rounding off, this gave a value per hectare of $25,000,000. Mr Kendall noted that there was 'no guarantee' of obtaining rezoning for the balance 47 hectares of Caloundra Downs 1, but he thought it likely to occur and that the land should be zoned on the basis that its highest and best use was for residential development. To allow for the risk that rezoning might not occur, or might be delayed, and the costs of obtaining it, he applied a rate of $20,000 per hectare to the balance area of 47 hectares, giving a value of $940,000. Thus he would value the total of Caloundra Downs 1 at $3,440,000.

[798] This approach appeared to be sensible. Mr Slater's approach is a little contrived and requires some guesswork.

[799] Mr Slater valued Caloundra Downs 2 by reference to an agreement between Lensworth and Prudential for the purchase of a half interest in it for $3,500,000 in December 1997. The consideration was paid by Prudential though it appears that no transfer of a half interest in the land was ever registered. Both valuers treated the transaction as genuine. Though subsequent to the date of valuation it was common ground that the market had remained flat between March 1995 and December 1997 so that the transaction was indicative of value at the earlier time.

[800] Mr Kendall was reluctant to accept the transaction as showing that the value of the land was $7,000,000. He claimed that Prudential was not only a willing purchaser but an anxious one who paid more than market value. His reason was that Prudential is the developer of a large residential estate located at Kawana, between

the northern end of Caloundra and Mooloolaba. This development commenced some years ago and is still proceeding. Mr Kendall's thesis was that to protect its investment Prudential was prepared to pay a premium for Caloundra Downs 2 so as in some way to be able to control its development or otherwise reduce the competitive effect any development of Caloundra Downs 2 might have.

[801] Mr Slater would not accept that there was evidence of Prudential's anxiety to purchase the half interest. His opinion was that it was simply another investment opportunity taken by Prudential.

[802] I am sceptical of Mr Kendall's claim. Reliance is placed on some documents obtained from Prudential which to my mind do not indicate anxiety on its part to protect its development at Kawana. Exhibit 376 is a Prudential memorandum in which one of its executives set out his 'analysis and thoughts' for the comments of his superior with respect to the proposed joint venture. The relevant part reads:

> 'The approach suggested by Lensworth is that they should be entitled to put the parcel to (Prudential) as current rural value (suggested at around $7,000,000 to $8,000,000) plus the opportunity cost of those funds to Lensworth at their internal investment handle rate …
>
> The options available to us are therefore;
>
> - Offer an alternate approach with reflects the risk each party is taking …
> - Pay half the rural value now to reduce the future cost.
> - Accept the risk of paying more for the land than it is worth as the premium required to secure this opportunity to keep out a potential major competitor to Kawana.
>
> Using the previous based case analysis … the put option cost and premium payable would be as follows
>
> Put Option Cost
>
> | | |
> |---|---|
> | Assumed current rural value | $7,000,000 … |
> | Premium (after 30% required rate of return) | $2,500,000 |

[803] I cannot get from this that the $3,500,000 paid by Prudential included a premium. The memorandum suggests the contrary: that the land had an agreed value of $7,000,000 (or as much as $8,000,000). The option of paying more for the land, which in any event was thought to be a risk rather than a certainty, appears to have been a suggestion alternative to making an immediate payment of half the value of the land.

[804] These are matters of conjecture. If it were important to Elders to cast doubt upon the transaction as an indication of value they should have done more than tender an ambiguous memorandum. Its author could have been called to explain the ambiguity and reveal whether Prudential was an anxious rather than a willing purchaser.

[805] There was evidence from Mr Booker, whose testimony I regarded as honest and reliable, that Prudential was 'a very willing buyer' of whom he 'was able to take full

advantage …'. When asked to explain the basis for his opinion he explained (T.7702.5.20) that its development at Kawana Waters had about seven years to run and that it had developed good relationships with the local authority and State Government. He went on to say:

> 'We believed that the best result we could get was to have a joint venture … because of those relationships which may bring development potential … sooner rather than later.'

He then concluded that:

> '(Prudential) paid above market …'

The evidence was objectionable, consisting as it did of opinion from a witness other than an expert. No basis for the opinion was provided: the avowed justification is insufficient to support a finding that Prudential was prepared to pay a premium on the market value of the land. The evidence shows no more than it had a reason to acquire the land, and a basis for believing that it might eventually obtain approvals for development. The evidence should have been objected to but was not, presumably because of the segmented way in which the plaintiffs conducted their case. Counsel who conducted the 'valuation' case for the plaintiffs was absent for Mr Booker's evidence. Counsel who was present appeared not to understand the relevance of this aspect. Nevertheless despite its receipt without objection I am not persuaded by it to find that Prudential was an anxious purchaser.

[806] I think it appropriate to act upon Mr Slater's assessment. There are two other components to Parcel 52 but there is agreement as to their value. Part of the parcel was resumed for rubbish disposal. Compensation was agreed in the sum of $600,000. A further parcel was the subject of an option to purchase which, though not exercised, was regarded by both valuers as providing satisfactory evidence of value. The amount for the exercise of the option was $1,250,000.

[807] I find therefore that the value of Parcel 52 was:

Caloundra Downs 1	$3,440,000
Caloundra Downs 2	$7,000,000
Resumed area	$600,000
Land subject to option	$1,250,000
	$12,290,000

which could be conveniently rounded down to $12,000,000.

[808] Both Mr Slater and Mr Kendall found it difficult to arrive at a valuation of Parcel 53, the land at Bribie Island. Mr Slater said:

> 'A valuation of this land is particularly uncertain. There is no use, apart from as a pine plantation, which could be considered as being achievable with some level of confidence. Additionally there is no sales evidence whatsoever that could be considered comparable.'

Mr Kendall thought:

> '… an overriding confusion exists as to the appropriate highest and best use for the land, and I therefore find that my approach to a valuation of the site is met with great difficulty and intangibility …'

[809] Mr Slater thought that a valuation at $6,850,000 was "not unreasonable". He pointed out that the parcel is unique in many respects, being a large private holding on an island accessible by car and in close proximity to a capital city. Because of these attributes he thought the land could be considered highly desirable for a number of forms of development including an integrated tourist resort, a golf course based residential community or simply traditional residential subdivision. He immediately recognised that development would face 'significant obstacles' and that the approval process would be 'somewhat challenging' with 'infrastructure problems to be overcome.'

[810] Mr Slater thought that the parcel might attract interest from the adjacent developer of Pacific Harbour. He pointed out that only a small part of the parcel need be sold for an extension to the proposed golf course and/or further residential development at the rates historically achieved to yield an amount in excess of $5,000,000.

[811] It should be pointed out that in 1989 the developer had bought 121 hectares of the parcel at the southern end adjoining the development for use as a golf course. The amount paid was $2,250,000. Subsequent to the sale of Parcel 53 by Kinglingston Pty Ltd to the State Government in June 1995 the government sold a further 20 hectares to the developer for an extension of the golf course for a price of $3,950,000.

[812] Mr Slater's conclusion was that:

> '… the best prospects for a development … would have been a tourism or golf course/residential development on a comparatively low scale with a preparedness to sacrifice a large part of the land for public ownership. The difficulty with a low scale development is the ability to bear large infrastructure costs. … the appropriate approach is to apply a long term holding value …'

[813] Mr Kendall was much more pessimistic. He noted that according to local government policies the parcel's dominant land use was open space and there was no long term potential for use other than within the 'Rural' zone. The property was vast in size and had a total street frontage of only about thirty metres. He observed that:

> 'Whilst an island location sounds attractive for tourism purposes … once one is physically on the site … it is found to be generally level and low lying with no instantly recognisable appeal. … Bribie Island is well known for being a limited budget retirement precinct, as well as a convenient day-tripper destination for nearby downscale socio-economic areas such as Caboolture. The … middle class of Brisbane tends to bypass Bribie Island …'

[814] Mr Kendall valued the land by reference to the contract for its sale by Elders to the State Government dated 9 June 1995. He adjusted the contract price to arrive at a

value of $3,000,000. There is no doubt the price does need adjustment but Mr Kendall has, in my judgment, been too severe.

[815] The contract price was $5,860,000 but the property sold included four separate parcels of land in addition to Parcel 53. The contract does not apportion individual consideration to the various parcels but a memorandum from Mr O'Grady to EFG of 13 June 1995 (Exhibit 16, 15/736) apparently records the agreement of the parties that the price for parcel 53 was $4,565,000. Payment was to be made by instalments; one payment on settlement and four payments on 1 January in each of the years 1996, 1997, 1998 and 1999.

[816] In addition to selling the land the contract settled a controversy begun by Mr Emanuele which passed to EFG when it acquired possession and subsequently ownership of the parcel. What had happened was that the standing pine trees on the parcel had been the subject of a contract made by Emanuel 14, by the terms of which the vendor was to provide access for the removal of the felled timber. In his haste to obtain the royalty revenue, Mr Emanuele had caused a haul road to be built over the parcel without obtaining the necessary permits and in a way which was insensitive to the local vegetation. His action outraged members of the environment protection groups on Bribie Island. The consequence was that trucks were forbidden the use of the haul road built by Mr Emanuele and there was a real danger that the valuable timber resources on Parcel 53 could not be harvested.

[817] The contract overcame the difficulties. The contract acknowledged EFG's right to sell the timber to Softwoods (for a price of $10,500,000) and allowed it to build a road for the purpose of removing the trees. As well, the Government agreed to compensate EFG should harvesting be prevented by Government policy or legislation. The cost of building the road remained with EFG which also remained liable to reinstate the land occupied by the road at the conclusion of harvesting. However, the contract transferred to the State the rehabilitation at a cost not to exceed $1,000,000 which was to be subtracted from the final instalment of the purchase price. In addition the State Government undertook the obligation, at its cost, to rehabilitate the landscape once the trees had been removed.

[818] As Mr O'Grady's memorandum noted:

> 'EFG has achieved a major objective of passing all the plantation risk associated with the harvesting of Bribie Island … to either the Queensland Government or Softwoods … the agreement does not relieve EFG of the cost of building the haul road … however the Government compensation quarantined the risks associated with obtaining the haul road approvals … the Government will assume the responsibility for removing and restoring the haul road … for a capped cost to EFG of $1,000,000. EFG believes that this is a significant benefit as it passes the responsibility for the road to the Government and caps EFG's costs at $1,000,000 for an event seven to nine years in the future.'

[819] Mr Kendall's approach was to discount the contract price because of the delayed receipt of part of it and to deduct the sum of $1,000,000 to be paid for the restoration of the road. Thus he arrived at his valuation of $3,000,000.

[820] It may be right to discount the price for delayed receipt but I cannot see the justification for further reducing the value by $1,000,000. That was, in a sense, the price paid for the right to remove $10,000,000 worth of timber. There is no doubt the contract did more than merely sell land. There is an obvious difficulty in equating the unadjusted price to the value of the land but it seems unjustifiable to reduce the value by the $1,000,000 without allowing anything for the economic benefit to the vendor of securing the right to harvest the timber.

[821] There is simply no evidence of the value of that right so one cannot notionally adjust the contract price upwards. The safest approach is to ignore the deduction on the basis that it is referable to a transaction separate from the sale of the land. It was a matter of convenience only that the parties agreed that payment for the restoration of the road should be made by deduction from a debt otherwise due as a separate reciprocal obligation.

[822] Accordingly, in my opinion, Mr Kendall's valuation is too low. However, I think Mr Slater's valuation is too high. I think Mr Kendall's telling criticisms of Parcel 53's tourist potential are well founded. Mr Slater ascribes too much development potential to the land and pays insufficient attention to the contract of sale for the very parcel three months after the relevant date. Such development potential as the land had would have been reflected in the contract price.

[823] Accordingly in my judgment Parcel 53 was worth somewhere between $3,000,000 and $6,850,000 as at March 1995. The contract price of $4,565,000 is the best evidence of value. Discounting a little for the delayed receipt of the price I would assess value at $4,000,000.

[824] Mr Gardiner's valuation of $6,400,000 was given before the making of the contract on 9 June 1995 and is shown to be wrong by that transaction.

[825] The last parcel to discuss is 62 at Caboolture. Mr Slater noted Mr Brannock's conclusion that an appropriate use for all of the land was rural residential purposes. Mr Slater reported:

> 'This form of development is consistent with development of adjoining lands where subdivision to rural residential estates has produced lots ranging from about 3,000 square metres to about 8,000 square metres.
>
> Subdivision to lots of this size however would be limited to that land above the Q100. The land below the Q100 would … be best developed as adjunct areas to adjoining rural residential areas as this would maximize the return on this land.'

[826] Mr Slater then referred to a number of sales of land 'in close proximity' which have been developed for rural residential subdivisions. Emanuel 14 was the vendor in both transactions in 1989 and 1992 respectively. The land sold had formed part of the original Parcel 62 acquired by Emanuel 14. One sale was of 101 hectares for $750,000 giving a value per hectare of $7,420. The second was a sale of 105 hectares for $700,000 giving a per hectare value of $6,666.

[827] Mr Slater thought that due to the 'relatively early timing of these transactions and the general movement in the market through 1993/1994' a reasonable rate to apply

to the flood-free land was $7,500 per hectare, giving a value of $2,722,500 for the 363 hectares. He thought that the flood-prone land was worth $3,000 per hectare because of its potential 'to form acreage additions to rural residential lots.' His aggregate value for Parcel 62 was therefore $5,300,000.

[828] His valuation is trenchantly criticised by Mr Kendall who points out that the two sales were of far better quality land which were the 'prime sections' of the original parcel acquired by Emanuel 14. There were subdivided off and sold because of their obvious value. They were the higher parts of the land and were close to established development. They were easily accessible by existing roads. The value ascribed by Mr Slater is higher than that achieved actually in the comparable sales which were of much better land. No evidence was offered to support a valuation of $3,000 per hectare for the submergible land; much of which is swampy, some of which is covered in mangroves or in salt water inundation.

[829] The parcel has, as Mr Kendall points out, a 'backwater location enclosed by physical barriers such as the Caboolture River, Burpengary Creek, Deception Bay and the Bruce Highway. … it appears to form an isolated market away from the rest of the mainstream metropolitan area.' Moreover:

> '… most of the overall property … had been fairly well picked over for the more desirable components by various developers prior to the relevant date … any remaining segments still worth pursuing are generally scattered as pockets or strips across the overall land mass … given the overall hotch potch nature of the subject holding and the lack of good quality development land linked together to create flood-free land of any substantial … mass … it is highly unlikely that a sophisticated developer would be interested in the property as a large overall holding.'

[830] Mr Kendall attempted to find comparable sales to arrive at a value. He listed the positive attributes of the land as being:

- A Bruce Highway frontage
- Location within a fringe section of the Brisbane metropolitan area
- Proximity to Moreton Bay
- A large parcel offering rural pursuits
- Some potential for further development

[831] Its negative attributes were identified as:

- Most of the site is subject to flooding and cannot be occupied for habitation
- Even for rural use much of the land is unsuitable because of the effect of salt water or waterlogging
- Most of the land which is suitable for potential high uses is restricted to strips or pockets which cannot be developed in an orderly fashion
- Access to a significant portion of the higher land is difficult or must traverse flood-prone land

- The site is between Caboolture and Deception Bay which are relatively poor areas
- Generally poor location and difficulty of access

[832] Mr Kendall considered eight sales which he thought might afford some basis of comparison. Two of these were the sales discussed by Mr Slater. The land sold varied in quality and location. The three sales of land physically closest to Parcel 62, other than the two superior properties relied on by Mr Slater, yielded per hectare rates of value of between $1,900 and $2,900. Mr Kendall thought that a rate of about $2,000 per hectare would ‘broadly align with an appropriate magnitude of value.’ and give an overall value of $2,452,000 which he rounded out to $2,500,000.

[833] I accept Mr Kendall’s opinions on Parcel 62. Mr Slater has been far too selective in his use of comparable sales. Large tracts of Parcel 62 are virtually useless and much of it would appear to be literally worthless. To ascribe a value of $3,000 per hectare to such land is not sensible. It is not realistic to regard the parcel as suitable for development as rural residential land.

[834] The land was also valued by Mr Gardiner but his valuations may be ignored. They appear to have been composed when the Caboolture Shire Council had given notice of its intention to resume the land and were designed to support a claim for compensation. They clearly overstated the value of the land. The valuation as at 30 June 1994 claimed the land to be worth $8,500,000. This was the result of a sparse hypothetical development method ignoring sales of comparable nature and assuming that the highest and best use for the land had been established by Mr Brannock as 970 rural residential and 20 waterfront rural allotments. A year earlier, in May 1993, Mr Gardiner had produced a valuation for the same purpose. He obviously regretted his expressed opinion, which was that the land had a value of $14,300,000, because he stamped his report ‘draft’ after he had signed it. It too was based upon a hypothetical subdivision development which included a marina and golf course adjacent to the Caboolture River near Beachmere.

[835] Mr Gardiner was embarrassed by the valuation, for obvious reasons.

[836] I therefore find that Parcel 62 had a value of $2,500,000 in March 1995.

[837] The total value of these four parcels of land transferred to Elders was:

Parcel 64	$14,000,000
Parcel 52	$12,000,000
Parcel 53	$4,000,000
Parcel 62	$2,500,000
Total	$32,500,000

[838] The stated consideration for these parcels of land in DOFR was $41,679,500 which went in reduction of the debt owed by the Emanuel group to EFG.

[839] Not only was the land not transferred at an undervalue but the plaintiffs did not make out the case that the value was fixed arbitrarily. Indeed they did not attempt such a case.

[840] Attention must now turn to the first component of the scheme which is that judgment was obtained by collusion for an amount agreed to be in excess of the 'true debt'. In order to appreciate the arguments it is necessary to rehearse in some detail the negotiations which culminated in the execution of the three deeds on 15 and 17 March 1995. The facts relevant to those negotiations are not seriously in doubt. They were conducted initially by EFG's own officers and then subsequently by solicitors. There is a comprehensive documentary record of communications concerning the negotiations. Where the parties differ is in the assertions they are prepared to make about their character.

The Negotiations

[841] The parties agree that the relevant commencement for a consideration of the events leading up to and constituting the 1995 Scheme can be dated in about August 1993. As a consequence one may ignore a very large part of the evidence adduced in the trial. Many documents running to thousands of pages concerning events prior to August 1993 were tendered. Some of those events were the subject of oral testimony. By limiting the evidence relevant to the 1995 Scheme to the period August 1993 to March 1995 the parties accept that earlier events can safely be ignored except, of course, where they relate to particular claims made by the plaintiffs or are relevant to an understanding of those claims. Happily it will not be necessary for these reasons to deal with many episodes of fact which it was thought necessary to explore at the trial.

[842] There is nothing in the evidence to suggest any dissatisfaction with the Emanuel group's performance under the DOOR or with the terms of that deed prior to August 1993. In that month, however, each of Messrs O'Grady, Crosby and Booker came to a belief, on differing grounds, that the objectives meant to be achieved by DOOR were not likely to be fulfilled. As I mentioned in the introduction Mr O'Grady was concerned by the implication which RPAG had on the value of the APM land which comprised the most significant part of the security for EFG's loan. Of the four major parcels only one, Parcel 64, was identified by the state planning authorities as having any potential for development. The other three were designated as open space. Previously Parcel 53, Bribie Island, had been thought to be of particular value. It had been the subject of the failed sale to Molinara for about $100,000,000. It was valued in the Wales report at $34,000,000. The RPAG report constituted an immediate threat to EFG's chances of recovering its debt. It will be recalled that by this point that debt exceeded the value of the properties so that the Emanuel group had no equity in the lands.

[843] If the strategic course for land use set out in the RPAG report was to be altered to allow development of some kind to occur on Parcels 52, 53 and 62 government would have to be negotiated with at a high level. Mr O'Grady thought that Mr Emanuele was unsuited for that task, particularly because of the pressing demands on the Emanuel group by a number of creditors, including other secured creditors, which meant continuous distraction from the task of devising and pursuing a plan which would see the APM land rezoned and sold. The financial difficulties of the Emanuel group, its lack of coherent management practice and structure and the distractions of pressing creditors meant that, in Mr O'Grady's opinion, Mr Emanuele would not successfully negotiate with the government. (T.8232.20-.30)

[844] A further consequence of DOOR was that the timeframe for development of the APM land was greatly extended from the two to three years envisaged by DOOR for the development and sale of the land. There was a distinct possibility that the land would be required as open space for a decade or more, and that even if negotiations were successful they would take years to bear a result. A basic premise underpinning DOOR had been falsified (T.8245.20-.35).

[845] A second concern was that there had been no success in achieving sales of large parcels of land which were necessary if a substantial reduction in the debt was to occur. The Kartha contract was terminated in about August 1993. Two previous sales in 1988 and 1991 had also failed to eventuate. This, as I mentioned earlier, was Mr Crosby's major concern. (T.6212.50-.60) Mr O'Grady shared this concern (T.8237.50-.30)

[846] Another point of concern for Mr O'Grady was that the moratorium might not be effective because similar indulgences had not been granted by other creditors of the Emanuel group so that its management did not have the ability to concentrate on selling the portfolio free from the worry that the group companies might be wound up or be subject to recovery action of some kind. According to Mr O'Grady:

> '… Whereas the moratorium … had been accepted by the other major lenders it had not been accepted by some of the smaller … creditors … and they were continuing to put pressure on the Emanuel group and as a consequence the Emanuel group were starting to not focus on the things that we wanted to focus on so the object of actually taking the pressure off the Emanuel group had not worked …' (T.8233.42-.55)

[847] Mr Booker had another concern. When he replaced Mr Grier as EFG's Queensland manager in July 1993 and took responsibility for the Emanuel group account he was critical of the Emanuel group's capacity to effect major sales. Mr Booker had not known Mr Emanuele in the better times when he was a successful property dealer and a valued customer of EFG. An experience of those times appears to have coloured Mr Grier's, Mr MacDonald's and Mr Crosby's judgment of Mr Emanuele and his conduct. Mr Crosby had been a friend of Mr Emanuele's for many years. Mr Booker came fresh to the task of managing EFG's Queensland property portfolio which required him to realise those properties in the shortest time for the best return for EFG. I have mentioned before my favourable impression of Mr Booker. He would have been an efficient, intelligent and direct manager. He did not let sentiment cloud his judgment. He thought that Mr Emanuele and his managers were incapable of dealing successfully with PRSC, and its consultants, to obtain the DCP for Mango Hill and likewise incapable of selling the other parcels for a substantial price. He recommended that EFG take possession of the properties as mortgagee and deal with them itself. Mr O'Grady was concerned that the workload involved in taking possession of, maintaining and marketing all of the Emanuel group properties 'which were spread from … Brisbane all the way up to Cairns' would exceed EFG's capacity. 'The Emanueles knew about those properties. We didn't know about them. We didn't have anybody … in those regional centres to manage them …' (T.8233.25-.30) Mr O'Grady did, however, share Mr Booker's concern that marketing the APM land was too large a challenge for Mr Emanuele.

[848] I do not understand the evidence I have just summarised to have been contested. In any event I accept the evidence and make those findings.

[849] Mr O'Grady formed the opinion that there should be an overall resolution of the difficulty which the Emanuel group account presented EFG. Having given the matter some thought he devised a proposal to split the portfolio:

> 'broadly into APM and non-APM land. The APM land would be dealt with entirely by EFG with assistance from Joe Emanuele … if EFG should request that assistance. EFG would become responsible for all the expenses and liabilities associated with the APM land and the Emanuel group … would have no residual interest in them. Joe Emanuele would drive the sale program of the non-APM lands subject to EFG's overview. In return EFG would provide the $500,000-$700,000 … which Emanuele believed would solve his immediate problem … EFG would also … give Emanuel group 20 per cent of the proceeds of the sale of non-APM lands if these were sold at above the price EFG agreed … After three years this arrangement would cease. To facilitate the sale program and to assist with the APM lands as requested by EFG, EFG would continue to pay the family remuneration for which the budget provided fixed at $500,000 per year.' (O'Grady's statement in Exhibit 454 para 190)

[850] Mr O'Grady thought that Mr Crosby, who was then a consultant to EFG, but known to and respected by Mr Emanuele, should undertake the task of putting the proposal to Mr Emanuele.

Mr O'Grady recognised that EFG and the Emanuele group had different 'agendas' with respect to the APM land. EFG wishes it to be sold for the highest return in the shortest time. Mr Emanuele wanted to hold the land, if necessary for many years, until its development potential could be fully realised. Mr O'Grady explained (T.8239.1-.40):

> 'We were interested in realising assets … as reasonably quickly for as much value as we could in the medium term. For the Emanuele's to actually have value return to those properties … the properties had to be held for extremely long … periods … on the basis that … the market would catch up with them at a point of time … and as a consequence would have … significant values returned to them and we were working on a short to medium term timeframe so … they'd need to hold them for 15 years and we were looking at three to five years as a maximum …'

[851] On 1 September 1993 Mr O'Grady sent to Mr Crosby a revised version of a proposal which Mr Crosby was to discuss with Mr Emanuele. It read (Exhibit 421, Volume 30):

> 'Recitals
>
> A. EFG has entered a deed of orderly realisation with the Emanuel group and is prepared to continue to work with Emanuele under the DOOR if Emanuele wishes.

B. If Joe Emanuele decides it is in his best interests to enter a Part X arrangement with his creditors EFG is prepared to support him …

C. …

D. … EFG is prepared to work with Emanuele under the following revised arrangements.

(i) Split the portfolio
The Emanuel portfolio is to be split into two components …

(a) APM portfolio
(b) Peripheral assets
- Queensland and South Australia
- Private assets

(ii) APM assets

(a) EFG will take title to the APM portfolio and related income streams immediately
(b) The Emanuel group shall have no further interest in or obligation in regard to the APM portfolio … or the realisation of those assets
(c) EFG shall take onto EFG's payroll those Emanuel staff who are working directly on the APM portfolio assets
(d) EFG shall bear all costs associated with the APM portfolio.

(iii) Peripheral Assets
EFG and the Emanuel group will work on the realisation of the $19,800,000 peripheral portfolio on the following basis:

(a) EFG shall bear all holding costs …
(b) EFG will continue to pay the 'family salaries' for three years capped as follows …
(c) EFG will continue to pay on the non-APM portfolio overheads … for one year … to enable an orderly wind down …
(d) Minimum realisation targets for the peripheral assets will be … along the following lines

Year 1	$4,000,000
Year 2	$4,000,000
Year 3	$4,000,000
	$12,000,000

(e) EFG will agree with the Emanuel group minimum sale figures below which the assets cannot be sold.

(iv) Fee
The Emanuel group will be able to earn a fee based on realisation of the peripheral assets as follows:

- If assets sold at valuation figures … 10 per cent of sale price
- If sold above Appendix A values 50 per cent of the profit above Appendix A value
- Total fees … capped at $4,000,000
- At the end of three years the arrangement will lapse … the Emanuel group will have no further interest in the disposal of the peripheral properties.

(v) EFG will make a once off advance payment on the fee in paragraph (iv) of $500,000 which will be deemed to be an advanced payment of the above fee income

(vi) Private Assets as Settlement of Fee
At the time of settlement the Emanuel group may elect to take the final payment in the form of cash or any unsold private assets listed in Appendix A.'

Item 2 in Appendix A under the heading 'Peripheral Assets' are four houses; three in South Australia and one in Queensland with a total value of $1,580,000.

[852] Mr O'Grady was prepared to show generosity towards Mr Emanuele. He explained why in his report to Ramco of 7 September 1993. Mr Emanuele (and his companies) had been an important customer of EFG's for 25 years during which his business had been profitable for EFG. In the previous two and a half years Mr Emanuele's efforts had raised $40,000,000 in sales which had gone in payment of interest and reduction of debt to EFG, and he had dealt with secured lands so as to improve their value.

[853] Mr O'Grady submitted his proposal to Ramco for its approval on 7 September 1993. He explained that the proposed arrangement:

'… attempts to address the following issues:

1. The proposal acknowledges that the objectives and time horizons of EFG and the Emanuel group are not the same and may be in conflict particularly on the major APM parcels … as

   (a) EFG wishes to generate cash and reasonable values as quickly as possible
   (b) … Emanuele needs a very extended timeframe to realise any equity interests which may emerge in the properties.

2. EFG has concerns about Emanuele's ability to handle extended negotiations to the State Government and local authorities which will be required to obtain appropriate zonings and concessions to enable development of the major parcels …

3. EFG believes that as a result of Emanuele's demonstrated 'deal doing' ability EFG will probably achieve better sales results on the peripheral assets, if Emanuele sells them …

4. The proposal attempts to

   (a) Free EFG to deal with the major land parcels in accordance with Foster's time horizons

   (b) Establish a fee formula whereby Emanuele can realistically be assured that he will be able to walk away at the end of three years with at least the 'private assets' valued at $1,580,000 …

   (c) Give Emanuele some 'blue sky' upside if he is able to sell peripheral assets above … current estimated … value

   (d) …'

The proposal put to Ramco for approval differed from that put to Mr Crosby for his comments. The second draft contained a proposal to release Mr Emanuele from his personal guarantees and his companies from their obligations after three years if the minimum cash realisation targets set out in the proposal had been met. In that case as well as the releases just mentioned EFG would release title to the private assets to Emanuele or his nominees.

[854] Mr O'Grady gave evidence, which I accept, that at this time he did not intend or expect that EFG would be involved in long term development of any of the APM land. The rationale for taking a transfer of the APM land was to add value to them by rezoning or obtaining development approvals for sale in the short to medium term. See T.8241.35-8242.20.

[855] On 9 September 1993 Ramco approved the proposal and authorised it to be put to Mr Emanuele.

[856] Thereafter Mr Crosby together with Mr O'Grady met with Mr Emanuele on a number of occasions over the next four months in an attempt to reach agreement along the lines of the EFG proposal. They were unsuccessful.

[857] A preliminary meeting had been held on 6 September 1993 prior to the proposal obtaining Ramco's approval. The purpose of the meeting seems to have been to give Mr Emanuele and his solicitors prior notice of the approach to be made after Ramco met. The first formal meeting was on 20 September 1993 between Messrs O'Grady and Crosby for EFG and Messrs G & R Emanuele and Mr Wales. Mr Emanuele refused to accept that his companies had no equity in the APM

portfolio and insisted upon being involved in its retention and sale. Mr O'Grady's recollection is that Messrs Emanuele:

> 'Didn't accept the fact that they lost their equity. They didn't accept the fact that they weren't adding to the realisation process …' (T.8252.15)

Mr Crosby's brief note of the meeting (Exhibit 421, Volume 30) Item 3 & 6 tend to support Mr O'Grady's recollection. Mr Crosby again met Mr Emanuele on 23 September 1993. Mr Emanuele continued his refusal to countenance the EFG proposal.

[858] On 1 November 1993 Mr Crosby and Mr Emanuele met again. Mr Emanuele put a counter-offer to Mr Crosby which the latter summarised in a fax to Mr O'Grady of the same date. Mr Crosby wrote:

> 'Set out below is what he would agree to accept, bearing in mind that he realises EFG may simply refuse to assist. It is perhaps best to pick up the points of EFG's original proposal in Emanuele's suggested approach.
>
> 1. Non core – must achieve $12,000,000 in sales by June 1995 – no fee payable to Emanuele.
>
> 2. Core – Emanuele doesn't accept that all is lost and that he shouldn't continue to play a role.
>
>   (a) He accepts the deed of orderly realisation needs to change … to reflect a greater EFG influence/control
>   (b) Parcel 64 … is to be an important benchmark i.e. unless … sold … by June 1995 for $45,000,000 then EFG to proceed without Emanuele involvement. If however price is achieved deed (as reconstructed) to continue for a further two years.
>
> 3. Creditors may need up to $1,000,000 over two years … however … no fees to be earned therefore this amount to be added to the debt.
>
> 4. Other existing budget controls to remain.'

[859] Mr O'Grady did not accept the counter-offer, principally because he did not believe that Mr Emanuele could make any worthwhile contribution to the sale of the APM portfolio and because he thought the proposed benchmark sale of Parcel 64 unattainable. Delfin had refused to pay a substantially lesser sum for the land only a few months earlier, saying that a price of $30,000,000 could not be justified for the parcel as an unzoned development site. See T.8259.55-8260.15. On 8 November 1993 Mr Crosby spoke to Mr Emanuele and told him that he wanted to avoid having to make an arrangement with his creditors under the *Bankruptcy Act*; that he wanted a continuing involvement in the whole portfolio and would not agree to a division of responsibility for sales; and that he 'wanted to stay with the DOOR for the present.'

[860] Mr Crosby and Mr Emanuele met on a few occasions in Adelaide over the Christmas holiday period. According to a letter of 12 January 1994 which Mr Crosby wrote to Mr O'Grady to report upon the outcome of their discussions:

> '… I took him through the submission to … Ramco of the 7th September … and the notes that I sent you on 1st November 1993 … As you are aware those notes were more a case of Emanuele's wish list, but as I explained at the time, it was as close as I was able to get him to the submission agreed to by Ramco.
>
> Basically, he is firmly of the opinion that his group has a role and value as far as the ongoing dismantling of the projects are concerned. I stressed the fact that the two agendas will never meet. Whilst he acknowledges that this may be the case, he has made a strong request for an ongoing role, subject to the normal review process.
>
> He also requires assistance to cover certain creditors over the next two or three years …
>
> Whilst all of the creditor issues may not necessarily be attended to, Emanuele is simply trying to get EFG to agree to a proposition that keeps him afloat during the period that the DOOR … remains in force.'

[861] Mr Crosby thought that there was no prospect that Mr Emanuele would agree to the EFG proposal and that further negotiations would be futile. He therefore asked to be relieved from the obligation. T.6232.50-6233.10.

[862] On receipt of the letter Mr O'Grady thought that there was no point in continuing negotiations with Mr Emanuele. He withdrew Mr Crosby's authority to continue the negotiations. Exhibit 454 para 258 T.8264.15-.30. It will be noted that the cessation of negotiations was unilateral. Mr Emanuele was not told of EFG's decision. Henceforth there were to be no further approaches from EFG.

[863] The stalemate ended on 31 March 1994 when Mr Emanuele was informed of EFG's decision to terminate the payment of timber royalties from the deposit account. Prior to the decision being communicated there were a number of events which led to it.

[864] In a report of 10 February 1994 Mr Booker drew Mr O'Grady's attention to the insolvency of the Emanuel group, and pointed out that a statement appearing in the June 1993 accounts for Emanuel Management, i.e. that the directors believed that the group could trade out of its current financial problems with the support of its major financiers, did not address the problem that it did not have that support and was 'continually at risk' of being wound up. Mr Booker expressed the view that the moratorium allowed for by DOOR would not succeed in having all debts paid and that liquidation was inevitable. The next day, 11 February, Mr Booker reported again and questioned the worth to EFG of releasing further funds to the Emanuel group. Mr Booker asserted that the cost to EFG of realising the properties itself would be lower than the sums being paid to the Emanuel group.

[865] Mr O'Grady did not act immediately upon the reports because he was preoccupied with obtaining approval from Ramco to pay for the costs of having Parcel 64 rezoned. He foresaw the amount involved to be substantial and sought the support of Mr Kunkel, the first defendants' chief executive officer for a request to Ramco to approve the expenditure. Mr O'Grady's agenda for the meeting read:

> '2. Opportunity/Mango Hill
>
> (a) Value today $20,700,000
> (b) Value rezoned $35,000,000
> (c) Value development interest
>
> - Profit of $100,000,000 plus over time
> - Additional peak investment $16,000,000 over inputted land value of $35,000,000
>
> 3. Next step
>
> - Strong recommendation at least go to 2(b).
> - 2(c) would depend on type of deal we can do
>
> 4. Key issue
>
> - Dealing with Emanuele
> - Dealing with Queensland Government
> - Structure/staffing
>
> 5. Practicalities Emanuele
>
> - If we decide 2(b) or 2(c) we must resolve relationship with Emanuele, as we are purely mortgagees
> - Technical problems and practical problems
> - Prefer to do it without having to foreclose.'

[866] The figures in paragraph 2 of the agenda were taken from Mr Gardiner's 1993 feasibility report.

Mr O'Grady regarded any decision about developing Mango Hill subsequent to its being rezoned as being 'for another day' depending upon 'what the circumstances were after the property had been rezoned' and whether EFG was selling it or developing it with a joint venturer. (T.8266.25)

[867] Mr O'Grady explained that Parcel 64 was in its then zone 'virtually unsaleable at anything other than giveaway prices.' The recommendation to have it rezoned was essential 'to realise anything like the values that we had in mind around the $35,000,000 mark' but that it would be an expensive undertaking and take a considerable time. He thought it would be difficult for a mortgagee to justify spending such sums which 'the Emanuel group didn't have'. This was the reason for 'wanting to go our separate ways.' Mr Crosby, too, thought that any decision to develop the land after rezoning could only be considered 'if in fact a separation

occurred or some agreement was reached to take control of the property.' (T.6236.40-6237.10)

[868] Mr O'Grady gave evidence that he recalled an advice from Clayton Utz the effect of which was:

> 'That there was dangers associated from our point of view in spending significant amounts of money against properties while we were the mortgagee in possession in that it could be potentially … challenged by the mortgagor in terms of the amount of money we had spent … so … the consequence … was that we either had to come to an arrangement with the Emanueles whereby we took the properties into our name or if we couldn't come to an arrangement … we had to foreclose … Our experience had been that foreclosure was a very long and complicated process. We'd done it on a couple of properties – not Emanuel properties … and I … understood that there was … advice from John Elliott that … when one foreclosed … the stamp duty was paid on the total value of the debt as opposed to the actual value of the property … so there was a couple of reasons why it was better to actually come to an arrangement …' (T.8266.50-8267.25)

[869] I should, perhaps, say that I accept this evidence. The only point of it which may be controversial is the assertion by Mr O'Grady and Mr Crosby that EFG did not intend, at this time, to develop Mango Hill itself as a long term project with a view to making considerable profits. The plaintiffs are disposed to argue that that decision had been made at about this time and that EFG moved inexorably forward to obtain possession of Parcel 64 to enable that development to occur. The documents, which I hope can be referred to briefly, show conclusively, to my mind, that this was not so. It is clear that EFG did desire to obtain possession of the APM portfolio and to rezone at least Parcel 64 in an endeavour to recover something of its debt. I accept the evidence I have summarised, and the testimony of Mr O'Grady and Mr Crosby, that EFG's wish to take possession of the APM portfolio, manifested late in 1993, was not for the purpose of developing it over the long term. I am also satisfied that EFG wished to obtain the APM land by agreement in transfer for the reasons Mr O'Grady articulated, i.e. a saving of time and money and the removal of uncertainty, but that it would seek to foreclose if it could not reach agreement.

[870] On 14 February 1994 Ramco authorised Mr O'Grady to proceed with the rezoning of Parcel 64 on the basis that it would significantly improve the value of the land as security. It also authorised him to continue negotiations with the Emanuel group.

[871] On 15 February 1994 Mr O'Grady and Mr Crosby spoke by telephone to Mr Elliott who cannot find a file note of the conversation but recalls having been told of the failed negotiations with Mr Emanuele and being asked to advise generally 'as to the legal ramifications of the various course of action available to EFG.' Mr Elliott remembers that Mr Crosby told him that his experience of Mr Emanuele was that he would 'fight to the death' and that the manifestation of this determination could result in protracted litigation and delays in realising EFG's securities. (Exhibit 463, paras 128-129, 132, 133)

[872] On 23 February 1994 Mr Crosby spoke to Mr Emanuele by telephone. Mr Crosby's note shows that Mr Emanuele wished to 'stay with DOOR with alterations to be agreed; for Emanuel group to live within the Softwoods royalties including all third party obligations; and that there should be no fee income on expiration of the deed.' (Exhibit 420, paragraph 543) Mr Crosby does not say he passed on the contents of the conversation to Mr O'Grady, but no doubt he did.

[873] On 9 March 1994 Mr Booker telephoned Mr Elliott to instruct him to give a written advice on whether the Emanuel group was in breach of the provisions of DOOR. This followed Mr Booker's concerns that Mr Emanuele had sought to defeat EFG's right as second mortgagee over land at Brendale by a contrived sale to Mr Schutz's company at an undervalue. By a letter of 14 March 1994 Mr Elliott advised that there had been a breach by the Emanuel group of DOOR but that:

> 'The difficulty which arises is that the Emanuel group will no doubt protest that it has acted *bona fide* in its dealings and if the matter does become litigious, the issues will turn on the credibility of the various witnesses involved and whether or not the actions by the Emanuel group have been reasonable.'

The letter went on to advise that EFG had 'an absolute discretion as to the release of funds from the Softwoods agreement' which it could exercise 'at any time' without having to justify its decision.

[874] A second letter of advice also dated 14 March 1994 identified and explained five courses of action available, the last of which was:

> 'Institute proceedings seeking a foreclosure order with respect to the secured properties or negotiate an agreement with the Emanuel group to transfer all or some of the properties to the EFG group or a subsidiary …'

The fourth course of action discussed was legal action. The advice given was:

> 'If … EFG … wishes to exert pressure upon Giuseppe Emanuele with a view to forcing him to negotiate an arrangement … consistent with … EFG … realisation strategy, legal proceedings for the outstanding debt could be instituted …'

The recommended course of action was:

- 'Serve a demand … requesting payment of the outstanding debt
- Take possession of the secured properties …
- Serve notices of exercise of power of sale and then, after expiry of the 30 day period, sell the properties which … EFG … does not wish to retain for longer term development strategy
- As regards to the properties which … EFG wish to develop prior to sale in the longer term, either remain in possession as mortgagee or via a receiver and manager, and sell the same after appropriate development, or consider foreclosing on

> these properties, or entering into an agreement with the Emanuel group to acquire the properties in question …'

Mr Elliott concluded:

> 'On balance, the history of the account and the many and varied issues that arise would seem to lead to the conclusion that a negotiated settlement with mutual releases may lead to the best result for the EFG group.'

[875] Mr Booker passed on the letters of advice to Messrs O'Grady and Crosby. The former noted the recommendation 'that it would be better in the circumstances if we attempt to negotiate the peaceful parting of the ways rather than resort to … litigation.' (T.8271.5)

[876] Mr Emanuele found Mr Booker's more forceful style of management unsettling after Mr Grier's easy-going ways. It was Mr Booker who uncovered the Livilla-Schutz transaction and the sale of gravel from Parcel 52. Mr Emanuele complained to Mr O'Grady several times about Mr Booker's severity. For his part Mr Booker had little time and no respect for Mr Emanuele. He thought him little better than a thief.

[877] Mr O'Grady reported to the 22 March 1994 meeting of Ramco that:

> '(a) … the Emanuel group effectively lost its capital base at the time the Molinara sale did not proceed.
>
> (b) EFG does not … believe (it) will recover all its principal and interest on the Emanuel loans and, hence the Emanuel group has lost its equity in EFG's securities.
>
> (c) In March 1993 EFG agreed to enter into the DOOR as
>
> - EFG believed Joe Emanuele to be a person of high repute with a history of successful property dealings
> - EFG hoped the Emanuel group might pull off a major transaction to enable the group to refinance itself. This has not occurred. In fact the reverse has occurred …
> - Emanuele's performance on the smaller asset sales has been in excess of the minimum targets in the deed but is not having a material impact on overall debt level.
>
> (d) EFG believes the agenda of EFG and the agenda of the Emanuel group are not the same now and never will be the same.
>
> (e) EFG, through JDC, has been trying for nine months to negotiate an exit scenario whereby:
>
> - EFG went its way and realised the security in accordance with EFG's agenda, and

- The Emanuele family went its way and started a new life with dignity.

EFG's proposal was rejected by the Emanuel group.'

Ramco then resolved that:

'(i) The value of EFG's securities is not to be eroded by the release of further funds to the Emanuel group; and
(ii) All cash realised on EFG's securities is to be used to repay EFG debt. As a consequence pursuant to DOOR no further funds shall be advanced from the … deposit account …
(iii) JOG is to advise the Emanuel group that no further funds shall be released from the Softwoods agreement …'

[878] Mr Crosby believed that Mr Emanuele's reaction would be to fight 'tooth and nail to try and survive …' (T.6242.1) Mr O'Grady sought further advice from Mr Elliott to be forearmed against any pre-emptive strike from Mr Emanuele. Mr Elliott gave his advice by letter of 24 March 1994. (Exhibit 462, Volume 2) Mr Elliott concluded his advice in a section headed 'Strategy'. He wrote:

> 'In our telephone discussion today it was … agreed that the strategy to be undertaken in the forthcoming meeting with the Emanuel group and its legal and accountancy advisors will be a communication of the decision … that no further funds … be forthcoming from the Softwoods agreement.
>
> We take the view that this meeting should be a communication of that decision and an opportunity for Mr Emanuele to take legal and accountancy advices on the basis that further negotiations are open if the Emanuel group is prepared to submit a reasonable program for exit from the EFG securities.
>
> It would seem to us that after 18 months of negotiation that if Emanuele is not prepared to enter into meaningful negotiations EFG will have no alternative but to consider its legal position and to pursue the recovery of the debt in the best possible manner. In the writer's experience at times litigation run in parallel with negotiation brings the best results.
>
> We would also suggest that it is an appropriate time for a clear message to be indicated to Mr Emanuele that he should take proper legal and accountancy advice …'

Mr Elliott's reference to '18 months of negotiation' is an error on his part. The negotiations had commenced in August the previous year.

[879] Mr O'Grady concurred with the thrust of the advice. He believed:

> '… that one of the issues associated with the Emanuel group … in particular Mr Emanuele, was that he was … in complete denial as to the true state of the financial position of the Emanuel group and that

> what he needed to do was to get some high level advice from Bruce Wales and … Danny Ferrugia … as to what his position was …'

Mr O'Grady also explained that his reasoning for denying the timber royalties to the Emanuel group was that:

> 'By … ceasing the flow of money under the Softwoods contract … this whole issue would be brought to a head and that, as a consequence of that, there would be some sensible discussions between Emanuele, through this advisors, and EFG, through our advisors. And that basically something would be sorted out at a lawyer to lawyer level rather than attempting to have commercial negotiations where it was obvious that both EFG and Emanuele had completely different views as to the reality of the situation.' (T.8277.10-.35)

[880] On 31 March 1994 Messrs O'Grady and Crosby met with Mr G Emanuele, Mr Rocco Emanuele, Mr Ferrugia and Mr Wales. The best record of what was said would appear to be Mr O'Grady's notes, prepared in advance, to which he spoke. Mr O'Grady's notes read:

> '1. EFG continues to have a high regard for the Emanuel group and the principals of the Emanuel group.
>
> 2. However EFG believes that Emanuel group lost its equity at the time the Molinara sale did not proceed.
>
> 3. EFG agreed to … the DOOR … as
>
>   (a) EFG believed Joe Emanuele to be a person of high repute and a very skilled operator
>   (b) EFG hoped that Emanuel group might pull of a major transaction to enable Emanuel group to refinance itself … (the miracle)
>   (c) No (miracle) has occurred. In fact the reverse, as Kartha could not perform …
>   (d) Emanuels performance on the smaller asset sales has been satisfactory
>
> 4. EFG believes the agenda of EFG and the agenda of Emanuel group are not the same now and never will be the same.
>
> 5. EFG (John Crosby) has been trying for nine months to negotiate an exit scenario whereby
>
>   (a) EFG went its way …
>   (b) The Emanuele family:
>   - Went its way and started a new life
>   - Departed with dignity, and
>   - Was left with the family's personal assets (houses/motor vehicles

EFG's proposal was rejected …

6. Emanuel group's counter-proposal had been rejected …

7. The EFG board's position is that:

   (a) EFG will not get all its interest back on the Emanuel account
   (b) Hence, the Emanuel group has lost its equity
   (c) EFG board wants all cash realised on EFG's securities to repay debt
   (d) EFG board is not prepared to erode its securities by the release of any funds to the Emanuel group pursuant to the terms of the DOOR and hence no further funds will be forthcoming from the Softwoods agreement.

8. The purpose of this meeting is to communicate the decision of the EFG board to the Emanuel group and its legal and accounting advisors.

9. EFG believes Joe Emanuele and the Emanuel group:

   (a) Should take proper legal and accounting advice, and
   (b) Any further discussions/negotiations must involve the lawyers and accountants to ensure all parties are protected.

10. EFG believes the next step should be for Emanuele's solicitor … and EFG's solicitor … to get together …

11. The Emanuel group shall revert to EFG with the practicalities of the exit of the Emanuel group from EFG's securities.'

[881] The first point in Mr O'Grady's notes may have some significance. As will be seen the Simionato deed recited that the consideration for the gratuitous payment of $4,600,000 was the high regard EFG maintained from Mr Emanuele personally. The plaintiffs regard this as the purest cant. They point to Mr Booker's trenchant criticism of Mr Emanuele's character and the evidence of his attempts (one of which appeared to have succeeded) to defraud EFG for his own benefit. The plaintiffs submit that EFG had, in truth, no regard at all for Mr Emanuele's character and the recital was intended to deceive the casual reader. Mr Crosby said about that comment:

> '… There was a divergent view … certainly the people that had had an association over a longer period of time … Mr O'Grady, those people that knew of Mr Emanuele on the Ramco committee still had high regard for the group and I think on what they mean by that is people of integrity and people who had been trying their heart out to … achieve a result. … That's what is meant by that comment.' (T.6245.50)

[882] My impression, formed from observing the examination and cross-examination of the EFG officers, tends to accord with Mr Crosby's statement. There was a difference between those officers who had dealt with Mr Emanuele when his group was successful and those who had not. The first group included Mr Crosby, Mr MacDonald and, at a lower level, Mr Grier. I thought they did retain a degree of respect for Mr Emanuele's abilities as a property dealer and had had regard for him personally. They were sympathetic for his fall into penury. Those who did not know him in the good times but dealt with him as he struggled with adversity, such as Mr Booker, had a very different view, as I have explained. Mr Crosby was, I suspect, the most sympathetic and the gentleman on closest terms with Mr Emanuele. Although he put Mr O'Grady in the same category I do not think he belongs there. Mr O'Grady did not have much personal contact with Mr Emanuele and did not, I thought, have a personal opinion about him. He was influenced by his senior managers, such as Mr Crosby and Mr MacDonald who did have empathy for Mr Emanuele.

[883] Mr Emanuele wrote to Mr O'Grady on 7 April 1994. Having referred to the meeting on 31 March his letter went on:

> '… EFG is threatening to withdraw financial support to my group by denying access to the timber royalty under the DOOR.
>
> I am surprised with his position given that:
>
> - The 40 months moratorium was agreed little more than a year ago; and
> - Our performance has been consistent with our obligations and better
>
> Clearly EFG's position has changed since the deed was signed. I understand that the rationale for the approach now taken is that in EFG's view my group's financial position is beyond redemption …
>
> I believe I have a deal with EFG for a 40 month moratorium the terms of which … allow my group access to the timber royalty. It is in that context that I put forward the following proposal.
>
> I have obtained agreement in principle to arrangements whereby a syndicate will acquire all of EFG's rights, interests and securities for $60,000,000 before 30 June 1994. If the transaction is not completed by that date, I will comply with EFG's instructions regarding the management and disposition of the portfolio subject only to:
>
> - Payment by EFG of $2,000,000 to my group to discharge its creditors
> - Continued funding by EFG of my operation for 12 months from 1 July 1994
> - EFG immediately releasing by Brisbane office, Beaumont SA House, Mt Barker, SA property, Cape Jervis SA house, Gap Queensland house for transfer;
> - All family and business car leases to be paid out

- EFG paying a commission fee of 10 per cent on sales of non-core assets
- EFG paying a fee of $1,000,000 on obtaining DCP approval on lot 64
- If EFG sell the portfolio for more than $60,000,000 EFG paying a fee equal to 10 per cent of the excess proceeds
- Absolute releases of all guarantees and other liabilities to EFG and the group of me, my family and my family trust
- Legal documentation of these arrangements on satisfactory terms.'

[884] Both Mr O'Grady and Mr Crosby thought the offer unrealistic. For a start the book value of EFG's securities was much more than $60,000,000. The payments which Mr Emanuele requested as the price for his agreement came to about $10,500,000 which Mr O'Grady regarded as exorbitant and bringing an end to further negotiations. As he said (Exhibit 454, para 304):

> 'I calculated the cost of the proposal to EFG was about $10,500,000 quite apart from the loss it would realise on its securities, which I viewed as ridiculous. … I had not turned my mind to a figure for the purposes of negotiation … but Joe Emanuele's proposal was not even a basis for further negotiation.

[885] On the same day Mr O'Grady replied to Mr Emanuele by letter. He wrote:

> 'Dear Joe
>
> 1. As discussed by telephone today:
>
>   (a) I was very disappointed to receive your letter … Your proposal is rejected.
>   (b) In the circumstances I believe there is no point is us meeting … tomorrow.
>
> 2. I advise that under the terms of clause 6.2 of the DOOR … EFG group has exercised its absolute discretion in respect to the release of funds from the Softwoods agreement and I confirm the advice … in my letter … 5 April 1994 that from 8 April 1994 EFG group shall cease to permit the flow of funds … to the Emanuel group.'

[886] As the letter indicated Mr O'Grady had spoken to Mr Emanuele on the telephone that same day, 7 April. His contemporaneous note of the conversation shows that he told Mr Emanuele:

- The Emanuele proposal of 7 April was completely unacceptable and is rejected.
- There was no point in going to Adelaide to meet, as had been planned, on 8 April.
- He would write to Mr Emanuele giving formal notice of the decision to withhold payment of the timber royalties.

Mr Emanuele said:

- He was very disappointed and surprised that the offer was rejected.
- He believed EFG wanted to get out of the Emanuel exposure and that $60,000,000 was, he had been told, a fair value for the portfolio.

Mr O'Grady replied:

- EFG's position was, and always had been, that it wanted to get all its money back. If anything was left over it would go to the Emanuel group.
- EFG did not believe that EFG would recover all its money and the Emanuel group had no equity in the securities.
- That any further discussions should involve the lawyers for EFG and the Emanuel group.

[887] It is of significance that Mr Emanuele's counter-proposals to bring about a termination of the relationship between his group and EFG, and the transfer of the APM land, involved the payment of a sum of money by EFG to allow Mr Emanuele, and his companies, to pay, or at least to compromise with their creditors. Mr O'Grady understood generally the need for Mr Emanuele to effect a compromise with his creditors if he was to continue in business but had no detailed knowledge of the claims on the Emanuel group, and Mr Emanuele, or how he intended to deal with them. He said:

> 'I had no clear understanding of any distinction (between company and personal creditors) between them … Mr Emanuele had followed the practice of giving personal guarantees to all … his lenders and to my mind the vast majority of … the Emanuel group's creditors had been personally guaranteed by Mr Emanuele and that they were virtually one and the same … I thought the group would have to call in its creditors and put a proposal to them in some form or other that … there would be some formal legal arrangement … in respect to both Mr Emanuele and the companies. … What form that took I don't think I really spent a great deal of time thinking about … There had to be a negotiation … where he put a proposal … and they either accepted it or they didn't accept it … If it wasn't accepted … he would have been presumably made bankrupt and … the companies went into liquidation.' (T.8279.40-8280.15)

[888] Also on 8 April 1994 Mr O'Grady sent a memorandum to Messrs Booker and Crosby (*inter alia*) advising them of the contents of the conversations he had had with Mr Emanuele on 7 April and setting out the stance they should take with respect to dealings with the Emanuel group. His instructions included:

- EFG expects the Emanuel group to continue to manage and market the properties in accordance with DOOR.
- EFG expects to continue to be involved in all those discussions and negotiations under clause 4.

- EFG should <u>initiate</u> no discussions with the Emanuel group in respect of the overall solution of the position.
- EFG should be <u>extraordinarily circumspect</u> in any discussions we have with the Emanuel staff and should not be drawn on EFG's position. The same applies with any discussions with other creditors …
- At a later date it may be appropriate to initiate a discussion between John Elliott and Danny Ferrugia, but we should play this by ear.
- In the immediate period going forward we should maintain the position that

> John Crosby's role has ceased in respect of attempting to organise an orderly exit of the Emanuel group.
> The matter has now gone to a different level, namely board/JOG/lawyers.

[889] Mr O'Grady had spoken to Mr Elliott following his receipt of Mr Emanuele's letter of 7 April. By letter of 8 April 1994 he set out some general advice for Mr O'Grady's consideration 'in preparation of any offensive action taken by the Emanuel group, as a response to the exercise by … EFG … of its absolute discretion in withholding further funds.'

[890] Also on 8 April Mr O'Grady and Mr Benskin met with Messrs G & R Emanuele. Mr Benskin had no involvement in the Emanuel group account but was asked by Mr O'Grady to attend as a witness and to take minutes. Mr Benskin's notes (Exhibit 421) record that Mr Emanuele explained that he had not meant the '$60,000,000 offer' to be insulting but he was 'looking for a point at which Emanuel and EFG (were) happy.' Mr O'Grady said:

> 'EFG has spent over nine months trying to get a solution. Based on the debt of $150,000,000 Emanuel's offer shows a $90,000,000 gap. Emanuel therefore has no equity in the properties. At the time the Molinara deal fell over Emanuel (was) stuffed … we were looking for the possibility of a miracle … these did not happen. We then asked how can we … make this as painless as possible. John Crosby tried to get a solution, failed, his mandate has been cancelled. EFG is not getting all its money back … there is nothing for Emanuel … there is no incentive for us to pay outstanding creditors. FBG (Fosters) is a public company and cannot take a bath and see Emanuel walking away with a large payoff …
>
> The proposal put to you to take houses/cars was to provide a settlement that we could live with and which preserved your self respect. We are now so far apart on your offer that it is useless talking.'

Mr O'Grady went on in response to a question from Mr Emanuele:

> 'The point is that EFG has got more lent against the portfolio than we will get back. We therefore want to dispose of the properties in our time horizons.'

In response to a plea from Mr Emanuele that he had performed in terms of the DOOR Mr O'Grady said:

> '… You have realised $90,000,000 versus $50,000,000 budget but the debt is $150,000,000, therefore little impression is being made … Our mandate is to get back as much as possible. Because of the massive gap Emanuel will never catch up. … Fosters Brewing Group board (is) happy for Emanuel to get personal assets such as houses and cars and keep their reputation.'

Mr O'Grady repeated that EFG wished to recover its debt to which Mr Emanuele responded that he could not accept 'being pushed out with no money.' He pleaded for more time, two years, in which he might perform 'a miracle'. Mr O'Grady expressed his scepticism and explained that EFG had tried 'to come up with a solution through John Crosby' but had failed. He went on:

> 'The fundamental problem is the huge gap between debt and asset value which means no equity will ever be there for Emanuel. Foster's view is that any money released to Emanuel re Softwood is wasted and we would not get back … The board believed that if John Crosby couldn't get a solution no-one could.'

Mr Rocco Emanuele agreed with the assertion that Emanuel had no equity in the securities and would never recover any.

The meeting ended on this note:

> 'JE I will not deal with Brisbane (Mr Booker) any more. I will not give up deed and I expect money.
>
> JOG EFG believed the deed is on foot and you will not be getting any money. The board have high regard for JE and that's why we have been nine months looking for solution (which) didn't materialise.
>
> JE We will put a further proposal and will not give up easily.
>
> JOG Suggest again that you discuss your position with your advisors and put any proposal in writing.'

[891] It was Mr O'Grady's wish that negotiations would pass from Mr Emanuele personally:

> 'Into the hands of his advisors, particularly Bruce Wales and Danny Ferrugia, on the basis that … they were likely to have a more balanced view of what Mr Emanuele's and the Emanuel group's real position was … so … the real strategy (was) that we were then trying to move it to a more professional and legalistic position rather than having myself and John Crosby … dealing with Mr Emanuele which … achieved nothing …' (T.8284.5-.20)

[892] On 13 April 1994 Mr Linton Emanuele sent Mr Crosby a copy of a document headed 'Deal Summary' which 'Dad and Rocco have been discussing with Elders in Melbourne …' The summary proposed:

- That Emanuel would pay EFG $100,000,000 before 30 June 1996. Of this $60,000,000 was to be paid within six months, $18,000,000 by 12 months and the balance within the two years. This was to be achieved by the sale of property, calling in vendor mortgages or refinancing. The timber royalties were to continue to be paid to the Emanuel group who would also receive the proceeds of sale of specified properties in excess of the projected sale price. As well a number of properties, including lots 52, 53 and 62 were to be transferred to the Emanuel group.

[893] Mr O'Grady rejected this proposal. He said:

> '… It was completely unrealistic for the Emanueles to think that they would be able to (make the sales suggested in the proposal). They had demonstrated no ability to do it in the past and I had no confidence … that they'd … be able to come up with that sort of a number … We were being asked to take a significantly less amount of money and effectively leave our fate in the hands of the Emanueles for another six or 24 months which we were not prepared to do. (T.8285.20-.35)

[894] On 13 April there was another meeting between Messrs O'Grady and Benskin and G & R Emanuele. It was held to discuss the proposal set out in the 'Deal Summary'. I have mentioned this meeting already. It is the one at which Mr Rocco Emanuele accepted that the Emanuel group had lost all equity in the mortgaged properties, the debt far exceeding their value.

The discussion served to reinforce the point that Messrs Emanuele were looking at a timeframe for the realisation of the APM portfolio much longer than EFG required. Mr Rocco Emanuele said:

> 'We are looking for a solution that gives us a future over the long term 5-10 years possibly 20 years.'

Mr Rocco Emanuele also mentioned that he and his father were endeavouring to put together a consortium of financiers presumably to refinance EFG's loans or to buy the mortgages from EFG. The meeting ended with a plea from Mr Emanuele to allow DOOR to run its course to enable him in the meantime to effect a major sale or refinance the EFG loans. Mr Emanuele said:

> 'Give us a chance to buy the assets.'

Mr O'Grady replied that the Emanuel group had no equity in them and whether the land was sold in the short or long term was a decision for EFG. He pointed out that the proposal was that EFG should accept $100,000,000 in two years when the debt was presently $150,000,000. The meeting concluded with Mr O'Grady promising to 'meet the consortium' if there was a sensible offer.

[895] On 19 April 1994 Mr O'Grady reported to Ramco and recommended that the most recent proposal by the Emanuel group should be rejected. It agreed and on 20 April Mr O'Grady telephoned Mr Emanuele to advise him of the decision. Mr Emanuele became upset and threatened some unspecified action which Mr O'Grady understood to be litigation.

[896] On 18 April 1994 Mr Emanuele wrote to Mr O'Grady. Given some evidence that Mr Emanuele did not always express himself clearly in English the letter would appear to have been written by solicitors. It identified QIDC as the consortium referred to in the meeting of 13 April and went on to advance reasons justifying the proposals set out in the 'Deal Summary'. The explained rationale for the transfer of some assets to the Emanuel group were that those assets were 'generally private properties or non-core assets which are long term holdings with likely development realisation over 5-10 years or more.'

[897] On 20 April 1994 Mr O'Grady wrote to Mr Emanuele to confirm his telephonic advice that Ramco had rejected his proposal of 13 April. He explained the grounds for the decision:

> '(a) The proposal does not address the major issues which EFG required … namely:
>
> - EFG believes the Emanuel group has lost its equity in the securities.
> - As a result … the agendas of Emanuel group and EFG are not the same and … never will be …
>
> (b) The proposal would result in a major loss of interest to … EFG and this is not acceptable …
>
> (c) The proposal would involve EFG losing for all time any upside on the (properties to be transferred to the Emanuel group) and tree income from those securities.'

Having referred to Mr Emanuele's letter of 18 April Mr O'Grady said that EFG was 'prepared to mutually investigate ways of finding a solution … to the Emanuel group's problems which is acceptable to EFG.'

[898] The next day, 21 April 1994, Mr Ferrugia rang Mr O'Grady. He said he wanted to arrange a 'without prejudice' discussion because he wished to try to help Mr Emanuele out of his present difficulties. He remarked that Mr Emanuele was 'pretty distressed' and could 'easily flip over in a fashion that was not constructive.' Mr Ferrugia suggested to Mr O'Grady that they should meet 'unofficially' in an attempt to 'find a middle ground.' He asked to be informed of 'EFG's position.'

[899] There was another meeting between Messrs O'Grady, Benskin and G & R Emanuele on 26 April 1994. It was concerned with the acrimonious relationship that had developed between the Emanueles and Mr Booker in Brisbane. There was no discussion of a compromise of the conflict of interests of EFG and the Emanuel group.

[900] On 29 April Mr O'Grady telephoned Mr Emanuele to warn him that he was sending a letter and to discuss its contents with him in advance. Mr O'Grady's desire was to explain the letter 'in the hope that we might be able to get somewhere on a commercial settlement. Our position was that the DOOR was still in place, albeit that we were no longer releasing funds … and the Emanuel group had obligations …' Mr Emanuele had asked Mr Crosby, who relayed the query to Mr O'Grady, whether DOOR would be extended after its expiration in June 1996. Mr O'Grady told Mr Emanuele that that was most unlikely. He told him the purpose of his call was to encourage Mr Emanuele to 'keep communication going'.

[901] On 3 May 1994 Mr O'Grady wrote his foreshadowed letter to Mr Emanuele. It reiterated past statements about EFG's position but went on to explain the reasons for its taking that position. Mr O'Grady wrote:

> 'In view of the long standing relationship between Emanuel group and EFG … I believe I should explain … why EFG … has made the decisions it has … which have not been taken lightly. In summary:
>
> (a) <u>High personal regard for Emanuele family</u>
> EFG group maintains a high personal regard for you and your family and the past achievements of the Emanuel group.
>
> (b) <u>Continued Solvency of Emanuel group?</u>
> However EFG believes that the Emanuel group may have solvency problems and that there does not appear to be a realistic prospect of the Emanuel group being able to recover its equity base …
>
> (c) <u>EFG believes it will not recover its loans in full</u>
> EFG group believes it will <u>not</u> recover the full amount of its loans … of approximately $153,000,000 from either the disposal of the security properties mortgaged to EFG … or from other sources.
>
> (d) <u>The Emanuel group has lost its equity in security properties</u>
> As EFG group believes it will not recover its loans in full EFG group believes that the Emanuel group has lost its equity in the EFG security properties.
>
> (e) <u>Agendas not the same</u>
> …'

The letter went on to summarise the respective obligations of the parties under DOOR, the action taken by EFG to appropriate the timber royalties and to express EFG's expectation that the Emanuel group would continue to comply with the terms of DOOR.

[902] On 11 May Mr Emanuele telephoned Mr Crosby to repeat his last proposal to effect a compromise. Mr Crosby told him to ring Mr O'Grady.

[903] On 20 May 1994 Mr O'Grady met with Mr Ferrugia who had requested the meeting. According to Mr O'Grady's note of the conversation Mr Ferrugia said:

‘(a) The Emanuel group was looking to a commercial solution with … EFG

(b) From his perception he thought EFG was looking for an Emanuel exit from the portfolio. An impasse had arisen because the Emanuel group was wanting EFG to exit and take a hit.

(c) He believed there had been a breakthrough in that possibly Joe might exit and walk.

(d) However Joe Emanuele was wavering during where his position is and where he wants to be.

- Joe is in a situation where he has to ‘bite the dust’ or take affirmative action now.
- The cash flows are important to the Emanuel group.
- The Emanuel group cannot go on indefinitely.

(e) A liquidator getting into the Emanuel group would be a problem for Joe Emanuele and in his opinion a problem for EFG.’

Mr Ferrugia made it clear he was not putting a proposal from the Emanuel group but was putting forward ‘ideas that EFG might like to think about’ so that a proposal ‘could be put to Joe Emanuele.’

[904] Mr Ferrugia then outlined the proposal which was:

(a) The Emanuel group would retain its existing corporate structure.

(b) There would be a restructure of the debt so that assets would be valued and transferred to EFG for fair value except for Parcel 52, Parcel 63 and the private houses which would be retained by Emanuele.

(c) The balance of the debt to EFG after the transfer of the assets would be assigned by EFG to a company nominated by Emanuele.

(d) The Softwoods contract would be valued and transferred to EFG at that value.

(e) The timber royalties from Parcel 52 would belong to the Emanuel group.

(f) EFG would pay the Emanuel group’s ‘pressing’ creditors up to $3,000,000.

(g) EFG would contribute to the cost of keeping the Emanuel group office open for 12 months.

(h) Emanuel group would keep the companies and their tax losses.

(i) EFG would release its mortgage over the Emanuel group office.

(j) EFG would pay the Emanuel group a fee of $1,000,000 upon the gazettal of a DCP on Mango Hill.

(k) EFG would pay the Emanuel group 10 per cent of the sale price of non-core assets estimated at $1,000,000.

(l) The private houses would be transferred to the Emanuel group at an estimated cost of $1,300,000.

(m) Car leases would be paid out at an estimated cost of $200,000.

(n) Parcels 52 and 63 would be transferred to the Emanuel group.

(o) EFG would pay all costs involved in the restructuring of the debt and transfer of properties.

(p) The Emanuel group was to have an option to make an offer for the core properties when EFG came to sell them.

[905] Mr O'Grady's reply was:

> '… EFG's starting point was that it would have to pay stamp duty of the order of $6,000,000 in order to transfer the assets to EFG via foreclosure … Any proposal which involved transferring them at fair value, say $75,000,000 resulted in a stamp duty saving of $3,000,000 to EFG.
>
> As a consequence it was easy for EFG management to justify a figure to the board of the $3,000,000, but beyond $3,000,000 any increase had to be justified on other commercial grounds. … The cost of the proposal to EFG would be the deciding factor. I believed the 10,000 acres at Caloundra was a very valuable security but … did not have its value to hand.'

[906] Mr O'Grady calculated that Mr Ferrugia's proposal would cost EFG $15,900,000. This was greater than the cost involved in the earlier proposal which EFG had rejected. On 23 May 1994 Messrs Crosby and O'Grady attended a meeting of Ramco to which Mr O'Grady explained the progress of the negotiations and outlined Mr Ferrugia's proposal. He recommended rejecting it but responding with a final offer in terms which he outlined. Ramco accepted his recommendation and on 24 May 1994 Mr O'Grady rang Mr Ferrugia to pass on the offer. Its terms were:

> '1. The Emanuel group shall transfer all the security properties except the private houses to EFG at fair market value which consideration would go in reduction of the EFG debt.
>
> 2. In consideration for that transfer
>
> (a) EFG would pay up to $3,000,000 to Emanuel's pressing creditors.
> (b) EFG would pay the costs incurred in running the Emanuel group office for 12 months.
> (c) The Emanuel group could retain its companies and tax losses.
> (d) EFG would release its mortgage over the Emanuel group office in Brisbane.
> (e) EFG would discharge the mortgages over the three houses in South Australia and the one in Queensland for no consideration.
> (f) EFG would pay out the leases on the cars used privately by Mr Emanuele's family.
> (g) EFG would make a payment in cash or property to the Emanuel group up to a total of $2,000,000.
> (h) EFG would transfer the residual balance of the EFG debt to a company to be nominated.
>
> 3. The offer was conditional on obtaining releases from the Emanuel group.
>
> 4. The offer was subject to legal documentation to EFG's satisfaction.

