SUPREME COURT OF QUEENSLAND

CITATION:	*Devpro v Seamark P/L & Anor* [2006] QSC 392
PARTIES:	**DEVPRO (A FIRM)** (plaintiff) v **SEAMARK PTY LTD ACN 058 624 516** (first defendant) and **MACPRO PTY LTD ACN 068 964 447** (second defendant)
FILE NO:	S3221 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	Reasons for judgment delivered on 18 December 2006. Order made 20 December 2006.
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	7, 8, 9, 10, 11 August, 20, 21 September 2006
JUDGE:	Wilson J
ORDER:	**That the first defendant pay the plaintiff the sum of $1,106,154.11, including interest in the sum of $257,508.61 from 26 August 2003 to 20 December 2006**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – TIME – where the plaintiff (developer) and the first defendant (owner) entered into a joint venture agreement to develop a parcel of land as a shopping centre – where the agreement had a sunset clause – where, on the passing of the sunset date, the first defendant had the right to terminate the agreement – where, after the sunset date, both parties acted as if the agreement were still in operation – where such conduct on the part of the first defendant constituted an election not to terminate – whether first defendant could validly bring the agreement to an end on the ground of effluxion of time CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY – where the joint venture agreement between the parties provided that the plaintiff was entitled to a substantial development fee if the buildings (as defined in the agreement) were leased when the development land was onsold – whether, on the facts, the plaintiff was entitled to be paid the development fee.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – where the calculation of the development fee owing to the plaintiff involves a consideration of the profit made by the project – where the first defendant agreed to bear the difference between the amount paid to the builder and a reasonable amount for the work done by the builder for the purpose of calculating profit – where the builder made substantial variation claims – what constitutes a reasonable amount for the work done

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT BASIS – IN GENERAL – where the plaintiff did work in relation to a nearby site – whether the plaintiff is entitled to be paid for that work on a quantum meruit basis

The Commonwealth v Amman Aviation Pty Ltd (1991) 174 CLR 64, cited
Immer (No 145) Pty Ltd v The Uniting Church in Australia Property Trust (NSW) (1992-1993) 182 CLR 26, cited
Interchase Corporation Limited (In Liq) v Grosvenor Hill (Queensland) Pty Ltd No 3 [2003] 1 Qd R 26, cited
Ray Teese Pty Ltd v Syntex Australia Limited [1998] 1 Qd R 104, cited
Serisier Investments Pty Ltd v English [1989] 1 Qd R 678, cited
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, cited

COUNSEL: S S W Couper QC for the plaintiff
M M Stewart SC for the first defendant
A M Hill (solicitor) for the second defendant

SOLICITORS: Forbes Dowling Lawyers for the plaintiff
Russell & Company for the first defendant
McCullough Robertson for the second defendant

[1] **Wilson J:** This is a dispute between developers of a parcel of land on the corner of Progress Road and Garden Road at Richlands known as "Progress Corner".

Background

[2] In about February 1998 Woodcroft Trading Co Pty Ltd ("WTC") formed a partnership with the second defendant Macpro Pty Ltd ("Macpro") called Devpro to undertake land developments. WTC (led by Mr Alan Rodney Woodcroft-Brown) was to attend to engineering works and project management, and the second defendant (led by Mr Grant McLennan) was to attend to leasing.

[3] Mr Woodcroft-Brown was a civil engineer. He was originally from South Africa where he had obtained a degree in civil engineering before doing postgraduate studies in Holland. He had extensive experience as a civil engineer working on major construction projects before immigrating to Australia in April 1997. From his arrival in this country until his involvement in the Progress Corner development he

had been involved in a number of developments including a food court in the Brisbane CBD and the refurbishment of an office building. His involvement in those other developments was on the basis that he identified development sites and then reached agreement with others to provide finance to allow the developments to proceed apparently under his supervision.[1]

[4] A month or so after the partnership was formed Mr McLennan introduced Mr Woodcroft-Brown to the property manager of Kentucky Fried Chicken, who had identified Progress Corner as a potential site for a drive-through KFC outlet. Progress Road was a busy thoroughfare providing access to Forest Lake, a very large residential development. There was a service station on part of the land, which was one of the largest sellers of diesel fuel to trucks in Queensland; it was patronised by heavy vehicles coming off the Ipswich Motorway and out of existing industrial areas which it served.[2]

[5] The plaintiff acquired an option to purchase the site, and Mr Woodcroft-Brown then approached Mr Usaz of KPMG, chartered accountants, in search of an investor to finance the project. He was introduced to Mr Harold Shand of Seamark Pty Ltd (the first defendant) in the first half of 1998.[3] Mr Shand was a businessman and formerly a practising solicitor. He was looking for an investment project with a comparatively short turnover of about 18 months to fill a hiatus while issues arising out of another development proceeded through the Planning and Environment Court.

[6] Negotiations between Mr Shand and Mr Woodcroft-Brown extended over the following months. The plan was for the first defendant to acquire the land, for the land to be subdivided, for the first defendant to retain ownership of the service station site,[4] and for Devpro (the plaintiff) and the first defendant to develop and then sell the balance ("the Development Land").

[7] The Council gave subdivisional approval on 2 December 1998. The first defendant entered into a contract on 18 June 1998[5] to purchase the site for approximately $2.6 million.[6] On 10 December 1998 a Development Agreement was executed between it as the Owner and the plaintiff as the Developer.

This proceeding

[8] In this proceeding the plaintiff claims two types of fees allegedly owing to it under the Development Agreement and makes a restitutionary claim in respect of work allegedly outside the Development Agreement and performed at the request of Mr Shand.

[9] Although the partnership between WTC and Macpro was dissolved in October 2002, the partners have cooperated in pursuit of their rights under the Development Agreement. The proceeding was brought by WTC on behalf of the partnership, and no relief was sought against the second defendant (Macpro), which did not take an active part in the trial.

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1 Transcript of the proceeding, pp 38, 114-115.
2 Transcript of the proceeding, p 117.
3 Transcript of the proceeding, pp 38-39, 273, 434.
4 This was referred to in the Development Agreement as "the Ampol Land", but at all material times there was a Caltex service station on it and the parties referred to the tenant as "Caltex".
5 Transcript of the proceeding, p 434.
6 Transcript of the proceeding, p 391.

The Development Agreement[7]

[10] The "Project" was defined as –

> "Project: the subdivision of the Parcel and the construction of the Buildings on the Development Land and its surrounds in accordance with the Plans and Specifications, the leasing of the Buildings and the sale of the Development Land and Buildings. The project does not include the ownership of the Ampol Land."[8]

The "Buildings" and the "Plans and Specifications" were defined as follows –

> "Buildings: the building or buildings comprising a fast foods store, a restaurant and a shop as defined in the Town Plan to be erected on the Development Land in accordance with the Plans and Specifications and where the context so admits any part of the Buildings."

> "Plans and Specifications:
> the plans and specifications to develop the Development Land which have been approved by the Council and the Owner and any variations or amendments agreed upon pursuant to the provisions of this Agreement."[9]

[11] In clause 2 the parties set out their broad intent as follows –

> "2. PURPOSE AND SCOPE
>
> 2.1 The purpose and scope of this Agreement is to establish the basis upon which the Parties will proceed to carry out the Project and develop the Development Land which comprises the implementation, conduct, co-ordination and management of:-
>
> - subdivision approvals;
> - development approvals;
> - the construction, development and leasing of the Buildings;
> - the sale of the Development Land and Buildings;
> - and includes sharing in any Profit."

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7 Exhibit 1, Document 41.
8 Clause 1.1.
9 Clause 1.1.

Essentially the first defendant was to make the Development Land available and provide finance.

[12] The plaintiff was to be –

> "… responsible for the construction and administration of the Project on a day to day basis to ensure development of the Development Land in accordance with the Plans and Specifications, the leasing of the Buildings (subject to the Owner's consent) and the sale of the Development Land and Buildings (subject to the Owner's consent) and shall use its best endeavours to complete the Project in accordance with the Plans and Specifications by the Sunset Date and…
>
> - arrange for all necessary consents, approvals and permits to be obtained to enable the development and subdivision of the parcel in accordance with the Plans and Specifications;
>
> - provide the necessary skill, work, materials and professional knowledge to complete the Project in a competent and expeditious manner;
>
> - recommend to the Owner the appointment of surveyors, consulting engineers and other consultants or experts as may be necessary to ensure the commencement, design, construction and completion of the Project;
>
> - call tenders and\or negotiate rates for the construction and completion of the Project and make recommendations to the Owner in respect of tenders received;
>
> - enter into contracts to complete the Project subject to the Owner's prior written approval;
>
> - be responsible at all times for the superintendency and co-ordination of the construction of the Buildings and completion of the Project;
>
> …
>
> - retain in a full supervisory capacity until completion of the Project qualified architectural and engineering consultants on behalf of the Owner;
>
> …
>
> - comply with the instructions of the Owner given in accordance with this Agreement and … subject to Clause 7.2 of this Agreement incorporate in the Project such variations as are approved by the Owner prior to the Date of Practical Completion;

…

- not incur any costs on behalf of the Owner unless approved by the Owner and … advise the Owner immediately if the Budget is or is likely to be exceeded."[10]

Its obligations with respect to leasing and sale were amplified in clauses 5.6 and 5.7, which provided –

"5.6 The Developer shall identify Prospective Lessees with whom the Owner may enter into Agreements for Lease. The Developer shall not settle any terms and conditions of an Agreement for Lease or Lease before the Owner has consented to such terms and conditions and the Owner is to sign all letters of intent. The Developer shall also arrange for any Leases to be signed by a Prospective Lessee.

5.7 The Developer shall identify parties willing to purchase the Development Land and Buildings with whom the Owner may enter into a contract of sale. The Developer shall not settle any terms and conditions of any contract of sale before the Owner has consented to such terms and conditions. The Developer shall also arrange for any contract of sale to be signed once the terms and conditions have been settled."

[13] The parties set a sunset date (30 April 2000, subsequently extended by agreement to 15 April 2001) with the first defendant having a right to terminate if the Project were delayed beyond that date.[11]

[14] The plaintiff was to be paid a Developer's Fee and a Development Fee in accordance with clauses 12 and 13 –

"12. THE DEVELOPER'S FEE

12.1 The Owner shall pay to the Developer $5,000.00 per month ("Developer's Fee") until the Date of Practical Completion or the Sunset Date, whichever is the earlier.

