SUPREME COURT OF QUEENSLAND

CITATION:	*Alborn & Ors v Stephens & Ors* [2011] QSC 341
PARTIES:	**RICHARD MOLLISON ALBORN** (first plaintiff) **ALBORN FAMILY CORPORATION PTY LTD** ACN 080 955 595 (second plaintiff) **SHAYKAR PTY LTD** ACN 076 868 552 (third plaintiff) **v** **RAY STEPHENS** (first defendant) **GLENYS MARGARET STEPHENS** (second defendant) **AS&L PTY LTD** ACN 087 729 048 (third defendant)
FILE NO/S:	SC No 7795 of 2006
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 November 2011
DELIVERED AT:	Brisbane
HEARING DATES:	8 June 2010; submissions received 3 August 2010, 9 November 2010 and 31 January 2011; exhibits received 9 June 2011
JUDGE:	Atkinson J
ORDER:	**As per minutes of order to be settled.**

1. The court declares that the third plaintiff is and has been the beneficial owner of the Clontarf Subway business and associated franchise and the Clontarf Baskin & Robbins business and associated franchise ("the Clontarf business").
2. The court declares that the third plaintiff is entitled to an account of profits of the Clontarf business from 14 August 2000 to the date of this order, 18 November 2011.
3. Mr Paul Vincent is appointed as Special Referee to take the account, in accordance with these reasons, pursuant to sub-rule 501(1)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). In accordance

with sub-rules 502(1) and (3) of the UCPR, it is directed that the Special Referee not hold a trial, but make such inquiries as he thinks fit to decide the questions in issue. Without limiting the generality of the preceding order, it is directed pursuant to sub-rule 502(1) of the UCPR that the Special Referee:

(a) may require the parties, or any of them, to furnish to him such documents and information as he thinks fit;
(b) may receive written submissions from the parties, in such manner as he thinks fit;
(c) may inform himself of any other fact, matter or circumstance, in such manner as he thinks fit;
(d) shall make such allowance for the personal exertions of the first and second defendants as he thinks fit (so long as it is consistent with these reasons); and
(e) shall not be bound by books of account and records to the extent that he considers them to be erroneous or unreliable.

4. In accordance with rule 506 of the UCPR, the remuneration of the special referee be on such basis as the parties may agree with the Special Referee in writing or, in default of such agreement, as may be fixed by the Registrar of this court.

5. The account of profits should be calculated by Mr Vincent in accordance with these reasons and the following principles:

(a) Shaykar is entitled to an account of the profits made by AS&L in respect of the Clontarf business from 14 August 2000 until the date of this order, 18 November 2011;
(b) Shaykar is entitled to the market value of the Clontarf business from AS&L as at 14 August 2000;
(c) From the sums referred to in 5(a) and (b) should be deducted:
    (i) the cost of the unpaid labour contributed by Mr and Mrs Stephens from 14 August 2000 to 18 November 2011;
    (ii) the proportion of the Subway settlement attributable to the loss claimed by Shaykar in respect of the Clontarf business, in the sum of $100,000.
(d) Mr Alborn should account to Shaykar for the proportion of the Subway settlement attributable to the loss claimed by Shaykar in respect of the Morayfield business, in the sum of $100,000, but only in so far as it acts as a set-off against any amount otherwise owing to Shaykar once the account of profits has been taken.

6. After the account is taken, any surplus remaining should be used to repay any outstanding loans made to Shaykar by its shareholders, as set out in [122] of these reasons for judgment;
7. Upon payment of any amount owing by AS&L to Shaykar after the account is taken, the Clontarf business should be transferred to a nominee of the franchisees, Mr and Mrs Stephens.
8. Once the steps set out in this order have been completed, Shaykar should be wound up.
9. The claim and counter-claim is otherwise dismissed.
10. I shall hear submissions on the appropriate form of order and costs.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – ACCOUNTS AND INQUIRIES – BETWEEN PARTICULAR PARTIES – where the Court of Appeal allowed an appeal in this matter and remitted it back to this court for further hearing and determination – where the parties were involved in a business of acquiring and operating franchised Subway stores – where the plaintiffs sought declarations that the third plaintiff was the beneficial owner of certain businesses and associated franchises and accordingly, an account of profits – where the defendants claimed they were entitled to an appropriate allowance for their working contributions in the businesses – whether such an account should be ordered and on what basis

CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – CONDUCT OF DIRECTORS – OPPRESSIVE, UNFAIRLY PREJUDICIAL OR UNFAIRLY DISCRIMINATORY CONDUCT – where the defendants counter-claimed that the first plaintiff had caused shares to be issued in the third plaintiff to the detriment of the defendants and for the sole purpose of funding litigation – where the defendants alleged that this was oppressive conduct and sought an order for the third plaintiff to be wound up pursuant to s 233 of the *Corporations Act* 2001 (Cth) – whether the third plaintiff company should be wound up or some other order made

Corporations Act 2001 (Cth), s 232, s 233
Uniform Civil Procedure Rules 1999 (Qld), r 501, r 502

Alborn & Ors v Stephens & Ors [2009] QSC 198, cited
Alborn & Ors v Stephens & Ors [2009] QCA 384, followed
Brookes v Ralph & Ors [2009] QSC 416, cited
General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd [1975] 1 WLR 819, cited
Paton & Anor v Reck & Ors [1999] QCA 517, cited
Re D G Brims and Sons Pty Ltd [1995] QSC 53, followed
Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors (No 2) [2007] QSC 232, cited
Warman International Ltd v Dwyer (1995) 182 CLR 544,

followed

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

SOLICITORS: Londy Lawyers for the plaintiffs
Gateway Lawyers for the defendants

[1] The Court of Appeal allowed in part an appeal against orders made by me on 29 July 2009 in this matter.[1] That court then made directions for the filing of further material and remitted the matter to me for hearing and determination in accordance with the reasons published by that court.

[2] Those directions were not complied with and the parties sought an extension of time from me in order to undertake mediation. Those extensions were granted and the mediation was conducted but was not successful in resolving the dispute. Further directions were given by me for the exchange of material between the parties. The parties did not limit their further submissions to the matters about which directions were given. I intend to confine myself to the task entrusted to me by the Court of Appeal and to confine the parties to the issues referred to in the pleadings and in the directions required by the Court of Appeal and subsequently by myself which were that they make submissions on the form of the orders, precisely state the factual findings which have not been made and which they contend are relevant to the content of the proposed orders and to the taking of accounts and identify the evidence relied on to support each such finding.

[3] In their submissions before me the plaintiffs sought the additional findings of fact:

> "1.1 That, in accordance with the 'Morayfield Management Agreement' pleaded and asserted by the Defendants at first instance, and the findings at trial (as upheld on appeal) concerning the 'Morayfield Management Agreement', the First and Second Defendants:
>
> 1.1.1 ceased, on or about 30 September 1999, to have any beneficial interest in any shares in the capital of the Third Plaintiff held by them (or either of them) or registered in their names (or the name of either of them);
>
> 1.1.2 have no interest in the Subway settlement which was negotiated after they had ceased to have an interest in the Third Defendant; and
>
> 1.1.3 have no basis to allege oppression in respect of the control and management of the affairs of the Third Defendant after they had ceased to have an interest in it;
>
> 1.2 That:
>
> 1.2.1 the trust property, being the Clontarf Subway and Baskin & Robbins [*sic*] businesses, was used for the purpose of establishing and maintaining the

1 *Alborn & Ors v Stephens & Ors* [2009] QSC 198 ("*Alborn v Stephens* QSC"); *Alborn & Ors v Stephens & Ors* [2009] QCA 384 ("*Alborn v Stephens* QCA").

Defendants' Kallangur and Bribie Island Subway businesses; and

1.2.2 the Defendants so mixed the profits from the Clontarf Subway and Baskin & Robbins businesses with their own property as to render the identification of their gain impossible."

[4] The plaintiffs then sought the following orders:

"2. The appropriate declaratory orders are:

2.1 Declarations that the Third Plaintiff is, and always has been, the sole beneficial owner of:

2.1.1 the Clontarf Subway business and associated franchise;

2.1.2 the Clontarf Baskin & Robbins business and associated franchise;

2.1.3 the Kallangur Subway business and associated franchise; and

2.1.4 the Bribie Island Subway business and associated franchise.

2.2 Declarations that the Third Plaintiff is entitled, in accordance with the succeeding provisions of this order, to an account of the profits of:

2.2.1 the Clontarf Subway business and associated franchise;

2.2.2 the Clontarf Baskin & Robbins business and associated franchise;

2.2.3 the Kallangur Subway business and associated franchise; and

2.2.4 the Bribie Island Subway business and associated franchise.

2.3 A declaration that the First and Second Plaintiffs are, and have been since 30 September 1999, the beneficial owners of all shares in the capital of the Third Plaintiff held by or registered in the names of the First and Second Defendants (or either of them).

2.4 A declaration that, subject to the execution, performance and carrying-out of the provisions of this order, all contractual rights, duties, obligations and liabilities, as between the Plaintiffs (or any of them) and the Defendants (or any of them) are fully executed, discharged and satisfied.

2.5 Declarations that, upon the making over, conveyance and transfer to the Third Plaintiff or its nominee, of all of the right to, title and interest in, and benefit of the said businesses:

2.5.1 the Plaintiffs (and each of them) are entitled to be indemnified and held harmless by the Defendants (and each of them) in respect of all liabilities theretofore incurred by, through or in connection with such businesses (or either of them); and

2.5.2 the Defendants (and each of them) are entitled to be indemnified and held harmless by the Third Plaintiff in respect of all liabilities thereafter incurred by, through or in connection with such businesses (or either of them), including (without limiting the generality of the foregoing) any liabilities pursuant to all and any guarantees executed by the Defendants (or any of them) for the purposes of or in connection with such businesses (or either of them).

3. It is also appropriate, in the circumstances, to grant a mandatory injunction to compel the Defendants, and each of them, by themselves, the directors of the Third Defendant, and their respective servants and agents, to do all things necessary to make over, convey and transfer to the Third Plaintiff or its nominee, all of the right to, title and interest in, and benefit of:

3.1 the Clontarf Subway business and associated franchise;

3.2 the Clontarf Baskin & Robbins business and associated franchise;

3.3 the Kallangur Subway business and associated franchise;

3.4 the Bribie Island Subway business and associated franchise; and

3.5 all shares in the capital of the Third Plaintiff held by or registered in the names of the First and Second Defendants (or either of them).

4. The order for an account should be in the following terms:

4.1 That an account be taken of the profits received by the Defendants (or any of them), directly or indirectly from the following businesses:

4.1.1 the Clontarf Subway business and associated franchise from 30 September 1999;

4.1.2 the Clontarf Baskin & Robbins business and associated franchise from 30 September 1999;

4.1.3 the Kallangur Subway business and associated franchise from the date of commencement of that business; and

4.1.1 the Bribie Island Subway business and associated franchise from the date of commencement of that business.

4.2 That Mr Paul Vincent be appointed as Special Referee to take the said account in accordance with sub-rule 501(1) of the *Uniform Civil Procedure Rules*.

4.3 That, in accordance with sub-rules 502(1) and (3) of the *Uniform Civil Procedure Rules*, it be directed that the Special Referee do not hold a trial, but make

such inquiries as he thinks fit to decide the questions in issue.