[907] If accepted the offer would have benefited the Emanuel group in the amount of $7,200,000. Mr O'Grady's justification for this payment from EFG's point of view was:

> '… getting a clean break from the Emanuel group in terms of enabling us to … realise assets … under our own time … and there was … a commercial benefit to us in terms of being able to realise the assets in a speedier and unfettered manner … The normal difficulties that you have … where you are realising assets in a mortgagee type situation … is that the interests of the mortgagor and, in this case the interests of Mr Emanuele's guarantor would have to always be taken into account and that potentially would put us in an ongoing conflict or tension situation with Mr Emanuele because his … objectives were one thing and our … objectives were another … He wanted to try and maintain value in the assets in the long term and we would be making decisions in the shorter term … and … as a consequence I … thought we would have a long and difficult realisation process unless we could actually come into a clean break with the Emanuele's.' (T.8291.1-.30)

[908] The idea of a transfer of residential properties had originated from Mr Emanuele in an earlier offer. Mr O'Grady was content to accept the proposal because:

> '… They were the equivalent of cash for the Emanuel group … there would be … a negotiating point … The Emanuel group would value retaining the residences on the basis that they were long-standing residences of the Emanuele family.' (T.8290.42-.50)

The houses were the equivalent of cash to the Emanuel group because:

> 'Mr Emanuele was the sort of guy that would mortgage his family home for his business … I, or EFG, did not want to be throwing the Emanuel group out of their houses. I was quite happy for those houses to be made available to the … other creditors of the Emanuel group. If Mr Emanuele was able to do a deal with those creditors, fine. If he could not … he would lose the houses. But as far as I was concerned the houses were the equivalent of cash and he was able to deal with those houses as he wished …'

When pressed on the point Mr O'Grady repeated:

> 'Mr Emanuele had been a long-standing 25 year client of EFG … and over the years had been a very good client of EFG – I did not want EFG to necessarily be putting Mr Emanuele and his family out on the street. But, in terms of a settlement, we were prepared to treat the houses and the cash as one, make them available to the Emanuel group and if he could then do a deal with his creditors and continue to reside in the houses that was all well and good for him. If he could not, it was up to the other creditors as to what they did (with) those houses.' (T.8446.1-.35)

[909] This proposal contained for the first time a release from the Emanuel group in favour of EFG. Mr O'Grady explained:

> '… I didn't put any value on the releases … but I wanted this to be a clean commercial and legal break. … I just wanted to be in a position where the Emanuele's could not come back to us at some stage in the future … I didn't think there was anything … that they could challenge us on but that was the thinking behind it.' (T.8291.35)

[910] Mr O'Grady was asked what he expected would happen to the Emanuel group should EFG's proposal be accepted. He answered:

> '… They would take the pool of cash and assets and have a negotiation with their creditors in terms of attempting to … compromise in some manner … and Mr Emanuele would presumably do the same in respect to his own personal situation.' (T.8293.30-.35)

[911] There does not appear to have been a response to EFG's 'final offer'. By letter dated 2 June 1994 Thomsons wrote to Mr O'Grady on behalf of the Emanuel group:

> 'Our client considers the actions of … EFG … to be in breach of DOOR … On our instructions it was clear from the discussions in

> meetings leading up to the signing of the deed that our client would have access to the timber royalties for the 40 month term of the moratorium …
>
> … EFG … is well aware that … withholding … the timber royalty proceeds severely compromises our client's ability to perform its obligations under the deed … by its conduct … EFG … has breached the deed … Our client requires that the payment direction to Softwoods … be withdrawn immediately … and that the flow of funds to it under the Softwoods agreement be restored forthwith.'

The letter finished with a threat to commence legal action 'unless this matter is resolved immediately.'

[912] On 7 June Mr O'Grady spoke by telephone to Mr Ferrugia and told him he would put the EFG 'final offer' in writing and post it. He did so on 8 June but, in the meantime, received a call from Mr Ferrugia advising him that Mr Emanuele 'had withdrawn any mandate (Mr Ferrugia) had to deal with (Mr O'Grady) and that Joe would be pursuing other avenues.'

[913] On 14 June 1994 EFG commenced proceedings in the Supreme Court of Queensland seeking declarations that it was entitled, pursuant to the terms of DOOR, to appropriate the timber royalties. The plaintiffs were the second, third and fourth defendants in these proceedings. The defendants were the Emanuel group and Mr Emanuele personally.

[914] On 14 June 1994 Mr Elliott wrote to Mr Ferrugia indicating that EFG would like to resolve their differences by agreement rather than resort to litigation. Mr Elliott reminded Mr Ferrugia that he had an offer which was open for acceptance until close of business until 15 June. The next day Mr Ferrugia replied in a letter to Mr O'Grady which was copied to Mr Elliott:

> 'It is the earnest desire of the Emanuel group to achieve a commercial resolution … The offer contained in your letter of 8 June … goes a long way towards achieving that objective however the matter requires further discussion …'

but he was unable to respond by the required deadline. Mr Ferrugia and Mr Elliott spoke by telephone on 16 June 1994. Mr Elliott told Mr Ferrugia that Ramco would not improve its last offer. Mr Ferrugia said that he wanted 'to keep the door open for a commercial settlement'.

[915] Mr Elliott wrote to Mr O'Grady on 16 June to report his conversation with Mr Ferrugia. Having received instructions from Mr O'Grady, Mr Elliott rang Mr Ferrugia. He told him that he had instructions from Mr O'Grady to respond to his letter of 15 June to the following effect:

- The previous offer which had lapsed had an upper limit of $7,200,000 which could not be exceeded.
- If Mr Ferrugia or Mr Emanuele could submit a proposal for a compromise within that limit of $7,200,000 it would be

considered provided that EFG was satisfied its true value was within the limit.

- EFG had valued the Caloundra land at $10,000,000.
- Any further discussions towards a commercial settlement must be put to EFG in writing. If EFG considered the offer worthwhile a meeting would be convened to discuss it.

[916] On 1 July 1994 the Emanuel group counter-attacked by commencing proceedings in the Adelaide Registry of the Federal Court. The parties to that litigation were the same as in the Supreme Court though, of course, their roles were reversed. The application sought a declaration that EFG had engaged in conduct contrary to s 52 of the TPA which had induced the Emanuel group to execute DOOR. Orders were sought pursuant to s 87 to rectify the terms of DOOR or to vary it so as to remove any right of EFG to withhold payment of the timber royalties.

[917] EFG's action did not proceed. The issues it raised could conveniently be disposed of in the Federal Court proceedings which the plaintiffs agreed should be heard urgently. The trial commenced on 11 August 1994 before the Honourable Justice Branson. Judgment was delivered on 15 November 1994. The Emanuel group's claims were dismissed. Her Honour rejected the evidence of misrepresentation inducing their entry into the DOOR and ruled in support of EFG's contention that the deed by its terms permitted EFG to withhold the timber royalties.

[918] On 11 July 1994 Mr Ferrugia wrote to Mr Elliott seeking approval to continue negotiating directly with Mr O'Grady because he was still seeking a 'commercial' solution to the dispute. Mr Elliott referred the request to Mr O'Grady. On 14 July 1994 Mr Perrett, the litigation partner, replied to Mr Ferrugia. He said:

> 'Our client's position has … been influenced by … your client's proceedings in the Federal Court, firstly for urgent interlocutory injunctive relief and subsequent relief for the allocation of very early trial dates. Our client is disappointed that your client has seen fit to proceed in that manner, but … our client is now committed to having the matter in dispute determined by the court.
>
> Our client would have preferred to achieve a commercial resolution …
>
> 1. Our client put forward a settlement offer in its letter of 8 June 1994 which has now lapsed.
> 2. Our client will not be making any further … offers. If there are to be further negotiations, our client requires a written offer from your client.
> 3. Such written offers should be communicated to this office and directed to (Mr Perrett). I shall seek instructions … and if it is thought the offer indicates that it is worthwhile for the parties to meet, appropriate arrangements can be made … Our client will require its legal advisors to be present …
> 4. In view of the legal proceedings now at foot:-
>
>   (a) Our client requires that all communications be between … legal representatives; and

> (b) Mr John Crosby has been requested to have no further direct dialogue with your client or its advisors.
>
> 5. As you will be aware … our client was prepared … to effect a settlement which resulted in your client retaining assets to a value of $7,200,000. Our client regarded this as … generous … Under no circumstances is our client prepared to entertain a settlement which results in provision of assets to your client in excess of this amount.
>
> Further our client has now been put to considerable expense … which costs will not be recoverable from your client. … In the event your client is minded to make a settlement offer … our client will take into account the costs which have been incurred .. in assessing that offer.'

[919] Late in July 1994 Mr Emanuele again contacted Mr Crosby to request a meeting to discuss 'a proposal for settlement of the matters in dispute' between himself and Messrs O'Grady and Crosby. Mr Perrett replied on behalf of EFG by letter of 25 July 1994 to Mr Ferrugia. He complained that the approach to Mr Crosby was 'contrary to the protocol for any further settlement discussions' set out in his letter of 14 July. He said that he had been instructed by Mr O'Grady that 'previous meetings between representatives of the parties had been unsatisfactory' and that EFG would only 'entertain further meetings once it had been demonstrated that there is a likelihood of something positive being achieved.'

[920] Showing the determination which the evidence suggested he possessed, Mr Emanuele refused to be rebuffed. He again spoke to Mr Crosby to request a meeting. By letter of 27 July 1994 Mr Perrett wrote to Mr Ferrugia:

> '… Mr Emanuele has again spoken to Mr Crosby in relation to meeting with Mr O'Grady.
>
> On the understanding of Mr O'Grady that there is a genuine desire on the part of your client to negotiate a commercial settlement … Mr O'Grady is prepared to meet with Mr Emanuele in Melbourne this Friday, 29 July 1994.
>
> The ground rules for the meeting (which we require you to accept in writing prior to the meeting) are:-
>
> 1. The … meeting will be completely without prejudice …
> 2. Mr O'Grady requires a written outline of your client's proposal in advance.
> 3. The only purpose of the meeting will be to examine if the matter is capable of commercial resolution; and
> 4. Mr Emanuele will not seek to raise at the meeting any matter which relates … to the subject matter of the … court proceedings …'

[921] Later that day Mr Ferrugia replied. He accepted the four pre-conditions in Mr Perrett's letter and set out the essential elements of the Emanuel group's proposal:

> '1. Our client is prepared to discuss a financial package along the lines previously outlined by EFG to a value that our client wishes to discuss directly with Mr O'Grady.
>
> 2. Our client seeks to retain the Caloundra properties at fair market value.
>
> 3. Our client seeks pre-emptive rights on a basis to be discussed in respect of specific parcels.'

It should be said in passing that Mr Ferrugia commenced his letter by expressing his understanding that discussions took place between Mr Emanuele and Mr Crosby 'at the instigation of Mr Crosby.' This is denied by Mr Crosby in emphatic terms. (T.6252.15) I accept his denial. Mr Crosby was a particularly careful witness. He was not prepared to essay many answers without first carefully perusing the documents relevant to the subject matter of the question. There is one aspect of his evidence about which I have reservations, namely the extent to which he knew about the ultimate terms of the agreement reached with the Emanuel group but, generally, I accept what he said. Moreover the probabilities are with Mr Crosby. He had asked Mr O'Grady not to be involved any further in the negotiations with Mr Emanuele when they had proved fruitless in about March 1994. His authority to negotiate had been expressly withdrawn by Ramco. Mr Crosby was a consultant to EFG whose livelihood depended to an extent upon it. It is unlikely he would have risked incurring the displeasure of his superiors. Mr Emanuele, on the other hand, looked on Mr Crosby as his 'friend in court'. It is more likely he initiated the contact.

Thomsons' letter of 27 July concluded with a statement that Mr Emanuele believed that 'Mr Crosby can contribute to resolution of this matter and suggests that it may be mutually advantageous for Mr Crosby to attend …'

[922] On 28 July Mr Perrett wrote in reply. He advised that the terms indicated in Thomsons' letter 'appear to fall substantially outside the parameters within which our client will give serious consideration to a settlement proposal', but that, 'as a matter of courtesy to Mr Emanuele' Mr O'Grady would meet him in Melbourne the next day. Mr Perrett warned that unless there was a substantial review of the proposal 'the meeting will be short and unproductive.'

[923] Mr Emanuele did meet with Mr O'Grady on 29 July. Prior to the meeting he sent two proposals in writing, marked respectively A and B. Proposal A was that:

> - 'EFG would retain Parcel 64 … with complete control
> - EFG to keep all vendor's finance due on all proceeds of property sold but not settled
> - The Emanuel group undertakes to pay $42,650,000 by June 30 1996 with the right to sell any of the listed properties at not less than the figures stated.

- The Emanuel group to receive all timber moneys payable to CSR from April 7 1994.'

Proposal B was that the Emanuel group:

- Would receive $2,000,000 to pay creditors; $1,000,000 to give 12 months assistance to the group; a bonus of $1,000,000 on grant of the DCP on Parcel 64 and 10 per cent by way of sales commission on the sale of non-core assets of $1,000,000, a total of $5,000,000;
- Would retain nominated freehold properties valued at $3,450,000
- Would retain the private residences valued at $1,500,000. Total value sought was $9,950,000. In addition the Emanuel group ought to have the right to purchase the Caloundra property for $6,000,000 by June 30 1996 and would pay quarterly adjustable interest at 10 per cent per annum on the $6,000,000 with the right to settle at any time. As well the Emanuel group was to have a 60 day first right of refusal on part or whole of the balance of the portfolio.

[924] Mr O'Grady made notes of the meeting for his file. They record:

> '1. …
>
> 2. The discussions were wide ranging …
>
> The only 'new issues' … were:
>
> (a) Personal guarantee
> … Joe Emanuele said that I and Peter Grier (he did not say John Crosby) had on "many occasions" said that the personal guarantee … would never be called.
>
> I said … that I had <u>never</u> said that his personal guarantee would never be called … Joe seemed generally stunned and confused by this and it was only after we had discussed the point fairly heatedly for about five minutes that … he began to come to the realisation that he might be mistaken.
>
> (b) Preference Shares
> … Joe said that while he was not trying to threaten me that he had information that would be seriously damaging to EFG. He then showed me a one page letter from a firm of chartered accountants … which said something along the lines that "in reference to the preference shares Elders security documents in respect of $140,000,000 … may be unenforceable".

> I said … that if there was any problem with the preference shares … it would be a much bigger problem for Joe Emanuele than for EFG. Joe's response was "Yes but I'll be dead anyway."
>
> (c) Interest Rates
> He also said that Elders had a serious problem with the interest rate that was being charged …
>
> 3. EFG's offer of 8 June 1994
>
> During the meeting I went through the offer … which had lapsed.
>
> Joe Emanuele did not seem to have … seen a copy of this letter … however he did seem to have all the relevant cash numbers in his notes.
>
> Joe Emanuele said that he rejected the EFG offer because he did not think the $7,200,000 was enough.
>
> 4. Emanuele Proposals A and B dated 29 July 1994
>
> We then went through his proposals … I explained … why Proposal A was not accepted as EFG would not be prepared to release security EFG already had for $42,650,000 payable by 30 June 1996 as this would cap any chance by EFG to recover … its loan position.
>
> We then went on to Proposal B …
>
> (a) I pointed out that the $9,950,000 was higher than the $7,200,000 which was on offer and that this was unacceptable.
>
> (b) In relation to the Caloundra property which he wished to purchase for $6,000,000 by 30 June 1996 this was not acceptable as EFG already had a valuation of $10,000,000 … excluding the trees.
>
> (c) …
>
> 5. …
> 6. …
>
> 7. The meeting ended in a very friendly manner but … little had been achieved …'

[925] Mr O'Grady said in evidence the meeting of 29 July was the first occasion on which any question was raised about the issue and redemption of preference shares. Later

he instructed Clayton Utz to 'look at it as an issue and the view was that there was nothing in it.' (T.8295.55)

[926] The trial in the Federal Court ran between 11 and 24 August. On 26 October 1994 Mr Ferrugia telephoned Mr Elliott to discuss a compromise but nothing of significance was said and no specific offer was made.

[927] When the judgment was handed down on 15 November 1994 Mr O'Grady spoke to Mr Perrett by telephone. He asked for a 'careful' advice on whether there were any breaches of the DOOR by the Emanuel group on which EFG could rely and for advice on what were EFG's legal options if there were a breach of DOOR. Mr O'Grady told Mr Perrett that Mr Elliott should remain receptive to approaches from Mr Ferrugia but that he did not want Mr Emanuele contacting him (O'Grady) personally.

[928] Having received those instructions Mr Perrett conferred briefly on 16 November with Mr H B Fraser QC who had appeared, led by Mr Sofranoff QC for EFG in the Federal Court. On 18 November Mr Perrett conferred with both Mr Sofranoff QC and Mr Fraser QC on a variety of topics which are identified from his notes and reproduced in paragraphs 114-120 of his statement, Exhibit 467. Following the conference Mr Perrett and Mr Elliott prepared a letter of advice for EFG which was sent on 21 November 1994. The advice was in these terms:

> '1. Federal Court trial …
>
> On 15 November 1994 Branson J ordered the judgment … be entered in favour of EFG … set out hereunder is a brief summary of the key findings …
>
> Accordingly, in ceasing to permit the flow of funds from the Softwoods agreement to the Emanuel group EFG did not act in breach of the DOOR.
>
> 2. Prospects of Appeal by Emanuel group
>
> (a) Having regard to Mr Emanuele's 'history' in relation to dealing with adverse court decisions, we think it is almost inevitable that an appeal will be instituted.
>
> (e) In our view, the Emanuel group's prospects of success on appeal are very low … The evidence of Messrs Giuseppe and Rocco Emanuele on fundamental issues was not accepted …
>
> 3. Consequences of the Judgment for the EFG group/Emanuel group Relationship
>
> In our view, the way in which Emanuel group conducted the case in the Federal Court and the findings … have the following major consequences …

(a) The litigation was conducted by Emanuel group on the basis that the DOOR remains on foot and is binding on the parties …

(b) Pursuant to the terms of the DOOR EFG … has no obligation to continue to provide financial support to Emanuel group

(c) … It cannot be argued … that EFG … is not entitled to rely upon 'monetary defaults' by Emanuel group as a default under its securities with EFG …

4. Present Objective of EFG group

As we understand it, you now seek our advice as to the means by which EFG … can achieve the following objectives:-

(a) Take control of the secured properties at the earliest opportunity to enable EFG … to take such steps in relation to its property as may be in its best commercial interest, without interference by the Emanuel group.

(b) In taking control … EFG … wish to act absolutely consistently with its legal rights … so that any challenge … will be unsuccessful.

(c) In exercising such rights … to take control of the secured properties EFG … recognise that there are likely to be legal challenges by the Emanuel group …'

The letter then went on to review the powers given to EFG by its securities and the evidence of default by the Emanuel group under the terms of DOOR. It concluded with advice that EFG should make a demand on the Emanuel group for payment of its outstanding debt and, after some days, serve notices for the taking of possession of the various secured properties.

[929] On 22 November 1994 Mr O'Grady telephoned Mr Perrett to advise him that Ramco had just met and had resolved to proceed in accordance with his advice but that 'there would be one more round of discussions with Emanuele before the enforcement process was to commence.' Arrangements were made for a meeting which occurred on 24 November 1994 at EFG's office in Melbourne. It was attended by Mr Giuseppe Emanuele, Mr Linton Emanuele and Mr Ferrugia on the one side and Messrs O'Grady, Elliott and Perrett on the other.

Mr Perrett made notes of the meeting which, in his statement, he has interpreted and expanded.

[930] Mr Elliott said the meeting was held so that Mr Emanuele had an opportunity to put forward any proposal he had. Mr Emanuele replied that his 'Proposal A' seemed out of the question but that 'Proposal B' may have some merit. He then outlined it in terms which amounted to a request that he, or his group, be given cash and/or properties to a value of $10,385,000 together with the right to buy Parcel 52 'at a

reasonable figure'. Mr Emanuele explained that $5,000,000 was needed to pay his creditors and to allow him to continue in business. Mr Ferrugia then spoke. He said that the Emanuel group must have $5,000,000 if it were to survive. According to Mr Perrett's note 'if can't get this, the rest is academic.'

The meeting adjourned. Messrs O'Grady, Elliott and Perrett retired to consider what had been said. They later invited Mr Ferrugia to join them to explain things further. Accordingly to Mr Perrett's notes Mr Ferrugia said that Mr Emanuele needed 'a minimum of $5,000,000 to fight on. $2,000,000 to $3,000,000 for creditors. Mr Ferrugia then left and Mr O'Grady discussed with Messrs Elliott and Perrett what EFG's response should be.

[931] The meeting was reconvened and Mr O'Grady offered Mr Emanuel $4,800,000 in cash; or properties in lieu. For this purpose he valued the Mount Barker house at $190,000, the house at Byrneside in Adelaide at $350,000 and the house at Cape Jervis at $760,000. The maximum amount on offer was $4,800,000 but some or all the properties could be taken as part of that sum. As well Mr O'Grady offered the Emanuel group the first right of refusal on Parcel 52: until 30 June 1995 if they paid an amount equal to any offer for the land within 14 days. Mr Emanuele reacted angrily. He rejected the offer which he described as insulting. He threatened 'all possible legal proceedings, delay and other interference …'

[932] This was the last attempt to reach a compromise which involved representatives of EFG and the Emanuel group themselves. All subsequent contact was between solicitors.

[933] After the departure of the Emanuel group representatives Mr O'Grady spoke to Mr Perrett and Mr Elliott. He instructed them to draft a letter for him to send Mr Emanuele confirming the terms of the offer he had made at the meeting. He requested that Mr Fraser QC settle the draft. He also instructed Mr Perrett to commence proceedings in the Supreme Court of Queensland against 'all relevant Emanuel parties as defendants' and to issue notices of demand to those companies.

[934] The letter was drafted and settled as instructed, and sent on 25 November 1994. Addressed to Mr Emanuele and signed by Mr O'Grady it read:

> '2. Proposal
>
> I am writing … to affirm the proposal … put to you at the conclusion of that meeting as the basis for negotiating a settlement which would be acceptable to EFG …
>
> (a) EFG … will provide to Emanuel group the sum of $4,800,000 to enable Emanuel group to deal with claims by its other creditors and for such other purposes as Emanuel group sees fit.
>
> This provision can be made by cash or a combination of cash and the following Adelaide properties. For the purposes of this proposal, EFG group has valued the Adelaide properties as follows:

Adelaide home in (Byrneside)	$350,000
Cape Jervis – beach house	$760,000
Mt Barker	$190,000
	$1,300,000

In the event Emanuel group wish to retain any or all of the above properties the value of the properties retained should be deducted from the sum of $4,800,000.

(b) In addition, EFG … will provide Emanuel group with the opportunity to match any acceptable offer EFG … receives for the sale of the Caloundra property up to 30 June 1995 … for a period of 14 days from notification … of any acceptable offer …

(c) In consideration of acceptance by Emanuel group of this proposal, Emanuel group will release any and all claims which it has in relation to the properties the subject of the DOOR and other securities and agree to transfer those properties to EFG … at market value in reduction of the debt … Emanuel group will further permit EFG … to exercise any and all rights which it has in relation to those properties without interference …

(d) In the event this proposal is acceptable … it will be necessary for … solicitors to liaise and agree the precise terms of a formal settlement agreement … Any final settlement will be subject to formal documentation … of a comprehensive agreement satisfactory to EFG … and Emanuel group.

Although you rejected this proposal … yesterday, I am writing to confirm the proposal and to advise that EFG … is prepared to leave the opportunity open … to resume negotiations in accordance with this proposal … up to 5.00 pm … 16 December 1994 at which time the proposal will lapse.

3. This proposal is made absolutely without prejudice to all of EFG group's rights, all of which are reserved in particular … nothing in this letter involves EFG group in giving up or deferring any right to take any action whatsoever … at any time …'

[935] Also on 25 November 1994 Mr Ferrugia telephoned Mr Elliott to discuss an alternative proposal by which the option over Parcel 52, Caloundra, might be granted. Mr Ferrugia went on to say, according to Mr Elliott's note, that Mr Emanuele was 'at the silly stage' and that he (Ferrugia) was trying to negotiate a settlement on the basis of achieving a minimum amount for the Emanuel group which would allow it 'to survive'. Mr Ferrugia raised another point. He said that the value placed on the Cape Jervis home was excessive. He gave a reason and

asked that its value be reduced for the purposes of calculating the worth of property to be taken as part of the $4,800,000. Mr Elliott sought Mr O'Grady's instructions and was told to reject Mr Ferrugia'a approach.

[936] On 30 November Mr Ferrugia again telephoned Mr Elliott. He said, among other things, that Mr Emanuele's position was that he wanted a 'combination of $5,000,000 and an element of face saving – deal on Caloundra or money'.

[937] On 1 December 1994 notices of demand were issued to each of the first 27 plaintiffs and Mr Emanuele by the second, third and fourth defendants. The notices alleged default in strict compliance of the terms of the DOOR and of the covenants, terms and conditions of the securities listed in a schedule to the demand, in consequence of which EFG demanded, pursuant to clause 7.2 of the DOOR and pursuant to the securities, payment of the principal sum and interest then owing. This was calculated in the notices in the sum of $181,645,881.21 'together with interest thereon which … accrues after 1 December 1994 at the rate of 20.5 per cent per annum compounding monthly.'

[938] The next day, 2 December 1994, Mr Rocco Emanuele telephoned Mr Booker who made a note of the conversation. Mr Emanuele said:

> 'You have fired the first shot and you are in for warfare.'

Mr Booker asked 'In what way, Rocco?' Mr Emanuele replied, 'In all ways, my friend, in all ways. You are in for the biggest fight of your life.'

Mr Emanuele then hung up. Mr Booker remarked that his manner had been aggressive. Mr Booker considered Mr Emanuele's statements to constitute a threat.

[939] By letter of 5 December 1994 Mr Emanuele replied to EFG's offer of 24 November repeated in its letter of 25 November. He wrote:

> '… I am prepared to negotiate a commercial settlement of the dispute between our companies. You have expressed that EFG has lost a lot of money and by making the previous offers EFG has been very generous. I have some difficulty in coming to terms with this for the following reasons:-
>
> - I too have lost a lot of money – in fact everything.
> - More importantly, in taking this action EFG is depriving me of any opportunity I may have had to recover anything at any time in the future from my investment in Queensland over the last 10 years – an opportunity which they agreed to give me under the DOOR.
> - DOOR evidenced by clear understanding with John Crosby and Peter Grier that 'subject to performance' I would have until June 1996 to 'work out' the portfolio with the support of EFG.
> - That allowed me to pursue the sell down of the portfolio and its development in an appropriate timeframe and with confidence.

I regarded the signing of the DOOR as a turning point in my relationship with EFG because had it been allowed to run its course it would in my opinion have produced an outstanding result including the realisation by EFG of $100,000,000+ during that period.

…

In any event you now say that EFG and the Emanuel group have different agendas … and … it is best that we should part. After all that has now occurred I agree … however, it is EFG that wish to take that course and in doing so it is EFG that deprived me … of everything …

It is in this context that I reject the proposal set out in your letter … of 8 June 1994.

You have now offered a substantially reduced amount … I am prepared to settle … and I agree that a clean break is in the interests of all concerned. If EFG wishes to settle … it should do so on the basis which is fair and equitable having regard to our association over the last 35 years … By way of compensation I seek an amount of $10,000,000 to enable my family and I to discharge or compromise our creditors and to go forward. Unless I have an amount of this order I will be faced with insolvency or spend the next 5 years fighting … to avert insolvency. There is no 'luxury' in this settlement for me …'

[940] Also on 5 December Clayton Utz wrote a detailed letter of advice to Mr O'Grady in relation to the various rights EFG might exercise as mortgagee, and matters to bear in mind when exercising those rights. The letter said in part:

'5. Foreclosure and its Limitations

5.1 If part of EFG's strategy is to develop part of the APM lands prior to sale then it may consider foreclosing … where the debt exceeds the value of the properties an action for foreclosure could be commenced …

5.2 There are a number of difficulties associated with foreclosure, none of which in insurmountable but there are cost and timing considerations … as follows …

8. Action for the Debt Against the Emanuel group

8.1 We are preparing a writ of summons … against the Emanuel group for the moneys outstanding … claimed in the notice of demand …

8.4 Once judgment is obtained EFG will be in a position to institute bankruptcy proceedings against Giuseppe Emanuele if this is considered necessary. This could be a very persuasive factor in dealing with him.

8.5 Consideration can also be given to making application to wind up the companies in the Emanuel group …'

[941] On 6 December Mr Ferrugia telephoned Mr Elliott as a courtesy to tell him that Mr Emanuele was responding by letter to Mr O'Grady. Mr Ferrugia said that 'he had got Joe to the stage of agreeing to a "clean break" and the matter is now just a question of the quantum of money.'

[942] On 6 December Mr Elliott wrote to Mr O'Grady to advise him of the call from Mr Ferrugia and to offer advice with respect to Mr Emanuele's offer of 5 December. He wrote:

> '3. The new offer embodies a payment of $10,000,000 and it is a commercial judgment for the EFG group as to whether such a payment can be justified.
>
> 5. The advantages that may come from a settlement would seem to include:-
>
> (a) A saving in stamp duty of approximately $1,500,000 as opposed to the stamp duty that would be payable in the event that a foreclosure action is undertaken …
>
> (b) Obtaining of all of the financial and other records relating to the security properties which may be of assistance in identifying tenancies … This information could be obtained by other less convenient means.
>
> (c) Removing further litigation which is always of an advantage in that there are uncertainties in any litigation …
>
> In summary … it is hard to justify in dollar terms an increase in the offer … currently on the table … We cannot recommend acceptance of the offer contained in the letter … of 5 December on legal grounds.'

[943] On 6 December the Emanuel group commenced an appeal from the judgment of Branson J.

[944] By letter of 6 December 1994 marked 'Without Prejudice', Thomsons (Mr Purcell) wrote to Mr Perrett with reference to the notices of demand. He said:

> 'Emanuele disputes liability to pay the sum specified in the notice as due and payable and seeks an immediate reconciliation in writing from EFG as to the calculation of this amount both as to principal and interest. …'

Mr Perrett replied on 8 December 1994:

> '… We note your request for a reconciliation of the amount payable under the notice of demand. It is difficult to see the point of this request given Mr Emanuele's admission that during the course of his evidence on 17 August 1994 that the Emanuel group is insolvent, and has been in that condition for some years.
>
> The Emanuel group management accounts prepared by Mr Wales and tendered as an exhibit … showed the Emanuel group indebtedness to EFG … as at December 1993 was in the sum of $163,000,000. In his affidavit … Mr O'Grady deposed that the indebtedness as at 1 July 1994 was approximately $175,000,000. Neither of these amounts were ever put in issue by your client.
>
> Given that your client has no prospect of paying the amount demanded, or any other amount of money, it is difficult to see what interest your client has in the reconciliation. Nevertheless, if your client (who was able to calculate the indebtedness) contends, and explains the basis for the contention, that the debt is less than the figure in the notice, we will seek further instructions. …'

[945] The terms of the reply had been settled by Mr Fraser QC in conference with Mr Perrett. It was Mr Fraser's opinion that the Emanuel group had no apparent real interest in the reconciliation given their admitted insolvency and their inability to pay any part of the demanded debt. Mr Fraser also explained in evidence that Mr Jaenke who had been given the task of calculating the amount of the debt for the purposes of issuing demands had encountered difficulty in attempting to replicate the value of the debt set out in the recital to the DOOR. His calculation of the balance of the debt working from its inception to the date of the DOOR resulted in figures higher than those set out in the deed. If he took the amount specified in the deed as the starting point he had no difficulty calculating from that date forward the amount of the debt due in December 1994. (See the evidence at T.8661.40-8662.20; Exhibit 467, para 214)

[946] On 7 December 1994 Mr O'Grady wrote to Mr Emanuele:

> 'I refer to your letter dated 5 December 1994 and respond as follows:
>
> 1. Your letter has been considered and your comments duly noted. It is clear that the EFG group sees the issues very differently to the way you see them.
>
> 2. A great deal of thought has been given to finding a compromise position to settle with you. Unfortunately, we are unable to justify acceptance of your counter-offer and the best proposal we can put to you is that set out in my letter dated 25 November … which is open for acceptance until 16 December …'

[947] The next day, 8 December, EFG went into possession of the vacant mortgaged properties. On 9 December 1994 Mr Ferrugia telephoned Mr Elliott to say, according to Mr Elliott's note, that there was 'no scope for negotiation; Joe has fight to the death attitude. One of the problems of the present offer is at one stage

EFG offered $7,200,000 and now its final offer is $4,800,000 – over the last few months $2,000,000 has disappeared.'

[948] On 12 December Mr Emanuele wrote in reply to Mr O'Grady's letter of 7 December. He wrote:

> '… I was promised $10,000,000+ and I … strongly believe I am entitled to it. If you think that you are in a strong financial position and you have won the first judgment, I can assure that this is just the first battle. You have not won the war. I have not even starting fighting. As I said in your office it will be a long time before EFG will be able to do anything with my portfolio. … A lot of people have and still believe I am down and, including EFG, believe I would be easy to beat, but I have proven many times in my life otherwise.
>
> I have gone through hell with the Canberra case for 9 years only because I always believed I was right (that appeal was heard on November 21 and all advice is that I will win it) so I suppose I can go through further hell with EFG for as long as it takes for right to prevail.
>
> I am a most determined man when I know I am right. I will never give up …'

The reference to Canberra was to a criminal charge brought against Mr Emanuele that he had attempted to bribe a Commonwealth official in connection with an offer by one of his companies to purchase a shopping centre in Belconnen. He was convicted after lengthy and expensive proceedings. The conviction was quashed on appeal on the ground that he was the victim of an *agent provocateur*.

[949] Mr O'Grady wrote back on 13 December:

> '1. EFG … is a subsidiary of a public company, and its duty is to its shareholders …
>
> EFG … has no obligation to justify its … settlement proposals to you. However you are well aware that the position has changed significantly since … June 1994, principally as a result of the court action …
>
> 2. Your letter contains factual inaccuracies … You have never been promised "$10,000,000+".
>
> 3. It does not and will not advance matters for you to threaten me or EFG …
>
> 4. EFG group's position … was made clear in … letters … of 25 November 1994 and 7 December 1994. The settlement proposal … is available for acceptance until close of business this Friday 16 December 1994 at which time it will be withdrawn.

> 5. In view of the tone of your letter … I request that all further communications and any future dealings be between our respective solicitors …'

[950] At 5.27 pm on 16 December Mr Ferrugia telephoned Mr Elliott. According to his notes Mr Ferrugia said that he had been 'working furiously for Joe to settle' but had 'no instructions to respond to the offer.' He said that Thomsons were endeavouring to 'progress their point of view' which presumably means persuade Mr Emanuele to revise his offer downwards.

[951] On 20 December Ramco authorised Mr O'Grady to pursue EFG's legal rights vigorously but to continue negotiations in respect of a possible commercial settlement and, in that regard, to offer up to $7,200,000.

[952] On 20 December 1994 the second, third and fourth defendants issued a specially endorsed writ out of this court against the first 27 plaintiffs and Mr Emanuele

> '… for the sum of $181,645,881.21 for principal (including capitalised interest) owing as at 1 December 1994 together with compound interest thereon at the agreed rate of 20.5 per cent per annum from 1 December 1994 calculated and charged on monthly rests … Any unpaid interest being added to the principal sum and bearing interest calculated … as aforesaid, such moneys being due and payable to the plaintiffs by each of the defendants pursuant to the terms of the securities and deeds referred to in the statement of particulars hereunder …'

[953] By letter dated 21 December 1994 Mr Ferrugia wrote to Mr Elliott:

> '… As you know EFG's expired offer was for $4,800,000 whilst Emanuele had sought $10,000,000.
>
> Enclosed is an outline of a proposal which I would like to discuss with Emanuele as a basis for putting a formal settlement offer to EFG. I would like to discuss this with you … as soon as possible.'

The proposal read:

> '1. Cash $5,000,000
> 2. Properties Byrneside, Cape Jervis and Mt Barker houses, Adelaide Office
> 3. Ancillary matters Haul road liability discharged immediately
> Croft Airlie Beach contract approved for settlement
> Brisbane office excluded
> 4. Transfers All properties except those noted above to be transferred to EFG for fair market value (proceeds to be applied in reduction of debt) and at EFG's cost
> 5. Release E will release all claims in relation to all properties subject to DOOR except as above
> 6. Co-operation E will permit EFG to exercise all EFG's rights without interference and E to provide reasonable

assistance to allow EFG to deal with properties.

7. Documentation Subject to documentation being agreed between the respective solicitors

8. Costs Each party to bear their own costs of the settlement and/or litigation.

[954] On 23 December 1994 Mr Ferrugia again wrote to Mr Elliott:

> 'We have met with our client today in an endeavour to formulate an offer of settlement to resolve the dispute between our clients.
>
> Our client genuinely wishes to reach a commercial settlement … but not at any cost …
>
> Enclosed is a document entitled "Terms of Settlement" which reflects the terms of offer which we are instructed to make … This offer affects our client's minimum requirements … in the sense that anything less does not provide our client with any real incentive or comfort in the sense of its survival.
>
> In relation to those Terms we comment as follows:
>
> - The amount of cash required is a function of the financial obligations which are required to be met or compromised in order for the group to survive and to continue to operate. Our position in this regard has been consistent and remains the same.
> - The properties retained are essentially the residential properties in South Australia …
> - As you know the haul road liability must be covered quickly as this is a pressing commitment.
> - Orderly negotiated settlement arrangements with Croft … necessitate the Croft contract being honoured by EFG and proceeding.
> - The proposed rent-free occupation of the Adelaide office is intended to allow a reasonable period to relocate.
> - The property and timber contract transfers are intended to be on a "net" basis … so that our client does not have to meet any outstanding financial obligations … in relation to the land.
> - The mechanics of the proposed release and assignment will require discussion.
> - Whilst … neither party wishes to prejudice its position until the documentation is finalised the cessation of litigation and withdrawal of all outstanding notices by EFG is an essential prerequisite for moving forward.
> - We believe that it may take until later in January to finalise the documentation …
> - The proposed completion date is the earliest possible which we expect … will be practicably achievable.
> - The arrangements must be kept strictly confidential.

> We have arrived at the terms of this offer after a great deal of debate with our client. … (It) has not been an easy task …
>
> As discussed we believe that it is in the interests of the parties to resolve the matter in principle today …'

[955] The terms of settlement were enclosed. They are substantially similar to the terms of the proposal sent two days earlier. Three items were added. They were:

> (i) EFG immediately discontinue all litigation and withdraw all outstanding notices
> (ii) Completion should be effected on or before 31 January 1995
> (iii) The fact of and terms of settlement should be confidential.

As well there were some additions to the items concerned with transfers. It was proposed that all outstanding rates, taxes and charges in relation to the lands being transferred to EFG would be assumed by it and paid by it. As well as the land the timber contract was to be transferred. An addition to the topic of releases was that EFG should assign the balance of the debt (struck after the transfer of the land) and all rights against guarantors, presumably to Emanuel or its nominee.

[956] Mr Perrett and Mr Elliott discussed the proposal between them and then spoke to Mr O'Grady by telephone. According to Mr Perrett the three of them agreed that a number of the proposed terms were unacceptable, namely:

> (a) That EFG's debt and securities be assigned as requested. EFG wished to retain the debt and the securities in order to keep the 'whip hand' in Mr Perrett's terms.
>
> (b) That the litigation should be discontinued and notices withdrawn.
>
> (c) That EFG should take an assignment of Emanuel 14's timber contract with Softwoods.

[957] Mr Elliott telephone Mr Ferrugia to tell him that the offer was unacceptable.

[958] The next working day was 28 December 1994. On that day Mr Ferrugia wrote to Mr Elliott, in effect to complain about the response to his terms of settlement. Most of his letter is concerned with justifying the Emanuel group's position with respect to the proposed transfer of the timber contract from Emanuel 14 to EFG. The letter concluded on a rather petulant note. Clayton Utz replied by letter of 3 January 1995. After noting that the solicitors had spoken on the afternoon of 23 December, not 22 December as Mr Ferrugia had said, the letter went on:

> 'We were surprised at the content and tone of your letter. It seems totally inconsistent with our discussions of 23 December which concluded with no resolution but an agreement to continue discussions.

> The principal source of your comments is the CSR contract … If matters are to be advanced we think it necessary to respond to a number of matters raised by you:-
>
> (1) The issue of the CSR contract arose because item 4 of the terms of settlement for the first time introduced the subject of a transfer of the CSR contract to our client. This had never been previously been mentioned … This proposal was unacceptable to our client.
>
> (2) It should be … no surprise … that our client is obtaining a report and advice as to the implications … of the CSR contract …
>
> (3) Your 'clear impression' that our client was 'ready, willing and able' to conclude the deal last Friday … is mistaken. You are well aware of what is involved in resolving a matter of this magnitude and that the only 'deal' to be concluded … is that contained in a final settlement … accepted by all parties and approved by the Ramco committee …
>
> (4) Until our telephone discussion … of 23 December … we were unaware of the likelihood of what you described in your letter … as a "multi million dollar claim from CSR …
>
> (5) It is not correct to say that the CSR contract has previously been of fundamental importance to our client …
>
> (8) We should say that this issue has also caused our client to reflect upon what other arrangements or agreements your client has entered into which may have implications for any settlement … We have today been provided … with a copy of Supreme Court writ … issued … against Emanuel 14 by Harrison and Genery …
>
> We and our client remain content … for discussions to continue …'

[959] By a letter of 23 December 1994 Mr Purcell of Thomsons noted that the writ had been served on the corporate defendants but not on Mr Emanuele; that agents from Brisbane had been instructed to enter appearances; and to request an extension of time within which to file a defence until 31 January 1994. On 3 January 1995 Mr Perrett replied. He pointed out that Mr Purcell 'may have misapprehended the effect of the Supreme Court rules.' He suggested that Mr Purcell 'reconsider the matter' but that 'nothing in this letter ought to be construed as suggesting that our client will not take such earlier action … as it may be advised.' By letter of 6 January 1995 Thomsons advised Clayton Utz that their Brisbane agents had 'advised that … time for the filing of defences does not expire … until at least 6 February …'

[960] It is necessary to digress from this chronology to explain some points which will be referred to subsequently and which might be puzzling without an explanation.

Kleinwort Benson Australia had been given a second mortgage over Parcel 64 to secure a substantial loan made to Emanuel 14 by the bank. By agreement with EFG the latter's priority as first mortgagee was limited to an amount of $19,000,000. The second mortgage prevented Emanuel 14 from transferring unencumbered title to Parcel 64 to EFG. EFG had sought to negotiate a release of the second mortgage by payment of a small amount to Kleinwort Benson. The amount was small because it was believed by all concerned that the value of Parcel 64 was less than $19,000,000 plus accrued interest. That assumption was correct, as follows from my findings on valuation.

In the end Kleinwort Benson did agree to the release of its mortgage upon payment of $150,000 but not until 9 March 1995.

[961] The contract for the removal of timber from the APM land by Softwoods has already been mentioned. Softwoods was a subsidiary of CSR Ltd. Emanuel 14, which was the contracting party, would be in breach of its contract if the land were transferred to EFG without preserving Softwoods' right to the timber. Emanuel 14 sought to avoid that consequence by having EFG accept its contractual obligations to Softwoods. EFG would not do so unless it was satisfied that the contract was acceptable from a commercial point of view.

As things turned out, condensing them considerably, after going into possession of the APM land EFG sought professional advice as to the value of the timber and of the Softwoods contract. It received advice that the timber was worth more than CSR was paying. It thereupon negotiated a more lucrative contract with Softwoods. The negotiations for that new contract were protracted. There were a number of issues that had to be resolved including difficulties in accessing the stands of timber on Bribie Island. These involved completion of the haul road. The new agreement with CSR was not finalised until June 1995.

[962] One matter can be put to rest now. There were complaints at times in the plaintiffs' case that the Emanuel group was given no credit for the admittedly valuable timber rights when the APM land was transferred pursuant to DOFR. The complaint was completely misplaced. DOFR did not deal with the timber rights. It transferred only the land. All receipts of timber royalties from the renegotiated contract as well as the previous one from the date EFG took possession of the land have been credited to the account of Emanuel 14 in reduction of the balance of its debt. (See Exhibit 455)

[963] Emanuel 14 had contracted to sell part of the APM land at Caloundra to Harrison & Genery. Mr Harrison had been involved in attempting to rezone Caloundra Downs. That purchaser had agreed to on-sell the land to Jandee Investments Pty Ltd. It was from the land the subject of these contracts that Mr Emanuele had allowed sand or gravel to be extracted in return for royalties. EFG took the position that it had been deprived of the royalties to which it was entitled pursuant to its mortgages. It had not given consent to Emanuel 14 to sell and it withheld consent. The matters were eventually compromised by a deed of covenant dated 27 March 1995.

[964] One of the Emanuel group companies had agreed to buy property at Airlie Beach from Finborough Pty Ltd, a company owned by Mr Croft. The purchaser defaulted and Finborough obtained judgment against it in 1993. Mr Emanuele sought to

negotiate a settlement of the judgment debt, which was in excess of $900,000, through the transfer of a different property by Airlie Bay Developments Pty Ltd to another Croft company.

EFG had refused its consent to this contract but had told Mr Emanuele it was willing to negotiate with Mr Croft. It will be recalled that the proposed terms of settlement of 23 November 1994 sought approval for the contract from Airlie Bay Developments as part of the settlement.

This dispute was not resolved until 19 May 1995 when a contract for the sale of the Airlie Beach property was executed.

[965] Another problem which arose early in 1995 concerned a company, Navicio Pty Ltd. It owned a property in north Queensland which it had bought with money borrowed from EFG secured by first registered mortgage and a mortgage debenture. These were the subject of a deed of priority with the second mortgagee, Esanda, which limited the prior debt to a sum of $338,000.

Navicio was only partly owned by the Emanuel interests. It was not controlled by Mr Emanuele. It was not a party to DOOR and had not been joined as a defendant by EFG in the Supreme Court proceedings.

In late 1994 EFG had served a notice of exercise of power of sale of Navicio's land. The mortgagor challenged EFG's right to sell.

This dispute, too, was not settled until March 1995. In the meantime EFG would not compromise with the Emanuel group unless Navicio was a party. This did not happen until 17 March 1995.

[966] To return to the narrative, negotiations for settlement did not proceed for some days after 3 January because Mr Elliott, in particular, was investigating claims made by or concerning the parties I have just digressed to describe. Until he had an understanding of what would be involved in EFG in coming to terms with those claims he saw no point in further discussions with Thomsons. On 18 January 1995 Mr Ferrugia rang Mr Elliott to say that the Emanuel group was embarrassed in its dealing with its creditors by a lack of progress in the negotiations with EFG. They spoke as well about the claims which Emanuele wanted included in the settlement with EFG. Later that day Mr Ferrugia sent a letter to Mr Elliott. He wrote:

> '3. As discussed with you I have a concern with EFG pursuing discussions with actual or potential creditors of Emanuele (such as Croft) without reference to Emanuele …
>
> 4. I believe that it is important that all EFG personnel who are involved in this matter be made aware of the highly confidential nature of the settlement terms between Emanuel and EFG …
>
> 5. As discussed … it is becoming increasingly difficult to deal with Emanuel's creditors without a clear direction. Shortly it will not be just difficult, but impossible … An early resolution … is required in order to avoid an undesirable outcome being determined by intervening events. …'

[967] In fact on the previous day, 17 January, Mr Elliott had asked Mr Byrne to draft a settlement deed containing terms on which EFG was prepared to compromise with the Emanuel group for submission to Thomsons as a means of progressing negotiations and moving away from the exchange of correspondence which was unproductive. On 25 January 1995 Mr Ferrugia wrote to Mr Elliott. He referred to their telephone conversation and his letter of 18 January and went on:

> ‘We had anticipated that following your meeting with EFG … that day we would hear further from you.
>
> As you are aware our client made a formal offer of settlement on 23 December 1994 with the intent … that the dispute should be resolved forthwith.
>
> Over a month has now elapsed … and there has been no formal response to the offer …
>
> In the circumstances our client is both frustrated and upset that his offer … has not been dealt with …
>
> Accordingly we have been instructed to formally request that:-
>
> - If your client genuinely wishes to settle this matter on the terms proposed then please accept our client’s offer; or
> - If your client does not wish to accept our client’s offer … then please formally respond …
>
> As advised last week our client’s circumstances do not permit anything other than immediate and decisive action … Please let us have your reply … today.’

[968] On 30 January Mr Byrne completed his draft of the settlement deed and sent a copy to Mr Booker and Mr O’Grady for their comments, and a copy to Mr Fraser QC for his consideration.

Mr Elliott must have told Mr Ferrugia of his tactic because the latter wrote on 30 January 1995 to Mr Elliott confirming that he had ‘indicated (his) intention to provide (Ferrugia) with a draft deed of settlement … the terms of which would reflect the attitude of EFG … in lieu of a “long” letter in response.’

[969] Removed from the negotiations but relevant to the claims in the case is a decision made by Ramco on 31 January. Mr Booker had submitted a report to Ramco in respect of Parcel 64. It contained a background of EFG’s involvement with the land and contained the following:

> ‘Until October 1993 the land was under contract to Kartha … This contract was rescinded due to non-performance and Brannock Humphrey was commissioned to prepare the Emanuel group and EFG a concept master plan for the … site.
>
> Based upon the report Emanuel/EFG resolved to improve the value of the asset by obtaining the necessary rezoning. From November

> 1993 to early March 1994 meetings were held with various State government departments and the local council …
>
> Because of events previously referred to which occurred during 1994 the opportunity to achieve a regional centre zoning has been put in jeopardy.
>
> The retail project posing the greatest immediate threat to EFG's plans is known as 'Tulip Town' … The developer … has considerable support for his proposal with the local authority.
>
> EFG's management is concerned that objection to the Tulip Town project by EFG in its capacity as a mortgagee in possession will have little weight despite the belief held by retail industry leaders that Tulip Town is an inadequate site … EFG management believe that a major retail land use for the … site can best be achieved by introducing into the process a major retail developer. It is considered that this will increase the chances of a favourable rezoning outcome by enhancing the profile of the site … This belief is supported by the town planning consultants …
>
> EFG … as mortgagee exercising power of sale would grant an option to a joint venture comprising an EFG entity and major reputable retail developer to purchase 51 hectares (being the proposed regional centre site) at valuation.'

Ramco accepted the recommendation and resolved to proceed in accordance with it.

[970] On 2 February Mr Purcell who conducted the litigation on behalf of the Emanuel group wrote to Mr Perrett:

> 'As you know discussions have continued to achieve an overall settlement of disputes and claims between our respective clients.
>
> In relation to action … in the Supreme Court of Queensland we seek your undertaking not to enter judgment for failure to file defences without giving us 48 hours written notice. We understand the defences need to be filed in the normal course by 6 February 1995 … Given the stage of settlement discussions our preference is not to take any steps … pending the completion of settlement terms …'

Mr Perrett spoke to Mr Fraser QC about the request. He then telephoned Mr O'Grady to recommend strongly that EFG should insist upon the delivery of defences by the Emanuel group which should not be allowed to use settlement negotiations as a basis for delay. Mr O'Grady accepted their advice and, accordingly, Mr Perrett wrote to Thomsons:

> 'As has been made clear from the outset, our client's position has always been that any settlement negotiations not be used as a means of delaying Supreme Court proceedings.

> Accordingly we are instructed not to give the undertaking sought … and ask that a defence be delivered within the time provided by the … rules.
>
> Our client's position is that your clients have no defence to the … action and in our view it would be improper … to deliver "denial defences". If your clients assert that they have a substantive defence … that defence should be delivered …'

[971] On 6 February 1995 Clayton Utz wrote to Thomsons enclosing a draft deed of forbearance and release – the first version of DOFR. The letter said:

> 'EFG has given a great deal of consideration to the terms of settlement which you forwarded to us for their consideration. Without reopening the discussions in relation to a number of the major issues … we advise that our clients' response … is reflected in the terms of the deed …
>
> 1. Cash Payment
> In clause 6.1 EFG covenants to pay the Emanuel group the sum of $4,690,000. In clause 6.6 EFG covenants, at the direction of the Emanuel group, to pay Blacklaw & Shadforth … the sum of $322,313.54. Accordingly in total EFG is paying the Emanuel group a cash payment equivalent to $5,012,313.54.
>
> In arriving at this figure EFG has had consideration to the difficulty that the Emanuel group has placed … EFG … in concerning … the sand mining operations and the royalty stream … EFG is prepared to take the sum of $310,000 in satisfaction of its loss …
>
> 3. Ancillary Matters
>
> - Haul Road
> As outlined above EFG has agreed to pay the sum at the Emanuel group's direction (this is a reference to the payment to Blacklaw & Shadforth whose connection to the events relevant to the action were discussed in the previous section of the judgment).
>
> - Croft/Airlie Beach Contract
> EFG is not prepared to agree to the contract. EFG has had some negotiations with Croft … but to date these have been unsuccessful.
>
> 4. Transfers
> EFG has requested that the APM lands be transferred to it in consideration for the valuations it has now obtained from JLW … set out in item 3 to the schedule …

EFG would not accept the transfer of the Softwoods agreement …

5. Release and Assignment
The Emanuel group will provide a full release to EFG.

The Emanuel group will consent to judgment being entered against it for the debt amount as defined. Provided the Emanuel group performs its covenants … under the deed EFG will forebear from enforcing the judgment …

6. Co-operation
EFG has inserted a term to this effect in the deed.

11. Confidentiality
EFG has agreed to this term.'

[972] The parties to the draft deed were the second, third and fourth defendants, defined as 'the EFG group' and the first 29 plaintiffs together with Mr Emanuele personally whom, together, were defined as 'the Emanuel group'.

It will be noted that this grouping of plaintiffs differs from that which has been called the "Emanuel group" in these reasons. That comprised only the first 27 plaintiffs. DOFR added Navicio and Airlie Bay Developments, no doubt for the reason that EFG required them to be bound by the settlement. From now on I will refer to the first 29 plaintiffs who were parties to the deed as 'the DOFR companies'.

[973] It is of particular significance that the draft deed included Mr Emanuele as one of the parties to it. The reason for this will emerge later.

[974] Relevant terms of the draft deed were:

'2. Admissions and Acknowledgements by the Emanuel group
The Emanuel group admit and acknowledge the following:

2.1 The Emanuel group (with the exception of Airlie Bay Developments Pty Ltd) are indebted to the EFG group for the debt amount together with interest accruing thereon at the rate of 20.5 per cent per annum.

2.3 The securities granted to the EFG group by the Emanuel group are valid and enforceable in every respect.

2.4 The Emanuel group have defaulted under the terms and conditions of the securities and the EFG group has entered into possession …

2.6 The EFG group has not adopted or consented to be bound by the Softwoods agreement.

3. Release by the Emanuel group

The Emanuel group release, discharge and forever hold harmless the EFG group and its past and present employees, servants, agents and solicitors in respect of:

3.1 Any causes of action or claims of any kind whatsoever which they or any of them have or consider they may have against the EFG group or any of its past or present employees, servants, agents or solicitors; and

3.2 Any causes of action and claims of any kind whatsoever which accrue to or are accrued by the Emanuel group or any of them at any time in the future against the EFG group or any of its past or present employees, servants, agents or solicitors …

4. Covenants by the Emanuel group

4.1 The Emanuel group covenant and undertake to immediately take all necessary steps to discontinue the appeal from the judgment of Justice Branson …

4.2 The Emanuel group agree and undertake to arrange for Emanuel 14 to transfer to the EFG group or its nominee those parts of the APM lands listed in item 2 of the schedule. The consideration for the transfer will be the fair market value of those parts of the APM lands … listed in item 3 of the schedule …

4.5 The Emanuel group covenant and undertake that the EFG group is entitled to and can enforce its rights under the securities without any interference by or any claim by or from the Emanuel group whatsoever.

4.8 The Emanuel group agree and consent to the EFG group entering judgment against the Emanuel group (excluding Navicio and Airlie Bay Developments) in the Supreme Court proceedings on 27 February for the debt amount and costs …

5. Forbearance

Provided the Emanuel group strictly perform all the terms, covenants and undertakings relating to each of them in this deed, the EFG group covenants and undertakes to forebear from:

5.1 Enforcing the judgment in the Supreme Court action against the Emanuel group …

5.2 Taking action against Navicio and Airlie Bay Developments

> provided … such forbearance shall not in any way preclude the EFG group from taking any steps for the purpose of dealing with the security property …

6. Covenant by the EFG group
   The EFG group covenants and undertakes:

   6.1 To pay to the Emanuel group the sum of $4,690,000 at the time of execution of this deed …

   6.2 To release its securities over the land and improvements known as the Byrneside premises, the Cape Jervis premises, the Mount Barker premises and the Brisbane office.

   6.3 That the Emanuel group can remain in occupation of the East Terrace premises rent free until 30 June 1995.

   6.4 Provided that the Emanuel group strictly performs all the terms … in this deed, the EFG group will appoint a partner of the firm Messrs Thomsons as its proxy for the purposes of voting in any meeting of creditors called for the purposes of part X of the *Bankruptcy Act* … in relation to Giuseppe Emanuele or part 5.3A … in relation to any of the companies defined as the Emanuel group and that the EFG group will vote in accordance with the direction of the partner of … Thomsons …

   6.6 To pay, at the direction of the Emanuel group, to Blacklaw & Shadforth … the sum of $322,313.54 for work performed for the Emanuel group in relation to the construction of the Haul Road on Bribie Island.

7. Default
   In the event that the Emanuel group do not strictly perform all the terms .. in this deed, the EFG group will be entitled, in addition to EFG's other rights … to:

   7.1 Enforce the judgment in the Supreme Court action …

   7.2 Take action against Navicio in the Supreme Court … for the balance moneys … outstanding …

   7.3 Take action against Airlie Bay Developments … for the balance moneys … outstanding …

   7.4 Take action against the Emanuel group (excluding Airlie Bay Developments) in the Supreme Court … for the balance moneys … outstanding …

10. Deed to be a Bar to Further Action

The Emanuel group agree and acknowledge that this deed may be pleaded by the EFG group as a bar to any proceedings in a court of law, which proceedings are or are related to a cause or cause of action released or discharged under the terms of this deed.

17. Confidentiality
Except for the purpose of enforcement of the securities or for the purpose of enforcement of this deed, the fact and terms hereof shall be strictly confidential.'

[975] Also on 6 February Clayton Utz caused an application for summary judgment returnable on 27 February to be filed and served. Later in that day a copy of the defence of the Emanuel group defendants was delivered. It was quite brief. It read:

'1. The defendants do not admit paragraphs 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13 of the … claim.

2. Save and except for admitting that the defendants entered into agreements with the plaintiffs the defendants cannot plead to paragraph 4 … because the term "security agreement" is vague and uncertain and the defendants do not understand that term.

3. Without an adequate description and sufficient particulars of the securities the defendants cannot plead to paragraph 9 …

4. The defendants deny each and every allegation in paragraph 12 …

5. In relation to paragraph 14 … the defendants:

5.1 Admit that they have failed to make payment of the amounts demanded by the plaintiffs;

5.2 Say that the demands made by the plaintiffs are invalid and that the defendants have no current obligation or liability to pay the amounts demanded;

5.3 Demand that the amount due in respect of principal and interest is $182,272,193.97 or any other amount; and

5.4 Deny any liability for the plaintiffs' costs …'

Mr Fraser QC thought, when he read the defence, that its terms would assist EFG to obtain summary judgment. He advised Mr Perrett to that effect.

[976] On 7 February Mr Ferrugia wrote to Mr Elliott proposing that they meet in a few days time. Mr Elliott replied by letter of 8 February to say that:

'… There is no point in holding a meeting until we receive your written advices as to the specific matters which your client wants you to discuss at the meeting. The deed which we have submitted …

> contains the terms upon which our client is prepared to agree. There is no flexibility in relation to amending any substantive terms of the deed … If the purpose of your proposed meeting is to reopen discussions on substantive matters … there is no point in holding the meeting. … We await receipt of your written advices …'

[977] By letter of 9 February 1995 Mr Ferrugia wrote to Mr Elliott:

> '… We are prepared to provide you with a list of issues for discussion prior to meeting with you tomorrow … We believe that a meeting is essential in order to progress this matter.'

True to his word Mr Ferrugia sent the list of topics for discussion by facsimile on 9 February. The meeting occurred in EFG's office in Melbourne on Friday, 10 February. Those present were Messrs Ferrugia and Purcell for the Emanuel group and Mr Elliott for EFG. There was a wide-ranging discussion on a number of topics but nothing of present relevance was determined. There is a full record of the meeting in paragraphs 513 and 552 of Mr Elliott's statement, Exhibit 463. Mr Elliott reported on the meeting at length in a letter of 22 February 1995 to Mr O'Grady. The letter concluded with a list of nine matters which needed to be addressed before settlement could eventuate. Mr Elliott finished by saying:

> '… We note 27 February is the return date for the application for summary judgment and we have previously indicated that in the event that the settlement is not in place by that date then the application will proceed to court.'

[978] Meanwhile on 14 February 1995 Mr Ferrugia wrote to Mr Elliott with respect to the points they had debated at the meeting. Mr Elliott responded. His letter included a reminder:

> '… The return date for the summary judgment application is 27 February 1995. Our instructions are to proceed … in the absence of finalisation of the DOFR.'

[979] On 22 February Mr Ferrugia rang Mr Elliott to request an adjournment of the summary judgment application. Mr Elliott consulted Mr Perrett and Mr O'Grady. Mr Perrett then returned Mr Ferrugia's call and told him that EFG's instructions were to proceed to a hearing on the 27th. Later that day Mr Ferrugia again rang Mr Elliott who has a note which records that Mr Ferrugia had concluded that the Emanuel group of companies should have separate legal advice and that Thomsons would continue to act for Mr Emanuele personally. Either Mr Ferrugia told Mr Elliott, or he assumed, that the realisation that there should be separate legal advice for Mr Emanuele and the companies had arisen because of the potential conflict between their interests. Mr Purcell rang Mr Perrett on the same day with the same information. He said, according to Mr Perrett's note:

> 'The companies have creditors in excess of what Joe can offer them. The companies should be separately represented. Joe should not participate in the decision making of the group.'

Mr Perrett understood there was a conflict between Mr Emanuele's personal interest and his duty as a director of the Emanuel group. Mr Purcell went on to say that Mr Winter of Johnson Winter Slattery would act for the companies. Mr Perrett suspected that the Emanuel group were endeavouring to create grounds for an adjournment of the summary judgment application. However Mr Purcell went on to explain the nature of the conflict that had arisen. He said that the draft DOFR gave the companies just under $5,000,000 in return for which the companies gave up rights and transferred properties but the deed did not 'descend to the detail' of how the money should be divided amongst the members of the "Emanuel group" in which he included Mr Emanuele.

Mr Purcell did then raise the question of an adjournment for 14 days to allow the agreement to be finalised. Mr Purcell said that 'as he understood the position' there was 'no major obstacles to a deal.'

[980] On 23 February Mr Perrett wrote to Thomsons rejecting the request for an adjournment and indicating that he had 'firm instructions to proceed next Monday.'

[981] On 24 February Mr Winter telephoned Mr Elliott. He said that he and Mr Ferrugia would visit Brisbane 'to sort out the difficulties and settle the deal.' He asked for an adjournment of the application for summary judgment for seven days because Mr Emanuele was 'uncomfortable' and 'will not consent to judgment.' Mr Perrett telephoned Mr Winter. They discussed the possibility of an adjournment for a week on the basis that on the adjourned date the Emanuel defendants would consent to judgment. Later Mr Winter called Mr Perrett to say that the defendants wanted to apply for an adjournment but would not undertake to consent to judgment on the resumed hearing.

[982] The application for summary judgment came on before Thomas J on Monday, 27 February. Mr Fraser QC appeared for EFG and a solicitor, Mr Jones, appeared for the defendants, including Mr Emanuele, as town agent for Mr Winter's firm. Mr Jones asked for an adjournment of 14 days on the basis that the parties were, and had been for some time, engaged in negotiations to settle the dispute over the alleged debt. He believed that a settlement could be reached within the 14 days and that if judgment were entered in the meantime it could prejudice the defendants' position in the negotiations. Thomas J remarked that the plaintiffs could not be held out of their legal rights if they insisted on pursuing them. Accordingly he refused to adjourn the application.

[983] The evidentiary basis for the application for summary judgment was DOOR and the acknowledgment of debt by the Emanuel group (and Mr Emanuele) it contained. Mr Jones took the point that the deed had not been stamped. An undertaking was proffered by EFG to stamp the deed; it being a collateral agreement the amount of duty was small. Mr Jones then said he did not consent to the application but could say nothing in resistance to it. Judgment was then entered.

[984] Mr Perrett's evidence, which I accept, was that he expected the defendants to argue strenuously for an adjournment and that, if they lost that application, to resist the application for summary judgment. Mr Perrett anticipated the delivery of late affidavit material in reply to EFG's affidavits. Mr Perrett said (T.9046.1-.30):

> 'We turned up at the hearing in the expectation that we may well get a bundle of late affidavit material trying to set up a triable issue and in the expectation that there would be a vigorous application for an adjournment. … We were sensitive that there were some real risks with that because of the magnitude of the judgment we were … seeking. As it developed there certainly was the application for the adjournment … That was refused. … Nothing else was produced in terms of substance in defence of the claim. My take on that was that they'd really put their eggs in the adjournment basket. They hadn't come along to defend it on the merits. On one level that didn't surprise me because I didn't think there were any merits on which they could defend. … Having failed to secure the adjournment there was just nothing of substance that could be raised. I thought that they may run the line that there was an appeal pending against the decision in relation to the Softwoods money and to try and argue that pending the outcome of the appeal the position should be preserved. … The impression I had was that for whatever reason they hadn't gone into the depth in terms of trying to establish default. … My sense was they turned up, they'd given it their best shot. The best shot was to run for the adjournment and they hadn't got it.'

[985] Mr Fraser QC had similar expectations. He expected 'that there would be some sort of arguments raised about summary judgment and that … there might be material filed in the morning.' (T.8652.35) He 'would have expected the Emanuel group to come along with a bundle of affidavits … arguing about the DOOR … which was really why (he) had prepared an argument to rely upon the non-monetary defaults.' (T.8657.15-.20)

No-one asked me to disbelieve Mr Fraser's evidence.

[986] Other things were happening in the background. On 27 February 1995 Mr Ferrugia wrote to Mr G Emanuele:

> 'We confirm our advice to you that you should resign as a director of the companies involved in the dispute with Elders.
>
> In negotiating any settlement with Elders the companies' interests in achieving the best financial settlement possible conflict with your desire to achieve the best result for yourself.
>
> We are therefore recommending your resignation because if you remain a director your duties as a director of those companies may conflict with your own personal interests. As a director of these companies you are obliged to avoid conflict of interest and where the companies' interests conflict with your interests you must defer to the companies' interests.
>
> Accordingly we enclose forms of resignation by you as a director of the (DOFR companies).
>
> You should be aware that if your resignation as a director … is accepted you may still be deemed to be a director under the

> *Corporations Law* if you exercise influence over the affairs and operation of these companies either in relation to the Elders matter or otherwise. You must leave these matters entirely to the continuing directors … and cannot interfere in any way in their conduct of the affairs of these companies. … You should therefore avoid contact and discussions with the continuing directors … regarding their affairs.
>
> Furthermore you should not contact or discuss with Elders or any other person dealing with these companies the affairs of these companies.
>
> Finally, you personally should in our view immediately cease any intermingling of your own affairs and those of these companies. You must draw a clear distinction between the assets of the companies and your personal assets … You should not compete with the companies either in securing a settlement with Elders or otherwise. If you act in breach of these directions you will be liable to account to the companies for any benefit derived by you.'

[987] The next day Mr Ferrugia wrote to Mr Winter enclosing letters of resignation by Mr Emanuele from the DOFR companies. He also wrote to Mr Elliott to confirm arrangements to meet in Brisbane on Thursday, 2 March to discuss 'Mr Emanuele's position'. He also advised Mr Elliott that Mr Winter would also be in Brisbane on the 2nd and suggested that the day be set aside 'with a view of resolving these matters.'

[988] In his letter to Mr Winter of 28 February, Mr Ferrugia confirmed a meeting with Mr Winter on 1 March 'for the purpose of discussing an approach to EFG through its solicitors Clayton Utz on 2 March in Brisbane' and went on:

> 'We have given … thought to the matters discussed … and have arrived at the following conclusions provisionally:
>
> - … It will be necessary for there to be contemporaneous dealings between EFG and the Emanuel companies … and Mr Emanuele … because all are parties to the Queensland Supreme Court proceedings in respect to which … judgment was given …
>
>   It is highly unlikely that EFG will compromise … with only some of the parties …
>
> - Contemporaneous dealings need to be clearly distinguished from dealings in competition …
>
> - The interests of the companies … are to maximise the return to the companies' creditors. The separate interests of Mr Emanuele are to avoid bankruptcy by securing financial and other support from EFG to achieve compromises with his creditors.

- We therefore believe that it is necessary for the companies and Mr Emanuele to have separate and independent contemporaneous dealings with EFG to pursue their respective interests on the basis that each of the parties will have separate representation …

- We do not believe that it is appropriate for the companies and Mr Emanuele to recognise, negotiate or agree an allocation of any supposed available settlement funds …'

[989] On 28 February Mr Perrett reported to Mr O'Grady on the success of the previous day's application. He advised:

> 'We think there is no realistic prospect of Emanuel group now successfully obtaining an injunction to restrain EFG group from exercising its rights as mortgagee. … In our view there is now nothing to prevent EFG … exercising all of its rights pursuant to the securities …'

[990] On the same day Mr Rocco Emanuele wrote to Mr Winter:

> 'The directors have considered all matters discussed at our meeting.
>
> The directors believe that the group should seek the sum of $700,000 from the proposed settlement with EFG and we instruct you to negotiate with EFG to achieve this outcome. … Please ensure that your fees (along with Thomsons fees) are paid directly by EFG at settlement.'