12.2 Such payment is to commence on the first Business Day of the month following the date of the Purchase Contract being accepted by the vendor named in the document and monthly thereafter.

13. DEVELOPMENT FEE

13.1 If the Buildings are fully leased at the Date of Completion of the Project the Owner shall pay to the Developer within 60 days from the Date of Completion of the Project a Development Fee calculated as follows:-

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10 Clause 6.2.

11 Clause 1.1, 16.6.

Development Fee = A + B + C

Where:-

A = 5% of the Development Costs less the Developer's Fee paid to the Developer by the Owner in accordance with Clause 12.

B = 20% of the Gross Rental.

C = 45% of the Profit.

13.2 If the Buildings are not fully leased at the Date of Completion of the Project, the Owner shall pay to the Developer within 60 days from the Date of Completion of the Project a Development Fee calculated as follows:-

Development Fee = A + B + C

Where:-

A = 5% of the Development Costs less the Developer's Fee paid to the Developer by the Owner in accordance with Clause 12.

B = 20% of the Gross Rental (if any).

C = ~~% of the Profit~~. A proportion of the profit as agreed

13.3 For the purposes of calculating the Development Fee payable by the Owner to the Developer pursuant to this Clause the Development Costs shall not include the Developer's Fee paid by the Owner to the Developer in accordance with Clause 12."

Relevant definitions –

"Date of Completion of the Project:	means the date of completion of the Sale Contract for the sale of the Development Land after construction of the Buildings.
Date of Practical Completion:	the date of issue of the Certificate of Practical Completion."
"Development Costs:	all costs of implementing and completing the Project including without limitation:-

- all costs of and incidental to the design of the Project;

- all costs associated with obtaining the required approvals and consents from the Council to develop the Development Land but excluding costs associated with the subdivision of the Parcel;

- contributions payable and cost of guarantees and performance funds required to be given to the Council or any other statutory body or authority;

- construction costs of roadworks, drainage, sewerage, headworks contributions and the provision of all other services and all other works necessary to complete the Project;

- the costs of and incidental to the supervision and construction of the works necessary to complete the Project;

- survey fees, plan approval and sealing fees and application fees;

- insurance premiums in respect of insurances put in place as agreed by the Owner in relation to the Project;

- any legal and all other professional expenses, stamp duty on any relevant instrument or in respect of any relevant transaction, registration fees, Department of Natural Resources fees, Council fees and the like relating to the Project."

"Expenses: all costs and expenses howsoever incurred or paid in relation to the Project including without limitation:-

- the sum of $200,000 representing the acquisition cost of the Development Land;

- the Development Costs;

- the Legal Costs;

- the Developer's Fee;

- the Marketing Costs;
- 20% of the Gross Rental;
- 5% of the Development Costs;
- all other expenses incurred in connection with the development or leasing or selling of the Buildings whether expressly provided herein or otherwise."

"Gross Rental: the annual rental payable by a Prospective Lessee pursuant to any Lease for the first year of the first term."

"Profit: the amount, if any, by which the Receipts exceed the Adjusted Capital Outlay."

"Receipts: all income however derived from the Project including without limitation interest on all moneys on deposit with any financial institution, proceeds of any claim under any insurance policy, proceeds of leasing of any Buildings and all other income received or receivable in respect of the Development Land and Buildings up to the Date of Completion of the Project including sale proceeds of the Development Land and Buildings if applicable."

"Adjusted Capital Outlay: the Capital Outlay calculated in accordance with Clause 8 plus an amount equal to the return the Owner would have received had the Owner invested the Capital Outlay at the rate of 9% per annum calculated on daily balances until the Date of Completion of the Project."[12]

Clause 8 provided –

"8. CAPITAL OUTLAY AND PAYMENTS

8.1 The Capital Outlay is the total of the Expenses and the costs paid by the Owner to the Architect.

8.2 Notwithstanding anything in this Agreement expressed or implied the Owner may at any time agree to any additional

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[12] Clause 1.1.

> item as an item of Capital Outlay or to any deletion of any item of Capital Outlay."

[15] At the time the Development Agreement was executed there were no plans and specifications approved by the Council and the first defendant. A number of different sketches had been considered during the negotiation phase, and Mr Woodcroft-Brown and Mr Shand had settled on one described as "Sketch A" as the one they would pursue. It showed a drive-through fast food outlet in the north-west corner diagonally opposite an L-shaped building containing a fast food outlet of 130 m^2, retail premises of 300 m^2 and other fast food outlets totalling 340 m^2 on the side of the Development Land which adjoined the service station land.[13] Both Mr Woodcroft-Brown on behalf of the plaintiff and Mr Shand on behalf of the first defendant understood that the final decision about what would be constructed would depend upon the availability of tenants.[14]

Overview

[16] The Project was fraught with delays and other problems variously attributable to Council requirements, lack of mutual respect between Mr Woodcroft-Brown and Mr Shand, Mr Shand's over-riding the tender process initiated by Mr Woodcroft-Brown and insisting upon the appointment of a builder of his choosing, an extremely poor working relationship between Mr Woodcroft-Brown and the builder's principal Mr Bennett, the need to negotiate with Caltex, and difficulties attracting tenants.

[17] Mr Woodcroft-Brown was conscientious in his approach to the plaintiff's obligations under the Development Agreement, but he did not demonstrate the commercial savvy of Mr Shand. Faced with a slow leasing market, Mr Shand remained focussed on the goal of completing so much of the development as was commercially viable and onselling it fully tenanted within a comparatively short time frame, while Mr Woodcroft-Brown was inclined to become more expansive in his development plans. The Progress Corner development was not the major focus of Mr Shand's business interests, in contrast to Mr Woodcroft-Brown. It was almost inevitable that their relationship would sour.

[18] The site was subdivided and ten fast food and retail premises including an ATM were built on part of the Development Land. The centre opened in January 2001.[15] Sale of the Development Land for $4 million was completed on 27 June 2003.[16]

History

[19] At the start of the Project, the Development Land was zoned Particular Development (Restaurants and Fast Food).[17] It was going to be necessary to apply for consent use for the retail shop. The plan was to build the drive-through fast food outlet first, and then other fast food outlets and retail space. In March 1999 a retail market report was obtained as consideration was being given to increasing the space allocated to retail shops.[18] Despite early optimism, the plaintiff was having

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13 Sketch A in Project Control Report No 5: Exhibit 1, Document 29; Transcript of the proceedings, pp 42-45, 311-312.

14 Exhibit 1, Document 12; Transcript of the proceeding, pp 135, 273.

15 Transcript of the proceeding, p 214.

16 Exhibit 1, Document 279; Transcript of the proceeding, p 391.

17 Exhibit 1, Document 49.

18 Exhibit 1, Document 49.

difficulty securing a tenant for the drive-through fast food outlet, and Mr Woodcroft-Brown raised with Mr Shand the possibility of building the L-shaped structure and filling it with fast food operators.

[20] A submission for development approval was lodged with the Council on 22 March 1999[19] and ultimately approved in August that year. Meanwhile the engineers Karamisheff Nagel Pty Ltd and architects Kuhn Kanas Pty Ltd worked on drawings and other documentation for the civil engineering and construction work necessary to construct the L-shaped building. Mr Woodcroft-Brown invited builders to tender for the work. He envisaged a design and construct contract in the form AS 4300, under which the builder would carry most of the risk, and so the price would be higher than under a fixed price contract.[20]

[21] Three builders, J M Kelly (Project Builders) Pty Ltd, Hutchinson Builders, and F K Gardiner & Sons Pty Ltd, submitted tenders to Mr Woodcroft-Brown. The J M Kelly tender (as revised) in the sum of $1,426,593 was the lowest.[21] Mr Woodcroft-Brown thought it was reasonable, and discussed it with Mr Maccheroni of J M Kelly.[22] He noted that three of the items related to the subdivision (which he considered not to be part of the Development Agreement) – external roadworks ($59,865), water supply reticulation ($22,446) and external sewer connection ($38,500). Although the tender referred to a form of contract (AS 2124) which was not a design and construct contract, Mr Maccheroni clarified that the tender was already on the basis of a design and construct contract.[23]

[22] However, J M Kelly was unacceptable to Mr Shand.[24] Mr Gorman (his fellow director and principal financier of the first defendant) would not agree to the appointment of J M Kelly. Mr Shand did not want Hutchinsons because he believed they had been responsible for overruns and disputations in the construction of Tattersall's Club in Brisbane.[25]

[23] Mr Shand instructed Mr Woodcroft-Brown to send the necessary documentation to Boss Constructions so that they could submit a tender. Mr Shand was intent upon assisting Boss to win the job. He sent Mr Bennett, the principal of Boss, rough budget costs for the job, telling him he was seeking other information from Mr Woodcroft-Brown, including quotes from other builders, which he intended to pass on. In fact that further information was not supplied by Mr Woodcroft-Brown.[26]

[24] Why Mr Shand was so keen for Mr Bennett's company to win the job was never revealed, even at the trial. They had some prior association, but it was not revealed to be particularly close. He had first met Mr Bennett some years earlier when they had children at the same kindergarten, he had visited a hospital construction project in Townsville being undertaken by Mr Bennett, and in his capacity as a solicitor he had caused a lease document to be prepared for him.

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19 Exhibit 1, Document 48.
20 Transcript of the proceeding, p 49.
21 Exhibit 1, Document 85.
22 Transcript of the proceeding, p 50.
23 Transcript of the proceeding, p 50.
24 Exhibit 1, Document 87; Transcript of the proceeding, p 283.
25 Transcript of the proceeding, p 283.
26 Exhibit 1, Document 104; Transcript of the proceeding, p 328.

[25] Whatever his real motivation for appointing Boss, Mr Shand did not share it with Mr Woodcroft-Brown. He simply said that he believed Mr Bennett to be an honourable man, and insisted on his appointment despite concerted protests from Mr Woodcroft-Brown.