4.4 That, without limiting the generality of the preceding order, it be directed pursuant to sub-rule 502(1) of the *Uniform Civil Procedure Rules* that the Special Referee:

4.4.1 may require the parties, or any of them, to furnish to him such documents and information as he thinks fit;

4.4.2 may receive written submissions from the parties, in such manner as he thinks fit;

4.4.3 may inform himself of any other fact, matter or circumstance, in such manner as he thinks fit;

4.4.4 shall make such allowance for the personal exertions of the First and Second Defendants as he thinks fit; and

4.4.5 shall not be bound by the books of account and records of any of the said businesses, to the extent that he considers the same to be erroneous or unreliable.

4.5 That, in accordance with sub-rules 502(1) and (3) of the *Uniform Civil Procedure Rules*, the remuneration of the special referee be on such basis as the parties may agree with the Special Referee in writing or, in default of such agreement, as may be fixed by the Registrar of this Honourable Court."

[5] This compared to the plaintiffs' claim as set out in their claim and statement of claim which was for the following relief:

"1. A declaration that Shaykar's Business referred to in the Statement of Claim is held by the Defendants on trust for Shaykar.

2. As against the First and Second Defendants:

(a) Damages or alternatively equitable compensation for breach of fiduciary duty;

(b) Damages for breach of the Shaykar Agreement referred to in the Statement of Claim;

(c) Compensation pursuant to section 1317H of the *Corporations Act 2001* for breach of section 183 of that Act.

3. As against the Third Defendant, damages or equitable compensation in respect of it having been knowingly concerned in and having benefited from the breaches of fiduciary duty committed by the First Defendant and the Second Defendant as pleaded in the Statement of Claim.

4. Alternatively, an order that accounts be taken as to the profits received by the Defendants as a result of the breaches of fiduciary duty pleaded in the Statement of Claim, and for the payment to Shaykar (or such of the other Plaintiffs as the

Court sees fit) of any such amount as may be found due upon the taking of such accounts.

5. Such further or other orders, directions, or relief, including orders for account or enquiries, as the Court thinks fit.
6. Interest over such portion of the Plaintiffs' claims, at such rate and for such period as the Court thinks fit.
7. Costs."

[6] The defendants sought the following substantive orders:

"1. A declaration that Shaykar Pty Ltd is the beneficial owner of the Clontarf Subway and Baskin & Robins [*sic*] business and associated franchises.

2. An order pursuant to s 232(1)(d) of the *Corporations Act* that for the consideration of $1:
   (a) on the condition that Shaykar release the Alborn parties from any claim in relation to the Subway settlement; and
   (b) on the further condition that Shaykar transfer the Clontarf business to the Stephens parties, or their nominee;
   (c) Mr and Mrs Stephens transfer all of their shares in Shaykar to Mr Alborn, or his nominee.

3. The claim and counter-claim otherwise be dismissed."

[7] The defendants' claim in the counterclaim had been for the following relief:

"(a) Equitable compensation for unjust enrichment in a sum equivalent to any amount that may be awarded to the Plaintiffs on the Claim in this proceeding;
(b) An accounting for the settlement proceeds received by the Plaintiffs in Proceeding No. 10121/02 in the Supreme Court of Queensland, including the benefit derived by Shaykar;
(c) An order pursuant to s.233 Corporations Act 2001 (Cth) that Shaykar be wound up."

[8] The question of what orders should now be made depends on an analysis of the pleadings, to show what matters were not in dispute, what findings have been made and what facts remain to be determined.

Analysis of the pleadings

[9] The plaintiffs were Richard Mollison Alborn, as first plaintiff, Alborn Family Corporation Pty Ltd ACN 080 955 595 ("Alborn Family Corporation" or "AFC"), as second plaintiff, and Shaykar Pty Ltd ACN 076 868 552 ("Shaykar") as third plaintiff. The defendants were Ray Stephens, as first defendant, Glenys Margaret Stephens, as second defendant, and AS&L Pty Ltd ACN 087 729 048 ("AS&L") as third defendant.

[10] The facts alleged in the statement of claim which were admitted by the defendants were:

- The first plaintiff, Mr Alborn, was and had, at all material times to the proceedings since on or about 30 September 1999, been the sole director and secretary of Shaykar and had, at all material times to the proceedings, been the

director of the second plaintiff, Alborn Family Corporation, and was the brother of the second defendant, Mrs Stephens, and brother-in-law of the first defendant, Mr Stephens (see paragraph 1 of the statement of claim, paragraph 1 of the defence and counterclaim and paragraph 1 of the reply and answer);

- Shaykar was duly incorporated "at law" on or about 8 January 1997 and thereafter at all times material to the proceedings had been capable of suing in its corporate name; and at all times material to the proceedings, had and continued to have as its shareholders as to 25 "C" class shares and 100 ordinary shares, the trustee from time to time of the Alborn Family Trust, being Mr Alborn and his then wife Maree Alborn until on or about 27 January 1998, and Alborn Family Corporation thereafter, and as to 51 "C" class shares and 100 ordinary shares, Mr and Mrs Stephens as trustee of the Stephens Family Trust for the benefit of members of their family; and had as its directors from 8 January 1997 until 30 September 1999, Mr Alborn, Mr Stephens and Ms McLintock and after on or about 30 September 1999 had as its sole director Mr Alborn (see paragraph 3(a), (b)(i), (iii), (c) and (d) of the statement of claim, paragraph 3 of the defence and counterclaim and paragraph 1 of the reply and answer);

- Shaykar was acquired by:

  (a) Mr Alborn and his ex-wife Maree Alborn, as trustees for the Alborn Family Trust;

  (b) Mr Brendan Alborn and Ms McLintock; and

  (c) Mr and Mrs Stephens, as trustees for the Stephens Family Trust (see paragraph 4 of the statement of claim, paragraph 4 of the defence and counterclaim and paragraph 4 of the reply and answer);

- Mr Stephens at all times material to the proceedings was the sole director, secretary and shareholder of the third defendant AS&L and controlled AS&L together with his wife, Mrs Stephens (see paragraph 5 of the statement of claim, paragraph 5 of the defence and counterclaim and paragraph 1 of the reply and answer);

- AS&L was and had been, at all times material to the proceedings, a company duly incorporated at law and capable of being sued in its corporate name (see paragraph 6 of the statement of claim, paragraph 6 of the defence and counterclaim and paragraph 1 of the reply and answer);

- Doctor's Associates Inc ("DAI") at all times material to the proceedings was and had been a corporation incorporated in the State of Florida in the United States of America and was and had been the owner of, or otherwise entitled to exploit in Australia and elsewhere, a system of operating, and franchising other persons to operate, retail businesses involving the production and sale to the public of filled bread-rolls known as "Subs" or sandwiches, using certain recipes and procedures ("the Subway system") and in that connection was the owner of, or otherwise entitled to exploit in Australia and elsewhere, the word "Subway" used as a business name or trademark; and carried on the business, in Australia and elsewhere, of granting franchises for the operation of Subway stores and entering into business arrangements with licensees allowing such

licensees to conduct the business of granting such franchises (see paragraph 8 of the statement of claim, paragraph 8 of the defence and counterclaim and paragraph 1 of the reply and answer);

- Subway Systems Australia Pty Ltd ("SSA") was incorporated or acquired by DAI to conduct DAI's business in Australia, was at all times material to the proceedings a licensee of DAI and as such engaged in the business of granting franchises to operate Subway stores in accordance with the Subway system (see paragraph 9 of the statement of claim, paragraph 9 of the defence and counterclaim and paragraph 1 of the reply and answer);

- In and from January 1997, Mr and Mrs Stephens commenced the management of the fitout of Subway stores at Morayfield and Clontarf, and in mid-February 1997, attended Subway franchisee training conducted by DAI in the United States of America at the expense of Shaykar and thereafter commenced managing the operation of the Morayfield and Clontarf businesses (see paragraph 17 of the statement of claim, paragraph 17 of the defence and counterclaim and paragraph 1 of the reply and answer);

- On or around 30 September 1999, Mr Stephens and Ms McLintock ceased to be directors of Shaykar and Mr Alborn commenced managing the Clontarf Subway and Baskin-Robbins store ("the Clontarf business") in lieu of Mr and Mrs Stephens (see paragraph 19 of the statement of claim, paragraph 19 of the defence and counterclaim and paragraph 14(a) of the reply and answer);

- On or about 14 February 2002, Mr Stephens sent a letter to Mr Brendan Alborn which referred to the Clontarf business and said that his company, AS&L, had taken over the management of that business on 14 August 2000 and concluded as follows:

  > "Shaykar, of course will have the option once all the debts are paid to arrange with me to offset my consultancy fees and debt repayments made by me against the price of the stores. We hope to settle this after the mediation, if successful. So in answer to your question about a possible dividend, you can see it is not possible and besides, you are not a shareholder of my Company. I hope all this information brings you up to date with what's been happening in the store and how we plan to continue with our debt repayment."

  (See paragraph 25 of the statement of claim, paragraph 25 of the defence and counterclaim and paragraph 1 of the reply and answer);

- On 20 December 2002 there was a meeting of the members of Shaykar held at the offices of accountants MSI Taylor at Toowong during which Mr Stephens asserted to those present (including Mr Alborn and Mr Brendan Alborn) that because Mr and Mrs Stephens were named as franchisees in the Morayfield franchise agreement and the Clontarf franchise agreement, they were the owners of those stores (see paragraph 26 of the statement of claim, paragraph 26 of the defence and counterclaim and paragraph 1 of the reply and answer).

[11] The facts alleged in the counterclaim which were admitted were:

- In or about November 2007, the plaintiffs compromised proceeding No 10121/02 in the Supreme Court of Queensland (see paragraph 3(a) of the counterclaim and paragraph 3(a) of the reply and answer);

- On or about 18 August 2008, Mr Alborn, in his capacity as sole director of Shaykar, caused shares to be issued in Shaykar ("the share issue") for the purpose of funding this proceeding (see paragraph 4 of the counterclaim and paragraph 4(a) and (b) of the reply and answer).

[12] Various matters were not admitted and others denied. The matters pleaded by the plaintiffs and not admitted by the defendants were:

- That at all times material to the proceedings Alborn Family Corporation, from on or about 4 December 1997, was a company duly incorporated at law capable of suing in its corporate name, was controlled by Mr Alborn and acted, from on or about 27 January 1998, as trustee of the Alborn Family Trust for the benefit of members of Mr Alborn's family (see paragraph 2 of the statement of claim, paragraph 2 of the defence and counterclaim and paragraph 2 of the reply and answer);

- On or about 27 January 1998:

  (a) Mr Alborn and Maree Alborn retired as trustees of the Alborn Family Trust and were replaced by Alborn Family Corporation pursuant to a Deed styled "Deed of Appointment and Retirement of Trustee" dated 27 January 1998;

  (b) The shares formerly held by Mr Alborn and Maree Alborn in Shaykar were transferred to Alborn Family Corporation;

  (c) Maree Alborn relinquished her involvement in the partnership or joint venture constituted by the Shaykar agreement;

  (d) In the premises, the remaining members of the partnership or joint venture constituted by the Shaykar agreement (the "investors") were then:

    (i) Alborn Family Corporation as trustee of the Alborn Family Trust (or alternatively Mr Alborn);

    (ii) Mr Brendan Alborn and Ms McLintock; and

    (iii) Mr and Mrs Stephens as trustees for the Stephens Family Trust.