[991] Mr Elliott met separately with Mr Winter and Mr Ferrugia on 2 March. The meeting with Mr Winter was held first. Mr Perrett attended. According to his evidence of it (Exhibit 467 paras 427-437) Mr Winter began by saying that he represented the Emanuel group companies and Mr Ferrugia represented Mr Emanuele. Mr Winter said there were some conceptual matters about the settlement that had to be discussed. The first was structure. The Emanuel group of companies would deliver all the commercial advantages that EFG sought. In exchange EFG would:

> (a) Pay an amount of money.
> (b) Forgive the shortfall of the Emanuel debt (or refrain from execution).
> (c) Vote in favour of a company arrangement proposed by the Emanuel group of companies.
> (d) Give an acknowledgment that it would probably not participate in the distribution under the company arrangement.

[992] He said that his goal was to have the Emanuel group of companies debt free as a result of the arrangements. Mr Winter then said that Mr Emanuele's position was that he wanted some money and a release from his guarantee.

[993] Mr Winter turned next to the division of the consideration between the companies and Mr Emanuele. He said that he was "there" for the Emanuel companies who would ask for as much as they could, but Mr Ferrugia would also be asking for as much as he could on behalf of Mr Emanuele. There was some reference to the South Australian house properties in respect of which the draft DOFR proposed a release of mortgages. Mr Winter said that EFG might instead be asked for a further amount of cash; the properties being sold to a nominee of Mr Emanuele for $1,300,000 and that money paid to EFG for the releases. Mr Winter then said that $700,000 was 'being talked about' as the figure which would be acceptable to the Emanuel companies. He then spoke about amending the draft DOFR and suggested that it make no reference to Mr Emanuele but instead dealt only with the companies. It is Mr Perrett's recollection that this was the origin of the notion that separate documents should record the terms of settlement with the companies and with Mr Emanuele. Mr Winter then said that the Emanuel group of companies wanted EFG to vote at the meeting of creditors in support of the company arrangements to be proposed for the Emanuel companies. Mr Winter told Mr Perrett and Mr Elliott that Mr Emanuele had resigned as a director of the companies and that his sons now controlled them and that Mr Emanuele was not participating in that control.

[994] Mr Elliott's evidence in chief of the meeting is in Exhibit 463 at paras 588-602. He made a note of a point he raised with Mr Winter, namely that EFG 'was looking for co-operation from the directors … Rocco, Linda and Linton Emanuele … (and) required a separate covenant from Mr G Emanuele independently of the others … with respect to the realisation by EFG of the mortgaged properties.'

[995] Mr Elliott met with Mr Ferrugia on the afternoon of 2 March. Mr Perrett was unavailable. Mr Elliott's recollection of the meeting, from his notes, is that Mr Ferrugia said that he was acting for Mr Emanuele in his personal capacity. He referred to a trust which he said Mr Emanuele did not control and of which he was not a beneficiary. Mr Ferrugia proposed an agreement between EFG and the trust which would address matters such as the purchase of the houses for fair value. Mr Ferrugia accepted $1,300,000 was fair value for those properties. He wanted EFG to consent to a sale by the Emanuel group of those properties to the trust. He also asked EFG to forbear enforcing the judgment it had obtained. He mentioned as well that Mr Emanuele would seek a compromise with his creditors by private arrangement or, perhaps, pursuant to the *Bankruptcy Act*.

[996] Mr Elliott has a recollection that Mr Ferrugia offered Mr Emanuele's co-operation with the realisation of the secured properties which he considered to be 'a real benefit' because, 'apart from non-interference, (Mr Elliott) expected that there would be a need to find out information about a range of matters relating to the properties …' There was discussion about a mutual release of liabilities and claims between EFG and Emanuele. Mr Ferrugia requested EFG to vote as a creditor in favour of any Part X arrangement Mr Emanuele might propose with his creditors. He also requested 'the usual stringent confidentiality terms' and requested that the negotiations with Mr Emanuele be treated separately from those with the DOFR companies.

[997] Mr Ferrugia did not mention any specific amount to be paid to Mr Emanuele. Mr Elliott did not mention that Mr Winter had asked for $700,000. He did say that $3,700,000 was available from EFG.

[998] Mr Ferrugia told Mr Elliott more about the proposed trust: that the trustee would be a corporation the members of which would be Messrs Simionato and Caruso. Mr Simionato and Mr Caruso were both nephews of Mr Emanuele. The trust would be discretionary and Mr Emanuele would have no control over it. The purpose of the trust was to enable Mr Emanuele to compromise with his creditors. Any payment of settlement moneys would go to the trust and not to Mr Emanuele personally. The purpose of the trust was to create a fund which Mr Emanuele did not control from which to negotiate compromises with his creditors.

[999] The suggestion that there be a trust to which there should be paid money to enable Mr Emanuele to compromise with his creditors almost certainly had its origin in a meeting of 13 February 1995 which Mr Patterson and Mr Cuming were asked to attend with Mr Emanuele and Mr Purcell. Mr Patterson was a tax partner with C & L. He was invited to the meeting to offer some tax advice on the consequences for Mr Emanuele of a settlement with EFG. He was not concerned about the tax consequences for the companies because he was 'probably confident that they had a few hundred million dollars in tax losses … so … the tax losses would cover any tax consequences.' (T.9577.30-.50) Mr Purcell gave a brief outline of the proposed settlement between Mr Emanuele and EFG. Mr Patterson 'started thinking about the tax consequences'. It was his opinion that the ATO:

> 'Would probably want to treat any amount paid by Elders as assessable income … and they should plan accordingly … I then started addressing how we could try and shelter that money from tax … The first thing I spoke about was … paying the money to a company that had tax losses … My concern there was … they wanted to negotiate with creditors and there were personal creditors and company creditors … and if you popped all of the money into one particular company, that wouldn't give them the opportunity to negotiate with creditors in the fashion that they may want to negotiate … (Another) option was to just pay the money to Joe. The problem with that was … that the Tax Office would treat it as assessable … The first option solved the tax problem but didn't solve their commercial problem. The second problem solved their commercial problem in that it allowed money to go to Joe so that he could then negotiate with the company and personal creditors but it didn't solve the tax problem.'

Mr Patterson explained that:

> 'The trust was my solution to the commercial and tax problems … it would allow us to use the tax losses of the companies and yet allow them to negotiate with creditors in the fashion that they wanted to …'
> (T.9580.10-9581.30)

[1000] Mr Patterson amplified his reasoning in a later passage (T.9590.55-9591.10)

> "… If you put money into a company and you intended that the money be used to satisfy a whole range of creditors it probably wouldn't be the case that all of those creditors would be creditors of that particular company. So that would be ... problematic in that how

> does a company that has that money then make payment to other creditors if they are not creditors of that company? So it might be convenient to pick a company in the group that has tax losses and to pay the money to that company to offset ... the income against the losses … but I wasn't really certain that that would be the case. But if, lets ... say the creditor of that company was Farrow then Farrow would get all the money and none of the other creditors would get any so ... it would solve the tax problem but not the commercial issue … of being able to pay money to all creditors."

In a long passage it would be tedious to repeat, Mr Patterson explained that payment to a trust would accommodate flexibility in paying creditors and allow economies in the payment of tax. Payment to the trust would not attract a liability to pay tax and if distributions were made from the trust to companies with tax losses to allow them to compromise with their creditors the distribution in the hands of that company would be offset by the accumulated losses.

[1001] During the meeting Mr Emanuele commented that he might not tell his creditors about the money the trust would receive from EFG. Mr Cuming responded sharply that if he did not tell the creditors and they subsequently found out about the money they might take him to court. (Exhibit 487 para 6.4; T.9585.15-.55)

Mr Purcell said that senior counsel had been consulted about this topic and that 'full disclosure would be made.' (T.9586.1-.30)

[1002] On 6 & 7 March Mr Perrett redrafted DOFR to take account of the discussions he had had on 2 March. As well he drafted another deed, that which has been called the Giuseppe Emanuele deed. He sent that as a draft to Mr Elliott and Mr Byrne for their comments which, in due course, he received. Also on 7 March Mr Perrett wrote to Mr O'Grady enclosing the two draft deeds. He explained:

> 'You have previously been provided with a draft deed of forbearance and release. Document no. 1 above uses that draft … as a starting point. Additions have been "shaded" and deletions indicated …
>
> The settlement arrangements are, in summary:-
>
> 1. The Emanuel group companies will be paid $700,000 in exchange for a full release together with their co-operation in relation to transferring certain lands and permitting EFG … to exercise … power of sale.
>
> 2. Mr Giuseppe Emanuele will be given a full release in respect of all claims other than the Supreme Court judgment. EFG … forbear from executing that judgment. In exchange, Mr Emanuele will release EFG from all claims and will provide … full co-operation.
>
> 3. A third agreement will be entered into between EFG … and an Emanuel trustee company whereby EFG … will pay that company $5,000,000. The payment will be in exchange for that company procuring the co-operation by Mr Emanuele and

release from Mr Emanuele referred to above. Of the payment of $5,000,000 the trustee company will acquire the “Adelaide” properties from Giuseppe Nominees for $1,300,000 which … will be paid to EFG … The balance of $3,700,000 will be retained by the trustee company.

4. The effect of the above arrangement is that EFG … pay:

   (a) $700,000 to the Emanuel … companies.
   (b) $3,700,000 to the Emanuel trustee company.
   (c) $322,313.54 in relation to the haul road.
   (d) EFG will obtain a transfer of all Emanuel group properties … other than the three Adelaide properties which will be sold as set out above, together with a full release from all present or future claims, and
   (e) EFG … for its part, will release Emanuel group and Mr Emanuel from all claims other than the liability for the judgment debt in respect of which EFG will not seek to exercise any rights provided Emanuel group and Mr Emanuel abide by the terms of settlement.

5. I will forward to you tomorrow … a draft of the deed between the Emanuel trustee and EFG …’

[1003] Some time during the day, 7 March, Mr Winter telephoned. Among other things he said that the payment of $700,000 was to be shared between the DOFR companies who would receive $650,000 and a payment direct to Mr Winter’s firm of $50,000 for its costs. He either said to Mr Perrett, or Mr Perrett appreciated, that this arrangement was to avoid Mr Winter’s firm receiving a preferential payment from insolvent companies. He then asked for a copy of the draft settlement deeds. Mr Perrett was reluctant to send them. He told Mr Winter that ‘there would not be a final deal until everybody was signed up and that had to be synchronised.’

[1004] Early in the evening Mr Perrett began a first draft of the Simionato deed. He spoke to Mr Byrne who was familiar with the Emanuel matter and who was an insolvency specialist. He asked Mr Byrne for his opinion whether the proposed structure of the settlement would infringe any law. Mr Byrne initially thought it would not, but suggested that he discuss it more fully with Mr Nash, another insolvency partner of Clayton Utz. They analysed the structure of the proposed settlement and concluded ‘that EFG is not doing anything improper (unlawful) in the deal. If O’Grady says the money was paid to the trust so that it would not be attacked by Joe’s creditors then there may be some adverse publicity.’ This conclusion was conveyed to Mr Perrett by telephone but probably without the caveat contained in the second sentence. He concurred in the conclusion. It seems that Mr Nash suggested to Mr Byrne that Mr Perrett should warn Mr O’Grady about the potential adverse publicity. It will be recalled that the plaintiffs expressly accept that Mr Byrne honestly believed that the opinion he gave Mr Perrett was correct.

[1005] Mr Perrett’s note of the advice from Mr Byrne was that the transaction gave rise to ‘nothing wrong from EFG’s perspective as a matter of law.’ Whether or not he was alerted by a warning from Mr Byrne, Mr Perrett was concerned about the appropriateness, from EFG’s point of view, of paying a substantial sum of money to a party with whom EFG had had no prior commercial dealings. His concern was whether that would cause any difficulties for Mr O'Grady or EFG. He spoke to Mr Elliott about the possible justification for the payment. Mr Elliott said that from EFG's viewpoint there was no commercial justification for making a payment to the trust and that there would be concern if the funds were paid to the trust 'and Joe Emanuele walk away from creditors.' The basis for the concern was that the whole purpose of the payment was to assist Mr Emanuele to reach a compromise with his creditors and the justification would disappear if the funds were not used for that purpose. Mr Elliott went on to say that he had told Mr Ferrugia that EFG could not justify paying Mr Emanuele anything and that benevolence was the only basis which might be advanced as a justification to the payment. Mr Elliott remarked that the payment had the potential to embarrass EFG.

[1006] Mr Perrett then sent the draft Simionato deed to Mr O'Grady. His covering letter read in part:

> 'This deed provides for the payment by EFG … of $5,000,000 to the Emanuele family trustee. In fact, $3,700,000 will be paid. The balance will be used to acquire the Adelaide properties from Giuseppe Nominees … who was obliged, pursuant to the company deed, to repay the sum of $1,300,000 to EFG in reduction of the Emanuel group debt.'

[1007] Later in the day Mr Perrett spoke to Mr O'Grady. He told him that there was nothing unlawful about the payment to the trustee but that it had the potential to embarrass EFG because it had no legal obligation to Mr Emanuele or to the trust and the payment was, therefore, gratuitous. He warned Mr O'Grady that the DOFR companies might be wound up or that Mr Emanuele might become bankrupt in which event the settlement might well be scrutinised by public examination which could compel production of the settlement documents.

[1008] It appears Mr Perrett did not spell out the essence of Mr Byrne's, and Mr Elliott's concern, which was that Mr Emanuele might not utilise the payment to settle with his creditors. Mr Perrett's concern seemed to have been that a public company could be embarrassed by the revelation that it spent its shareholders' money gratuitously. His concern was not that the object of the gratuity did not apply the money as he said he would. (T.9066.40-9067.35)

[1009] Mr Perrett's note of Mr O'Grady's reply is that he was not troubled about justifying the payment. He said EFG perceived this to be the quickest commercial solution to the dispute and that the precise mode of payment was chosen because Mr Emanuele requested it. (Exhibit 467, paras 478-504) Mr O'Grady's recollection is substantially the same. (Exhibit 454, paras 756-764) He believed he could justify the payment because it was within the authority given him by Ramco to settle the dispute with the Emanuel group and it secured EFG's right to deal with its secured properties without interference.

[1010] Over the next few days changes were made to the draft deeds in discussion between the respective solicitors. On 14 March 1995 Clayton Utz wrote to Thomsons (Ferrugia):

> 'We advise that we have had detailed discussions with Mr O'Grady as to EFG's position in relation to supporting a Part X arrangement … Our client is concerned that it not be the vehicle whereby your client can enter into an arrangement with his other creditors that is totally unsatisfactory to those creditors and totally uncommercial.
>
> On the other hand our client will not stand in the way of Mr Emanuele negotiating an arrangement with his creditors … or seek in any way to influence or play a role in those negotiations.
>
> Accordingly we are instructed … EFG … is prepared to covenant that in the event of the calling of a meeting pursuant to Part X … it will not participate … will not seek to prove its debt, will not seek to vote and will not participate in any dividend …'

On the same day a letter in similar terms was sent to Mr Winter with respect to EFG being required to support a company arrangement that was 'totally unreasonable and uncommercial insofar as … creditors are concerned …'

[1011] On 15 March 1995 the Deed of Forbearance and Release between the second, third and fourth defendants and Mr Emanuele (the Giuseppe Emanuele Deed) was executed. The deed recited:

> '(a) The Emanuel group and Giuseppe Emanuele have entered into and granted to certain of the companies in … EFG … the securities … certain of (which) have been assigned to (the second defendant) …
>
> (b) Certain moneys have been lent and advanced by … EFG … to the Emanuel group and … EFG has issued notices of demand …
>
> (c) Notices of exercise of power of sale relating to the land the subject of the securities have been served …
>
> (d) Giuseppe Emanuele acknowledges and admits the default or defaults set out in the notices of demand and that the default or defaults are continuing and that the notices … have been duly served.
>
> (e) Giuseppe Emanuele acknowledges and admits that (the second defendant) is entitled to enter into possession … of the lands the subject of the securities.
>
> (f) EFG … has on 27 February 1995 been awarded judgment against Giuseppe Emanuele in the Supreme Court of Queensland … and Giuseppe Emanuele acknowledges and admits that EFG … is entitled to enforce the judgment against him.
>
> (g) Giuseppe Emanuele wishes to compromise and settle his differences, claims, actions and/or disputes with … EFG of

> whatsoever nature upon the terms set out in this deed … and … EFG … is prepared to enter into this deed.'

Clause 1 contains definitions. The "Emanuel group" means the DOFR companies. The other definitions may be passed over. By Clause 2 Mr Emanuele admitted and acknowledged:

- That EFG was entitled to enforce the Supreme Court judgment against him.
- That the securities granted to EFG by the DOFR companies were valid and enforceable in every respect.
- That the DOFR companies had defaulted under the terms of the securities and that EFG had entered into possession and was entitled to possession of the secured properties and that EFG was entitled to exercise all the rights given it by the securities.
- That Mr Emanuele intended to use his best efforts to secure compromises with his creditors other than EFG and wishes to avoid bankruptcy or any bankruptcy arrangement with his creditors.

By Clause 3:

> 'Giuseppe Emanuele releases, discharges and forever holds harmless … EFG and its past and present employees, servants, agents and solicitors in respect of
>
> (a) any causes of action or claims of any kind whatsoever which he has or considers he may have against … EFG … or any of its past or present employees, servants, agents or solicitors; and
> (b) any causes of action and claims of any kind whatsoever which accrue to or are accrued by him at any time in the future against … EFG … or any of its past or present employees, servants, agents or solicitors which arise out of or are in any way connected with any act, omission, circumstance, representation or conduct with respect to the security … or lending of any moneys, or in relation to the Softwoods agreement … or in relation to any other dealings whatsoever … between … EFG … and (the DOFR companies).'

By Clause 4 Mr Emanuele promised to take immediate steps to discontinue his appeal from the judgment of Branson J in the Federal Court and gave a further covenant to the effect that EFG was entitled to enforce its rights under the securities, with an important exception, namely EFG's rights under any personal guarantee given by Giuseppe Emanuele to EFG or any other personal liability which Giuseppe Emanuele may have to EFG under the securities. He further covenanted that EFG could deal with the securities without any interference or claim by or from him whatsoever, whether by caveat or other process or by direct or indirect means. Moreover Mr Emanuele covenanted and undertook to provide assistance, co-operation and information to EFG which it might reasonably require to enforce its rights under the securities.

By Clause 5 EFG:

> ‘Releases, discharges and forever holds harmless Giuseppe Emanuele in respect of any causes of action or claims whatsoever (save … for the liability … of the judgment debt together with interest … at the rate of 20.5 per cent …) which … EFG … considers it has or may have against him which arises out of or are in any way connected with any act, omission … with respect to the securities …
>
> … covenants … to forbear from enforcing the Supreme Court judgment …
>
> … agrees, provided that it has not proceeded to enforce the Supreme Court judgment as a consequence of earlier default … to release and discharge Giuseppe Emanuele on and from 30 June 1998 from any further liability … for the judgment debt …
>
> Provided however that such forbearance and release shall not … preclude … EFG … from taking any steps for the purpose of dealing with the security property …’

By Clause 6 it was agreed that in the event that Mr Emanuele did not strictly perform all of the terms of the deed that EFG was entitled to enforce the judgment.

By Clause 7 EFG agreed to vote in support of any resolution proposed by or on behalf of Mr Emanuele at a meeting of creditors called for the purposes of Part X of the *Bankruptcy Act*, and not to participate in any dividend which may be payable to his creditors.

[1012] By a letter dated 15 March 1995 addressed to the directors of EFG Mr Emanuele wrote:

> ‘I am writing to the board to confirm my intentions in relation to my creditors.
>
> I confirm that I intend to use my best endeavours to secure compromises with my creditors. As discussed with you previously I wish to avoid the stigma of bankruptcy or any arrangement under the *Bankruptcy Act*.
>
> Accordingly I intend to use my best efforts to secure compromises with my creditors. I am very keen to do so but, of course, I may not be able to and in those circumstances I am advised that I may have no choice but to pursue a Part X arrangement in order to avoid bankruptcy.
>
> I intend to remain in business with my sons. I have been dealing with financial problems for many years and I have not come this far to simply accept bankruptcy or a bankruptcy arrangement. That is not my preference or my intention if it is practically avoidable.’

This letter was included with the board papers submitted to Ramco for its meeting of 27 March 1995 at which Mr O'Grady reported that settlement with Mr Emanuele and his companies had been effected.

[1013] On 16 March Mr Winter replied to the concerns raised by Clayton Utz on 14 March and 'the possibility that (EFG) could be embarrassed in the event that the arrangements proposed between … the Emanuel group and their creditors proved to be unreasonable and uncommercial.' Mr Winter's letter went on:

> 'It is likely to prove vital to the passage of the proposed deeds of company arrangement that there is a vote supporting those transactions by … EFG … Accordingly we would be most reluctant to see EFG's final position to be that it would not attend and would not vote …
>
> It occurs to us that it may be preferable that we outline to you the nature of the transactions that will underpin the proposed deeds … so that Mr O'Grady can be satisfied that they are reasonable and … commercial and accordingly they are worthy of the support of EFG …
>
> By way of general outline it is anticipated that it may only be necessary to propound a deed … between Management and its creditors. However … it may be necessary to propound further deeds … in respect of the members of the Emanuel group … indebted to the ATO …'

The letter then set out those companies and went on to make the point that if the Commissioner of Taxation accepted the proposal that the dividend proposed for his office from Management would constitute a payment from all those companies then only one deed would be necessary. If the Commissioner did not accept that position then a deed for each company would be required. In that event those other deeds would contain a provision that inter-company claims and debts would be foregone to the intent that the funds being made available by EFG would go in satisfaction of the claims of creditors outside the Emanuel group.

Mr Winter then explained how the $650,000 which would flow from the settlement would be applied. The administrators' fees would be paid in full as would all trade creditors and employees. The only unsecured creditor who would not receive full payment was the ATO. As to that Mr Winter explained:

> 'The commercial benefit to the ATO … is that none of the following creditors will participate as scheme creditors in the distribution of the fund …'

The identified creditors were Emanuel companies.

> 'In addition Mr … Emanuele proposes to use his best endeavours to secure a compromise of his personal indebtedness to the following creditors, on the basis that, subject to the appropriate deeds … being approved, those creditors will discharge any claims they have against each member of the Emanuel group …'

The list of creditors comprised mostly the financiers who had lent to companies in the Emanuel group and for whom Mr Emanuele had gone guarantor. It included EFG, whose debt was said to amount to $180,000,000 after deducting the value of securities of $17,000,000, and the ATO whose debt was $44,473,000.

The letter went on:

> 'Under the terms of the proposed deed … assuming Mr Emanuele is successful in compromising each of the above creditors … the only creditor who receives less than its full entitlement is the ATO … (which) will receive a dividend of approximately $162,000. This dividend is paid … in addition to the outstanding group tax and prescribed payments tax to get a total of a further $300,000.'

The $300,000 referred to was to be paid from the $650,000.

The letter pointed out that in the event of liquidation the likely return to the ATO 'would attract a dividend of $95,368.40 …'

The letter concluded:

> 'In the circumstances the commercial interests of the ATO are far better served by the proposed deed … where the return will be $462,000 compared with a winding up where the return is likely to be less than $95,000 and this amount could be substantially reduced as no provision has been in these calculations for liquidator's fees and expenses …
>
> We trust this will assist Mr O'Grady in his consideration of our request that he agree that … EFG … vote … in favour of the deed …'

[1014] On 17 March 1995 DOFR and the Simionato Holdings deed were both executed. I have already set out at some length the principal terms of the first draft of DOFR and will not repeat those provisions which are the same or substantially similar.

By Clause 2 the DOFR companies admitted EFG's rights under the judgment and securities, and by Clause 3 released EFG in the terms found in the draft and in the Giuseppe Emanuele deed. By Clause 4 the DOFR companies undertook to abandon the Federal Court appeal and promised that Emanuel 14 would transfer the APM lands identified in item 2 of the schedule to the deed for the consideration set out therein. By Clause 4.3, which was new:

> 'The (DOFR companies) agree and undertake for Giuseppe Nominees to effect the sale of the properties listed in item 3 of the schedule (the private residences) for a consideration of $1,300,000 which sum will be paid by the (DOFR companies) to EFG … and is to be applied by EFG … in reduction of the judgment debt.'

By Clause 5 EFG promised to forbear from enforcing the judgment or taking other action against the DOFR companies 'provided the (DOFR companies) strictly perform all the terms … in this deed.' By Clause 6 EFG covenanted:

‘6.1 To pay:-

(a) To the (DOFR companies) the sum of $650,000 …
(b) To Messrs Johnson Winter & Slattery the sum of $50,000 … on account of that firm’s legal costs of and incidental to acting for the (DOFR companies).

6.2 (a) To release its securities over the land and improvements known as the Byrneside premises, the Cape Jervis premises, and the Mount Barker premises to enable the sales referred to in Clause 4.3 to be effected …

6.4 That it will exercise its best endeavours:-

(a) To negotiate the release of Emanuel 14 from any liability … to Softwoods Queensland pursuant to the Softwoods agreement …

6.5 Provided that

(a) The (DOFR companies) strictly perform all the terms relating to each of them in this deed; and
(b) Any resolutions referred to in this clause does not have the purpose or effect that all or any part of the judgment debt … is discharged …
(c) Any resolution as referred to in this clause does not have the purpose of effect of creating or imposing any liability or obligation upon … EFG …
(d) The purpose and effect of any resolution referred to in this clause is substantially in accordance with the arrangements set out in a letter … by Messrs Johnson Winter & Slattery to Messrs Clayton Utz dated 16 March 1995.

The EFG group agree:

(i) In relation to any meeting of creditors which any of the (DOFR companies) call

A. To vote in support of any resolution proposed by any of the (DOFR companies) and
B. Not to participate in any dividend … payable to the creditors … in the event that any of the (DOFR companies) execute a deed of company arrangement …

(ii) In the event of the winding up of any of the (DOFR companies) upon its own application or pursuant to its own resolution then … EFG … would not participate in any dividend …

> 6.7 To pay, at the direction of the Emanuel group, to Blacklaw & Shadforth … the sum of $322,313.54 for work performed … in relation to the construction of the haul road on Bribie Island.'

By Clause 8 EFG agreed that if the DOFR companies did not default in the strict performance of all the terms of the deed, then, from the second anniversary of the execution of the deed the liability of the DOFR companies to repay the balance of the judgment debt was to be satisfied only from the proceeds of realising the securities. Clause 11 provided that the deed was to be a bar to further action in the same terms as the initial draft and clause 18 provided for confidentiality in the same terms as the Guiseppe Emanuele deed.

The total consideration set out in item 2 in the schedule was $47,809,500. This would seem to include some land in addition to the four 'major' APM parcels.

[1015] The Simionato deed was made between the second, third and fourth defendants and Simionato Holdings. It recited:

> '(a) The (DOFR companies) and Giuseppe Emanuele have been engaged in a commercial relationship with … EFG … for … approximately 30 years.
>
> (b) In the course of that relationship certain moneys have been lent … by EFG … to the (DOFR companies) and to Giuseppe Emanuele, for various purposes, … and the (DOFR companies) and Giuseppe Emanuele have entered into and granted to … EFG … certain securities …
>
> (c) In the course of that relationship, Giuseppe Emanuele and members of his family have developed a detailed knowledge and understanding of the properties the subject of the securities.
>
> (d) In the course of that relationship … EFG … has come to value the contribution to the relationship between … EFG … and the (DOFR companies) of Giuseppe Emanuele both personally and in his capacity as a director of the (DOFR companies) and the contribution of members of (his) family …
>
> (e) The (DOFR companies) and Giuseppe Emanuele are in default under the securities and EFG … is now entitled to enter into possession of the properties the subject of the securities and to exercise its power of sale as mortgagee.
>
> (f) The commercial relationship between … EFG … and the (DOFR companies) and Giuseppe Emanuele is now at an end and … EFG … is desirous of paying a gratuity to Simionato Holdings in recognition of the commercial relationship between … EFG … and Giuseppe Emanuele and in consideration of the provision by Giuseppe Emanuele and by

> the members of (his) family … of such co-operation and assistance as may be required by … EFG … in enforcing its rights under the securities …'

Clause 2 provided:

> 'In consideration of Simionato Holdings causing Giuseppe Emanuele to enter into the Giuseppe Emanuele deed and in consideration of Simionato Holdings causing each of Rocco … Linton … and Linda Emanuele to provide to … EFG … a letter in the terms set out in … the schedule … EFG … hereby agrees to pay to Simionato Holdings the sum of $4,600,000 … for the use and benefit of Simionato Holdings such payment to be subject to and conditional upon the execution by Giuseppe Emanuele of the Giuseppe Emanuele deed and upon the provision … of the … letters.'

Clause 3 was in these terms:

> 'Save for the obligations set out in clause 2 hereof, … EFG … has and shall have no obligation to Simionato Holdings whatsoever and Simionato Holdings releases, discharges and forever holds harmless … EFG … in respect to any cause of action or claim of any kind whatsoever which it has or considers it may have against … EFG … its employees, agents, servants or solicitors and Simionato Holdings acknowledges and agrees that this deed may be pleaded by … EFG … as a bar to any proceedings which are related to any claim or cause of action released or discharged under … this deed.'

By Clause 4 EFG consented:

> '… to the payment by Simionato Holdings or its nominee to Giuseppe Nominees of the sum of $1,300,000 for the purpose of completing the acquisition by and transfer to Simionato Holdings or its nominee … the properties described in item 3 of the schedule … (the private houses).'

Clause 10 which dealt with confidentiality was more expansive that the similar clause in the other two deeds. It provided:

> 'Each of the parties covenant with each other that they will not disclose any of the terms, conditions or other provisions of this deed, or cause or permit such disclosure to any person except:-
>
> (a) As required by law and then only to the extent necessary; or
> (b) For the purpose of enforcement of this deed; or
> (c) To the parties' advisors upon receipt of a written undertaking from the advisor that the terms, conditions or other provisions of the deed will be kept strictly confidential … or
> (d) Upon receipt of the prior written consent of the other party which consent may be refused or granted on any terms or conditions as the other party may in their absolute discretion determine.'

[1016] By three separate letters each dated 16 March 1995 Mr Rocco Emanuele, his brother Linton and his sister Linda all wrote to Mr O'Grady:

> 'I hereby acknowledge, covenant and undertake to you that the EFG group is entitled to and can, by its employees and agents from time to time, enforce its rights under all of its securities with the Emanuel group of companies and with Mr Giuseppe Emanuele and deal with the property the subject of its securities, without any interference or claim by me whatsoever.
>
> I further covenant and undertake that I will provide any assistance, co-operation or information to the EFG group as I am able to provide and the EFG group may reasonably require to assist the EFG group in enforcing such rights or dealing with such properties.'

[1017] Settlement of the deed was duly effected on 17 March 1995. EFG paid $50,000 to Johnson Winter & Slattery and $650,000 to that firm for and on behalf of the DOFR companies. The specified amount was paid to Blacklaw & Shadforth and $2,900,000 was paid to Simionato Holdings being the balance of the $4,600,000 less the $1,300,000 to be paid for the discharge of the mortgages over the private residences and $400,000 paid to Messrs Thomsons for their fees at the request of Mr Emanuele. DOFR (clause 4.3) contemplated the payment of $1,300,000 to EFG by Nominees on the sale of the houses. What happened was a notional 'sale' by Nominees to Simionato Holdings for the sum of $1,300,000 and the payment of that sum to EFG by Nominees. In fact EFG subtracted that amount from the settlement sum paid to Simionato Holdings and released the mortgages to allow the transfers to take place.

[1018] On 23 March 1995 Mr Bruce Carter was appointed administrator of 40 of the plaintiff companies, 34 of them by resolution of the companies themselves. His appointment to the other six which were in voluntary liquidation was made by their liquidator. These were the Cuming companies except for Investments. The 40 companies included all members of the Emanuel group. The first meetings of creditors were held on 30 March 1995, when resolutions that a committee of creditors be appointed and that the administrator be replaced by another lapsed for want of support. The meetings were then adjourned to await the administrator's report required by s 439A of the *Corporations Law*. Mr Carter was obliged to obtain an extension of time to complete his report which he delivered on 22 May 1995. He reported that he held about $550,000 which would be made available to creditors. This was part of the money which had been paid by EFG pursuant to DOFR. Mr Carter pointed out that the records of the companies were incomplete and inaccurate but that it appeared that some transactions might be amenable to attack by a liquidator which could result in the recovery of moneys for the companies. However, there would be a substantial cost which would require funding by creditors.

[1019] He reported that the proposed deeds of company arrangement offered

> '… a small cash contribution for unsecured creditors of approximately .3 cents in the dollar … if the administrations proceed, this will allow for the controlled administration of the companies' affairs and a prompt return to creditors. However the

> dividend … is very small and if this proposal is accepted the creditors … are prevented from taking any further steps to recover their debts … Further there would be no investigation of the conduct of the directors of the companies …'

[1020] Mr Carter recommended that the proposed deeds should only be entered into if the creditors:

- 'Wished to receive a certain return for their debts
- Wished to receive a prompt return
- Do not believe that further investigation or litigation is likely to lead to an increased dividend to creditors.'

[1021] The second meetings of creditors were held on 30 and 31 May 1995. They were acrimonious. The representatives of the ATO were disruptive and argumentative. They sought to have the companies wound up and opposed the proposed deeds of company arrangement. When put to the vote 23 creditors having a combined of debt of just over $473,000,000 voted in favour of the resolution to accept the deed. 11 creditors with a total debt of just over $19,000,000 opposed it.

[1022] A fact of which the plaintiffs make much is that Mr Winter, the solicitor for the DOFR companies, was EFG's proxy for the meetings. Judgment had been entered against the Emanuel group in favour of the second, third and fourth defendants whose debt was adjudged to be joint and several. Mr Winter voted the full amount of the judgment debt on behalf of each of the three defendants. Mr Carter objected to this use of the debt but was obliged to allow it pursuant to regulation 5.6.26(2) of the Corporations Regulations. No appeal was brought by any creditor. Mr Carter, having done the sums, informed the meeting that the outcome of the vote on the resolution would have been the same had Mr Winter voted only once in respect of the judgment debt.

[1023] Mr Winter was a late choice as proxy for EFG. Mr Byrne advised Mr O'Grady in a letter of 28 March 1995:

> '… In relation to the appointment of proxy for the first creditors' meeting we recommend that … EFG … appoint the chairman, B J Carter to be EFG's proxy for the meeting. That will obviate the necessity for … EFG … to arrange for a representative to attend …'

The letter went on, with respect of a different topic,:

> '… We note that you have been contacted by Mr Ross Burton of the government solicitors office in relation to a claim which (ATO) has against companies in the Emanuel group. We will contact Mr Burton and advise him that (EFG) will await the proposal from the administrator before making its decision as to whether to support any resolution proposing an arrangement with creditors.'

The next morning, 29 March, Mr Byrne spoke by telephone to Mr Winter and told him that EFG intended to appoint the chairman as its proxy for the first meeting of creditors. That evening Mr Winter called back. According to Mr Byrne's file note (Exhibit 466, para 220) Mr Winter told him that Mr Carter could not exercise a general proxy because Regulation 5.6.33(1) forbad it when the proxy would derive some remuneration from the assets of the company. Mr Carter as the proposed administrator would, of course, be paid fees out of company assets. Mr Winter then asked if EFG would appoint him its proxy.

Early next morning, 30 March, Mr Byrne spoke to Mr O'Grady by telephone to pass on the content of Mr Winter's communication and to ask for instructions. Mr O'Grady agreed to the appointment of Mr Winter without, it seems, much enthusiasm. This, at least, is how I read Mr Byrne's note reproduced in his statement at para 221.

Mr Byrne did not know or foresee that Mr Winter would use his proxy to vote the debt to the second, third and fourth defendants as three separate debts (Exhibit 466, para 224; T.8917.40-.60). As far as the evidence goes that appears to have been Mr Winter's own frolic.

[1024] Subsequently litigation was brought in the Federal Court in Adelaide by the ATO which sought to have the plaintiff companies wound up. Those proceedings were ultimately successful and Mr Macks was appointed liquidator. The deeds of company arrangement were set aside. The liquidator at the instigation and with the financial backing of the ATO then embarked aggressively upon a number of public examinations of the directors, officers and others into the affairs of the plaintiff companies.

[1025] On 15 March 1995 the directors of Simionato Holdings, Mr Simionato and Mr Caruso met and resolved that the company should consent to act as trustee of the "Emanuele family trust" and that the obligations, powers and discretions conferred by the trust deed should be exercised and discharged 'upon the resolution of the directors of this company.' On the same day, ten minutes later, the directors of Liddan Pty Ltd ("Liddan"), who were also Messrs Simionato and Caruso met and resolved in identical terms with respect to the "Liddan Trust".

[1026] The deeds establishing the Emanuele Family Trust and the Liddan Trust are relevantly identical and are both dated 15 March 1995. Mr Ferrugia was the settlor for both. By Clause 3, on and after the vesting day, the trustee stood possessed of the trust fund and its income for such of the eligible beneficiaries in such proportions and as between those beneficiaries as the trustee in its absolute discretion appointed.

There is a similar discretion with respect to the income of the fund in the period prior to the vesting day.

"Eligible beneficiaries" were defined to be the owners of the shares in the trustee company and their parents, parents-in-law, brothers, sisters, spouses, children, grandchildren, cousins, nephews and nieces, as well as any charity recognised for the purposes of the *Income Tax Assessment Act* and any other charity nominated by the trustee and any companies in which a natural beneficiary is a shareholder.

The evidence did not establish the identity of the shareholders of Simionato Holdings or of Liddan until six weeks after the trial concluded when the plaintiffs sought to tender the share register and certificates. There being no objections I admitted them into evidence. Messrs Simionato and Caruso were the shareholders of the trustee companies. There is, however, no evidence showing how the trustees exercised their discretion and/or how the trust estate was applied.

[1027] In the days following 17 March 1995 Giuseppe Nominees obtained a discharge of EFG's mortgages over the three residential properties which were then transferred to Liddan. The ownership of the properties after their transfer to Liddan was not established by the evidence. It appears from Annexure 6 to Exhibit 1, Mr Macks' statement that the Mount Barker property had been mortgaged, subsequent to its transfer to Lidden, to the Commonwealth Bank of Australia. There is no evidence as to the amount of the advance secured by mortgage or the application of the funds borrowed. Similarly the Byrnside property had also been mortgaged to the Commonwealth Bank but again there is no information as to the amount of the advance or its application. The third property, Cape Jervis, had been mortgaged to Cassa Commerciale Australia Ltd and there is a similar dearth of evidence about the advance from that mortgagee.

Review

[1028] This necessarily long rehearsal of the dealings between the Emanuel group and EFG has covered the period during which it is alleged that the 1995 Scheme was developed and carried out. I have not described every event in that period but I have endeavoured to mention those events and communications which explain the development and final execution of DOFR, and which led to the judgment of 27 February 1995. The documentary evidence shows a great many other activities in the same period but to mention all of them, if the task were achievable, would result in reasons for judgment incomprehensibly long and detailed. Moreover most of it is irrelevant to the issues which were eventually defined by the parties in their submissions. I have endeavoured to recount all of the events which appear relevant to the contentions concerning the 1995 Scheme. A complete account of all that happened may be obtained from the statements of Messrs O'Grady and Crosby and the solicitors Messrs Elliott, Perrett and Byrne. Their statements are a comprehensive record of all their involvement in all aspects of EFG's dealings with the Emanuel group and the secured properties. As well the documentary record of meetings, communications and facts are chronologically set out in Exhibits 421, 462 and, from the plaintiffs' side, Exhibits 171 and 412.

[1029] The documentary record is comprehensive. Every communication involving the solicitors was fully documented by diary note or correspondence produced shortly after the conversations recorded in the letters. EFG's own officers made copious file notes of their meetings and conversations with Mr Emanuele and his advisors. There is nothing in the evidence to give rise to any doubt about the accuracy or authenticity of any document (with the exception of Exhibits 58 and 59 and their variants with which I have dealt elsewhere).

[1030] I accept the evidence of the first defendants' witnesses which I have rehearsed in the history of the negotiations. Indeed I accept it for all purposes but, for the moment, I express my satisfaction with the testimony of Mr O'Grady, Mr Elliott, Mr Perrett, and Mr Byrne. I was unable to detect in the cross-examination of the solicitors any attack on their credibility. There was an attack of sorts on Mr O'Grady's evidence but I accept what he said. His evidence was largely corroborated by Mr Elliott and Mr Perrett who have contemporaneous notes of what they said. Mr O'Grady's own dealings with Mr Emanuele and Mr Ferrugia were diarised.

[1031] Mr Crosby was not a helpful witness. He was excessively careful and would rarely venture an answer without first carefully perusing the contemporaneous documents relevant to the topic about which he was asked. His answers did not often go beyond what was recorded. I do not accept his evidence that he was ignorant of the terms on which EFG was endeavouring to come to a compromise with the Emanuel group after his involvement in the negotiations ended. I can understand that his friendship with Mr Emanuele would make him reluctant to become involved after he had failed to broker a settlement but I would have expected him to remain curious about the outcome of the negotiations. Indeed Ramco, of which Mr Crosby was a member, was informed of the progress of the negotiations in general terms. The final settlement was put before Ramco for its information. Mr Crosby would have received that information in the agenda papers for the meetings and the conscientious discharge of his duties as a member of that committee would have required him to read the report. I am sure he did.

My rejection of this curious aspect of his evidence does not lead me to dismiss the rest of his testimony which, for the most part, consisted only of confirming the documentary record. Nor does it lead me to infer that he is concealing knowledge of some fraud or conspiracy as alleged by the plaintiffs. It is more likely that he desired by his evidence to remove himself as far as possible from the negotiations for the settlement. The claims brought against him personally might explain the desire but should not have led him to dissimulate on this point.

[1032] The evidence which I have reviewed effectively disproves the plaintiffs' allegations as to the 1995 Scheme. It was, it will be recalled, said to have been made between July 1993 and March 1995 and to involve Messrs G & R Emanuele, Ferrugia, Winter, Elliott, O'Grady and Crosby. The proof offered by the plaintiffs of their case is Exhibit 171 (supplemented by Exhibit 412 which was scarcely referred to and which appears to consist of irrelevant and/or incomprehensible documents). The documents contained in Exhibit 171 are, for the most part, an incomplete record of that which is more fully contained in Exhibits 421 and 462. The documents appear, on my reading, positively to disprove the case of conspiracy and fraud. They show two parties, on the opposite sides of a commercial and legal relationship, with differing interests and differing views about how those interests should best be advanced. They negotiated and litigated over 18 months in an endeavour to resolve their conflicting positions. They were separately represented by solicitors (and senior counsel) as well as advised by chartered accountants in their endeavours.

[1033] It is an unlikely conspiracy, even if one considers only those said to have been involved on the EFG side. One of the alleged conspirators was a partner of established reputation in a substantial firm of solicitors. He documents his every contact with his alleged co-conspirators and he involved two of his partners in furthering the objects of the conspiracy. He went to the lengths of formally documenting by letters of advice what he had discussed. It also involved a senior executive of the subsidiary of a very large public company conspiring with others to achieve by unlawful means what his company could have quite legitimately pursued. It is not seriously contended that an action for foreclosure over the APM lands would not have succeeded in the circumstances of this case where the value of the land was far less than the debt it secured and any recovery depended on spending further substantial sums on the land. Despite some initial reluctance the plaintiffs accept that a mortgagee may lawfully purchase its mortgagor's interest in the mortgaged land. The law is, I think, clear in this regard. Reference may be made to *Melbourne Banking Corporation Ltd v. Brougham* (1881-82) 7 App Cas 307 at 315; *Reeve v. Lisle* [1902] 1 Ch 53 affirmed 1902 AC 461; *Fisher and Lightwoods Law of Mortgage* 8th Edition p. 464. Accepting that EFG wished to acquire title to the APM land its desire was permitted by the law which provided means to consummate it. One must wonder why Mr O'Grady would then involve so many people is a conspiracy to defraud the mortgagor when the land could have been lawfully bought.

[1034] The plaintiffs called no witness to support its case and refrained from putting it squarely, or at all, to any of the witnesses called by the first defendants to refute the case. Moreover the plaintiffs persisted in allegations which seemed demonstrably falsified by the evidence. Mr Crosby was said to be involved in the conspiracy by negotiating DOFR and in obtaining the judgment in 1995. Despite my reservations about his evidence there is no doubt that he was not involved in the negotiations after about March 1994. There can be no doubt about this. It does not depend upon uncertain oral testimony. There is a comprehensive documentary record of the negotiations. They show no trace of Mr Crosby's involvement.

Setting Aside the Judgment

[1035] Rather similar considerations apply to the claim that the judgment obtained on 27 February 1995 ought to be set aside on the ground that it was obtained fraudulently and/or collusively. The facts surrounding the litigation and the successful application for judgment speak for themselves. They demonstrate convincingly that there is no basis for complaint about the judgment.

The plaintiffs' starting point for their argument is that the judgment was obtained by consent. It is pointed out that the solicitor who appeared on the application for summary judgment had had no role in preparing the defence and had been given no grounds to argue by way of defence. He was given no affidavits raising triable issues. His instructions were to apply for an adjournment of 14 days on the basis that the parties were negotiating a settlement and in the event his application failed he was neither to oppose nor consent to the application. (See the evidence of Mr Jones at T.3525-5). The plaintiffs submit (para 779 of Volume 4):

> 'In truth there was no opposition. This level of "opposition" is tantamount to a consent. The only thing missing are the actual words. Jones … told the judge that he would neither consent nor oppose. That is tantamount to a consent as well, as we all know.'

[1036] The submission ignores reality. The fact is that Mr Emanuele and the Emanuel group refused to consent to judgment. The draft DOFR had provided for a judgment by consent. Mr Emanuele and the Emanuel group would not accept the term. It was explained that it was 'an emotional thing' for Mr Emanuele. Not opposing an application is not the same as consenting to it. Mr Jones' position was consistent with his clients having no defence to EFG's claim and, therefore, having no rational grounds for opposing it but being precluded by his instructions from consenting to judgment. It is a far cry from agreement, let alone collusive agreement.

[1037] The plaintiffs also submit (Opening Part 6 para 849):

> '… That from the moment the draft DOFR was done on 30 January 1995 EFG were pressing for a judgment by consent and required it as part of the DOFR … The Emanuel solicitors conveyed that their own view was that judgment by consent was the way to go, and effectively backed that up by filing no real documents in defence … When the day finally came, there was no true opposition to the judgment … In truth, the Emanuele family directors, knew that the offer which had been made to provide benefits to the tune of about $6,000,000 … was, in EFG's terms, conditional upon their consent to the judgment. The token resistance which occurred … was … not a reflection of any lack of willingness to settle …'

[1038] The submission is falsified by the facts. EFG did request the Emanuel group's consent to the judgment but did not obtain it. So much for a 'willingness to settle.' The evidence shows that the litigation was conducted separately and distinct from the negotiations for a compromise. Mr Jones' request for an adjournment expressly recognises that point. He was not concurring pursuant to a scheme or arrangement or conspiracy or agreement, but seeking to put off judgment because of the existence of the negotiations.

[1039] I cannot discern any basis in law for the application to set the judgment aside. The plaintiffs seem to assert three separate propositions:

1. Fraud as the basis for setting aside a judgment includes equitable fraud such as mistake, accident, surprise or unconscionable conduct and is not limited to dishonest conduct.

2. Collusion in the sense of agreement is a separate basis for impeaching a judgment.

3. The judgment is not binding on the liquidator.

[1040] Each proposition appears wrong.

[1041] In *The Ampthill Peerage* [1977] AC 547 Lord Wilberforce said (570-571):

> 'So can the declaration be attacked for fraud … What is fraud for this purpose? Learned counsel for John Russell without venturing upon a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments … it is clear that only fraud in the strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it.'

Lord Simon said (591):

> 'To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to a suggestion of

> the false … but short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient.'

[1042] In *Patch v. Ward* (1867) LR 3 Ch App 203 at 206-7 Lord Cairns said:

> 'The fraud … must … be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. … I apprehend the fraud, therefore, must be fraud which you can explain and define … and that mere irregularity, or the insisting upon rights which, upon due investigation … might be found to be overstated or overestimated, is not the kind of fraud which will authorise the court to set aside a … decree …'

[1043] In *Flower v. Lloyd (No. 1)* [1877] 6 Ch D 297 at 302 James LJ said:

> 'You cannot go to your adversary and say, "you obtained the judgment by fraud, and I will have a hearing of the whole case" until that fraud is established. The thing must be tried as a distinct and positive issue; "you" the defendants or "you" the plaintiff "obtained that judgment or decree in your favour by fraud; you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud."'

Note the phrase "fraud … of that kind".

[1044] Secondly, collusion as a ground for setting aside a judgment is, I apprehend merely a species of the fraud which is necessary for that purpose. The ordinary meaning of collusion is:

> '1. Secret agreement for a fraudulent purpose; conspiracy.
> 2. An arrangement between persons apparently in conflict … to do some act in order to injure a third person or deceive the court'

according to the Macquarie Dictionary which accords with my own understanding of the term. The plaintiffs seemed to contend that the word means no more than agreement, but it has never been the law that a judgment entered by consent or pursuant to an agreement could, on that ground alone, be set aside. If authority be needed it may be found in *Harvey v. Phillips* (1956) 95 CLR 235 at 243-4. The plaintiffs rely upon a decision of The Privy Council in *Edison General Electric Co v. Westminster & Vancouver Tramway Co.* [1897] AC 193. That case concerned a particular statute which provided that:

> 'In case any person being … insolvent … voluntarily or by collusion with a creditor … gives a confession of judgment … with intent … to defeat or delay his creditors … every such confession … shall be deemed … to be null and void …'

Speaking of collusion in that particular context The Privy Council said (198):

> 'In their Lordships' opinion "collusion" in this section means agreement or acting in concert.'

The decision is of no wider authority. It does not assist the plaintiffs.

[1045] I reject the submission that the 66th plaintiff can ignore the judgment. That, also, was the view of Debelle J in this action when his Honour ordered its transfer from the Supreme Court of South Australia to this court. See 149 FLR at 318:

> 'First, when determining the issues in this case, the court is not exercising an insolvency jurisdiction or exercising a jurisdiction which entitles it to go behind the Queensland judgment. Instead, this is an action to be determined by the court in the ordinary exercise of its jurisdiction in civil matters. The fact that the liquidator is a party … does not alter the nature of the action.
>
> Secondly, the power of the insolvency court is exercised only in limited circumstances, namely, when the court is determining whether the judgment can be relied upon by the petitioning creditor in support of … a sequestration order, or when a debtor relies upon the judgment as a set-off when opposing an application for a sequestration order …'

[1046] The views of the authors of *Res Judicata* 3rd edition, Spencer Bower Turner & Handley at paragraph 42 are the same:

> 'The bankruptcy court in determining whether it shall make a bankruptcy order has power to "go behind" or "go round" a judgment against the debtor including a judgment obtained after a hearing. The court has the same power in determining whether the trustee should admit a judgment debt to proof. Nevertheless, for other purposes the judgment stands as a *res judicata* until set aside, which the court of bankruptcy has no power to do nor can it finally determine that there was no antecedent debt.'

[1047] The position is different with respect to those causes of action which the liquidator brings in his own right.

[1048] It is, as the first defendants' submissions point out, extraordinary that the plaintiffs should seek to set the judgment aside on the ground of fraud and collusion without seeking a finding, or advancing evidence in support of a finding, that EFG did not honestly believe it was entitled to the judgment as entered. It is as well to recall Lord Simon's remarks about the court being deceived by a case known to be false.

[1049] The plaintiffs have contended that part of the conspiracy was an arrangement to fix the amount of the debt for the purposes of obtaining judgment. They complain also that EFG did not provide particulars of the calculation of the debt despite a request to do so. The second point would seem to contradict the first. If the parties had conspired to fix the amount of the debt they would not bicker about providing particulars of its calculation.

[1050] The evidence does not, in any event, support these contentions. There is no suggestion in the evidence of any agreement between EFG and the Emanuel group concerning the quantum of the debt. It does not appear to have been a subject ever discussed during the course of the negotiations between the parties and their representatives.

[1051] The plaintiffs rely upon the correspondence of 6 & 8 December 1994 in which a request for a reconciliation of the debt demanded was requested but refused. It is hinted that the refusal was motivated by EFG's inability properly to calculate the amount it was owed.

[1052] In a sense this may be right but the difficulty was resolved in favour of the Emanuel group. I have briefly mentioned Mr Fraser's explanation. This is corroborated by the statements of Mr Byrne (Exhibit 466). He recalled:

> '… That there was some difficulty … in producing a calculation of the amount demanded which did not exceed the amount admitted in the DOOR. The question was whether to adopt the calculated amount or the amount in the DOOR. … Perrett (suggested) that the calculation start at the amount admitted in the DOOR … and then take account of receipts and accruing interest …
>
> On 28 November 1994 I spoke to Hugh Fraser QC about this issue: Mr Fraser's advice was to adopt the approach suggested by Perrett provided that the notice made it clear that the amount demanded would be accepted in full payment …' (paras 48-50)

[1053] This course of conduct was unexceptionable. The parties agreed by the DOOR what was the amount of the debt then owing by the Emanuel group to EFG. They were estopped by the execution of the deed from disputing the amount of the debt established by the deed. That was one of the reasons the debt recital was included (Mr Elliott's evidence T.8685.50) There was no difficulty with the calculation of the debt from that event.

[1054] Although the plaintiffs' point to EFG's failure to provide the reconciliation required by letter of 6 December 1994 they do not assert that the reconciliation was beyond the ability or resources of the Emanuel group. More importantly they did not attempt in cross-examination to elicit evidence that any EFG officer did not believe the amount claimed was the amount of the debt truly owing.

[1055] Mr Macks attempted a recalculation of the debt as at 27 February 1995 for the purposes of the action. His calculation is in his supplementary statement, Exhibit 140, annexure 31.6. He apparently proceeded on the basis of historical transactions rather than taking as the starting point the debt admitted in DOOR. He arrived at an amount only $519,000 less than the $186,000,000 claimed. As to this the remarks of Lord Cairns already quoted are apposite. Insisting upon rights which upon due investigation are found to be overstated or overestimated is not the kind of fraud which justify setting a judgment aside.

[1056] The plaintiffs' case with respect to the entering of judgment in February 1995 is part of its wider case on the 1995 Scheme which is both multi-layered and multi-faceted. The way the plaintiffs put their arguments involves an intersection between layers and facets, and support for one part of the case is sought in others. Nevertheless, at bottom, the case depends upon proof of an agreement between EFG and the

Emanuel interests by which the judgment should be entered and for an amount in excess of the ‘true debt’. The evidence concerning the entry of judgment is unequivocal. There was no agreement. EFG had sought Emanuel’s consent to the judgment, and had been rebuffed. The evidence of Mr Fraser QC and Mr Perrett, which I accept unhesitatingly, was that each anticipated there would be a request for an adjournment and/or a dispute as to EFG’s right to obtain judgment. The first occurred but not the second. The case of collusion would necessarily mean that Mr Elliott deceived both his partner and his client’s senior counsel. It was not put to him that he did. Moreover EFG refused to allow the negotiations, which it hoped would result in agreement, to obstruct its proceeding to judgment. It refused overtures from Thomsons that the demands and action be withdrawn or discontinued while negotiations proceeded and it refused to adjourn the application for summary judgment while attempts were made to reach a compromise.

The plaintiffs’ case as to the judgment fails at its fundament.

Undue Influence

[1057] It was alleged (statement of claim paras 266A, 269) that the judgment was obtained by undue influence. It is not certain that the plaintiffs persist in this allegation which, in the event, has not been made out. I have summarised the whole of the evidence relevant to the circumstances in which judgment was obtained. There is simply no evidence at all of influence of the kind required by this branch of the law being brought to bear on Mr Emanuele or his fellow directors in connection with the litigation and judgment. The allegations must be predicated upon Mr Emanuele’s agreement to the judgment; and is that he was persuaded by undue means to give his consent to it. But the fact is he did not consent and made it clear he would not. If there had been any influence, it was ineffectual.

[1058] It follows, in my judgment, that no basis has been shown for impugning the judgment of this court given on 27 February 1995. It stands as an unimpeachable record of the debt owed by the Emanuel group and Mr Emanuele to EFG and is incontrovertible proof of that debt. It was not the result of agreement between officers of EFG, or their solicitors, and the Emanuel group and was not procured by collusion or fraud.

[1059] Accordingly the plaintiffs have failed to make out their case with respect to the first component of the 1995 Scheme.

[1060] Before turning to consider the third and last component of the scheme it is convenient to consider the effect of the judgment.

Effect of the Judgment of 27 February 1995

[1061] The plaintiffs appear to accept that if they succeed on the claims in respect of the preference shares and of the transactions between 1988 and 1994 there will be a judgment in these proceedings which is inconsistent with the judgment of 27 February 1995. They argue (para 180 of general submissions on the 1995 Scheme):

> ‘… It is wrong to look at the Emanuel group as being in the state reflected by the judgment’s debt. Many of the transactions which underpin the judgment debt are subject to challenge in these

> proceedings; to the extent that they are set aside or varied, the true debt position of the Emanuel group changes. To the extent that any of those transactions are (sic) set aside … the consequence can only be better for the Emanuel group …'

[1062] By paragraph 111 of the statement of claim the plaintiffs plead that the redemption of the A & B class preference shares:

> '111.1 enriched EFG, in that it was repaid its investment;
>
> 111.3 was at the expense of Management in that it reduced equity and increased debt;
>
> …'

In paragraph 114 it is alleged:

> 'The judgment debt comprises in part moneys lent for the purpose of the payment of dividends and redemption (alternatively one or the other), and the interest that accrued thereon … and thereby enriched the (first defendants).'

Paragraph 115 alleges that the plaintiffs are entitled to restitution of:

> '115.3 That component of the judgment debt that represents the aggregate of moneys lent for payment as dividends and redemption as alleged in paragraph 112 and 113.'

[1063] Paragraph 180 of the statement of claim pleads that the issue of the writ and the application for summary judgment stated an account of the debt due by the Emanuel group to the second, third and fourth defendants, and that that statement of account included *inter alia* 'the amounts by which the judgment debt was excessive (as) contained in schedule 17A', being the items which the plaintiffs wish to delete from the computation of the debt.

Paragraph 181 alleges that the statement of account was reflected in the judgment debt.

[1064] Paragraph 113 pleads that the judgment (which stated the account) was 'in excess of that which was truly owed.' Particulars of the amount by which the judgment debt was excessive is contained in schedule 17A. It identifies the "component parts" and asserts that a final calculation of the amount of the parts could not be made before trial. Paragraph 2 refers to 'loans for the unlawful payment of dividends and redemption'; Paragraph 3 refers to interest on those amounts; paragraph 4 refers to amounts unlawfully paid by way of dividends and redemption which would have been used to retire debt so that the debt is greater to the extent that the Emanuel group was unlawfully deprived of the money. The plaintiffs' point is that Management was deprived of capital by having to pay the dividends and to redeem the shares and was thus obliged to borrow equivalent amounts so that it could carry on business.

[1065] The statement of claim makes it clear that the dividends paid on the preference shares and the money paid to redeem those shares are moneys that should have been taken into account when the debt owed by Management to EFG was calculated, so that those moneys should have been credited to Management against other sums due by it. This is made clear by schedule 17A and by paragraph 122.7 of the statement of claim which alleges:

> 'At the times when the dividends and redemption of the preference shares were paid, the (first defendants and Crosby):
>
> 122.7 Caused the entry of that part of the judgment debt that included moneys lent and interest thereon for the purpose of payment of dividends and redemption.'

[1066] Schedule 17A refers as well to amounts, which the judgment debt purported to bring into account, in respect of transactions which are attacked in these proceedings as being harsh and unconscionable; the product of undue influence; caused by breach of fiduciary duty or breach of statutory duty; of constituted voluntary settlements; fraudulent dispositions; insolvent transactions or voidable transactions. The transactions identified in that part of schedule 17A are all of the 1988-1994 transactions.

[1067] In addition the deeds of variation of 4 May 1990; 16 August 1993; 23 September 1993; 16 November 1993 are identified as transactions the result of which was to inflate the judgment. As well the charging of profit fees totalling $11,000,000 on 31 December 1988, 30 June 1989, 31 December 1989 and 12 January 1991 is also said to inflate the judgment and they are attacked as transactions which were harsh and unconscionable. Lastly the schedule identifies interest charged at excessive rates from 11 June 1989.

[1068] The plaintiffs therefore accept, by their pleading and more particularly Schedule 17A that the account stated by the judgment must be re-opened and adjusted to give the plaintiffs credit for the amounts which they say were wrongly debited against them. Those debits are the product of the payment of dividends without profit to support them; the redemption of the preference shares in the same circumstance; and the consequences of the transactions just identified.

[1069] EFG's defence pleads that these claims are barred as *res judicata* or by issue estoppel of the type explained in *Port of Melbourne Authority v. Anshun Pty Ltd* (1981) 147 CLR 589. The passage usually quoted to explain the first rule is that of Fullager J in *Jackson v. Goldsmith* (1950) 81 CLR 446 at 466:

> 'The rule as to *res judicata* can be stated sufficiently for present purposes by saying that, where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. The rule is not, to my mind, correctly classified under the hearing of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims "*interest republicae ut sit finis litium*" and "*nemo debet bis vexari pro eadem causa*."

As to this Deane & Gaudron JJ said in *Rogers v. The Queen* (1994) 181 CLR 251 at 273:

> 'It is convenient … to say something of the latin maxims to which his Honour referred. The first expresses the need, based on public policy, for judicial determinations to be final, binding and conclusive. The second looks to the position of the individual and reflects the injustice that would occur if he … were required to litigate afresh matters which have already been determined by the courts. … There is, however, another related principle, likewise fundamental, which is embodied in the latin maxim … (which) gives expression to a rule … which has … been recognised as part of our common law. It expresses the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct.'

[1070] There is, as Brennan J pointed out in *Anshun* at 610 an imprecision about what is meant by cause of action for the purposes of determining whether it is merged in a judgment. It may mean the facts which support a right to judgment, or the right which has been infringed or the substance of the action as distinct from its form.

The matter was discussed by Gummow J in *Trawl Industries of Australia Pty Ltd v. Effem Foods Pty Ltd* (1992) 36 FCR 406 (affirmed 43 FCR 510) which reviewed the authorities in the context of a case in which the plaintiff had unsuccessfully sued the defendant in the Supreme Court of New South Wales for damages for breach of contract and, subsequently, sued in the Federal Court for damage suffered by reason of contravention of s 52 and s 53 of the TPA and for negligence. These were based upon allegations of representations inducing the formation of the contract. The defendant/respondent sought a stay of proceedings on the grounds of *res judicata* and/or issue estoppel. Gummow J said (418):

> 'The question is whether Trawl seeks to vex Effem again upon a "cause of action" it lost in the Supreme Court. It is said that for the estoppel to operate, the cause of action in each proceeding must be the same … but, as Brennan J pointed out in *Anshun* the phrase … is used imprecisely and in several senses. … For the law of Australia it is most suitable to focus upon the substance of the two proceedings as distinct from their form. … It allows for the very many controversies which now come before superior courts, Federal and State, without pleadings. And even where pleadings are necessary or are ordered, the effect of the judicatory system of pleading … is …
>
> > "There is no necessity to assert or identify a legal category of action … it is sufficient … to assert the facts on which the plaintiff or applicant … relies and to nominate the remedies which he seeks …" '

His Honour then embarked upon a comparison of the allegations of fact in the two proceedings and said (422):

> 'What emerges from this review of the matter in broad terms is that in the present proceeding Trawl seeks to recover a loss measured in

> the same way and in the same quantum as it did on the Trade Practices claim it propounded in the Supreme Court proceeding. Not all of the misrepresentations alleged in this court are found in the pleadings in the Supreme Court, but some are … Each set of claims in this court is particularised by reference to statements which were in evidence in the Supreme Court … The one factual matrix generated the controversy which is given legal form in the two pleadings. As a matter of substance, in this Court Trawl seeks to attack Effem again upon a corresponding cause of action.'

[1071] Gummow J upheld the claim of *res judicata* but went on to consider whether there was an *Anshun* issue estoppel. He found there was, on the basis that should the applicant succeed in the Federal Court there would be a judgment inconsistent with the earlier Supreme Court judgment. He said (423):

> 'And the entry of judgment for Effem upon the action against it by Trawl in the Supreme Court must conflict with the judgment now sought by Trawl against Effem, in the sense of being contradictory, albeit without precise correspondence between the legal claims. In *Anshun* … Gibbs CJ, Mason and Aikin JJ said that by "conflicting" judgments they included judgments which were contradictory though not pronounced on the same cause of action, it being enough that they appeared to declare rights which were inconsistent in respect to the same transaction.'

[1072] The present is not a case where a plaintiff, having failed in one action, seeks relief against the same defendant in a second action in respect of a similar subject matter. The first 27 plaintiffs were defendants in the Supreme Court proceedings in which judgment was given against them. They now seek to recover against their protagonist in those proceedings relief for a variety of causes of action. The answer put against them is that some at least of those causes of action are merged in the judgment or that the judgment they seek will be inconsistent with the earlier judgment. Slightly different considerations apply to those under consideration in cases such as *Trawl.*

[1073] There are cases in which the principles applicable to *res judicata* and issue estoppel have been considered in the context of disputes between mortgagor and mortgagee and between parties who, *inter se*, must give each other an account of their dealings. *Henderson v. Henderson* (1843) 3 Hare 100, which contains the *locus classicus* in this branch of the law, was itself a case of accounts between partners. The facts are conveniently summarised by Mr Justice Handley in his article '*Anshun Today'* 71 ALJ 934 at 936-7. The Hendersons were brothers who operated a business in partnership each managing a different branch of the business. Their late father gave £15,000 to one brother on trust for the other. Following that brother's death his widow and children took proceedings in Newfoundland (where he had carried on business) for an account of the partnership and of the estate of the father possessed by the other brother on account of the deceased. The defendant Henderson pleaded cross-claims that his deceased brother had been indebted to him on the balance of the partnership accounts, that the property derived from their father formed part of the assets of the partnership and that the deceased brother's estate was indebted to him for a private debt. The defendant failed to appear at the hearing to justify his claims and an order was made against him for the taking of accounts. He failed to appear when the accounts were taken and an order was given against him for the £15,000 but not in respect to the partnership because the defendant had withheld the books. The deceased brother's family sued in England on the decree for the £15,000. The surviving brother commenced proceedings in Chancery to enforce the claims he had not pressed in Newfoundland. His claim was struck out because:

> 'The whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, that *prima facia* therefore the whole is settled.'

According to Handley JA:

> 'The Newfoundland decree was treated as settling the partnership account leaving neither party owing anything to the other.'

[1074] Another case, this time involving mortgagor and mortgagee, is *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 in which the owners of a property borrowed from the respondent bank which took a mortgage over the land. The owners defaulted and the bank, exercising its powers of sale, sold the property to the appellant, advancing the purchase price to the appellant again secured by mortgage over the property. The appellant also defaulted, and the bank again exercised power of sale. The appellant commenced an action against the bank claiming that the sale of the property to it was a sham and that the mortgage was accordingly a nullity. The bank denied the allegation and counter-claimed for the loss suffered on the resale of the property. The appellant's claim was dismissed and judgment was given for a money sum on the bank's counter-claim. One month later the appellant brought a second action against the bank and the subsequent purchaser claiming that the sale to it by the bank was fraudulent in that the bank and the purchaser had acted in concert to sell at a low price and to extinguish the plaintiff's interest in the property. The Privy Council, having found that there would have been no procedural difficulty for the appellant to litigate the issue it raised in the second action in its first action, held that *res judicata* 'in its narrower sense' could not be discerned since there had not been in 'the first judgment' any formal repudiation of the pleas raised by the appellant in (the second action).' (590) However, The Privy Council went on:

> 'But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.'

Their Lordships then referred to *Henderson v. Henderson* and went on to hold that had the subject matter of the second action been raised in the first it would have been decisive and led to a judgment in its favour and a dismissal of the bank's counter-claim. The plea of *res judicata* in the 'wider sense' was upheld.

[1075] The famous passage in 'Henderson' should, no doubt, be repeated:

> 'Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to

open the same subject of litigation in respect to a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

[1076] The Court of Appeal (New South Wales) has said succinctly in *Westpoint Finance Pty Ltd v. Chocolate Factory Apartments Ltd* [2002] NSWCA 287 at para 33:

> '… There is no right to an interlocutory account, and a mortgagor is not entitled to a partial account. A mortgagor cannot pick out one or more aspects of the accounts between the parties and litigate that alone. The Court of Appeal has decided this on numerous occasions …'

[1077] In his article Handley JA had this to say about 'account cases' (937):

> 'In *Yat Tung* The Privy Council held that the mortgagor's claim for compensation for a wrongful exercise of the bank's power of sale was barred by the extended doctrine. The result was undoubtedly correct, but in *Anshun* the majority criticised some of the Board's reasoning, in particular Lord Kilbrandon's simplistic principle that barred claims which "could and therefore should" have been raised in the earlier proceedings. I wish to add a further criticism. Lord Kilbrandon held that a defence of *res judicata* was not available, but in my view it was. The facts were that the bank had counter-claimed against the appellant in earlier proceedings claiming $45,231.97 as the balance due under the mortgage and it recovered … the full amount. The counter-claim assumed the regularity of the sale by the bank under its mortgage. The proceedings by the mortgagor dismissed as an abuse of process claimed a declaration that the sale was fraudulent, or in breach of duty, and compensation for its loss which if allowed would have shown a balance due to the mortgagor of some $900,000.
>
> The money judgment in favour of the bank involved taking an account, albeit summarily, at the trial. The mortgagor's claim for compensation for wrongful exercise of the power of sale was relevant to that account and should have been brought forward in answer to the bank's counter-claim. The money judgment in favour of the bank was therefore final, and in accordance with *Henderson* there was a cause of action estoppel against the mortgagor … Any claims under the general law which impeached the mortgagee's title to the mortgage debt or the security and are thus available by way of equitable set-off are for that very reason admissible in taking

> accounts under the mortgage and should be barred by a money judgment in favour of the mortgagee.'