[26] The revised Boss tender dated 14 October 1999[27] was in the sum of $1,498,473 made up of civil work $473,473 and building work $1,025,000. It included the following qualifications –

> "Your requirement to accept full responsibility for structural design, documentation and construction of all structural elements of the building is contrary to normal practice.
>
> Without the knowledge of soil conditions (soil test) this is extremely difficult to do.
>
> …
>
> CONTRACT
>
> We are not prepared to accept Australian Standard Building Contract.
>
> We are prepared to extend Defects Liability Period to 52 weeks for External Works, Plumbing, Drainage, Electrical, and Airconditioning Works, and 26 weeks for building works."

[27] Mr Shand went overseas on business in mid-October 1999. As he departed, he sent Mr Woodcroft-Brown a fax from the airport advising of the decision to proceed with Boss.[28] On 19 October 1999 Mr Woodcroft-Brown prepared a detailed analysis of the tenders, together with a statement of his concerns about the Boss tender, which he sent to Mr Shand while he was overseas.[29] He asked Mr Shand to delay a decision on the appointment of Boss until he returned. He did not receive a reply.[30] But the die had been cast – Mr Shand had already told Mr Bennett that he had been awarded the contract, which would be executed on his return.[31]

[28] Mr Woodcroft-Brown continued to remonstrate about the appointment of Boss, but to no avail. He had a meeting with Mr Shand on about 15 November 1999 in which Mr Shand proposed the appointment of a quantity surveyor. There is substantial dispute about the precise terms of the agreement, to which I will turn shortly. Suffice it to say at this point that, despite Mr Shand's subsequent representations to Mr Woodcroft-Brown that he had such an appointment in hand, no appointment was ever made.

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27 Exhibit 1, Document 82.

28 Exhibit 1, Document 87.

29 Exhibit 1, Document 93.

30 Transcript of the proceeding, p 51.

31 See Exhibit 1, Document 95 (a letter from Boss Constructions to Mr Woodcroft-Brown, dated 20 October 1999). Mr Bennett sent the letter to both Mr Shand and Mr Woodcroft-Brown. He did not receive a reply from Mr Woodcroft-Brown: transcript of the proceeding, p 472. Mr Shand received the letter: transcript of the proceeding, p 287. Mr Woodcroft-Brown, however, said that he did not recall receiving the letter: transcript of the proceeding, p 50.

[29] On 16 November 1999 Boss revised its tender price further to $1,565,473 (made up of building work $1,092,000 and civil work $473,473).[32]

[30] By November 1999 all hope of obtaining a tenant for a drive-through fast food outlet had been lost.[33] On about 9 December 1999 a material change of use application was lodged with the Council for permission to have retail as well as fast food use of the Development Land.[34] This was not approved until 17 May 2000.

[31] On 25 November 1999 the first defendant wrote to Boss confirming its verbal advice to enter into a formal building contract in the form AS 2124 (amended) generally in accordance with previous correspondence, and asked Boss to proceed with all necessary arrangements to commence site filling and civil works and commissioning of structural engineering design and documentation.[35]

[32] A contract between the first defendant and Boss in the form AS 2124-1992 (a fixed price form of contract) was prepared and executed.[36] It bears the date 25 December 1999; Mr Shand could not remember executing it on Christmas Day although Mr Bennett could.[37] Mr Shand never supplied Mr Woodcroft-Brown with a copy of the contract, despite repeated requests until the sale in June 2003.[38] Mr Shand assumed the role of superintendent under the contract, effectively excluding Mr Woodcroft-Brown from the supervisory and co-ordinating role assigned to the plaintiff under the Development Agreement.[39] There was to be ongoing tension, indeed acrimony, between Mr Woodcroft-Brown and Mr Bennett.

[33] By 1 February 2000 Boss had started clearing the Development Land. Relations between Mr Shand and Mr Woodcroft-Brown had deteriorated to the point where most of their communications were in writing.[40] The plaintiff wrote to the first defendant summarising the current situation on the project in these terms:

> "CONSTRUCTION
>
> Awaiting copy of QS report and elemental costing
>
> Awaiting details of Design & construct agreement with Boss Constructions
>
> Awaiting a detailed Construction program
>
> The fill on the site for stage 1 appears to be completed. We had requested the design engineers to monitor the filling operation in case they are requested to supply a certificate. We had requested that Boss formalise the arrangement when we introduced them to Karamisheff Nagel

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32 Exhibit 1, Document 103; Transcript of the proceeding, p 53.
33 Transcript of the proceeding, pp 165-166.
34 Exhibit 1, Document 148. cf transcript of the proceeding, p 148.
35 Exhibit 1, Document 112.
36 Exhibit 2, Tab 5.
37 Transcript of the proceeding, pp 366, 477.
38 Transcript of the proceeding, p 54.
39 Transcript of the proceeding, pp 177, 197, 316.
40 Transcript of the proceeding, p 291.

> We recommend that building work be halted until the above issues are resolved and we have more certainty on the leasing of the development.
>
> For discussion: Meeting held with council on 31/01/2000 regarding a major shopping centre.
>
> TENANTS:
> Refer to the attached details for discussion purposes.
>
> No tenants have signed agreements to lease at this stage.
>
> SALE:
>
> Devpro will prepare a sales document on this project and begin with the local agents to pre sell the development. We had for the record discussed the possibility of holding this development until after the effects of the GST introduction have passed. We do have interest subject to leases and finial [sic] price from syndication groups."[41]

Mr Shand replied on 2 February 2000[42] asserting that the report was misleading – that the recommendation to halt work was really based on the tenancy situation; he wanted to know the exact position with the Council; and said that if adjoining land were available, they should move to get it under option. He had given a stop work notice to Boss, which had been met with incredulity. He advised that a little more fill might be placed in the next couple of days.

[34] The works were apparently suspended until the material change of use was approved, but nevertheless Boss performed some earthworks, and submitted both a suspension of work compensation claim and a progress claim.[43] I will return to this.

[35] At about the time work was resumed in May 2000, Mr Shand brought in Mr McGinty to act as a go-between and to try to resolve some issues relating to the Caltex site.[44]

[36] As early as March 2000[45] Mr Shand expressed concerns at what he regarded as undue delays and expressed a desire to extricate the first defendant from the Project so long as that could be done on terms commercially acceptable to it. This attitude hardened over the ensuing months, although it is fair to observe that right up until the sale in June 2003 he deliberately gave Mr Woodcroft-Brown mixed messages about his wish to proceed with the Project in order to keep the pressure on the plaintiff.[46]

[37] By August 2000 Mr Woodcroft-Brown was trying to interest South African investors in buying out the first defendant. Mr Shand was enthusiastic about this, as

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41 Exhibit 1, Document 128.
42 Exhibit 1, Document 129.
43 Exhibit 1, Documents 139, 141; Transcript of the proceeding, pp 345-346.
44 Transcript of the proceeding, pp 196-197, 403.
45 Exhibit 1, Document 138.
46 See, for example, transcript of the proceeding, p 314.

he saw it as a possible way out for the first defendant. However, there was never any concrete proposal, and after about 18 months the idea died.[47]

[38] The L-shaped building under construction was referred to as "Stage 1". Preliminary sketches for "Stage 2", a complementary L-shaped building along the north-east of the Development Land had been drawn by the architects in October 1999.[48] At a meeting on 15 September 2000 attended by Mr Shand, Mr Woodcroft-Brown and Mr McLennan, Mr Shand instructed the plaintiff to proceed to Stage 2.[49]

[39] There were various matters relating to the Caltex land which had to be resolved – reciprocal easements with the Development Land, pump relocation, resumption by the Council to allow for a slip-lane, as well as the renewal of the Caltex lease. Mr Woodcroft-Brown was involved in the engineering aspects of these, and in negotiations (other than in relation to the lease itself) until about September 2001. That involvement is the subject of the quantum meruit claim raised on the pleadings.[50]

[40] Both Mr Woodcroft-Brown and Mr Shand were concerned about the tenancy situation. By January 2001 there were still three vacancies in Stage 1[51] although plans for Stage 2 were being finalised. In March and April 2001 they both seemed to appreciate the need to finalise Stage 1 first, but they were also giving consideration to Stage 2.[52] On 23 March 2001 Mr Woodcroft-Brown raised (inter alia) the need to agree on timing and a sunset date for Stage 2,[53] to which Mr Shand replied –

> "Stage 2 - First and foremost, the timing and sunset date will be driven by the tenants. Get the tenants in place and I can then make some considered decisions rather that agreeing to dates that cannot be achieved."[54]

[41] The extended sunset date under the Development Agreement (15 April 2001) passed without comment by either side. When asked in cross-examination why he had not terminated the joint venture immediately, Mr Shand said –

> "Because I still perceived that the property was unable to be sold at a commercially sensible price. The preferred option was for people associated with Devpro to replace us in the contract because they would have some confidence. I assumed that the project could proceed. By this stage I was aware that it was unrealistic to expect that the property could be subdivided because there were so many issues with road access off Garden Road, quite apart from the Caltex issue and other services, it would have made the property a fair bit of a mess and therefore purchasers much less likely to have a look at it."[55]

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47 Transcript of the proceeding, pp 204-211, 294-295, 373.
48 Exhibit 1, Document 97.
49 Exhibit 1, Document 169.
50 Exhibit 3.
51 Exhibit 1, Document 189.
52 Exhibit 1, Documents 206, 218; Transcript of the proceeding, p 74.
53 Exhibit 1, Document 206.
54 Exhibit 1, Document 218
55 Transcript of the proceeding, pp 299-300.