  (see paragraph 12 of the statement of claim, paragraph 12 of the defence and paragraph 8 of the reply);

- Pursuant to a Deed entered into on or about 11 September 2006 ("the Deed of Assignment"), Mr Brendan Alborn and Ms McLintock agreed to transfer their shares in Shaykar and assign their causes of action against the defendants (pleaded in the statement of claim) to Mr Alborn (see paragraph 7 of the statement of claim, paragraph 7 of the defence and paragraph 5 of the reply and answer);

- Until the date of the share transfer effected by the Deed of Assignment referred to in paragraph 7 of the statement of claim, Shaykar had and continued to have

as its shareholders, as to 24 “C” class shares and 100 ordinary shares, Mr Alborn’s nephew Mr Brendan Alborn and Mr Brendan Alborn’s de facto partner Ms Karyn Anne McLintock (“Ms McLintock”). That was admitted by the defendants except to the extent that they did not admit the terms, meaning or effect of the Deed of Assignment (see paragraph 3(b)(ii) of the statement of claim, paragraph 3 of the defence and paragraph 3 of the reply);

[13] None of the matters which were not admitted were any longer in dispute during the trial. There remained a large number of allegations in dispute on the pleadings, some of which were the subject of findings which were not disturbed on appeal.

The initial agreement

[14] The plaintiffs pleaded that:

- Shaykar was acquired in or about early January 1997 for the purpose of **acquiring and operating** franchised “Subway” stores by way of an incorporated partnership or joint venture between Mr Alborn and his ex-wife Maree Alborn, as trustees for the Alborn Family Trust, Mr Brendan Alborn and Ms McLintock, and Mr and Mrs Stephens, as trustees for the Stephens Family Trust, for the benefit of themselves and their respective families, in the circumstances more particularly described in paragraphs 10 and 11 of the statement of claim which dealt with the Shaykar agreement (see paragraph 4 of the statement of claim).

- Paragraphs 10 and 11 of the statement of claim stated:

“**THE SHAYKAR AGREEMENT**

10. In and between December 1996 and January 1997:

(a) Mr Alborn and his then wife Maree Alborn as trustees of the Alborn Family Trust;

(b) Mr Brendan Alborn and Ms McLintock; and

(c) Mr and Mrs Stephens as trustees for the Stephens Family Trust;

entered into a contract (‘the Shaykar Agreement’) to conduct, by way of an incorporated partnership or joint venture, the business of **acquiring and operating** franchised Subway stores within the Redcliffe and Caboolture Shires (‘Shaykar’s Business’), in consideration of the mutual promises contained therein.

Particulars

(d) The Shaykar Agreement was partly written and partly oral.

(e) To the extent that the Shaykar Agreement was entered into in writing, it was contained in, evidenced by or may be inferred from a document styled ‘Shaykar Pty Ltd Business Plan’ (‘the Business Plan’), undated but prepared on or about 4 January 1997.

(f) To the extent that the Shaykar Agreement was entered into orally, it was entered into during conversations taking place during the course of the following meetings:

(i) A meeting on 18 December 1996 at Mr Alborn's home at 3 Bernborough Way, Ningi ('the First Investors' Meeting'), which meeting was relevantly attended by Mr Alborn (representing for the purposes of the meeting himself and the Alborn Family Trust), Mr Brendan Alborn, Ms McLintock and Mr and Mrs Stephens; and

(ii) A meeting on 4 January 1997 at Mr Alborn's home at 3 Bernborough Way, Ningi ('the Second Investors' Meeting') which meeting was relevantly attended by Mr Alborn (representing for the purposes of the meeting Mr Brendan Alborn, Ms McLintock and the Alborn Family Trust) and Mr and Mrs Stephens, during the course of which the Business Plan was prepared.

(g) The substance or effect of such conversations was that the parties attending such meetings discussed and agreed upon the matters referred to in the Business Plan and the other matters referred to in the succeeding paragraph hereof.

11. The following were terms of the Shaykar Agreement:

(a) A company to be called Shaykar would be incorporated to conduct Shaykar's Business (paragraph 1.1 of the Business Plan);

(b) Shaykar's Business would be the acquisition and operation of franchised Subway stores within the Redcliffe and Caboolture Shires (paragraph 1.3 of the Business Plan);

(c) The first store to be so acquired would be a store at Clontarf and the second store to be so acquired would be a store at Morayfield. (Appendix 1 to the Business Plan);

(d) The parties to the Shaykar Agreement would loan funds to Shaykar as follows:

(i) Mr and Mrs Alborn as trustees for the Alborn Family Trust: $180,000.00;

(ii) Mr Brendan Alborn and Ms McLintock: $40,000.00;

(iii) Mr and Mrs Stephens as trustees for the Stephens Family Trust: $40,000.00;

(e) It was agreed during the First Investors' Meeting that any dividends payable from profits earned by Shaykar in carrying on Shaykar's Business were to be distributed in proportion to the 'ordinary' shareholdings in Shaykar, that is to say:

(i) To the trustee from time to time of the Alborn Family Trust – 1/3;

(ii) To Mr Brendan Alborn and Ms McLintock – 1/3; and

(iii) To Mr and Mrs Stephens as trustees of the Stephens Family Trust – 1/3.

(f) In order to satisfy the requirement of DAI and SSA that Subway franchisees be natural persons and not corporations, Mr and Mrs Stephens would enter into any necessary franchise agreements and leases in respect of the stores to be acquired and operated by Shaykar, and would do so for the benefit of Shaykar (this was agreed during the Second Investors' Meeting).

(g) Mr and Mrs Stephens were to be employed by Shaykar as 'General Manager' and 'Assistant General Manager' respectively to manage the fitout and continuing operation of the Morayfield and Clontarf stores on behalf of Shaykar, in return for which they would be paid a monthly management fee (this was agreed during the Second Investors' Meeting, and also in paragraphs 1.2, 4.3, 5.1, 5.2.2 and 5.2.3 of the Business Plan). The remuneration to be paid to the General Manager and the Assistant General Manager formed part of the 'salary' figures set out in Appendix 3 to the Business Plan.

(h) Mr Alborn was to be appointed 'Chairman' of Shaykar (paragraph 1.2 of the Business Plan)." (emphasis added)

[15] The defendants denied the allegations in paragraphs 4, 10 and 11 of the statement of claim and said that Shaykar was acquired for the purpose of **managing** "Subway" stores by way of incorporated partnership or joint venture and not for the purpose of **acquiring** "Subway' stores (see paragraphs 4, 10 and 11 of the defence and paragraphs 4, 6 and 7 of the reply).

[16] In paragraph 13 of the statement of claim the plaintiffs made the following allegations which were denied by the defendants:

"13. In and between January 1997 and June 1998 Mr Alborn and/or AFC caused funds totalling $196,033.00 to be advanced to Shaykar pursuant to the Shaykar Agreement.

Particulars

(a) $5,000.00 on or about 13 January 1997.
(b) $15,000.00 on or about 14 March 1997.
(c) $40,000.00 on or about 20 April 1997.
(d) $40,000.00 on or about 19 May 1997.
(e) $35,000.00 on or about 6 June 1997.
(f) $50,000.00 on or about 25 August 1997.
(g) $7,585.00 in or about June 1998.
(h) $3,448.00 in or about June 1998."

[17] In paragraph 13 of the defence, the defendants said those allegations were untrue and said:

"(a) no monies were advanced by *'Mr Alborn and/or AFC ... to Shaykar pursuant to the Shaykar Agreement'* because the Shaykar Agreement as alleged is denied and the Defendants

repeat and rely on the direct explanation for the denial contained in paragraphs 4 and 10 of this Defence;

(b) any monies (the quantum of which is not admitted) advanced by Mr Alborn and/or AFC were advanced to Shaykar to provide capital in furtherance of its business plan to manage 'Subway' stores."

[18] In reply the plaintiffs joined issue with the denials and repeated and relied on matters already pleaded and then said in paragraph 9 of the reply:

"(b) deny the allegation that no monies were advanced by Mr Alborn and/or AFC to Shaykar pursuant to the Shaykar Agreement on the grounds that monies were so advanced;

…

(d) deny the allegation that any monies advanced by Mr Alborn and/or AFC were advanced to Shaykar to provide capital in furtherance of its business plan to manage Subway stores on the grounds that:

(i) as pleaded in paragraph 13 of the Statement of Claim, monies were advanced to Shaykar pursuant to the Shaykar Agreement; and

(ii) at no time did Shaykar have a business plan to 'manage' Subway stores"

[19] The plaintiffs alleged in paragraph 14 of the statement of claim that in and between January and August 1997, Mr and Mrs Stephens as trustees for the Stephens Family Trust advanced approximately $40,000 to Shaykar pursuant to the Shaykar Agreement. Those allegations of fact were denied in paragraph 14 of the defence which were said to be untrue because:

"(a) no monies were advanced by *'Mr and Mrs Stephens as trustees for the Stephens Family Trust ... to Shaykar pursuant to the Shaykar Agreement'* because the Shaykar Agreement as alleged is denied and the Defendants repeat and rely on the direct explanation for the denial contained in paragraphs 4 and 10 of this Defence;

(b) all monies advanced by Mr and Mrs Stephens as trustees for the Stephens Family Trust were advanced to Shaykar to provide capital in furtherance of its business plan to manage 'Subway' stores."

[20] In paragraph 10 of the reply and answer the plaintiffs:

"(b) deny the allegation that no monies were advanced by Mr and Mrs Stephens as trustees for the Stephens trust to Shaykar pursuant to the Shaykar Agreement, on the grounds that monies were so advanced;

…

(d) deny the allegation that all monies advanced by Mr and Mrs Stephens as trustees for the Stephens Family Trust were advanced to Shaykar to provide capital in furtherance of its business plan to 'manage' Subway stores, on the grounds that:

(i) all monies advanced to Shaykar by Mr and Mrs Stephens as trustees for the Stephens Family Trust

were advanced pursuant to the Shaykar Agreement; and

(ii) at no time did Shaykar have a business plan to 'manage' Subway stores"

[21] The plaintiffs alleged that in and between February and April 1997 Mr Brendan Alborn and Ms McLintock advanced $40,000 to Shaykar pursuant to the Shaykar Agreement by way of a series of instalments. These allegations were denied in paragraph 15 of the defence on the basis:

"(a) no monies were advanced by *'Mr Brendan Alborn and Ms McLintock ... to Shaykar pursuant to the Shaykar Agreement'* because the Shaykar Agreement as alleged is denied and the Defendants repeat and rely on the direct explanation for the denial contained in paragraphs 4 and 10 of this Defence;

(b) all monies (the quantum of which is not admitted) advanced by Mr Brendan Alborn and Ms McLintock were advanced to Shaykar to provide capital in furtherance of its business plan to manage 'Subway' stores."