[1078] Handley JA went on to consider the application of the *Anshun* principle in subsequent cases and concluded that the principle which has been applied is whether the additional claim arises out of substantially the same facts. If so the amended claim will be barred. It will be otherwise if the facts are not substantially the same. (See 71 ALJ at 938) This test is of less utility when the debate concerns a claim, subsequently brought by the defendant in the earlier proceedings relying upon facts which might have given rise to a defence in the earlier proceedings. Because the defence was not raised there will not be, in the second trial, a duplication of facts. I think in this situation it is necessary to have regard to whether the second action would, if successful, result in a judgment conflicting with the earlier. As Handley JA pointed out (939):

> '*Anshun* decides that a cross-claim which would have been a defence in earlier proceedings and other cross-claims which would result in inconsistent judgments will be barred.'

[1079] The claims of the first 27 plaintiffs, arising out of the 1988-1994 transactions and the issue and redemption of the preference shares, are that, broadly speaking, the amount claimed by EFG as its debt is excessive and that it was paid moneys to which it was not entitled. These claims go to the very essence of the matters which Thomas J adjudicated upon. His judgment struck the balance of the account due between mortgagors and mortgagee 'albeit summarily', to borrow Handley JA's phrase. The judgment sought by the plaintiffs would necessarily involve a determination that the debt due to EFG was less than the amount for which judgment was given. The conflict is stark.

[1080] The pleadings which I summarised at the beginning of this section show that the plaintiffs themselves see these claims as being inextricably involved in the ascertainment of the debt due by the Emanuel group to EFG.

[1081] The test ultimately accepted in *Anshun* was reasonableness:

> 'There will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect we need to recall that there are a variety of circumstances … why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings …' (per Gibbs CJ, Mason and Aicken JJ at 602-3)

[1082] The claims in respect of the 1988-1994 transaction could clearly have been raised as defences to the claim by EFG for its debt. The plaintiffs claim that by reason of the matters put forward in support of that part of their case that they were overcharged by EFG and that there should be a reduction in the amount of the debt.

[1083] The claims in respect of the preference shares may be different although it would seem to me that, in accordance with the plaintiffs' own pleading, that those claims are put forward as impeaching EFG's title to part of the debt claimed. The preference shares claims, too, are put forward as effecting a reduction in the amount truly owed to EFG by Management, one of the defendants to the Supreme Court proceedings. The plaintiffs put forward their claims for relief in respect of the preference shares on a number of bases but principally they claim the dividends and redemption moneys as moneys had and received by the second defendant to the use of Management. This is a restitutionary claim but in origin it was, or was akin to, an action for debt. See *The Law of Restitution* by Goff and Jones 3rd ed., p. 6-7. As such the amount claimed could have been set off as a defence to the claim by EFG. See Order 22 r 3 of the former Rules of the Supreme Court and now UCPR 173.

[1084] Debelle J when ordering the transfer of proceedings thought that the plaintiffs' claims would, if successful, produce a judgment contradicting that of 27 February. It was principally for that reason that his Honour made the order. For the plaintiffs to succeed the judgment must be set aside and that could only be properly done by this court. His Honour said (149 FLR 314-6):

> '… The claim is made in respect of the preference shares and the 1988-1994 transactions … raise issues which touch directly upon the judgment. The … amount lent to pay dividends and to redeem the preference shares … plainly represents a substantial part of the judgment debt. … The proper adjudication of the claim requires the court to determine issues which could have been relied upon as a defence … for the amount for which the Queensland judgment was ultimately entered … The advances made between 1988 and 1994 constitute a substantial portion of the judgment debt. … This part of the claim seeks compensation for what is said, among other things, to be unconscionable dealings which gave rise to the ultimate indebtedness of 27 of the plaintiff companies … Again, the grounds now relied upon could have been raised as defences to the claim …'

[1085] Even if this be wrong, and the claim in respect of preference shares should properly be regarded as a counter-claim, it is so closely connected with the subject matter of EFG's action that it was unreasonable not to raise it in the earlier proceedings. The claims stem from the relationship between EFG and Management as lender and borrower. The issue of preference shares was an alternative to a loan advanced on security because of the commercial advantages to be had by that mode of raising money. EFG took security over the assets of Management and associated companies to secure Management's obligation to redeem the shares and pay dividends in the meantime. As Handley JA said, cross claims which would have been a defence in an earlier proceeding may not be raised afresh.

[1086] There is a substantial reason for thinking that it was unreasonable for the Emanuel group not to raise the argument in respect of the preference shares as an equitable set-off or counter-claim in the Supreme Court proceedings so as to bring about a reduction of the judgment debt. The reason is that the Emanuel group was aware of the availability of the argument in mid-1994 and chose, for reasons it has never explained, not to raise the arguments in this court.

[1087] Mr Furniss was employed by the Emanuel group as an accountant in 1993 and remained so employed until their liquidation. While reviewing the accounting records of Management and its subsidiaries at the end of 1993 or early the next year it occurred to him that there had been no profits from which to pay dividends or effect the redemption of the preference shares (T.3858.3-.45). Mr Furniss spoke to Mr Simionato about his thoughts and continued his investigation to ascertain, if he could, what possible financial implication might follow. He showed the results of his work to G & R Emanuele (T.3858.45-3859.3). Thereafter, in February and March 1994 he spent time in devising a claim to be used to the advantage of the Emanuel group in arriving at a settlement with EFG. He obtained information from Mr Patterson of C & L and, on or about 1 March 1994 with the approval of Mr Emanuele sent to Thomsons a three page document he had prepared which set out 'ball park' figures to the effect that the debt to EFG of $165,000,000 as at 31 December 1993 might be reduced by almost $100,000,000. The amount of reduction comprised:

(a) $20,309,000 on account of dividends paid to EFG not out of profits.
(b) $38,506,000 on account of interest saving on the previous sum.
(c) $11,000,000 on account of excessive fees charged by EFG on loans to the Emanuel group.
(d) $8,088,000 on account of interest on the preceding sum.
(e) $20,000,000 on account of reduction in the 'unconscionable' interest rates charged by EFG.

The analysis is Exhibit 330. See also T.3890.15-3891.10.

[1088] It appears that Thomsons sought clarification of Mr Furniss' calculations. This was provided by a letter of 26 April 1994 sent by Mr Furniss to Mr Simmons with the approval of Mr Emanuele.

On 12 May 1994 Mr Furniss sent Mr Emanuele a letter enclosing an analysis of the events concerning the payment of dividends on, and redemption of, the preference shares and an adjustment to the EFG debt giving effect to his analysis.

[1089] It is apparent from Mr Furniss' note (Exhibit 318) that he had identified essentially all of the issues the plaintiffs now raised in Part 2 of their statement of claim, and the very sophisticated arguments which were the subject of the expert accounting evidence. As well Mr Furniss concluded that by giving effect to these claims i.e. dividends unlawfully paid, and invalid redemption of the preference shares and excessive fees and interest rates, the debt owed to EFG could be reduced by as much as about $140,000,000 and at least $95,000,000.

Lastly Mr Furniss raised the question whether, as a matter of tactics, the point should be raised with EFG.

[1090] He had submitted his analysis to Mr Schoch a practising accountant and non-practising barrister who had told him that 'there is a very strong case, especially for use as a "bargaining chip" '.

[1091] A decision was apparently taken to raise the matter privately with Mr Crosby as a means of inducing EFG to reduce its claim. Mr Crosby told Mr Byrne in a conference on 27 June 1994 that Mr Emanuele had asserted that there was a problem with the preference share funding. (Exhibit 326 para 30-31)

[1092] The Federal Court proceedings were commenced in July 1994 but at no stage did the Emanueles raise allegations concerning the unlawful payment of dividends on preference shares or their unlawful redemption or that they had been charged excessive fees or rates of interest. However on 12 or 13 July 1994 Mr Rocco Emanuele sent Mr Furniss a draft letter which he thought might be sent to Mr O'Grady to suggest an adjustment of the debt taking account of the preference share claims. See Exhibit 332 and Mr Furniss' reply, Exhibit 164, 1/86. (T.3907.35-.55; 3915.16-.40)

[1093] On or about 21 July 1994 Mr Furniss sent a letter to Mr Emanuele in which he discussed the strategy of negotiations with EFG (Exhibit 320). He noted that he intended to seek advice from Mr David Russell QC (whose retainer had been authorised by Mr Emanuele) (T.3862.45-3863.4) and hoped that his written opinion could be used as the basis for negotiations. Mr Furniss observed that Thomsons were approaching the Federal Court litigation on a narrow basis and did not propose to advance arguments relating to dividends or redemption of the preference shares or allegations that EFG officers had become *de facto* directors of the Emanuel group. Mr Furniss went on:

> '… These matters could be used as very strong arguments to show that the Emanuele relationship with EFG has not been that which one would expect between a financial institution and their client. These could be used to show the incestuous relationship and the degree of connivance and manipulation that has gone on over many years.
>
> It therefore comes down to a matter of judgment as which is the best way to proceed with the overall battle!'

[1094] In a brief letter (Exhibit 321) Mr Schoch wrote to Mr Emanuele advising that there was 'serious doubt as to the lawfulness' of the payments of dividend and redemption and that over $140,000,000 of the debt claimed by EFG may be unenforceable. He recommended 'a commercial settlement which could include a reduction of the debt … by that amount.' (Exhibit 321)

According to Mr Furniss this document was obtained for tactical purposes to show EFG in the course of negotiations (T.3920.10-.20)

[1095] Mr Emanuele, it seems, obtained a copy of Mr Schoch's letter. He showed it to Mr O'Grady when they met on 29 July 1994. It is referred to in Mr O'Grady's notes of the meeting (see his statement at para 406).

Mr Schoch's letter was also produced for inspection during the process of discovery in the Federal Court proceeding. The letter was not relevant to those proceedings and its disclosure can only have been for reasons of tactics.

[1096] I accept the first defendants' submissions that:

> 'The circumstances in which the claims were developed and the way in which they were deployed against EFG in the settlement negotiations reinforce the conclusion that it was unreasonable for

> Emanuele not to have raised the claims in the Queensland Supreme Court proceedings.'

In my opinion the court should be most reluctant to permit a litigant to raise, in subsequent proceedings, arguments it knew it had in earlier proceedings in which they could have been raised but were not, as a matter of tactics, especially when the agreements were utilised in negotiations collateral to the first proceedings. It is true that the debate within the Emanuel group about how best to use the argument involved the Federal Court proceeding. Nevertheless the arguments were available, had the Emanuel group chosen to make use of them, as a means of seeking a reduction of the debt claimed in the Supreme Court.

[1097] The plaintiffs called no evidence to show why the claims were not advanced in opposition to EFG's claim. The court should not lightly infer the existence of special reasons to give rise to the exception recognised in *Anshun* where the litigant does not bother to give any reason. The evidence does, perhaps, show a possible reason. There is a letter from Mr Purcell to Mr Saint (both of Thomsons) of 2 December 1994: (Exhibit 417)

> 'Joe Emanuele is becoming more and more desperate and now considers his best option is to strike again at EFG with litigation arising out of the preference share loan arrangements and also to pursue an argument that EFG were *de facto* directors of the Emanuel group at times of insolvency. I have consistently told Emanuele that these claims have no proper legal basis and even if they were pursued they would not make inroads into EFG's debt. …'

[1098] It is not, in my view, a special reason justifying the subsequent litigation of points that could have been raised in previous litigation that the litigant chose not to advance them because he had advice that they would fail.

[1099] I have described briefly the nature of the Federal Court proceedings commenced by the Emanuel group. The application sought to have the court refashion the terms of the DOOR on the basis that it was the product of misleading and deceptive conduct by EFG. The statement of claim alleged that arising out of the negotiations for DOOR an agreement was made the principal terms of which were that for a period of three years EFG would ensure that the Emanuel group continued to have access to the timber royalties and that this agreement, to the extent that it was not to be found in the terms of DOOR, constituted a separate collateral contract binding on the parties. Further there were allegations that during the course of the negotiations EFG represented that it would continue to make sufficient funds available to the Emanuel group to allow it to perform its obligations connected to the workout for the agreed period of three years and, more particularly, that EFG would ensure that the Emanuel group would continue to receive the timber royalties throughout the period. It was also pleaded that EFG knew that the Emanuel group could not perform the obligations imposed on it by DOOR unless it continued to receive the timber royalties. The pleading proceeds on the basis that the Emanuel group was indebted to EFG as provided for by DOOR and that a detriment it suffered in relying upon the representations was that it incurred liability to EFG for interest on the debt at rates higher than the prevailing market rates of interest.

There was also a claim that on its true construction DOOR did not permit EFG to appropriate the royalty payments as long as the Emanuel group was performing its obligations under the DOOR.

[1100] Branson J found against the Emanuel group on all claims. Essentially her Honour rejected the evidence of Messrs G & R Emanuele that the entry into DOOR by the Emanuel group was induced by misrepresentation or misleading and deceptive conduct. Her Honour also construed the agreement against the Emanuel group and upheld EFG's right to appropriate the payments.

[1101] The attack on DOOR and the relief claimed as a consequence could conveniently have included the grounds now set forth by the plaintiffs for attacking the DOOR.

The secondary attack on the DOOR should not be permitted. The formulation of principle in *Henderson* and *Anshun* both preclude the Emanuel group from seeking to set aside DOOR or alter its provisions. All bases for attacking the DOOR or asserting that it was not binding upon the Emanuel group should have been included in the Federal Court proceedings. This court should not now entertain any further submission that DOOR is not binding upon the Emanuel group.

[1102] The first defendants go beyond this point and argue that by reason of issue estoppel of the *Anshun* type the judgment in the Federal Court precludes the plaintiffs from raising claims in respect of the preference shares and the 1988-1994 transactions. I think the submissions should be accepted. If there were substance in the plaintiffs' claims about the preference shares and the 1988-1994 transactions, and had they been raised in the Federal Court proceedings relief could have been given either by way of rectification of the DOOR to correct the amount stated by it to be the debt due and owing by the Emanuel group, or by way of a declaration as to the amount actually owing. The issue of the amount of the debt truly belonged to the litigation. The Emanuel group raised as part of their dispute its own financial position. It was relevant in two ways. It was said that it was unconscionable for EFG to appropriate the timber moneys when it knew that the Emanuel group could not carry on business without that income. One of the reasons it could not do so was its crippling debt burden which attracted high rates of interest. The second aspect is that it was a detriment suffered by the Emanuel group in reliance upon misrepresentations to become party to the DOOR to have to pay interest at high rates on the amount of debt stated in the DOOR. Both points would have been affected by evidence that the true level of debt was substantially less than that stated in the DOOR.

[1103] Accordingly the claims in respect of preference shares and the 1988-1994 transactions properly belonged to the subject matter of the Federal Court litigation. The applicants should have brought those matters forward in that action. Not having done so, they are *res judicata* within the *Henderson* principle. Alternatively they were so closely connected to the subject matter of that litigation that it was unreasonable for the plaintiffs, or the Emanuel group of plaintiffs, not to raise those issues for determination in the action. On either view the plaintiffs may not ventilate them now.

The Purpose of the Trust

[1104] The existence of the Emanuele family Trust, and its function, was first raised with EFG in the meeting of 2 March 1995 between Mr Ferrugia and Mr Elliott, though the trust was not then given any name. According to Mr Elliott's notes Mr Ferrugia said that he was acting for Mr Emanuele in his personal capacity and made reference to a trust which he said Mr Emanuele did not control and of which he was neither beneficiary nor trustee. Mr Ferrugia proposed an agreement between EFG and the trust which would include the sale of the three house properties to the trust at fair value. Later in the meeting Mr Ferrugia returned to the question of the trust. He said there would be a corporate trustee, the members (shareholders) of which would be Mr Robert Simionato and Mr Caruso who would also be the directors. The trust was to be discretionary and Mr Emanuele would have no control over it. Its purpose was to enable Mr Emanuele to compromise with his creditors. The idea was that payment would be made to the trust fund which would not be amenable to enforcement action by creditors who would be encouraged to reach a compromise on the basis that money would be paid to them from the fund. In the absence of agreement they could not have recourse to the fund and Mr Emanuele had no assets. (See Exhibit 463 paras 605, 608)

[1105] Mr Elliott was asked in chief whether he believed Mr Ferrugia's assurance that the payment to the trust was for the purpose he had explained. Mr Elliott said (T.8708.10-.20):

> 'Yes, I did. I could see that there was some merit in having a fund which one could honestly say to a creditor "I don't have money to … do a compromise with you but I have access to money and I've asked that that money be directed to you." My understanding would be that if all of the money were in the name of Giuseppe Emanuele and somebody found out … the first in line would try to grab it all … I believe that there was a genuine endeavour to reach a compromise with all the creditors and for the Emanuele family to keep going in business.'

Mr Elliott confirmed his position in cross-examination (T.8731.15-8732.22) in which he said he had had previous experience of such arrangements and he thought them 'feasible'.

[1106] When Mr Perrett was asked to draft the Simionato deed he turned his mind to the question of whether the proposal that money be paid to the trust was lawful or 'whether there were any difficulties with that …' Mr Perrett explained (T.9064.15-9065.55):

> '… It had always been the case that what EFG was proposing was a payment of money to the Emanuel companies and to Giuseppe Emanuele to achieve a clean break and to give them an opportunity to deal with their creditors and perhaps start off again … That had given rise to the potential of conflict between Giuseppe Emanuele's fiduciary duties to the company and his own interest as one of the recipients of those settlement moneys and I was comfortable with the way in which that conflict had been addressed in that Giuseppe had resigned as a director of the companies … The companies were receiving independent and … competent and experienced legal advice … and the issue of the split in the moneys between Giuseppe and the companies had been agreed and that caused me no concern because … there was no right or wrong way as to how those moneys

> would be split … and I had assumed that most of those creditors, certainly the major ones, would be common in the sense that Giuseppe would have guaranteed other Emanuel facilities so … there was a lot of sense to that split in that providing moneys to the companies would leave those moneys exposed to some other secured creditor … swooping in … (so providing most of the money to Giuseppe Emanuele) … would be to the mutual benefit of him and the companies because if he was able to achieve those settlements then the companies benefited because he was dealing with the common creditors. So it seemed to me having got to that point that the split had occurred in the circumstances it had, I was entirely comfortable … it made sense … that once the conflict had been identified there was an inevitability that something like that would occur … Whilst I could see a clear rationale (for paying moneys of the trust) in that it would better increase his leverage in being able to use those moneys to deal with the creditors because it removed direct access … to … the money. What I was reflecting on was whether … that direction gave rise to any legal impediment. For my own part I couldn't see a problem … because … EFG had no obligation … to pay Giuseppe anything, it was choosing to make a payment to bring an end to matters and to enable him to deal with the creditors … and it was also apparent to me that John Elliott … could see no difficulty with it because John had sat in on those negotiations, had agreed to this approach … but I … got to the point where I just wanted to have someone else reflect on it … and I went to Byrne who I knew was familiar with the matter and who … specialised in insolvency.'

[1107] I expressly accept Mr Perrett's evidence. By this I mean I accept that the thought processes explained in the passage just quoted were what Mr Perrett thought at the time. To the extent that the passage contains legal analysis of the proposition being put to EFG as a means of settling its dispute with the Emanuel group and Mr Emanuele, it appears to me that the analysis was sound.

[1108] I have already mentioned in the chronology of negotiations the referral of the point to Mr Byrne for his consideration and I have recounted the advice given by Mr Byrne to Mr Perrett. Mr Byrne explained his reasoning in his statement (Exhibit 466, paras 193-195). It was that:

> - 'EFG was under no obligation to Joe Emanuele or the Trust prior to this proposed settlement. On the contrary, EFG had a judgment debt against Joe for $186,000,000 and a massive shortfall in its security.
> - EFG was … prepared to pay further moneys to Joe Emanuele.
> - If Joe Emanuele asked EFG to pay these moneys to anyone he was free to do so. As a natural person, he was under no obligation to his creditors to ensure that benefits of this kind came to him personally.
> - On the other hand, I could see every reason why Joe Emanuele would want to have the EFG moneys go to a trustee – so that the funds would not be attacked by creditors,

> but could be dealt with in an orderly way. In my experience, this kind of approach is the most common way for individuals who are insolvent to deal with their creditors. They appreciate that if any funds came into their hands, the most aggressive … is able to … take all the benefits … Accordingly, they seek to arrange funds in the hands of a third party and then seek to negotiate an orderly resolution of their affairs with their creditors.'

Mr Byrne notes that Mr Nash concurred in his analysis and that his appreciation appeared to be shared by Mr Winter. He explained (para 196):

> 'When I saw the undertaking by Mr Emanuele that he intended to use his best endeavours to deal with his creditors and the letter of 16 March 1995 from … Winter … I assumed that the intention was to establish a trust that would provide the funds to arrange a compromise of Mr Emanuele's creditors … It did not … occur to me that the proposed settlement transaction would involve any breach of duty by anyone to the Emanuel companies. As I understood the position, Joe Emanuele and the … companies had separate legal representation and they had resolved the division of the EFG proceeds between themselves.' (para 197)

[1109] Mr Byrne's note of 8 March reads in part:

> 'If O'Grady says the money was paid to the trust so that it would not be attacked by Joe's creditors then there may be some adverse publicity. RGP to warn John O'Grady.'

It will be recalled from the earlier narrative that the matter was not put in those terms by Mr Perrett to Mr O'Grady when they spoke on 8 March. It is not clear that the effect of that part of the note was conveyed to Mr Perrett (see Exhibit 466, para 195; T.8911.30-8912.10). When he made the note Mr Byrne had not spoken to Mr O'Grady and did not know what, if any, views he had about the payment of money to the trust. His concern was:

> '… that O'Grady ought to be aware that … when creditors find out that money is in a trust and is not immediately available for them they may well be critical. So … be aware of adverse publicity …'

Mr Byrne also explained the basis for his assumption that Mr Emanuele would use the money paid to the trust to compromise with creditors. He had been involved in the Federal Court proceedings in 1994 and spent considerable time with Mr Crosby preparing his statement. He 'got on well with Crosby and … respected his opinion.' Mr Crosby told him that Mr Emanuele was a man of integrity and that he was trying to come to terms with the creditors (T.8912.3-.50).

Mr Byrne does not appear to have been cross-examined about what he said to Mr Perrett when he conveyed the result of his discussion with Mr Nash.

[1110] Mr Perrett's note of what he was told by Mr Byrne is simply that there was:

> ‘Nothing wrong from EFG’s perspective as a matter of law.’ (Exhibit 467 para 478-479)

Accordingly to his oral testimony the conversation was short and Mr Byrne said only that:

> ‘… EFG owed no money to Emanuele, had no obligation to Mr Emanuele and that being the case if Mr Emanuele directed the payment to be made to some third party there was no issue with that and my recollection is he used the illustration that if he directed the payment go to the Red Cross then that wouldn’t be a problem …’ (T.9066.30-.35)

When questioned in cross-examination Mr Perrett said that he had no recollection that Mr Byrne had expressed the concern that appears in his note (T.9240.35-9241.10).

[1111] I set out earlier in the narrative the contents of the conversation between Mr Perrett and Mr O’Grady. It does not contain Mr Byrne’s warning. As Mr Perrett explained in the passage just mentioned, he was moved to speak to Mr O’Grady by a conversation he had had with Mr Elliott who worried that ‘as a matter of commercial reality EFG can’t justify a payment to a third party … We would be concerned the funds are paid to the trust and Joe Emanuele will walk away from his creditors.’ Mr Perrett explained that Mr Elliott’s concern was not that he expected that Mr Emanuele would so treat his creditors, or that EFG would have acted unlawfully if Mr Emanuele did that, but rather if he did it would be a matter of embarrassment to EFG. (T.9067.10-.20) Mr Perrett confirmed that the embarrassment he foresaw was not that the proposed arrangement might allow Mr Emanuele to keep the money from his creditors. He said (T.9068.8-.40):

> ‘… I had no expectation at all that he would not use the money for the purpose for which they were being paid because … I was quite satisfied … from what I had seen of Emanuele and what I had seen of the history of the matter that he … wanted to stay in business. He was a proud man. He was a significant figure within the Adelaide community … He felt he had the ability to, as he was doing with EFG, … negotiate his way out of … difficulties … and hopefully having something left … to start over and he was adamant that’s what he wanted to do … but I was also very mindful that this might all just fall apart … There was the real possibility that despite Emanuele’s best endeavours this just wouldn’t work. The companies may be liquidated. Emanuele may be bankrupted. I had no doubt that if that occurred all this … would come to light and that EFG may be faced with the embarrassment … of having to justify why they’d given $5,000,000 to somebody they just had no obligation to give the money to in terms of their relationship with their own shareholders.’

[1112] Mr O’Grady has a similar recollection (Exhibit 454, para 759-764). It does not appear that Mr O’Grady was alerted to the possibility that Mr Emanuele might not use the payment to Simionato Holdings to pay creditors but Mr O’Grady appears to have realised that that was a possibility. It was one he discounted because of his strong belief that Mr Emanuele was determined to avoid bankruptcy and would therefore have to compromise privately with his creditors (see para 764).

[1113] The plaintiffs submit I should be reluctant to accept Mr Byrne as a witness of truth 'because of his unduly combative approach to giving evidence.' I thought Mr Byrne's directness in testimony was indicative of his veracity. Moreover the plaintiffs expressly disavowed dishonesty on his part as to the critical part of his evidence, as I mentioned. Mr Byrne was, it seemed to me, a man who did not suffer fools gladly, or perhaps at all. I accept his evidence.

[1114] Mr Perrett's recollection of his conversation with Mr O'Grady is in his statement, Exhibit 467, para 500-507. His evidence in chief is at T.9068.50-9070.42. The essence of it was that Mr Perrett told Mr O'Grady that there was nothing illegal in a payment to Simionato Holdings to be held by it on trust, but that the payment had the potential to cause embarrassment to EFG with its shareholders because the payment was a gratuity. Mr O'Grady replied that the payment could be justified because it was achieving the quickest commercial solution to a long-standing dispute.

[1115] The conclusion I draw from all of this is that the payment to Simionato Holdings as trustee was proposed to EFG by Mr Ferrugia as a means of providing an orderly settlement between Mr Emanuele and his creditors and that EFG, having taken legal advice, honestly believed that the proposal was intended to achieve that purpose and was an appropriate means of achieving it. Moreover I am satisfied that the legal advice given by Mr Byrne and Mr Perrett was soundly based. I accept that the solicitors recognised, as did Mr O'Grady, that there was a risk that the money may not be used for its avowed purpose but that the risk was believed to be fanciful.

[1116] It is not at all clear on the evidence when Mr Emanuele irrevocably decided not to attempt a compromise with creditors and not to request Simionato Holdings to apply the money in satisfaction of the compromise. The thought had occurred to him on 13 February but he had been advised that he should disclose to his creditors the full amount of money that had been made available to the Trust. There is no basis in the evidence for finding that Mr Ferrugia, when he spoke to Mr Elliott on 2 March, did not honestly believe that money paid to the Trust would be used by Mr Emanuele to settle with creditors.

[1117] It does not matter, it seems to me, that Mr Elliott, Mr Perrett and Mr O'Grady all recognised, but discounted, the possibility that Mr Emanuele might not attempt to apply the money to be paid to Simionato Holdings to compromise with his creditors. EFG had no obligation to ensure that the money went to the creditors. EFG would come under no legal liability to the DOFR companies or their creditors whether or not all or part of the moneys on offer went to the creditors. EFG was offering to pay a sum of money to the companies and to Mr Emanuele to achieve an end to their dispute and litigation, and a transfer of the APM land at fair value. How the money was applied and how it was divided between the companies *inter se* and between them and Mr Emanuele had no legal consequences for EFG.

There might have been an argument that EFG had participated in a breach of fiduciary duties by the directors of the DOFR companies had the offer initially been made to the companies only and that subsequently Mr Emanuele had, to the knowledge of EFG, resolved to take the money for himself. Depending on what it did and what it knew, EFG might have become liable as an accessory to a breach of Mr Emanuele's duty of good faith to the companies.

As I endeavour to explain later in this section of the reasons under the heading '*Breach of Fiduciary Duties*' it is not the case that Mr Emanuele acted in breach of those duties by seeking to secure payment to himself of part of the offered sum. It was not offered only to the companies. He was included as an offeree and was entitled, once he was no longer a fiduciary of the companies, to bid for a share of the money.

[1118] The plaintiffs' criticise Mr Perrett because he knew that a substantial part of the settlement sum would not go to the DOFR companies but to a trust to be applied in payment of Mr Emanuele's creditors, and, to the extent he succeeded in negotiations, partly to be retained from Mr Emanuele personally to allow him to commence afresh in business. The plaintiffs criticised Mr Perrett (para 786-788 of their final submissions Volume 5) on the basis that he did not consider 'putting all of the moneys into the companies via a Deed of Company Arrangement …' because Mr Emanuele wouldn't have agreed to it and 'there would have been no settlement' without his agreement.

The unstated premise behind the submission is one I have rejected: that EFG came under some obligation to ensure that all the money it was prepared to pay to settle its dispute with the Emanuel group and Mr Emanuele had to be paid to the corporate creditors. Once it is understood that EFG's offer of settlement included Mr Emanuele as well as the companies and that it was free to deal with him as well as them the criticism disappears.

DOFR and the Other Deeds

[1119] I digressed from the consideration of the 1995 Scheme because it was convenient to discuss the effect of the 27 February judgment on those claims which have been dealt with in Section III of the reasons, and those claims, yet to be discussed, arising out of the issue and redemption of the preference shares. It is appropriate now to return to the third component of the 1995 Scheme: the making and terms of DOFR, the Simionato deed and the Giuseppe Emanuele deed and the payments made pursuant to them. The plaintiffs argue this aspect of their case on a number of bases which intersect and are complicated. It is necessary to deal separately with the various strands.

Bribery

[1120] The most dramatic claim made by the plaintiffs is that payments made pursuant to the deeds constituted bribes to the Emanuele family directors and the solicitors who acted for Mr Emanuele and the DOFR companies, Thomsons and Johnson Winter & Slattery respectively. The case of bribery as pleaded is that Mr Emanuele and his son Rocco were parties to the 1995 Scheme, an element of which was that EFG would pay $4,600,000 'to the nominee of Giuseppe Emanuele for the benefit of Giuseppe Emanuele and his family'. (Statement of claim para 214.7.7) It is also alleged that the 1995 Scheme was 'unlawfully and dishonestly executed and implemented by the corruption and subornation of the Emanuele family directors … to breach their fiduciary and statutory duties. (Statement of claim 264.1) It is also pleaded that the DOFR companies consented to the deeds and transactions concerning them in circumstances where their directors had been corruptly induced or suborned by EFG by the payment of $3,300,000 to Simionato Holdings and the transfer of the family homes to Liddan Pty Ltd. (Statement of claim 269.4)

[1121] In relation to Messrs Ferrugia and Purcell of Thomsons the allegation is that they, too, were conspirators in the 1995 Scheme, an element of which was that EFG would pay Thomsons' outstanding legal fees plus a reward for their support for the implementation of the 1995 Scheme. (Statement of claim para 214.7.10) It is then said that Messrs Ferrugia and Purcell participated in the formulation and implementation of the 1995 Scheme on behalf of the Emanuele family directors and the DOFR companies between September 1993 and 27 February 1995 and thereafter on behalf of Mr Emanuele, Simionato Holdings and Liddan. It is pleaded that EFG paid Thomsons $400,000 partly in satisfaction of a debt for legal services owed by the Emanuel group and partly as a reward for Thomsons' services in formulating and implementing the 1995 Scheme. (Statement of claim paras 250-251) It is then alleged that the 1995 Scheme was unlawfully and dishonestly executed and implemented by the corruption and subornation of Thomsons and that Messrs Ferrugia and Purcell were corruptly induced or suborned by EFG by the payment of $400,000.

[1122] Rather similar allegations are made against Johnson Winter & Slattery, Mr Winter's firm.

[1123] The plaintiffs put their submissions this way: (para 110, 115 of Final Submissions Volume 4):

> '… The bribe of the Emanuele Family Directors should have been paid to the Emanuel group and by inducing the directors to take a bribe … EFG induced them to breach their fiduciary and statutory duties by not paying the money to the corporate group but keeping it for themselves …
>
> Considering the 1995 Scheme as an integrated arrangement:
>
> (a) There was a relevant gain resulting from the payment of the bribe pursuant to the Simionato agreement by which, directly or indirectly, the Emanuele family directors and Giuseppe Emanuele were to take advantage of the bribe.
>
> (b) There was a relevant gain resulting from DOFR by which (EFG) was to receive title to the land and a release of all liability.
>
> (c) There was a relevant gain resulting from the Giuseppe Emanuele agreement by which support was offered by a creditor for a Part X arrangement by which Giuseppe Emanuele would be released from many of his debts.
>
> (d) There was a relevant detriment arising from the entry of judgment in an amount that had not been and apparently could not be verified.

(e) There was a relevant detriment arising from the failure to reduce the EFG debt by either full satisfaction (as would be the case on foreclosure) or by an amount equal to that which might have been realised had the land been offered for sale to the public …

(f) There was a relevant detriment arising from the failure to account for the bribe.

(g) There was a relevant detriment arising from the support for a deed of company administration by a creditor whose debt was preserved in a large amount, thus denying or impeding the appointment of a liquidator who would … investigate the affairs of the corporate group and effect recoveries for the benefit of its creditors.'

[1124] There are deficiencies in the plaintiffs' formulation which are immediately apparent. Extraordinarily in a case involving serious allegations that directors were corrupted and suborned from performing their duties by a bribe, the plaintiffs have neglected to prove that any benefit was paid to 'the Emanuele family directors' or Mr Emanuele. The essence of this claim is that the sum of $3,300,000 paid to Simionato Holdings and the discharge of mortgages over the three private residences in return for notional payment of $1,300,000 were benefits paid to or transferred to the Emanuele family directors or Mr Emanuele or at their direction.

The money was paid to Simionato Holdings and no attempt was made to prove how it applied those moneys. It of course took the money on trust and had a discretion as to how it should disperse the money. The Emanuele Family Directors, Messrs Rocco and Linton and Miss Linda Emanuele were numbered among the class of beneficiaries. They were cousins of shareholders of the trustee. Mr Emanuele was the uncle of the shareholders and was not a beneficiary. The class of beneficiary was large. It was not shown that Mr Emanuele's children received anything from the trust.

Similarly it is known that the house properties were transferred to Liddan and then mortgaged. No attempt was made to prove how the moneys raised on mortgage were applied.

[1125] The case of bribery fails at the outset. It is not shown that those who were said to have been corrupted and suborned by EFG by the payment of a large amount of money and moneys worth ever received anything at all.

[1126] A second, less significant, point is that the 'relevant gain', being EFG's release from all liability, was in fact a release from all claims. Mr O'Grady, and those advising him, did not know of and did not believe there were any liabilities in EFG to the Emanuel group.

[1127] Likewise the detriment arising from judgment in an amount which could not be verified is insubstantial. The debt was verified by the judgment independently obtained. Moreover it was ascertainable and had been ascertained by calculation not challenged taking as its commencement the amount which the Emanuel group admitted by deed to be the amount it owed. The second relevant detriment that the amount credited in reduction of the debt on the transfer of the lands was less than might have been obtained from a sale also disappears when it is remembered that the amount of the credit was greater than the value of the land.

The Cases

[1128] In *Logicrose Ltd v. Southend United Football Club Ltd* (1988) 1 WLR 1257 Millett J in a discussion about remedies available in cases of bribery said: (1262)

> 'The two are only different aspects of the same general principle, expressed in varying terms and contexts but always forcibly and to the same effect: "any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognisable in this court": see the *Panama* case LR 10 Ch App 515, 526 per James LJ; and "the real evil is not the payment of money, but the secrecy attending it": *Shipway v Broadwood* [1899] 1 QB 369, 373 per Chitty LJ.'

[1129] In a factually complicated case involving advice given to a client by a joint venture in which there were common directorships between the joint venturers, their clients and agents, Austin J in *Aequitas v. AEFC* (2001) 19 ACLC 1006 reviewed the leading authorities on bribes, *Hovenden & Sons v. Millhoff* (1900) 83 LT 41; *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324 and said (1075):

> 'At least for the purposes of the present case, the following elements emerge as the ingredients of a bribe:
>
> (a) A donor makes a gift to a fiduciary;
> (b) The gift relates to the fiduciary's position in the sense that it is an inducement to the fiduciary to use his … position in a particular way; and
> (c) The gift is secret between the donor and the fiduciary, in the sense that the principle is not aware of it.
>
> Put together these three elements give rise to an undisclosed conflict of interest …'

[1130] Slade J, in *Industries & General Mortgage Co Ltd v. Lewis* [1949] 2 All ER 573 at 575 said:

> 'A large number of authorities have been cited. Sometimes the words "secret commission" are used, sometimes "surreptitious payment," and sometimes "bribe." For the purposes of the civil law a bribe means the payment of a secret commission, which only means
>
> (i) that the person making the payment makes it to the agent of the other person with whom he is dealing;
> (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and

(iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.

> Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.'

W B Campbell J appears to have approved this formulation in *Baker v. Palm Bay Island Resort Pty Ltd* [1970] Qd R 210 at 220 where his Honour emphasised the secret or surreptitious nature of the payment.

[1131] The elements common to the two definitions are that there be a gift to a fiduciary which is secret in the sense that the fiduciary's principal is unaware of the gift. Slade J required also that the payment be made with the knowledge that the recipient was the agent 'of the other person with whom he was dealing.' This is implicit, no doubt, in Austin J's second element that the gift be an inducement to the fiduciary. There could hardly be an inducement if the payer is ignorant that the payee is a fiduciary and is in a position to influence his principal. That leaves as the only difference the requirement that the payment be made to induce the agent to act in favour of the donor. Inducement formed part of Lord Templeman's definition when speaking for The Privy Council in *Attorney General for Hong Kong v. Reid* [1994] 1 AC 324 at 330:

> 'A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust.'

That definition speaks of inducement from the perspective of the dishonest fiduciary. The judgment of Romer LJ in *Hovenden & Sons v. Millhoff* (1900) 83 LT 41 at 43 speaks of inducement from the perspective of the donor:

> 'It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law.'

[1132] It is apparent that no court has attempted an exhaustive definition of what constitutes a bribe. It is unnecessary, and would no doubt be unwise, for me to attempt that task. The authorities seek to establish four elements which are necessary to constitute a bribe. Depending on the particular circumstances one or more of them is likely to be important in determining whether, in the particular case, there has been a bribe. It seems there must be:

(a) A gift of money or money's worth to an agent/fiduciary.
(b) The gift is intended by donor and donee to be an inducement to the donee to influence his principal.
(c) That the donor knows the donee is the agent/fiduciary of the principal with whom the donor is dealing.

(d) The gift is secret i.e. not disclosed to the principal of the donee.

Facts

[1133] I turn to analyse the facts against what appear to be the constituent parts of a bribe. The first requirement is that there be a payment to a fiduciary/agent. The case here is that there was a bribe to the Emanuele family directors who, prior to 27 February 1995, were Mr Giuseppe Emanuele, Mr Rocco Emanuele, Mr Linton Emanuele and Miss Linda Emanuele. On that day Mr Giuseppe Emanuele resigned as a director of all the DOFR companies. So far as the evidence goes he thereafter played no role in any decisions made by any of those companies. The plaintiffs may suspect that he influenced his children and remained *de facto* controller of the DOFR companies. To state the obvious, suspicion is not evidence, let alone proof. No attempt was made to establish that Mr Emanuele's resignation from the DOFR companies was not genuine and effective.

[1134] Prior to 2 March 1995 the only payments contemplated by the negotiations between the parties was an undifferentiated payment to "the Emanuel group" which included Mr Giuseppe Emanuele. The only other 'gift' was the release of mortgages but this was to the benefit of one of the companies in the group, Giuseppe Nominees. There was no hint of any payment or gift being provided to any of the Emanuele family directors (other than Mr Giuseppe Emanuele's right to participate in the distribution of the payment between the members of "the Emanuel group").

[1135] There was no payment and no promise of payment until the execution of the DOFR and the Simionato Deed on 17 March 1995. Negotiations were conducted on the express basis that final agreement depended upon execution of the deeds. DOFR, by its terms, does not confer any benefit upon any of the Emanuele family directors or Mr Giuseppe Emanuele. Likewise the Simionato deed does not confer any benefit upon any of these people. The trust was not controlled by any of the members of the (immediate) family who were not directors of it. The trust conferred no vested beneficial interest on them. It was discretionary in its terms.

[1136] There is, as the first defendants' submissions point out, not even evidence that the Emanuele family directors who continued after 2 March 1995 were in contemplation as being persons who would receive benefits from the trust.

[1137] On the evidence Simionato Holdings cannot be regarded as the *alter ego* of the Emanuele family directors. There is no evidence that it was their nominee or that the payment to it was made at their direction or for their benefit.

[1138] The first element has not been satisfied.

[1139] The second element is that the donor should know that the payment is to confer a benefit on the donee fiduciary/agent. So far as Mr Giuseppe Emanuele is concerned he was not a fiduciary of any of the DOFR companies after 2 March when the concept of dividng the settlement sum between the DOFR companies and Simionato Holdings was first suggested. He was never a fiduciary of Simionato Holdings. To repeat, Mr Giuseppe Emanuele had resigned as a director and there is no evidence of *de facto* directorship after his resignation. So far as concerns his children who remained as directors of the DOFR companies the evidence which I have discussed shows that EFG by Mr O'Grady and his solicitors believed that the payment to Simionato Holdings was not to be paid to any members of the Emanuele family but was to be applied in payment of Mr Giuseppe Emanuele's creditors in order to effect a compromise with them. It was not even put to any of Messrs O'Grady, Elliott, Perrett or Byrne that they understood or believed that any part of the payment to Simionato Holdings would find its way to any of Mr Emanuele's children. The plaintiffs have failed to show that the payment by EFG to the DOFR companies and to Simionato Holdings was intended to be an inducement for the directors of those companies to influence the conduct of the companies. The evidence similarly disproves the requisite knowledge in EFG.

[1140] It is not necessary to consider the element of inducement from the donee's point of view. The discussion of the application of the first two elements makes this irrelevant.

[1141] The fourth element is that the benefit be kept secret from the principal, in this case the DOFR companies. The companies were directed by Messrs Rocco and Linton Emanuele and Ms Linda Emanuele. They knew of the proposed payment to Simionato Holdings. Mr Rocco Emanuele instructed Mr Winter to obtain $700,000 of the funds on offer from EFG for the companies on the basis that that amount would be sufficient to come to terms with their creditors. The letter from Mr Rocco Emanuele to Mr Winter which gave those instructions mentioned Mr Emanuele's understanding that the three house properties were intended by EFG 'to benefit Joe Emanuele for his own use.' (It will be recalled that Mr Ferrugia told Mr Elliott on 2 March 2995 that the houses were to be sold to the trust for fair value). Mr Rocco Emanuele remained a director of the DOFR companies at all times. He would have been aware of the terms of the initial DOFR which offered about $5,000,000 to the Emanuel group and his father. He was aware of the change in approach and of the division of the proffered payment. Mr Winter, solicitor for the DOFR companies, and Mr Ferrugia both knew of the amount available and of the fact that it was to be divided between the companies and Mr Emanuele. That is why Mr Emanuele was advised to resign as the director. The only sensible inference is that Mr Rocco Emanuele and his co-directors knew that the balance of the offered sum was to go to Simionato Holdings.

[1142] The plaintiffs' answer is that this knowledge is not to be imputed to their principal, the DOFR companies because 'the director is perpetrating a fraud on his own company. The exception has been recognised since the decision in *Re Hampshire Land Company* (1896) 2 Ch D743 (para 97 of submissions Volume 4).

[1143] That principle applies only where the director is acting, as it is said, 'totally in fraud' of the company. Where the director's fraudulent activity benefits the company as well as himself then his knowledge is not notionally withheld from the company, his principal. See *Beach Petroleum NL v. Johnson* (1993) 43 FCR 1 at 29:

> 'Difficulty arises where the director's fraud or misfeasance, whilst in some aspect inimical to the interests of the company, nevertheless achieves a benefit for the company.'

And at 30:

> 'If … a company is imputed with the knowledge and intention of a person who is the directing mind of the company, acting in the field of operations assigned to him, when his actions are not totally in fraud of the company and by design or result are partly for the benefit of the company, the imputation of the knowledge and intention of that person to the company for the purposes of civil responsibility should be no less extensive …'

This view has apparently been accepted as sound by the authors of *Ford's Principles of Corporations Law* 11th Ed p. 749.

[1144] It cannot be said that the actions of the Emanuele family directors was 'totally in fraud' of the DOFR companies. The allegation, it will be remembered, is that they were induced by the payment to Simionato Holdings to have those companies execute DOFR. To make good its submission the plaintiffs must establish that no benefits flowed to the DOFR companies by reason of their execution of the deed, whether those benefits were by design or accident. DOFR, in fact, conferred substantial benefits upon the DOFR companies. For a start they received sufficient moneys to discharge all the debts owed to their employees, trade creditors, their solicitors and the ATO in respect of group tax. They would not have received those payments or the benefit of those payments without DOFR. As well the lands were transferred for a consideration, which went in reduction of the debt to EFG, considerably greater than the market value of the land. That may have been serendipity because the parties believed that they were being transferred at market value, but they were not. Even on the expectation of the parties the transfer was of benefit in that the transfer was immediate and for full market value. There was no delay during which interest accrued and was capitalised which would have occurred during a normal marketing period. The costs associated with advertising the properties were saved as was commission that would have been payable to agents. What the plaintiffs put against these benefits is the loss of the right to claim, and perhaps to recover, compensation in respect of the issue and redemption of preference shares and of the 1988-1994 transactions. These are lost by reason of the releases found in DOFR. The releases, in my view, did not occasion the DOFR companies any detriment. The entry of judgment on 27 February barred those claims in any event so that the releases were of no value to EFG and represent no loss to the DOFR companies.

[1145] It follows that the principal whose fiduciary/agent was said to have been bribed by the payment to Simionato Holdings knew of the payment and must, by reason of inactivity, be taken to have consented to it.

[1146] It also follows that the plaintiffs have failed to make out their case of bribery against the Emanuele family directors.

Bribery of Thomsons

[1147] The plaintiffs plead that part of the consideration paid by EFG for the participation of Messrs Ferrugia and Purcell in the 1995 Scheme was the payment of Thomsons' outstanding fees 'in part as reward for its services in the conception, formulation and implementation of the 1995 Scheme' (paras 214.7.10 and 251 of the statement of claim)

[1148] What happened was that by letter of 14 March 1995 to Mr Simionato (a director of Simionato Holdings) Mr Ferrugia wrote, *inter alia*:

> 'It is understood that it has been agreed that some $400,000 will be paid to Thomsons directly by EFG on account of costs incurred in this matter and that the settlement amount payable by EFG to your company will be reduced accordingly.
>
> Please discuss this matter with Mr David Purcell and confirm that this is in order so that we can make the necessary arrangements with Clayton Utz.'

By letter of the same date Mr Ferrugia wrote to Mr Elliott:

> 'We are instructed to request that clause 8.1 of the deed be modified to provide that EFG pays to Thomsons on account of costs the sum of $400,000 and that the amount of the consideration specified in clause 2.1 be reduced accordingly.'

By letter of 16 March 1995 Clayton Utz to Mr Ferrugia:

> 'We are instructed by … EFG … that upon settlement of all outstanding matters with the Emanuel group, Mr Giuseppe Emanuele and his family and the Emanuele Family Trust, it will pay to your firm the sum of $400,000 on account of your legal costs in acting for the aforementioned parties.
>
> Prior to … making … this payment, our client requires that your firm provide us with a written acknowledgment that such payment by … EFG … is made without any legal liability or other obligation … to your firm and is a payment made in recognition of the long relationship between … EFG, the Emanuel group and Mr Emanuele and of your firm's role in representing the Emanuel group and Mr Emanuele throughout that relationship.
>
> Our client requires your firm to provide written acknowledgment and confirmation that the responsibility for the payment by … EFG … shall be fully discharged upon the handing to a duly authorised representative of your firm of a cheque in the sum of $400,000 and further requires your written confirmation that the subject matter of this correspondence is and shall remain strictly confidential …'

Mr Rocco Emanuele's letter of 28 February 1995, which has been mentioned before, instructed Mr Winter to ensure that Thomsons' fees were paid directly by EFG at settlement. Mr Emanuele wrote on behalf of the DOFR companies.

By letter of 17 March Mr Ferrugia replied to Clayton Utz:

> 'On behalf of my Firm I confirm that:
>
> - At settlement EFG group will pay to this firm the sum of $400,00 on account of legal costs.

- On that basis it is acknowledged that such payment is made by the EFG group without legal liability or other obligation and is a payment on the basis set out in the second paragraph of your letter.
- It is further confirmed that the responsibility for payment by EFG shall be fully discharged upon handing to a duly authorised representative of this firm a bank-marked cheque in the sum of $400,000 in favour of this firm.
- The subject matter of this letter and your letter of 16 March 1995 on this subject is and shall remain strictly confidential and shall not be disclosed to any person except as may be required by law and such obligation is mutual.' (Exhibit 171 Tab 197)

[1149] The evidence fails to establish that the payment to Thomsons was a bribe and/or was paid as a reward for their participation in the 1995 Scheme. For a start no payment to Thomsons was contemplated until 28 February, by which time Thomsons acted only for Mr Giuseppe Emanuele. The bribe was to induce the directors of the DOFR companies to cause those companies to relinquish their rights to be paid the full settlement sum. Thomsons did not act for any of the DOFR companies and was not a fiduciary for any of those companies at the critical time.

[1150] Secondly the payment was not secret or surreptitious. It had been authorised by Mr Rocco Emanuele on behalf of the DOFR companies who had been, prior to 27 February, Thomsons' principal. Mr Ferrugia's letter of 14 March to Mr Simionato in his capacity of director of Simionato Holdings outlined his intention to seek payment direct from EFG from the settlement moneys. Both former and present principal knew of the proposed payment

[1151] Thirdly it should be said that there is no convincing evidence that any of the partners in Thomsons acted dishonestly or improperly. Criticisms of serious misconduct have been levelled against them including, of course, that two of their partners engaged in a conspiracy to defraud their former clients. The correspondence does not bear out the slur. It appears to show practitioners conscientiously working to further their clients' interests. The fact that the money paid to Simionato Holdings appears not to have been used to pay Mr Emanuel's creditors *pro tanto* does not prove that the proposal to make the payment to Simionato Holdings was designed to bring about that result. It is equally consistent with Mr Emanuele changing his mind about the application of the money after it was paid to Simionato Holdings (assuming of course he could control that entity) and also consistent with the possibility that Mr Emanuele told his solicitors one thing while intending another. All hypotheses being reasonably open I decline to choose the one inimical to the solicitors.

Bribe of Johnson Winter & Slattery

[1152] Similar allegations are made against Mr Winter's firm. Paragraph 252 of the statement of claim alleges that Mr Winter, to the knowledge of EFG, assisted in the implementation of the 1995 Scheme in that he acted on behalf of the DOFR companies 'in respect of the scheme'; assisted to negotiate DOFR; attended at settlement and received the money payable to the DOFR companies and, more importantly,

> 'Assisted in the implementation of the 1995 Scheme by providing legal assistance … in
>
> (a) Placing companies … under administration …
> (b) Attending at meetings of creditors of companies … in administration.
> (c) Concealed material matters from creditors at the … meetings.
> (d) Cancelled approval for deeds of company arrangement …
> (e) Resisted the setting aside of the deeds …
> (f) Resisted the winding-up of the DOFR companies.'

By paragraph 253 it is pleaded that Johnson Winter & Slattery were paid $50,000 for those services.

[1153] Johnson Winter & Slattery were first engaged to act on behalf of the DOFR companies on or about 22 February 1995. Six days later Mr Rocco Emanuele authorised the payment of the firm's fees from the settlement moneys to be paid by EFG. On 7 March Mr Winter telephoned Mr Perrett, who was drafting the DOFR, to ask him to make provision for the division of the consideration between the companies and his firm which was to be paid $50,000 while the balance of $650,000 would go to the companies. (Exhibit 467 para 458) Mr Perrett accordingly amended the draft deed and by clause 6.1(b) provided for the payment of $50,000 to Johnson Winter & Slattery 'on account of that firm's legal costs of and incidental to acting for the Emanuel group'. The deed was in that form when it was signed, sealed and delivered by the DOFR companies on 17 March and the money was paid in accordance with its terms.

[1154] It is impossible to conceive of the payment as a bribe. It was expressly authorised by the principal by the letter of 28 February as well as by the execution of the deed making provision for the payment on 17 March.

[1155] Secondly, of the activities described in the statement of claim for which the payment is said to be a consideration, only those which I set out more or less in full might be regarded as nefarious. They all occurred subsequently to 17 March when the payment was made. There is no evidence that they were in contemplation or had been discussed prior to 17 March.

[1156] I conclude that the payment was made for the provision of legal services rendered in an orthodox fashion with the knowledge and approbation of the client.

Uncommercial Transaction

[1157] The plaintiffs submit that the three deeds together constitute one transaction which the court should set aside pursuant to s 588FB of the *Corporations Law*. This section has been dealt with previously in these reasons and I will not repeat its terms in full. An uncommercial transaction is one which, it might be expected, a reasonable person in a company's circumstances would not have entered into, having regard to any benefits the company obtained, any detriment it sustained and the respective benefits to other parties of the transaction. The enquiry is an objective one: the question whether a transaction was uncommercial is answered by reference to what the reasonable person in the company's circumstances would have done. See *Tosich Construction Pty Ltd (in liq) v. Tosich* (1997) 78 FCR 363. The circumstances in which the company finds itself when it makes the transaction include the state of mind of those who managed and/or controlled it.

[1158] The plaintiffs submit that the three deeds should be considered together as ‘reflecting one entire transaction.’ I am prepared to proceed on this basis which accords with the evidence and EFG’s declared approach which was to effect a settlement of all disputes with the DOFR companies and members of the Emanuele family. The consequence is, as the plaintiffs submit, that one must have regard to all the benefits which accrued to the DOFR companies, any detriments which they suffered by reason of all or any of the deeds and what benefits were conferred on other parties by the deeds.

[1159] The plaintiffs’ analysis of the transaction is that the DOFR companies obtained the following benefits:

(a) $650,000 paid under DOFR
(b) $50,000 paid to Johnson Winter & Slattery for their fees
(c) $1,300,000 for the private residences pursuant to DOFR
(d) The right to occupy its Adelaide office rent-free until 30 June 1995
(e) EFG’s promise to use its best endeavours to obtain a release of Emanuel 14 from the Softwoods agreement
(f) The assumption by EFG of the liability to pay rates and taxes on the private homes
(g) Payment of creditors, Blacklaw & Shadforth and Thomsons, amounting to almost $750,000.

[1160] The plaintiffs had this to say of the benefits:

> ‘… Some are of minimal benefit, whilst others are of dubious benefit. Having (the office) rent-free for a little over three months is not of great benefit. The promise to use best endeavours to get release of Emanuel 14 … was, at the time … of no benefit whatsoever. It had long since been agreed as between CSR and EFG that the arrangements would be such that Emanuel 14 would be excluded. The agreement with CSR … was reached prior to 17 March 1995 although the documentation had yet to be finalised. The payment of the three creditors was also of doubtful benefit given that those creditors received a preferential payment …’

[1161] I cannot accept the submissions. The payments to the DOFR companies or at their direction were of a direct and substantial benefit. Had the transaction not been entered into the companies would have remained indebted to the two firms of solicitors and Blacklaw & Shadforth in an amount of almost $800,000. That liability was discharged. Additionally the companies received $650,000 which would have allowed them to pay their trade creditors in full and to pay the ATO what it claimed apart from the assessments raised in 1993. Likewise the promise to use best endeavours to have Softwoods release Emanuel 14 from its contract turned out to be of substantial financial advantage. EFG negotiated a new timber supply contract which produced far more lucrative returns. Those returns were credited to Emanuel 14’s account with EFG which escaped any financial consequences from the termination of its contract with Softwoods. If the plaintiffs real point is that the agreement between EFG and CSR had been made prior to DOFR the point lacks substance. The negotiations only commenced because the Emanuel group had in November 1994 included as part of a settlement the requirement that Emanuel 14 be released from its obligations to CSR by EFG taking an assignment of the contract.

It does not seem to matter that the payments made to the creditors may have been set aside as preferences. Whether they discharged three creditors in full or added to a pool of funds available for distribution among all creditors the DOFR companies were better off by the amount of the payments.

[1162] The plaintiffs identify the detriments of the transaction to the DOFR companies as being:

(a) Acknowledgments that the securities were valid and that they were in default.
(b) A full release of EFG from all claims arising out of its dealings with the Emanuel group.
(c) Discontinuance of the Federal Court appeal.
(d) Transfer of the APM land at an undervalue.
(e) Delivery of the Adelaide office after June 1995.
(f) Transfer of the private residences from Nominees to Simionato Holdings.

According to the plaintiffs:

> ‘The central detriment relates to the transfer of the land, the releases given to EFG and the discontinuance of the appeal.’

[1163] Two of the three ‘central detriments’ can be disposed of briefly. On the findings I have made the land was not transferred at an undervalue. Indeed the DOFR companies received a reduction in the debt owed to EFG in an amount millions of dollars greater than the value of the land. Likewise the only evidence is that the prospects of appeal from the decision of Branson J were regarded as negligible by EFG’s solicitors and senior counsel who appeared at the trial and no evidence of a contrary view was advanced by any witness called by the plaintiffs or any document tendered by them. Mr Fraser QC and Mr Perrett both gave advice to EFG that the appeal would fail. There is no evidence that any directors of the Emanuel group thought they had worthwhile prospects of success.

[1164] That leaves the releases contained in DOFR exonerating EFG from all claims which might be brought against it by any of the DOFR companies arising out of their dealings over the years as lender and borrower, mortgagor and mortgagee and the provision of securities. The point is that the releases preclude any of the Emanuel group from bringing action to recover compensation for dividends paid on the preference shares and the redemption of those shares as well as the effect of losses occasioned by the 1988-1994 transactions. These claims are seen by the plaintiffs as valuable and their loss by reason of the release a substantial detriment for which there is no corresponding benefit.

There is a short answer to this point also. It is that after the judgment, which I found unimpeachable for fraud or collusion, the plaintiffs had no right to prosecute claims in respect of the 1988-1994 transactions or in respect of the preference shares. The right had been lost by *res judicata* or issue estoppel. The claims had no value and the releases deprived the DOFR companies of nothing of value.

[1165] The plaintiffs analyse the benefits to EFG from the transaction as being:-

(a) Transfer of the APM land at an undervalue in circumstances where 'the only method by which it could have done so otherwise was foreclosure which would have necessarily resulted in 'extinction' of the debt.

(b) Preservation of the debt which could be used to realise securities and to support any scheme of arrangement or bankruptcy arrangement proposed by the Emanuel group or Mr Emanuel.

(c) Releases from the DOFR companies.

(d) Undertakings from the directors of the DOFR companies and Mr Emanuele not to interfere with the realisation of securities.

(e) A release from Mr Giuseppe Emanuele.

(f) Acknowledgment that the securities were valid and could be enforced.

(g) Discontinuance of the Federal Court appeal.

[1166] Not much need be said about these. EFG did not obtain the land at an undervalue though it did receive them on terms where the judgment debt remained extant. The releases were of no real value for the reasons just explained. It did receive undertakings from the Emanuele family directors and Mr Emanuele not to interfere with the realisation of the secured properties. This was of benefit to EFG. It is the reason it had wanted to settle the dispute in the first place. Mr Emanuele had threatened disruption to the realisation process, by legal action and otherwise, and the purpose of the settlement was to 'buy peace'. The acknowledgment was, as I see it, ancillary to the last point, namely as an adjunct to the promise of co-operation and non-interference. It would be hard to mount a program of disruption after having formally admitted that the mortgagee was entitled to enforce its securities.

No-one appears to have thought the Federal Court appeal had any value.

[1167] Next the plaintiffs point out that there was benefit to Simionato Holdings of $4,600,000. This overlooks the fact that it took the money on trust and not beneficially. Lastly the plaintiffs identify benefits received by Mr Emanuele personally as 'the receipt of $4,600,000. Simionato Holdings only had the money in order to do as Giuseppe Emanuele wished.' In addition it is said Mr Emanuele benefited by EFG releasing its claims against him including, of course, the debt for which judgment had been entered and obtained EFG's promise to support a bankruptcy arrangement with his creditors.

[1168] It is the plaintiffs' case that the payment of $4,600,000 was paid to Mr Emanuele by way of Simionato Holdings. As I have remarked no evidence at all was adduced to show how Simionato Holdings dealt with the money paid to it. It is a profound mystery why the plaintiffs would not have addressed this point of fact which is basic to their case. At best it is a matter of surmise and suspicion that any of the money was applied to Mr Emanuele or at his direction. I apprehend that no court could proceed to make findings or give judgment on such a basis.

[1169] No doubt it was of benefit for Mr Emanuele not to have the judgment enforced against him, and to have EFG's support in coming to terms with his creditors under the *Bankruptcy Act*. It is hard to put a value on the benefit. He had no property that was not encumbered to financiers so he was not materially better off. He had nothing, whether he was bankrupt or made an arrangement with creditors. Should he have achieved the latter he would have had greater scope to recommence in business and could have done so sooner than if he had become bankrupt but, as I say, this is a difficult quality to value.

[1170] The plaintiffs' submission is that:

> 'Having regard to the benefits that flowed to the other parties to the transaction as compared to the benefit that inured to the Emanuel group, and the detriment that inured to the Emanuel group … no reasonable person in the companies' circumstances would have entered into these transactions. The companies were insolvent, the subject of a huge judgment, and knew that the former managing director had negotiated for an arrangement under which he was to receive the vast majority of any sum … EFG was prepared to make available. Further, the companies knew that he intended to benefit himself at the expense of the companies, and at the expense of the companies' creditors.'

The conclusion is said to be reinforced because:

> '… Entry into the transactions involves the directors … in breaches of … duty. The concept of the "reasonable person in the companies' circumstances" … cannot … comprehend the companies acting in contravention of the law or … on the basis of their directors' breach of duty.'

[1171] The second point will be addressed later as a separate topic, but I do not conclude that the directors of the DOFR companies were in breach of the fiduciary and statutory duties they owed the companies in entering into the transaction. I would accept as a general proposition that it is unlikely that a transaction could be regarded as commercial if participation in it involved the directors in breaches of fiduciary or statutory duties though, of course, the particular circumstances would need to be looked at.

[1172] If one looks dispassionately at the transaction it does not seem to me to be uncommercial for the purposes of s 588FB. DOFR gave the companies the benefit of enough money to satisfy the debts of their trade creditors (including Blacklaw & Shadforth), its solicitors and to make part payment to the ATO. The DOFR companies gave up nothing of value in return for that benefit. They received more than market value for the land. They released claims which they could not have pursued and gave up an appeal that appeared hopeless. They acknowledged default under securities when judgment for a huge debt had been entered against them which the securities existed to enforce. Giuseppe Nominees transferred the three house properties to Liddan for no consideration but it had had no equity in them because they had been fully mortgaged to EFG. The mortgage was discharged pursuant to the Simionato deed. The result was a net loss of nil.

[1173] The plaintiffs real complaint is, I apprehend, that the transaction did not result in the payment of the $4,600,000 to the DOFR company. Instead it went to Simionato Holdings. This consideration is central to the argument that the directors of the DOFR companies acted in breach of their fiduciary duties in not securing that payment to the companies. The starting point for the analysis is that EFG's initial offer of $5,000,000 or thereabouts was made to the Emanuel group *and* Mr Emanuele. It was never an offer that could be accepted only by the companies. There was, as Mr Perrett and Mr Elliott readily appreciated, a conflict of interest between Mr Emanuele and the companies both wanting as large a share as they could obtain of the offered amount. Mr Emanuele could not participate in any debate as to the division while he remained a director of the companies for the obvious reason explained to him in correspondence by Mr Ferrugia. His personal interest conflicted with his duty to the companies. Having resigned his directorships he was free to press his claims as vigorously as he could to as large a share of the sum as he could obtain. There was no 'right answer' as to the amount that should go to the companies and to Mr Emanuele. That was a matter of negotiation between the directors and him. What is clear is that the directors could not insist upon the payment of the whole sum to the companies.

[1174] Moreover, as the first defendants point out, a substantial case can be made for paying most of the money to Mr Emanuele. It must be borne in mind that the discussions took place on the basis that the moneys were not to go to Mr Emanuele personally but to be used by him to make an arrangement with his creditors. That is what EFG and its solicitors had been told. There is no evidence it is not what the directors of the DOFR companies had been told and believed. It is what Mr Ferrugia said and there is no evidence that it is not what he believed. If it was important for the plaintiffs to prove the contrary evidence of it should have been adduced. It is submitted that there was no debate between the companies and Mr Emanuele because his children did not exercise their powers as directors and were not, in reality, negotiating on behalf of the companies. There is no evidence that this is so. Exhibit 175 suggests the contrary. It is a file note of Mr Ferrugia's showing that Messrs Rocco and Linton Emanuele disagreed with their father's approach to the settlement in 1994. There are a number of examples in the evidence of Mr Rocco Emanuele taking an active part in the direction of the companies. Moreover there was good sense in making the bulk of the moneys available to Mr Emanuele for the specified purpose. He was the consummate negotiator. There was, importantly, a great deal of commonality between his creditors and those of the DOFR companies. The coincidence was not exact but very substantially the two sets of creditors overlapped. Mr Emanuele was a personal guarantor to the loans by financiers to the companies. On this last point, as the first defendants point out, Mr Emanuele had a right as guarantor of the debts of the DOFR companies to insist that the companies use their available funds to discharge their debts which he had guaranteed. To the extent that he utilised the money to discharge his liabilities as guarantor he discharged the companies' obligations to him.

In short it cannot be said that the payment of most of the settlement sum to enable him to deal with his (and the companies) creditors was not something which the directors should have rejected. On the contrary it was an arrangement which appeared to offer substantial advantages to the companies.

The plaintiffs might object that this analysis depends upon a 'pious' theory while the reality was, as the Emanueles knew, that the money would go no further than Mr Emanuele. For the objection to succeed it would need evidentiary support, which is missing.

[1175] To the extent that the plaintiffs rely upon terms that EFG would support deeds of company arrangement to prevent or obstruct an investigation of the 1995 Scheme by a liquidator the answer is surely that the deeds could have been, as they were, overturned by the application to the court of an aggrieved creditor. EFG's vote in favour of the deeds could not guarantee immunity from scrutiny. Moreover the point overlooks the evidence that this term had been proposed at an early stage in the negotiations for the stated purpose of assisting Mr Emanuele to avoid bankruptcy and to remain in business. I cannot recall that any EFG witness was challenged in cross-examination on the basis that that term was intended to defeat a liquidator's scrutiny of the transaction.

[1176] An important point to bear in mind is that EFG would not have agreed to settle its dispute with the Emanuel group unless Mr Emanuele were personally a party to the agreement and was bound by it not to disrupt the process of realising the securities. The plaintiffs themselves accept this point which is conceded in para 83 (Vol 4 Part 1) relying upon evidence of Mr Perrett to that effect. Mr Perrett's assertion may be accepted but it is clear from other evidence that a settlement that did not involve Mr Emanuele was never contemplated. The whole tenor of the negotiations was to bring about a separation between EFG, the Emanuel group and Mr Emanuele and to allow him and them some money to pay creditors and recommence business. The consequence is that in order for the settlement to proceed the amount which EFG was prepared to pay had to be divided between the DOFR companies and Mr Emanuele. There was never a prospect that all of the money would go to the companies. The division of the money was a matter for the decision of the directors of the companies on the one side, and Mr Emanuele on the other. Both sides had the assistance of solicitors who, as far as the evidence goes, were competent and experienced. In addition Mr Emanuele had the assistance of a reputable firm of chartered accountants. EFG cannot be criticised for leaving the decision to the companies and Mr Emanuele. It had no right to participate in the process.

[1177] The plaintiffs submit that the resignation of Mr Emanuele and the appointment of separate solicitors to represent the companies and the subsequent decision as to the allocation of the settlement sum was a 'pious fraud' demonstrated, for example, by the letter of 28 February from Mr Rocco Emanuele to Winter instructing him to seek only $700,000. The plaintiffs' submissions continue:

> '… Notwithstanding the protestations of the likes of O'Grady, Elliott and Perrett at the meeting on 2nd March 1995 it was painfully obvious that there had been collusion with respect to the division of the cash … There was no negotiation … There was no vigorous

> pursuing of rights …' (para 96; Volume 4 Plaintiffs' Final Submissions)

The submission is a little overstated. Mr O'Grady was not at the meeting of 2 March. It is not self-evident that from the records of the meeting that there had been collusion as distinct from a negotiated agreement between the companies and Mr Emanuele as to the division of the money. Neither Mr Elliott nor Mr Perrett was asked whether he appreciated that there had been collusion between Messrs Winter and Ferrugia. The division of the money is not, on its face, irrational. Mr Winter's letter of 16 March 1995 indicates that the sum sought was sufficient to deal, with one exception, with the unsecured creditors while the larger balance could be used by Mr Emanuele who was a debtor, by and large, of the same secured creditors as were owed money by the companies.

[1178] The plaintiffs make much of the fact that Mr Rocco Emanuele's letter indicated an understanding that the three residential properties would be used for Mr Emanuele's personal benefit but there is no evidence that EFG was made aware of this plan, if it was a plan. As Mr O'Grady explained from EFG's point of view it was making available money and moneysworth to effect a settlement. He regarded the properties as assets convertible to cash by sale or mortgage. This is what, in fact, happened.

[1179] It is implicit in the plaintiffs' approach to this aspect of the case, the 1995 Scheme, that EFG was obliged to ensure that the creditors of the DOFR companies received the money it was prepared to pay by way of settlement. Their submissions are replete with incompletely articulated complaints that that did not happen, or assertions that EFG should have acted with the interests of those creditors in mind. The plaintiffs did not make the point expressly or identify any authority which gives expression to the principle. I do not know of such a principle. In the absence of such a principle most of the criticism the plaintiffs level at EFG disappears.