By memoranda dated 24 May 2001 and 5 July 2001 the first defendant called on the plaintiff to perform its obligations under the agreement.[56]

[42] There were discussions with supermarket operators AUR and Spar about a convenience store as the anchor tenant in Stage 2 (despite a potential problem in that the renewal of the Caltex lease was being negotiated, and the standard form Caltex lease document prohibited setting up a convenience store on adjoining land.)[57] On 17 September 2001 Mr Shand wrote to Mr Woodcroft-Brown –

> "What is the state of play with the tenants, particularly the Convenience store. Is anything going to happen or should we just shut Stage 2 down and wait till thing improve and tenants or developers start to approach us?"[58]

[43] On 1 October 2001 Mr Shand wrote to Woodcroft-Brown –

> "Tenants at Richlands continue to be a concern. The sunset clause on our joint venture agreement, which had been extended twice,[59] has long since expired. I think it is important that we move to re-introduce a sunset clause so we can bring about some closure on the development [and I] would appreciate your suggestions of a date by which you expect to bring about some real progress in the leasing of Stage 2. As you observe, this impacts on the performance of tenants in stage 1. We need to finalise our involvement in the project so we can get on with other developments and I am sure you are in the same position."[60]

[44] In November and December 2001 and January 2002 relations between Mr Woodcroft-Brown and Mr Shand were clearly strained with Mr Shand pushing for an early dissolution of the joint venture and Mr Woodcroft-Brown trying to keep it on foot. On 1 November 2001 Mr Woodcroft-Brown wrote to Mr Shand asking that any decision to sell or terminate the joint venture be held over until February 2002, and asserting there had never been a sunset date agreed upon for Stage 2.[61] This provoked a prompt response that there was no sunset date on Stage 2 because there had never been a distinction in the documents between Stage 1 and Stage 2, that is, that the sunset date in the Development Agreement applied to the development of the whole site.[62] On 10 December 2001 Mr Shand announced his intention to terminate any joint venture arrangements with effect from 31 January 2002.[63] Early in the new year Mr Woodcroft-Brown took steps towards a sale approaching Colliers Jardine to prepare a sales proposal.[64]

[45] Matters proceeded in much the same vein until May 2002. Mr Woodcroft-Brown continued to investigate the possibility of a supermarket/convenience store as the anchor tenant in Stage 2. The plaintiff acquired an option over adjoining land owned by Rabazzo and was endeavouring to obtain an option over further land owned by

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56 Exhibit 1, Documents 221, 225.
57 Exhibit 1, Document 231; Transcript of the proceeding, p 83.
58 Exhibit 1, Document 232. See also transcript of the proceeding, pp 83-84.
59 Once before the Development Agreement was executed and subsequently to 15 April 2001: see transcript of the proceeding, pp 51-52, 138-139.
60 Exhibit 1, Document 235; Transcript of the proceeding, p 84.
61 Exhibit 1, Document 239.
62 Exhibit 1, Document 241.
63 Exhibit 1, Document 242.
64 Exhibit 1, Document 251.Transcript of the proceeding, p 85.

the Lions Soccer Club, as one of the supermarket proposals straddled these two sites.[65] Mr Shand continued to send mixed messages to Mr Woodcroft-Brown. On the one hand he made it clear he did not want to be involved in the supermarket project.[66] But he had no intention of building Stage 2 in the absence of tenant interest: his strategy was to pretend to the plaintiff that he wanted to build Stage 2 to flush out a buyer – a specific buyer interested in the larger scheme based on the Action supermarket.[67]

[46] On 1 May 2002 Mr Shand asserted for the first time that the sunset date had passed and that the joint venture had been terminated by the effluxion of time.[68] Mr Woodcroft-Brown responded that Stage 1 had been completed and was then fully leased, and that the plaintiff had proceeded to Stage 2 on Mr Shand's instructions; he asserted that no sunset date had been set for Stage 2 and refuted the suggestion that the joint venture had expired by the effluxion of time.[69]

[47] After a heated meeting on 24 May 2002,[70] Mr Shand wrote to Mr Woodcroft-Brown on 28 May 2002 purporting to terminate the Development Agreement in these terms –

> "As indicated to you at our recent meeting, I have had further discussions with a view to determining how best to proceed with this project.
>
> While I acknowledge you [sic] comments about Stage 2 being open ended without a 'sunset clause', I do not accept such an interpretation is in any way supported by our Development Agreement which relates to the entire development and does not contemplate the different Stages that were utilised in the overall development.
>
> You have proposed a series of options for consideration. As I have indicated to you, I do not intend to include the sale of the Caltex site, which is not part of the Development Agreement, as an option. Likewise I am somewhat disenchanted with the sale prospects following the unfortunate experiences in Toowoomba.
>
> I therefore give notice under the Development Agreement of the termination of the Development Agreement as contemplated by Clause 16.6 of the agreement. Consistent with the owner's obligations under that Clause, I am enclosing a cheque for $23,367.30 for outstanding fees claimed by you."[71]

[48] Clause 16.6 of the Development Agreement was in these terms –

> "16.6 If completion of the Project is delayed beyond the Sunset Date as extended pursuant to Clause 16.2 the Owner may at any time terminate this Agreement by notice in writing to

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65 Exhibit 1, Document 244; Transcript of the proceeding, pp 87-88.
66 Exhibit 1, Documents 258, 259.
67 Transcript of the proceeding, p 314.
68 Exhibit 1, Document 263; Transcript of the proceeding, p 89.
69 Exhibit 1, Document 265.
70 Exhibit 1, Document 286; Transcript of the proceeding, p 90.
71 Exhibit 1, Document 269.

> the Developer, in which event the Developer shall have no further Claim of any kind whatsoever against the Owner arising under this Agreement or by reason of any act or thing done or to be done by the Developer on the Owner's behalf except the right to terminate this Agreement, provided however that such termination shall be without prejudice to any existing liability of the Owner to pay the expenses payable by it under this Agreement then already incurred."

[49] In cross-examination Mr Shand said that this purported termination was really a bluff to force whoever was involved in the Action supermarket proposal to acquire the first defendant's land. He said that he could not share his thoughts with Mr Woodcroft-Brown because he was a proponent of the supermarket scheme. He said his patience had worn thin.[72]

[50] Mr Woodcroft-Brown promptly refuted Mr Shand's right to terminate the joint venture in this fashion and returned the cheque, asserting that the payment was not in terms of clause 16.6 of the Development Agreement and that moneys were outstanding for "leasing fees".[73]

[51] Thereafter, the plaintiff continued to look for tenants for Stage 2 and Mr Woodcroft-Brown approached a number of real estate agents asking them to forward any offers to purchase. The partnership between WTC and Macpro was dissolved, with no apparent effect on the joint venture, Macpro concentrating on leasing and WTC on planning.[74]

[52] One of the tenants of Stage 1, Cake-it-Away, ceased to trade at about Christmas time 2002,[75] and administrators were subsequently appointed.[76] The first defendant was concerned at having made a substantial contribution towards the fitout of that tenancy and there not being a successful lease outcome. There was a meeting between Mr Shand and Mr Woodcroft-Brown on 3 March 2003[77] when Mr Shand attempted to withhold leasing fees from the plaintiff. He acknowledged in cross-examination that the first defendant had no lawful entitlement to withhold the fees in these circumstances, but that it had been "the commercially sensible thing to do".[78] He also acknowledged having said that the first defendant would honour the existing contract with the plaintiff.[79] I found his evidence in cross-examination that he did not believe the first defendant was under any legal obligation to do so but that it was prepared to make an ex gratia payment to the plaintiff to "honour the framework of the existing agreement … regardless of whether there were legal responsibilities"[80] disingenuous.

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72 Transcript of the proceeding, p 302.
73 Exhibit 1, Document 271; Transcript of the proceeding, p 93.
74 Transcript of the proceeding, p 94.
75 Transcript of the proceeding, p 262.
76 Exhibit 11, Document 4; Transcript of the proceeding, p 262.
77 Exhibit 1, Document 281.
78 A phrase put to him by senior counsel for the plaintiff, with which he agreed: transcript of the proceeding, p 389.
79 Transcript of the proceeding, p 392.
80 Transcript of the proceeding, p 393.

[53] In March 2003 Mr Woodcroft-Brown introduced Mr Lawrence Oudendyk to Mr Shand. Mr Oudendyk was a director and chief executive officer of the Queensland Lions Soccer Club and Pivotal Holdings Pty Ltd. He was interested either in purchasing the shopping centre from the first defendant or in selling the adjoining land to it.[81] Negotiations followed. On 12 May 2003 a Put and Call Option was executed between the first defendant as vendor and Pivotal Holdings Pty Ltd as purchaser.[82] Pursuant to that agreement Queensland Lions Soccer Club – to which Pivotal Holdings had assigned the option[83] – acquired the Development Land for $4 million, settlement taking place on 27 June 2003.[84]

[54] Before the sale was completed, the first defendant wrote to Mr Woodcroft-Brown and Mr McLennan on 3 June 2003 asserting for the first time since May 2002 that the joint venture had been terminated. The letter read –

> "As you are aware from previous correspondence, the Joint Venture Agreement was terminated following the failure to meet the extended sunset dates.
>
> It now seems possible that the existing contract may proceed to completion within the next month. From my negotiations with Mr Oudendyk, it seems Rod [Woodcroft-Brown] is intimately familiar with the progress of the matter. Notwithstanding the termination of the Joint Venture Agreement and on a without prejudice basis, I confirm my previous verbal commitments to you that I would consider implementing the principle of the Joint Venture Agreement by paying to you the amounts to which you may be entitled. Could you please submit to me your calculations of the amounts for urgent consideration?"[85]

[55] Mr Woodcroft-Brown and Mr McLennan responded –

> "Thank you for your letter of 3 June 2003. In order for us to calculate our entitlements under the Joint Venture would you please provide us with the following details:
>
> 1. Expenses of the Joint Venture since June 2001;
> 2. Income of the Joint Venture since June 2001; and
> 3. Copy of the land sale contract.
>
> Once we have that material we will provide details of our calculation of our profit entitlement.
>
> In the meantime please do not take this letter as an acceptance of your position regarding termination of the Joint Venture Agreement. Hopefully, that issue will not be relevant to finalising the matter."[86]

[56] Mr Shand volleyed –

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81 Transcript of the proceeding, pp 261-262.
82 Exhibit 1, Document 289.
83 Exhibit 1, Document 294.
84 Exhibit 1, Document 279.
85 Exhibit 1, Document 290.
86 Exhibit 1, Document 298.