[22] In the reply the plaintiffs said with regard to paragraph 15 of the defence that they:

"(b) deny the allegation that no monies were advanced by Mr Brendan Alborn and Ms McLintock to Shaykar pursuant to the Shaykar Agreement on the grounds that monies were so advanced;

…

(d) deny the allegation that all monies advanced by Mr Brendan and Ms McLintock were advanced to Shaykar to provide capital in furtherance of its business plan to 'manage' Subway stores, on the grounds that:

(i) all monies advanced by Mr Brendan Alborn and Ms McLintock were advanced to Shaykar pursuant to the Shaykar Agreement; and

(ii) at no time did Shaykar have a business plan to 'manage' Subway stores"

[23] In paragraph 16 of the statement of claim the plaintiffs claimed:

"16. In and between January and April 1997, Mr and Mrs Stephens executed the following agreements pursuant to the Shaykar Agreement and for the benefit of Shaykar, being:

(a) A written franchise agreement with SSA in respect of the Morayfield store (DAI Franchise No 19486), executed on or about 23 January 1997 ('**the Morayfield Franchise Agreement**');

(b) A written sub-lease from Subway Realty Pty Ltd in respect of the Morayfield store executed on or about 22 April 1997 ('**the Morayfield Sub-Lease**');

(c) A written franchise agreement with SSA in respect of the Clontarf store (DAI Franchise No 19547), executed on or about 20 February 1997 ('**the Clontarf Franchise Agreement**'); and

(d) A written sub-lease from Subway Realty Pty Ltd in respect of the Clontarf store, executed in early 1997 (‘**the Clontarf Sub-Lease**’).”

[24] The defendants denied those allegations because they said they were untrue and said:

"… in relation to the Morayfield Franchise Agreement, the Morayfield Sub-Lease, the Clontarf Franchise Agreement and the Clontarf Sub-Lease executed by Mr and Mrs Stephens (collectively referred to as ‘the Franchise and Sub-Lease Agreements’):

(a) the Franchise and Sub-Lease Agreements were not executed *‘pursuant to the Shaykar Agreement and for the benefit of Shaykar’* as alleged because the Shaykar Agreement as alleged is denied and the Defendants repeat and rely on the direct explanation for the denial contained in paragraphs 4 and 10 of this Defence;

(b) the Franchise and Sub-Lease Agreements were executed by Mr and Mrs Stephens in their own right for their benefit with the intention that they would hold the legal and equitable interest therein absolutely and without notice of any other interest whether legal or beneficial.”

[25] Those allegations were denied in paragraph 12 of the reply by repeating the allegations found in paragraph 16 of the statement of claim.

[26] In paragraph 18 of the statement of claim the plaintiffs alleged that in or around March 1997, it was agreed during a discussion between Mr Stephens (acting on his own behalf and on behalf of Mrs Stephens) and Mr Alborn (acting on his own behalf and on behalf of AFC, Mr Brendan Alborn and Ms McLintock) that Shaykar's business would thereafter include Baskin-Robbins ice-cream stores which would be run as part of the Subway stores at Morayfield and Clontarf.

[27] Those allegations were denied in paragraph 18 of the defence and the defendants alleged that:

"(a) in or around May 1997 discussions occurred between Mr Alborn and Mr Stephens in relation to the operation of a Baskin-Robbins ice cream store in premises adjoining the Subway store at Clontarf;

(b) Mr and Mrs Stephens entered into a Franchise Agreement and Sub-lease Agreement with respect to the Baskin-Robbins ice cream store at Clontarf in their own right for their benefit with the intention that they would hold the legal and equitable interest therein absolutely and without notice of any other interest whether legal or beneficial;

(c) Mr and Mrs Stephens agreed with Mr Alborn that the Baskin-Robbins store at Clontarf would be managed by Shaykar on the same terms and conditions that had been agreed with respect to the management of the Subway store at Clontarf.”

[28] In paragraph 13 of the reply, the plaintiffs pleaded in response:

"As to paragraph 18 of the Defence, the Plaintiffs:

(a) admit that in or around May 1997 discussions occurred between Mr Alborn and Mr Stephens in relation to the operation of a Baskin-Robbins ice cream store in premises adjoining the Subway store at Clontarf;

(b) as to subparagraph 18(b):

(i) do not admit the allegations that Mr and Mrs Stephens entered into a Franchise Agreement and Sub-Lease Agreement with respect to the Baskin-Robbins ice cream store at Clontarf, on the grounds that having made such inquiries as are reasonable in respect of such allegations within the meaning of Rule 166 of the UCPR, the Plaintiffs remain uncertain as to the truth or falsity of such allegations and therefore can neither admit nor deny such allegations; and

(ii) otherwise deny the allegations therein contained, on the grounds that if Mr and Mrs Stephens entered into such agreements (which is not admitted), they did so pursuant to the agreement pleaded in paragraph 18 of the Statement of Claim and for the benefit of Shaykar;

(c) as to subparagraph 18(c), and the particulars thereof dated 17 November 2006:

(i) deny that Mr and Mrs Stephens agreed with Mr Alborn that the Baskin-Robbins store at Clontarf would be managed by Shaykar on the same terms and conditions that had been agreed with respect to the management of the Subway store at Clontarf, on the grounds that the agreements referred to therein were never reached; and

(ii) repeat and rely on the allegations contained in paragraph 18 of the Statement of Claim."

[29] The allegations with regard to the initial agreement between the co-venturers were resolved at trial essentially in favour of the plaintiffs[2] with the relevant findings not disturbed on appeal being:[3]

> "The co-venturers agreed that although Mr and Mrs Stephens were to be Subway franchisees and sub-lessees, Shaykar would beneficially own and operate the franchises and the franchise businesses. Mr and Mrs Stephens were to be the franchisees and sub-lessees because of the franchisor's requirement that the franchisees and sub-lessees be natural persons. Shaykar was the beneficial owner of the franchises and of the Clontarf and Morayfield businesses and it received the income and paid all of the expenses of the franchise businesses including the costs of purchase. Mr and Mrs Stephens received consultancy fees for their work in respect of each franchise, which fees were paid by Shaykar to a company owned and controlled by the Stephens.

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2 See *Alborn v Stephens* QSC at [5]-[25].

3 *Alborn v Stephens* QCA at [40]-[42].

> Before the Clontarf store was opened it was agreed between the co-venturers that Mr and Mrs Stephens would enter into a Baskin-Robbins franchise in respect of that store on behalf of Shaykar.
>
> Moneys were lent to Shaykar by or on behalf of the co-venturers but there was no express agreement as to the terms upon which the moneys were lent 'except that it was an interest only loan for a minimum of two years.'"

The Morayfield Management Agreement

[30] In paragraph 19 of the defence and counterclaim the defendants alleged that on or around 30 September 1999 it was agreed between Mr Alborn (representing his own interests and the interests of Shaykar, including the interests of AFC, Mr Brendan Alborn and Ms McLintock) and Mr and Mrs Stephens, that AS&L would assume the management role of the Morayfield store in lieu of Shaykar and, in consideration of AS&L assuming all liabilities outstanding in relation to the management of the Morayfield store on any account whatsoever, that Shaykar would be released from and indemnified against any further liability or obligation arising with respect to the Morayfield store with the intention that Shaykar would have no further interest in the Morayfield store on any account whatsoever ("the Morayfield Management Agreement").

[31] In paragraph 14 of the reply and answer, the plaintiffs denied the allegations pleaded in paragraph 19 of the defence and counterclaim on the grounds that the Morayfield Management Agreement was never entered into.

[32] The finding at trial that the Morayfield Management Agreement was made[4] was upheld on appeal. The Court of Appeal characterised that finding as follows:[5]

> "In summary, the primary judge found that the co-venturers had entered into an agreement in September/October 1999 in which it was agreed that Mr and Mrs Stephens or AS&L would become the beneficial owner of the Morayfield store business and related assets in consideration of assuming legal responsibility for the liabilities relating to such business and assets. Under the agreement, Shaykar remained the beneficial owner of the Clontarf business and the assets associated with it and Mr Alborn was to manage that business."

The Clontarf Management Agreement

[33] In paragraphs 20 and 21 of the statement of claim, the plaintiffs alleged that:

> "20. In or about August 2000:
>
> (a) The Clontarf store was experiencing financial difficulties, having made a significant loss in the financial year ended 30 June 2000;
>
> (b) Accountant Mr Ray Frazer advised Mr Alborn and Mr Stephens during a meeting at Mr Frazer's offices that it would be best for Shaykar to close the Clontarf store;

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4 See *Alborn v Stephens* QSC at [40]-[62].

5 See *Alborn v Stephens* QCA at [55].

(c) Following this meeting Mr Stephens told Mr Alborn that he wanted to re-commence managing the Clontarf store through his company AS&L;

(d) Mr Alborn disagreed, telling Mr Stephens that he thought that this was a bad idea; and

(e) Mr Stephens insisted that he wanted to re-commence managing the Clontarf store.

21. In or about August 2000, following the said meeting and discussion, Mr and Mrs Stephens re-commenced managing the Clontarf store on behalf of Shaykar."

[34] In response the defendants denied the facts pleaded in paragraphs 20 and 21 of the statement of claim and alleged in paragraph 20 of the defence that on or about 13 August 2000:

"(a) Mr Alborn unilaterally decided that Shaykar could no longer afford to manage the Clontarf store and that the Clontarf store was unable to pay its debts;

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

[35] In paragraph 21 of the defence they alleged:

"that AS & L commenced management of the Clontarf store on 14 August 2000 with the consent of, and in lieu of, Shaykar."

[36] At trial I did not accept that the Clontarf Management Agreement had been made on 13 August 2000 but rather found that an agreement had been made in October 2001.[6] The latter finding was set aside on appeal.[7] I remain of the view based on the evidence before me that there was no Clontarf Management Agreement made on 13 August 2000 and am of the view that therefore, in the absence of any other agreement between the parties, Shaykar remained the beneficial owner of the Clontarf business which was a combined Subway and Baskin-Robbins store and is entitled to a declaration to that effect. Shaykar is entitled to an account of the profits made by AS&L (including the various entities for which it was the trustee) from 14 August 2000 when it took over operation of the Clontarf business to the date of this order, 18 November 2011.

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6 *Alborn v Stephens* QSC at [73] – [86].

7 *Alborn v Stephens* QCA at [84].

Further findings of fact sought by the plaintiffs

[37] As previously mentioned, the plaintiffs sought the following additional findings of fact:

> "1.1 That, in accordance with the 'Morayfield Management Agreement' pleaded and asserted by the Defendants at first instance, and the findings at trial (as upheld on appeal) concerning the 'Morayfield Management Agreement', the First and Second Defendants:
>
> 1.1.1 ceased, on or about 30 September 1999, to have any beneficial interest in any shares in the capital of the Third Plaintiff held by them (or either of them) or registered in their names (or the name of either of them);
>
> 1.1.2 have no interest in the Subway settlement which was negotiated after they had ceased to have an interest in the Third Defendant; and
>
> 1.1.3 have no basis to allege oppression in respect of the control and management of the affairs of the Third Defendant after they had ceased to have an interest in it;
>
> 1.2 That:
>
> 1.2.1 the trust property, being the Clontarf Subway and Baskin & Robbins businesses, was used for the purpose of establishing and maintaining the Defendants' Kallangur and Bribie Island Subway businesses; and
>
> 1.2.2 the Defendants so mixed the profits from the Clontarf Subway and Baskin & Robbins businesses with their own property as to render the identification of their gain impossible."

[38] The plaintiffs submitted that:

> "Consistently with the findings at first instance, the Court of Appeal concluded that the Alborn interests – rather than the Stephens interests – became, and remained, beneficial owners of all shares in the Third Plaintiff, pursuant to the 'Morayfield Management Agreement'; that is to say, the very agreement which the Defendants themselves set up and relied upon as entitling them to receive the Morayfield business in consideration for (*inter alia*) their transfer of such shares to the Alborn interests."