[1180] According to the full Federal Court in *Demondrille Nominees Pty Ltd v. Shirlaw* (1997) 25 ACSR 535 at 548 the purpose of s 588FB:

> 'Is to prevent a depletion of the assets of a company which is being wound up by, relevantly, "transactions at an undervalue" entered into within a specified limited time prior to the … winding up …'

The question the court asked in that case was whether the other party to the transaction had obtained, at the companies' expense 'a bargain of such magnitude that it could not be explained by normal commercial practice.' Clause 1044 of the explanatory memorandum to the *Corporate Law Reform Bill* 1992 elucidated s 588FB. It said:

> 'The provision is specifically aimed at preventing companies disposing of assets or other resources through transactions which resulted in the recipient receiving a gift or obtaining a bargain of such magnitude that it could not be explained by normal commercial practice'.

[1181] So understood the transaction contained in the three deeds was not an uncommercial one. The DOFR companies received money to which they were not entitled and would not have received but for the settlement (transaction). It received more than market value for the transfer of the land. It lost nothing by the transfer (nor, if it matters, did its creditors) because it had no equity in them. The amount of the debt secured over the land was far greater than the value of the land. The releases gave away nothing of value. EFG had no obligation to pay all the settlement sum to the DOFR companies or to pay a larger proportion than was paid. It was entitled to come to terms with the companies and Mr Emanuele separately as it saw fit. The companies did not lose anything to which they were entitled by not receiving all or more of the settlement sum.

Breach of Fiduciary and Statutory Duties

[1182] The plaintiffs plead that the execution of DOFR by the DOFR companies and their agreement to the wider transaction involving the terms of the three deeds was a breach by the directors of those companies of the fiduciary duties they owed them and of the statutory duties imposed upon them. The plaintiffs' submissions appear to deal only with the alleged breaches of statutory duty but as they largely overlap and as there was no formal abandonment of the former I will deal with both.

[1183] There is a plea (para 274 of the statement of claim) that EFG as *de facto* director of the DOFR companies caused them to engage in and implement the 1995 Scheme. This plea fails because of my findings that EFG did not become a *de facto* director of any of the companies and because the 1995 Scheme as identified in the pleadings has been shown by the evidence not to have existed. There is then an allegation that EFG, by Messrs O'Grady and Crosby in particular, assisted in a breach of fiduciary duty by the Emanuele Family Directors. (para 275 of the statement of claim)

[1184] There is thirdly a plea that the fifth, sixth, seventh and eighth defendants, incorporated for the purpose of taking transfers of the APM lands, took the transfers as volunteers pursuant to a breach of fiduciary duty by the directors of the transferor, Emanuel 14. The difficulty for this plea is that the transfer occurred for consideration, namely the reduction in the debt by an amount set out in the transfers and which exceeded the true value of the land. The transferees were not volunteers.

[1185] Lastly it is pleaded that the fifth, sixth, seventh and eighth defendants took transfers of the APM land knowing that the transferors, or the directors, were acting in breach of fiduciary duty in making the transfer. This claim depends upon a proof of breach of fiduciary duty and knowledge of it by EFG.

[1186] The gravamen of the plaintiffs' submission is, I apprehend, that the directors of the DOFR companies were obliged to secure the payment of the whole of the settlement sum to the companies for the benefit of their creditors and that they were induced to neglect their duty by the payment of $4,600,000 to their nominee, Simionato Holdings. This latter point can be dismissed at once. I have dealt with the facts. There is no evidence that the payment to Simionato Holdings was intended to or did benefit any of the directors of the DOFR companies.

The first point can also be disposed of briefly. The directors could not insist upon the payment of any particular sum to the companies. There had to be a division between the companies and Mr Emanuele. The directors could do no more than argue for what, in their judgment, was the amount necessary for them to compromise with their creditors in the context of an overall settlement with creditors by the companies and Mr Emanuele who was guarantor of a very large part of their debts.

[1187] The test for determining whether directors' fiduciary duty, in relation to business decisions, has been breached is whether:

> 'An intelligent and honest man in the position of the director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.' (per Pennycuick J in *Charterbridge Corp Ltd v. Lloyds Bank Ltd* [1970] Ch 62 adopted in *Reid Murray Holdings Ltd (in liq) v. David Murray Holdings Pty Ltd* [1972] 5 SASR 386 at 402)

Moreover:

> 'Directors in whom are vested the right and duty of deciding where the companies' interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.' (per Barwick CJ, McTiernan and Kitto JJ in *Harlows Nominees Pty Ltd v. Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493)

[1188] The plaintiffs submit (their paragraph 21) that when a company was insolvent or was approaching insolvency its directors owed a duty to its creditors not to prejudice their interests by keeping its property inviolate and available for the payment of the creditors. Reference was made to *Winkworth v. Edward Baron Development Co Ltd* (1987) 1 All ER 114. It is this notion which appears to underpin much of this part of the plaintiffs' case. Lord Templeman's remark in *Winkworth* has been rejected by the High Court. In *Spies v. The Queen* (2000) 201 CLR 603 at 636-7 it was said that statements in cases, including *Winkworth*:

> '… came within Professor Sealy's description of … "words of censure directed at conduct which anyway comes within some well- established rule of law, such as the law imposing liability for misfeasance, the expropriation of corporate assets or fraudulent preference" … Hence the view that it is "extremely doubtful" whether Mason J "intended to suggest that the directors owe an independent duty directly to creditors" … insofar as remarks in *Grove v. Flavell* … suggests that the directors owe an independent duty to, and enforceable by, the creditors by reason of their position as directors, they are contrary to principal and later authority and do not correctly state the law … furthermore, the mere fact that a transaction with a company may have adverse consequences for the creditors of the company does not constitute a defrauding of those creditors, even if it is done dishonestly.'

[1189] I am not satisfied that the decision of the directors of the DOFR companies to accept $700,000 as their share of the settlement sum necessarily involved a breach of their fiduciary duty to the companies. For the reasons expressed earlier in this judgment I cannot conclude that the directors' decision was self-evidently inimical to the interests of the companies. One of the difficulties is that the plaintiffs did not adduce any evidence from the directors, or concerning their deliberations. It is not as though they lacked the resources to do so. They conducted public examinations of the directors, their solicitors, accountants and advisors and employees between July 1995 and May 2000. See Exhibit 415. Many of the examinations extended over days. The plaintiffs led no evidence as a result of their examinations to throw light upon the circumstances in which the directors of the DOFR companies acted as they did. The plaintiffs appear to be content to rest their case upon the bare facts that $4,600,000 was paid to Simionato Holdings rather than the creditors of the DOFR companies. Given the circumstances this is an insufficient basis for a finding of breach of fiduciary duty.

[1190] Whether or not the directors breached their fiduciary duty, there is no basis for a finding that EFG, by its officers, knew of such a breach and participated in it. It is said that (para 681, 682 of the general submissions) EFG and its solicitors were aware of the ‘conflict of interest and duty on the part of Giuseppe Emanuele and the companies … no consideration seemed to have been given to the ethnicity [*sic*] of the transaction … the most extraordinary of lapses …’ The occasion referred to is the meetings of 2 March 1995. By then the question of Mr Emanuele’s conflict of duty and interest had disappeared by reason of his resignation as a director which took with it his obligation to act in the interest of those companies. He was then free to act in his own interest. That is how the solicitors saw it at the time. Knowledge of what was said at the meetings of 2 March does not show knowledge of any breach of fiduciary duty by the directors of the DOFR companies.

[1191] The plaintiffs place reliance upon the decision of the full court of the Supreme Court of South Australia in litigation brought by Mr Macks against Liddan and others in which Mr Macks sought successfully to recover money paid to Simionato Holdings and the value of property transferred to Liddan pursuant to the Simionato Holdings deed. The claim succeeded on the basis that the directors of the DOFR companies should have ensured that the payment to Simionato Holdings went instead to the companies, and that the payment was a deliberate diversion of assets undertaken to defraud their creditors.

[1192] The essence of the reasoning appears to have been that the offer of payment of the entire settlement sum was an opportunity available to the DOFR companies whose directors acted in breach of fiduciary duty in not securing the whole sum for the companies. The principal judgment was given by Perry J with whom Cox and Debelle JJ agreed, giving short reasons of their own. The case is *Addstead Pty Ltd (in liq) v. Liddan Pty Ltd* [1997] 70 SASR 21. Perry J said (42-44):

> ‘Instead of the Emanuel group receiving the settlement moneys on offer from EFG, which was clearly intended by both parties, having regard to my summary of the negotiations as at 15 February 1995, almost all of the settlement moneys were diverted away from the Emanuel group to be disposed of by Mr Joe Emanuele and for his benefit. … One wonders … what could properly have prompted a public company … gratuitously to pay several million dollars at the direction of the managing director of a group of companies indebted to them … in excess of $186,000,000 as a gesture made in recognition of a pre-existing commercial relationship … The answer emerges from the circumstances … in particular the course of events

> after the middle of February 1995 can only be explained on the footing that there was a deliberate decision taken to divert most of the settlement moneys to Mr Joe Emanuele for his benefit, at the expense of the creditors of the Emanuel group, and that that diversion be disguised by separating out the elements of the transaction into the three deeds to which I have referred. … The transaction was nothing but a transparent fraud on the creditors of the Emanuel group, and the participation by the directors of the group amount to a gross breach of the fiduciary and other duties which they owed. (Reference was then made to *Grove v. Flavell* which has since been overruled) … It is nothing to the point that at a late stage Mr Joe Emanuele resigned as director of some (but it is important to note not all) of the companies in the Emanuel group. Not only did he continue to owe duties as a director of the companies from which he did not resign, but a director cannot avoid a finding of a breach of fiduciary duties owed to a company by bailing out of the directorship …'

[1193] Despite the strong terms in which the judgment is expressed it is apparent that the Supreme Court of South Australia did not have put before it all the facts which have been ventilated in this action. Moreover it appears that counsel for Liddan did not bring the court's attention to crucial factors, the oversight of which leads me to respectfully conclude that had they been provided the case would have been decided differently.

[1194] When the court referred to 'the Emanuel group' it was referring to the 65 companies which were joined as plaintiffs, presumably the same plaintiffs which have been joined in this action. The reference to Mr Emanuele resigning from some but not all of the companies is, obviously enough, a reference to his resignation from what I have called the DOFR companies (see p 24). The matter was not the subject of particular evidence before me but I am content to accept that Mr Emanuele remained a director of the thirtieth to the sixty-fifth plaintiffs. At p 27 of the report his Honour recited that during the course of the litigation, in the Supreme Court of Queensland, prior to 27 February 1995:

> 'Various negotiations were taking place with a view to reaching an overall settlement between EFG and the Emanuel group. … An understanding of the course of those negotiations is important in order to expose what … the learned trial judge correctly found to be a carefully executed fraud on the creditors of the Emanuel group.'

What is overlooked is the fact that EFG did not seek to reach a settlement with all 65 plaintiffs. Its offer was directed only to the first 29 plaintiffs (initially 27) *and Mr Emanuele*. Mr Emanuele was not regarded in the judgment as part of the Emanuel group, but he clearly was included in all the offers.

[1195] There are other indications in the judgment that it proceeded on the basis that EFG's offer was addressed only to the Emanuel group of 65 companies. At 35-36 Perry J said of the course of negotiations:

> 'The Emanuel group emphasised again and again … that it needed a substantial amount to pay pressing unsecured creditors and the

> proposals for settlement … were clearly designed to generate sufficient funds in the hands of the Emanuel group to address that need. … At no time was it contemplated by any offer put by either EFG or by the Emanuel group or in the response to any offer put by either, that there would be a payment of any kind to Mr Joe Emanuele personally.'

[1196] On this appreciation of the facts the decision was, with respect, correct. The court's attention was not drawn to the fact that the offer, particularly that constituted by the draft deed of 6 February, was one to 27 companies together with Mr Emanuele personally, and it was contemplated that there would be a payment of some kind to him personally. The understanding on which the judgment was predicated, that there was an offer, or an opportunity for the companies, to be paid the full amount which the directors should have accepted for the companies instead of diverting it to one of their number, is not that which has been proved in evidence before me.

[1197] It is pointed out that the decision of the Full Court has been accepted as correct by the authors of *Equity: Doctrines and Remedies* by Meagher, Gummow and Lehane 3rd Edition para 5-090. However it is cited as authority for the proposition that 'a director … cannot avoid liability by resigning in order to do that which, had he not resigned, would have been a breach of duty'. The proposition is undoubted and the case, upon the facts found, made the principle applicable. On the fact proved before me Mr Emanuele did not resign to take advantage of an offer made only to him in his capacity as director of the DOFR companies. He resigned to avoid a conflict of interest and duty in the acceptance of an offer made to him in his personal capacity and to companies of which he was a director. Moreover he resigned as a director of all the companies to whom the offer was addressed. The remaining companies of which he remained a director were never included in the offer and could never have participated in it.

[1198] For these reasons I am not persuaded by the decision in *Addstead* to conclude that the directors of the DOFR companies were in breach of their fiduciary duty in acting as they did.

Breach of Statutory Duties

[1199] The alleged breach of statutory duties is put forward on several bases. The first is that EFG by its named officers were *de facto* directors of the Emanuel group during the subsistence of the 1995 Scheme and that they caused or permitted the Emanuel group to engage in the scheme. They therefore contravened the duties contained in s 232 of the *Corporations Law*. The second basis is that EFG, which became a mortgagee in possession of the property of Emanuel 14 on and after 5 December 1994 thereupon became an officer of Emanuel 14 and subject to the same statutory duties as a director of the company owed under s 232. Then it is said that Messrs O'Grady, Crosby, Jaenke and Booker or some of them caused or permitted the Emanuel group, including Emanuel 14, to engage in the 1995 Scheme. In so doing EFG committed a contravention of the statutory duties found in the section.

[1200] The third basis is a claim that EFG became liable as an accessory for breaches of s 232 by the Emanuel Family Directors of the Emanuel group 'by causing or assisting the first to twenty-ninth plaintiffs to engage in and implement the 1995 Scheme.'

[1201] The fourth basis again rests on accessorial liability, this time for insolvent trading by the Emanuele family directors which caused the Emanuel group to enter into the 1995 Scheme part of which was incurring a debt by the entry of judgment on 27 February. It is said that by permitting this event to occur the Emanuele family directors contravened s 588G and that EFG and Messrs Crosby and O'Grady were involved in the contravention by causing or assisting the first to twenty-ninth plaintiffs to engage in and implement the 1995 Scheme.

[1202] The plaintiffs rely principally upon subsections 2, 4 and 6 of s 232 which provides:

> '232(1) In this section:
>
> "Officer" … means
>
> (a) A director … of the corporation
> (b) A receiver, or receiver and manager, of property of the corporation, or any other authorised person who enters into possession or assumes control of property of the corporation for the purpose of enforcing any charge;
> (c) …
>
> (2) An officer of a corporation shall at all times act honestly in the exercise of his or her powers in the discharge of the duties of his or her office.
>
> (4) In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.
>
> (6) An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.'

[1203] Speaking of the subsections as they appeared in the *Companies Code* Dawson J said in *Chew v. The Queen* (1991-1992) 173 CLR 626 at 641-3:

> '… Subsection 1 … requires an officer … of a corporation to act honestly in the exercise of his powers and the discharge of the duties of his office. … In *Marchesi v. Barnes* [1970] VR 434 Gowans J concluded that, in requiring a director to act honestly, (the subsection) imposed a common-law obligation to act bona fide in the interests of the company … however, he expressed the view that for their to be a breach of this obligation … there had to be "a consciousness that what is being done is not in the interests of the

> company, and deliberate conduct in disregard of that knowledge … I cannot, with respect, equate dishonesty in the context of (subsection 1) with mere impropriety. As I have said, the use of power for an impermissible purpose, viewed objectively as it should be, may be improper, but it is not necessarily dishonest …
>
> The offence created by … failing to exercise a reasonable degree of care and diligence in the exercise of an officer's powers and the discharge of his duties – does not seem to import a mental element, the test being limited to what may reasonably be expected of a director in the circumstances. …'

His Honour pointed out (643) that the obligation contained in subsection 6 of the *Corporations Law*, making improper use of position, 'does expressly declare an intention to cause a particular result to be an element of the offence created …'

[1204] The plaintiffs rely upon the second part of the definition of "officer" to submit that EFG, having gone into possession of Emanuel 14's land in December 1994 thereupon became an officer of Emanuel 14. The first defendants develop a submission that that part of the definition of "officer" which extends to 'any other authorised person who enters into possession or assumes control of property of the corporation' should not be construed as applying to a mortgagee who goes into possession of mortgaged property. The submission is that that extended part of the definition (which was added by amendment in 1983 and removed in 1999) should be read *ejusdem generis* with the preceding identified genus of persons who are declared to be officers, namely receivers, or receivers and managers, of property of the corporation. The point about people in this category is that they are appointed to act on behalf of the company. The expanded class of persons who become officers must be, it is submitted, those who also enter into possession or assume control of the corporation's property on its behalf.

I accept the submission, generally for the arguments advanced in support of it and particularly on the ground that mortgagees and mortgagors have opposing interests and a mortgagee is, within limits, entitled to prefer its interests to those of the mortgagor where they conflict. See *Forsythe v. Blundell* (1973) 129 CLR 477 at 493-4 per Walsh J. A mortgagee in possession of the property of a corporation entitled to prefer its opposing interest to that of the mortgagor cannot, I think, have been intended to be an officer of the corporation owing primary allegiance to the company.

[1205] If this view be wrong and a mortgagee in possession is by virtue of s 232(1)(b) an officer of the company the ambit of the remaining subsections is of limited application. The duties imposed by the section arise in the exercise of the powers of the officer and in the discharge of the duties of the office. I would think it clear that, if a mortgagee in possession is an officer, it only exercises powers for the purposes of enforcing the charge pursuant to which it took possession, and the duties are only to enforce the charge. The obligation to act honestly and with reasonable diligence, and not to make improper use of position are limited to conduct involved in enforcing the charge.

[1206] Lastly it is necessary to refer to s 79 of the *Corporations Law* which provides:

> '… A person is involved in a contravention if, and only if, the person:
>
> (a) Has aided, abetted, counselled or procured the contravention;
> (b) Has induced … the contravention;
> (c) Has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
> (d) Has conspired with others to effect the contravention.'

[1207] Because of the way the plaintiffs framed their final submissions it is possible to deal briefly with some of the claims that EFG is involved in a breach of s 232.

The first basis, namely that EFG is liable as *de facto* director of the Emanuel group, fails because of the findings already made in Section II of the reasons. At no time was EFG or any of its officers *de facto* director of any of the Emanuel group.

The claim also fails on the ground that the plaintiffs have not made out a contravention of the duty to act honestly in the interests of the companies by their directors for the same reason that I found the plaintiffs had not proved breach of fiduciary duty with respect to becoming a party to DOFR.

[1208] The third basis was that EFG, by its officers, was involved in a breach of the statutory duties by the Emanuele family directors, relying upon the provisions of s 79 of the *Corporations Law*. This claim fails for the reason last mentioned, that it has not been shown that there was a breach of duty by the directors in which EFG could have participated. Secondly, before a person can become involved in a contravention by any of the means specified in s 79 it must be shown that the person intentionally aided, abetted, counselled or procured a contravention or induced the contravention. To be knowingly concerned in the contravention the person must have knowledge of the essential elements which constitute the contravention. Likewise to form the necessary intention he must have knowledge of those essential elements which make up the contravention. See *Yorke v. Lucas* (1983-1984) 158 CLR 661; *Edwards v. The Queen* (1991-1992) 173 CLR 653 at 657.

[1209] If there were a breach of the statutory duty by the Emanuele family directors of the DOFR companies to act honestly in the best interests of the companies, the breach must presumably consist of some agreement or some compact with Mr Giuseppe Emanuele to divide the settlement sum in such a way as to allow the bulk of it to go to Simionato Holdings and for a purpose other than paying creditors who were also creditors of the company. The plaintiffs have not proved there was such a compact. I have already rehearsed the evidence. The plaintiffs have certainly not proved that any officer or solicitor of EFG knew of such a compact. The evidence I have outlined and accepted shows that Messrs Elliott, Perrett and O'Grady all believed that the division of the money was sensible and that the payment to Simionato Holdings would be used to compromise with creditors for the benefit of both Mr Emanuele and the DOFR companies in circumstances where the offer had been made to those two separate interests.

[1210] Accordingly this claim also fails.

[1211] The claim based on liability for involvement by EFG in insolvent trading can likewise be disposed of quickly. The allegation is that while the Emanuel group was insolvent the directors of the companies ‘entered into the 1995 Scheme which had as part the acknowledgment and entry of the judgment debt and at the time there were reasonable grounds for suspecting that the companies in the Emanuel group were insolvent as the Emanuele family directors knew or should have been aware’. The argument goes on that by causing or permitting the DOFR companies to engage in the 1995 Scheme EFG by its officers as *de facto* director of the companies breached the duties imposed by s 588G of the *Corporations Law*. Alternatively it is said that EFG was involved in the contravention of the section committed by the Emanuele family directors. See paras 280-283 of the statement of claim.

[1212] This claim cannot succeed because I have found there was no agreement between EFG and the DOFR companies concerning the entry of judgment. Judgment was obtained by the unilateral pursuit by EFG of its legal rights.

[1213] The claim also founders because of my findings that EFG and its officers did not become *de facto* directors of the Emanuel group.

[1214] Lastly the claim is answered by a consideration of the terms of s 588G which show that there was no contravention of it by the Emanuele family directors, let alone by EFG. The section provides:

> ‘This section applies if:
>
> (a) A person is a director of a company at the time when the company incurs a debt; and
> (b) The company is insolvent at that time …
> (c) At that time, there are reasonable grounds for suspecting that the company is insolvent …
> (d) …
>
> 588G(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:
>
> (a) The person is aware at the time that there are such grounds for so suspecting; or
> (b) A reasonable person in a like position in a company in the company’s circumstances would be so aware.’

It is essential to the operation of the section that the company incur a debt in the circumstances described. The entry of judgment against the Emanuel group on 27 February 1995 did not involve the companies ‘incurring a debt’. The judgment was a record of the pre-existing debt and provided means by which payment of it might be enforced, but he did not create a debt where none had previously existed. The right to obtain judgment existed only because there was a debt which had to be proved before judgment could be obtained.

[1215] This leaves the claim based on liability arising from EFG’s position as an officer of the DOFR companies by reason of its being a mortgagee in possession of the property of a number of the companies in the Emanuel group. It is apparent from the plaintiffs’ final submissions that this is their real point. They argue (paras 675-683 of General Submissions Vol 4):

> 'Emphasis is placed on the fact that the legal advice upon which the EFG group were operating included advice that upon entry into possession (EFG) would assume the duties of an officer … The advice which had been given on 5 December 1994 to EFG and upon which EFG was acting was at section 232 would catch a mortgagee in possession … One would have expected to see some sign that (EFG) was attentive to its obligations under section 232 … There is no sign that it ever gave thought to what those duties might me [*sic*] … On 2 March 1995 both EFG and its solicitors were conscious of the question of conflict of interest and duty on the part of Giuseppe Emanuele and the companies … no consideration seems to have been given to the ethnicity [*sic*] of the transaction from the point of view of an officer of Emanuel 14 … This … is the most extraordinary of lapses. The advice was given by Elliott and Byrne … O'Grady and the solicitors were familiar with … the duties under section 232 … One has to ask: how on earth did this not surface in the consciousness of all these people? The answer can only be … that EFG … was so thoroughly determined to reach the settlement … that it … didn't care about such matters … The position is that EFG and its solicitors knowing that the division of the spoils … was a source of a potential breach of interest and duty knowingly assisted in the arrangements which perfected the breach …'

[1216] The argument is seriously flawed. Before dealing with them reference should be made to the letter from Clayton Utz of 5 December 1994 to which all of Messrs Elliott, Perrett and Byrne contributed. It was a general letter of advice covering a number of topics. On the question of the responsibilities of a mortgagee in possession it was said:

> 'Generally mere negligence or carelessness should not give rise to a claim by a mortgagor. However this position has become a little unclear since the … *Corporations Law* has included a mortgagee in possession within the definition of an officer of a corporation for the purposes of section 232 … Section 232(4) … provides that an officer … must exercise the degree of care and diligence that a reasonable person in a like position … would exercise.'

Mr O'Grady, no doubt, read the letter.

[1217] The plaintiffs' submissions should be rejected for a number of reasons. First there was no apparent conflict of interest and duty involving Mr Giuseppe Emanuele and the companies on 2 March 1995. The conflict between Mr Emanuele's interest and his duty had been resolved by his resignation of the offices which gave rise to the duty. There was certainly a conflict of interest between Mr Emanuele and the companies with respect to the division of the money but that was a conflict of an ordinary commercial kind which was resolved by negotiation between the parties separately represented. By the terms of the offer EFG made earlier both had a right to argue for a part of the sum. Second, the submission depends upon EFG, as mortgagee in possession, being an officer of the DOFR companies. The plaintiffs seem to assume that this point is precluded against EFG because of the letter of advice, but the letter gives rise to no estoppel and does not preclude my determination that, as a matter of law, EFG was not an officer of the companies.

Third, even if it were an officer, its office was that of mortgagee in possession and its duties were to enforce the mortgage. It was not exercising that office nor performing that duty when it negotiated and compromised with the DOFR companies. In negotiating and reaching settlement EFG did not exercise any powers as a mortgagee or in any other capacity as an officer of any DOFR company; it did not use its position as an officer of any of the companies for any of the purposes prohibited by subsection 6 nor did it make use of its position as an officer improperly to gain an advantage or to cause detriment to the DOFR companies.

That, presumably, would have been the answer to the rhetorical question posed by the submissions had it been directed to any of the witnesses.

[1218] It should, perhaps, be pointed out that this basis for liability was not pleaded by the plaintiffs. The only basis for alleging that EFG became an officer of Emanuel 14, or the other companies, was that it became *de facto* director in the manner already discussed. The point seems to have eluded the plaintiffs until trial. It is therefore right to regard the criticism of Messrs O'Grady, Perrett, Byrne and Elliott for not adverting to the point in 1995 as unfair, as the first defendants do.

Despite its not being pleaded, I have dealt with the point because it was fully argued and the facts on which it was based were not in contest.

[1219] To the extent that this claim involved an assertion that EFG knowingly assisted in the breach of duty by the directors of the DOFR companies, it is met by the considerations I have discussed previously. A breach by those directors has not been proved and knowledge by EFG of such a breach has not been established.

[1220] There appears to be a confusion of concepts in the plaintiffs' submissions. It is said that EFG knowingly assisted in the arrangements which perfected a breach of duty by the directors of the DOFR companies. This is accessorial liability, but I apprehend the real case to be that EFG was itself an officer of the DOFR companies and breached the duties it itself owed to act honestly in the best interests of the company and to use reasonable care and diligence in the performance of its duties. If the plaintiffs contend for liability on the basis of accessorial liability the point is met by the considerations I have previously discussed: there is no proof that the directors of the DOFR companies were in breach of their statutory duties and knowledge by EFG in any such breach has not been established.

[1221] It follows that the plaintiffs have failed to make out any claim against EFG on the basis of breach or involvement in breach of statutory duties contained in s 232.

Conspiracy

[1222] The plaintiffs succinctly describe this part of their case in their closing submissions as:

> '… A combination on the part of Crosby, O'Grady and their companies in … EFG to achieve their object which would inflict harm on the companies (by the removal of their assets) and by

> unlawful means (offering a bribe to the directors, in the form of private houses and cars).'

The object referred to was to obtain control over or title to the APM land. (See para 791, 786 of General Submissions, Vol 4)

As pleaded, the case of conspiracy was that EFG together with Messrs O'Grady and Crosby were parties to the arrangement which constituted the 1995 Scheme which, as noted previously, had as its purpose dividing the assets of the Emanuel group between EFG and the Emanuele family directors and their lawyers, and with the intention of injuring the Emanuel group and its creditors (see para 263 of the statement of claim). This last allegation can be ignored. The plaintiffs cannot complain of a conspiracy to injure someone other than themselves i.e. their creditors, but the pleading is indicative of a misplaced preoccupation with the Emanuel group's creditors.

[1223] I accept the first defendants' analysis of the legal principles applicable to conspiracy. There must be:

> (a) An agreement or combination between defendants or defendants and others.
> (b) A common intention or purpose held by the conspirators to injure the plaintiff.
> (c) An agreement or understanding among the conspirators that unlawful means would be used to inflict injury on the plaintiff.
> (d) The performance of the agreement.
> (e) Resulting damage to the plaintiff.

[1224] There are, of course, "lawful act conspiracies" but the pleadings in this case make it clear that the conspiracy alleged was to damage the plaintiffs by unlawful means. Before a conspiracy is made out it must be shown that the predominant motive for combining was to inflict harm upon the plaintiff and that motive must be shared by all the conspirators. See *Fatimi Pty Ltd v. Bryant* [2002] Aust. Torts Reports 81-677. The unlawful means which the conspirators agree should be utilised to damage the plaintiff must be an act which constitutes a criminal offence, or tort or breach of contract. See *Coomera Resort Pty Ltd v. Kolback Securities Ltd* (McKenzie J Supreme Court of Queensland 20 February 1998) at 37 citing *McKernan v. Fraser* (1931) 46 CLR 343 at 378 and *Williams v. Hursey* (1959) 103 CLR 30 at 122.

[1225] The case on conspiracy fails at every point. The evidence of the negotiations which I have set out at some length establishes convincingly that there was no combination between members of the Emanuele family, EFG by Messrs O'Grady and Crosby, and the solicitors for their respective interests. There was, as the narrative shows, negotiations between parties with opposing commercial interests which resulted in an agreement which resolved those differences. The 1995 Scheme as pleaded is elaborately complicated and involves many inter-connecting parts. I have dismissed the notion that there was agreement to enter the judgment, or to fix the amount of it at an artificially high amount, and I have rejected the allegation that the lands were transferred for an undervalue which had been arbitrarily fixed. I have also dismissed the claim that the Emanuele family directors were bribed to procure their consent to the execution of the deeds and, in particular DOFR, and in so doing breached their statutory and fiduciary duties to the companies.

Nothing is left of the 1995 Scheme. The allegation that the scheme involved a combination of the persons identified must consequently disappear.

[1226] The evidence does not sensibly allow a finding that all the alleged conspirators shared a common intention to injure the DOFR companies. It is submitted that Messrs Ferrugia, Purcell and Winter were corrupted by the payment of their fees. There seemed scant factual justification for such a statement but, accepting it to be true, it does not follow that those gentlemen all intended to harm the plaintiffs. The more obvious inference is that they intended to benefit their firms and themselves. Nor is it realistic to infer that Mr O'Grady intended to damage the DOFR companies. It was not put to him in cross-examination that such was his intention. The facts do not readily give rise to the inference. I have no doubt Mr O'Grady intended to advance the cause of EFG by his negotiations with the DOFR companies and Mr Emanuele. It does not follow that he intended to harm his opponent in the negotiations. Indeed it is clear from the terms of the conversation between him and Mr Perrett that he believed there was an element of benevolence in EFG's treatment of the DOFR companies. Mr O'Grady and his solicitors expressly recognised that the DOFR companies and Mr Emanuele had no claim on them. The payment was, in a real sense, a gratuity which EFG was willing to pay to achieve the unimpeded realisation of its securities. The fact that the APM land was transferred at what was believed to be fair market value following upon independent valuations makes it difficult to believe that EFG intended to damage the companies which would receive a reduction in their debt by the transfer.

[1227] The law requires an intention to damage the plaintiff. It is not enough that such harm was an incident of their combined action. In *McWilliam v. Penthouse Publications Ltd* [2001] NSWCA 237 Mason P (with whom Handley and Hodgson JJA agreed):

> '[12] An agreement to do an unlawful act, such as a tort or breach of contract, will be an actionable conspiracy if carried into effect and causative of damage. It is no defence that the agreement was for the primary … purpose of furthering or protecting the defendants' own legitimate interests if the plaintiff proves that each defendant in such a conspiracy acted with intent to injure the plaintiff …
>
> [13] These principles emphasise that a plaintiff … must establish intent to injure the plaintiff. It is not enough to establish that the acts of the conspirators necessarily involved injury to the plaintiff or that the plaintiff was a person reasonably within the contemplation of the conspirators as a person likely to suffer damage …'

This case would seem to fall within the ambit of those remarks if one accepted that the terms of DOFR wrought damage on the companies. I do not think they did but the conspiracy could only be made out if the plaintiffs proved, as they have not, that the alleged conspirators combined to inflict harm on the plaintiffs.

[1228] EFG, by its officers and solicitors, knew that all of the assets of the DOFR companies were secured to EFG and were insufficient in value to meet their liability to EFG. It was entitled to exercise rights as mortgagee, including those of foreclosure, to obtain title to the APM land. In those circumstances the transfer of the land for fair market value cannot have been intended to damage the Emanuel group.

[1229] It is to be noted that the plaintiffs formulation of the conspiracy does not contain the assertion that EFG intended to damage the Emanuel group. Rather it is said that their combination was to achieve their object which would inflict harm. This is the confusion to which Mason P drew attention.

[1230] It is not necessary to consider this cause of action any further. The view I have take of the facts makes conspiracy untenable. It is likewise unnecessary to consider, whether if a conspiracy has been proved, the result would have been an avoidance of DOFR or whether damages were the only remedy. In that event it is hard to see how the DOFR companies were worse off, monetarily.

Duress, Unconscionability and Undue Influence

[1231] Although the statement of claim seeks orders setting the 1995 Scheme aside on the grounds of duress, unconscionability and undue influence this basis for relief is not advanced in the plaintiffs' final submission. The findings of fact sought by the plaintiffs do not include any finding that DOFR, or the other deeds, were the product of duress, unconscionability or undue influence. I take it then that these claims have been abandoned, and rightly so in the light of the evidence. I will indicate very briefly why that is so.

[1232] The principles for determining whether an agreement should be set aside for economic duress (which is the relevant category here) are found in *Crescendo Management Pty Ltd v. Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-6:

> '… The law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate. … The proper approach … is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.'

[1233] The reference by McHugh JA to 'unconscionable conduct' may be misplaced following the decision of the High Court in *Australian Competition and Consumer Commission v. C G Berbatis Holdings Pty Ltd* (2003) HCA 18 which has considerably restricted the class of persons in respect of whom conduct may now be regarded as unconscionable. It may well now be the law that economic duress requires illegitimate pressure by unlawful conduct, and what was formerly encompassed by the notion of unconscionable conduct will be insufficient to constitute economic duress.

[1234] The plaintiffs case on duress, unconscionability and undue influence depends entirely upon inferences to be drawn from the terms of the contract attacked and the evidence generally concerning the disparity of the financial position between the Emanuel group and EFG. There is no evidence of pressure or inducements actually applied to Mr Emanuele and his children. There was no evidence from them that they were in any sense overborne or coerced by threats, inducements or the like to give their agreement to the deeds. Although there are allegations of corruption and subornation they are to be inferred from the general evidence I have mentioned.

[1235] One thing which is clearly established by the authorities is that inequality of bargaining power is insufficient to give rise to a successful plea of duress or undue influence or unconscionable dealing. In *Berbatis* Gleeson CJ said (para 11):

> ‘A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.’

[1236] In *Westpac Banking Corporation v. Cockerill* (1998) 152 ALR 267 at 290 Kiefel J pointed out that relief would not be granted only on the basis of an inequality, even a great inequality, of bargaining position. Those comments were approved by the Court of Appeal in *National Australia Bank Ltd v. Freeman* (2001) QCA 473 at para 44. Giles J remarked in *Equiticorp Financial Services Ltd (NSW) v. Equiticorp Financial Services (NZ)* (1992) 29 NSWLR 260 at 297:

> ‘… A consistent theme in the cases is that commercial pressure, even to the point where the party the subject of the pressure is left with little choice but to act as he did, is not of itself sufficient.’

[1237] The plaintiffs fare no better if regard is had to the doctrines of unconscionable dealing which, for the time being, has now been settled by the High Court in *Berbatis* which decided that relevant disadvantage, exploited for the benefit of the exploiter so as to render the dealing unconscionable, requires an inability or diminished ability in the exploited to make a judgment about what is in his interests. According to Gleeson CJ:

> ‘It was the inability of a party to judge his or her own best interests that were said by McTiernan J in *Blomley v. Ryan*, and again by Deane J in *Amadio*, to be the essence of the relevant weakness. … Unconscientious exploitation of another’s inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. … There was no lack of ability on their part to make a judgment about anything. Rather, there was a lack of ability to get their own way. That is a disability that affects people in many circumstances in

> commerce and in life. It is not one against which the law ordinarily provides relief.'

In their joint judgment Gummow and Hayne JJ said:

> '… The litigation was conducted on the footing that the facts fell within that well established area of equitable principle concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other. In such situations … equity intervenes not necessarily because the complainant has been deprived of an independent judgment and voluntary will, but because that party has been unable to make a worthwhile judgment as to what was in the best interests of that party.'

Having referred to *Amadio* their Honours concluded:

> '(Mason J) went on to emphasise the need for the plaintiff seeking relief to establish the taking of unconscientious advantage of the plaintiff's disabling condition or circumstance. It will be apparent that the special disadvantage of which Mason J spoke … was one seriously affecting the ability of the innocent party to make a judgment as to that party's own best interests.'

[1238] So understood the doctrine of unconscionable or unconscientious dealing can have no application to Mr Emanuele or his children. The evidence is silent as to their capabilities. The plaintiffs have not proved that they possessed any particular disadvantage which diminished their ability to judge what was in the best interests of the companies they directed. The evidence as to Mr Emanuele positively shows he had no such disadvantage.

[1239] Undue influence gives the plaintiffs no better prospects of setting aside DOFR. The joint judgment of Gaudron, Gummow and Kirby JJ in *Bridgewater v. Leahy* (1998) 194 CLR 457 at 478 adopted with evident approval the description of Sir Anthony Mason:

> 'My understanding of undue influence … is that it denotes an ascendancy by the stronger party over the weaker party such that the relevant transaction is not the free, voluntary and independent act of the weaker party. In other words, it is the actual or presumed impairment of the judgment of the weaker party that is the critical element in the grant of relief on the ground of undue influence.'

At the risk of being repetitious I point out that there is no evidence that the judgment of Mr Emanuele or any of his children was impaired in any way or that they were 'the weaker party' in any respect other than their financial position which, as has been seen, is insufficient to justify setting aside transactions on this ground.

[1240] The first defendants developed submissions (para 43 – para 94 in section 24 of their submissions "*Part 1 The 1995 Settlement*") in support of their resistance to the claims based upon duress, unconscionability and undue influence. I accept those submissions but think it unnecessary to repeat the substance of them. It is enough to point out that the history of the negotiations between the Emanuel directors and EFG show them to have been formal and distant with no opportunity for EFG's officers to overbear, coerce or induce the Emanuel directors personally in their decision-making processes. As well, as is apparent, the Emanuel group had access to, and utilised, their own professional advisors, both accountants and lawyers. There is nothing in this part of the case except inequality of bargaining position.

Conclusion

[1241] I have written enough to indicate that I find no substance in the claims to have DOFR, the Simionato Deed and the Giuseppe Emanuele Deed set aside. The plaintiffs have failed to make out any part of their pleaded 1995 Scheme and failed to show that the deeds are on any ground amenable to being set aside.

The plaintiffs advanced a circumstantial case in support of their claims. The circumstances and the evidence for them are collected in Part II of the plaintiffs' submissions, volumes 4 and 5. The defendants called direct evidence probative of the facts relevant to the making of the three deeds and the litigation which ended in judgment for EFG against the Emanuel group and Mr Emanuele. I have accepted that evidence, really without reservation. Not only did the witnesses appear credible their evidence was supported by contemporaneous documents. Whatever strength the plaintiffs' circumstantial case had it was answered by the first defendants credible testimony about what was said and done by those who made the agreement embodied in the three deeds. Accordingly it is unnecessary to lengthen these reasons by dealing with each of the circumstances relied on by the plaintiffs to argue for an inference that there was conspiracy, corruption and an attempt to defraud on the part of so many people. The plaintiffs' submissions do not form a coherent argument nor do the circumstances, such as they are, support the plaintiffs' case. The circumstances are impossible to summarise. They depend upon a selective reading of the evidence with a determination to make it conform to the template of the plaintiffs' belief about the case. I will, however, mention some of the circumstances to show why I do not accept that they support the inference contended for. I deal first with the two which figured most prominently in the plaintiffs' cross-examination.

Confidentiality

[1242] The plaintiffs argue that the inclusion of confidentiality clauses in the three deeds and the subsequent conduct by EFG in trying to enforce those clauses show that EFG sought to conceal the terms of the transaction found in the three deeds, and that that desire is evidence of a guilty knowledge that the transaction was unlawful.

The circumstances are collected in Part 2 of the submission "Heads of Evidence" in Volumes 4 and 5.

The inclusion of confidentiality clauses is unremarkable. They are commonly found in commercial agreements of all kinds. Such a term was first proposed in the negotiations on 23 December 1994 when the Emanuel group sent its suggested terms for a settlement. Later, on 18 January 1995, Mr Ferrugia advised EFG that his clients were experiencing difficulty with their creditors who apparently suspected that money might be paid under a settlement and were anxious to receive some payment. Mr Ferrugia requested that the fact of, and terms of, the negotiations be kept confidential. This, too, is unremarkable.

It cannot be said that EFG was anxious to preserve the confidentiality of any settlement. The draft DOFR prepared by Mr Byrne contained no confidentiality clause. It was Mr Fraser QC who suggested the clause be inserted.

[1243] On 7 March 1995 Mr O'Grady rang Mr Elliott to tell him that he had been approached by Mr Robert Edge, the liquidator of the Farrow group from which the Emanuel group had borrowed a substantial amount of money. Mr Edge had learned of the settlement negotiations with EFG and approached Mr O'Grady for further information. Mr O'Grady told Mr Elliott that he was concerned that he might be accused of having breached the confidentiality of the negotiations (see Exhibit 463, para 627-629). Mr Ferrugia had previously emphasised the need for discretion. In a letter of 8 March 1995 covering a number of topics Mr Elliott wrote to Mr Ferrugia:

> '… We wish to draw to your attention a matter of considerable concern which has the prospect of jeopardising these negotiations. Mr O'Grady was contacted yesterday by Mr Robert Edge … to discuss the "proposed settlement" …
>
> It is you (and your client) who have emphasised the confidentiality of these negotiations and it is a matter of significant concern to our client that the confidence has been breached. Mr O'Grady does not propose meeting with Mr Edge but considers that if a settlement is to be achieved … that ought occur very quickly.'

Mr Elliott said of this letter that he used 'a certain amount of poetic licence' in the letter as retaliation against Mr Ferrugia's earlier communications which hinted at EFG's indiscretion. Mr Elliott thought he had probably gone further than Mr O'Grady had required and that the latter's 'instructions were better reflected in (saying) that he didn't wish to be accused of having breached confidentiality.' (T.8712.8-.20)

[1244] After the deeds had been executed EFG received a number of requests to produce them. EFG was, by then, bound by the deeds to retain their confidentiality and referred each request to its solicitors. The advice given cannot be criticised. The deeds were not withheld from anyone entitled to them and EFG did not take any unusual steps in response to requests for information as to the deeds. The criticism appears to be that EFG and its solicitors did not actively seek to provide copies of the deeds to Mr Carter, the administrator of the companies, and/or the ATO. I do not see in that any evidence of guilty knowledge. Mr O'Grady and Mr Perrett both made their understanding of the position clear in their evidence. Both understood that Mr Emanuele and the DOFR companies wished to negotiate with their creditors and for that to be successful a degree of confidentiality was required. The conduct of those negotiations did not concern EFG who cannot sensibly be criticised for not volunteering information it was contractually bound to keep confidential. Moreover both Mr Perrett and Mr O'Grady understood that if Mr Emanuele were unsuccessful in compromising with his creditors the terms of the deeds would become public, the companies would be wound up and Mr Emanuele would be bankrupt. Mr Perrett specifically advised Mr O'Grady that if a compromise were not reached insolvency proceedings would, probably, result in public examinations and the production of the deeds. This is exactly what happened. The terms of this discussion are quite inconsistent with a desire on the part of EFG and its solicitors to suppress the deeds to conceal their involvement in wrongdoing.

[1245] On 12 April 1995 Kelly & Co, solicitors for Mr Carter, wrote to Mr Elliott to inform him that the ATO had sought a copy of the terms of settlement agreed between the DOFR companies and EFG. The letter recorded that Mr Carter had replied that he could not reveal the terms because of the obligation as to confidentiality. The letter ended with a request that EFG waive that term 'to permit Mr Carter to disclose this information to the creditors.' On 18 April 1995 Mr Elliott wrote to Mr O'Grady to inform him of the request and to advise:

> '… There is a strict confidentiality provision in Clause 18 … in the circumstances it would seem to us that a waiver … should not be given without the expressed request from … Management and … each of the guarantors which would include Mr Emanuele. …'

Mr Elliott then replied to Kelly & Co on 20 April:

> '1. Our client, as the financier, is most mindful of the issues of confidentiality in relation to … dealings with … borrowers.
>
> 3. In this particular case the question of confidentiality is even more stringent as the terms of a commercial compromise reached with the borrower and the guarantors … contains a … strict confidentiality clause.
>
> 4. … One of the guarantors … is Mr Giuseppe Emanuele and … our client takes the view that it would require a request from all the guarantors including Mr Giuseppe Emanuele.
>
> In summary our client company without an expressed request from the borrower … and all of the guarantors is not prepared to consent to the waiver of the confidentiality provisions …'

[1246] On 22 May 1995 Kelly & Co again wrote to Mr Elliott to advise that Mr Carter was preparing a report pursuant to s 439A of the *Corporations Law*, and that he was obliged to comment in the report on the arrangements between EFG and the DOFR companies, in particular DOFR. The letter then set out the terms of what Mr Carter proposed to say and invited Mr Elliott's comments. Mr Carter's draft included reference to the deed, the payment of $650,000 under it and some of its provisions. Mr Elliott responded by letter of 22 May. One of the things he said was:

> 'We object strongly to disclosure of the terms of the deed as the deed is expressed to be strictly confidential except for the purpose of enforcement of the securities or for the purpose of enforcement of the deed. … Mr Carter … is the representative of the companies who entered into the deed … and we see no reason for granting him a waiver in relation to his obligations as to confidentiality …'

[1247] Mr Elliott explained in cross-examination that he believed EFG had a contractual obligation to maintain the confidentiality of its dealings with its secured borrowers.

He objected to the proposition put to him that he 'resisted' disclosure of the DOFR. (T.8895.12; 8896.40) It was put to Mr Elliott that it was quite unreasonable for EFG not to give Mr Carter, the administrator, a copy of the deed but the answer seemed to me quite plausible: that only if all parties to the deed agreed to waive the term as to confidentiality should it be disclosed.

[1248] It was put to Mr Elliott in cross-examination that he had not embellished his instructions, and that his letters accurately reflected Mr O'Grady's desire to keep the terms of settlement secret. Mr Elliott denied it. (T.8896.35-8897.15) My impression was that Mr Elliott was very cautious in his advice to EFG (and no doubt his other clients) and perhaps overly fastidious in protecting their rights. His letters appear to me, in this regard, to suggest a slight degree of professional smugness rather than anything else.

[1249] On 3 July 1995 Mr Perrett received a copy of a facsimile from Finlaysons who were solicitors acting on behalf of Navicio to EFG of 30 June 1995. The facsimile gave notice that Navicio had commenced proceedings in the Federal Court in Adelaide. It sought payment of 1/29th of the sum of $650,000 paid in the aggregate to the DOFR companies (of which Navicio was one). The judge before whom the application came, O'Laughlin J, made orders that EFG be served with the proceedings because it appeared that the terms of DOFR would be published in the course of the proceedings and EFG was entitled to argue that its right to confidentiality be respected.

[1250] Mr Perrett spoke to the relevant solicitor at Finlaysons to learn what the debate was about and how it involved EFG. He then spoke to Mr O'Grady on 4 July 1995 and received instructions to proceed 'as he saw fit'. Mr Perrett spoke to Mr Winter who briefed him on the nature of the proceedings and discussed with him what EFG's response would be. He told Mr Winter that to the extent to which the deed had to be disclosed by law it would be, and that provided EFG's views were respected it would not appear in the proceedings. Mr Perrett then wrote to Finlaysons on 6 July:

> '… We understand that the deed may be a relevant document in proceedings which have been taken … We further understand … the parties, and the court, were concerned that EFG … be allowed the opportunity to be heard in relation to the issue of confidentiality … We are instructed that our client does not wish to appear personally and would appreciate it if you could communicate its position to the court by tendering this letter … Our client's position is as follows:-
>
> 1. As a general proposition, our client asks that the confidentiality of the document and that the contents … not be disclosed to entities which are not parties to the deed;
>
> 2. However, to the extent that the contents of the deed need to be disclosed to non-parties as a matter of law or practice for the proper conduct of the proceedings, our client has no objection to such disclosure, subject to the imposition of reasonable conditions to maintain the confidentiality …'

The next day Mr Perrett reported to Mr O'Grady on what had happened:

'…

3. As discussed between us on Thursday, 4 July 1995 confidentiality alone is not itself a valid basis for resisting production of documents in court proceedings if those documents are otherwise relevant …

4. However, having regard to the confidentiality of the document, it as appropriate to submit that the extent to which the document was disclosed ought have restrictions imposed upon it.

5. We saw no value in incurring the costs of appearing in Adelaide …

6. Prior to writing to the solicitors for Navicio … I discussed the matter with Mr Winter … Mr Winter confirmed that the Emanuel group had no objection to the position being taken by EFG …

I should also emphasise that the present proceedings in South Australia are of no direct interest to … EFG … and the settlement arrangements … are not the subject of any attack. Apparently, the Deputy Commissioner of Taxation is anxious to establish that EFG … ought not be entitled to vote in relation to the scheme of arrangement … if EFG … do not support the proposed deeds … the arrangements will fail, an outcome which the Deputy Commissioner of Taxation is apparently anxious to achieve.

I do not … agree that there is no indebtedness between EFG … and Emanuel group … nevertheless, that is a battle to be fought between the relevant parties and we are no more than an interested onlooker.'

[1251] These letters do not indicate to me that EFG and its solicitors were relying upon the confidentiality provisions of the deeds to conceal their wrongdoing. Mr Perrett's entirely professional approach to the request for the disclosure of DOFR and the alacrity with which Mr O'Grady was prepared to leave the request entirely to be dealt with by Mr Perrett demonstrates a lack of anxiety in those gentlemen about the consequences of disclosure. This approach is entirely consistent with Mr Perrett's earlier appreciation that disputes with creditors of the DOFR companies and Mr Emanuele might result in proceedings in which the contents of the deeds would be disclosed. Mr Perrett specifically drew Mr O'Grady's attention to this possibility. I have dealt with this conversation. It cannot stand with the notion that EFG and its solicitors sought to use contractual protection from disclosure to conceal conduct which was known to be unlawful. The letter of 6 July concludes on a note of detachment and disinterest inconsistent with an appreciation of wrongdoing at risk of discovery.

[1252] One further matter should be mentioned. At the meeting of creditors for Worando Trust convened by Mr Carter on 31 May 1995 one of the creditors present asked whether:

> 'The director of any of the companies within the Emanuel group … or any company … entered into any arrangement with any of the creditors which will result in those creditors receiving any payment … in addition to that which may be received under the Deed of Company Arrangement.' (in the sum of $650,000)

Mr Winter who was present representing the DOFR companies answered that there were 'no arrangements at all.' Another creditor present at the meeting asked if the answer could be confirmed by a director of the DOFR companies. Mr Rocco Emanuele was present and said 'Yes, I did answer, I said no.' (Exhibit 257A, Tab 53)

Representatives of Thomsons, Mr Purcell and Mr Bonett were present but said nothing.

Mr Carter explained that he took care to ensure that the question and the answers were recorded because the ATO suspected that there was some form of clandestine arrangement involving the payment of money to the Emanuel group and that Mr Carter was complicit in it. The question was 'very important' and Mr Carter directed that the denials of Mr Winter and Mr Emanuele that any arrangements had been made with creditors outside the terms of the DOFR be recorded (T.3392.25-.40).

[1253] Something similar happened at the meeting of creditors of Management on 21 June 1995. Mr Macks asked Mr Carter what investigations he had undertaken to ascertain whether any incentives had been given for creditors to vote in favour of the Deeds of Company Arrangement. Mr Carter replied that he had been assured in the past that there were no such incentives but he could not 'investigate each creditor and their motives' but he had 'asked whether or not there are any other incentives and the answer that (he) got is no …' Mr Winter then volunteered 'the answer is categorically no.' Mr Carter asked Mr Emanuele for a comment and he corroborated Mr Winter's denial (Exhibit 257A, Tab 53).

[1254] It is evident that both Mr Winter and Mr Rocco Emanuele lied to the creditors present at the two meetings, and to Mr Carter. No doubt they intended by their deceit to increase the prospect that the creditors would vote in favour of the deeds. There may have been other motives. Their conduct was deplorable. It is especially regrettable that a solicitor should behave in such a manner.

[1255] The important point for present purposes is that that reprehensible behaviour cannot be attributed to EFG. There is no evidence that EFG authorised the deception or even knew about it. It is not evidence that EFG sought by deception to conceal the existence of the payment to Simionato Holdings.

"EFG Always Wanted the Land"

[1256] The heading comes from the plaintiffs' submissions and commences an argument that, such was EFG's determination to obtain title to the land that it was prepared to, and did, use unlawful means to achieve its end. The argument, and the evidence upon which it is based, is put forward as a circumstance calling for the inference of unlawful combination or other unlawful conduct.

As I have endeavoured to explain the plaintiffs' circumstantial case is met by the direct testimony of the first defendants, supported by documents, which I accept.

[1257] The plaintiffs' argument makes an illogical connection. They submit that because EFG wanted to obtain title to the APM land it must have gone about the transfer by unlawful means. There is no doubt about the first part of the proposition. The opening gambit of the negotiations in September 1993 clearly show EFG saw its interests being served by improving the value of the APM land and selling it off and that it could do that more easily if it need show no concern for the interests of the mortgagor. Mr O'Grady conceded as much in his cross-examination in a passage which assumes fundamental importance to the plaintiffs. It is found at T.8602-8604 and is reproduced in para 1006 in Volume 5 of the plaintiffs' submissions.

The second part of the proposition, that EFG must have resorted to unlawful means to obtain the land, does not follow necessarily from the first. It requires distinct proof. The course of the negotiations which reveal EFG's attempts to obtain the land clearly establishes that those attempts were lawful and were directed towards achieving a lawful transfer of the land. Moreover it appears clear that the negotiations took so long and were so difficult because they were conducted in an ordinary, honest, manner with a reluctant opponent. Had EFG truly resorted to a substantial bribe of millions of dollars to have Mr Emanuele procure his companies to transfer their land it would have happened quickly and in secret. It would surely not have involved solicitors carefully documenting every move. A mortgagee is not to be criticised only because it preferred its interests to its mortgagor's in circumstances where it did not breach any duty it owed the mortgagor and where it was not precluded, by law, from attempting to obtain a consensual transfer of the mortgaged land.

[1258] An example of the plaintiffs' approach is indicative. By a letter which is undated but would seem to have been sent on 5 November 1993 Mr Jaenke instructed Mr Gardiner, the valuer, to estimate the 'value of the site, not for mortgage purposes but as an "owner/developer" of the property.' The property in question was Mango Hill and the request followed the receipt from Mr Brannock of his concept master plan for the development of that land.

This is regarded by the plaintiffs as evidence that in November 1993 EFG had determined to become the owner of the land and develop it. The plaintiffs seize also upon Mr O'Grady's apparent inability to explain why Mr Jaenke should have written in those terms as proof of duplicity. Mr Jaenke explained things clearly in his statement, Exhibit 457 para 386. The point was whether EFG should incur the considerable cost of obtaining development approval for the land in accordance with Mr Brannock's proposal. There was no point in proceeding if the end result did not justify the expense. It was for that reason that Mr Gardiner was asked to estimate the value of the land on the basis indicated, rather than to value it on the basis of a mortgagee sale in its then state. It will be recalled that Mr Gardiner's estimate of value on the assumptions he was asked to make was $35,000,000. Mr Jaenke endeavoured to explain the terms of his letter to Mr Gardiner at T.8146.50-.60. He was not a man given to clarity of expression but I take his answer to be an attempt to repeat what he set out in his statement.

[1259] EFG's intention with respect to the APM land is the subject of record and report in a very large number of documents. They do not support the plaintiffs' case that from an early date EFG intended to develop the APM land over the long term with a view to making substantial profits. They show, rather, that EFG wished to sell the land in the shortest timeframe for the best return, understanding that to obtain such a return some of the land would have to be rezoned and/or put in a developable state and that would require both time and money. A sample of the documents should suffice to demonstrate the point.

[1260] Following the termination of Kartha's contract Mr Booker and Mr Rocco Emanuele conferred with a view to reinstating the application for development approval. Together EFG and the Emanuel group retained Brannock Humphries to prepare a concept master plan for the parcel (Exhibit 449, para 61-62). On 18 October 1993 the Emanuel committee meeting consisting of Messrs O'Grady, Crosby, Booker and Johnston met in Brisbane to consider EFG's 'specific strategies for each (APM) parcel.' The 'overall strategy' was to take advantage of the local and State governments strategic planning for Mango Hill to obtain 'fast track approvals and thus maximise *en globo* value.' The minutes note that the recission of the Kartha contract presented EFG with the opportunity to add value to the security by proceeding to obtain all necessary subdivision approvals, and noted the need to 'move quickly'. With respect to Parcel 62 it was noted that reports from town planners, engineers and valuers would be required before a decision could be made on how best to proceed 'to determine the site's potential …' With respect to Parcel 53 it was noted that it had a 12 year tree harvesting program and was therefore a 'long-term hold' but that approaches should be made to Government 'in an attempt to influence them to have the "door" left open in their planning decisions … to determine options for development …' A similar approach was suggested with respect to Parcel 52.

[1261] In September 1994 Mr Booker and Mr Jaenke prepared a security executive summary for the asset realisation meeting held on 12 October 1994. Speaking of EFG's 'exit strategy' the report noted:

> 'A number of parcels of land in south-east Queensland … are capable of being enhanced by planning feasibilities, rezonings and negotiations with Government bodies. Consultants (town planners, engineers and marketing professionals) are employed to achieve these objectives.'

Under the heading 'Estimated Realisable Value' this was said about Parcel 64:

> 'Parcel 64 which, although valued by Gardiner in June 1994 at $20m has been included … at $35m in accordance with a report … in December 1993. The report values the land at $35m assuming rezoning and approvals are obtained within two years for a development approximating the concept plan prepared by Brannock Humphries. As it is Emanuel/EGG's strategy to obtain such approval the estimated realisation of $35m has been adopted …'

Appendix A to the report lists the APM land as having an estimated realisable value of $92,633,000.

The value for Parcel 64 (assuming DCP obtained) was put at $35,000,000. This is obviously the value of the land if sold with development approvals. It is not an estimated return from a development.

[1262] The Emanuel committee comprising Messrs O'Grady, Crosby, Booker and Johnston met on 8 February 1994. The minutes show that the 'updated strategy' for Parcel 64 was reviewed. It showed that, in broad terms 'a value of Parcel 64 ranging from $35-50m … compared with an old valuation of $20m. It was reiterated that it is expected to cost $1m and take 18 months for Parcel 64 to be in a saleable condition'. The strategies for the other parcels which had been earlier proposed were accepted.

Attached to the minutes of the meeting are reports on the realisation strategies of the four major APM parcels. The declared strategy for Parcel 64 read:

> 'The property is "off the market" while the value adding process (planning) is completed. Obtain maximum value for this area of 1,100 hectares by achieving a gazetted development and control plan …'

The strategy for Parcel 62 was:

> 'To obtain maximum value … by way of having the notice of resumption for sewerage purposes … rescinded … and seeking an upgrading of the present "rural" zoning to allow for residential development.'

The strategy for Parcel 52 was 'to make representations to the office of the Co-ordinator General in an attempt not to have the land irrevocably dedicated for open space whilst EFG investigated development options.'

For Parcel 53 the strategy was:

> '… Utilising the property in a trade off with the Government for favourable consideration on Caloundra and/or Mango Hill …'

[1263] On 16 January 1995 Mr Booker reported to Mr O'Grady and Mr Crosby in detail with respect to the Emanuel group land subject to EFG securities. He concluded with an overview of strategies:

> '1. Sell the North Queensland properties, aiming for valuation or better over next six months.
>
> 2. Negotiate a commercial agreement with Softwoods for the supply of the timber. This necessitates negotiating with the relevant authorities to resolve the haul road issues on Bribie Island. Escalation of the rate of removal of trees will be sought.
>
> 3. Pursue a viable rezoning for Parcel 64 … and, thus having enhanced value, offer the property for sale by auction or tender.

> 4. We consider the Government is interested in acquiring the Bribie Island freehold, and part of the Caloundra land for regional open space. Although encumbered by the timber, there may be an avenue of negotiation to pursue, which involves the Government acquiring the land and timber in exchange for developable Crown land elsewhere.'

[1264] As part of his report Mr Booker compiled a more detailed assessment of EFG's approach to the realisation of Parcel 64. It drew attention to an 'immediate threat' to EFG's plans to have part of the parcel rezoned to achieve approval for a regional shopping centre site on the land. Mr Booker expressed his concern that an objection to the rival application for a regional shopping centre would carry little weight coming from a mortgagee in possession and he therefore recommended that EFG 'introduce a major retail developer to the project' to 'increase the chances of a favourable rezoning outcome by enhancing the profile of the site as perceived by Government and the retail industry.' He suggested that EFG grant an option to a joint venture consisting of an EFG company and a major reputable retail developer. He suggested that the EFG company have a 'put option' requiring the developer to acquire EFG's interest 'at valuation at the end of the option term if the site has been rezoned.'

I have mentioned this report earlier when dealing with the narrative of the negotiations. Ramco approved the proposal and commenced negotiations.

[1265] This is the first documented occasion on which EFG considered developing any part of the APM land as opposed to enhancing its value and selling it. It should be noted that the proposal envisaged EFG selling its interest in the development to its joint venturer when the land had been rezoned. Mr Booker explained his thinking (T.7692.1-7693.5):

> '… It was a moving feast from day to day trying to protect the assets value and at this particular stage we were putting a suggestion forward that we could … subdivide the property and have a 51 hectare part of the site zoned for the regional and/or retail centre. That would then leave us available the other part of the property being a residential component that could be developed … It really came down to asset value protection … against … the threats … from Tulip Town.'

He was asked what role he envisaged for EFG in the joint venture and he said:

> 'A passive role. We … were looking at a major developer with retail experience who could attract the major retailers into the site and at least put Tulip Town on hold.
>
> Was EFG in the business of property development … at this time? – No, it wasn't.
>
> And had anyone suggested to you that EFG had an interest in getting back into that business? – Definitely not. Indeed the idea of the joint venture was to package it up so that it could be a passive investment for EFG … because my role was to close … EFG down.

> … The interest in that passive investment, would it itself be … a disposable asset? – It … enabled Fosters to dispose of it at any given time so it gave them greater flexibility. If the market improved significantly they could sell it.'

[1266] Mr O'Grady confirmed EFG's desire to obtain a return in the short-term from Parcel 64. He said (T.8322.10-.15):

> '… The joint venture … was viewed as a step in the wind-down process. … Effectively we were attempting to reduce our exposure to property and a joint venture with a major developer like this was an opportunity to do that …'

[1267] I accept the evidence. That testimony and the brief review of some of the documents referrable to EFG's intentions with respect to the APM land shows that the plaintiffs are wrong to assert that the first defendants 'always wanted the land', at least for the purpose of engaging in long-term profitable development. It is, I think, clear that from about September 1993 EFG, by Mr O'Grady, did want to deal with the APM land free of any restrictions imposed by the interests of a mortgagor. His interest in the land was to sell it to reduce or discharge the Emanuel group debt. I have no doubt he understood that that process might involve some time and expenditure of money to put the land into a condition in which it would attract the interest of buyers. I reject completely as being contrary to the evidence the notion that from September 1993, or even earlier, EFG intended to itself develop any part of the APM land, whether alone or in partnership, by way of subdivision, improvement and sale.

[1268] This finding would, I apprehend, necessarily dispose of the plaintiffs' main thesis, that EFG had a motive for acquiring the land which inspired and informed all of its actions and those of its solicitors. The case is the more prosaic one of a mortgagee with a huge debt secured by vast landholdings of a peculiar nature endeavouring to come to terms by lawful means with an obdurate mortgagor. It is nothing to the point that EFG might have eschewed negotiations altogether and exercised its powers as mortgagee to take possession, sell and/or foreclose. For its own reasons it thought compromise rather than unilateral legal action was the preferable course. Both courses were legitimate. No doubt EFG has reflected since, as have others, on what might have been. Such reflections are irrelevant to the determination of this litigation by the application of legal principle to the facts.

[1269] The plaintiffs refer also to interest shown in Parcel 64 by a number of potential developers such as QIDC, Delfin, and Hudson Conway. Their expressions of interest were rejected by EFG which the plaintiffs take to be a sign of its determination to obtain the land for itself. Examination of the correspondence and the explanations for it given in the transcript will show that no firm offers were ever made by any interested party to purchase Mango Hill. At best there were invitations to treat on terms which seemed to Mr Booker and Mr O'Grady to offer less than EFG's appraisal of the worth of Parcel 64. It is not surprising that these expressions of interest did not proceed to negotiations or to a contract. EFG would have acted irresponsibly in selling Parcel 64 for a sum less than its apparent worth. It would also have left itself open to litigation by Emanuel 14.

[1270] I do not intend to go through the balance of the circumstances relied on by the plaintiffs. The 1995 Scheme is disproved by the evidence I have rehearsed and the reasons I have endeavoured to express.

Position of the Solicitors

[1271] Criticism is made of the evidence of Messrs Elliott, Byrne and Perrett on the basis that they were all, or had been, partners in Messrs Clayton Utz, the solicitors who represented the first defendants throughout the trial. I was referred to the remarks of Thomas J in *Jeffery v. Associated National Insurance Co Ltd* [1984] 1 Qd R 238 at 245 to the effect that it is undesirable for a solicitor representing a litigant to be a witness in the proceedings where his evidence will be 'of a controversial kind.' Mr Perrett remains a partner. Mr Elliott is retired while Mr Byrne has taken up a position elsewhere but remains a consultant to Clayton Utz. It is said I should have doubts about the objectivity of their evidence, and therefore its reliability, by reason of their relationship or former relationship with the solicitors on the record.

I would not wish to say anything that might seem to cast doubt upon what was said in *Jeffery* but the criticism of these witnesses in this case is unfounded. I thought that the evidence of Mr Byrne and Mr Perrett was direct, responsive and credible. I also accept Mr Elliott's evidence although he was not always as clear in his testimony as the others. He was, at times, flustered but that was understandable given his personal circumstances during cross-examination. He was delayed and put to inconvenience, to some extent unnecessarily, by cross-examining counsel.

[1272] The comment by Thomas J was made in the context of a trial in which a disputed conversation between the plaintiff and another may well have been critical to the outcome of the case. The defendant's solicitor gave evidence in support of the version damaging to the plaintiff. The situation in this trial is quite different. No evidence was called to contradict what the solicitors said. The first defendants appear to be right when they say it was never contemplated that their evidence would be contradicted. The solicitors' communication with their client and the Emanuel group are comprehensively documented. The first defendants waived privilege with respect to all communications between them and their solicitors and counsel so that there could be a full examination of what passed between them. In the circumstances there is no reason for reconsidering the impression I formed of the witnesses.

Gift to Mr Emanuele

[1273] The plaintiffs advance as a reason why I should disbelieve Mr Elliott and find evidence in support of the payment of a bribe to Mr Emanuele, a note (Exhibit 462, Volume 10) made by Mr Elliott at his meeting with Mr Winter on 2 March 1995. On the second page of his notes of the meeting Mr Elliott wrote '$2m Giuseppe gift'. The notation is in brackets and enclosed in a box. On the same page other figures are also circled and/or boxed. Mr Elliott said that he did not know and could not remember what prompted the note or to what it referred. The plaintiffs see this answer as suspicious and make 'the plain suggestion that … EFG was simply prepared to make a gift to Emanuele in order to procure the transfer of the APM land. … This notation is so close to recording the bribe that Elliott did not wish to confront it.'

It is unlikely that the note records anything said at the meeting. Mr Perrett was present at took notes of what was said. They do not refer to a gift of $2,000,000, or any amount, to Mr Emanuele. Mr Perrett's notes appear to be a complete, though succinct, record of what was said by Mr Winter.

Another reason is that this meeting was with Mr Winter who represented the DOFR companies, not with Mr Ferrugia who represented Mr Emanuele. It is not likely that Mr Winter would be talking of a gift to Mr Emanuele.

Mr Elliott has said that his notes record not only things said at the meeting but his own 'figurings' and thoughts about the settlement being negotiated. Some of those notes record Mr Elliott's calculation of the moneys he proposed to offer Ferrugia in the subsequent meeting. He had been told how much Winter said he needed to allow the companies to compromise with their creditors and he knew how much in total EFG would make available. Mr Elliott could calculate the balance taking into account such things as the deduction for the gravel royalties and the release of the mortgages over the private houses.

The contentious note is more likely to be a rumination rather than a record of anything said at the meeting.

[1274] There is nothing sinister in the terms of the note. The point was made repeatedly by Messrs O'Grady, Elliott, Perrett and Byrne that EFG had no obligation to make any payment to the Emanuel group or Mr Emanuele. EFG was prepared to make a payment to effect a commercial settlement and, in a sense, to 'buy' Mr Emanuele's promise not to interfere in their program of realising their securities over his companies' land. EFG, and its solicitors, regarded the payments to DOFR and Simionato Holdings as gratuitous. In a sense they were a gift.

[1275] Nor is it sinister that EFG, by its solicitors, contemplated money going to Mr Emanuele. He had always been intended as one of the offerees to whom EFG addressed its offer of compromise.