> "As per your request, I am attaching the contract. I do not understand your comments regarding the termination of the Joint Venture.
>
> The Sunset date which had been extended had expired and notice was given.
>
> Until your letter of 26 June 2003, no indication of any dispute as to the termination had ever been made by you. Your oblique reference occurred some 15 months after termination. I think you need to state your position quite clearly as it will impact on an expeditious resolution. Where do you stand on this matter and what are your grounds?"[87]

[57] After Cake-it-Away ceased to trade, there were negotiations with a Vietnamese baker, Mr Dam, with a view to his taking up the tenancy. The lease to Mr Dam had not been executed when the sale was completed. A draft lease had been submitted to Mr Dam's solicitors about a month before, and there had been negotiations about its terms over the ensuing weeks. He had signed a letter of intent and paid a deposit.[88] The lease was all but finalised shortly before completion of the sale, when Mr Dam wanted a further clause preventing the landlord from leasing another shop in Stage 1 or Stage 2 to another baker. Mr Shand said he would agree to this if the purchaser agreed.[89] The sale was completed on the understanding that the purchaser would enter into a lease with Mr Dam. The first defendant's solicitors, who had had the conduct of the lease negotiations, commenced to act for the purchaser in relation to the lease. Subsequently the tenant made two further amendments and executed the lease on 7 July 2003;[90] the purchaser executed it on 30 July 2003.[91]

Termination

[58] The first defendant pleaded in response to the plaintiff's claims under the Development Agreement –

> "24. As to the allegations in paragraph 4 of the amended Statement of Claim:
>
> (a) clause 16.6 of the Development Agreement provided, so far as material, that if the completion of the project was delayed beyond the Sunset Date, [the first defendant] could terminate the Development Agreement by notice in writing to [the plaintiff];
>
> (b) completion of the project was delayed beyond the extended Sunset Date, namely, 15 April, 2001;
>
> (c) completion of the project had not occurred by 28 May, 2002;

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87 Exhibit 1, Document 299.
88 Exhibit 11, Document 20.
89 Exhibit 11, Document 48.
90 Exhibit 11, Document 61.
91 Exhibit 11, Document 67.

> (d) [the first defendant] gave written notice of the termination of the Development Agreement to [the plaintiff] on 28 May, 2002, as it was entitled to do."[92]

[59] The plaintiff's primary submission was that because the three specified tenancies were let by the extended sunset date (15 April 2001), the plaintiff complied with its obligations and there is no cause to consider clause 16.6.[93] In my view that is too simplistic an approach. Clause 16.6 referred to "completion of the project", and it is clear from the definitions of "Project" and "Date of Completion of the Project" that the project was not complete until the Development Land and Buildings were sold. In other words, it was not complete until 27 June 2003.

[60] By clause 16.6 the first defendant could terminate the Development Agreement "at any time" after 15 April 2001 because the Project was not complete. It was confronted with the choice of terminating the agreement or keeping it on foot. The right of termination was a continuing one, not required to be exercised promptly. Whether the first defendant exercised its right of election must be inferred from its conduct after 15 April 2001. As the High Court observed in *Immer (No 145) Pty Ltd v The Uniting Church in Australia Property Trust (NSW)*[94] –

> "The point is that where the right to rescind is a continuing one, it is not so readily concluded that the party entitled to rescind has abandoned that right completely as opposed to taking no action to exercise the right at the time in question."

Nevertheless, once an election is made, it cannot be exercised again. Here the first defendant by Mr Shand made a deliberate decision not to terminate in reliance on clause 16.6 because the project was then commercially unsaleable[95] and by memoranda dated 24 May 2001 and 5 July 2001 it called on the plaintiff to perform its obligations under the agreement.[96] As its senior counsel conceded, Mr Shand's conduct effected an election not to terminate.[97]

[61] Senior counsel for the first defendant submitted that it was open to his client, notwithstanding the election, to call for the Project to be completed within a reasonable time and in the event that it was not, to terminate the Development Agreement. I did not understand the argument to be one about the reintroduction of a sunset date;[98] rather I understood the argument to be based on the general principle that where an agreement is not of finite duration, it may be brought to an end by one party on reasonable notice to the other. Senior counsel for the first defendant submitted that the evidence supported the conclusion that in the period from about October 2001 to 28 May 2002 Mr Shand made it clear to Mr Woodcroft-Brown that, unless the Project was completed promptly or the plaintiff (alone or through others) took it over on terms satisfactory to the first defendant, the first defendant would terminate the agreement.[99] This was not pleaded. In any event, the

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92 Second Further Amended Defence of the First Defendant to the Further Amended Statement of Claim, filed by leave 7 August 2006.

93 Plaintiff's written submissions, [16].

94 (1992-1993) 182 CLR 26, 42.

95 Transcript of the proceeding, p 318.

96 Exhibit 1, Documents 221, 225.

97 First defendant's written submissions, [50].

98 cf the submissions of senior counsel for the plaintiff, transcript of the proceeding, pp 579-580.

99 He relied on Exhibit 1, Documents 235, 239, 241, 242, 245, 252, 253, 258, 259, transcript of the proceeding, p 379.

factual foundation for the submission was not made out. Mr Shand did not make his position unequivocally clear to Mr Woodcroft-Brown; on the contrary he deliberately continued to send him mixed messages.

Developer's Fee (clause 12)

[62] By clause 12.1 the Developer's Fee was payable monthly until the earlier of the Date of Practical Completion and the sunset date.

[63] A Certificate of Classification was issued for the purpose of the *Building Act 1975* (Qld) on 28 November 2000.[100] Practical completion was attained before that, although no Certificate of Practical Completion issued.[101] Mr Woodcroft-Brown gave evidence that the Developer's Fee had been paid to the plaintiff for the period from the inception of the work until and including December 2000.[102] Thus there is no amount presently recoverable by the plaintiff pursuant to clause 12.

Development Fee (clause 13)

[64] The plaintiff claims the Development Fee pursuant to clause 13.1 or 13.2. By clause 13.1 the first defendant undertook to pay the plaintiff a Development Fee if the "Buildings" were "fully leased" at the "Date of Completion of the Project". If they were not "fully leased" at that date, the plaintiff claims such a fee under clause 13.2.

[65] The contract for the sale of the Development Land was completed on 27 June 2003; that was the "Date of Completion of the Project" if the "Buildings" had been constructed by then.

[66] There were two principal components of the definition of "Buildings" in the Development Agreement: that the building or buildings comprise three specific tenancies (a fast food store, a restaurant and a shop) and that they be in accordance with "the Plans and Specifications", which were in turn defined as "the plans and specifications … which have been approved by the Council and the Owner". In circumstances where both parties to the agreement knew that no plans and specifications had been approved at the time the agreement was made, the parties must be taken to have intended to use the future perfect tense – that is, "the plans and specifications … which shall have been approved". On the evidence only one set of plans and specifications was ever approved – namely, those relating to Stage 1, which was all that was ever constructed. Stage 1 as constructed included a fast food store (a Domino's Pizza store), a restaurant (a Subway outlet, which was within the definition of "restaurant" in the Town Plan), and a shop (a video shop), as well as other tenancies.

[67] Those three tenancies were filled by the sunset date of 15 April 2001. Stage 1 was fully tenanted when Cake-it-Away was trading. Then there was a period of several months when the bakery was unoccupied, and as I have described there were negotiations with Mr Dam for him to take up a tenancy.

[68] The first defendant pleaded that –

> "(g) by approximately 20 October, 1999, it had been orally agreed by Mr Shand, on behalf of the first defendant, and Mr Woodcroft-Brown, on behalf of the plaintiff, that the

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100 Exhibit 1, Document 182.

101 Transcript of the proceeding, pp 475-476.

102 Transcript of the proceeding, p 203.

Buildings, within the meaning given to that term by the Development Agreement, be varied so that they comprised the buildings depicted in the plan dated 20 October, 1999 prepared by Kuhn Kunas ('the Plan');

(h) it was an express term of the Development Agreement or, alternatively, it was a term implied from the other terms of the Development Agreement, that the plaintiff and the second defendant must, amongst other things, construct all of the Buildings before becoming entitled to the development fee provided for by clause 13 of the Development Agreement;

(i) at no time were the buildings depicted in the Plan and described there as 'Stage Two' ('the Stage Two Buildings') constructed."[103]

[69] The Stage 2 building was not in contemplation when the Development Agreement was executed, it was not within the definition of "Buildings" in that agreement, and no plans and specifications in relation to it were ever approved.

[70] I accept that the parties both wished to maximise their profits, and that a potential way to do that was to build and lease more premises. Senior counsel for the plaintiff submitted that to that end they agreed that the whole of Stage 1 would be built, but they did not enlarge the obligation of the plaintiff before it became entitled to a fee under clause 13.[104] I accept that submission.

[71] Nor did the parties enlarge that obligation of the Plaintiff in any of their discussions about Stage 2. As at 20 October 1999, Mr Shand and Mr Woodcroft-Brown were arguing about the selection of a builder for Stage 1, and it was not until September 2000 that Mr Shand "instructed" the plaintiff to proceed to Stage 2. Moreover, a variation such as that pleaded would have been quite inconsistent with Mr Shand's admission in cross-examination that he never intended proceeding with Stage 2 unless satisfied there were tenants available to fill it.[105]

[72] On the evidence the parties did not agree by about 20 October 1999 to vary the definition of "Buildings" to include Stage 2, and payment of the Development Fee under clause 13 was not made conditional on completion of Stage 2.

[73] The first defendant contended that the Buildings were not "fully leased" within the meaning of clause 13.1 at the Date of Completion of the Project.[106]

[74] As I have said, the agreement to build the whole of Stage 1 did not enlarge the obligation of the plaintiff before it became entitled to a fee under clause 13. As at 27 June 2003 (the Date of Completion of the Project) the three tenancies designated in

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103 Second Further Amended Defence of the First Defendant to the Further Amended Statement of Claim, filed by leave 7 August 2006, [24].

104 Transcript of the proceeding, pp 570-571.

105 Transcript of the proceeding, p 375.

106 Second Further Amended Defence of the First Defendant to the Further Amended Statement of Claim, filed by leave 7 August 2006, [23].

the definition of "Buildings" were leased, and that was sufficient for the plaintiff to be entitled to the Development Fee under clause 13.1

[75] If I am wrong about that, then it is necessary to consider whether Stage 1 was "fully leased" as at that date. The argument focussed on tenancy 7 – the bakery.