[39] It was not part of the findings at the trial, or on appeal, that as part of, or as a result of, the Morayfield Management Agreement Mr and Mrs Stephens ceased, on or about 30 September 1999, to have any beneficial interest in any shares in the capital of Shaykar held by them (or either of them) or registered in their names (or the name of either of them). No evidence was referred to which would justify such a finding being made now. The statement made by Mr Stephens to Allied Brands International on 3 May 2000 referred to at [73] of *Alborn v Stephens* QSC is not a sufficient basis to make a finding that from 30 September 1999, Mr and Mrs Stephens no longer had any beneficial interest in any shares in Shaykar.

[40] The findings sought in paragraphs 1.1.2 and 1.1.3 cannot therefore be made as they depend upon there being a finding that Mr and Mrs Stephens no longer had any beneficial interest in any shares in Shaykar, a finding which I am not prepared to make on the evidence before me.

[41] The plaintiffs also sought a finding that the trust property (that is the Clontarf business) was used to establish and maintain the Kallangur and Bribie Island Subway businesses. They submitted that such a finding was incontrovertible on the whole of the evidence and especially paragraph 7.6 of the Vincent's Report. I will set out in full paragraph 7.6 from the Vincent's Report:

> "7.6 **The extent to which the establishment and operations of the Defendants' Bribie Island Store were funded by Income or Profits from the other Businesses**
>
> 7.6.1 AS&L purchased the Bribie Subway franchise as a going concern for $297,000 (inclusive of trading stock) and commenced trading on or around 1 May 2007. Acquisition of the Bribie Subway was funded by:
>
> (i) A variation to AS&L's finance facilities with Westpac Banking Corporation on 4 April 2007 which increased the limit of its business development loan by $210,000 (refer **Annexure 25** at **page 193**). $185,000 was withdrawn on 2 May 2007; and
>
> (ii) Related party loans as follows:
>
> (a) The R&G Morayfield Trust - $52,000;
>
> (b) R&G Stephens - $55,000;
>
> (c) The Kallangur Subway Partnership - $10,000.
>
> 7.6.2 I have agreed the related party loan balances above, to the balance sheets of each of the corresponding related parties. I am instructed by Mr Stephens, that no formal loan agreements were made between the Bribie Subway Trust and the related parties (listed in **paragraph 7.6.1(ii)** above). However Mr Stephens advises that the loans are provided on interest free terms and that the Bribie Subway store will repay the loans 'as and when it can afford [to]'.
>
> 7.6.3 Further, I note that the Bribie Subway Trust received $11,091 in profit distributions from the R&G Morayfield Trust during the financial year ended 30 June 2007 (refer **Annexure 10 (page 115)**.
>
> 7.6.4 Based on the matters set out above, I would conclude that $63,091 (i.e. $52,000 + $11,091) in profits from the Morayfield Subway Store was used in the acquisition and initial operation of the Bribie Subway Store.
>
> 7.6.5 Furthermore, in my opinion the increase in AS&L's Westpac facilities would only have been possible due to AS&L's net asset base/earnings potential.

> The Morayfield Subway, Clontarf Subway and Baskin-Robbins franchises businesses contribute to AS&L net asset base and earnings.
>
> 7.6.6 I have therefore included the business value of the Bribie Subway Trust in my determination of AS&L's entity value (refer **Annexure 22 at page 177**)."

[42] Since the net earnings of the Clontarf Subway and Baskin-Robbins franchise businesses were negative at the time of the purchase by AS&L of the Bribie Subway franchise, I am satisfied that the Bribie Island business was not purchased using the profits of the Clontarf business. The observation by Mr Vincent in paragraph 7.6.5 of his report is not sufficient to support a declaration that Shaykar is the sole beneficial owner of the Bribie Island Subway business and associated franchise. As can be seen nothing in paragraph 7.6 deals with the acquisition of the Kallangur Subway business out of profits made by the Clontarf franchise business. Furthermore this was not the subject of such finding at first instance and that was not the subject of any appeal. The plaintiffs have not demonstrated that the defendants so mixed the profits from the Clontarf business with their own property as to render the identification of their gain impossible. The plaintiffs have not shown that the findings sought with regard to the Kallangur or Bribie Island Subway businesses should be made.

Account of profits

[43] The claim for an account of profits arose out of paragraphs 22 to 32 of the statement of claim (insofar as they related to the Clontarf business) for breach of fiduciary duty and paragraph 4 of the prayer for relief.

[44] The duty to account for profits arose when Mr and Mrs Stephens caused AS&L to take over the operation of the Clontarf business which was owned by Shaykar when it was abandoned by Mr Alborn who was operating it on behalf of Shaykar. That occurred on 14 August 2000. Mr and Mrs Stephens thereafter acted as if the Clontarf business was beneficially owned by AS&L whereas it was still beneficially owned by Shaykar.

The relevant law

[45] The remedy of an account of profits is, as the High Court observed in *Warman International Ltd v Dwyer*,[8] "ancient and notoriously difficult in practice".

[46] After setting out the principles relating to a fiduciary's duty to account for profits, the court observed at 558 that:

> "The assessment of the profit will often be extremely difficult in practice; accordingly it has been said that '[w]hat will be required on the inquiry … will not be mathematical exactness but only a reasonable approximation'. What is necessary however is to determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty." (footnotes omitted)

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[8] (1995) 182 CLR 544 at 556; *Paton & Anor v Reck & Ors* [1999] QCA 517 at [41], [57].

[47] There are many different types of fiduciary relationships and the breach of duty may occur notwithstanding that the fiduciary has acted *bona fide* and the opportunity to make profit would not, as occurred in this case, have been availed of but for his skill and knowledge. It is, however, "necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particulars facts."[9]

[48] With regard to a fiduciary who conducts a business, the High Court said:[10]

> "In the case of a business it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources. This is not to say that the liability of a fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.
>
> It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own.
>
> Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of the given case. However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make allowance for skill, expertise and other expenses." (footnotes omitted)

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[9] *Warman International Ltd v Dwyer* at 559; *Brookes v Ralph & Ors* [2009] QSC 416 at [102]; *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors (No 2)* [2007] QSC 232 at [56].

[10] *Warman International Ltd v Dwyer* at 561-562; *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors (No 2)* at [45], [57].

[49] In the Court of Appeal, Muir JA observed that matters that occurred to him as being in need of addressing in respect of the taking of accounts were the contractual entitlement of Mr and Mrs Stephens and/or AS&L to consultancy fees, their entitlement (if any) to just allowances for their work and the entitlement, if any, of the parties to interest (if any) on their respective loans.[11]

The defendants' submissions

[50] The defendants submitted that the critical evidence before the court with regard to an account of profits were the reports prepared by Paul Vincent of Vincent's Chartered Accountants, the joint expert appointed in this case. Those reports are exhibit 2 and exhibit 6. In Table 16 of exhibit 2 Mr Vincent set out the income and expenses (excluding trust distributions) of the Clontarf Subway store and the Clontarf Baskin-Robbins store between 30 June 1997 and 30 June 2007. Those figures show that the total profit of the Clontarf Subway store over that period was $62,047. The total loss suffered by the Baskin-Robbins store at Clontarf was $66,437. It follows that up to 30 June 2007 the net loss of operating the Clontarf business was $4,390. The defendants submitted that there was no profit to account for, at least not in the period to 30 June 2007.

[51] The defendants contended that the first Vincent's report at paragraph 4.10 proceeded on the basis, which was not challenged at trial, that $179,880 in Shaykar debts with regard to the Clontarf business were repaid by the efforts of the defendants after they took over the operation of the Clontarf business.

[52] The defendants further submitted that Mr Vincent calculated that the unpaid work that Mr and Mrs Stephens put into the businesses over the period up to June 2007 was in excess of $370,000 as set out in paragraphs 7.4.9 and 7.4.10 and Table 21 of his first report. That assessment was based on advice given to him by Mr and Mrs Stephens of the number of hours they contributed to the businesses. Based on those figures Mr Vincent prepared Table 21 which shows the consulting fees actually paid by the businesses and compared that to the amount of time actually spent by Mr and Mrs Stephens at each of the franchise businesses to calculate whether Mr and Mrs Stephens owed money to the franchise businesses or the franchise businesses owed money to Mr and Mrs Stephens in respect of their working hours.

[53] The defendants submitted that even if the plaintiffs could point to any significant profits from July 2007 onwards it was still unlikely that that would justify the cost and expense of the account. They submitted that given the profits, or lack of them, made by the Clontarf business in the 10 years up to June 2007, it was unlikely that in the couple of years following, the business could possibly have made the hundreds of thousands of dollars that would be needed just to overtop the unpaid wages and debts repaid in relation to the Clontarf business by the defendants, without even considering any of the qualitative just allowances for risk and skill they would be entitled to.

[54] The defendants therefore asked for the following findings to be made:

> "(a) In the period through to June 2007 the Clontarf business had made a net loss so there is nothing to account for.
>
> (b) To the extent the Clontarf business might have made any profits in the period from July 2007 to whatever date is

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[11] *Alborn v Stephens* QCA at [96].

chosen for ending any account, just allowance would have to be made for the unpaid work of Mr and Mrs Stephens, which equates to $138,750.

(c) Further, there would also have to be an allowance for the extent to which the Stephens interests caused the debts of the Clontarf business that they inherited in 2000 to be repaid.

(d) Finally, there would then also be an entitlement to an allowance; considerable in the circumstances; for the risk that Mr and Mrs Stephens took and the skill they applied that lead to the salvage of the Clontarf business and the repayment of its debts. Without their effort, skill and risk in taking over the Clontarf business after it was abandoned by the Alborn parties, the Clontarf business was 'substantially worthless'.

(e) In those circumstances it is, frankly, inconceivable that the profit, if any, of the Clontarf business for the period from 1 July 2007 to whatever date is chosen would exceed the allowances that the Stephens parties would be entitled to. There is, in those circumstances, simply no point in continuing with an account, and to do so would be inconsistent with *UCPR* r 5. An account being a discretionary remedy this is a value *[sic]* basis to refuse such an order."

The plaintiffs' submissions

[55] The plaintiffs submitted that the effect of the judgment of the Court of Appeal is that the defendants have been in control of the Clontarf business which has belonged in equity to Shaykar for over 10 years. The plaintiffs are entitled to an account of profits. They submitted that there is no basis, either in law or on the substantive merits of the present case, for allowing the defendants to take the full benefit of the very thing which the Court of Appeal has found that they were not entitled to, and which they unlawfully arrogated to their own use, the Clontarf business. A full account should therefore be made, not simply to June 2007.

[56] The plaintiffs submitted that the figures relied upon by the defendants being a net loss of $4,390, repayment of the debt of $179,880 and unpaid work claimed by the Stephenses in excess of $370,000 should be rejected. The plaintiffs submitted that the suggestion that the businesses were unprofitable is contradicted by the following:

- the Morayfield debt was paid off in seven months of trading;
- the Clontarf business debt was repaid;
- a loan of $12,000 was drawn by the Second Defendant (as yet unpaid at the date of the statement);
- the repayment of the debt of Clontarf was by AS&L assigning store profits to pay the debt (as Mr Stephens deposed: 'AS&L have been able to repay the debt through Glenys and I continuing to work in our teaching roles and assigning store profits to repay the debt'); and

- profits from the Clontarf business were utilised to establish and operate the Defendant's Kallangur and Bribie Island stores (see paragraph 7.6 of the Vincents Report – especially paragraph 7.6.5).