SECTION V: Preference Shares - Recovery of Dividends and Redemption Payments

[1276] The practice of financiers acquiring redeemable preference shares in, rather than lending money to, companies in need of funding became commonplace in the mid 1980's. Because dividends, unlike interest, are not tax deductible in the accounts of the paying company, and because the payment of dividends and redemption must come from profits, two conditions were necessary for the arrangement to be worthwhile. The company must have had accumulated tax losses so that it would not, in the period between issue and redemption of shares, pay income tax so that the loss of an interest deduction was of no consequence. Secondly, a company must be profitable during that time so that it could make the payments required from profits. There are obvious dangers for the financier if the company whose shares it bought did not remain sufficiently profitable. It could not then recover its investment or the dividend return on the investment. To overcome the problem Elders, in this case, put in place an array of contracts, guarantees and securities to ensure that whatever occurred to Management, it would recover the monies outlaid in acquiring the shares and the dividends payable on them.

[1277] Finance provided by the issue of redeemable preference shares was attractive because the financier/shareholder who received the dividends was entitled to a rebate of income tax on the payment. This meant that the net rate of return to the financier was greater than if it had lent the money and been paid interest on which it had to pay full, unrebated, income tax. The saving was passed on to the company issuing the shares so that the cost of raising funds was reduced. The dividend rate was lower than the interest rate.

[1278] On 8 June 1983 Management amended its articles of association to provide for the rights of the holders of two different classes of redeemable preference shares: (Exhibit 89 2/047A). The relevant provisions of the articles as so amended are set out in the following paragraphs.

[1279] Articles 3(b)(i) and (ii):

> Each holder of Class "A" Preference Shares shall:-
>
> (i) be entitled, on each Class "A" Preference Share held by him, to receive from the profits of the Company on each dividend payment date up to and including the redemption date a cumulative preferential dividend calculated from the allotment date or the immediately preceding dividend payment date whichever is the later at the relevant rate such dividends to accrue from day to day and to be payable without the need for any declaration by the Company or the Directors. Articles 104 to 106 (inclusive) shall not apply to the Class "A" Preference Shares and shall in all respects be subject to this Article;
>
> (ii) be entitled on each Class "A" Preference Share held by him to receive from the profits of the Company a cumulative preferential default dividend calculated from the due date for payment of any dividend at the relevant rate such default

dividend to accrue and be payable from day to day without the need for any declaration by the Company or the Directors; ..."

[1280] Articles 3(c)(i) and (ii):

"Each holder of Class "B" Preference Shares shall:-

(i) be entitled, on each Class "B" Preference Share held by him, to receive from the profits of the Company on each dividend payment date up to and including the redemption date a cumulative preferential dividend calculated from the allotment date or the immediately preceding dividend payment date whichever is the later at the relevant rate such dividends to accrue from day to day and to be payable without the need for any declaration by the Company or the Directors. Articles 104 to 106 (inclusive) shall not apply to the Class "B" Preference Shares and shall in all respects be subject to this Article;

(ii) be entitled on each Class "B" Preference Share held by him to receive from the profits of the Company a cumulative preferential default dividend calculated from the due date for payment of any dividend at the relevant rate such default dividend to accrue and be payable from day to day without the need for any declaration by the Company or the Directors;.. ."

[1281] Article 3(d):

"Notwithstanding any other provision of the Articles of Association of the Company the profits of the Company shall be applied first in paying dividends pursuant to paragraph (b)(i) (c)(i) (b)(ii) and (c)(ii) of this Article 3”

[1282] Article 3(f):

"Subject to the provisions of the Code, the Company shall redeem the Preference Shares on the date stated in the share certificate therefor as being the due date for redemption and the Company shall pay to the holder on redemption of each Preference Share the redemption amount provided always that without prejudice to the Company's obligations under the provisions of this Article if the Company is not able in accordance with the provisions of the Code to redeem such Preference Shares in full on the due date for the redemption thereof then with the consent in writing of the holders of the Class "A" Preference Shares and the holders of the Class "B" Preference Shares the Company shall pay to the holders *or* such Preference Shares such of the funds of the Company as may be lawfully applied in redemption of such Preference Shares and the Company shall thereafter from time to time pay to the holders of such Preference Shares all funds of the Company that may lawfully be applied for such purpose until the redemption amounts of all such Preference Shares have been paid in full and such Preference Shares are accordingly redeemed."

[1283] Article 3(k):

"(i) Preference shares may be issued on the terms that the dividends payable thereon shall be at a rate or amount in dollars per share per annum

(aa) fixed by the Company before the shares are issued;

(bb) to be determined in whole or in part in accordance with an algebraic formula or in such other manner as the Company may fix before the shares are issued;

(cc) to be varied from time to time in accordance with the values from time to time of elements in an algebraic formula or other factors or in such other manner as is fixed by the Company before the shares are issued;

(dd) to be increased during any period when the Company is in default in paying any dividend or in redeeming the preference shares.

(ii) The share certificate issued to a Shareholder for a Preference Share shall set out the rate or amount of the dividend payable on such share and the terms (if any) on which the same is to be determined varied or increased.

(iii) Dividends on Preference Shares shall be declared and paid on the sum of the amounts paid up and the premium (if any) paid on such shares.

(iv) In the event that dividends on any Preference Shares are not to be paid quarterly the share certificate or certificates therefore shall specify the dates for payment of dividends and the date for payment of the first dividend thereon."

[1284] Article 103:

"No dividend shall be paid otherwise than out of profits. . ."

[1285] Article 104:

"Subject to paragraph (k) of Article 3 the Directors may before recommending any dividend set aside out of the profits of the Company such sums as they think proper as reserves which shall at the discretion of the Directors be applicable for any purpose to which the profits of the Company may be properly applied and pending any such application may at the like discretion either be employed in the business of the Company or be invested in such investments (other than shares in the Company) as the Directors may from time to time think fit. The Directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide."

[1286] Article 109:

> "The Company in general meeting may upon the recommendation of the Directors resolve that it is desirable to capitalise any part of the amount for the time being standing to the credit of any of the Company's reserve accounts or to the credit of the profit and loss account or otherwise available for distribution and accordingly that such sum be set free for distribution amongst the members who would have been entitled thereto if distributed by way of dividend and in the same proportions on condition that the same be not paid in cash but be applied either in or towards paying up any amounts for the time being unpaid on any shares held by such members respectively or paying up in full unissued shares or debentures of the Company to be allotted and distributed credited as fully paid up to and amongst such members in the proportion aforesaid or partly in the one way and partly in the other and the Directors shall give effect to such resolution. A share premium account and a capital redemption reserve fund may for the purposes of this Article be applied only in the paying up of unissued shares to be issued to members of the Company as fully paid bonus shares provided always that at any time whilst the Company has issued and not redeemed any redeemable preference shares the aforesaid accounts shall only be applied in and towards the redemption and payment of premium on redemption of such redeemable preference shares."

[1287] Definitions relevant to the foregoing articles were set out in Article 1 (b) as follows:

> "The following shall have the meanings respectively assigned to them unless there be something in the subject or context inconsistent therewith :-
>
> …
>
> (iii) "default dividend" means with respect to each Preference Share an extra dividend payable only where the company fails to pay a dividend due on any dividend payment date or on redemption of the share; the amount of such extra dividend shall be an amount computed on the amount of the dividend due but ~ unpaid from the date it was due until the date it is actually paid at a rate equal to the relevant rate at the time such dividend was due but not paid;
>
> (iv) "dividend" includes any preference dividend due or to become due on a Preference Share on a dividend payment date or on redemption of the share and includes a partial dividend but does not include a default dividend;
>
> (v) "dividend payment date" means the date or dates specified in a Preference Share Certificate for the payment of dividends thereon in each year commencing on the date specified in such Certificate until the redemption date or if no date or dates are

specified such dividends shall be paid quarterly on the last days of the months of December March June and September in each year commencing from the relevant quarter day immediately following the allotment of such Preference Share provided always that where any such date falls on a day other than a business day the date for the payment of the dividend which fell due on that date shall be the next following business day thereafter. ...

(vii) "Preference Share" means any of the Redeemable Cumulative Preference Shares known as Class "A" Preference Shares and Class "B" Preference Shares.

(viii) "premium" means a premium of ninety-nine dollars ($99.00) in respect of each Preference Share;

(ix) "redemption amount" means the aggregate of the following amounts calculated, in relation to any Preference Share redeemed or to be redeemed, as at the redemption date thereof:

(aa) the amount of capital paid up on the Preference Share;

(bb) the premium;

(cc) any dividend then due or in arrears whether or not declared;

(dd) where applicable, any default dividend then due but not paid whether or not declared.

(x) "redemption date" means the date when upon redemption of any Preference Share the redemption amount is paid to the shareholder. The due date for redemption is as set out in the share certificate issued to the Shareholder;

(xi) "relevant rate" means the rate of dividend on each Preference Share (including the amount of the premium) expressed as a rate or an amount in dollars per share per annum and provided always that such rate shall be subject to adjustment pursuant to paragraph G) of Article 3; ..."

[1288] On 17 August 1983 the directors of Management met and resolved to:

'… allot 69,264 Class "A" redeemable cumulative preference shares at $1 each to Elders Lensworth Finance Limited … for a consideration of $100 per share and 156,000 Class "B" redeemable accumulative preference shares of $1 each … for a consideration of $100 per share.

The allotment … is subject to the following terms and conditions, namely –

(i) the shares are to be allotted to the preference shareholder with the several rights and privileges referred to in article 3 of the Articles of Association …

(ii) the shares are (subject to the Articles …) to be redeemable on the 31st day of December 1987. The redemption amount is to be the sum of $100 per share being $1 per value per share and $99 premium per share …

(iii) (a) Dividends – A Class Shares
Dividends on the shares partly paid on the 7th day of each calendar month commencing on the 7th day of September 1983. The dividends upon the shares are to be calculated and payable at the rate of $13.25 per share per annum.

(b) Dividends – B Class Shares
Dividends on the shares are to be paid on the 7th day of each calendar commencing on the 7th day of September 1983. The dividend upon the shares is to be calculated and payable at the rate of $12 per share per annum.'

[1289] Elders Lensworth Finance Ltd (the second defendant, in this section of the reasons called "Elders" or "Lensworth") subscribed for the "A" Class preference shares in Management at its request to provide capital to repay existing debt of its own and other of the plaintiff companies to EFG: see T.3988.29. The amount invested by EFG was $6,926,400. Details of the issue were -

(a) there were 69,264 Class "A" redeemable cumulative preference Shares of $1 each;

(b) the shares were issued for a consideration of $100 per share, comprising $1 for the issue price and $99 premium per share;

(c) the shares were redeemable on 31 December 1987;

(d) dividends were to be paid monthly at the rate of $13.25 per share per annum.

[1290] The purpose of the subscription for "B" Class preference shares was not to replace existing debt, but to provide an alternative, and cheaper, means of obtaining finance for a new acquisition, namely the Myer site in Adelaide (14- 36 Rundle Mall): (see T.3988.30). The amount provided by Elders was $15,600,000. Details of the issue were -

(a) there were 156,000 Class "B" redeemable cumulative preference Shares of $1 each;

(b) the shares were issued for a consideration of $100 per share, comprising $1 for the issue price and $99 premium per share;

(c) the shares were redeemable on 31 December 1987;

(d) dividends were to be paid monthly at the rate of $12.00 per share per annum.

[1291] In accordance with the articles information was stated on the share certificates issued in respect of the redeemable preference shares as follows:

(a) The certificate for the Class "A" shares (Exhibit 479) provided:

(i) that the dividend payment dates were the 7th day of each calendar month commencing 7 September 1983; and

(ii) that the redemption date was 31 December 1987.

(b) The share certificate for the "B" Class shares (Exhibit 479) provided:

(i) that the dividend payment dates were 7 September in each year commencing 7 September 1983; and

(ii) the redemption date was 31 December 1987.

[1292] In August 1985 the redemption date for the A and B Class preference shares was extended to 19 August 1995 subject to Management's right to redeem the shares on 19 August 1987, 19 August 1989, 19 August 1991 or 19 August 1993. The dividend rate changed to $12 per share per annum. New share certificates were issued reflecting these alterations.

[1293] The circumstances in which the shares were redeemed earlier than had been resolved were explained by Mr Bruce Elliott, a taxation advisor employed by EFG since 1984. He is a chartered accountant. According to his statement (Exhibit 446) in June 1990 EFG was in 'wind down mode', the objective of which was to reduce its balance sheet, that is both assets and liabilities, with a consequential reduction of its overall debt position. Mr Elliott went on:

> '… In about June 1990 I was involved in the preparation of the … accounts for … EFG. I turned my attention to the property section's involvement in the preference share market through their holding of preference shares in … Management. I made some inquiries … and I believe that I was informed that the preference shares in … Management had been on issue since the early 1980's, that they comprised A and B Class shares, that the total in issue was approximately $22.5 million … and that the security supporting the issue was a cash deposit of an almost equal amount. I believe I was also informed that the security supporting the issue originally comprised property mortgages and that, as the properties had been sold, the proceeds had been placed on deposit as a substitute security.
> …
>
> I formed the view that the … preference shares might no longer be required. If this was the case, the redemption of the … shares would achieve one of (EFG's) aims, namely to reduce the balance sheet, the shares being an asset and the deposit lodged as security being a liability …

> After making the inquiries … I went to see John O'Grady to whom I reported. I recall having a meeting with him … with regard to the possible redemption of the preference shares.
>
> At some stage a 31st December 1990 target was set to achieve the redemption of the … shares. My recollection is that this date was chosen as it was the next reporting period to the Stock Exchange after 30 June 1990.
>
> … I obtained a copy of the Articles of Association of Management … so as to understand the redemption mechanism. I discovered that EFG could not simply redeem the shares at their discretion unless there was a default, and that therefore it required the co-operation of the Emanuel group if the shares were to be redeemed.'

[1294] Mr Elliott spoke to Mr MacDonald who was then the account manager for the Emanuel group. He suggested a meeting with Coopers & Lybrand whom he knew were the auditors and accounting advisors to the Emanuel group. Mr Elliott and Mr MacDonald met with Mr Allen of Coopers & Lybrand in Adelaide on 26 November 1990 to discuss EFG's desired redemption of the preference shares by the end of the calendar year and any problems that might pose for the Emanuel group. On 10 December 1990 C & L wrote to Mr Sara, the Emanuel group's then chief accountant and sent a copy of his letter of advice to Mr Elliott. The letter advised:

> '… It is critical to the taxation status of (Management) and its … subsidiaries that (EFG) maintains some shareholding in (Management) for the short term future.
>
> Given this criteria it is our opinion that the most effective means of achieving the … aims … is either of the following:
>
> (a) (Management) to redeem all but one of either the Class A or Class B shares; or
>
> (b) (Management) to issue a small number of redeemable accumulative preference shares at no premium to (EFG) and then redeem all the Class A and Class B shares.
>
> The only practical difference between our advice in A and B above is that under B (Management) will presumably be required to amend its Articles of Association.'

[1295] Mr Elliott thereafter spoke to Cannan & Peterson about the proposed changes to the Articles to facilitate the redemption.

[1296] By a letter dated 17 December 1990, Mr Sara sought advice from Mr Boyd, a partner of Cannan & Peterson, whether the articles of association of Management could be changed to allow the preference shares issued to Elders to be redeemed by 31 December 1990. Mr Boyd was away and the matter was directed to Mr Dutney. Coopers & Lybrand had requested Management to obtained solicitors' advice as to the possibility of amending the articles to allow for the earlier redemption. Their letter of advice to Mr Sara of 10 December 1990 was provided to Mr Dutney. The detail of the advice is irrelevant for present purposes. In the course of developing his opinion Mr Dutney spoke on several occasions to members of staff at Cannan & Peterson and Mr Sara. Mr Dutney made shorthand notes of his conversations but his habit was to record what was said to him rather than what he said during those telephone attendances. One of his notes dated 17 December 1990 is in a different category. It contains points written down by Mr Dutney in the course of researching his opinion and which he intended to discuss with Mr Sara. It reads in part:

> 'Of course under s.120 the shares can only be redeemed out of profits'.

Although he has no recollection of the conversation he believes from a consideration of his notes that he told Mr Sara that 'of course' the redemption had to be paid for out of profits. His evidence was:

> 'It was a note to myself saying, "Of course", but the inference I drew is that that's what I planned to say to Mr Sara when I phoned him, to avoid any suggestion that I was trying to condescend to him.' (T. 2978.40 in chief.)

He repeated the testimony in cross-examination (T. 2991.50)

> '… do you believe that you said something to Mr Sara during your telephone conversation about the need for profits? – I think that's likely.'

There seems no reason not to accept Mr Dutney's evidence – Mr Sara has no recollection of any conversation with Mr Dutney.

[1297] By letter dated 18 December 1990 Mr Dutney advised Mr Sara:

> '… that we consider that the articles need to be changed to provide for the redemption by 31 December 1990 as the due date for redemption shown on the share certificates is apparently a date subsequent to this. … We suggest the following alterations to the articles …'

[1298] Mr Dutney also prepared a notice of redemption of redeemable preference shares to be signed by the appropriate officer of Management and the terms of a special resolution to be passed by Management to effect the change to its articles. He sent them under cover of a letter to Mr Leonardis, who was not called to testify. The notice of redemption provided that:

> 'Emanuel Management Pty Ltd gives notice that on the 31st day of December 1990 225,262 redeemable preference shares … were redeemed out of profits of the company (apart from the premium of $99 per share which was provided out of share premium account).

[1299] Redemption followed a meeting of Management held on 31 December 1990 which resolved to change its articles as advised by Mr Dutney, and then to redeem the shares. Elders, as a member of Management, was represented at the meeting by Mr Crosby who was the only EFG employee available during the holiday period.

[1300] The redemption occurred by the payment to EFG of moneys held in two deposit accounts, one titled 'The Elizabeth House Deposit Account' and the other 'The Emanuel Management Deposit Account'. The credit balances in these accounts represented the proceeds of sales of property made by companies in the Emanuel group which were deposited with an EFG company or subsidiary. In theory Management withdrew the moneys on deposit and paid them to EFG. In fact there was an appropriation of the moneys by Elders by book entry. The amount standing to the credit of The Elizabeth House Deposit Account on 31 December 1990 was $6,796,355.41. The amount of the credit in the Emanuel Management Deposit Account was $15,298,729.92.

$100 was left in each account representing one A and one B Class share which were retained by Elders so that it continued to be a shareholder of Management. This was the point of Mr Allen's advice that, to maintain tax benefits, the ownership of Management should remain constant.

Elders had subscribed for shares to a value of $22,526,400. There was, therefore, a shortfall on redemption of $431,114.67.

[1301] Section 565 of the *Companies Code* provided:

> '(1) No dividend shall be payable to the shareholder of any company except out of profits or pursuant to section 119.
>
> (2) Every director … of a company who wilfully pays or permits to be paid any dividend out of what he knows is not profits except pursuant to section 119 –
>
> (b) is … liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits,
>
> and the amount for which a director … is so liable may be recovered by the creditors or the liquidator suing on behalf of the creditors.'

Section 119 provides:

> '(1) Where a company issues shares for which a premium is received … a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account to be called the 'Share Premium Account' and the provisions of this Code relating to the reduction of the share capital of a company … apply, subject to this section as if the Share Premium Account were paid up share capital of the company.
>
> (2) The Share Premium Account may be applied –

(c) In the payment of dividends, if those dividends are satisfied by the issue of shares to members of the company.'

Section 120 provides:

'(1) Subject to this section, a company having a share capital may, if so authorised by its articles, issue preference shares that are, or at the option of the company are to be, liable to be redeemed.

(2) The redemption shall not be taken to reduce the authorised share capital of the company.

(3) The shares shall not be redeemed –

(a) Except on such terms and in such manner as are provided by the articles;
(b) Except out of profits that would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purposes of the redemption; and
(c) Unless they are fully paid up.

(4) The premium (if any) payable on redemption shall be provided for out of profits or out of the Share Premium Account.

(5) …
(6) …
(7) …
(8) …
(9) …
(10) …'

[1302] The dividends paid on the A and B Class shares (adjusted to accommodate the minor challenge by Coopers & Lybrand) were:

1984	2,252,817
1985	2,789,748
1986	2,942,862
1987	2,703,168
1988	2,704,000
1989	2,703,000
1990	2,478,000
1991	1,789,000
	$17,862,629

[1303] Between 1984 and 1991 inclusive the annual profit and loss accounts revealed that there were either no profits, or insufficient profits, declared in the profit and loss accounts to pay dividends on the preference shares.

	Net profit/loss		Dividends Paid	Overpayment
1984	Profit	2,236,036	2,252,817	16,871
1985	Loss	(5,231,392)	2,789,748	2,789,748
1986	Profit	1,102,028	4,069,262	2,967,234
1987	Profit	685,130	4,241,202	3,556,072
1988	Profit	6,564,000	3,434,000	0
1989	Loss	(2,245,000)	3,010,000	3,010,000
1990	Loss	(3,287,000)	2,478,000	2,478,000
1991	Loss	(57,643,000)	1,789,000	1,789,000
				16,606,925

[1304] The availability of profits and their over-payment was examined by Mr Morris, who computed slightly different losses.

Year	Profit available For distribution/loss	Dividend Paid	Dividend Overpayment
1984	2,236,036	2,252,817	16,871
1985	(5,231,392)	2,789,748	2,789,748
1986	915,402	4,069,262	3,153,860
1987	871,756	4,241,202	3,369,446
1988	5,232,000	3,434,000	0
1989	(2,245,000)	3,010,000	3,010,000
1990	(3,287,000)	2,478,000	2,478,000
1991	(57,643,000)	1,789,000	1,789,000
			16,591,725

[1305] Two points can be noted. The first is that in determining whether there was profit from which dividends and redemption could be paid only the profits of Management may be taken into account. Profits made by Management's subsidiaries should be ignored. There is no scope for the consolidation of profits on a group basis. See *Industrial Equity Ltd & Others v. Blackburn & Others* (1976-1977) 137 CLR 567.

[1306] The second point is that, before dividends may be paid from capital profits, the capital account of the company must be such that there has been no diminution in its capital. In other words any losses of capital suffered by the company must be recouped before a dividend may be paid from capital profits, i.e. additions to capital. The principle was reaffirmed by the High Court in *Australasian Oil Exploration Ltd v Lachberg & Others* (1958) 101 CLR 119. The Court (Dixon CJ, McTiernan & Tayor JJ) referred to

> 'the fundamental principle of company law that the whole of the subscribed capital of a company with limited liability, unless diminished by expenditure upon the company's objects … shall remain available for the discharge of its liabilities.' (132)

Their Honours went on to say (133)

'… A company has no capital profits available for dividend purposes unless upon a balance of account it appears there has been an accretion to the paid up capital …'

[1307] The defendants invite me to hold that this principle no longer applies, and the decision of *Lachberg* may be ignored, because they have been superseded by changes to company legislation which have ameliorated the restrictions on reducing corporate capital.

[1308] I do not accept that this is an appropriate course for a trial judge to adopt. It is true that the number of statutory exceptions to the 'fundamental principle' that corporate capital should be maintained have increased but not, I think, to the extent that the principle is no longer of importance or that is has ceased to be fundamental. *Lachberg* has been regarded (as I think it had to be) as relevant and authoritative in a number of subsequent decisions: *Marra Developments Ltd v. B.W. Rofe Pty Ltd* [1977] 2 NSWLR 616 at 630; *ANZ Executives & Trustee Company Ltd v. Qintex Australia Ltd* [1991] 2 Qd R 360 at 367 and *QBE Insurance Group Ltd v. Australian Securities Commission* (1992) 110 ALR 301 317-318. In my opinion I am not free to disregard it.

[1309] Mr Morris' assessment was predicated upon profits or losses made on the revenue account of Management. He did not consider whether Management had made capital profits out of which the dividends could have been paid and the shares could have been redeemed. This is understandable as, on their face, the financial accounts for Management for the years in question did not suggest that capital profits had been used for those purposes. The accounting experts called by the defendants identified capital profits which could have been, if they were not, applied for the payments. There is no doubt that those capital profits in the form of an Asset Revaluation Reserve were intended by Management to be the source from which dividends on the preference shares were paid. Coopers & Lybrand gave express advice to that effect. There is a question whether the Reserve was applied to pay dividends. That debate occupied much of the time at trial devoted to this aspect of the claim. For reasons which will emerge it is not necessary to adjudicate upon the issue, interesting as it was. If the defendants were right in their contentions that capital profits could be used and, applying the rule in *Lachberg* the situation in relation to the payment of dividends is as follows:

Financial Year	1. Dividend Paid $	2. Morris Available Profits $	3. Boymal Available Profits $	Variance (3 – 2) $	4. Morris Dividend Overpayment $	5. Boymal Dividend Overpayment $	Variance (5 – 4) $
1984	2,252,817	2,236,036	2,236,036	-	16,781	16,871	-
1985	2,789,748	-	8.993,4	8,993,481	2,789,748	-	(2,789,748)
1986	4,069,262	915,402	7,305,761	6,390,359	3,153,860	-	(3,153,860)
1987	4,241,202	871,756	3,921,629	3,049,873	3,369,446	319,473	(3,049,973)
1988	3,434,000	5,232,000	6,564,000	1,332,000	-	-	-
1989	3,010,000	-	3,129,300	3,129,300	3,010,000	-	(3,010,000)
1990	2,478,000	-	118,800	118,800	2,478,000	2,359,200	(118,000)
1991	1,789,000	-	-	-	1,789,000	1,789,000	-

[1310] There is also a question whether the Asset Revaluation Reserve could be applied to fund the redemption of the shares. The argument has a further complication in the sense that the reserve which one finds declared in the financial statements would have been insufficient, but there is evidence that the directors of Management, had they turned their minds to the point, could have increased the value of the Reserve because of increases in the value of real property held by Management and its subsidiaries to the point where there was sufficient to allow the redemption to occur out of capital profits. On this point, too, it is unnecessary to expand but it should be pointed out that the amounts involved in the redemption for which profits were required are not as great as might first appear. The par value of the A and B Class preference shares were respectively $69,264 and $156,000. The balance is referrable to the premium payable on the shares on their issue. The *Companies Code* permitted the redemption of the premium to come from a Share Premium Account. It is clear that Management had such an account and that the amount in it was sufficient for the redemption of the premium value of the preference shares. Mr Macks identifies the account (Exhibit 1, Annexure 28, paras 5.12 and 5.14 and Exhibit 89 3/149 and 3/150). Mr Morris (Exhibit 86, para 2.22 – 2.24) identifies some bookkeeping errors in the entries relating to Management's share premium account but accepts there was such an account from which Management paid the redemption of the premium on the preference shares. This is made clear by the resolution of the directors of Management which met on 28 December 1990 (Exhibit 89 2/67):

> 'Following the amendment of the Articles the company redeem, on 31 December 1990, all except one of the Class A preference shares held by (the second defendant) and all except one of the Class B preference shares … including the dividend as provided by the articles calculated up to and including the date of redemption, such redemption to be made out of profits except for the premium payable on redemption which shall be provided out of the Share Premium Account as provided by the *Companies Code*.'

In a document curiously dated 28 December 1990 Management gave notice to the National Companies and Securities Commission that:

> '… On the 31st day of December 1990 225,262 redeemable preference shares to the nominal value of $1 each were redeemed out of profits of the company (apart from the premium of $99 per share which was provided out of Share Premium Account). …'

[1311] It follows that the claim in respect of the redemption of preference shares which occurred otherwise than out of profits is limited to the par value of the A and B Class shares, i.e. $69,263 for the A Class shares and $155,999 in respect of the B Class shares.

[1312] The evidence in relation to the creation of a share premium reserve from which the preference shares were redeemed is collected in Exhibit 88, Mr Leppinus' report Part D Section 7.

[1313] I have found that Management was insolvent on and from 1 July 1988. It follows that it should not have declared or paid dividends because the payment reduced the capital of Management which should have remained available for the discharge of its liabilities. See *Peter Buchanan Ltd v. McVey* [1955] AC 516 at 521-2; *ANZ Executives and Trustee Company Ltd v. Quintex Australia Ltd* [1991] 2 Qd R 360 at 367-8. See *McVey* at 521-522. For payments made after 1 July 1988 it is irrelevant whether or not there were or could have been profits of a capital nature out of which dividends could have been paid and the redemption could have been made. Those payments should not have been made when the company was insolvent. Nor should the shares have been redeemed.

Release and *Res Judicata*

[1314] The reason why it is not necessary to ponder the intricacies of the respective arguments of the parties is that the claims which the plaintiffs wish to bring in respect of payments made pursuant to the issue and redemption of the preference shares have been lost to them.

[1315] The first reason that this is so was explained in the previous section of these reasons which dealt with the effect of the judgment entered against the Emanuel group in February 1995. Those claims should have been brought forward in the proceedings which resulted in that judgment. They would have been a partial answer to the action for the debt. The plaintiffs are now precluded from litigating those issues.

[1316] The second reason is akin to the first but depends upon the judgment in the Federal Court in November 1994. The claims for redress in respect of payments made pursuant to the issue and redemption of the preference shares should have been raised in those proceedings.

Whether by *res judicata* or estoppel of the *Anshun* type the plaintiffs may not now complain about the payment of dividends or redemption of the shares.

[1317] The third reason is found in the terms of the releases contained in DOFR. I have set them out previously but they bear repeating. By Clause 3:

> 'The Emanuel group release, discharge and further hold harmless the EFG group and its past and present employees, servants, agents and solicitors in respect of:
>
> 3.1 Any cause of action and claims of any kind whatsoever which they or any of them have or consider they may have against the EFG group … and
> 3.2 Any cause of action and claims of any kind whatsoever which accrue to or are accrued by the Emanuel group or any of them at any time in the future against the EFG group … which arises out of or are in any way connected with any … dealings whatsoever and howsoever arising between the EFG group and the Emanuel group.'

The plaintiffs appear to accept that the terms of this release are sufficient to bar their claims. By para 258 of the statement of claim they plead the release as a cause of loss which impeded or barred the plaintiffs from pursuing the claims in respect of the 1988-1994 transactions and the preference shares. It is partly for this reason that the plaintiffs seek to have DOFR set aside. In that endeavour they failed, as I have found. DOFR therefore stands in their way and prevents their recovery of the dividends and redemption moneys.

[1318] The plaintiffs advance their claims for recovery of the moneys paid by way of dividends and for redemption in the form of a number of causes of action. Their primary basis is restitutionary, seeking to recover the money on the basis that payments unjustly enriched the second defendant and that the payments were had and received by the second defendant to the use of Management. There are other claims seeking to set aside agreements pursuant to which the payments were made on the basis that those agreements were procured by duress or unconscionable conduct. The basis for these claims is also restitutionary. As well there are claims consequent upon alleged breaches of directors' fiduciary and statutory duty. The nature of these claims is essentially equitable, it being said that the moneys were received by the second defendant on a constructive trust for Management or that the second defendant received the moneys knowing that they had been paid in breach of fiduciary duty. There is also a claim pursuant to the misfeasance provisions of the *Companies Code* (Section 542) or of the *Corporations Law* (Section 598) on the ground that the payments were made in circumstances giving rise to causes of action, fraud, negligence or breach of trust by the directors of Management. The section is procedural only and does not give the liquidator any greater right than the companies had.

[1319] Additionally there was a claim by the liquidator pursuant to s 565 of the *Companies Code* for recovery of the dividends against the directors and a claim pursuant to s 565 of the *Corporations Law* calling in aid s 120 and s 121 of the *Bankruptcy Act*.

[1320] All the claims save those referred to in the preceding paragraph are caught by the terms of the release in DOFR. They are all causes of action or claims which Management had on 17 March 1995 against the second defendant, a member of the EFG group as defined in DOFR.

[1321] The claims which attach to the liquidator, as opposed to those which are the companies' and in respect to which he can cause them to sue, are those pursuant to s 565 of the *Companies Code* to recover dividends from the directors and those pursuant to s 565 of the *Corporations Law* making void as against the liquidator transactions which constitute voluntary settlements or fraudulent dispositions property.

[1322] The first of these claims is untenable by reason of my finding that none of EFG, Crosby or O'Grady were ever *de facto* directors of Management. There are claims that EFG by Crosby and O'Grady were participants in a breach of fiduciary duty by the Emanuele family directors which led to the payment of the dividends and redemption but claims on this basis are within the terms of the release.

The only claim not affected by the release is that of the liquidator pursuant to the *Bankruptcy Act*.

[1323] The claims brought pursuant to s 542 of the Code 'on the ground that the Emanuel Fosters directors were guilty of fraud, negligence, default, breach of trust and breach of duty in relation to … Management …' (para 468 of the plaintiffs' opening Part 3) is also met by the finding that EFG was never a *de facto* director of Management. These claims, in addition, are within the release.

Limitation of Actions

[1324] Although it is unnecessary to consider this defence I will deal with it briefly. The first defendants argue, correctly in my opinion, that many of the plaintiffs' claims in respect to the preference shares were commenced out of time. One which was not is the liquidator's action relying upon s 565 of the *Corporations Law* and the *Bankruptcy Act* which will have to be dealt with on its merits.

[1325] There is a question whether the *Limitations of Actions Act* 1974 (Qld) or the *Limitations of Actions Act* 1936 (SA) is applicable. The plaintiffs contend for the South Australian Act ('the Limitation Act') and the first defendants are content with that proposition. I proceed on the basis that it is the relevant legislation.

[1326] The present proceedings were commenced by a writ issued in South Australia on 24 December 1996. The period six years prior to the date of the issue of the writ commenced on 24 December 1990.

The redemption of the preference shares thus occurred less than six years prior to the issue of the writ. The limitation defences apply, if at all, to the payment of dividends. As mentioned earlier a combination of the articles and the terms contained in the preference share certificates meant that dividends at the specified rate were paid on the seventh day of each month until redemption. Accordingly the last payment of dividends before redemption should have occurred on 7 December 1990. In fact the December payment of dividend on the A Class shares was made on or about 18 December 1990. There was a *pro rata* payment of dividend for the period 7 December – 31 December, made in January 1991.

[1327] Section 31 of the *Limitation Act* provides that, in effect, no claim by a beneficiary against a trustee in respect of any property held on an express trust shall be barred by any statute of limitations. Section 32 provides:

> 'Further Provisions as to Application of Act to Trusts
>
> 32.(1) In any action … against a trustee … except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party … or is to recover trust property, or the proceeds thereof still retained by the trustee, … the following provision shall apply:
>
> (a) All rights and privileges conferred by this Act shall be enjoyed in a like manner and to the like extent as they would have been enjoyed in the action … if the trustee … had not been a trustee …
>
> (b) If the action … is brought to recover money … and is one to which no other provision of this Act applies, the trustee … shall be entitled to the benefit of and be at liberty to plead lapse of time as a bar to the action … in the like manner and to the like extent as if the action … had been … for money had and received.
>
> (2) …
>
> (3) This section shall apply only to actions … begun after the twenty-third of December, 1893 …'

[1328] The effect of s 32, which follows the terms of s 8 of the (English) *Trustee Act* 1888, is that claims for relief against breaches of fiduciary duty, or to recover trust property said to be subject to a constructive trust, or to have the constructive trustee restore property lost to the constructive trust, are barred after the passage of six years if it is the defendant's conduct which gives rise to the fiduciary obligation or the existence of the constructive trust. The exceptions to the application of the limitation period exist only where the defendants were fiduciaries before the occurrence of the misconduct complained of, or where the trust existed before the impugned transaction which is said to give rise to the trust, took place.

This was established by the Privy Council in *Taylor v. Davies* [1920] AC 636 at 649-653; see also *Paragon Finance PLC v. DB Thakerar & Co* [1999] 1 All ER 400 at 407-414.

The limitation defence applies to claims against directors who breached their fiduciary duty by which a corporate advantage is misappropriated. See *Queensland Mines Ltd v. Hudson* (1976) ACLC 40-266 at 28710-28711. An appeal to the Privy Council (18 ALR 1) was dismissed though on grounds which made the trial judge's reliance on the limitation provisions irrelevant. However the Court of Appeal in *Paragon* regarded *Hudson* as correctly applying the limitation provision (411).

[1329] The plaintiffs contend that Elders and its officers became constructive trustees of the dividends and redemption moneys by reason of their assistance or participation in breach of fiduciary duties by the directors of Management. It is that conduct which amounts to the 'transaction' which fixes on them the equitable obligation to make good the consequences of breach of fiduciary duty, or to account for money they received as constructive trustee for Management. Where a breach of duty:

> 'makes, in the view of the court of equity, the defendant a trustee for the plaintiff, the court … treats the defendant as a trustee … by construction … and against the breach … the court of equity allow statutes of limitation to be vouched.'

Per Lord Esher in *Soar v. Ashwell* [1893] 2 QB 390 quoted by Lord Cave in *Taylor v. Davies* at 652.

[1330] Section 35 of the *Limitation Act* provided that:

> 'The following actions namely:
>
> (a) Actions founded upon any simple contract expressed or implied …
> (b) Actions of account or for not accounting.
> (c) Actions founded on tort.
> (d) …
>
> shall, save as otherwise provided in this Act, be commenced within six years next after the cause of action accrued and not after.'

[1331] Section 38 is concerned with claims to recover money on restitutionary bases. It provides:

'… An action for the recovery of money paid under a mistake (either of law or of fact) or otherwise based on restitutionary grounds must be commenced

(a) If the cause of action arose on or after the commencement of this section within six years after the cause of action arose; or
(b) If the cause of action arose before the commencement of this section within the limitation period that would have been applicable if this section had not been enacted or six years after the commencement of this section (whichever expires first).

2. …'

Section 38 commenced on 2 June 1994.

[1332] The plaintiffs' restitutionary claims are those to recover dividends as moneys had and received by EFG to the use of Management, and those which depend upon having the agreement, pursuant to which the dividends were paid, set aside or avoided on the basis that, once the contract goes, so does the consideration for the payment. See *Dimskal Shipping Co. SA v. International Transport Workers Federation* [1992] 2 AC 152 at 165.

[1333] The plaintiffs appear to contend that there was no limitation period for restitutionary claims before the insertion of s 38 in June 1994 so that the relevant limitation period for those claims is six years from 2 June 1994. The first defendants' industry has produced an interesting submission that at least since the *(Imperial) Statute of Frauds and Limitations of 1623* there has been a limit of six years on such claims. According to *Derby and Bosanquet's Statutes of Limitations* 2nd ed., s 3 of the 1623 statute provided that all actions of account and all actions on the case (among many other actions) should be commenced and sued for within six years next after the cause of such actions or suit and not after. See at p.3-4. The common counts which formed the basis for the modern law of restitution had their origins in the form of action of assumpsit which was an offshoot of the action on the case. See the discussion by Dawson J in *Pavey & Matthews Pty Ltd v. Paul* (1986-1987) 162 CLR 221 at 265-6. See also the *Law of Restitution* by Goff & Jones 3rd ed. at p. 3-4.

[1334] In *re Mason* (1928) 1 Ch 385 at 393-4 Romer J held that s 3 of the *Imperial Act* applied to a claim for money had and received of the kind identified by Lord Mansfield in *Moses v. Macferlan* (1760) 2 Burr. 1005. Although the action on the case disappeared with the passage of the *Judicature Act* in 1873 'yet the actions which have taken their place are governed by the same rules, and to all intents and purposes, are the same actions' according to *Derby and Bosanquet* at p.4. The more modern statutes of limitation did not, obviously, refer to actions on the case or more relevantly to actions in quasi contract, or for restitution, but the limitation period of six years which commonly appeared, for actions in simple contract express or implied were 'taken to cover actions for money had and received, formerly actions on the case …' according to Lord Greene MR, Wrottesley and Evershed LJJ in *re Diplock* [1948] 1 Ch 465 at 514. Section 35(a) of the *Limitation Act* was such a provision.

[1335] The authors of *Restitution Law* in Australia, Mason and Carter (para 2717). expressed the view that 'claims in restitution are subject to the same limitation period as actions brought on simple contract. The standard limitation period for contractual claims is six years in all jurisdictions, except the Northern Territory, where it is three.' The authors refer to s 35(a) of the *Limitation Act*. Their work was published in October 1995 and research for it would seem to have pre-dated the 1994 amendment.

[1336] The submission therefore appears to be correct that the *Limitation Act* prior to June 1994 provided for a limitation of six years for restitutionary claims.

[1337] It follows that, with one exception, a limitation period of six years applies to all of the plaintiffs' claims arising out of the payment of dividends on the preference shares. Therefore it is only claims in respect of payments made after 24 December 1990 that are not barred by the *Limitation Act*. This means all payments of dividends save for the last in January 1991 are irrecoverable. The exception is the cause of action vested in the liquidator pursuant to s 565 of the *Corporations Law* and the *Bankruptcy Act*. The weight of authority in this country supports the view that that cause of action accrued on the appointment of the liquidator. See *Horsburgh v. Strongman & Crouch* [1998] 3 VR 896 and *Spedley Securities Ltd v. Western United Ltd* (1992) 7 ACSR 722.

Extension of Time

[1338] The plaintiffs seek an extension of time pursuant to s 48 of the *Limitation Act* which provides:

> '1. Subject to this section, where an Act, regulation, rule or bylaw prescribes or limits the time for
>
> (a) instituting an action
> (b) …
> (c) …
>
> the court may extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require.
>
> 2. A court may exercise the powers conferred by this section in respect of any action that
>
> (a) …
> (b) the court would, if the action were not out of time, have jurisdiction to entertain.
>
> 3. This section does not
>
> (a) …
> (b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied

> (i) That facts material to the plaintiffs' case were not ascertained by him until some point of time occurring within 12 months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or
>
> (ii) That the plaintiffs failure to institute the action within the period of the limitation resulted from representations or conduct of the defendant … and was reasonable in view of those representations …
>
> and that in all the circumstances of the case it is just to grant the extension of time.'

[1339] The period of 12 months referred to in s 48(3)(b)(i) will vary according to which payment of dividend is in question. There is a separate limitation period of six years applying with respect to each payment. The question of the plaintiffs' knowledge has to be addressed with respect to each period but the process can be shortened because it is clear that Mr Furniss' investigations, which are described in the previous section of these reasons, had revealed by March 1994, all of the circumstances relevant to the claims which the plaintiffs now bring to recover dividends. Action did not commence within 12 months of Mr Furniss' discoveries.

It follows that the first pre-condition for the exercise of the discretion has not been made out.

[1340] The second pre-condition is likewise not made out. There is no suggestion of representations by Elders which induced the plaintiffs, or Management, not to institute actions to recover the dividends earlier than it did. Anyway, the effect of such a representation must have been dissipated by March 1994 when Mr Furniss discovered 'the facts'.

[1341] The occasion for the exercise of the discretion allowed by s 48 does not arise. If it did I would not think it appropriate to exercise it in favour of the plaintiffs given their knowledge, through Mr Furniss, and their studied inactivity and conscious decision not to commence proceedings. It is beside the point that the liquidator was not aware of the facts as early as Mr Furniss. His own causes of action are not out of time. It is the corporate plaintiffs' causes of action that are statute barred and in respect of which I would not think it appropriate to extend time because of the companies' knowledge.

The Liquidator's Claims under the *Bankruptcy Act*

[1342] Mr Macks was appointed liquidator of Management on 30 August 1995 (Exhibit 1, Annexure 4). His claims to recover dividends and redemption moneys on the basis that their payment is void as against him are claims for money had and received to which a limitation period of six years applies. Accordingly these claims are limited to the redemption and dividends paid after 30 August 1989. See *Marks v. Feldman* (1870) LR 5 QB 275; *SCT v. Jacques* (1956) 95 CLR 223 at 229; *NA Kratzmann*

Pty Ltd v. Tucker (No. 2) (1968) 123 CLR 295 at 298; *The Law of Company Liquidation* by McPherson 3rd ed., page 326.

[1343] The claim pursuant to s 120 may be disposed of shortly. In view of Mr Bruce Elliott's evidence there is no doubt that the redemption of the shares was sought by Elders to 'reduce its balance sheet', in other words to convert an asset (shares) into cash and to remove a liability (the deposits payable to Management and Elizabeth House). The net result of the redemption was that EFG held the money on deposit in its own right and applied it in reduction of its own debt. The payment of the redemption money was, clearly, never to constitute a fund to be retained by EFG. It was to be used immediately to pay off its debt. It was not a settlement.

The evidence does not deal specifically with what was intended with respect to dividends paid or how the payments were applied by Elders. There is no reason to think that they were not consumed by it as part of its ordinary revenues. To the extent that the 66th plaintiff must make out his case for recovery, he has failed to prove that the moneys were retained or were intended to be retained by way of the settlement.

[1344] The claim pursuant to s 121, while not much more complicated conceptually, depends, unhappily, upon an understanding of the contractual and security arrangements put in place between Elders and some of the plaintiffs to ensure that the moneys outlaid to acquired the preference shares and dividends payable on them, were returned to Elders. There were many contracts, guarantees and charges brought into existence to protect Elders' recovery of the moneys. It is necessary to set out the main provisions of a number of the documents.

[1345] The point to which I ultimately come can be succinctly stated. Management and a number of the other plaintiffs agreed to pay moneys equivalent to the dividends payable on the shares, and moneys equal in value to the amount subscribed for the shares, in the event that dividends were not or could not be paid, or in the event that the shares were not or could not be redeemed. Some of these promises took the form of guarantees and indemnities and were secured by mortgages over real property and charges over moneys deposited with Elders. Pursuant to some of the documents Elders could appropriate the moneys on deposit in satisfaction of those promises should Management become insolvent.

[1346] Two consequences follow. The first is that an intention to defraud creditors cannot be made out on the part of the directors of Management when it paid money to a creditor which was entitled to it, and had securities which enabled it to take the money on demand and/or in the event that Management became insolvent. Other creditors can hardly have been defrauded when the money would have gone inevitably to the secured creditor.

The second consequence is that the liquidator's claim for money had and received, or restitution fails, because Elders has not been *unjustly* enriched or because the money paid to Elders was not 'to the use of' Management. The payment discharged existing obligations of Management and the various guarantors and is not therefore recoverable in restitution. See *Barclays Bank Ltd v. W J Simms Son & Cook (Southern) Ltd* [1980] QB 677 at 695; *Australia and New Zealand Banking Group Ltd v. Westpac Banking Corporation* (1988) 164 CLR 662 at 673;

David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 373 at 379-380.

[1347] The plaintiffs doubt that Elders would have had recourse to its securities in the event that Management refused to redeem the shares or confessed that it could not do so because it was insolvent. The suggestion that Elders would not have enforced its securities when $22,000,000 lent to it had been charged in order to provide recourse to the money in the very event that Management failed to redeem the shares is a suggestion that a secured lender would act in a most uncharacteristic way. The evidence is clear as to what would have happened. Mr Bruce Elliott said (T.7266.30-.45) that if he had been informed of a difficulty in redeeming the preference shares because of a lack of profits or insolvency he would have recommended to Mr O'Grady that resort be had to the securities. Mr O'Grady's evidence was that if he had been told that the shares could not be redeemed or dividends could not be paid because of a lack of profits or insolvency he would have determined that Management was in default under its securities and Elders would have taken action to enforce its charges. (T.8168.25) Mr Crosby, to whose evidence I attach less weight, said the same thing. (T.6025.40-T.6026.50) Mr MacDonald (T.6972.15-.45) also believed that had he been told that Management could no longer pay dividends because they lacked profits to support such payments he would have advised that recourse should be had to the securities to recover the unpaid dividends.

[1348] It is no doubt right, as the plaintiffs point out, that this evidence was hypothetical in nature and addressed the question of what would have been done more than a decade earlier. The evidence was given by witnesses called to support Elders' defence and there is an obvious reluctance to accept at face value *post facto* assertions that are self-serving in nature. Nevertheless the probabilities overwhelmingly support the evidence. The securities had been obtained to cover the very eventuality which formed the hypothesis. It is not sensible to suppose that, if it occurred, Elders would not enforce the securities it had insisted upon for its own protection in that eventuality.

[1349] The plaintiffs seek support in the fact that EFG did not act on its real property securities when the Emanuel group defaulted on the terms of its loan agreements in respect of the APM lands 'from 1988 onwards, compelling EFG to choose between capitalising the interest … or actioning their security documentation'. It is pointed out that EFG 'chose not to do that' and that 'it would have been contrary to this approach to exercise rights' under the charges over the deposit accounts. This overlooks the difference between the property charged. In the first case the realty could not be realised in the short term for anything like its assessed value. By contrast the property charged with the performance of the obligation with respect to redemption was cash which could be taken without difficulty.

I have no real doubt that is what Elders would have done.

[1350] One can no longer put off the depiction of the agreements and mortgages. They are to be found in Exhibit 89 (mostly in Volume 1) and in Exhibit 476.

[1351] The contracts relevant to the issue of the A Class preference shares were two agreements each dated 9 August 1983.

[1352] The first was made between Elders on the one part and Carsim, Constructions, Holdings, Investments, Projects, Properties, Giuseppe Nominees, Hendon Industrial Park, Libra, Lonsdale Stage 2, Molinara Pastoral Co, Meka Securities, Paterson and Sayer Properties and Mr and Mrs Emanuele on the other part. Elders promised immediately upon execution of the agreement to apply to Management for the allotment of 69,264 redeemable cumulative preference shares (A Class preference shares) on the terms subsequently proposed in the resolution, and agreed to pay the subscription price of the shares to Management. The agreement then provided that in consideration of Elders entering into the agreement and applying for the shares, the other parties to the agreement (called the 'purchasers') agreed to purchase the A Class preference shares from Lensworth which agreed to sell the shares to the purchasers at a price set out in Clause 12 of the agreement.

Other relevant terms of the agreement were:

> '4. In addition to the payment of the purchase price for the shares and without limiting any other provision … the purchasers shall indemnify and keep indemnified Lensworth against any loss which it may suffer by reason or in consequence of
>
> (a) Lensworth not being entitled to a rebate pursuant to … Income Tax Assessment Act …
>
> (b) Lensworth being a contributory in the winding up of (Management).
>
> 5. (i) The purchasers shall pay the purchase price … to Lensworth on 30 June 1985 provided that Lensworth may demand payment of the purchase price and the purchaser shall pay the same to Lensworth within three business days of the making of any such demand upon the happening of any one or more of the following events:-
>
> (a) If (Management) fails to redeem the shares on the due date …
>
> (b) If (Management) fails to pay … within 7 business days of any dividend payment date a dividend at the relevant rate …
>
> (d) If an order is made or resolution passed for the winding up of (Management) or the purchasers
>
> (s) If (Management) or the purchasers become insolvent or unable to pay its debts …
>
> 6. Lensworth may give the purchasers not less than two calendar months notice in writing to complete the purchase of the shares and the purchasers shall pay the purchase price

of the shares to Lensworth on the day specified in such notice if:-

(a) An alteration is made to … Income Tax Assessment Act … the effect of such … is … that Lensworth ceases … to be entitled to the benefit of the full rebate on dividends …

(b) If any alteration to the income tax legislation … the effect of such … is … that payment of the purchase price of the shares … will be treated in any manner other than as a non taxable capital receipt by Lensworth.

8. Upon completion of the sale and purchase … Lensworth shall deliver to the purchasers the … certificates … and a transfer thereof in favour of the purchasers … duly executed …

9. (i) The purchasers shall pay the purchase price … to Lensworth … notwithstanding:-

(a) That at such time (Management) may have been wound up …

(b) The shares may have ceased to exist or the transfer thereof … would be void or illegal or

(c) Any rule of law or equity to the contrary

(ii) Notwithstanding anything hereinbefore contained the right of Lensworth to be paid the purchase price of the shares is not conditional upon Lensworth transferring the shares to the purchasers or their nominee or delivering the certificate for the shares to the purchasers or their nominee if the transfer of the shares or any alteration in the status of the members of the company would be void or illegal or if the company has been wound up or if the shares have ceased to exist.'

12. The purchase price payable by the purchasers for the shares (… "the purchase price") shall be an amount consisting of the aggregate of the following amounts namely

(a) The sum of $100 for each share
(b) An amount equal to any adjustment of dividend due to Lensworth in accordance with the terms of issue
(c) An amount equal to interest on the amounts referred to in subclauses (a) and (b) … at the rate of 22% …

calculated until the time of payment from the day on which the shares were allotted.

16. The purchasers will procure (Management) to notify Lensworth forthwith of the occurrence of any of the events specified in clause 5 … and shall themselves notify Lensworth of the occurrence of any such event forthwith upon becoming aware of the same.

18. The shares shall be at the risk of the purchasers from the date of allotment thereof and the purchasers shall pay the purchase price … to Lensworth … and the said purchase price shall still be payable notwithstanding the winding up of Management or that the transfer of the shares may be or be held to be void by reason of any provisions of the *Companies Code* … or for any other reason whatsoever.

15. The purchasers hereby warrant to Lensworth that

(a) The purchasers and each of them are empowered by their respective memorandum and articles of association to enter into this agreement and to do all things required by this agreement and that all necessary meetings have been held and all resolutions passed as required by their memoranda and articles … and the *Companies Code* in order to render this agreement fully valid and binding …

(d) The issue of the shares to Lensworth and the compliance by (Management) with its obligations under its articles … are within the corporate authority of (Management) and have been duly authorised by proper corporate proceedings and do not and will not contravene any provisions of law or the … articles …'

[1353] The second agreement was made between Elizabeth House and Lensworth. By it, Elizabeth House, 'the guarantor' guaranteed:

> 'The due payment by the purchasers (under the first agreement) to Lensworth of the purchase price of the said shares and all other monies at any time due owing or payable by the purchasers to Lensworth under or pursuant to the said agreement …
>
> (b) that the due observance and performance by the purchasers of each and every of the terms conditions covenants and agreements (expressed or implied) and on the part of the purchasers to be observed and performed contained in the said agreement …'

By Clause 3 Elizabeth House agreed with Lensworth that:

‘(a) this guarantee shall be a continuing guarantee so long as the principal or part thereof or any other sum or sums of money shall be owing or payable by the purchasers to Lensworth under the said agreement … and notwithstanding the payment of any or all such monies to Lensworth this guarantee shall continue in full force and effect until the purchasers shall have carried out observed and performed all the terms conditions covenants and agreements in the said agreement …

(b) Lensworth shall not be bound at any time to exercise all or any of its rights or powers against the purchasers … and any omission by Lensworth so to do shall not affect or discharge the liability of the guarantor hereunder and Lensworth may exercise its rights against the guarantor before contemporaneously with or after the exercise of any of its rights or powers against the purchasers or any of them.

(f) That the guarantor shall pay to Lensworth upon demand the principal and all other monies payable under the said agreement … with interest thereon … if

(i) the purchasers make default …
(ii) the said agreement or said securities or any of them is or are invalid, void, voidable or unenforceable in whole or in part or the rights or powers of Lensworth against the purchasers or any of them or any of such rights or powers are postponed, suspended or rendered unenforceable.

(iii) the purchasers or any of them are or were prohibited from or without capacity power or authority to enter into the said agreement or to grant the said securities … or enter into any obligation therein contained …

(j) The guarantor undertakes the liability to pay the principal and all other monies payable under the said agreement and the said securities as principal debtor and waives all or any rights (legal, equitable, statutory or otherwise) which it may at any time have as surety which is inconsistent with this provision.’

By Clause 4 Elizabeth House agreed to

‘Indemnify and to keep indemnified Lensworth from and against all loss, damage, costs and expenses which it may sustain or incur by reason or on account of

(a) Any breach, neglect or non performance by the purchasers of any of the terms, conditions, covenants and agreements (expressed or implied) contained in the said agreement …

> (b) Any failure or default by the purchasers in the payment of the principle and other monies payable under the said agreement or securities … whether such agreement or securities are valid or enforceable or not."

[1354] By a further deed also made 9 August 1983 between Elizabeth House and Elders the making and the terms of the first agreement were recited, as was the guarantee given by Elizabeth House in respect of the obligations imposed on the purchasers by that agreement. A further recital said:

> '(c) The company has deposited the sum of $311,302.66 … with Discount Factors Ltd … as an unsecured deposit.'

The deed then provided:

> 'In consideration of Lensworth entering into the said agreement and applying for the issue … of the said shares … (Elizabeth House) as beneficial owner of the deposit hereby transfers and assigns to Lensworth all that deposit to hold the same for Lensworth absolutely subject however to the proviso for redemption hereinafter contained and hereby charges all other monies at any time or from time to time hereafter deposited by it with Discount Factors Ltd … with the payment to Lensworth of the principal …'

Clause 1 read:

> 'That (Elizabeth House) shall pay to Lensworth upon demand all and every sum … of money which may at any time … be or become due owing or payable by (Elizabeth House) to Lensworth
>
> (i) Under or pursuant to the provisions of any deed, agreement, covenant, guarantee, indemnity or other document or writing whatsoever now or hereafter made between Lensworth and (Elizabeth House) to or in favour of Lensworth …'

Clause 11 was in these terms:

> 'If the principal or any part thereof shall become due and payable Lensworth may at any time or from time to time thereafter in its absolute discretion and without giving any notice to the company demand and receive payment of the deposit or any part or parts thereof from (Discount Factors Pty Ltd).'

[1355] Discount Factors Pty Ltd ("Discount Factors") was a subsidiary of the first defendant, but was not part of EFG as I have defined it.

[1356] A similar series of agreements were made with respect to the application for and allotment of the B Class preference shares. By agreement made 11 August 1983 between Lensworth and Rundle Mall the latter company agreed to purchase the shares at a price and in a manner set out in Clause 12 of the agreement. This agreement is essentially identical to that made by the purchasers with respect to the A Class shares.

[1357] By a deed also dated 11 August 1983 Rundle Mall recited that it was entitled to receive rent from a large retail tenant (Myers in Adelaide) and had directed the rent to be paid to Lensworth 'to be held by it as an unsecured deposit.' The deed then charged the monies in the deposit account with the payment of the purchase price of the B Class shares and all other monies at any time due, owing or payable to Lensworth in the same manner and on the same terms as Elizabeth House had charged its deposit.

[1358] There was, with respect to the B Class shares as well, a guarantee given by a number of Emanuel companies and Mr Emanuele, identical to the guarantee given in respect of the A Class shares. The guarantors for the purchase of the B Class shares were: Constructions, Holdings, Properties, Projects, Securities, Enterprises, Investment, Establishment Holdings, Giuseppe Nominees, Joe Emanuel Pty Ltd, Meka Securities, Roclin Enterprises, Lonsdale Stage 2, Paterson & Co, Jacost, Carson, Hendon Industrial Park, Hondel, Worando Trust, Sayer Properties, Emanuel (South) Aust., Libra, Molinara Pastoral Co, Elizabeth House and Giuseppe Emanuele.

[1359] A number of features of the agreements should be noted. By Clause 5 of the purchase agreements dated respectively 9 and 11 August, Elders could demand payment of the purchase price earlier than the date set for redemption in the event of any of the defaults specified in the clauses. Those events of default included failure by Management to pay dividends or to redeem the shares (Clause 5(a), 5(b)) or if it became insolvent (5(s)). The purchasers' obligations to pay the purchase price was independent of any transfer of the shares to them. The obligation to pay was not conditional upon Elders transferring the shares. The obligation remained whether or not any transfer of the shares would be void or illegal. See Clauses 9 and 18.

[1360] It is also noteworthy that the purchasers warranted to Elders that they could lawfully make the purchase agreements and that all the formalities required by their articles and the *Companies Code* had been complied with, and that the issue of the shares did not contravene any section of the *Code*. Elders was also protected by the promise that it would be notified immediately of any breach by Management of the *Companies Code*. See Clause 16.

[1361] In the agreement referrable to the A Class preference shares the purchasers agreed that the performance of their obligations should be secured by mortgages granted by them over land described in the second schedule. See Clause 22. In the B Class shares agreement Clause 22 was to the same effect but the land to be mortgaged was described in the clause itself.

[1362] The two guarantees contained an obligation to pay Elders which was independent of the validity of the obligations contained in the purchase agreements and there was a warranty that those agreements were valid and enforceable. It will have been seen that Clause 3(j) was a 'principal debtor clause' so that the guarantors were liable to pay the money as principals as well as guarantors.

The indemnity contained in Clause 4 applied whether or not the agreements or securities were valid or enforceable.

[1363] The purchasers and guarantors gave security for their promises. The Deed of Charge given by Elizabeth House over moneys in its deposit account has already been described. In addition Rundle Mall mortgaged the land which comprised the

Myer site in Adelaide as security for its obligation as purchaser of the B Class preference shares. See Exhibit 476, Item 9. Moreover by a deed described to be of irrevocable authority between Rundle Mall, EFG and Myer SA Stores Ltd the last mentioned agreed to pay all rent payable by it to Rundle Mall pursuant to its lease of the Myer site to EFG to be held by it as an unsecured deposit.

[1364] By another Deed of Charge made between Rundle Mall and Elders on 11 August 1983 (Exhibit 89 1/31) Rundle Mall charged the rent paid by Myer SA Stores Ltd into the deposit account with the payment to Elders of the purchase price and all other money whenever owing or payable by Rundle Mall to Elders pursuant to the agreement. By Clause 5 of that deed Elders and Rundle Mall agreed:

> 'If the principal or any part thereof shall become due and payable Lensworth may at any time or from time to time … in its absolute discretion and without giving any notice … appropriate the deposits or any part or parts thereof in or towards payment of the principal in such order and in such manner as Lensworth shall … think fit …'

[1365] By Clause 6 of that same deed the parties agreed that should Elders pay part of the deposits to Rundle Mall or appropriate part of them towards payment of principal the deed should continue in full force and effect with respect to the balance of the deposits remaining and to any further deposits made to the account. By Clause 7 it was agreed that the deed and the right, powers and remedies given by it to Elders should not be merged or be affected in any way by any other security then or thereafter held by Elders for the payment of the principal.

[1366] I have mentioned the extension to the dates for redemption of the shares which occurred in August 1985 and which, with respect to the A Class shares, reduced the dividend rate to $12 per share per annum.

[1367] Consequent upon these changes, two further deeds were made, both dated 19 August 1985. The first, in respect of the A shares, was made between Lensworth and the purchasers named in the first agreement of 9 August 1983, and some further companies as guarantors, one of whom was Elizabeth House. The other agreement was between Lensworth and Rundle Mall, and the guarantors to the 11 August 1983 agreement. The deeds recited that the purchase price of the preference shares was due and payable pursuant to the terms of the agreements made in August 1983, and then provided:

> '1. The purchasers and the guarantors hereby request Lensworth to consent in writing to (Management) varying the rights attached to the Class A preference shares …
>
> 2. In consideration of Lensworth consenting … the purchasers and the guarantors hereby covenant with Lensworth as follows:-
>
> (i) the variation of the rights … shall not affect the obligations of the purchasers to purchase the … shares under the said agreement or any of the rights or powers of Lensworth thereunder …

(ii) that (Management) shall pay the purchase price … and all other monies payable by the purchasers … upon demand by Lensworth and shall observe and perform all the terms, conditions, covenants and agreements on the part of the purchasers to be observed and performed contained in the said agreement …

(iii) that Lensworth may demand the payment of the purchase price … and all such other monies … at any time in its absolute discretion …

(iv) the liability of the guarantors under the guarantees given by them shall continue in full force and effect and shall not be released or in any way affected by

(a) Lensworth consenting to the variation of the rights …

(b) The company varying the rights …

(c) Any other act, deed or thing done by Lensworth …

(d) Any of the covenants hereinbefore contained.

(e) Any other act, deed or thing whatsoever.

[1368] The original purchase agreements and guarantees bound the purchasers and the guarantors to pay the second defendant the amount it had outlaid to subscribe for the shares and an amount equivalent to the dividends on the shares by 30 June 1985, two and a half years earlier than the original redemption date. Although the redemption date was extended for 10 years with a right in Management to redeem on 19 August in each second year the obligations of the purchasers and the guarantors pursuant to the deeds of 19 August 1985 remained one to pay Elders the specific amounts on 30 June 1985, and thereafter on demand.

[1369] Exhibit 114 is a summary compiled by the plaintiffs of deposits into and withdrawals from the Elizabeth House deposit account. The first entry on 17 August 1983 is of the deposit of $311,302.66 mentioned in the recital to the Deed of Charge by Elizabeth House of 9 August 1983. The deed recites the deposit having been made on or prior to 9 August but it may have been later as the Exhibit suggests. The last transaction on the account is dated 25 March 1991, described as ‘redemption of preference shares’ and shows a withdrawal of $6,796,355.41 leaving a credit balance of $100. That date is, presumably, the date on which the transaction was entered into the record. Redemption occurred three months earlier.

[1370] In the proceedings against C & L those defendants contend that as between Elizabeth House and Management the chose in action represented by the credit balance in the account from time to time was the property of Management and not Elizabeth House. This is relevant to the claim brought by the plaintiffs against

Mr Cuming. As between the second defendant, Elizabeth House and Management there is no doubt that there was a deposit account in credit at all times between 17 August 1983 and 25 March 1991, that the account was opened by and in the name of Elizabeth House and that it and the second defendant treated those moneys or, more accurately, the chose in action, as property charged to Elders to secure the promises and obligations of Elizabeth House pursuant to the agreements I have recently reviewed.

[1371] Exhibit 392 is a compilation of documents prepared by Mr Morris showing the movement of balances in the Elizabeth House deposit account. Between August 1983 and January 1988 monthly statements were issued. They were typed on a form which contained two letterheads. One was 'Elders Lensworth Finance Ltd' which was printed on the form. The other was typewritten and was 'Discount Factors Pty Ltd, 147 Flinders Street, Adelaide'. It appears from this that it was Discount Factors on whose behalf the statements were issued showing that deposits to and withdrawals from the account gave rise to a balance of debt owing by it to Elizabeth House. The records from December 1988 to March 1991 are different in format. They are on letterhead entitled 'Elders Finance Group' and deal with three separate deposit accounts: one operated by Emanuel 7, one by Management and the third by Elizabeth House. The letterhead suggests that the statements were issued on behalf of companies generally in the financial services division of the first defendants and not on behalf of any particular company. The statements differ slightly in their format, being more descriptive and taking the form of a letter rather than a statement.

There is nothing in this change of format to indicate that there had been a novation or other substitution of Elders for Discount Factors as the recipient of the deposits made by Elizabeth House.

[1372] Exhibit 392 also contains a number of documents dated in 1983 and 1984 evidencing payments by Elizabeth House to Discount Factors 'to be held by (it) as an unsecured deposit payable at call and bearing interest at the rates from time to time payable by Elders … on moneys deposited with it and payable at call.' One such letter gave notice to Discount Factors that the deposit had been charged in favour of Elders and directed Discount Factors to deliver the receipt for payment to Elders. There are also withdrawals from Elizabeth House evidenced by a request from it to Discount Factors for the repayment of sums deposited. These withdrawals bear the endorsement of Elders which consented to the payment and the release of the moneys deposited on its charge.

[1373] A number of the documents which comprise Exhibit 115 show that Discount Factors corresponded with Elizabeth House about deposits to and withdrawals from the Elizabeth House deposit account and provided monthly statements to it recording the balance of the account. There is also a letter of 7 August 1987 from Elizabeth House to Discount Factors recording a deposit into the account of $2,400,000. It is apparent from Exhibits 114 and 115 that this and other substantial deposits into the account came from the proceeds of the sale of properties owned by various of the plaintiff companies other than Elizabeth House, which did not own or deal in property in any of the years relevant to this litigation.

[1374] There is no direct evidence of what, if any, arrangements were made between the companies which sold their properties and Elizabeth House which deposited the sale proceeds, about the payments into the account. In the next section of the reasons I conclude that the vendor companies lent the surplus proceeds to Management which deposited them sometimes into the account in its name and sometimes into the account in the name of Elizabeth House. Elizabeth House made no claim to the deposits and did not record them as an asset in its financial statement. Management did record them as one of its assets. This does not affect the conclusion that the moneys were charged to Elders. As between Elders and Elizabeth House there was a charge over the deposits in the account which did exist and which was in credit. The terms of the charge were apt to catch all moneys paid into the account. As between Management and Elders, and Management and Elizabeth House, it could not be said that Management did not intend the moneys to be subject to the charge. It knew of the existence of the charge and that moneys paid to the credit of the deposit account would be subject to the security. Exhibit 115 itself showed that the moneys deposited into the account were intended to be security for those obligations. The letter of 7 August 1987, already referred to, gave notice to Discount Factors that the deposit had been charged in favour of Elders and directed Discount Factors to deliver the document of title to the deposit to Elders. It is apparent that the only parties who had any interest in the funds which formed the deposits consented to their payment into an account charged to Elders.

[1375] I have mentioned the guarantee given by Rundle Mall in respect of the purchase agreement for the B Class preference shares and the mortgage given by it over the Myer site in Adelaide to secure its guarantee. On 12 August 1987 Rundle Mall sold the Myer site to Remmadell Pty Ltd. Elders financed the acquisition as a result of which Remmadell was substituted for Rundle Mall as mortgagor and Rundle Mall's debt to EFG was discharged. As part of the refinancing Elders took an assignment of mortgages from Remmadell to Management, given to secure payment of part of the purchase price. Management also gave a guarantee to Elders in respect of Remmadell's obligations. As a further part of the refinancing the sum of $15,600,000 was deposited into the Rundle Mall deposit account over which a charge had been given to secure Rundle Mall's guarantee obligations. That sum remained on deposit until October 1987 when other property transactions led to an alteration in the structure of the parties and obligations.

[1376] The change came about because Emanuel 7 had borrowed money from a merchant bank, Tricontinental, to purchase a property known as Market Plaza. Emanuel 7 had experienced difficulty in making payments to Tricontinental which threatened to take action to recover its debt. Emanuel 7 turned to EFG for assistance and borrowed from it sufficient to pay out its loan from Tricontinental. At the same Pellota Pty Ltd ("Pellota") replaced Rundle Mall as the purchaser in respect of the B Class preference shares.

[1377] The funds utilised by Emanuel 7 to pay out Tricontinental came from the moneys, $15,600,000, standing to the credit of Rundle Mall in its deposit account. Those moneys had been charged as security for the purchase agreement for the B Class shares. By way of substitute security Emanuel 7 granted a mortgage over the Market Plaza building in favour of the second defendant.