[76] The plaintiff's obligation was to identify prospective lessees with whom the first defendant would enter into agreements for lease.[107] That it did this in the case of Cake-it-Away (with whom the first defendant entered into a lease) did not satisfy the requirement of clause 13.1 –

> "If the Buildings are fully leased at the Date of Completion of the Project …" *(emphasis added)*

because Cake-it-Away ceased to trade some months before 27 June 2003. It was not to the point that at some anterior time the Buildings had been fully leased: they had to be in that state at the Date of Completion of the Project.

[77] What then of the lease to Mr Dam? As the Development Fee was intended as a reward for performance, the question must be whether the plaintiff had performed all that was required of it in the circumstances. As senior counsel for the plaintiff submitted,[108] the negotiations between the first defendant and Mr Dam were concluded when the last term was agreed shortly before completion of the sale; all that remained to be done was the execution of the lease. It was practically too late for the lease to be executed, and it was thought better for the purchaser to grant the lease as lessor. I accept the submission made on behalf of the plaintiff that Stage 1 was "fully leased" when the sale was completed, and that it is not to the point that there was subsequently some fine tuning between the purchaser and Mr Dam.

[78] I conclude that the plaintiff is entitled to the Development Fee under clause 13.1. In the circumstances it is not necessary to consider 13.2.

***Property Agents and Motor Dealers Act 2000* (Qld)**

[79] Section 140 of the *Property Agents and Motor Dealers Act 2000* (Qld) precludes a person from recovering any reward or expense for the performance of an activity as a real estate agent if he did not hold a real estate agent's licence at the time he performed the activity. None of Mr McLennan, Mr Woodcroft-Brown or the plaintiff held such a licence at any material time.

[80] By clause 6.2 of the Development Agreement the plaintiff was responsible for the leasing of the Buildings (subject to the first defendant's consent) and the sale of the Development Land and Buildings (subject to the first defendant's consent). The first defendant contended that these tasks fell within the description of activities as a real estate agent,[109] and that as the evidence provided no basis for identifying what part of any Development Fee was attributable to activities as a real estate agent as opposed to the other activities performed by the plaintiff to earn such a fee, s 140 precludes recovery of any Development Fee.[110]

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107 Development agreement (Exhibit 1, Document 41), clause 5.6.

108 Transcript of the proceeding, pp 572-573.

109 *Property Agents and Motor Dealers Act 2000* (Qld), s 128.

110 Second Further Amended Defence of the First Defendant to the Further Amended Statement of Claim, filed by leave 7 August 2006, [25A(l)-(n)]; Written submissions of the first defendant, [90]-[93].

[81] However, by clause 6.4 of the Development Agreement the plaintiff was entitled to employ sub-contractors (who might be licensed real estate agents). It did so. It did not itself perform any of the activities of a real estate agent, and there is no warrant for denying it any part of the Development Fee in reliance on s 140.

Unconscionability

[82] The plaintiff did not pursue its claim for damages under the *Trade Practices Act 1974* (Cth).

Quantum

[83] Senior counsel for the plaintiff submitted that his client is entitled to approximately $800,000 under clause 13.1.

[84] The plaintiff retained BDO Kendalls, chartered accountants, to calculate the Development Fee payable under clause 13. Their report dated 25 November 2003 was in evidence.[111] Working from that, the first defendant prepared a quantum schedule in the form which is annexed to these reasons for judgment,[112] which senior counsel for the plaintiff accepted as a useful starting point in the assessment of quantum.[113] As I shall explain, the contentious items in that schedule are items 1, 2 and 4 of the Development Costs. The first defendant abandoned its claim to a set-off.

[85] The Boss contract price was $1,565,473,[114] and the amount actually paid to it was $2,363,274 (made up of progress claims $2,132,274 and a prolongation claim of $231,000). The JM Kelly tender price had been $1,426,593[115] of which Mr Woodcroft-Brown had considered $120,811 was not referrable to the Development Agreement,[116] leaving an adjusted tender price of $1,305,782. The Gardiner tender price was $1,560,500. Devpro's estimate had been $1,387,255.[117]

[86] The plaintiff pleaded –

> "2D. In or about December 1999:
>
> …
>
> (b) [the first defendant] by Mr Shand agreed that [the first defendant] would take responsibility for all risk (including excess of building costs over the tender prices obtained by the plaintiff), arising from the appointment of Boss Construction as builder."[118]

The first defendant pleaded –

> "8. As to the allegations in paragraph 2D of the amended Statement of Claim, [the first defendant]:

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111 Exhibit 2, Tab 8.
112 Exhibit 10.
113 Transcript of the proceeding, p 584.
114 Exhibit 2, Tab 5.
115 Exhibit 1, Document 85.
116 Transcript of the proceeding, p 50.
117 Exhibit 1, Document 93.
118 Further Amended Statement of Claim, filed 25 November 2004.

…

> (b) Mr Shand, on behalf of it, and Mr Woodcroft-Brown, on behalf of the plaintiff, orally agreed in approximately November or December, 1999 that a quantity surveyor would be appointed and that, to the extent that the building costs actually incurred as a result of the appointment of Boss Constructions exceeded the sum assessed by the quantity surveyor as representing a reasonable construction price for the works actually constructed by Boss Constructions, the first defendant would bear the difference."[119]

[87] I accept Mr Woodcroft-Brown's evidence that in a conversation in October 1999 Mr Shand had said he would "wear the risk" regarding the appointment of Boss.[120] Be that as it may, the agreement about the appointment of a quantity surveyor was made in the meeting between Mr Shand and Mr Woodcroft-Brown on about 15 November 1999. Having regard to this passage in the cross-examination of Mr Woodcroft-Brown –

> "Mr Shand said that during this conversation that a quantity surveyor could be appointed and if he determined that the amount paid to Boss for the work which was done was more than was reasonable, he, Mr Shand, would bear the difference when it came to calculating profit shares under the development agreement. Do you remember that? – I do remember that.
>
> That was the agreement that you had with him, wasn't it? – That's correct.
>
> You agreed with that or accepted that offer? – I accepted that."[121]

I am satisfied that the agreement was in the terms pleaded by the first defendant.[122]

[88] But I am also satisfied that Mr Shand never intended to appoint a quantity surveyor and that his representations to Mr Woodcroft-Brown that he had the appointment in hand and even that an appointment had been made were deliberately false.[123] Mr Shand was a hard-headed businessman who was increasingly frustrated by delays associated with a development he had hoped would take only about 18 months. I was unimpressed by his explanations of having perceived the necessity to pursue strategies to bring the development to a commercially acceptable conclusion. He was high-handed and at times blatantly misleading in his dealings with Mr

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119 Second Further Amended Defence of the First Defendant to the Further Amended Statement of Claim, filed by leave 7 August 2006. The first defendant's plea in the Second Further Amended Defence, [8(d)], that the oral agreements referred to in para 2D of the Statement of Claim and para 8(b) of the Defence were unenforceable because they were unsupported by consideration moving from the plaintiff and the second defendant to the first defendant was abandoned: Written submissions of the first defendant, [6], transcript of the proceeding, pp 557-558.

120 Transcript of the proceeding, pp 60-61.

121 Transcript of the proceeding, p 185.

122 Subsequent exchanges in terms of the first defendant's "wearing all the risk of the Boss appointment", even if able to be used to ascertain the terms of the agreement (which is doubtful in light of the *Royal Botanic Gardens Case* (2002) 186 ALR 289), did not throw any light on what the risk was.

123 Exhibit 1, Documents 114, 129, 133, 169, 186; Transcript of the proceeding, pp 308, 341-342, 343, 354, 358.

Woodcroft-Brown. He paid scant regard to his obligations under clause 28 of the Development Agreement to be just and faithful in all matters provide for in that agreement and at all times to give the plaintiff a full and true account of all matters within his knowledge relating to the Project.

[89] Having appointed Boss as the builder, Mr Shand was cavalier in the extreme in his administration of contract claims. Progress claims submitted by Boss should have been accompanied by supporting documentation and certified by an architect pursuant to clause 11.1 of the Development Agreement. Mr Shand arranged for Lloyd Bennett & Associates, a firm of which Mr Bennett was the principal, to be appointed as the architect,[124] and then paid the claims without sighting supporting documentation.[125]

[90] By the time the dispute came to trial, it was no longer practicable to engage a quantity surveyor: the Development Land and Buildings had been sold and the builder had destroyed its records.[126] This eventuality will not prevent the Court from assessing the amount payable to the plaintiff. If there is evidence from which it can otherwise determine what would have been a reasonable construction cost, the Court must do the best it can to quantify the plaintiff's loss.[127]

[91] It is not possible to reach a precise figure. Leaving aside the Hutchinson tender (because they were unacceptable to Mr Shand), the various prices were as follows –

Boss contract price	$1,565,473
Gardiner	$1,560,500
J M Kelly (as adjusted)	$1,305,782
Plaintiff's estimate	$1,387,255.

Senior counsel for the plaintiff submitted that the Court should adopt the J M Kelly price as the starting point because it was close to the plaintiff's estimate and close to that of Gardiner [sic].[128] It seems to me that the Gardiner estimate was in fact closer to the Boss contract price. It may be too generous to the plaintiff to choose the J M Kelly tender as the starting point when that was lower than the plaintiff's own estimate and considerably lower than the other two. Doing the best I can, I have settled upon $1,400,000 as the starting point.

[92] There were variations, for which reasonable allowances must be made.[129]

[93] The plaintiff called Mr Geoffrey Greenhalgh, a civil engineer and a principal of Karamisheff Nagel Pty Ltd (now called KN Group Pty Ltd), who had reviewed the variation claims. He was familiar with the development, his firm having been consultants to it from an early date. He had meticulously reviewed the variation claims, where necessary performing computer modelling, and prepared a

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124 Transcript of the proceeding, pp 307, 317, 440.

125 Transcript of the proceeding, pp 306-307, 317, 326.

126 Transcript of the proceeding, pp 478-483.

127 *The Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64, 83; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23, 26, 37; *Ray Teese Pty Ltd v Syntex Australia Limited* [1998] 1 Qd R 104, 109-110.

128 Transcript of the proceeding, pp 593-594. See also p 402 where the supposed similarity was put to Mr Shand, but he did not agree with it.

129 Exhibit 2, Tab 7.

schedule[130] summarising his opinions. He gave his evidence carefully and fairly, not shrinking from acknowledging that some of the claims were properly made.