[57] The plaintiffs further submitted that the net loss of $4,390 from the period June 1997 to June 2007, "based on Clontarf Subway net profit of $66,437 [*sic*] and Baskin & Robbins' net loss of $66,437" wrongly takes into account deductions from the revenue of the stores. The figures which it says were wrongly taken into account are as follows:

> " 31.2.1 $110,078 claimed for the Stephenses paid working contributions in the Clontarf Subway store in the relevant period (see table 12 in the Vincents Report);
>
> 31.2.2 $11,046 claimed for the Stephenses paid working contributions in the Baskin & Robbins store;
>
> 31.2.3 $18,143.54 for legal fees in regard to this litigation (see paragraph 7.5.2 of the Vincents Report);
>
> 31.2.4 $8,000 in its entirety for 'conferences' in Hawaii and on the Gold and Sunshine Coasts attended by the Stephenses (paragraph 7.5(v) of Vincents Report);
>
> 31.2.5 Funding applied to the establishment and operation of the Defendant's Kallangur and Bribie Island stores from income and profits of the businesses (see paragraph 7.6 of the Vincents Report – especially paragraph 7.6.5);
>
> 31.2.6 Shaykar's debts that were repaid by AS&L entities and 'expensed' in the franchise business income and expenditure statements (see paragraph 7.3.6 of Vincents Report – particularly 7.3.6 (iv) where Mr Vincent refers to advice from the Stephenses which 'suggests that the payment of Shaykar debts were expensed in the franchise business income and expenditure statements', and concludes that 'if repaid Shaykar debts were expensed, the repaid debts have already been accounted for between the parties in lower franchise business profits'.)
>
> 31.2.7 interest on related-party loans (see paragraph 7.6.1(ii) and 7.6.2 of the Vincents Report);
>
> 31.2.8 the repayment of debts of $179,880 claimed by the Stephenses (which is a simple matter of double-counting); and
>
> 31.2.9 repayment of the Morayfield debt, which is unrelated to the Clontarf businesses.
>
> 31.3 There are other matters which have to be clarified. These include remaining amounts unpaid for superannuation, GST and tax amounts. The statement of the First Defendant refers to ATO liabilities, super and GST (para 234). The amount still owing to the ATO in respect of SGIC for Morayfield staff ought to be credited to the Clontarf businesses.

31.4 The claim by the Stephenses for unpaid work, up to June 2007, in excess of $370,000 based on a 37.5% figure, is outrageous and unsustainable.”

[58] The plaintiffs further submitted that they do not need to prove that the stores have earned more than ‘the hundreds of thousands of dollars that would be needed, just to overtop the unpaid wages and debts repaid in relation to the Clontarf store by the Stephens interests’. A fiduciary who has an equitable obligation to provide an account cannot evade that obligation, they submitted, by attempting to transfer the onus of proof to the other party to establish that the accounting is likely to arrive at a positive net figure. The plaintiffs submitted, in any event, there is every reason to suppose that the figure will be a positive one, once the anomalies, outlined above, in the Stephens’ accounting, have been addressed and rectified and the accounting is brought forward to the present time.

[59] It was accepted by the plaintiffs that the calculation would necessarily be difficult. They referred to the observation in *Warman International Ltd v Dwyer* that ‘[w]hat will be required on the inquiry … will not be mathematical exactness but only a reasonable approximation’. What is necessary however is to determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.

[60] The plaintiffs also accepted that the defendants were entitled to an appropriate allowance for their work. It did not, however, follow, they submitted, that they ought be burdened with the defendants’ own extravagant view of what their services were worth.

[61] The appropriate course, in the plaintiffs’ submission, was for the court to appoint Mr Vincent to conduct the account, in accordance with the draft orders they proposed.

Discussion

[62] In view of the uncertainty of the result until an account is conducted, the account of profits should be ordered.

[63] There is in my view no reason not to calculate the unpaid contributions of Mr and Mrs Stephens according to the hours which they said they worked in the franchise businesses. On the evidence before me, I am satisfied this is the best estimate of the time they spent.

[64] In Table 18, Mr Vincent set out the hours worked by Mr and Mrs Stephens in the franchise businesses. With respect to the Clontarf business they were as follows:

Commercial Remuneration/
Historical Franchisee Working Contributions

	Clontarf Subway			**Clontarf Baskin-Robbins**		
	Hours per week			**Hours per week**		
Year	**Ray Stephens**	**Glenys Stephens**	**Total**	**Ray Stephens**	**Glenys Stephens**	**Total**
30 Jun 00	20	5	25	5	5	10
30 Jun 01	20	5	25	5	5	10
30 Jun 02	20	5	25	5	5	10
30 Jun 03	20	5	25	5	5	10
30 Jun 04	20	5	25	5	10	15
30 Jun 05	20	7	27	5	10	15
30 Jun 06	20	7	27	5	10	15
30 Jun 07	15	5	20	5	7	12

[65] In Table 19, Mr Vincent set out the amount of commercial remuneration on an hourly basis to which Mr and Mrs Stephens were entitled that was as follows:

Commercial Remuneration/
Historical Franchisee Working Contributions

CPI Brisbane		**Hourly Rate**			
CPI Year Ended	Annual % change	Year Ended	Base Salary Rate	% Super Contribution	Salary + Super Rate
1998-99	1.0	30 Jun 00	$19.58	7%	$20.95
1999-00	1.7	30 Jun 01	$19.78	8%	$21.36
2000-01	5.9	30 Jun 02	$20.12	8%	$21.73
2001-02	2.9	30 Jun 03	$21.31	9%	$23.23
2002-03	3.2	30 Jun 04	$21.93	9%	$23.90
2003-04	2.9	30 Jun 05	$22.63	9%	$24.67
2004-05	2.6	30 Jun 06	$23.29	9%	$25.39
2005-06	3.2	30 Jun 07	$23.90	9%	$26.05

[66] Mr and Mrs Stephens therefore contributed the following value for the hours worked in the Clontarf business as follows:

Year Ended	**Total working hours**	**Hourly rate**	**Total**
30 June 00	35x52 = 1820	20.95	38,129
30 June 01	35x52 = 1820	21.36	38,875.20
30 June 02	35x52 = 1820	21.73	39,548.60
30 June 03	35x52 = 1820	23.23	42,278.60
30 June 04	40x52 = 2080	23.90	49,712
30 June 05	42x52 = 2184	24.67	53,879.28
30 June 06	42x52 = 2184	25.39	55,451.76
30 June 07	32x52 = 1664	26.05	43,347.20

[67] The amount of remuneration to which Mr and Mrs Stephens were entitled compared to what they were actually paid in respect of the Clontarf business is as follows:

Commercial Remuneration/
Adjustment for the Stephens's Working Contributions

	Consulting fees paid by Franchise Business to Stephens				
Year	**Clontarf Subway**	**Clontarf Baskin-Robbins**	**Total**	**Stephens actual Working Contribution (Tables 18&19)**	**Additional amt owed in respect of Stephens' working contribution**
30 Jun 00	0	0	0	$38,129	$38,129
30 Jun 01	705	0	705	$38,875	$38,170
30 Jun 02	600	0	600	$39,549	$38,949
30 Jun 03	0	0	0	$42,279	$42,279
30 Jun 04	16,055	1,091	17,146	$49,712	$32,566
30 Jun 05	20,773	3,409	24,182	$53,879	$29,697
30 Jun 06	34,627	3,273	37,900	$55,452	$17,552
30 Jun 07	37,318	3,273	40,591	$43,347	$2,756
TOTAL	**110,078**	**11,046**	**121,124**	**$361,222**	**$240,098**

[68] The additional amount owed to Mr and Mrs Stephens in respect of their unpaid working contributions from July 1999 to 30 June 2007 was therefore $240,098. However this will have to be adjusted when the account is taken as the only dates relevant to the account are from 14 August 2000 to 18 November 2011.

[69] The Kallangur and Bribie Island stores are irrelevant to the account to be taken for the reasons already given. The $18,143.54 for legal fees paid by the Clontarf Subway in relation to defending this litigation should not be deducted from the income of that business. There does not appear to be any reason to suggest that the conferences attended by Mr and Mrs Stephens were not legitimate business expenses and should not be taken into account as legitimate expenditure. The repayment of Shaykar's debt by AS&L has already been taken into account in the net profit and loss statement prepared. Any accounting will have to consider any amounts outstanding for tax liabilities or after government imposts which the Clontarf business generated during the period from 14 August 2000 to 18 November 2011.

[70] It remains to determine the effect of the counterclaim on the account of profits.

Counterclaim

[71] The findings in respect of the Clontarf Management Agreement mean that the counterclaim, which it was not necessary to consider in the original judgment, now falls to be considered. At [90] in the Court of Appeal judgment, Muir JA observed:

> "… the only relief sought in the counter-claim which continues to have relevance for the present purposes is the claim for an account of the proceeds of the settlement of other Supreme Court proceedings and the claim for an order that Shaykar be wound up: the relevance

> being that the [defendants] may have claims that give rise to a set-off."

The proceeds of settlement of other Supreme Court proceedings ("the Subway settlement") may give rise to a set off because of the nature of the claim Shaykar made in those proceedings. The future of Shaykar is significant in determining what is relevant in the account of profits.

[72] The paragraphs of the counterclaim that deal with these matters are:

> "3. In or about November 2007, the Plaintiffs:-
> (a) compromised Proceeding No. 10121/02 in the Supreme Court of Queensland at Brisbane ("the compromise");
> (b) have failed to bring to account the benefit of the proceeds of the compromise received for the benefit of Shaykar, full particulars of which cannot be provided until such time as disclosure has been made.
>
> 4. On or about 18 August 2008, the First Plaintiff, in his capacity as sole director of Shaykar, caused shares to be issued in Shaykar ('the share issue') to the detriment of the First Defendant and the Second Defendant and for the sole purpose of funding this proceeding.
>
> 5. The share issue was oppressive to, unfairly prejudicial to, or unfairly discriminatory against the First Defendant and Second Defendant within the meaning of s 232 *Corporations Act* 2001 (Cth).
>
> 6. The Defendants' [*sic*] claim as against the Plaintiffs:-
> …
> (b) An accounting for the settlement proceeds received by the Plaintiffs in Proceeding No. 10121/02 in the Supreme Court of Queensland, including the benefit derived by Shaykar;
> (c) An order pursuant to s 233 of the Corporations Act 2001 (Cth) that Shaykar be wound up."

[73] In the answer to the counterclaim, the plaintiffs pleaded as follows:

> "3. As to paragraph 3 of the Counterclaim, the Plaintiffs:
> (a) admit that in or about November 2007, they compromised proceedings No 10121 of 2002 in the Supreme Court of Queensland;
> (b) say that, pursuant to the said compromise, no part of the benefit of the proceeds was paid on account of Shaykar's claim and no proceeds of the compromise were received by or on behalf of Shaykar; and
> (c) in the premises, deny that the Plaintiffs have failed to bring to account proceeds of the compromise received for the benefit of Shaykar.
>
> 4. As to paragraph 4 of the Counterclaim, the Plaintiffs:
> (a) admit that the First Plaintiff did, on or about 18 August 2008, as sole director of Shaykar, cause Shaykar to issue shares in Shaykar;

(b) admit that the shares were issued by Shaykar for the purpose of raising capital to fund the costs of these proceedings;

(c) say that all shareholders of Shaykar, including the First and Second Defendants, were given the same opportunity to take up the shares so issued;

(d) say that the only detriment to the First and Second Defendants was that the said share issue put Shaykar in a financial position to pursue this proceeding against the Defendants;

(e) in the premises, deny that the First and Second Defendants have suffered any detriment in their capacity as shareholders in Shaykar as a result of the said share issue.