[1378] By deed made 29 October 1987 between Lensworth, Rundle Mall and the guarantors named in the agreement of 11 August 1983, that agreement was cancelled. To replace it a further agreement was made on 29 October 1987 between Lensworth and Pellota. This agreement provided that:

> ‘2. (Pellota) shall purchase the (B) shares from Lensworth and Lensworth shall sell the shares to (Pellota) at a price … calculated in the manner set out in clause 11 …
>
> 3. In addition to the payment of the purchase price … and without limiting any other provision … (Pellota) shall indemnify and keep indemnified Lensworth against any loss which it may suffer by reason or in consequence of
>
> (a) Lensworth not being entitled to a rebate pursuant to … the *Income Tax Assessment Act* …
>
> (b) Lensworth being a contributory in the winding up of the company.
>
> 4. (i) The purchaser shall pay the purchase price … to Lensworth on Settlement Day (which is defined to mean 12 August 1995 or such earlier day as Lensworth may appoint by not less than three calendar months written notice).
>
> (ii) Lensworth may demand payment of the purchase price … prior to settlement day upon the happening of any one or more of the following events …
>
> (s) if (Management) or (Pellota) becomes insolvent or unable to pay its debts or is deemed by s. 364 of the *Companies Code* or any corresponding statute or law to be unable to pay its debts.’

By Clause 5(2) it was agreed that:

> ‘(Pellota) shall indemnify and keep indemnified Lensworth against any and all loss it may suffer by reason or in consequence of Lensworth not being entitled to a rebate pursuant to … Income Tax Assessment Act.’

A number of other clauses should be noted. They are:

> ‘8.(i) Notwithstanding anything herein contained expressed or implied or any rule of law or equity to the contrary the right of Lensworth to be paid the purchase price of the shares shall not be conditional upon Lensworth transferring the shares to (Pellota) … or delivering the certificate … to (Pellota) … if the transfer of the shares or any alteration in the status of the members of (Emanuel Management) would be void, voidable or illegal or if (Emanuel Management) has been wound up of if the shares have ceased to exist.

14. (Pellota) hereby warrants to and covenants with Lensworth as follows:-

    (h) (Management) is not a holding company of (Pellota) and is not deemed to be a holding company … under or by virtue of any of the provisions of the Companies Code and would not before the completion of the sale and purchase of the shares … be or become or be deemed to be a holding company of (Pellota).

16. (Pellota) will not consent or agree to or accept redemption of the shares before the purchase price has been paid to Lensworth without the prior consent in writing of Lensworth first had and obtained and will use its best endeavours to ensure that the shares are not redeemed before the purchase price has been paid to Lensworth.

18. (Pellota) shall pay the purchase price … to Lensworth … and the said purchase price shall be payable notwithstanding the winding up of (Management) or that the transfer of the shares may be or be held to be void or voidable by reason of any provisions of The Companies Code or any statutory modification thereof or any statutory provisions substituted therefor … or for any other reason whatsoever.

25. 1.(c) (Pellota) shall indemnify and keep indemnified Lensworth against:

    (i) All actions, proceedings, claims and demands which may be made or taken against it by the liquidator of (Management) in the event of the winding up of the company.

    2. Notwithstanding anything hereinbefore contained Lensworth may demand the immediate payment of the purchase price of the shares if (Management) gives notice of its intention to redeem the shares.'

[1379] By a Deed of Guarantee and Indemnity dated 29 October 1987 (Exhibit 89 1/42) a number of Emanuel companies, including Emanuel 7, Elizabeth House and Management, in consideration of Lensworth agreeing to sell preference shares to Pellota guaranteed:

'1.(a) The due payment by (Pellota) to Lensworth of the purchase price … and all other money at any time or from time to time due, owing or payable … including … any and/or money payable under any indemnity contained in the … agreement and any … money payable by way of damages under the … agreement or in respect of or consequent upon

> in default by (Pellota) in the payment of any money payable under the … agreement or in the due observance or performance or any term … in the … agreement …'

Furthermore the guarantors promised by Clause 3 to:

> (g) '… pay to Lensworth upon demand the principal and all other money payable under the said agreement if:
>
> > (ii) The said agreement is invalid, void, voidable or unenforceable in whole or in part or the rights … of Lensworth against (Pellota) are postponed, suspended or rendered unenforceable
> >
> > (iii) (Pellota) is or was prohibited from or without capacity, power or authority to enter into the said agreement or enter into any obligation therein contained …
>
> (k) undertake the liability to pay the principal and all other money payable under the said agreement as principal debtors and waive all or any rights (legal, equitable, statutory or otherwise) which they may at any time have as sureties which is inconsistent with this provision.'

By clause 4 the guarantors promised to:

> 'INDEMNIFY and keep indemnified Lensworth from and against all loss, damage, costs and expenses which it may sustain or incur by reason or on account of
>
> > (a) any breach, neglect or non performance by (Pellota) of any terms … contained in the said agreement …
> >
> > (ii) the indemnity contained in this clause is a separate and distinct principal obligation and the liability of the guarantors under this clause shall not be affected or reduced by reference to the guarantee contained in clause 1 … or by reason of this indemnity being contained in the same document as the said guarantee.'

[1380] Clause 7 provided that the guarantors covenanted and agreed with Lensworth:

> '(a) Lensworth may at any time … in its absolute discretion and without any further consent or agreement of the guarantors … and without notice to them …
>
> > (i) Release from any or all liability hereunder … any one or more of the guarantors
> > (ii) Release and discharge any of the said securities

(iii) Release the property thereby mortgaged or charged or any part or parts thereof from any such security

(b) That the liability of the guarantors hereunder and under the said securities … shall continue in full force and effect not withstanding any release or discharge … under … subclause (a)

Clause 9 provided:

‘(1) The guarantors … may at any time request Lensworth to release and discharge any security … and to accept some other security in substitution therefore.

(3) The provisions of Clauses 5-7 hereof shall apply to any substituted security …’

[1381] In order to provide security for the guarantor a Deed of Assignment also dated 29 October 1987 was made between Management and Elders. It recited:

‘… A certain loan agreement … between Remmadell … and (Management) whereby … Remmadell … agreed to pay to (Management) the advance … and … granted to (Management) memorandum of mortgage …

… A guarantee and indemnity of even date … given by (Management) and others to Elders … (whereby) (Management)

1. Guarantee to Elders payment of the purchase price of the said shares … by Pellota …’

By the deed Management agreed and covenanted:

‘(1) … to pay to Elders upon demand any and all money which is now or which may at any time … hereafter be or become due owing or payable … pursuant to the … guarantee (… “the principal”).

(2) (Management) … hereby assigns and transfers to Elders … the Remmadell agreement … the mortgage … to hold the same until Elders absolutely subject to the proviso for redemption …

(3) Contemporaneously with the execution hereof (Management) shall execute and deliver to Elders a memorandum of transfer of the said mortgages to Elders …

(5) (Management) covenants with Elders …

(iv) All money received by Elders under the said mortgages … shall be appropriated by Elders –

> (c) as the deposit to be held … upon the terms … set out in Clause 10 …
>
> (10) All money which Elders may at any time … appropriate as a deposit and all other money at any time … deposited with Elders by or on behalf of (Management) and all interest payable thereon … shall be charged with the payment to Elders of the principal and any other money payable hereunder.
>
> (5) If the principal … shall become due and payable Elders may at any time … in its absolute discretion and without giving any notice … appropriate the … deposits … in or towards payment of the principal …'

[1382] On or about 8 November 1989 Emanuel 7 sold its Market Plaza property. Part of the proceeds of sale were deposited with Elders in a deposit account in the name of Management in substitution for the mortgage over Market Plaza which had been substituted for the deposit of $15,600,000. Exhibit 441, an EFG securities register, shows that on 8 and 9 November 1989 respectively deposits of $12,189,226.72 and $70,000 were made from the sale of Market Plaza. The deposit was into an account in the name of Emanuel 7. Exhibit 478 is an extract from the general ledger journal of the 'Emanuel group of companies'. It shows that on 28 November 1989 from the proceeds of sale of $20,000,000 received for Market Plaza, $12,189,226.72 was 'placed on deposit to secure preference shares' in a deposit account with Elders.

[1383] Emanuel 7 was a party to the 29 October 1987 Deed of Guarantee and Indemnity and had covenanted that any of the guarantors might request Elders to release and discharge security and to accept some other security in substitution and the provisions of Clause 5 and 7 applied to any substituted security. It follows that Emanuel 7 covenanted that any substituted security would be held as security for the payment of the principal and all other moneys payable under the guarantee and for the performance of the obligations of the guarantors. Mr Sara gave evidence (T.3726.25; T.3727.55-3728.10) that the moneys held in deposit accounts was not used 'generally for the operations of … Emanuel Management or … the group' because 'it was tied in with the preference shares.' At T.3808.40-.50 Mr Sara accepted that 'in the event that the payments in respect to the preference shares weren't made … these deposit accounts (were) security for those obligations (and) if the payments hadn't been made then Elders could have moved on those accounts.'

[1384] I think this sufficiently indicates that the intention of Elizabeth House, Emanuel 7 and Emanuel Management was that the moneys in respect of the deposit accounts were intended to be the subject of the various security documents I have reviewed and that those deposits were charged with the payment of moneys due under the purchase agreements and guarantees.

[1385] Although the securities register shows the deposits of 8 and 9 November 1989 to have been paid into an Emanuel 7 deposit account it seems that in fact it was paid into a deposit account in the name of Emanuel Management. Exhibit 117 prepared by the plaintiffs shows that the Emanuel 7 deposit account had a nil balance in November 1989. A memorandum of 9 November 1989 from Mr Hosking (the then Adelaide manager of Elders) to Mr MacDonald states that the two sums had been deposited with EFG 'in the name of Emanuel Management' and that the money had been required to make up a deposit of $15,600,000 'to fully redeem the B Class preference share scheme.' It appears from this memorandum as well as a letter of 5 January 1990 from Mr Hosking to Mr Leonardis (Exhibit 118) that the deposits made from the sale of Market Plaza were combined with an existing deposit account held by Management with Elders which had a credit balance at 16 November 1989 of $2,916,603.20 (according to the plaintiffs' summary, Exhibit 118) to produce the one credit balance of $15,219,829.92. Exhibit 118 suggests that the deposit to the account of just over $12,300,000 was 'unknown' but it is, I think, clear that the moneys came from the sale of Market Plaza. The documents I have mentioned are plain in this regard.

[1386] The consequence is that by the Deed of Assignment of 29 October 1987 Management had charged its 'deposit account', that is the chose in action represented by the debt to it from Elders arising from the payment of moneys into the account to produce the credit balance, with the payment to Elders of moneys owed to it by Management under the guarantee and indemnity.

[1387] The first defendants rely upon a large number of other agreements and securities to show that Management had charged the credit balances in its deposit accounts with Elders to secure its obligations as guarantor under the 1987 arrangements. It is only necessary to mention one of them. That is a Deed of Master Loan Agreement (Exhibit 476, Item 62) dated 9 June 1988 between Management as mortgagor, the fourth defendant as mortgagee and the Emanuel group, and Mr Emanuele, as guarantors. By Clause 1 a 'deposit' was defined to mean a deposit made under Clause 9. By the same clause 'moneys hereby secured' were defined to include:

> 'All moneys now or hereafter owing or payable to the mortgagee by the mortgagor (or any related corporation of the mortgagor within the meaning of the *Companies Code*) either alone or in conjunction with any other person … directly or indirectly or contingently under this agreement or on any other account whatsoever …'

'Mortgagee' was defined to include any corporation which was related to the fourth defendant. It would catch the second and third defendants, i.e. Elders.

The 'principal sum' was defined to include:

> 'All moneys the payment of which (Management) whether alone or with others has guaranteed to the mortgagee … on any other account whatsoever;'

'Security' was defined to mean any security document at any time given to or held by the mortgagee for the payment of the moneys 'hereby secured'.

By Clause 5 Management covenanted:

> 'To pay any other moneys forming part of the moneys hereby secured … in accordance with any written agreement between the mortgagor and the mortgagee in respect of the same or in the absence of any such agreement such other moneys shall be payable on demand by the mortgagee.'

Clause 6 was headed 'Default' and provided:

> 'The moneys hereby secured shall immediately become due, payable and recoverable and each security shall immediately become enforceable at the option of the mortgagee upon the happening of any one or more of the following events without the necessity for any notice or demand:
>
> (a) If default is made by the mortgagor in the due and punctual payment of the moneys hereby secured.
>
> (b) If default is made by the mortgagor or any guarantor in the observance or performance of any other obligations whatsoever on the part of them or any of them … in this agreement or under … any security or agreement … between the mortgagee … and the mortgagor.
>
> (h) If any ground referred to in the Companies Code arises upon which any court may order the winding up of the mortgagor …'

By Clause 9 it was agreed that:

> 'The mortgagor may at any time and from time to time pay to or deposit with the mortgagee moneys with instructions to credit such moneys to a deposit account.'
>
> (e) Any moneys at any time … owing or payable to the mortgagor pursuant to the deposit of moneys in the deposit account are book debts and mortgaged and charged in favour of the mortgagee for the performance of the mortgagor's obligations hereunder.'

[1388] Its terms are sufficient to have charged the moneys deposited in the account with Elders to secure Management's obligations as purchaser and/or guarantor pursuant to the 1987 purchase agreements.

By the extended definition of mortgagee, Elders, as well as the fourth defendant, was the mortgagee for the purposes of the agreement. The deposit referred to in Clause 9 was a deposit with Elders, the mortgagee. The moneys secured by the agreement included those at any time owing by Management to the mortgagee (Elders) on any account whatever. This, obviously, would include the purchase agreements. Those moneys were due and immediately payable without demand upon Management's insolvency, that being a ground referred to in the *Companies Code* upon which its winding up could have been ordered by the court. By Clause 9(e) the credit balance in the deposit account was charged in favour of Elders on the performance of Management's obligations, including those to pay the money which was immediately due upon its insolvency.

[1389] By Clause 27(c) of the Annexed Covenants and Conditions the moneys secured by the deed were immediately payable and recoverable without demand or notice in the event of default by Management in the due and punctual payment of the money or in observing or performing any provision of the deed or any security.

[1390] It is necessary to consider only the position of Elizabeth House and Management because it was those companies which allowed their credit balances to be applied in payment of the share redemption. Both of them were parties to agreements which obliged them to pay to Elders an amount equal to the sum needed to redeem the shares and to pay dividends at the specified rate to the time of redemption. Both had charged their credit balances in the deposit accounts to Elders to secure the payments. In the case of Management by the deed of June 1988 it had made itself liable to pay the purchase price on demand and without notice in the event that it was insolvent. In that circumstance Elders could act on its security without notice. Additionally by the deed of 29 October 1987 Pellota agreed that Elders could demand payment of the purchase price in the event that it or Management became insolvent (Clause 4(ii)(s)) and that Elders could demand immediate payment of the purchase price if Management gave notice of its intention to redeem the shares (Clause 25(2)). By the guarantee of the same date Management guaranteed the due payment by Pellota of the purchase price and, as well, promised to pay as principal debtor any loss which Elders might suffer by reason of Pellota's non-performance. In the case of Elizabeth House by its guarantee of 9 August 1983 it guaranteed the due payment by the purchasers of the purchase price and that it would pay to Elders on demand those moneys if the purchasers defaulted. By the terms of the purchase agreement the price was payable three days after demand in the event that Management became insolvent. In the case of both companies after the redemption date was extended in August 1985 the purchase price was payable on demand and the guarantors were liable to pay if the purchasers did not. Both Elizabeth House and Management had made themselves liable as principal debtor as well as guarantor for the payment of the purchase price and both had charged their credit balances in the deposit accounts with the payment.

[1391] In these circumstances it does not seem possible to conclude that the redemption of the shares defrauded Management's creditors. Whether or not the shares were redeemed, whether or not dividends were paid, the moneys on deposit would have been paid to Elders. Upon the redemption the obligation of Management and Elizabeth House pursuant to the purchase agreements, guarantees and other deeds were discharged. Had the redemption not occurred Management and Elizabeth House would have been called upon pursuant to those agreements to pay the moneys they had promised. The balances in the deposit accounts charged with the payment would have been appropriated by Elders by way of enforcement of its securities to secure payment of the promised amounts.

[1392] It is not therefore possible to regard the other creditors of Management as having lost anything by reason of the redemption. The balances in the deposit accounts would never have been available for distribution among those creditors. Whether they went in discharge of the obligation to redeem the shares or in discharge of the obligation pursuant to the purchase agreements and guarantees they would have been paid to Elders. The other creditors have lost nothing.

[1393] It is not even possible to infer in Mr Emanuele an intent to cause detriment to those other creditors. The moneys were payable immediately by Management and Elizabeth House to Elders in the event that the shares were not redeemed. By redeeming Management discharged its own and Elizabeth House's obligation to make the payments pursuant to the agreements. To pay money to a secured creditor entitled to it is not to defraud other creditors. As Gaudron J pointed out in *Cannane* (at 572):

> '… There is no intent to defraud if the person in question believes that others have no right or interest in or in relation to the property concerned and that the law accords them no opportunity or advantage with respect to the property.'

[1394] Mr Emanuele's actual intention is not known. No officer of the Emanuel group who might have taken part in the decision to effect the redemption was called to give evidence. Mr Sara testified but he, clearly, had not been informed of the reasons by those who made the decision. The court is asked to infer that the redemption was intended to defraud creditors by reason only of the fact that the payment was made when Management was insolvent. In the absence of evidence from those who could have supplied it, and because there are competing inferences from the facts, I do not think it right to draw the inference of dishonesty. The facts are equally consistent with Mr Emanuele believing that Elders was entitled to the money pursuant to its array of securities and that, one way or the other, the money would have to go to Elders and that its passage would be lawful. In paying money which he believed Management could never make available for the benefit of other creditors Mr Emanuele would not have intended to defraud them. Mr Emanuele's precise state of mind is not known, but it is likely he remembered and understood that moneys in the deposit accounts had been charged to protect Elders in the event that the shares could not be redeemed.

[1395] There is an ancillary point of fact which, additionally, would lessen the inference that there was a fraudulent intent that might otherwise arise from payment by an insolvent company. The additional fact is that in December 1990 Mr Emanuele probably entertained sanguine hopes that Emanuel 14 would soon sell Parcel 53 of the APM land for a sum in excess of $100,000,000 which would have returned his companies to solvency and profitability, so that he would have expected that all creditors would be paid in full. If that were his belief it would go far to displace an inference that the redemption of shares by an insolvent company was intended to defraud creditors.

The Molinara contract was on foot during the second half of 1990. It is not known precisely when Mr Emanuele learned that the Queensland Government would oppose FIRB approval. If he did not learn of that opposition until after 31 December 1990 it is likely that when he agreed to the redemption and effected it he believed that his companies would shortly receive $100,000,000.

[1396] By 13 December 1990 the Queensland Government had resolved not to recommend approval of the application by FIRB. There is a letter of 13 December 1990 (Exhibit 16 8/330) from the then Premier to Messrs Price Waterhouse, accountants for the purchaser. The tender of the letter was objected to by the defendants as evidence that knowledge of the State's opposition to FIRB approval was received by Mr Emanuele. The objection was good and the plaintiffs were warned that proof of notice to Mr Emanuele would have to be furnished by other means. None was provided. The letter of 13 December is referred to in Exhibit 318, Mr Furniss's letter of 12 May 1994 but he does not say when it was received by Emanuel 14. There was a letter of 4 January 1991 from Cannan & Peterson, solicitors for the

Emanuel group, to EFG setting out details of the contract for sale between Emanuel 14 and Manifort (Exhibit 421, Volume 15). This would suggest that Mr Emanuele had not then been told that the contract could not proceed. It is clear that as late as 23 January 1991 EFG was unaware of the Government's decision. The Ramco minutes for 23 January 1991 show that FIRB approval was expected. There is no evidence that Mr Emanuele knew that FIRB approval would not be granted until 6 February 1991 when Ramco's records show it had been told of the State's opposition. If, as appears to be the case, he believed in December 1990 the sale would proceed then it is probable that he believed that his companies' creditors would all be paid in full from the proceeds of the sale and that in redeeming the shares he did not intend to deprive those creditors of payment.

Were Elders' Securities Invalid?

[1397] The plaintiffs seek to overcome the first of the arguments destructive of the inference of fraudulent intent by arguing that, on a number of grounds, the purchase agreements, guarantees and supporting securities were invalid.

[1398] The first point taken relates to the purchase agreement for the A Class shares of 9 August 1983. It will be recalled that Paterson was one of the purchasers. The point made is that Paterson was a subsidiary of Management and that the agreement infringed the provisions in the *Companies Code* prohibiting companies giving financial assistance for the acquisition of their own shares or shares in their holding companies.

[1399] There is no doubt that prior to 1 July 1983 Management was a subsidiary of Paterson. Management was chosen as the company to issue preference shares because it had the greatest tax losses. Later, after the shares were issued, it was realised that dividends had to be paid out of profits, and the only way that Management could generate sufficient profits to pay dividends was by charging the other companies in the group interest on the loans it had made to them. For this purpose it was made the holding company of the other companies in the group which had previously been subsidiaries of Paterson. That company was wholly owned by Emanuel Holdings. The shares, two in number, were transferred from Holdings to Management which thereupon became the holding company of Paterson and the ultimate holding company of the companies owned by Paterson. Paterson, in turn, became a subsidiary of Management by allotting 998 shares to Management.

[1400] S 129 of the *Companies Code* provided:

> (i) Except as otherwise expressly provided by this Code a company shall not
>
> (a) Whether directly or indirectly, give any financial assistance for the purpose of, or in connection with –
>
> (i) the acquisition by any person, whether before, or at the same time as, the giving of financial assistance, of –
> (A) …

(B) shares … in a holding company of the company; or

(ii) the proposed acquisition by any person of –

(A) …

(B) shares … in a holding company of the company; or

(b) Whether directly or indirectly, in any way, -

(i) …

(ii) acquire … shares … in a holding company of the holding company …

Subsection 10 provides that

> 'Nothing in subsection 1 prohibits the giving by a company of financial assistance for the purpose of, or in connection with, an acquisition … of shares … in a holding company of the company if –
>
> (a) the company, by special resolution, resolved to give financial assistance for the purpose of or in connection with, that transaction.
>
> (b) …'

The balance of the subsection specifies conditions which must be satisfied if the resolution is to be effective.

[1401] The plaintiffs contend that the agreement of 9 August 1983 between Paterson and the other purchasers is illegal and/or unenforceable by reason of the fact that Management had become the holding company of Paterson on 1 July 1983 so that the agreement was one by which Paterson *inter alia* agreed to acquire shares in its holding company.

[1402] The evidence in support of the fact that the exchange of shareholding between Paterson and Management to make the latter the holding company of the former occurred on 1 July 1983 is the annual return for Management lodged on 18 October 1984 showing that the change in ownership had occurred at the beginning of the previous financial year (Exhibit 106 4/425). There is, however, compelling evidence that the document was ante-dated and that the actual exchange of shareholding did not occur until about March of 1984. In a memorandum from Mr Wales (then a partner of C & L) to Mr Biancardi, a tax partner of C & L in Sydney, Mr Wales analysed the financial performance of the Emanuel companies and identified Management as a company which should issue preference shares. To make the issue viable commercially he proposed that 'Management become a wholly owned subsidiary of Holdings and Paterson a wholly subsidiary of Management'. The memorandum bears a handwritten date 26 March 1984 (Exhibit 89 1/7).

[1403] A letter of 5 July 1984 from Mr Bund, general manager of the 'Emanuel group of companies' (Exhibit 421, Volume 2) to Mr MacDonald refers to:

> 'The proposed restructuring of the group's corporate structure to better represent what actually happens and to improve the logical flow of transactions within the group … the major change is with respect to Emanuel Management Pty Ltd. This company is the group borrower and the administration vehicle for the group and all transactions pass through this company's books. We have moved Emanuel Management to be a direct subsidiary of Emanuel Holdings and it in turn holds the shares in Paterson …'

Mr Bund asked Mr MacDonald to have the proposal reviewed by EFG's tax advisors and indicate its approval. Documents enclosed with the letter show the corporate structure of the Emanuel group as at 8 July 1983 and January 1984. The first of these showed Emanuel Holdings being the shareholder in Paterson which in turn owned shares in a large number of companies, one of which was Management. The structure for January 1984 showed Holdings being the shareholder of Management which in turn was a shareholder in Paterson.

[1404] Mr Bund accepted in evidence that the change in shareholding did not occur any earlier than January 1984 and probably after March. (See T.4015.25-.35; T.4017.15; T.4019.40) It may not have happened until after July.

[1405] It is quite clear that Paterson was not a subsidiary of Management when, in August 1983, it became a purchaser under the purchase agreement. The agreement is not, for that reason, invalid. The plaintiffs must rely upon some supervening illegality to contend that the purchase agreement, not only in respect of Paterson but in respect of all purchasers, is invalid.

[1406] The plaintiffs' submissions do not comprehensively deal with their objections to the validity of the purchase agreement but it was pleaded that they became frustrated by the change in ownership by which Management became Paterson's holding company.

[1407] There is a difficulty for the plaintiffs because the events which they claim frustrated the purpose of the agreements were brought about by their deliberate, unilateral action. There was no *force majeure*. The Emanuel group, for its own reasons, chose to make the change in the shareholding. Lord Sumner pointed out in *Bank Line Ltd v. Arthur Capel & Co* [1919] AC 435 at 452:

> '… It is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self induced frustration …'

Viscount Simon said in *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd* [1942] AC 154 at 160-161:

> '… In *Mertens v. Home Freeholds Co* … Lord Sterndale observed: "It has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself"; and the Master of the Rolls went on to illustrate his meaning by saying that in *Taylor v. Caldwell* … the defence of frustration would have failed "if the defendant had burned

> down the music hall himself". Similarly in *Maritime National Fish Ltd v. Ocean Trawlers Ltd* … Lord Wright … laid it down that "the essence of frustration is that it should not be due to the act or election of the party," and … went on to say: Lord Sumner … quotes from Lord Blackburn … who refers to a frustration as being a matter "caused by something for which neither party was responsible" …'

[1408] Another difficulty is that before a frustrating event can terminate the obligations of parties to a contract, the contract itself must be silent as to what is to happen in the circumstances that arise. Lord Denning pointed out in *The Eugenia* 1964 2 QB 226 at 239:

> 'We are thus left with the simple test where the situation must arise which makes the performance of the contract "a thing radically different from that which was undertaken by the contract" … to see if the doctrine applies, one first construes the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration.'

[1409] I agree with, and accept, the first defendants' submission:

> 'In the present case there was no frustration because the various deeds provided for the very situation the plaintiffs say arose. … The parties agreed that, even if the kind of illegality about which the plaintiffs now complain were established, the Emanuel parties would remain liable to perform their obligations to pay EFG.'

I have already set out the relevant clauses quite extensively. There is no doubt that the purchasers agreed to pay the purchase price whether or not the transfer of the shares could be legally effected.

[1410] Moreover, and perhaps more importantly, the agreements themselves make it clear that the obligation to pay the money was quite independent of a transfer of the shares or an agreement to transfer the shares. There was an obligation to pay the purchase price notwithstanding that shares may not exist or that the transfer of them would be void or illegal. In clear terms it was said that Elders' right to be paid the purchase price was not conditional upon Elders transferring away the shares. In clearer terms still it was said that the purchase price was payable in the event that Management was wound up and that a transfer of the shares was prohibited by law. The guarantees were in similarly clear terms and imposed on the guarantors obligations to the principal debtor and that notwithstanding any illegality or unenforceability of the principal agreement.

The case could not be plainer. The obligation to pay was distinct from, and severable from, the contractual provisions concerning the transfer of the shares.

[1411] In a case of the same kind as the present the Privy Council said in *Carney v. Herbert & Ors* [1985] 1 AC 301 at 311:

> 'There are therefore two matters to be considered where a contract contains an illegal term, first, whether as a matter of construction the

> lawful part of the contract can be severed from the unlawful part, thus enabling the plaintiff to sue on a promise unaffected by any illegality; secondly, whether, despite severability, there is a bar to enforceability arising out of the nature of the illegality.'

[1412] On the first point there can be no doubt that the promises to pay Elders can be severed from the provisions concerned with the transfer of shares. This was clearly the intention of the draughtsman and is obvious from the words chosen.

[1413] On the second point it is clear that the kind of illegality involved in a contravention of s 129 of the *Code* is not of such a nature as to strike down or render unenforceable ancillary or severable promises which do not themselves contravene the section. *Carney v. Herbert* is itself such a case and authority for that proposition. See also *Firmin v. Gray & Co Pty Ltd* [1985] 1 Qd R 160.

[1414] There is a dispute between the parties as to the validity of the guarantees in the event that the purchase agreement is held to be invalid by reason of its infringing s 129 of the *Code*. This dispute is of little importance since I have held that the purchase agreements contained severable promises to pay distinct from any obligation to transfer shares and that these severable promises are enforceable. The guarantees would have effect in relation to those severable, enforceable, promises. Nevertheless I will mention the debate briefly.

[1415] The plaintiffs rely upon *Heald v. O'Connor* [1971] 1 WLR 497 for the proposition that a creditor cannot enforce a guarantee for payment of a principal debt where the principal contract giving rise to the debt is void. The judgment in that case, however, makes it clear that whether a guarantee can be enforced where the principal obligation is invalid depends upon the terms of the guarantee. Fisher J said at 506:

> '… (The question) is one of construction. Did the guarantor undertake to pay only those sums which the principal debtor could lawfully be called upon to pay but had not duly paid, or did he promise to pay those sums which the principal debtor had promised to pay but had not paid whether the principal debtor could lawfully be called upon to pay them or not? I have no doubt that the promise made by the guarantor in the present case was the former: the promise was to pay the principal moneys which had become due under the debenture if the company did not. If the debenture was void, then no moneys could become due under it.'

I have no doubt that the guarantees here are in the second category mentioned by Fisher J. The guarantors promised to pay whether or not the principal debtor could lawfully pay. Indeed the guarantors promised to pay whether or not the principal debtor were asked to pay. They assumed the obligations themselves of principal debtor.

[1416] The plaintiffs advance rather similar arguments for the invalidity of the contractual arrangements and supporting security provided when the October 1987 restructuring occurred. It will be recalled that a company, Pellota, replaced Rundle Mall as the purchaser under the purchase contract. Pellota had been owned by Paterson and was therefore, after 1984, a subsidiary of Management. The plaintiffs were disposed to argue that it remained so at the date of the restructure, October 1987. However the evidence appears quite clear that Pellota was not a subsidiary of Management when the agreements were made. The documentary evidence is sufficiently clear that the shareholding in Pellota had been changed to avoid this very problem. There is no doubt that both the plaintiffs and Elders were aware of the problem and sought to avoid it. There is no reason to think that they did not.

[1417] On 4 September 1980 Pellota issued the only two shares ever allotted, one each to G Emanuele and A Charleston. On 22 September 1982 Mr Charleston transferred his share to Mr Cosimo Leonardis. On 28 June 1984 Mr Leonardis declared in writing that he held his share in Pellota on trust for Paterson. On the same day Mr Emanuele also declared in writing that he held his share on trust for Paterson.

[1418] It appears clear that Mr Emanuele and his advisors appreciated the need for Pellota not to be a subsidiary of Management. Accordingly Mr Leonardis executed a share transfer form transferring his share to Emanuel Holdings. The transfer form has been duly executed by both transferor and transferee but is undated. However, by document signed and sealed by Paterson dated 1 September 1987 Paterson authorised and directed Mr Leonardis to transfer his ordinary share in Pellota which he held on his behalf to Holdings for a consideration of $1. This authorisation may help to date Mr Leonardis' transfer form. Mr Emanuele also executed a transfer of his share in Pellota to Holdings. That form is dated 1 September 1987. With respect to it there was also a signed and sealed authorisation from Paterson directing Mr Emanuele to transfer the share to Holdings for a consideration of $1.

[1419] The plaintiffs point out that the transfers may not have been recorded or registered by Pellota whose statutory records continued to show, at least until 30 November 1990, that its shareholders were Messrs Emanuele and Leonardis who held their shares in trust for Paterson.

[1420] The statutory register of Pellota, Exhibit 228 is contained in a ring-binder. The first document in it is a handwritten note on Coopers & Lybrand letterhead which advises

> 'The registered office of Pellota is in Canberra, ACT. This file is intended to be maintained as a "mirror image" to the one in Canberra.'

[1421] In the section headed 'Register Members' there are two pages recording the allotment of shares. One, dated 4 September 1980, records the allotment of one ordinary share to Giuseppe Emanuele '(in trust for Paterson & Co)'. There is also a record of the allotment of one share, also on 4 September 1980, to Adam Charleston which was then transferred on 22 September 1982 whereupon he ceased to be a shareholder. A third entry shows that on 22 September 1982, by transfer, Cosimo Leonardis became the holder of one share '(in trust for Paterson & Co)'. The record also contains a declaration of trust signed by Mr Leonardis and dated 27 March 1992 (nine and a half years later than the date of the transfer) showing that he held shares in a number of companies, including Pellota, in trust for Paterson. There is a similar declaration of trust signed on 25 March 1992 by Mr G Emanuele. This relates to a larger number of companies, but include Pellota. These declarations of trust appear to be originals.

[1422] The register also contains the share transfer forms I have already described, one by Mr Leonardis which is undated and one by Mr Emanuele dated 1 September 1987. Each transfer is followed by Paterson's authorisation to the transfer of the shares to Emanuel Holdings.

[1423] Apparently those who prepared the later declarations of trust for execution were unaware of the transfer of the shareholding in Pellota from Messrs Emanuele and Leonardis to Holdings. Those documents cannot be reconciled with the others suggesting that the shares had been transferred a few years earlier.

[1424] The plaintiffs produced another statutory register for Pellota which is said to have come from Canberra. It is in form a bound book of foolscap size published in a standard form by Collins. What appears to be the original share transfer forms have been inserted loosely into the book. The one signed by Mr Leonardis is dated 1 September 1987, suggesting that the undated photocopies of the form which appear elsewhere in the evidence were made prior to its being dated. The register of members appears to show that the original shareholders were Brian Doyle and Christopher Chenoweth. Presumably these were the subscribing shareholders when the company was incorporated as a shelf company. The register records the transfer of the two shares, one to Mr Emanuele on 29 September 1980 and the other to Mr Charleston on the same day. Pages 27 and 28 of the book then record, in pencil, a transfer of shares from each of Mr Emanuele and Mr Leonardis to Holdings on 1 September 1987. The manner in which the transfers are recorded is quite confusing and suggests, nonsensically, that as a result of the transfers Holdings held no shares and Mr Leonardis held two. The previous two pages are equally confusing, suggesting a transfer of shares from Mr Doyle to Emanuel Holdings in 1987 and from Mr Chenoweth to Mr Leonardis on a date not shown.

[1425] Despite the confusion and the obvious inaccuracy of the registers the weight of evidence supports the finding that the shareholding of Pellota was transferred to Emanuel Holdings on 1 September 1987 in accordance with the understanding and desire of Mr Emanuele and his advisors as well as Elders' solicitors that this occur.

[1426] Whether or not the transfer of the shares to Holdings free of the trust in favour of Paterson was registered prior to 29 October 1987, the effect of the transfers and direction by Paterson was to make Holdings a beneficial owner of the shares on and from their execution. See *Avon Downs Pty Ltd v. Federal Commissioner of Taxation* (1949) 78 CLR 353 at 365. The direction by Paterson to transfer the shares, it being under no disability and absolutely entitled to the trust property constituted by the shares could, and did, bring the trust to an end by directing the transfer. See *Saunders v. Vautier* 49 ER 202; *Queen Street Hotels Pty Ltd v. Byrne* (1980) ACLC 40-611.

[1427] Some contemporaneous correspondence supports the conclusion that the shares were transferred on or before 29 October 1987. On that day the solicitors for Mr Emanuele and his company spoke by telephone with the solicitors for Elders. A note of their conversation records that Mr Brebner (Elders' solicitor) said that the share transfers should be effected so as to transfer 'the beneficial ownership of the shares in Pellota Pty Ltd away from Paterson & Co Pty Ltd' before the purchase agreement and supporting guarantees and charges were executed. Mr Swann (Emanuele's solicitor) said that he 'would take care of this and it would be done prior … to submitting the documents to stamp duties.' By a letter of 29 October 1987 from Thomson Simmons & Co to Mr Sara of the Emanuel companies, the solicitors wrote:

> 'We confirm that it will be necessary to transfer the shares in Pellota Pty Ltd held by Mr C. Leonardis and Mr G. Emanuele on behalf of Paterson & Co Pty Ltd to Emanuel Holdings Pty Ltd in order to ensure that at the relevant time Pellota Pty Ltd was not a subsidiary of Emanuel Management Pty Ltd.'

On 30 October 1987 Mr Leonardis wrote to Thomson Simmons:

> 'We refer to your letter … and accordingly enclose … the documents …
>
> 1. Share transfer form whereby C. Leonardis transfers one ordinary share in Pellota …
>
> 2. Share transfer form whereby Mr G. Emanuele transfers one ordinary share …
>
> 3. Direction from Paterson & Co Pty Ltd … authorising and directing C. Leonardis to transfer the one ordinary share to Emanuel Holdings …
>
> 4. Direction from Paterson & Co Pty Ltd … authorising and directing Mr G. Emanuele to transfer the one ordinary share to Emanuel Holdings …'

By a letter dated 3 November 1987 Thomson Simmons asked Mr Leonardis to:

> '… forward … as soon as possible a copy of the latest balance sheet and profit and loss account of Pellota Pty Ltd in order that we may stamp the share transfers …'

[1428] These documents establish that the solicitors for Emanuele and his companies, and indeed Elders' solicitors, appreciated that the share transfers should be effected before Pellota became bound by the agreement to purchase the preference shares from Elders if required to do so. The documents also indicate that the shareholders and the beneficiary were aware of the fact and responded to the situation. There is no reason to doubt that the shares were transferred to Holdings on or before 29 October 1987, though it may not have been as early as 1 September 1987. At no relevant time was Pellota a subsidiary of Management.

[1429] S 130 sets out the consequences of a company contravening s 129. S 130(1) provides that a contract or transaction is not invalid by contravention of s 129(1)(a). The contract which effects the acquisition forbidden by s 129(1)(b) is voidable by the company and, with the court's permission, by a shareholder, debenture holder or director. See s 130(2) and (3). However, by s 130(6)

> 'If a certificate signed by not less than two directors … stating that the requirements of paragraphs 129(10)(a) to (j) inclusive have been complied with in relation to the proposed giving by the company of financial assistance for the purposes of an acquisition or proposed acquisition by the person of shares … in … a holding company is given to a person –
>
> (a) The person to whom the certificate is given is not under any liability to have an order made against him under subsection 4 …
> (b) Any such contract or transaction is not invalid, and is not voidable under subsection 2, by reason that the contract is made or performed or the transaction is engaged in, in contravention of section 129 …'

[1430] The following subsection creates an exception to the protection given to the transaction in cases where the person to whom the certificate is given had knowledge that its contents were erroneous.

[1431] On 29 October 1987 all of the corporate guarantors of the Pellota purchase agreement which were subsidiaries of Management, and Management itself, executed certificates pursuant to s 130(6) of the *Companies Code* by which each company certified:

> 'That the requirements of paragraphs 129(10)(a) to (j) inclusive of the Code have been complied with in relation to the proposed giving by the company of financial assistance for the purpose of in connection with the acquisition by Pellota Pty Ltd of 156,000 Class B preference shares in the capital of Emanuel Management Pty Ltd.'

There were three corporate guarantors which did not provide such certificates. They were Emanuel Holdings, Establishment Holdings and Giuseppe Nominees. None of these was a subsidiary of Management. They were all above Management in the corporate structure. (The certificates are Exhibit 109)

[1432] There is no evidence that any officer of Elders knew, contrary to the assertions in the certificates, that the requirements of s 129(10) had not been complied with. It follows that the certificates are a complete answer to this part of the plaintiffs' submission. Contravention of s 129 as a ground for asserting invalidity of the October 1987 purchase agreements concerning the B Class shares has not been made out.

[1433] The plaintiffs also call in aid s 205A of the *Companies Code*. It provides that:

> '(1) Where –
>
> (a) A company creates a charge on property of the company on favour of a … relevant person … and
> (b) Within six months after the creation of the charge, the chargee purports to take a step in the enforcement of the charge without the court having … given leave …

> the charge, and any powers purported to be conferred by an instrument creating or evidencing the charge are … void.'

'Relevant persons' are defined to be those who were officers of the company when the charge was created or within six months prior to the creation of the charge. The term includes persons associated with such officers.

For the section to be applicable Elders must have been, or its officers must have been, directors of Management. I have found that neither Elders nor its officers were directors of Management.

Secondly the section applies only where the chargee takes a step in the enforcement of the charge within six months of the creation. The charges were relevantly created in 1983 and 1987. It is not at all clear that the charges over the deposit accounts were ever enforced. There appears to have been a consensual transfer of the credit balances from Management and Elizabeth House to Elders. In any event any such enforcement occurred on the date of redemption, 31 December 1990, years after the charges were created.

The section has no application.

[1434] The last point taken by the plaintiffs is that the purported charges over funds in the deposit accounts are invalid because, in the nature of things, a chose in action, being a debt owed by A to B, cannot be the subject of a charge even by B to secure a promise to pay A. Perhaps a simpler way of putting the proposition is that a debt cannot be the subject of a charge by the creditor in favour of the debtor. Such a charge is said to be a conceptual impossibility. The point can apply only to the Management deposit account which was with Elders in whose favour the charges were given. The Elizabeth House deposit account was held with Discount Factors, a company other than Elders. There can be no challenge to a charge by A in favour of B over a debt owed to A by C, on that ground alone. The plaintiffs rely upon in *re Bank of Credit & Commerce International S.A. [No. 8]* [1998] AC 214 but cannot have read it. The judgment of Lord Hoffman (with whom the other members of the House agreed) supported the validity of such a charge. He said (226-227):

> 'The depositor's right to claim payment of his deposit is a chose in action which the law has always recognised as property. There is no dispute that a charge over such a chose in action can validly be granted to a third party. In which respects would the fact that the beneficiary of the charge was the debtor himself be inconsistent with the transaction having some or all of the various features which I have enumerated? The method by which the property would be realised would differ slightly: instead of the beneficiary of the charge having to claim payment from the debtor, the realisation would take the form of a book entry. In no other respect, as it seems to me, would the transaction have any consequences different from those which would attach to a charge given to a third party. It would be a proprietary interest in the sense that, subject to questions of registration and purchaser for value without notice, it would be binding upon assignees and a liquidator or trustee in bankruptcy. The depositor would retain an equity of redemption and all the rights

> which that implies. There would be no merger of interests because the depositor would retain title to the deposit subject only to the bank's charge. The creation of the charge would be consensual and not require any formal assignment or vesting of title in the bank. If all these features can exist despite the fact that the beneficiary of the charge is the debtor, I cannot see why it cannot properly be said that the debtor has a proprietary interest by way of charge over the debt.'

[1435] The proposition that 'a man cannot have a proprietary interest in a debt … which he owes another' had been accepted as correct by Millett J in *re Charge Card Services Ltd* [1987] Ch 150 but was resoundingly rejected by the House of Lords in *Bank of Credit and Commerce*. Lee J had also favoured the notion, subsequently rejected, that 'there can be no mortgage or charge in favour of oneself of one's own indebtedness to another' in *Broad v. Commissioner of Stamp Duties* (1980) 2 NSWLR 40 at 46. The reasoning in *re Charge Card Services* was followed by the full Supreme Court of *South Australia in Jackson v. Esanda Finance Corporation Ltd* [1992] 59 SASR 416 at 418 and by Lee J of the Federal Court in *Griffiths v. Commonwealth Bank of Australia* (1994) 123 ALR 111 and in *Wily as Liquidator of AUR NL (in liq) & Anor v. Rothschild Australia Ltd* [1999] 47 NSWLR 555 at 564.

[1436] In *Cinema Plus Ltd (Administators Appointed) v. Australia & New Zealand Banking Group Ltd* (2000) 49 NSWLR 513 Spigelman CJ, having noted these cases, observed (518) that there were a number of judicial statements which appeared to contradict that line of authority and then said:

> 'The matter must now be revisited in light of the House of Lords in *re Bank of Credit and Commerce …*'

His Honour said (521):

> 'In my opinion, there is no reason why, in an appropriate case, equity could not find that the intention of the parties to create a charge between a debtor and creditor, overrides what would be regarded, at common law, as a 'conceptual impossibility'.'

The other members of the court, Sheller and Giles JJA did not directly address the point.

[1437] In *Associated Alloys Pty Ltd v. ACN 001 452 106 Pty Ltd* (2000) 74 ALJR 862 Gaudron, McHugh, Gummow and Hayne JJ in their joint judgment (para 6) referred to Lord Hoffman's description of an equitable charge in *re Bank of Credit and Commerce* with apparent approval, though their Honours were not concerned with the point whether a charge by a debtor over a debt owed to him by the chargee was valid. Nevertheless it was his analysis of the nature of a charge which led Lord Hoffman to his affirmative conclusion and that analysis appears to have been accepted by the High Court.

[1438] In these circumstances I think the law in this State should be as explained by Lord Hoffman. Accordingly I conclude that the charges were valid.

[1439] The last question to be addressed is an argument that Elders had released a number of the instruments creating a charge over the deposit accounts prior to 31 December 1990. The only charge which it is necessary to investigate is the Deed of Assignment of 29 October 1987 given by Management to change its deposit account in support of the guarantee made pursuant to the substitution of Pellota as purchaser.

The charge given by Elizabeth House is not said to have been discharged.

Nor is the charge given by Management pursuant to the deed of June 1988. It is said, however, that this charge was never registered so that it is void as against the liquidator. This overlooks the fact that the validity of the charge is to be determined by reference to the events of December 1990, more than four years before the liquidation of Management. S 200(10) of the *Companies Code* provided that a charge on property was not invalid by reason only of a failure to register it. S 205 makes void as against the liquidator charges on property of a company that had not been registered as required by the Code. However this section had no application to the situation four years before there was a liquidator which is the time when one had to assess whether there was a charge over the deposits. The charge was then valid as between the parties to it.

[1440] I will deal with the Deed of Assignment. The first defendants submit that the Deed of Assignment, the terms of which I set out earlier, was registered on the register of company charges on 4 November 1987 as charge number 9650/26. The reference is to Exhibit 477, Item 3.1. This is an exhibit in electronic form which I have accessed on my P.C. and read but I cannot identify the registration asserted. Nevertheless I will proceed on the assumption that it is there. Exhibit 477, Item 3.2 is a form dated 1 November 1989, entitled

> 'Memorandum of Payment or Discharge of Debt or Liability
> Memorandum of Release or Part of Property from Charge'

Under the hand of Mr Hosking Elders certified by the form that a debenture charge dated 4 November 1987 numbered 9650/26 created by Management in favour of Elders had been paid in full on 3 October 1989. The form also stated that property described in the schedule was released from the charge. But the schedule contains no entries. No property is identified as being released.

[1441] What seems to have happened in fact is that the mortgages granted by Remmadell to Management which had been assigned to Elders as part of the security for the performance of Management's guarantee of Pellota's purchase agreement were transferred back to Management. Mr Hosking's certificate is apparently meant to record the discharge of the obligations contained in the mortgages which, pursuant to the assignment of October 1987, were obligations owed to Elders.

[1442] By Deed of Reassignment dated 21 November 1989 (Exhibit 476, Item 95) made between Management and Elders the parties recited:

> 'By a deed of assignment … made 29^{th} October 1987 (Management) assigned to Elders mortgage … no. 6399809 … (the Remmadell mortgage)
>
> 3. (Management) has requested Elders to reassign the mortgage to it.'

The deed then provided for the assignment by Elders to Management of all its interest in the mortgage and all money payable under or secured by the mortgage. Importantly clause 3 provided:

> ‘Nothing contained in this deed nor the execution or registration of the … transfer shall
>
> (a) Affect the right of Elders to recover payment of the principal referred to in the assignment or to enforce the securities thereby granted other than the mortgage hereby released
>
> (b) Release (Management) or any other party from the guarantee and indemnity referred to in the assignment or release any other security granted by (Management) or by any such other party
>
> And all of the rights and remedies of Elders against (Management) (except as aforesaid) and the other parties to the said guarantee and indemnity and under the securities granted by them are hereby expressly reserved.’

[1443] Exhibit 441, EFG’s securities register, notes the Deed of Assignment of 29 October 1987 and against which is the notation ‘Discharged 5.12.89’. The notation does not refer to the Deed of Reassignment which tempered the effect of the transfer of the mortgage back to Management. The Deed of Reassignment, by its terms, preserved the effect of the charge over the deposit account.

Moreover Mr Hosking’s certificate of 1 November 1989, though it declared that the payments secured by the charge had been made in full, did not purport to release any property from the charge. Page 4 of the register shows, as mentioned earlier, the receipt of deposits from the sale of Market Plaza and refers to a letter of acknowledgment about those deposits.

[1444] Clause 9 of the Deed of Assignment of 29 October 1987 provided that:

> ‘This deed shall remain in force as a running and continuing security for the payment of the principal from time to time … payable by the assignor to Elders …
>
> 2. This deed shall not be or be deemed to have been redeemed –
>
>   (i) By reason of any settlement of accounts or of any payment made by the assignor to Elders
>   (ii) By the payment or satisfaction of all money hereby secured for the time being, or
>   (iii) By reason that no moneys due, owing or payable hereunder at any time
>
> 3. This deed shall continue in full force and effect and shall not be redeemed or redeemable until Pellota has paid to Elders the purchase price of the said shares and all other money payable under the said agreement …’

At no time did Pellota make the payment referred to in subclause (iii). The emphatic terms of Clause 9 are not overcome by the ambiguous form noting only the reassignment of mortgages but no other release of security. The reassignment of the mortgage appears to have been what prompted the registration of the form but neither it nor the notation on EFG's own securities register had the effect of releasing the deposit accounts from the charge created by the Deed of Assignment of October 1987.

[1445] The plaintiffs raise one more argument against the validity of the security over the Elizabeth House deposit account. They submitted that:

> '500. … EFG was not a bank, it not holding a banking licence, and so it was not an authorised deposit taking institution. The deposit accounts were nothing more than book debts owed by EFG to … Management and to Elizabeth House … They are not funds of cash in which it is possible to trace funds, as though they were bank deposits. There is no evidence … of the names in which the funds were ultimately invested by EFG … or even whether EFG did no more than record the debt in its own accounts, not otherwise keeping the money physically separate from its own funds.
>
> 501. EFG held no security from Elizabeth House … over any book debt owed (by) it (EFG) to Elizabeth House … The 1983 deed of assignment relied upon related to moneys deposited by Elizabeth House with Discount Factors. The terms of the assignment do not purport to charge moneys deposited by other companies with Discount Factors. Further, in the absence of any evidence of any such charged funds held by Discount Factors as at December 1990, EFG had no secured asset over which it could have enforced any security.'

[1446] The point about the banking licence was taken too late to be allowed. Had it been pleaded or had earlier warning been given of it evidence of the matters, the absence of which the plaintiffs relied upon in para. 500, could have been called. It may be right to assume that EFG did not hold a banking licence although the point was not proved, as I recall. But whether 'the deposit accounts were nothing more than book debts owed by EFG …' or whether they were choses in action represented by the payment of moneys into an account designated as such, and regarded by the parties as akin to deposits to a bank account, could have been the subject of evidence and fuller argument. It is far from clear that by accepting the payment of money by Elizabeth House and/or Management (or other Emanuel companies) by way of loans, and by paying interest thereon, by recording further loans and repayments by way of records in a running account designated a 'deposit account' that EFG was carrying on the business of banking. As I say the point was thought of too late to be taken advantage of, if it has any substance.

[1447] I do not understand the attempt to denigrate the balance of the account between Discount Factors and Elizabeth House into a mere 'book debt'. On any view of the transactions between Elizabeth House and Discount Factors there was a debt owed by the latter to the former which was recorded in books of account. The debt, the chose in action, was the subject of a charge. Whether it be called a book debt, a debt or a chose in action is surely beside the point.

[1448] The next point apparently taken is that Elders held no security from Elizabeth House over any debt owed by it to Elizabeth House. That may be right but as I pointed out earlier the Elizabeth House deposit account was with Discount Factors not Elders or any other Elders company. The Deed of Charge of 9 August 1983 given by Elizabeth House refers to moneys deposited with Discount Factors. There is no doubt there was such a deposit account. There is no evidence that by novation or some other means another Elders company was substituted for Discount Factors.

[1449] Another point seems to be that the charge was not apt to cover moneys deposited by Elizabeth House which were not its own. The point no doubt has its origin in the statement made with respect to Exhibit 114 that most of the moneys deposited by Elizabeth House into its account came from the proceeds of sale of properties owned by other companies. The charging clause charged 'all other moneys at any time or from time to time … deposited by (Elizabeth House) with Discount Factors …' There is nothing to limit the operation of the clause to moneys which were Elizabeth House's own, or to exclude money which Elizabeth House borrowed and deposited.

[1450] If the plaintiffs are to be taken as submitting that there is no evidence of funds in the account to which the charge could attach it is disproved by Mr Macks own Exhibit, 114, which summarises in spreadsheet form, the moneys in the account.

[1451] The plaintiffs' attack on the validity of Elders' securities has not succeeded. I am satisfied that there were valid charges in favour of Elders over the moneys which were held on the deposit accounts as Exhibits 114 and 118 show. The consequence for the liquidator's claims under the *Bankruptcy Act* have already been explained. The liquidator has failed to make out his case that the redemption of the preference shares or the payment of dividends after 24 December 1989 were made with an intention to defraud creditors.

[1452] Even if Elders' securities were for some reason invalid or unenforceable it would not seem to affect the outcome, unless Mr Emanuele or the other directors of Management knew of the invalidity. So long as Mr Emanuele believed that Elders had valid securities under which they could insist upon payment of the purchase price by the purchasers and guarantor, and could enforce the charges given in support of those obligations then his state of mind in paying for the redemption of the shares would have been the same as if the securities were in fact valid. In either case his intention would have been to make a payment he genuinely believed was due and which could be enforced against Management. In both cases there is an absence of an intention to defraud other creditors.

[1453] All of the claims with respect to the issue and redemption of preference shares must be dismissed.

SECTION VI : Miscellaneous Matters

[1454] I have considered all of the plaintiffs' claims and causes of action against the first defendants, and have concluded that none of them have been made out, and should be dismissed. There will be judgment for the first to tenth defendants against the plaintiffs. Three points remain to be noted.

Loss by One Diminishes All

[1455] Paragraph 26 of the statement of claim pleads that the corporate regulator from time to time:

> '… made class orders relieving specified members of the Emanuel group from the requirement of preparing and auditing separate accounts of subsidiaries where deeds of indemnity had been entered into between the parent and its subsidiaries whereby each undertook to meet each other's liabilities as if they were their own (the "class orders")'

Paragraph 27 pleads that, pursuant to those class orders, deeds of cross-guarantee and indemnity were executed between various members of the Emanuel group (which, it will be remembered, was defined in the pleading to be the first 65 plaintiffs). Clause 31 alleged:

> 'By reason of the cross-guarantees each and every company in the Emanuel group that was a party thereto had an interest in the wealth of each and every other company that was a party thereto, and was thereby and to that extent affected by a diminution of that wealth.'

[1456] The first 27 plaintiffs, together with Mr Emanuele, were joined as defendants in the Supreme Court action which resulted in judgment against them all in February 1995. The first 27 plaintiffs and Mr Emanuele were the applicants in the Federal Court proceedings in 1994. The first 29 plaintiffs were parties to DOFR in March 1995.

[1457] The pleas of *res judicata* and *Anshun* estoppel which I have found to have been made out preclude the first 27 plaintiffs from pursuing in this action the claims in respect of the 1988-1994 transactions, and the payment of dividends and redemption of the preference shares. I have also found that those plaintiffs have no right to have the judgment of February 1995 set aside. The first 29 plaintiffs who are parties to DOFR are also precluded by the terms of the releases found in that deed from prosecuting their claims against EFG in respect of the preference shares and the other transactions.

[1458] The other corporate plaintiffs, the 30^{th} to 65^{th}, were apparently joined to avoid the consequences of the findings I have just summarised. They were not parties to the judgment in the Supreme Court or in the Federal Court, and they are not bound by the terms of DOFR. The plaintiffs put forward an undifferentiated claim that all of them have suffered loss by reason of the preference share dealings and the earlier transactions as well as the transfer of the APM land consequent upon 'the 1995 Scheme'.

[1459] The orthodox view, following *Salomon v. Salomon & Co Ltd* [1897] AC 22 and *Walker v. Wimborne* (1976) 137 CLR 1 would be that only a company, which is an entity separate from its members and creditors, had a right to sue for a loss sustained by the company. This is so, of course, even where companies are in a 'group' with common shareholders and directors. All of the plaintiffs, however, seek to recover what is said to be the loss suffered by Emanuel 14 by the transfer of the APM land at an undervalue. All of the plaintiffs seek to recover the losses suffered by Management in the payment of dividends and the redemption of the preference shares. To the extent that entering into the agreement constituted by DOFR occasioned loss it was the loss suffered by the first 29 plaintiffs but all 65 claim.

[1460] The plaintiffs seek to escape the consequences of legal orthodoxy by the terms of the deeds of cross-guarantee. The one to which I was referred as being typical (Exhibit 106 13/1224) was made on 24 June 1988 between Management as 'the holding company' and Emanuel Queensland, Havana, Grangeville, Emanuel Holdings, Trombone, Villa Cairns, Cofordo 260, Saroon, Cofordo 251, Leominor, Derwentwater, Antlia, Centaurus, Giuseppe Nominees, Dangier, Herriott, Etruscan, Cloudland Investment and Pellota as 'subsidiaries'.

[1461] The deed recited that the subsidiaries were wholly owned by the holding company, and that they were all desirous of being relieved from compliance with the requirements of the *Companies Code* relating to the making out, auditing and publication of individual accounts. By Clause 1 they agreed:

> '1. In the event that any of the Subsidiaries is wound up and there is a deficiency in the dividends available for distribution to creditors of such subsidiary to the intent that those creditors whose debts and claims have been admitted have not received payment … in full at the time the affairs of such Subsidiary are fully wound up … then the Holding Company hereby severally, unconditionally and irrevocably guarantees to and undertakes with any such Subsidiary to pay on demand from the liquidator of any such Subsidiary the amount of any such deficiency.
>
> 2. In the event that the Holding Company is wound up and there is a deficiency in the dividends available for distribution to creditors of the Holding Company to the intent that those creditors whose debts and claims have been admitted have not received payment … in full at the time the affairs of the Holding Company are fully wound up … then each of the subsidiaries hereby severally, unconditionally and irrevocably guarantees to and undertakes with the Holding Company to pay on demand from the liquidator of the Holding Company the amount of any such deficiency.'

[1462] The primary purpose of the imposition of the cross-liabilities was to give the creditors of an insolvent company indirect access to the assets of the holding company, thus diminishing the significance of the unavailability of audited financial statements of individual subsidiaries by persons investing in, or extending credit to, those subsidiaries. See *Westmex Operations Pty Ltd (in liq.) v. Westmex Ltd (in liq.) & Ors* (1992) 8 (ACSR)146 at 151.

[1463] Dealing with relevantly identical deeds Debelle J in *re J N Taylor Holdings Ltd (in liq.)* (1991) 6 ACSR 187 held that they did not operate where both the holding company and the subsidiaries were in liquidation and the assets of both were insufficient to meet the claims of creditors. His Honour pointed out that the deed made no provision for that event and secondly, an attempt to give effect to Clauses 1 and 2 of the deed would, in that situation, result in absurdities. His Honour pointed out that (at 190):

> 'The obligation on the part of the subsidiaries to pay the liquidator of the holding company will thus include an obligation in an amount equal to the sum of the deficiency of the holding company and the aggregate of the deficiencies of each of the subsidiaries.'

Given the insolvency of both the result was 'particularly absurd'.

[1464] McLellan J in *Westmex* took a different view, preferring to construe the deed so that 'admitted debts of the holding company and admitted claims against the holding company did not include debts or obligations arising from the operation of the deed itself.' His Honour said (8 ACSR 152-3):

> 'The … preferred construction is that the debts and claims referred to in each of clause 1 and 2 … are intended to denote only debts and claims external to the deed itself (and, by implication, equivalent deeds between the holding company and other wholly owned subsidiaries), and anterior to the obligations arising thereunder … In my opinion the evident scheme of both the … deeds … is that the amount payable under a particular covenant is to be calculated by reference to a completed notional winding up of the relevant company, for the purposes of which claims under all the deeds are to be ignored.'

[1465] Whichever of these views as to the operation of the deeds of cross-guarantee is accepted the plaintiffs' contention is not made out. If Debelle J be right then the deeds have no operation in a situation where, as here, both Management and its subsidiaries were insolvent at all relevant times. If the alternative view be preferred then the deeds only operate after the liabilities of both subsidiaries and holding company have been ascertained as on a notional, but complete winding up. The determination of liabilities of the companies on the notional winding up will take account of amounts recovered by the liquidator on causes of action the company had. The determinatioin will also take place on the orthodox basis that it is only the liabilities of the company in question that are taken into account. The operation of the deeds will be ignored for the purposes of the determination. The deeds will operate only if there is a surplus in the holding company to make good the deficiency in a subsidiary, or vice versa, after the determinations are concluded.

The deeds do not operate so as to confer generally on one or more of the parties to them, an interest in the property of any of the other parties, or a right to sue for a loss suffered by any other party.

Futility of Claims

[1466] The plaintiffs' claims appeared always to have an air of misplaced optimism as to their ultimate outcome. This is particularly so once the claim to have the judgment set aside was shown not to have any basis. Any judgment which the plaintiffs may have obtained in this action would have been set off against the judgment of 27 February 1995, and judgment given for the net amount. So much appears clear from the decision of McPherson J in *Kostka v. Addison* [1986] 1 Qd R 416 at 420-421. The point is concurred in by the *Law of Set-Off* 3rd ed. by Derham at p.50:

> 'It has been the practice of the common law courts since the 18th century to allow one judgment or order for the payment of a sum of money to be set off against another. This practice extends to a judgment for damages, as well as to an order for costs … Furthermore, it is not an objection that one of the judgments have existed at the commencement of the other action, and might have been pleaded as a defence in the action. The set-off in these cases is not pursuant to the statutes of set-off, but rather it is allowed in the discretion of the court as part of its inherent jurisdiction. It has been described as a form of "equitable" jurisdiction possessed by the common law courts for the purpose of preventing absurdity or injustice.'

[1467] Even on the most optimistic of assessments the plaintiffs' claims did not equal or exceed the amount for which EFG had obtained judgment. Even if the judgment might have been ignored, the underlying debt existed and would have had to be brought into account when determining what, if any, amount the plaintiffs should recover. Their claims did not ever approach the amount of the EFG debt which might have been reduced, had the plaintiffs succeeded, but would never have been eradicated. Moreover any substantial relief obtained by the plaintiffs must have been on the basis that EFG was restored to its former position as a secured lender with its mortgages and charges reinstated. See *Maguire v. Makaronis* (1996-1997) 188 CLR 449; *Alati v. Kruger* (1955) 94 CLR 216. The *status quo ante* was that EFG was a secured lender, Management and the other companies in the Emanuel group were insolvent debtors and EFG could move under its securities.

[1468] Exhibit 455 is a certificate under the hand of Mr O'Grady pursuant to Clause 9.1 of DOFR certifying that, at 20 February 2003 the debt owed by the Emanuel group (as I have defined it) was $542,916,467.92. The calculation of the debt appearing in the certificate is based upon the judgment debt having been reduced by the stated consideration for the APM land which was transferred from Emanuel 14 to the fifth, sixth, seventh and eighth defendants. The other properties the subject of securities were not transferred to EFG. EFG went into possession of them. It has sold some and received income from others. Amounts received by sale proceeds or income have been credited to the mortgagors' account but interest has continued to accrue at 20.5 per cent capitalised monthly. This explains the magnitude of the debt.

[1469] The plaintiffs complain about this treatment of interest by EFG and argue that since judgment was entered in February 1995 simple interest at 10 per cent allowed by the Supreme Court Act is all that could lawfully be claimed.

[1470] The first defendants' answer is that Clause 2 of the Deed of Loan and Guarantee of 4 September 1990 (Exhibit 106 15/1366) provided that:

> 'The mortgagor will pay to the Mortgagee interest on the principal sum or insomuch thereof as shall from time to time be or remain owing … at the required rate … specified in the second appendix … calculated and charged on the rests and payable on the days and computed all as specified in the Second Appendix … PROVIDED ALWAYS that if any such interest or any interest payable on arrears of interest capitalised under the provision shall be unpaid on the due date … in every such case the interest on arrears shall without prejudice to the right of the Mortgagee to sue for and recover such interest … be added to the principal sum and … bear interest payable at the rate and on the days aforesaid and all the covenants and provisions herein expressed or implied with respect to interest on the principal sum shall equally apply to interest on such arrears …'

Management was the mortgagor and the other members of the Emanuel group were the guarantors. The second appendix shows the required rate of interest to be 22.5 per cent and the rest periods to be monthly. In fact EFG has charged interest 20.5 per cent which would be the applicable rate had Management paid interest punctually.

[1471] There were non-merger clauses in the securities which entitles EFG to charge interest at the agreed, higher rate and capitalise it monthly despite the judgment. Clause 1 of the mortgage debenture given by Emanuel 14 (Exhibit 106 14/1357) provided that:

> 'In the event of the liability of the Mortgagor … becoming merged in any judgment or order, the Mortgagor will pay to the Mortgagee upon demand from time to time interest on the amount for the time being owed under such judgment or order at the highest rate charged or chargeable by the Mortgagee in respect of the moneys hereby secured …'

Clause 3 of the deed of 4 September 1990 provided:

> 'If the Mortgagee shall at any time obtain judgment for all or any of the principal sum such judgment shall until satisfied bear interest at the Required Rate.'

Fry LJ had this to say about such provisions in *Ex parte Fewings, In re Sneyd* (1883) 25 Ch D 338 at 355:

> 'The first question is simply one of construction. When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the

> principal debt, that covenant also is merged in the judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment.'

Lord Halsbury thought that Fry LJ's remarks put the point 'with great precision and accuracy' in *Economic Life Assurance Society v. Usborne* [1902] AC 147 at 149. Those cases were followed and applied by Hoare J in *McDonald v. Scobie* [1980] Qd R 477 at 478.

[1472] It follows that the judgment debt has correctly attracted interest at 20.5 per cent capitalised monthly as the first defendants have calculated and the plaintiffs could not hope to have profited from this action unless their claims exceeded half a billion dollars which they did not do, on their assessment.

It is true that the plaintiffs seek, as part of their relief, an account of the profits made by EFG from its development of Mango Hill. Some years after the settlement with the Emanuel group EFG decided to develop the land itself in joint venture with Lendlease. The development is now known as North Lakes. During the trial the joint venture was brought to an end by EFG which is now the sole developer.

On the evidence the development has not yet produced a profit and is not forecast to do so for several more years. An account of profits would yield the plaintiffs nothing.

Claims by EFG

[1473] In the event that EFG should be found liable to Management in respect of payments made pursuant to the issue or redemption of the preference shares EFG seeks leave to counter-claim against Management and claims contributions from Coopers & Lybrand on the basis that their conduct led to the redemption and/or payment of dividends, the receipt of which is the basis for the claims by Management against EFG. It is said that Mr Allen, of Coopers & Lybrand, advised Mr Elliott of EFG when they met in Adelaide that it was in order for the redemption to occur and that, if he was in error in that advice because of Management's insolvency EFG acted on it to its detriment. Relevantly it was said he was acting as agent for Management so that both it and Coopers & Lybrand are liable for contravention of s 52 of the *TPA* or in negligence.

[1474] EFG requires leave pursuant to s 471B of the *Corporations Act* before it may pursue its counter-claim. The plaintiffs oppose the grant of leave.

[1475] For the reasons which I have given EFG is not liable to pay any sums it received by way of dividends or redemption. Accordingly it is not necessary to consider the questions raised by the counter-claim or the claim for contribution against Coopers & Lybrand.

[1476] Additionally EFG sought leave to counter-claim against the Emanuel group for the amount of the judgment debt, less subsequent receipts together with interest compounded monthly at the contracted rate of 20.5 per cent per annum. As well there is a counter-claim against the 28th and 29th plaintiffs (defendants by counter-claim) for the sums received by them pursuant to DOFR. As well there is a claim against Emanuel 14 that any cause of action it has against EFG which it prosecutes in these proceedings are subject to the mortgage debenture by it in favour of EFG in 1987 so that the proceeds of this action would return to EFG.

[1477] These claims would only need to be considered if the judgment were set aside, or if DOFR was set aside and if the plaintiffs otherwise succeeded in their actions. As they have not it is unnecessary to consider the counter-claim or whether leave should be given to prosecute it.

Rulings on Evidence

[1478] The first defendants sought a ruling on the admissibility of ten documents included in the bundle which became Exhibit 105 and on one document in Volume 2 of Exhibit 89. Some of the documents are referred to in the plaintiffs' closing submissions.

[1479] Exhibit 105 was tendered at T.1436.55. The point to which it was said to be relevant is developed in the opening address at T.1428.50. The discussion is almost incomprehensible and it is not easy to understand what point the documents contained in the Exhibit were meant to prove. There are hints that they were meant to show 'that there was a s 129 problem and that Elders … had to have the Emanuel group go through that process' (T.1431.55). None of the Elders' witnesses were asked about any of the documents in Exhibit 105.

[1480] The documents to which objection were taken are:

(a) PT001 03 0003-0004 [document purports to be a memorandum from the Emanuel's solicitor Mr Saint to John Tucker dated 12 February 1986]

(b) PT001 03 0084 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 17 March 1986]

(c) PT 015 03 0206 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 16 July 1986]

(d) PT015 01 0023 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 18 August 1986]

(e) PT015 01 014 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 19 November 1986]

(f) PT043 14 0039 [document purports to be a memorandum by Emanuel's solicitor Mr Saint dated 5 May 1987]

(g) PT003 01 0008 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 20 August 1987]

(h) PT003 01 0019 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 28 August 1987]

(i) PT003 01 0021 [document purports to be a file note by Emanuel's solicitor Mr Saint dated 1 September 1987]

(j) PT003 01 0061 [purports to be various other file notes by Emanuel's solicitor Mr Saint]

[1481] The grounds for objection are that the documents are hearsay, the maker of the statement was not called as a witness and that the authorship of the documents has not been proved.