[94] The first defendant called Mr Lloyd Bennett, the principal of Boss Constructions and of Lloyd Bennett & Associates. He was an unimpressive witness. The largely unexplained nature of his association with Mr Shand and the unusual circumstances in which Boss Constructions was awarded the contract cast a shadow over his independence; that shadow was darkened by the appointment of Lloyd Bennett & Associates to certify claims, and by Mr Shand's conduct in paying claims without scrutinising them to any meaningful degree. Mr Bennett's evidence was at times confused, and not supported by documents contemporaneous with the events in question: he said these had been destroyed in the ensuing years.

[95] In so far as Mr Greenhalgh and Mr Bennett gave evidence on the same matters and their evidence differed, I accept that of Mr Greenhalgh.

[96] Senior counsel for the plaintiff prepared a schedule of the disputed variations showing the extent to which the allowance for each should, in his submission, be reduced.[131] Mr Greenhalgh's evidence dealt with all but seven of the disputed variations. With respect to one variation,[132] my understanding of Mr Greenhalgh's schedule is that, contrary to the plaintiff's schedule, the amount should be reduced rather than disallowed in full. Thus I have concluded that these variations should be reduced as follows –

Variation Number	**Amount of Reductions**
2	$ 51,000
3	$ 33,725
6(2)	$ 4,142
8(1)	$ 5,851
9F	$ 8,576
9H	$ 1,300
9I	$ 2,130
10G1	$ 688
10G2	$ 4,752
10G5	$ 928
10H	$ 7,182
10I	$ 1,862
10J	$ 6,730
11C	$ 3,720
Total	$132,586

[97] By variation 5 Boss claimed $25,405 for certain alterations requested by Subway – removal of an existing steel door frame at the rear of the tenancy and demolition of certain block columns. There was no break up of the costs as between the two items. According to Mr Woodcroft-Brown[133] the columns had not in fact been built, although starter bars had been put into the foundations for four such columns. While

130 Exhibit 17.
131 Written submissions of the plaintiff, [57].
132 Variation 8.1.
133 Transcript of the proceeding, pp 103-104; see also pp 252-253.

the starter bars had to be cut off and pulled out, overall there should have been a cost saving. Mr Bennett's evidence was that the columns were built before Boss received the plaintiff's request for the variation.[134] He said he received amended drawings on 19 April 2000, but could not satisfactorily explain how the columns could have been built before then if the works were suspended in that preceding time. When asked how the figure of $25,405 was calculated he referred to various documents which he "would have had" but which had been destroyed. I was left with no confidence in his version. I accept the evidence of Mr Woodcroft-Brown with respect to this variation, and accordingly disallow the whole amount claimed.

[98] By variation 6(1) Boss deducted $2,898 for the saving effected by merely painting the rear wall of a building rather than scrub fine rendering it. Mr Woodcroft-Brown said that because plastering is much more expensive than painting, and given the area involved, the deduction shown in the variation was only about half what it should have been.[135] Mr Bennett's evidence was once again peppered by what he "would have done" and unsupported by documents.[136] I accept Mr Woodcroft-Brown's evidence, and would allow a further reduction of $2,900.

[99] By variation 7(3) Boss claimed $13,105 for increase in roofing costs as a result of the suspension of the work: the subcontractor's price was firm for only a certain period which expired before the resumption work.[137] Mr Bennett conceded in cross-examination that Boss had included the increase in roofing costs in variation 12, which was a claim for 4.5% increase on all building costs by reason of delays.[138] Because I consider variation 12 should be disallowed in full, I would allow variation 7(3).

[100] By variation 7(5) Boss claimed $5,806 to upgrade the main switch from 600 amps to 800 amps for Stage 2 and to supply and install additional underground conduits for power and phone across the carpark for Stage 2. No break-up was put into evidence. Under the contract the switch boards were required to have 880 amps, not 600.[139] Mr Bennett gave evidence that he and Mr Shand agreed that services for Stage 2 should be installed before the carpark was completed,[140] but there is no evidence that the plaintiff agreed to this. In the circumstances this variation should be disallowed in full.

[101] By variation 7(6) Boss claimed $4,150 to delete part of the shopfront to the Subway and real estate tenancies and to block up, render and paint in lieu. Mr Bennett explained that the blockwork included foundations, starter bars, blocklaying, steel reinforcement of the blocks, core filling, flashing and/or capping, rendering and painting,[141] and that it was more expensive than providing the shopfront.[142] Mr Woodcroft-Brown did not elaborate on his assertion that blockwork is not as

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134 Transcript of the proceeding, pp 447-448, 505-508.
135 Transcript of the proceeding, pp 104, 253-254.
136 Transcript of the proceeding, pp 448-449.
137 Transcript of the proceeding, pp 451-452, 509-512.
138 Transcript of the proceeding, pp 511-512.
139 See Scope of Works (Exhibit 2, Tab 1, p 2) which was incorporated by reference into the contract (Exhibit 2, Tab 5, p 62): 80 amp sub-boards were to be supplied to each tenancy. Originally 11 tenancies were envisaged.
140 Transcript of the proceeding, p 453.
141 Transcript of the proceeding, pp 452, 512-513, 515-516.
142 Transcript of the proceeding, pp 452, 512.

expensive as glass and aluminium shopfronts,[143] and senior counsel for the plaintiff's cross-examination of Mr Bennett by reference to *Rawlinsons Australian Construction Handbook* (18th ed) failed to take account of all of the tradework and materials involved. Although Mr Bennett could not produce supporting documentation, on balance I have decided to allow this variation in full.

[102] By variation 8(2) Boss claimed $6,546 for the supply and installation of 80 linear metres of 50 millimetre copper water main for Stage 2. I accept Mr Woodcroft-Brown's evidence that this was an unnecessary duplication as a full water main had been supplied along the entire length of the site.[144] The variation should be disallowed in full.

[103] The second item under "Development Costs" in the first defendant's quantum schedule[145] is "Prolongation claim paid $231,000". This refers to variation 12, which was described as "suspension of work – compensation claim" made up as follows –

Increase in building costs between September/October1999 and September 2000 – as per Brisbane Building Cost Index	$ 70,446
19 weeks' delay at $5,000 per week	$ 95,000
Additional site establishment costs	$ 4,920
	$170,366.

That claim was the subject of negotiation between Mr Bennett and Mr Shand,[146] and after agreement had been reached, on 18 October 2002 Boss submitted a tax invoice in the sum of $231,000, which was paid. That sum was made up of –

Value of variation no 12	$ 170,000
Interest as agreed	$ 40,000
GST	$ 21,000
	$ 231,000.

[104] Boss' claim for increased building costs as reflected in movements in *Rawlinsons* Brisbane Building Index was presumably made pursuant to clause 36 of the building contract. Even if extensions of time were validly granted (which seems doubtful), the claim made ought not to have been paid because there was in fact no increase in the index between 30 September 1999 and 30 September 2000.[147] It seems that Mr Bennett relied on incorrect information as to movements in the index which was given to him by a quantity surveyor.[148] The $70,000 component of the prolongation claim should be disallowed.

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143 Transcript of the proceeding, p 105.
144 Transcript of the proceeding, p 106.
145 Annexed to these reasons for judgment.
146 Transcript of the proceeding, pp 520-523.
147 Exhibit 21 (*Rawlinsons Australian Construction Handbook Quarterly Update* October 2000); Transcript of the proceeding, p 520.
148 Transcript of the proceeding, pp 519-520.

[105] The claim for 19 weeks' delay was made up of 13 weeks from the beginning of February 2000 to the end of April 2000[149] and 6 weeks at the end of the construction.

[106] As to the first of these, it is clear that despite the nominal suspension of work, work was performed, and, as the following table demonstrates, progress claims were made.[150]

Progress claims

No	Date	Amount
1	25 January 2000	$227,010
2	24 February 2000	$ 45,900
3	6 April 2000	$ 30,352
4	18 May 2000	$261,464
5	23 June 2000	$264,167
6	28 July 2000	$294,560
7	28 August 2000	$267,652
8	28 September 2000	$366,245
9	31 October 2000	$142,230
10	15 December 2000	$170,144

Mr Bennett drew a distinction between work related to Stage 2 (which was the subject of some of the variations – for example, the filling of Stage 2 which was the subject of variation 2) and work required under the original contract.[151] But the plaintiff has not questioned Boss' entitlement to be paid for work truly attributable to and actually performed in relation to Stage 2. On the evidence, I am not satisfied that the claim for 13 weeks' delay was a valid one, and I consider that for the purposes of this litigation between the plaintiff and the first defendant it should be disallowed.

[107] By the end of September or early October 2000 Boss had completed the building work and received the final certificate for it subject to the approval and installation of the water trunk main, the approval and installation of the sewerage connection point, and final plumbing and fire services approval.[152] There was a six week period between completion of the building itself and the issue of the certificate of classification at the completion of these remaining matters. Boss claimed $5,000 per week over that period as the wages payable to its supervisor, foreman and labourer. The claim that these three men were idle over that period is inconsistent with there being work to be done. At any rate, I am not persuaded that the claim was properly made under the building contract or properly included in the Development Costs. For present purposes it should be disallowed in full.

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149 See also Extension of Time Claim no 2 (Exhibit 14); Transcript of the proceeding, p 524.

150 See also Progress Certificate no 4 wrongly dated 19 April 2000, but meant to be dated 19 May 2000, certified by Mr Bennett in the sum of $261,464 (Exhibit 1, Document 147; Transcript of the proceeding, pp 490-491) which is consistent with substantial work being performed during the period the works were supposedly suspended.

151 Transcript of the proceeding, pp 489-490.

152 Transcript of the proceeding, pp 487-488.

[108] It follows that the additional site establishment costs should also be disallowed.

[109] In summary, I consider that the whole of the prolongation claim ($231,000) should be disallowed.

[110] In the first defendant's quantum schedule[153] the fourth item under Development Costs is "Fit-out contributions paid to tenants $329,091". These were incentives paid to tenants. I accept the evidence of Mr Woodcroft-Brown that sums claimed for variations for some specific tenancy fit-outs have been included in this figure[154] –

Tenancy	**Variation No**	**Amount**
Domino's	9A	$29,759[155]
Brumbys	9B	$10,813
Subway	9C	$31,543
ATM tenancy	10A	$ 3,704
Various	11	$ 2,128
		$77,947.