5. As to paragraph 5 of the Counterclaim, the Plaintiffs say further that the said share issue was not unfairly prejudicial to, or unfairly discriminatory against the First and Second Defendants, or either of them, either generally or in their capacity as shareholders in Shaykar.

6. On the grounds contained in paragraphs 1 to 5 hereof, the Plaintiffs deny that the Defendants are entitled to all or any of the relief sought in paragraph 6 of the Counterclaim."

The defendants' submissions

[74] The defendants submitted that as to the claim pleaded in paragraph 3 of the counterclaim, the non-accounting of the Alborn parties to Shaykar for the proceeds of the Subway settlement (that is, compromised proceeding No 10121/02 in the Supreme Court of Queensland at Brisbane), it could be readily seen to be a claim in the same species of claim that the Alborn parties had successfully caused to be brought in relation to the Clontarf business: that is, each is a claim for an interest that is truly Shaykar's that has been appropriated to the use of one of its shareholders. In the case of the Stephens parties that was the treating of the Clontarf business as their own from the time the Alborn parties abandoned it, and in the case of the Alborn parties the non-accounting to Shaykar for the Subway settlement.

[75] The defendants submitted that other matters of significance arose. Firstly, neither the Stephens parties, assuming they are vindicated on the counterclaim, nor the Alborn parties as a result of the decision in the Court of Appeal, are themselves entitled to anything as a result. In respect of either of these claims, the only party with an entitlement in respect of it is Shaykar. Secondly, the nature of those similar, and to some extent cancelling, claims makes relevant the relief that the court ought appropriately give if satisfied that oppression in contravention of s 232 of the *Corporations Act* 2001 (Cth) by the Alborn parties is made out. Put another way, the court is both entitled and bound to mould an order in relation to the oppression proceedings which efficaciously and pragmatically deals with those competing claims.

[76] The defendants submitted with regard to the Subway settlement that notwithstanding the fact that Mr Alborn chose not to give or call any evidence in the proceedings, the details and circumstances of the Subway settlement to the extent

they were accessible to the Stephens parties were proved by certain documents in the trial bundle.

[77] At document 166 was the statement of claim in the Subway proceedings, in which Shaykar was the fifth plaintiff. It was relevantly alleged by the Alborn parties that Shaykar was "substantially worthless" (paragraphs 55(a) and (c)) and had suffered substantial operating losses (paragraph 57(a)). This matter was emphasised again in the reply (paragraphs 185 and 187).

[78] As to the claim made by Shaykar in the Subway proceedings they referred in particular to paragraphs 1(b)(iv), 5, 19(a)(v) and (b)(v), 31-38, 54, 55(a)-(c), 56(a)-(c), 57(a) and 58 of the statement of claim.

[79] On 12 October 2007 Mullins Lawyers, the solicitors for Subway, offered to settle with all plaintiffs, including Shaykar. The offer is at document 205 in the trial bundle. They also referred to the subsequent letter from Mullins Lawyers of 25 October which is at trial bundle document 206.

[80] Londy Lawyers, the solicitors for all plaintiffs, including Shaykar, unconditionally accepted the offer made by Subway, as is evidenced by the email from Londy Lawyers to Mullins Lawyers of 25 October 2007, which is document 207 of the trial bundle.

[81] Mr Alborn sought then to have Subway enter into a deed of settlement that purported to evidence that the settlement sum of $1,500,000 (being $1,000,000 to settle the claim and $500,000 for costs) was payable solely to him, as is shown by the email sent by Mr Londy on 1 November 2007 enclosing a draft deed, and in particular clauses 1.1 and 1.3 of that draft. The defendants submitted that as is clear, including from paragraphs 1-6 of the statement of claim in the Subway proceedings, Shaykar had a separate interest to the Alborn parties.

[82] Throughout November 2007 Subway refused to have anything to do with that attempt. This started with the response from Subway's solicitor on 13 November 2007, which is document 210 of the trial bundle. Notwithstanding, Mr Alborn persisted with his wish to get Subway to agree in writing that the settlement monies were to be paid only to him by the email from his solicitor of 13 November 2007, which is document 211 of the bundle.

[83] As may be seen by the correspondence between Londy Lawyers and Mullins Lawyers between 19 and 27 November 2007, at documents 212-217 of the trial bundle, persistent attempts were made to agree which were refused by Subway.

[84] Consequently the defendants submitted that it remains to be determined what part of the Subway settlement received by Mr Alborn on behalf of, *inter alia*, Shaykar, was properly to be accounted to Shaykar.

[85] Because Mr Alborn chose not to give evidence, and because of what the defendants referred to as his plainly commercially reprehensible conduct at the time of the Subway settlement – he, after all, had never been a franchisee and plainly Shaykar's interests did not fully align with his, yet he was wishing to take all of the proceeds of the settlement personally – any measure of a proper apportionment of what he ought to have accounted to Shaykar must be somewhat rough and ready.

[86] The defendants submitted that the passages from *Warman International Ltd v Dwyer* cited above are equally, if not more, apposite to this matter. They submitted of particular relevance on this point of the proper approach to the taking of an account is the High Court's adoption of the reasoning of Lord Wilberforce in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*[12] in these terms:

> "Indeed, what is required in the present case is essentially what Lord Wilberforce described as a 'judicial estimation of the available indications'."[13]

[87] It was submitted that a reasonable way of making such assessment in the circumstances would be to recognise that the Subway proceedings were brought by the plaintiffs, including Shaykar, in respect of 10 stores. They were the Clontarf and Morayfield stores where the claim was made by Shaykar, the claim in relation to Subway Gold Coast in respect of the Mermaid Beach, Broadbeach, Burleigh Waters, Robina and Nerang stores and the claim by and in relation to Subway Brisbane South concerning the Cleveland, Wynnum and Beenleigh stores. On that basis the claim in so far as it was prosecuted on behalf of Shaykar was in respect of 20% of the stores in question. Therefore, a tolerable means would be to calculate that 20% of the settlement sum should have been accounted to Shaykar, or $200,000.

[88] Perhaps a more precise figure could have been calculated, but Mr Alborn, throughout, chose for that not to be the case. In those circumstances the defendants submitted that it is fair to infer that there is nothing that Mr Alborn could have said that would have aided his case in relation to what on the face of the documents can be inferred should be Shaykar's proportion of the Subway settlement.

[89] Thus, it was contended that the finding in relation to the claim made at paragraph 3 of the counterclaim should be that the sum of $200,000 was not accounted by the Alborn parties to Shaykar in relation to the Subway settlement.

The plaintiffs' submissions

[90] The plaintiffs argued that the matters raised in the counterclaim were not and could not be issues outstanding for resolution. They submitted that consistently with the findings at first instance, the Court of Appeal concluded that the Alborn interests, rather than the Stephens' interests, became, and remained, beneficial owners of all shares in the third plaintiff, pursuant to the Morayfield Management Agreement.

Discussion

[91] The plaintiffs' submissions should not be accepted. As was held at first instance neither Mr nor Mrs Stephens had any control over Shaykar after the entry into the Morayfield Management Agreement. Mr Alborn has been the sole director of Shaykar since 1 October 1999. However, at that time and at all times material to these proceedings it had, as was admitted on the pleadings, as its shareholders, as to 51 "C" class shares and 100 ordinary shares, Mr and Mrs Stephens as trustee of the Stephens Family Trust and, as to 25 "C" class and 100 ordinary shares, from 27 January 1998, Alborn Family Corporation. It appears that from 11 September 2006, Mr Brendan Alborn and Ms McLintock agreed to transfer their shares, being 24 "C"

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12 [1975] 1 WLR 819 at 826.

13 *Warman International Ltd v Dwyer* at 567.

class shares and 100 ordinary shares, to Mr Alborn. I cannot therefore agree with the submission made by the plaintiffs that it is consistent with the findings made at trial which were upheld on appeal that the defendants cannot assert an interest in the third defendant which entitles them to claim either:

> "18.1 An interest in the Subway settlement which was negotiated after they had ceased to have an interest in the Third Defendant; or
>
> 18.2 Oppression in respect of the control and management of the affairs of the Third Defendant after they had ceased to have an interest in it."

[92] In any event, as the defendants submitted, it is Shaykar, rather than Mr and Mrs Stephens, that has an interest in the Subway settlement as Shaykar compromised those proceedings.

[93] The compromise received for the benefit of Shaykar was a result of the settlement of proceeding SC No 10121 of 2002 in the Supreme Court of Queensland. In that proceeding there were five plaintiffs being Mr Alborn, Alborn Family Corporation, Plug Mates (Aus) Pty Ltd ACN 080 955 577 (formerly Rick Alborn & Associates Pty Ltd), Subway Brisbane South Pty Ltd ACN 079 977 932 and Shaykar. SSA was the first defendant and DAI the second defendant.

[94] Claims were made in those proceedings on behalf of Shaykar with respect to the Morayfield and Clontarf franchises. It was alleged that as a result of representations made by Subway Development of Queensland Pty Ltd ("SDQ") in December 1996, Shaykar invested in the acquisition of Subway stores at Morayfield and Clontarf and the making of the representations was misleading or deceptive or likely to mislead or deceive or negligent and/or that those representations were made fraudulently. It was further alleged in paragraph 54 of that statement of claim that the defendants took unconscientious advantage of, *inter alia*, Shaykar and as a result, in paragraph 55, it was alleged that Shaykar was substantially worthless and as a result had lost the whole of its investment in the Morayfield and Clontarf businesses and had incurred operating losses in respect of those businesses as a result of the defendants' conduct.

[95] The claim for relief was for damages (including aggravated, exemplary and punitive damages) and/or other relief:

> "(a) for deceit
>
> (b) further or alternatively, for misleading or deceptive conduct;
>
> (c) further or in the further alternative, for negligence;
>
> (d) further or in the further alternative, for unconscionable conduct."

[96] On 12 and 25 October 2007 the solicitors for the defendants in that case, Mullins Lawyers, made an offer to settle the plaintiffs' claim including costs for $1,500,000. The offer was contained in a letter from Mullins Lawyers to Londy Lawyers dated 25 October 2007 which is document 206 in the trial bundle. By letter dated 25 October 2007 from the plaintiffs' solicitors to the defendants' solicitors the offer was unconditionally accepted. The letter of acceptance then asserted:

> "We will furnish you with a proposed deed of release for your consideration. This will include terms discussed today with Mr Nicholson as to the identity of the payee and the fact that no part of

> the settlement amount is paid in respect of the claim by Shaykar Pty Ltd, however our clients unconditional acceptance is not subject to the execution of such a deed (or any deed)."