[1482] Two of the documents appear to be inter-office memoranda of Thomson Simmons, solicitors for the Emanuel group. Most of the others purport to be telephone attendances by Mr Saint of Thomson Simmons on Mr Brebner, EFG's solicitor.

[1483] I uphold the objections. No reason was given why Mr Saint was not called. The documents are hearsay and are not admissible unless their author were called. Nothing was put before the court to justify an exercise of the discretion contained in s 92(2) of the *Evidence Act* to dispense with calling Mr Saint.

The documents are not admissible pursuant to s 1305 of the *Corporations Act*. They were not kept by a body corporate under a requirement of the Act nor do they purport to be so.

[1484] The other document objected to is Exhibit 89 2/118. It is in the same category as the others, being a file note of Mr Saint's. The grounds of objection are the same and I uphold them.

[1485] I have removed the documents from the Exhibits.

SECTION VII : Claims Against Coopers & Lybrand

[1486] There are in essence two claims against the 11th, 12th and 13th defendants, Coopers & Lybrand (11th defendant), Mr Anderson (12th defendant, the auditor of Management and its subsidiaries from 1988 until 1992) and Mr Cuming (13th defendant, who was the liquidator appointed to 11 of the plaintiff companies on 29 January 1991).

Claims Against Mr Cuming

1. The Cuming Companies

[1487] All 11 companies to which Mr Cuming was appointed were dormant. There is no controversy as to four of them. The remaining seven have been called 'The Cuming Companies'. As mentioned in the Introduction they were Elizabeth House, Emanuel (South Australia), Emanuel Investments, Hondel, Libra, Sayer Properties, and Worando Trust.

[1488] The Cuming companies were wound up pursuant to a resolution of their members on 28 January 1991. They were said to be solvent and their liquidation was part of a rationalisation of the plaintiff companies which had become very numerous and had included companies that had not carried on business for years and whose only assets and liabilities were inter-company loans.

[1489] The plaintiffs summarised their case against Mr Cuming as being that he did not 'get in' the assets which comprised debts due to the Cuming companies from Management. Additionally it is said that, in respect of Elizabeth House, he did not recover the moneys taken from its deposit account to redeem the A Class preference shares in December 1990.

The point underlying the last claim is the contention that the credit balance in the Elizabeth House deposit account with Discount Factors was the property of Elizabeth House which had been misappropriated by Management in order for it to redeem the shares.

The plaintiffs gave particulars of their claim in correspondence with the solicitors for Coopers & Lybrand. The claim in respect of inter-company loans to the Cuming companies by other of the plaintiffs was $8,947,211 which it is said Mr Cuming should have recovered, or attempted to recover, for the benefit of the Cuming companies. The amount in the Elizabeth House deposit account taken to redeem the shares was $6,796,455.41.

[1490] It appeared from some remarks in the plaintiffs' opening address that it was to be argued that Mr Cuming owed duties to Management and that his investigations as liquidator of the Cuming companies should have led him to discover that Management was insolvent in 1991 and that consequently he should have put in train the liquidation of Management. That, in turn, would have reduced its losses by causing it to cease trading and incurring debts after about 1991.

Upon inquiry the plaintiffs denied any such claim against Mr Cuming. The concession is, I think, quite right. The only claims being pursued against Mr Cuming are that he did not recover any assets for the benefit of the Cuming companies.

[1491] The directors of all of the Cuming companies signed declarations of solvency on 23 January 1991 in respect of each company. The declarations stated that the directors had made an inquiry into the affairs of the company and had formed the opinion that the companies would be able to pay their debts in full within a period of 12 months from the commencement of the winding up. The statement of (estimated realisable) assets and liabilities attached to each declaration showed that none of the companies had any liabilities and each had an asset in the nature of a debt due to it. As I mentioned all the debts were owed by Management.

[1492] Mr Cuming reviewed the most recent available financial statements and annual returns of the Cuming companies. They showed a position consistent with what appeared in the declarations of solvency and statements of affairs. On 1 March 1991 Mr Cuming wrote to the ATO in respect of the 11 companies to which he had been appointed liquidator:

> 'Pursuant to s 215(1) of the *Income Tax Assessment Act*, I advise that at an extraordinary general meeting of shareholders of each of the abovenamed companies held on 28 January 1991 the companies were placed into liquidation and I was appointed liquidator. Final taxation returns for the company are being prepared and will be forwarded to you in due course.'

Mr Cuming explained that he could not make a complete distribution of company assets to the shareholders until he had received notification from the ATO that no tax was payable, or what amount was payable. In the event that some tax was payable he would have to withhold enough moneys to satisfy any tax assessment from the distribution.

Before his appointment Mr Cuming had been made aware, having been told by Mr Allen in 1989 or 1990, that the ATO was conducting an audit of the Emanuel companies. Mr Cuming understood that he would not receive notification from the ATO in response to his letter of 1 March until the audit was complete.

[1493] Mr Cuming did not hear from the ATO for about 18 months. On 21 August 1992 he received notification that no tax was assessable in respect of four companies. With respect to the remaining seven, the Cuming companies, he received a letter marked 'Without Prejudice' from the ATO also dated 21 August 1992. The letter set out what the ATO regarded as the results of its audit with respect to the Cuming companies. The analysis showed that substantial amounts of tax were payable and should have been the subject of returns in earlier years. The letter sought a response from Mr Cuming if he wished to contest the ATO's reasoning underlying its conclusions.

[1494] On 24 September 1992 Mr Cuming wrote to the ATO:

> 'It is my understanding from the directors and their advisors that the amount claimed for income tax is subject to dispute.
>
> Further, as these amounts have not been previously provided in the company's accounts which I have reviewed, it is necessary for me to ascertain and determine that the amounts indicated in your correspondence may be due to you.

> At this stage, it is not my intention to proceed to distribute the assets of the company until the amount, if any, due to the Deputy Commissioner of Taxation has been determined. In the event that I do distribute the assets, I will comply with your requirement for me to withhold the amount as stated in your letter from the assets which I distribute.'

[1495] By separate letters each dated 21 August 1992 the ATO set out the amounts which it contended were payable by the companies. They were:

Elizabeth House	$710,000
Emanuel (South Australia)	$2,250,000
Emanuel Investments	$125,000
Hondel	$300,000
Libra	$510,000
Sayer Properties	$400,000
Warando Trust	$1,825,000

The letters stated that the ATO believed that those amounts were required to be provided for income tax payable by the companies and that, in accordance with s 215, Mr Cuming was directed to set aside assets to those values as payment for the ordinary debts of the companies.

[1496] Either Mr Allen or Mr Patterson told Mr Cuming that the correspondence of 21 August was to be discussed with Thomson Simmons and that a meeting involving the solicitors, Coopers & Lybrand and the ATO would be convened. Mr Cuming was also told that Messrs Allen and/or Patterson would meet with the ATO of behalf of the Emanuel companies and would represent his interests as liquidator of the Cuming companies. Mr Cuming was also informed that Mr Emanuele 'strongly disputed the ATO's conclusions' and Mr Patterson believed 'that there were strong arguments that the conclusions drawn by the ATO were incorrect.'

[1497] Mr Cuming believed it was appropriate that discussions with the ATO be dealt with 'on a group basis', that is, that all of the companies affected by the audit be represented at the same negotiations with a view to achieving a settlement for all the companies on an aggregate basis 'with the parent company agreeing to meet any tax liability …'. Mr Cuming thought that if the tax liabilities could be settled the liquidation of the Cuming companies could still proceed as a members voluntary winding up. The companies had no liabilities apart from the disputed tax assessments.

[1498] Mr Cuming played no part in the negotiations with the ATO. At a meeting on 15 September 1992 Mr Merritt for the ATO said that it would take no action while negotiations were in progress and that in did not require Mr Cuming to take any action as long as he complied with the letters of 21 August and did not distribute assets to shareholders without holding back the sums specified in correspondence.

[1499] The negotiations proved fruitless and on 29 and 30 November 1993 the ATO issued income tax assessments in respect of the Cuming companies. The details are:

‘(a) Elizabeth House:

- Income tax assessment for year ended 30 June 1983: $256,761.74
- Income tax assessment for year ended 30 June 1984: $19,447.10
- Income tax assessment for year ended 30 June 1985: $5,278.92.

(b) Emanuel (South Aust), income tax assessment for year ended 30 June 1988: $1,801,845.59.

(c) Emanuel Investments, income tax assessment for year ended 30 June 1986: $67,320.08.

(d) Sayer Properties

- Income tax assessment for year ended 30 June 1984: $235,051.76
- Income tax assessment for year ended 30 June 1987: $50,845.22

(e) Hondel income tax assessment for year ended 30 June 1987: $231,268.48

(f) Libra, income tax assessment for year ended 30 June 1987: $383,791.34

(g) Worando Trust income tax assessment for year ended 30 June 1987: $1,467,081.70.

[1500] The due date for payment of each assessment was 4 January 1994. Mr Cuming left it to Mr Patterson to draft objections on behalf of the Cuming companies. He was attending to that task on behalf of the other Emanuel companies which had been assessed to tax. Objections to the assessments were lodged but had not been dealt with by the ATO when Mr Cuming’s appointment as liquidator came to an end in March 1995.

[1501] Mr Cuming knew in 1994 that the Cuming companies did not have the wherewithal to pay the tax assessments. He believed the ATO might accept the situation and agree to a settlement. If it did not he ‘would have to form a view as to the solvency of the Cuming companies and call a meeting of creditors to convert the members voluntary winding up to a creditors voluntary liquidation …’. From the end of 1993 he understood that if the tax assessments could not be negotiated downwards, or if Management did not repay the debts, the Cuming companies were insolvent and would have to be wound up on that basis.

[1502] Section 496 of the *Corporations Law* provided:

> ‘Where a declaration has been made under s 494 and the liquidator is at any time of the opinion that the company will not be able to pay

> … its debts in full within the period stated in the declaration he … must do one of the following as soon as practicable:
>
> (a) Apply … for the company to be wound up in insolvency;
> (b) Appoint an administrator …
> (c) Convene a meeting of the company's creditors …'

Section 494 allows the directors of a company which it is proposed to be wound up voluntarily to make a written declaration that after inquiries they believe that the company will be able to pay its debts in full within a period not more than 12 months after the commencement of the winding up.

[1503] Mr Chrzaszcz of the Australian Government Solicitor, acting for the ATO, wrote to Mr Cuming on 21 March 1994. He referred to the assessments of late November 1993 and pointed out that the statements of assets and liabilities completed with respect to the resolutions that the companies be wound up by their members had not referred to the tax debt and that, if that were taken into account, one at least of the Cuming companies was insolvent. Mr Chrzaszcz called upon Mr Cuming to 'form an opinion concerning the question of the solvency of the company' and to call a meeting of creditors as soon as possible to convert the winding up from a members voluntary one to a creditors voluntary winding up. Mr Chrzaszcz asked when Mr Cuming would convene such a meeting and asked him to reply by 23 March 1994. Mr Cuming telephoned Mr Chrzaszcz to express his 'concern about the requirements specified in the letter of 21 March 1994.' He said that the objections to the assessments had not been dealt with and that the ATO 'was still talking to the Emanuel group.' Mr Cuming believed that the upshot of their conversation was that he need not respond to the letter of 21 March and that Mr Chrzaszcz would contact him in the future when the fate of the objections was known or when the ATO required Mr Cuming to act. Mr Chrzaszcz did not again contact Mr Cuming until 17 November 1994 when he wrote to say:

> 'I would be grateful if you could convene a meeting of creditors in order that (Emanuel Investments) be converted from the members voluntary winding up to a creditors voluntary winding up. May I suggest the meeting be convened next Friday, 25 November 1994? …'

It is to be noted that Mr Chrzaszcz made no complaint of any delay on Mr Cuming's part. This would tend to confirm Mr Cuming's recollection that in the conversation in March it was agreed that a creditors' meeting need not be called until Mr Chrzaszcz requested it. Mr Cuming's diary note of 23 March is also some support for the fact of that agreement.

[1504] On 18 November 1994 the ATO lodged proofs of debt with Mr Cuming in respect of each of the Cuming companies. A meeting of the creditors of Emanuel Investments was convened pursuant to s 496 of the *Corporations Law* and was held on 9 January 1995. Mr Macks was appointed liquidator of the company.

When, on 23 March 1995, Mr Carter was appointed administrator of the Cuming companies, among many others, Mr Cuming's appointment as liquidator came to an end.

[1505] On 11 January 1995 Mr Cuming wrote to Mr Rocco Emanuele and requested, as a matter of urgency, information as to 'which group company has a loan from' the Cuming companies. Mr Furniss replied by fax the same day stating that Management owed each of the companies inquired about debts the amounts of which were he set out. They were:

Emanuel Investments	$63,861.61
Emanuel (South Australia)	$2,608,532.42
Elizabeth House	$1,612,747.96
Sayer Properties	$390,936.99
Libra	$848,388.95
Worando Trust	$3,113,487.89

The list excluded Hondel but the declaration of solvency with respect to it asserted that Management owed it $314,655.

It will be seen that in the case of Emanuel Investments the tax assessment was greater than the amount of the debt owed by Management. In the other companies the amount of the debt was greater than the amount of the tax assessment.

[1506] On 12 January 1995 Mr Cuming wrote to Mr Chrzaszcz to inform him that he had accepted the ATO's proofs of debt but would expected amended proofs to be submitted in the event that objections to the tax assessments were upheld. His letter went on:

> 'I have written to the directors of the companies and (Management) to ascertain the likelihood of the recoverability of the assets of the companies. In the event that I determine that any of the companies are unlikely to realise sufficient assets to meet its liabilities then I will take appropriate action with regard to convening a meeting of creditors.'

On the same day, 12 January, Mr Cuming wrote to each of the Cuming companies (other than Emanuel Investments) and to Management to inquire whether the loans from Management to the Cuming companies would be repaid and, if so, when. He asked for a reply by 31 January 1995. When no response came he rang Mr Rocco Emanuele to prompt him to answer. He was told that 'he was seeking legal advice.' Mr Emanuele confirmed that advice in a letter of 8 February 1995.

[1507] The plaintiffs' case against Mr Cuming is that by his excessive dilatoriness the chance of recovering any of the loans due to the Cuming companies from Management was lost. It is contended that had he acted promptly and vigorously at least part of that debt would have been recovered. The plaintiffs submit more fully:

> '6.(c) Mr Cuming did not seek to recover payment of those debts until early 1995 when he sent a letter of demand to Emanuel Management and Mr Rocco Emanuele responded that the debts could not be paid. *(This is inaccurate. Mr Emanuele wrote that he was seeking legal advice)*
>
> (g) After receipt of the tax assessments and up until December 1994 Mr Cuming took no steps in the liquidations to

investigate the affairs of the companies, recover assets or … call a meeting of creditors …

24. … The Cuming companies had other liabilities that had not been disclosed on the director's statement of affairs and … Mr Cuming knew so.

25. The specific liabilities include Mr Cuming's own fees and … outlays, for he had no arrangement … for them to be paid by any other party.

26. Once he received the position papers of the ATO in August 1992, he appreciated that it would be … expensive to investigate and respond to the position paper. Yet he took no steps to get in assets to cover that potential expense.

28. … Mr Cuming knew from at least April 1990 that the Cuming companies had assets comprising inter-company debts *(Mr Cuming was not appointed until January 1991. He cannot have owed any duties to the companies before then)*

29. Mr Cuming took no steps until early 1995 to investigate whether there were any other assets nor did he take steps to preserve, collect … or inquire about … assets.

41. … Mr Cuming well knew of the financial difficulties afflicting the Emanuel group.

46. It is submitted that Mr Cuming:

(a) failed to give attention to the liabilities of the Cuming companies
(b) failed to attend to investigating, preserving and collecting in the assets of the Cuming companies
(c) failed to all timely meetings of creditors'

[1508] The crux of the plaintiffs' complaints are that:

'50. By the time he received the ATO position paper in August 1992 Mr Cuming ought to have taken immediate steps to inquire about a source of funds to carry out the investigations necessary to determine what his position, as liquidator, ought to be … yet he did nothing.

51. … This failure to act has caused the Cuming companies to be deprived the opportunity to challenge the … tax assessments.

56. … Had he performed his duties and taken steps to get in the inter-company loans from Management with … vigour …

then it is entirely likely that EFG may have provided some payment to the Cuming companies which would then have enabled the ATO position paper to be responded to and rebutted. …

62. When the … assessments issued in November 1993, Mr Cuming admitted he knew the Emanuel group was in grave financial difficulty and that he had no money to pay for a challenge to the assessments.

64. … Had he written (the letter of 12 January 1995) (in 1992) it is entirely possible that EFG would have provided some funds.'

[1509] It is apparent from the chronology of Mr Cuming's activities as liquidator that he did not act with any celerity. It is said that no criticism can be levelled at him for any inactivity prior to the issue of the tax assessments in November 1993, or just before when he had an intimation that they would issue. This is the opinion of David Lombe, a chartered accountant with considerable experience in liquidations and, in particular, members voluntary liquidations. His evidence was not the subject of any particular challenge. He was critical of Mr Cuming's conduct of the liquidation after November 1993 when, in view of the assessments, it was clear that the Cuming companies were insolvent unless Management paid its debts to them and there was, to say the least, doubt about its ability to make those payments.

[1510] Mr Lombe, however, thought it acceptable for Mr Cuming not to take action prior to the ATO issuing the assessments. While negotiations were in progress and might result in there being no tax, or a reduced amount payable Mr Cuming was entitled to rely upon the declarations of solvency made by the directors. Before the ATO acted the Cuming companies had no liabilities and had assets which could be distributed to their shareholders in specie which had been Mr Cuming's intention.

[1511] Mr Lombe wrote in his report (Exhibit 111):

'12.10 … It is incorrect to assert that the liquidator should have initially undertaken extensive investigations which could have led him to form the opinion that the courses of action were of merit. This is based on the fact that prior to 29 November 1993 the companies did not have any external liabilities …

12.11 I have reviewed the documents to determine when the liquidator should have formed the view that the Commission intended … to issue the assessments …

12.12 In my opinion this position is reached on 22 September 1993 when … notice is given that assessments will be issued in seven days.

12.13 Therefore in the period 22 September 1993 to … 29 November 1993, the liquidator needs to form a view pursuant to s 496 of the Corporations Law. However in all

> likelihood this determination would be in the nature of a simple review of the asset and liability position of the Cuming companies …
>
> 12.16 In respect to the assessments issued … it is apparent that the amount of the assessment when compared to the value of the inter-company loan with … Management … indicates that, with the exception of Emanuel Investments, the companies still possess sufficient assets to pay the ATO in full and for the liquidations to continue as members voluntary liquidation …
>
> 12.17 It is not until the liquidator … is put on notice that the ATO is pursuing its view of the companies' taxation affairs and that the (Cuming) companies … would receive assessments. … This would be the period … where the liquidator should consider, given the information he now possesses, what steps he might need to take in the winding up of these companies. In this regard, these companies now have external liabilities and the liquidator must give consideration as to whether these loans are collectable as he is now unable to make a distribution on a *in specie* basis.'

[1512] Mr Lombe said it was a 'grey area' whether the liquidator should have acted to recover assets of the company at an earlier stage, more particularly when the ATO issued its *Without Prejudice* position paper in August 1992. As to that the liquidator would need to consider whether the companies were solvent and whether they were liable to pay the amount of the tax referred to in the s 215 notices (T.9604.1-.25)

[1513] Mr Cuming was cross-examined about his response to the ATO position paper in August 1992 (T.9482-9491.10). It does not seem that he made any assessment of the position of the Cuming companies as Mr Lombe would have required. He seems to have taken no independent action at all but relied on Mr Allen and Mr Patterson 'to do the best they could' with the ATO. Mr Cuming does not appear to have turned his mind to whether the adumbrated assessments were correct, or whether they could have been contested, and if so whether the Cuming companies (or someone on their behalf) had the resources to contest the assessment. He does not appear to have considered whether the debt from Management would be paid. If it was irrecoverable the Cuming companies were insolvent, if any part of the proposed assessments later issued.

[1514] Accordingly I think the plaintiffs' criticism of Mr Cuming was justified. It is conceded that he should have made attempts to recover the loan from Management on behalf of the Cuming company in November 1993. He did not do so until January 1995.

I think he should have acted earlier, in 1992 when there was, at the least, a distinct possibility that the Cuming companies would be liable to pay income tax and had no means of discharging that liability without recovering the loans from Management. There were ample indications that Management was in financial difficulty. Coopers & Lybrand's own fees had not been paid for some time. Given the distinct possibility that the loans might not be recovered, and that tax might be assessed, Mr Cuming should have acted to attempt to recover the loans no later than August 1992.

[1515] The real question is whether his neglect of his duty has caused any loss to the Cuming companies. The answer is, clearly, no. By August 1992 Management was insolvent. It had been in that condition for four years. Any payment it made to the Cuming companies would have been voidable as preferences and would have been set aside by a liquidator, as Mr Macks' energetic pursuit of these claims demonstrates. What was lost was a right to participate in the *pro rata* distribution of Management's assets amongst its creditors. On the evidence it had no assets that were not encumbered to EFG or other financiers. Its only estate was real property, all of which was mortgaged and charged, much of it several times over. EFG, ANZ and Westpac were all owed more than the value of the property securing their debts. The plaintiffs have not supplied me with any reference to evidence indicating unencumbered assets that might have been available for distribution to unsecured creditors. Given what the evidence does reveal about Management's financial position it is most unlikely there were any such assets. Nor have I been provided with evidence of Management's unsecured creditors as at August 1992 so that one might value the lost chance of participating in a dividend on the winding up of Management. I presume the task was not attempted because it would have shown there were no assets or property of any kind that could have been made available to pay unsecured creditors.

[1516] That leaves only the prospect that EFG might have made a payment to Management to enable it to discharge all or part of its debt to the Cuming companies. This prospect can be dismissed. There is no reason why EFG should have made any such payment.

The plaintiffs point out that EFG had made payments to some creditors of the Emanuel group who had pressed their claims and threatened legal action. This is true but it had not paid out all such creditors. Those it chose to pay were selected on the basis that their actions might adversely affect EFG's own position as secured lender or adversely affect Mr Emanuele's ability to sell the land mortgaged to EFG. A distinction also has to be made between payments before February 1991 when a more liberal view was taken of what support should be offered the Emanuel group and the position after 1991 when EFG, by and large, supported the Emanuel group financially only to the extent that its support protected or enhanced its own securities. There is nothing in the evidence to suggest that in August 1992 EFG would have made payments to Management to allow it to pay subsidiaries so that they could pay a tax assessment. It would be right to categorise such a payment, as the second defendants do, as irrational.

A further difficulty for the plaintiffs is that they did not cross-examine Mr O'Grady or any other of the senior officers of EFG with a view to establishing what its attitude would have been to a demand from the Cuming companies that Management pay its debts to them. I should not infer what the answer might have been when the question was not put to available witnesses.

[1517] It follows that no loss has been shown to flow from Mr Cuming's dereliction of his duty.

2. Elizabeth House Deposit Account

[1518] This is one of the more curious claims advanced by the plaintiffs. No questions at all concerning it were put to Mr Cuming in cross-examination. The plaintiffs own description of it appears to indicate that it could not succeed. Despite this anomaly being pointed out in emphatic terms by senior counsel for the second defendants the plaintiffs have persisted with it.

[1519] Shortly put the claim is that Mr Cuming should have recovered the sum of more than $6,000,000 taken by Management from the Elizabeth House deposit account to pay for the redemption of the preference shares. The first answer to it is that no record of the deposit account appeared in any of the books of account of Elizabeth House so that Mr Cuming could not ever have noticed that there might be an asset he could seek to recover. Secondly, as I described in Section V of the reasons, the money in the deposit account was subject to a charge in favour of Elders to secure the payment of moneys in the event that the preference shares could not be redeemed or in the event that Management became insolvent. Mr Cuming, on behalf of Elizabeth House, could never have recovered the moneys in the deposit account. If their use in the redemption of the shares was unlawful Elders might have had to refund them into the deposit account where they would have remained, subject to the charge and liable to be appropriated by Elders without notice to Elizabeth House on the ground that Management was insolvent, that being an event of default.

[1520] The case is hopeless but I suppose I must deal with it.

[1521] Although a number of causes of action are pleaded against Mr Cuming the only one which was pressed was breach of s 232(4) of the *Corporations Law* that, as an officer of the Cuming companies, he did not exercise the requisite degree of care and diligence in the exercise of his powers as liquidator.

[1522] The credit balances in the Elizabeth House deposit account appeared in the records of Management and was accounted for as an asset of Management. The accounts of Elizabeth House do not contain any record of the deposits which do not appear as an asset in its financial statements. The most recent accounts for Elizabeth House were those for the year ended June 1989. The only current asset shown in the balance sheet is the loan due from Management. Mr Macks conceded in cross-examination (T.2846.12-.22):

> '… You agreed that as a result of your investigations you have learnt that on many occasions once a subsidiary sold a property … the proceeds … were deposited into one or other of the Management or Elizabeth House deposit accounts? – Yes.
>
> But so far as Elizabeth House is concerned you know from your investigations that Elizabeth House Pty Ltd in its general ledger or journal doesn't record as an asset money in the Elizabeth House deposit account? – Yes.
>
> And you also know from your investigations that Emanuel Management Pty Ltd does? – Yes.'

Mr Morris said this about it (T.5296.5-.20):

> 'You accept, do you not, that from at least 1987 onwards Elizabeth House … in its accounts behaved in a manner consistent with it having no ownership of the money deposited into the Elizabeth House deposit account? – Yes, I'd have said the financial statements had no recognition that the Elizabeth House deposit is (an asset) of that company.
>
> And nor did Elizabeth House's journals record any ownership? – Yes, that's correct.
>
> Whereas the journals and accounts of Emanuel Management … treated the money in the Elizabeth House deposit account as its? – Yes.'

[1523] The auditor's trial balance for Management for the year ended June 1988 lists as an asset, under the heading 'cash on hand', three deposits. The first is 'Elders: Eliz Hse' and the amount is shown. The information from which the auditor's prepared their papers would have come from Management's trial balance prepared by its accounting staff. The trial balance for the Elizabeth House accounts for the year ended June 1988 do not show the deposit account as one of its assets.

The trial balance for Management prepared on 13 February 1989 records as assets two amounts of 'cash on deposit', one described as 'Elders – Eliz Hs' and one as 'Elders'.

[1524] Mr Lombe's opinion was that Mr Cuming would have had no basis to conduct any analysis into the financial affairs of a company to which he had not been appointed liquidator i.e. Management (Exhibit 111, Para 12.4). The liquidator was, Mr Lombe thought, entitled to rely upon information provided to him by way of the financial accounts of Elizabeth House and the directors' declaration of solvency. In his opinion 'the nature and circumstances of a members voluntary liquidation are such that only in exceptional or extraordinary circumstances would a liquidator be expected to undertake a more than cursory review of the company's assets, liabilities and past transactions.' Mr Lombe confirmed that a review of the records of Elizabeth House would not have revealed the existence of the Elizabeth House deposit account.

These opinions were not subjected to cross-examination and they appear correct. Mr Cuming is not to be criticised for not conducting an investigation into the status of an asset, or for not attempting to recover it, when he had no reason to believe it existed.

[1525] The second defendants advance a third answer to the claims in respect of the deposit account. It is that, as between Management and Elizabeth House, the moneys deposited and the ensuing credit balances were the property of Management which merely utilised the account to invest its own moneys. The second defendants emphasise the concession by counsel for the plaintiffs (T.1798.3):

> '… The moneys that are deposited into the Elizabeth House deposit account could on no interpretation be said to be Elizabeth House's money'.

Moreover Elizabeth House had been dormant since 1984 when it sold the only property it had owned and that there is clear evidence that the proceeds of sale of properties owned by other companies were deposited into the Elizabeth House deposit account. In this regard it is pointed out that Management was the banker for the Emanuel group, it borrowed on their behalf and received the proceeds of the sale of property of its subsidiaries. Mr Macks' investigation into inter-company dealings showed that on occasions where a subsidiary had sold property and the proceeds of sale had been deposited into the Elizabeth House account that the proceeds were accounted for as a loan from the selling subsidiary to Management. There is no record of a further loan from Management to Elizabeth House. Rather it appears as though Management used the account for its own purposes and as its own.

[1526] Mr Meagher QC summarised the position in his opening thus (T.68.10-.40):

> 'The plaintiffs allege that the financial management for the companies … was conducted by Management. Fosters admits that Management acted as a banker for some of the companies and that … borrowed money was advanced to them. Coopers admit that on occasions Management borrowed money from financiers and lent it to subsidiaries … The major borrowings to pay for the group's property acquisitions and development were borrowed by Management and the moneys lent … to the property holding subsidiary. … Upon sale of the properties the proceeds were paid to Management. That was recorded as a debt to Management in its loan account with the subsidiary. Where the transactions resulted in a profit this meant that Management was paid back more than it had lent to the company resulting in a debit balance owed by Management.'

[1527] This statement by counsel for the plaintiffs is borne out by the evidence and was, indeed, common ground between the parties. Mr Macks said this at T.2840.1-2841.5:

> '… We've already seen and you've accepted that it was often the case that when subsidiaries sold properties the net proceeds of sale … went to Emanuel Management? – Yes.
>
> Your investigation has revealed that money (lent) to Emanuel Management was often deposited into one or other of the Emanuel Management deposit accounts or Elizabeth House deposit accounts? – Yes, that was used for many purposes.
>
> Because you know from your investigation that Elizabeth House had sold its real estate back in 83 or 84? – Yes.
>
> And it never acquired any more real estate? – Not to my knowledge, no.'

Later Mr Macks said (T.2846.15-.25):

> '… Mr Macks, just before we closed yesterday you agreed that as a result of your investigations you've learnt that on many occasions once a subsidiary sold a property part or all of the proceeds of sale were deposited into one or other of the Management or Elizabeth House deposit accounts? – Yes.
>
> But so far as Elizabeth House is concerned you know from your investigations that Elizabeth House … in its general ledger or journal doesn't record as an asset money in the Elizabeth House deposit account? – Yes.
>
> And you also know from your investigations that Emanuel Management … does? – Yes.'

[1528] Exhibit 223 is a bundle of documents evidencing the distribution of the proceeds of the sale of a property by Hendon Industrial Park in September 1988. It shows that from the proceeds of sale of just over $6,500,000 a little over $4,500,000 was paid to Elders, and that exactly $4,500,000 of that payment was credited to the Elizabeth House deposit account. The balance sheet for Hendon Industrial Park for the year ended June 1989 (part of Exhibit 221) shows as one of its current assets an inter-company loan to Management in the sum of $2,262,135. The balance sheet reveals that the company owned no real estate. It had sold its property the previous year. No loans from Elizabeth House are recorded.

[1529] I have already set out Mr Morris' evidence at T.5296.10. Following that passage this was said:

> 'The name given to an account into which money is deposited does not determine ownership of that money, does it? – *Prima facia*, no.
>
> It may give you a clue as to ownership might it not? – One would expect it to, yes.
> …
>
> So the fact that the money is in an account called the Elizabeth House deposit account doesn't really take you very far, does it, in working out whose money it is? – No, although … it's described as the Elizabeth House Pty Ltd deposit account as opposed to just having a general nomenclature.
>
> And if one looks at the journals of Elizabeth House and … Management that gives a fairly strong indication that the money is … Management's money, doesn't it? – Yes, it gives a strong indication of that, it does.
>
> And if you happen to find out that all the money that went into the account was … Management's money that even strengthens the conclusion that it is … Management's money, doesn't it? – If it were the case that all the money that went into the account was … Management's money it would tend to suggest that … A lot of the

> money that went into the account really found its way from somewhere else in the group but in view of the fact that … Management was the banker to the group the perception that I had was that it ought to have been accounted for as an advance from Management to Elizabeth House and then into the asset account of House.'

[1530] I understand Mr Morris' reservation described in his last answer. The treatment of the deposits in the books of account of the various companies gives rise to two possibilities. The first is that Management, having borrowed the surplus proceeds of sale from one of its subsidiaries which sold property, invested those loan funds into the deposit account of Elizabeth House as a matter of choice or convenience. It could have paid the moneys into the account in its own name but it chose to operate a second account in the name of Elizabeth House which that company had allowed to fall into desuetude. Management, on this basis, made use of the account for its own purposes and for the investment of its own moneys.

The second alternative is that Management on-lent the moneys it borrowed from its subsidiaries to Elizabeth House which then deposited them in its account. On this basis the money, or the chose in action being the debt which arose from the deposit, was the property of Elizabeth House which owed an identical debt to Management.

[1531] Despite Mr Morris' reservation that proper accounting of the moneys would have shown them as having been on-lent from Management to Elizabeth House, the evidence from the financial records of how the moneys were actually treated makes it sufficiently plain that they were not on-lent. Rather Management made use of the account in the name of Elizabeth House to make some deposits. There may have been a reason for the choice of one deposit account over another but neither Mr Bund nor Mr Sara who might have known about it was asked. No other officer of Management was called, as I have noticed.

[1532] The evidence indicates that the appropriate finding is that the moneys represented by the credit balance in the Elizabeth House deposit account was the property of Management not of Elizabeth House. Had Mr Cuming known about the account and investigated it he should have concluded that it was not an asset of Elizabeth House and that he was not entitled, as liquidator, to demand the repayment by Management of the sum taken from the deposit account in December 1990.

[1533] It was conceded by the plaintiffs that if the 'money' in the Elizabeth House deposit account was not the property of Elizabeth House Mr Cuming owed no duty to that company to attempt to recover the sum in the account from Management. Whether or not the concession was made the point is obvious. The claim against Mr Cuming by Elizabeth House is without substance.

Claims Against Coopers & Lybrand and Mr Anderson Arising out of Payment of Dividends and Redemption of the Preference Shares

[1534] Before setting out a summary of the claims made against C & L and Mr Anderson I should mention briefly some facts which it has not been relevant to set out earlier.

[1535] On 16 July 1985 Management passed a special resolution permitting it to issue 1,280 C Class preference shares to be issued on the same terms as the A and B Class shares had been issued. The redemption date was to be that set out on the share certificates. On 8 August 1985 Management issued 1,200 C Class cumulative non-participating redeemable preference shares with a par value of $1 each and a premium of $9,999 each, thereby raising $12,000,000. 500 shares were allotted to Colonial Mutual Life Assurance Society Ltd (No. 1 Fund); 100 shares to Colonial Mutual Life Assurance Society Ltd (Lifelink Fund); 100 shares to Swann Insurance (Aust) Pty Ltd and the remaining 500 shares to Government Insurance Office of New South Wales.

The redemption date for the shares issued to CML (both funds) was 10 August 1987. The redemption date for the shares allotted to Swann Insurance was 31 August 1987 and the redemption date for the shares issued to GIO was 30 September 1987.

[1536] Management found it difficult to redeem the preference shares allotted to CML on the due date. Eventually Citicorp Australia Ltd, which had guaranteed the redemption, paid just over $3,200,000 to CML which it recovered from the proceeds of the sale of a property owned by an Emanuel subsidiary, and by an advance to Management from EFG. The end result was that 700 of the C Class preference shares were redeemed in the financial year ended June 1988. The remaining 500 C Class shares were redeemed during the following year, that ending June 1989. A summary of the facts relating to the issue and redemption of the shares appears in Exhibit 1, Annexure 17.

[1537] The plaintiffs allege that dividends paid on the A and B Class preference shares were not paid from profits and that the redemption of those shares, and the redemption of the 500 C Class shares in the 1989 financial year did not occur out of profit. The plaintiffs claim that the amounts representing dividends and redemption not paid out of profit were losses suffered by Management as a result of Coopers & Lybrand's, and Mr Anderson's, breach of contract, negligence and knowing assistance in breach of fiduciary duties by the directors of Management. These liabilities are said to arise out of the accountants' retainer as auditors for Management.

[1538] The claim against Mr Anderson in equity is that he knowingly assisted the directors of Management in the breach of their fiduciary duties constituted by their decision to pay dividends when there were no profits to support these payments. His 'knowing assistance' is said to be that he failed to note in his auditor's report that Management was insolvent in the years ended June 1989 and 1990, and failed to draw attention to the fact that there were no profits from which dividends could be paid.

There is a similar allegation with respect of the redemption of the shares. It is said that by advising that redemption could not lawfully occur without profit was to knowingly assist in the breach of fiduciary duties by the directors.

[1539] Paragraphs 338 and 339 of the statement of claim allege:

> 'If Coopers & Lybrand including Anderson
>
> 1. Had informed … Management … that … dividends could only be paid to the A, B and C Class preference shareholders … to the extent … there were profits

2. Had disclosed in the auditor's … reports that in making payment of … dividends or redemption when there are no … profits Management … had committed … breaches of the article (and) the Code.

3. Management would or may not have paid dividends.

4. Alternatively would or may have desisted from making payment of … dividends.

339. In the premises Management has suffered loss …

1. … moneys wrongfully paid as dividends.

2. … moneys wrongfully paid on redemption of the preference shares being $5,000,000 on the C Class shares and $22,301,136 on the A and B Class shares.

…'

[1540] The plaintiffs did not plead or otherwise advance a case that by reason of C & L's, or Mr Anderson's, failure to warn about a lack of profits that they thereby lost the opportunity to recover dividends that had been paid previously. The only claim in respect of the dividends is that they were paid, on the basis that had the warning been given Management would not have made the payments.

[1541] Paragraph 337.6 does plead that the breaches of duty identified in para 336 'denied or hindered the timely recovery of the moneys wrongfully paid as dividends and redemption …' but it is not clear that this is intended to be a pleading of lost opportunity to recover those moneys. There is such a case pleaded against Mr Cuming as I have mentioned earlier. The particular allegation in para 337.6 may well be intended to relate to the claim against Mr Cuming. If, however, it was meant to be part of a wider pleading of lost opportunity by Management to recover dividends and redemption money it was unsupported by any evidence of what attempts at recovery would have been made or what results would have followed those attempts.

[1542] The plaintiffs' closing submissions make it clear that the only loss claimed was the amounts paid out by way of dividends and redemption and that no case is made for loss of opportunity to recover those payments. Paras 415 and 416 of Volume 2 'Preference Shares' read:

> 'It is submitted that the loss suffered by Emanuel Management in consequence of the breach of statutory and fiduciary duties was the loss sustained at the instant of wrongful payments of dividends and redemption. … Losses sustained at the instant that money belonging to Emanuel Management was wrongfully paid. The evidence establishes that money was paid for dividends and redemption … The payment was an appropriation which resulted in Emanuel Management being deprived permanently of its asset. "But for" the

> payment of dividends and redemption, Management would have retained the moneys …'

There is also a claim by the liquidator brought pursuant to s 542 of the Code and/or s 598 of the *Corporations Law*. These provisions are procedural. They permit a liquidator to enforce liabilities of the company which exist independently. See *Hamilton v. Kaljo* (1989) 17 NSWLR 381 at 384, following *re J E Hurdley & Son Ltd (in liq.)* (1941) NZLR 686 at 723. If the companies cannot make good their claims against C & L and Mr Anderson the liquidator's claims must fail.

Limitation Act

[1543] It is possible to dispose of the remaining claims against the second defendants briefly and without having to determine whether the second defendants were in breach of any duty they owed the plaintiffs. The recovery of loss represented by the payment of dividends and the redemption of the C Class preference shares are barred by lapse of time. I set out in Section V of these reasons the relevant provisions of the *Limitation Act* of South Australia. Whether claims are made against Coopers & Lybrand and Mr Anderson for breach of contract, negligence or assisting in a breach of fiduciary duty, action to recover those losses must have been brought within six years of the accrual of the causes of actions. Proceedings were commenced on 24 December 1996. All causes of action which accrued before 24 December 1990 are barred by the *Limitation Act*.

[1544] The plaintiffs' submissions with respect to its loss accept that the loss occurred on the instant that payment of dividends and redemption occurred. The concession is clearly right. The consequence must be that the redemption of the C Class shares which occurred prior to 30 June 1989 and the payment of dividends prior to 24 December 1990, to the extent that they give rise to causes of action, did so more than six years before the issue of the writ.

[1545] The claims in question are for economic loss and the application of the limitation statutes to such claims can give rise to difficulty as the discussion in *Hawkins v. Clayton* (1988) 164 CLR 539, *Wardley Australia Ltd v. State of Western Australia* (1992) 175 CLR 514 and other cases demonstrates. However, in this case the economic loss is identified as the payment by Management to Elders of the dividends and the payment of redemption moneys to the holders of the C Class shares. The losses giving rise to the causes of action occurred when the payments were made. There is here no difficulty, as there was in *Hawkins* of there being no-one in existence at the time the loss occurred who could sue to recover the loss. Nor is it a case, as in *Wardley*, of determining when exposure to a contingent liability resulted in loss, or a case in which notice of a defect in title was given years after the purchase of land, as in *Christopolous v. Angelos* (1996) 41 NSWLR 700. Nor is it a case of latent defects in a building becoming manifest years after purchase or construction. It is a straightforward case of a failure to warn that payment should not be made, in the absence of which payment was made.

[1546] Section 285 of the *Companies Code* provides:

> '(1) An auditor of a company shall report to the members on the accounts required to be laid before the company at the annual

general meeting and on the company's accounting records and other records relating to those accounts …

(2) A report by an auditor … shall be furnished … to the directors in sufficient time to enable a company to comply with the requirements of s 274(1) in relation to that report.

(3) An auditor shall, in a report under this section, state –

(a) Whether the accounts … are in his opinion properly drawn up –

(i) so as to give a true and fair view of the matters required … to be dealt with in the accounts
(ii) in accordance with the … Code
(iii) in accordance with applicable approved accounting standards

(4) It is the duty of an auditor … to form an opinion as to each of the following matters:

(a) Whether he has obtained all the information and explanations that he required
(b) Whether proper accounting record … had been kept …

…'

[1547] I have found that Management was insolvent from 1 July 1988. The plaintiffs submit that Mr Anderson, who was the auditor for that year, should have detected that fact and drawn attention to it in his report for the year ended 30 June 1989. As well it is said he should have noticed, and drawn attention to, the fact that there were no profits from which to pay dividends. The appointment of Coopers & Lybrand, and Mr Anderson, as auditor of Management and its subsidiaries was made each year with respect to the audit of that year's accounts. That is to say, there was a separate contract made each year that Mr Anderson performed those services by which he was retained to audit the accounts. The duty to warn of insolvency and the lack of profits arose from the terms of the contract. There was, no doubt, a co-extensive duty in tort to give the same warning. The duty continued throughout the period during which the audit was conducted. That is to say the duty arose upon the formation of the contract of retainer and endured until the contract was performed. Performance was complete when the auditor furnished his report to Management.

[1548] In *Larking v. Great Western (Nepean) Gravel Ltd* (1940) 64 CLR 221 at 236 Dixon J said:

'If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever renewed until he actually

> does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair … then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair …'

In *Hawkins v. Clayton and Others (trading as Clayton Utz & Co)* (1986) 5 NSWLR 109 Kirby P at 115-6 and Glass JA at 122-3 regarded the retainer of a solicitor to locate an executor appointed by the will of his client to be in the first category described by Dixon J. *Hawkins* was reversed in the High Court but not on the basis that the solicitor's duty was continuous until he performed it. Brennan and Gaudron JJ held that the limitation period did not begin to run until an executor was appointed so that there was in existence a person with the right to sue. Deane J held that the *Limitation Act* should be construed as not to apply to a cause of action not known by the plaintiff to exist.

[1549] In *Bell v. Peter Browne & Co* [1990] 2 QB 495 the plaintiff transferred his former home to his wife in 1978, on the understanding that whenever it was sold he would received one sixth of the proceeds. The solicitors who acted for him failed to protect his interests by declaration of trust or mortgage or by entering a caveat on the land register. In 1986 the former wife sold the home and spent the proceeds. Proceedings against the solicitors which commenced in 1987 failed because they were out of time. The fact that the solicitors could have remedied the breach at any time before the wife sold the house did not have the result that there was a continuing breach of contract until the date of sale, or that the loss in tort occurred only on sale. Nicholls LJ said of the claim in contract (500):

> 'Clearly, all those steps needed to be taken at the time of the transfer or, in the case of lodging a caution, as soon as reasonably practicable thereafter. When the solicitor failed to take those steps in 1978 he was … in breach of contract. This was so even though the breach, so far as it related to lodging a caution, remained remediable for many years … indeed … until the … wife sold the house … The solicitor's breach of contract in 1978 did not *discharge* his obligations. Had the plaintiff learned, of what had happened, he would still have been entitled to go back to his former solicitor and require him to carry out, belatedly, his contractual obligation … for example, lodging a caution. Despite this, it was in 1978 that the breach occurred. Failure thereafter to make good the omission did not constitute a further breach. The position after 1978 was simply that, in breach of contract, the solicitor had failed to do what he ought to have done … and, year after year, that breach remained unremedied.'

In relation to the claim in tort the Lord Justice held that the solicitor's failure to have the plaintiff's interest recorded in the land register or protected by caveat gave rise to a loss at the time of the transfer of his interest in the house to his wife:

> 'At that point the plaintiff parted with the title to the house, and he became subject to the practical inconvenience which might flow from his not having his wife's signature on a formal document … To

> the extent that this was less satisfactory than a formal document recording the deal, the plaintiff suffered prejudice. … In considering whether damage was suffered in 1978 one can test the matter by considering what would have happened if in, say, 1980 the plaintiff had learned of his solicitor's default and brought an action for damages. Of course, he would have taken steps to remedy the default. But he would have been entitled at least to recover from the defendants the cost incurred in going to other solicitors for advice on what should be done and for their assistance in lodging the appropriate caution.' (502-503)

Mustill LJ agreed and dismissed the notion that there might have been a continuing retainer that persisted for as long as the breach went unremedied. He said (512-513):

> 'The proposition entails that the defendants have two duties, one expressed and the other implied. The expressed duty would be to perform the task for which they were retained and paid, namely to put into effect in a legally appropriate manner the informal arrangement between the plaintiff and his wife. The second duty, implied and presumably gratuitous, and commencing immediately after the last moment when a careful solicitor would have taken the necessary steps to … protect his client's interest in the future proceeds of sale, would be to exercise continuing vigilance to discover any mistake which they, themselves, might have made, and then to busy themselves in putting it right. Evidently this obligation can continue up to, but not beyond, the time when the mistake became irretrievable. I find it impossible to imply such a strange obligation … and equally improbable to suppose that if it did exist the obligation would be broken at any time other than the time when the mistake should have been discovered and put right: namely, straight away.'

Lord Justice Nicholl's judgment that the contract provided for something to be done and that the failure occurred when performance was due under the contract was approved by Lord Slynn and Lord Hope in *Preston v. Wolverhampton Health Care NHS Trust & Others (No. 2)* [2001] 2 AC 455 at 472, 474.

[1550] Mr Anderson's auditor's report in respect of the year ended June 1989 was signed on 31 October 1989. This appears to be the only evidence as to the date when the audit process for that year concluded. If there was a duty to warn Management of its insolvency and/or of the lack of profits from which to pay dividends that duty ceased with the performance of the retainer on 31 October. Any breach of contract to give the warning occurred no later than that date. All causes of action for breach of contract arising out of a failure to warn during the 1989 audit were complete by 31 October 1989 and were more than six years old when the writ was issued.

[1551] Time began to run on the cause of action in negligence arising out of a failure to warn from the conduct of the 1989 audit when the first dividend was paid after 31 October 1989. Annexure 28 to Exhibit 1 shows that dividends were paid on both A and B Class shares in November 1989. Indeed the annexure shows that dividends were paid monthly until December 1990 in respect of the B Class shares and

January 1991 for the A Class shares. It appears to be common ground that the last payment of dividend in January 1991 was in respect of dividends payable between 7 December 1990 and the date of redemption, 30 December. The amount paid, $222,178, was slightly less than the amounts paid in each of the preceding months, $225,264.

[1552] The position is the same for the 1990 audit. There is some uncertainty about the precise date when the audit report was signed but it seems to have been on 14 December 1990. (See Exhibit 484 and T.9422.10-9425.5) It appears that Mr Anderson would have signed the audit report upon receiving Mr Allen's intimation on 14 December that the terms in which he had proposed to qualify the accounts of Management were appropriate.

[1553] The dividend payment due in December on the A Class preference shares was paid on or about 18 December 1990 but before 24 December 1990. This appears from Exhibit 89 5/421 and Exhibit 218 (which has been inserted in Volume 5 following Document 421). Mr Macks conceded this to be so (T.2820.1-2823.10).

[1554] Any breach of duty by the auditor in failing to warn Management in the 1990 audit that it could not lawfully pay dividends came to an end when the contract was discharged by performance on 14 December. Any breach of duty in tort for failing to warn occurred in the period during which the audit was conducted. That period ended on 14 December. The December dividend was paid on or just after 18 December. When that payment was made Management suffered loss and its cause of action in negligence was then complete. Recovery of the December dividend had been lost by the effluxion of time.

[1555] On these findings of fact the payment of the dividend in January is also time-barred. In relation to the claim in contract the cause of action arose when the contract was breached no later than 14 December 1990. In relation to the claim in tort the cause of action is complete when any loss was suffered as a result of the breach of duty and loss was suffered on or about 18 December when the previous dividend was paid.

[1556] Whether or not the dividend payment in January 1991 is time-barred does not matter to the outcome. The evidence does not establish that the loss would not have occurred anyway because of the manner in which payment was effected. It is evident that Management suffered no loss by reason of that payment. On 10 January 1991 Mr Hosking wrote to the Emanuel group to set out interest payable on various accounts. One item, for $222,178.19 was said to be due by reason of 'preference share dividends for December 1990 (preference share scheme settled 31.12.90 dividend due for 30 days)'. The letter went on:

> 'Please arrange for this cheque to be exchanged at your convenience with ours totalling $249,480.33 i.e. and that payment … is required.'

The amount payable by Elders to the Emanuel group was in respect of interest due on the sums in the deposit accounts up until 31 December 1990 when the moneys were taken for the share redemption (Exhibit 89 5/422). A page from the Emanuel group's general ledger journal seems to show that the January dividend was paid 'by way of advance against APM facility on the 30th January 1991'. What appears to have happened is that, by book entry, Elders credited Management with the payment of dividend but debited its loan account secured on the APM land with the equivalent amount. There was no actual payment.

[1557] The plaintiffs led no evidence that a warning given by the auditor on or before 14 December 1990 would have been efficacious in preventing Elders doing what it did. Emanuel did not make a payment of dividends. Elders, by adjusting its own accounts, obtained ‘payment’ of the dividends. It is not shown that a warning would have come to Elders attention or that it would have acted differently if it had received the warning.

[1558] I have already mentioned that the claim arising out of an alleged failure to warn that the C Class preference shares should not be redeemed is out of time. The redemption occurred on 31 August 1988 (Exhibit 89 2/101, 102, 103). Any loss arising from a failure to warn during the 1987 audit occurred on 31 August 1988. Apart from that it appears Mr Anderson had no occasion to give a warning. The audit for the year ended June 1987 was completed on 31 December 1987. He did not commence the next year’s audit until October 1988. By the time work on that audit commenced the loss had been suffered.

[1559] I conclude that claims against Coopers & Lybrand and Mr Anderson arising out of the payment of dividends on the preference shares, and the redemption of the C Class preference shares are barred by the *Limitation Act*.

Claim by Elizabeth House Against the Auditors

[1560] There is a claim by Elizabeth House that C & L and Mr Anderson should have warned it not to allow the credit balance in its deposit account to be applied in partial redemption of the preference shares. The claim is for the loss of the moneys in the Elizabeth House deposit account which were taken to redeem the preference shares. The claim fails because of my findings that the moneys were charged by Elizabeth House to pay the equivalent of the sum needed to redeem the shares in the event that Management did not or could not redeem the shares or in the event that one of the specified acts of default occurred. Whether or not the shares were redeemed Elizabeth House would have been obliged to part with the moneys in the deposit to Elders. Secondly I have found that as between Elizabeth House and Management the moneys represented by the balances in the account were the property of Management and Elizabeth House suffered no loss by being deprived of them.

Redemption of the A and B Class Shares

[1561] This claim arising out of an alleged failure to advise that the December 1990 redemption could not occur because of a lack of profits has two bases. It is said that Mr Anderson, who was the auditor at the time, should have given that advice.

There is a separate claim against Coopers & Lybrand arising out of advice given in December 1990 about the proposed redemption of the A and B Class shares. Mr Allen was asked to give advice about the possible tax implications of the redemption and advised how the redemption might occur without Management losing its accumulated tax losses. It is alleged that he ought to have advised that there were no profits out of which the redemption could lawfully be made.

It is necessary to consider the claim against both accountants separately.

Anderson

[1562] The audit strategy for the 1990 audit compiled by the staff of Coopers & Lybrand for 'the Emanuel group of companies' is undated but would have been compiled after that financial year end and before the audit concluded. It contains a note:

> '7. Elders Finance wish to redeem their preference shares of $23,000,000. These are not due for redemption until 1992. If redeemed, Elders will simply take the money from deposits they hold on Emanuel's behalf.'

Mr Anderson accepts he would have read the note during the 1990 audit but went on to say:

> 'I had no information about the proposed redemption beyond what is recorded in para 7 of the audit strategy and I do not know the source of the information recorded … I made no inquiry about whether a firm agreement and date had been fixed for redemption. The note … did not convey … that an agreement about early redemption had been reached or was about to be reached.
>
> If redemption had taken place before completion of the audit, or if an agreement had been made and date fixed for redemption before completion of the audit, I would have expected to have been told because it would be a reportable post-balance date event. I first learnt that redemption had taken place after I commenced work on the 1991 audit.
>
> Beyond the information contained in para 7 … I was not told of any arrangement and date for redemption and, in particular, I did not know that a proposal and time to redeem at the end of December 1990 had been agreed upon.' (Exhibit 481, Para 3.3)

This aspect of Mr Anderson's evidence was not challenged in cross-examination. Indeed the cross-examination appeared to accept what he said. See T.9378.35-.40:

> 'Now, let me ask you this, in 1991 when you did the accounts then, you found, did you not, that redemption had taken place? – In 1991, yes.
>
> And that would have been when you did the accounts in the latter half of the calendar year 1991 …? – It would have, as I believe, yes.'

[1563] It is clear, then, that Mr Anderson did not know about the redemption and the preparations for it in December 1990. No case was advanced that he should have inquired and ascertained that a redemption was planned. There is no case of a negligent failure to ascertain the facts. The case against Mr Anderson is that he did not warn that redemption could not occur because there were no profits. The case necessarily falls when Mr Anderson did not know that there was an occasion for any such advice and it is not said that his ignorance was itself the result of any breach of duty.

[1564] For the same reason Mr Anderson cannot have been knowingly concerned in a breach of fiduciary duty by the directors of Management in effecting the redemption. He did not know about it.

Allen

[1565] The claim against Coopers & Lybrand arising from Mr Allen's involvement is pleaded in paras 327-329 of the statement of claim. The allegations are:

> '327. On or about 1 December 1990 Management sought the advice of Coopers & Lybrand about the redemption of the preference shares … The advice was sought orally by Graeme Sara from Patterson and Peter Hill …
>
> 328. Coopers & Lybrand having the knowledge of the financial state of the Emanuel group including that of Management and of its insolvency … advised Management as to steps to be taken to effect the redemption.
>
> Particulars of Advice
>
> Letter dated 10 December 1990 from Coopers & Lybrand to Sara
> Memorandum from Coopers & Lybrand to Sara dated 11 December 1990
>
> 329. Coopers & Lybrand … did not:
>
> 1. Advise Management that redemption … other than out of profits would breach articles … and … the *Companies Code*.
> 2. Advise Management … that it was insolvent …
> 3. Advise Management … that the proper course .. was not to redeem the shares.
>
> …'

[1566] There is an issue between the plaintiffs and the second defendants as to the terms of the retainer pursuant to which the advice of 10 and 11 December was sought. The plaintiffs contend for a retainer the terms of which were that on any occasion when Coopers & Lybrand were requested to perform any service of an accounting nature they were obliged to give advice to the Emanuel group on all aspects of possible relevance connected with the topic the subject of the request. It was to give advice 'more generally' than to answer a specific inquiry (T.1656.5-1657.25). The second defendants argue that the scope of the retainer was determined by the specific request addressed to it on each occasion.

[1567] Rather than address the question in the abstract it is preferable to consider the evidence relating to the request for advice in December 1990.

[1568] Mr Sara made the approach on behalf of Management. He said (T.3781.25-.40) that he first learnt of the proposal to redeem the preference shares in October or

November 1990 when Mr Hartley told him 'they were to be redeemed'. He was asked what happened next and said (T.3871.41-3872.45):

> 'I approached Gerry Allen in respect of the redemption of the shares. … In about November … I informed Gerry Allen that there would be a substantial change in ownership and that the Emanuel group would put at risk its accumulated losses. I approached Gerry Allen regarding the redemption … knowing that they were being redeemed early. There was a problem that if they'd redeemed all the preference shares as they proposed there would be a substantial change in ownership of the Emanuel group and under Australia income tax law there would be a substantial change of ownership and therefore put at risk the accumulated losses (of) the Emanuel group …
>
> And what did he say? - … He agreed with me and that they would make further inquiries.'

[1569] In cross-examination Mr Sara said (T.3815.10-.32):

> '… And you said that Brian Hartley told you about the proposal? – Yes …
>
> And you said that (you) weren't given any instructions about the redemption at that time; is that correct? – As far as I can recall, no.
>
> But you thought about the redemption and became concerned that redemption of the preference shares may put the tax losses at risk? – Yes.
>
> And that's something that crossed your mind in the general course of your duties? – Yes, it did.
>
> And … Mr Gerry Allen was the person from Coopers & Lybrand you generally spoke to in relation to tax-related matters; is that correct? – Generally, yes.
>
> And it was because of your concern about loss of tax losses on redemption that you approached Gerry Allen for advice on that issue? – Yes.
>
> And that was the specific and only matter that you approached Gerry Allen about at that time in relation to the redemption; wasn't it? – Yes that was the only matter I can recall.'

[1570] Mr Sara agreed that the letter of 10 December 1990 from Coopers & Lybrand was in response to his inquiry and that the advice he had sought was advice about retention of tax losses (T.3815.45). He accepted, explicitly, that he did not ask Mr Allen 'for general advice about redemption.' (T.3815.51)

[1571] Mr Sara did not claim to have spoken to Mr Patterson, who was the tax partner at Coopers & Lybrand, or Mr Hill. His only contact was with Mr Allen. Mr Patterson confirmed that the approach to him was with respect to the tax implications arising from the redemption of shares (Exhibit 487, para 4.2).

[1572] The letter of 10 December 1990 (Exhibit 89 2/60) was written by Mr Patterson. Addressed to Mr Sara it read:

> 'You have asked for our advice as to the most appropriate method of redeeming preference shares in … Management … currently held by Elders …
>
> Executive Summary
>
> 4. For reasons explained in detail below it is critical to the taxation status of (Management) and its wholly-owned subsidiaries that (Elders) maintains some shareholding … for the short term future.
>
> 5. Given this criteria, it is our opinion that the most effective means of achieving the aims expressed in 2(b) (i.e. redemption of the shares) is either of the following:
>
> (a) (Management) to redeem all but one of either the Class A or Class B shares; or
> (b) (Management) to issue a small number of redeemable cumulative preference shares at no premium to (Elders) <u>then</u> redeem <u>all</u> the Class A and Class B shares.'

The letter then went on to give advice in more detail. Mr Hill's memorandum of 11 December 1990 (Exhibit 89 2/61) was sent by facsimile transmission. It read:

> 'Further to the letter which we faxed to you this morning I have had a discussion with Bruce Eliott [*sic*] of Elders …
>
> 2. Bruce wished me to clarify for you paragraph 2(k) of our letter … Bruce advised that Elders … is not willing to finance the redemption … Instead Elders will be offsetting the deposit that Emanuel has with Elders against the moneys that would be due to Elders as a result of the redemption …
>
> 3. After discussing our advice Bruce considered that the recommendation in paragraph 5(a) in our letter was the most viable option …'

[1573] The plaintiffs seize upon the phrase 'you have asked for our advice as to the most appropriate method of redeeming preference shares …' in the letter of 10 December as evidence of a retainer to give advice generally on the redemption. However, it is clear from the context in which advice was sought and given that the advice was limited to the preservation of the accumulated tax losses. Coopers & Lybrand's retainer did not go beyond advising on that limited point.

[1574] It is not sensible to imply a term into the retainer that Coopers & Lybrand would give advice on all aspects of possible relevance to the redemption. The implication of such a term would not be reasonable. Indeed it would be most onerous. Not only would it require an investigation of what might be relevant to the redemption, and so involve considerable work, the term would impose an obligation to undertake the work whether or not Coopers & Lybrand wished to undertake it or believed they were capable of undertaking it. It may well involve them in doing the work gratuitously for Management could say 'we undertook to pay you only for the work we expressly requested.'

The implication of such a term is not necessary to give business efficacy to the contract. Moreover the implication of such a term is, in my opinion, inconsistent with the express terms of the retainer which required Coopers & Lybrand to address a specific and limited point of taxation law. A contract to advise with respect to a particular specific topic is inconsistent with a contract to advise generally on all topics of possible relevance.

Nor is the implication of the term necessary for the reasonable or effective operation of the contract. See *BP Refinery (Westernport) Pty Ltd v. Shire of Hasting*s (1977) 180 CLR 266 at 283; *Byrne v. Australian Airlines Ltd* (1995) 185 CLR 410 at 442.

[1575] The plaintiffs did not make out a case that a term should be implied into the retainer to give advice generally by custom or usage. I am not sure they tried. The evidence shows no more that on numerous occasions when requested to perform particular accounting services the second defendants did so. According to the High Court in *Con-Stan Industries of Australia Pty Ltd v. Norwich Winterthur Insurance (Australia) Ltd* 1985-1986 160 (CLR) 226 at 236-7:

> '(1) The existence of a custom or usage that would justify the implication of a term into a contract is a question of fact …
>
> (2) There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract … however, it is not necessary that the custom be universally accepted …
>
> (3) A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement …'

The evidence does not establish the fact that accountants, when asked to advise on a particular issue, are expected to advise on all possible areas of relevance to the advice sought or that those retaining accountants presume that to be a term of their contract. Moreover the implied term appears to be inconsistent with the express terms of the contract, as I have indicated.

[1576] Insofar as the claim is put in contract it fails because Coopers & Lybrand gave the only advice they were asked to give. It was not a breach of their contract not to advise that there were no profits out of which redemption could be made and that, for that reason, redemption should not occur.

[1577] In any event a breach of that contract occurred no later than 11 December 1990 and so is barred by the *Limitation Act*.

[1578] Any failure to advise as to a lack of profits had no consequence. Mr Dutney had passed on that information to Mr Sara when he advised about the necessary legal changes to the articles to allow the redemption to occur. I dealt with the terms of his conversation in Section V of the reasons. Mr Sara had the requisite knowledge whether or not Coopers & Lybrand told him.

[1579] Although not expressly articulated as such the claim arising out of the request for advice gives rise to a tortious duty, as well as a contractual one, to take reasonable care in the performance of the retainer. The ambit of the duty is, however, no greater. It is to take reasonable care with respect to what was required to be done pursuant to the retainer. The liability imposed by law does not impose a duty to take reasonable care with respect to a wider range of services than the retainer obliged the contractor to perform.

It follows that there was no negligence in advising with respect to the preservation of tax losses and not giving advice on the needs for profits to fund the redemption.

[1580] Although the statement of claim contains allegations against Coopers & Lybrand for 'accessorial liability' no such case appeared to be advanced in the evidence. I did not detect any cross-examination designed to elicit liability on the basis that any partner or employee of Coopers & Lybrand aided and abetted, or participated in, or was knowingly involved in a breach of fiduciary duty by the directors of Management (or its subsidiaries). I have mentioned why such a claim against Mr Anderson must fail. Such a claim is out of time in respect of the payment of dividends and is beaten in relation to the redemption by Mr Anderson's ignorance of its occurrence.

[1581] There does not seem to be a plea that the performance of Mr Allen's retainer to give tax advice in December 1990 gives rise to 'accessorial liability'. If there were such a claim it would fail because of the absence of evidence that Mr Allen or Mr Patterson acted dishonestly. Mr Allen was dead and could not give evidence. Mr Patterson was a witness but was not taxed with the proposition that in giving advice of 10 December 1990 he was consciously participating in a breach of duties by the directors of Management. The basis for accessorial liability is dishonesty. In *Royal Brunei Airlines v. Phillip Tan Kok Ming* [1995] 2 AC 378 Lord Nicholls said (389, 391, 392):

> '… In the context of the accessory liability principle acting dishonestly, or with a lack of probity … means simply not acting as an honest person would in the circumstances. This is an objective standard. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. … The standard of what constitutes honest conduct is not subjective … If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. … To inquire … whether a person dishonestly persisted in what is later said to be a breach of trust is to ask a meaningful question, which is capable of being given a meaningful answer. This is not always so if the question is posed in terms of

> "knowingly" assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the "sort" of knowledge required, when the truth is that "knowingly" is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind. … Drawing the threads together … dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation.'

[1582] I consider that I should accept this formulation of principle as authoritative. The decision of the High Court in *Consul Development Pty Ltd v. D.P.C. Estates Pty Ltd* (1974-1975) 132 CLR 372 does not contain a definitive exposition of the necessary ingredients to establish the liability of one who assists in a breach of fiduciary duty. That case followed *Selangor United Rubber Estates Ltd v. Cradock (No. 3)* [1968] 1 WLR 1555 and *Karak Rubber Co Ltd v. Burden (No. 2)* [1972] 1 WLR 602. Subsequent decisions have cast considerable doubt on those cases and, as Lord Nicholls said in *Royal Brunei Airlines* at 388:

> 'Since then the tide in England has flowed strongly in favour of the test being one of dishonesty …'

More important Gibbs J in *Consul Development* appeared to have reservations about the test applied in *Selangor* (398) and Stephen J (with whom Barwick CJ agreed) thought that *Selangor* went further than the prior authorities (412) and did not accept its authority.

[1583] One looks in vain to see evidence of Mr Patterson's having acted with conscious impropriety or lack of honesty in giving his advice. Indeed, as I say, he was not taxed on the point. Moreover it is difficult to see how he assisted, in any real sense of the word, in the redemption of the shares. He gave advice about a means by which it might be performed without losing tax losses. The services he performed were not different in kind from those rendered by the solicitors in *Barnes v. Addy* (1874) LR 9 Ch App 244 who were held not to be liable for the breach of trust to their client.

[1584] The claim for assisting in breach of fiduciary duty has not been made out.

[1585] The last point to mention is that the plaintiffs' case against Coopers & Lybrand and Mr Anderson would fail even if they established some breach of contract, or negligence, or accessorial liability, in not giving a warning that the redemption should not take place because of a want of profits, or insolvency, in Management. This is for the reason that had the advice been given, and had Management acted on it so as to refuse to redeem the shares, Elders would undoubtedly have taken action pursuant to the purchase agreements, guarantees and charges to appropriate the moneys in the deposit account. Any breach of duty by the second defendants would not have been causative of loss. The money would have gone inevitably to Elders regardless of their conduct.

[1586] The balances in the Elizabeth House deposit account were charged by it to Elders under the deed of 9 August 1983 as security for the performance of the obligations of the purchasers of the A Class preference shares under their purchase agreement of the same date. The moneys represented by the balances in both deposit accounts were charged by the Deed of Master Loan Agreement of 9 June 1988 with the obligations of Management and Elizabeth House to pay sums equivalent to the redemption amount. There is no point in repeating the recitation of the terms of the various agreements and charges which were dealt with in Section V. I am satisfied that they were valid and would have entitled Elders to the moneys in the deposit account in the event of Management's insolvency (and I have found it was insolvent by December 1990) and upon a failure to redeem the shares on 31 December 1990.

[1587] The plaintiffs object that questions of causation of this kind are not relevant to their claims against the second defendants for dishonestly assisting in a breach of fiduciary duty by Management's directors. They rely upon *Youyang Pty Ltd v. Minter Ellison Morris Fletcher* 2003 (HCA) 15 for the proposition that the court may not have regard to such considerations of causation in determining the losses for which a defaulting fiduciary is liable. It was submitted that if the second defendants were liable as accessories for a breach of fiduciary duty by the directors in paying out moneys to redeem the shares then those involved in the breach must restore all the moneys paid away regardless of whether the beneficiary of the duty, Management, would have suffered the loss in any event.

[1588] The submission involves a misunderstanding of *Youyang* in which the trustee paid away money in breach of trust which consisted of making the payment without first receiving a bearer deposit certificate from a prime bank which would have been both negotiable and a security for the money paid out. The recipient of the money misappropriated it. The argument for the trustee was that the moneys were paid to the authorised recipient who dishonestly misapplied them so that the loss would have occurred in any event. The argument was rejected, but not because questions of causation were irrelevant; rather because the facts showed that the loss of the trust estate was occasioned by the payment of the money pursuant to a certificate which did not provide the promised security for the investment made by *Youyang*. The court said (paras 43,44):

> '43. The essence of *Youyang's* complaint is shortly identified. It is the misapplication of the moneys held on trust on terms that, in the events that happened, obliged *Minters* to hold the moneys absolutely for *Youyang* and at its direction. To adapt what was said by Fry LJ in *Webb v. Stenton*, *Minters* has made itself "personally liable to pay money to (*Youyang*) by *reason of* some breach of trust or default in the performance of [its] duties of trustee". …
>
> 44. This appeal turns upon the significance for the facts of the causal requirement expressed by Fry LJ in the phrase "by reason of". That serves to remind … that "there is no equitable bypass of the need to establish causation" and that "in questions of causation it is important to focus on the relevant equitable duty".'

[1589] The discussion of the facts in paragraphs 62 and 63 show that the court was concerned to analyse whether *Youyang's* loss was caused by the breach of trust. It pointed out that had the facts been different the trustee might have escaped liability.

As it was the "dishonest and discreditable subsequent act by third parties which led to the loss of the funds" occurred after the trustee had parted with the money without obtaining the security which the terms of the trust required it to obtain before payment. Had the security been obtained the beneficiary would have been protected.

[1590] Accordingly I am satisfied that the plaintiffs have not established that any breach of fiduciary duty in which Coopers & Lybrand were involved caused any loss to Management.

[1591] It follows that the plaintiffs have not made out any of their causes of action against the second defendants. There must be judgment for the 11th, 12th and 13th defendants against the plaintiffs.