This amount cannot be allowed twice, and should be deducted from the total Development Costs as shown on the defendant's quantum schedule.

Conclusion re Development Fee

[111] My assessment of the Development Fee payable to the plaintiff pursuant to clause 13.1 can be summarised, by reference to the first defendant's quantum schedule,[156] as follows—

(a) The Development Costs ($2,940,464) should be reduced by $647,663 as follows –

Development Costs shown in first defendant's quantum schedule		$2,940,464
Reduction in amount claimed for variations (including prolongation claim)		
Variations considered by Greenhalgh	$ 132,586	
Variation 5	$ 25,405	
Variation 6(1)	$ 2,900	
Variation 7(5)	$ 5,806	
Variation 8(2)	$ 6,546	
Variation 12 (prolongation)	$ 231,000	$404,243

153 Annexed to these reasons for judgment.

154 Transcript of the proceeding, p 256; see also pp 453-457, 464, 469 (Mr Bennett).

155 The amount of the deduction sought in the plaintiff's written submissions, [58], being total claimed less $1140.54.

156 Exhibit 10, annexed to these reasons for judgment.

Difference between Boss contract price and reasonable price	$1,565,473 $1,400,000	$165,473	
Reduction in fit-out contributions		$ 77,947	$ 647,663 $2,292,801

(b) The Development Fee must be recalculated in accordance with the formula in cl. 13.1 –

Development Fee = A + B + C

Where:-

A= 5% of the Development Costs less the Developer's Fee paid to the Developer by the Owner in accordance with Clause 12.
B= 20% of the Gross Rental.
C= 45% of the Profit.

Quantum meruit

[112] At Mr Shand's request Mr Woodcroft-Brown performed work in relation to the Caltex site –

(a) dealing with the proposed resumption by the Council of a portion of the service station site;
(b) dealings with Caltex and others in an attempt to finalise a new lease over the service station site;
(c) dealing with issues concerning connection of the sewerage on the service station site to the rising main from the shopping centre;
(d) registration of easements affecting the service station site.

The plaintiff claimed the value of his work on a quantum meruit basis.[157] A schedule of the work performed, the dates upon which it was performed, the time spent, and charges at the rate of $300 per hour was put into evidence.[158] The schedule is in three parts –

A. Caltex resumption and lease and subdivision issues	$ 20,925
B. Subdivision requirement – rising main and Mobil option on sewerage	$ 11,070[159]
C. Easement documentation & $35,000 compensation claim/subdivision requirements	$ 4,125
	$36,120.

Mr Woodcroft-Brown's evidence that he had done this work[160] was not challenged. He said the $300 per hour had consistently been his charge-out rate for consultancy

157 Further Amended Statement of Claim, filed 25 November 2004, [15]-[17].
158 Exhibit 3.
159 In part B, the total number of hours claimed is 27.2 which, at $300 per hour, yields a total of $8,160. However, the total number of hours itemised in part B is 36.9. At $300 per hour, this yields a total claim under this part of $11,070.

work over the nine years since his arrival in Australia, and that it was comparable with that of engineers, project managers and superintendents with whom he had come into contact.[161]

[113] The main issue with respect to the quantum meruit claim is whether this work was part of the Project regulated by the Development Agreement. The "Project" was defined as including the subdivision of the parcel but not the ownership of the service station site.[162] Clause 3.4 provided that the service station site did not form part of the agreement for any purpose whatsoever, and by clause 5.8 the first defendant had to use its best endeavours to permit access through it from the Development Land and, if able, to grant an easement for that purpose subject to the consent of the Council and the tenant.

[114] The "Development Costs" were defined to include "all costs associated with obtaining the required approvals and consents from the Council to develop the Development Land", but to exclude "costs associated with the subdivision of the Parcel".[163] Those costs were further defined as including costs of various works necessary to complete the Project.

[115] The Project was the development of the Development Land. Because the Development Land and the service station site were on the one title at the commencement of the Project, subdivision was necessary. But the service station site was to remain the property of the first defendant. With the exception of the registration of reciprocal easements, the work the subject of the quantum meruit claim was all in relation to and for the benefit only of the service station site, and the associated costs were not Development Costs.

[116] Mr Woodcroft-Brown's evidence that the rate of $300 per hour was comparable with that of like professionals engaged in this type of work was not challenged, and I accept that it was a reasonable rate. Nor was there any challenge to the number of hours claimed.

[117] Accordingly, I would allow the first two components of the quantum meruit claim, which amount to $31,995.

Abandonment of Set-Off

[118] The first defendant abandoned the set-off ($78,420).[164]

Amount Paid

[119] The amount paid to the plaintiff since the commencement of the litigation must be deducted ($23,367).[165]

Interest

[120] The plaintiff claims interest pursuant to s 47 of the *Supreme Court Act 1995* (Qld). Whether to grant interest, and if so, over what period and at what rate are matters within the discretion of the Court. As this dispute arose out of a commercial

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160 Transcript of the proceeding, p 107.

161 Transcript of the proceeding, p 108.

162 Clause 1.1.

163 Clause 1.1.

164 Second Further Amended Defence of the First Defendant to the Further Amended Statement of Claim, filed by leave 7 August 2006, [40]; First defendant's written submissions, [6].

165 See Exhibit 10, item 17.

dealing, it is appropriate to grant interest and to do so at a commercial rate. See *Serisier Investments Pty Ltd v English*;[166] *Interchase Corporation Limited (In Liq) v Grosvenor Hill (Queensland) Pty Ltd No 3*.[167]

[121] By clause 13 of the Development Agreement, the plaintiff was entitled to be paid within 60 days from the Date of Completion of the Project – ie within 60 days of 27 June 2003. It seeks interest from 26 August 2003.

[122] The first defendant has submitted that interest should be calculated from 1 December 2003 – ie from a short time after it received the BDO Kendalls report of 25 November 2003.

[123] Although the BDO Kendalls report was the first independent analysis and presentation of the plaintiff's claim, I do not think it affords reason for postponing the date from which interest should run. Accordingly, I allow interest from 26 August 2003.

[124] Such interest should be calculated at 9% per annum. In fixing on 9%, I have had regard to the parties' agreement that it should be the rate used in the calculation of the Adjusted Capital Outlay and to its being the rate set in Practice Direction No 2 of 2002[168] for the purpose of *UCPR* r 283(2)(a).

Conclusion

[125] The plaintiff is entitled to –

	Development Fee	$.....
	Quantum Meruit	$31,995
Less	Amount paid	$23,367
Plus	Interest	$_____
		$_____

[126] I will ask the parties to submit calculations of the development fee and interest. I will hear them on costs.

Addendum – 20 December 2006

[127] The parties have calculated the Development Fee as $840,017.50.

[128] There was argument upon whether interest should be allowed on the quantum meruit claim (as well as on the Development Fee), and if so, from what date. The quantum meruit claim was first raised in an amended pleading on 4 October 2004. I determined to allow interest on the quantum meruit claim (as well as on the Development Fee) from 26 August 2003.

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166 [1989] 1 Qd R 678, 680-681.

167 [2003] 1 Qd R 26, 54-55

168 [2002] 1 Qd R 638.

[129] In the premises, the parties agreed upon the following figures –

	Development Fee	$840,017.50
	Quantum Meruit	$31,995
Less	Amount paid	$23,367
Plus	Interest	$257,508.61
		$1,106,154.11

[130] I order the first defendant to pay to the plaintiff the sum of $1,106,154.11, including interest in the sum of $257,508.61 from 26 August 2003 to 20 December 2006.

[131] I direct –

1. The plaintiff to serve upon the first and second defendants written submissions on costs by 19 January 2007;
2. The first defendant to serve upon the plaintiff and the second defendant written submissions on costs by 2 February 2007;
3. The second defendant to serve upon the plaintiff and the first defendant written submissions on costs by 2 February 2007; and
4. The parties to deliver copies of their submissions on costs to my associate by the dates outlined above.

Annexure (Exhibit 10)

Defendant's quantum calculation.

DEVPRO v SEAMARK

Costs

Development costs (element A in clause 13.1 of the Development Agreement)

1.	Sums paid to the builder pursuant to progress claims	$2,132,274	
2.	Prolongation claim paid	$231,000	
3.	Consultants as per appendix 1 to the BDO Kendalls report	$111,150	
4.	Fit-out contributions paid to tenants	$329,091	
5.	Leasing fees paid as per the BDO Kendalls report	$68,389	
6.	Legals as per the BDO Kendalls report	$47,199	
7.	Advertising as per the BDO Kendalls report	$21,361	
			$2,940,464
	Developer's fee (as per element A of clause 13.1)	$245,531	
8.	Therefore element A referred to in clause 13.1 comprises $134,746.70 (ie $2,940,464 - $245,531 x 5%).		
9.	20% of gross rentals comes to $68,389.		

Receipts

10.	Sale price	$4,000,000
11.	Rent received $574,969	$4,574,969

Adjusted capital outlay

12.	The capital outlay (as set out above) was $2,940,464.
13.	9% return (this is calculated by adopting the figure reached in the BDO Kendalls report ($651,952) and adding to that 9% of the difference between the building costs the accountants worked on and the figure of

$2,300,000 approximately referred to in the first paragraph above, ie a difference of $1,000,000. This interest is calculated at 9% on the difference for 2.5 years and the addition comes to $239,259). The total for the capital outlay then is $891,211.

14. The adjusted capital outlay as per the definition in the Development Agreement then is $3,831,675 (ie $2,940,464 + $891,211).

15. Therefore element C in clause 13.1 is calculated as follows:

16. Receipts ($4,574,969) – adjusted capital outlay ($3,831,675) = $743,294 x 45% = $334,482

17. Therefore, the appropriate calculation is as follows:

(a)	element A	$134,746.70	
(b)	element B	$68,389	
(c)	element C	$334,482	$537,617
Less the amount Seamark claims to be entitled to set off.		$78,420	$459,277
Less the amount paid to Devpro subsequent to the commencement of litigation.		$23,367	$435,910