[97] Mullins Lawyers acknowledged, by email, receipt of the plaintiffs' unconditional acceptance of the defendants' offer of settlement. On 1 November 2007, the plaintiffs' solicitors sent to the defendants' solicitors a proposed Deed of Release by which the monies would be paid to Richard Alborn and no part of the settlement sum was to be paid in respect of the claims of any of the parties other than Mr Alborn but that all of the plaintiffs would release the defendants from the causes of action and claims contained in the proceedings. Those terms were not agreed and correspondence ensued between the solicitors with proposed amendments to the draft settlement deed throughout November 2007. No deed was able to be agreed and on 23 November 2007 Mullins Lawyers, the defendants' solicitors, paid $1,500,000 to the trust account of the plaintiffs' solicitors in settlement of proceeding SC No 10121/02.

[98] There has therefore been no determination of what part of the Subway settlement received by Mr Alborn on behalf of, *inter alia*, Shaykar was properly to be accounted to Shaykar. I accept the defendants' submission that because Mr Alborn chose not to give evidence before me at the trial and because of his conduct at the time of the Subway settlement, "he, after all, had never been a franchisee and plainly Shaykar's interest did not fully align with his, yet he was wishing to take all the proceeds of the settlement personally", any measure of a proper apportionment of what he ought to have accounted to Shaykar must be somewhat rough and ready.

[99] Shaykar's interest in the Subway settlement acts as a set–off to the extent to which Shaykar has already been compensated by that settlement for the loss claimed by Shaykar in these proceedings. In respect of the Clontarf business that was approximately one-tenth of the settlement or $100,000; and in respect of the Morayfield business, $100,000. Mr Alborn, as director of Shaykar, has a fiduciary duty to Shaykar not to claim all of the settlement monies for himself to the detriment of Shaykar which compromised those proceedings. This is a matter that will have to form part of the taking of accounts.

What should happen to Shaykar and the Clontarf business?

[100] The submissions of all parties sought orders that would end any legal or financial relationship between them. That is clearly a desirable outcome.

The plaintiffs' submissions

[101] The plaintiffs sought a mandatory injunction to compel the defendants to do all things necessary to transfer to the third plaintiff or its nominee, all of the right to, title and interest in, and benefit of, the Clontarf Subway business and associated franchise, the Clontarf Baskin-Robbins business and associated franchise, the Kallangur Subway business and associated franchise, the Bribie Island Subway business and associated franchise and all shares in the capital of Shaykar held by or registered in the names of Mr or Mrs Stephens. This order was sought in the context of seeking a declaration that the first and second plaintiffs are, and have been since 30 September 1999, the beneficial owners of all shares in the capital of Shaykar held by or registered in the names of Mr and Mrs Stephens.

[102] As has been previously set out, the plaintiffs have no entitlement to any interest in the Kallangur and Bribie Island businesses and associated franchises. As I have already said, no evidence was referred to in support of the factual findings necessary to support a declaration that the first and second plaintiffs are, and have been since 30 September 1999, the beneficial owners in all shares in the capital of Shaykar held by or registered in the names of Mr and Mrs Stephens. I decline to make any such declaration. I shall deal with what should now happen to Shaykar and its beneficial interest in the Clontarf business.

The defendants' submissions

[103] The defendants sought an order that Shaykar be wound up or another appropriate order be made pursuant to the court's power conferred by s 232 and s 233 of the *Corporations Act* 2001 (Cth). The terms of such an order are relevant to the question of a set-off against the profits that would otherwise have to be accounted for to Shaykar.

[104] The defendants referred to the admission in the reply that Mr Alborn caused the issue of shares in Shaykar in August 2008 and he did so for the purpose of raising capital to fund the costs of these proceedings against Mr and Mrs Stephens and their company, AS&L. It was submitted that company funds were thus admittedly raised for the purpose of prosecuting these proceedings. These proceedings prosecuted claims not only for Shaykar, but also for Mr Alborn and Alborn Family Corporation.

[105] Further Mr Alborn caused these proceedings to be commenced not only in relation to the Clontarf business and in relation to the separate claims of Mr Alborn and Alborn Family Corporation, which were of no advantage to Shaykar, but also caused Shaykar to bring the proceedings in relation to the Morayfield business. That claim was, the defendants submitted, always unlikely to succeed. This can be seen from the documentary evidence of the Morayfield Management Agreement and the inevitable inference from the fact Mr Alborn did not himself give or offer any evidence to try to offer some contrary explanation in the face of those documents.[14]

[106] The prayer for relief sought an order that Shaykar be wound up pursuant to s 233 of the *Corporations Act* 2001 (Cth). Section 232 having been engaged, however, there is ample scope for the court to make whichever order it sees fit under s 233. Indeed, the relief is, by the opening words of s 233 of the *Corporations Act* 2001 (Cth), a matter of the discretion of the court not the election of the parties. Once oppressive conduct is demonstrated the powers conferred on the court by the *Corporations Act* 2001 (Cth) are plenary in nature, granting flexibility to fashion an order to meet the circumstances of a particular case.

[107] In the circumstances the defendants submitted that a better order, in the events that have transpired, is a compulsory buy out order pursuant to subs 233(1)(d). The basic requirement of the valuation exercise, and consequent orders, in such a case is that it must be fair on the facts of the particular case.

[108] It was submitted that Shaykar had, by these proceedings, vindicated two entitlements:

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[14] *Alborn v Stephens* QSC at [40]-[63]; *Alborn v Stephens* QCA at [60]-[65].

- On the one hand, it had vindicated an entitlement to a declaration that it remains the beneficial owner of the Clontarf business. Mr Vincent at paragraph 2.7 and Table 3 of his first report (exhibit 2) and Table 3 of his second report (exhibit 6), values the Clontarf business at $103,000. There is, it was submitted, for the reasons already identified, no reason to think there is any actual profit to be accounted for by the Stephens interests in relation to the operation of the Clontarf business over the period.

- On the other hand Shaykar has also vindicated a right to its proportion of the Subway settlement which should be $200,000.

[109] It was submitted that the relations between the Alborn parties and the Stephens parties is at such a point that they cannot realistically work with each other anymore and it is undesirable that they continue to have separate interests in the one company.

[110] Further, it was submitted that the franchisors would be unlikely to accept the Alborn interests to run the Clontarf business, nor is there any reason to think that the Alborn interests would be any better ten years later at running the business they abandoned in 2000.

[111] Consequently, the defendants submitted, the position in relation to Shaykar could be summarised, and findings should be made, as follows:

> "(a) the shareholdings are controlled by two groups, the Stephens parties and the Alborn interests, who are plainly unable to agree on any matters of substance;
>
> (b) the shareholding of the Stephens parties was diluted for an unlawful purpose, viz the prosecuting of a claim with company funds that the company had no interest in and a claim by the company that plainly should never have been brought because there was no factual basis to do so;
>
> (c) the only assets of Shaykar are the Clontarf business and the entitlement to recoup its share of the Subway settlement from the Alborn parties;
>
> (d) there is no realistic reason to think that the Alborn interests or Shaykar (because of the differences between the Alborn interests and the Stephens interests) could or would be in a position to successfully run the Clontarf business;
>
> (e) on a practical level the return of the Clontarf business to Shaykar on the one hand, and the accounting by the Alborn parties of the Shaykar proportion of the Subway settlement on the other hand, involves each of those parties paying into Shaykar an asset that it has an entitlement to an interest in as a shareholder of Shaykar;
>
> (f) a buy out order on the terms set out below would do justice between the parties because it would involve the Stephens parties being entitled to keep an asset worth approximately $100,000 and the Alborn parties being relieved of the obligation of having to pay over

to $200,000, in circumstances where their shareholdings in Shaykar, prior to the impugned issue of shares, was 1/3 - 2/3. Further, such a result is, if anything, favourable to the Alborn interests as it does not give Shaykar any account for any part of the $500,000 of costs received under the Subway settlement and calculates the share of the damages amount in an at least neutral, if not generous, manner to the Alborn parties."

[112] In the circumstances the defendants submitted that the appropriate order is that there be a compulsory buy out order, for nominal consideration, on the following terms:

"(a) on the condition that Shaykar release the Alborn parties from any claim in relation to the Subway settlement; and

(b) on the further condition that Shaykar transfer the Clontarf business to the Stephens parties, or their nominee;

(c) Mr and Mrs Stephens transfer all of their shares in Shaykar to Mr Alborn, or his nominee."

[113] The defendants submitted this would fairly reflect the success that will ultimately come to pass on either side and adjust appropriately according to the rights of the parties.

[114] In light of the findings urged above, and submissions in aid of them, the defendants submitted that the formal substantive orders should be as follows:

"1. A declaration that Shaykar Pty Ltd is the beneficial owner of the Clontarf Subway and Baskin & Robins business and associated franchises.

2. An order pursuant to s 232 (1) (d) of the *Corporations Act* that for the consideration of $1:

(a) on the condition that Shaykar release the Alborn parties from any claim in relation to the Subway settlement; and

(b) on the further condition that Shaykar transfer the Clontarf business to the Stephens parties, or their nominee;

(c) Mr and Mrs Stephens transfer all of their shares in Shaykar to Mr Alborn, or his nominee.

3. The claim and counter-claim otherwise be dismissed."

Discussion

[115] In the circumstances it was, as the defendants submitted, oppressive conduct to cause Shaykar to raise capital, one of the purposes of which was to bring a claim which was completely lacking in merit against one of its shareholders.

[116] The application of company funds to prosecute the claims of some of the persons interested in the company against other persons interested in the company is oppressive on the basis that it "is unfair and infringes the basal principle that 'the powers, and the funds, of a company may be used only for the purposes of the company'": *Re D G Brims and Sons Pty Ltd*.[15]

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[15] [1995] QSC 53 at 53 per Byrne J; see also *Advance Bank Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 at 493; *ANZ Executors & Trustee Company Limited v Qintex Australia Limited* [1991] 2 Qd R 360 at 370.

[117] Consequently, it was oppressive conduct to raise capital for Shaykar for it to litigate not only claims it had an interest in, but also claims that it plainly did not have an interest in, but rather only Mr Alborn or Alborn Family Corporation had such an interest in, or in which it had no legitimate interest as they had no realistic prospect of success, such as the claims in respect of the Morayfield, Kallangur and Bribie Island franchises.

[118] The oppressive nature of that conduct is underscored by the fact that had Mr Alborn not failed to take into account Shaykar's interests in relation to the Subway settlement in 2007, Shaykar would have had its own funds to litigate a claim for the return of the Clontarf business at the time it raised further capital in 2008. As a result the capital raising was unnecessary.

[119] In those circumstances the statutory requirements of s 232 of the *Corporations Act* 2001 (Cth) set out below are made out. Section 232 provides:

> "**Grounds for Court order**
>
> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or
>
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
>
> is either:
>
> (d) contrary to the interests of the members as a whole; or
>
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity."

[120] Section 233 provides:

> "**Orders the Court can make**
>
> (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
>
> (a) that the company be wound up;
>
> (b) that the company's existing constitution be modified or repealed;
>
> (c) regulating the conduct of the company's affairs in the future;
>
> (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
>
> (e) for the purchase of shares with an appropriate reduction of the company's share capital;
>
> (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
>
> (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
>
> (h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

Order that the company be wound up

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:

(a) as if the order were made under section 461; and

(b) with such changes as are necessary.

Order altering constitution

(3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make such a change or repeal; or

(b) the company first obtains the leave of the Court."

[121] As part of the account of profits, Shaykar would ordinarily be entitled to the reconveyance of the Clontarf business to it or the value of the Clontarf business at the date of this order. However, the stores are run as franchises and there is no evidence to suggest that DAI or SSA would accept Shaykar (or Mr Alborn or any company nominated by him) as the franchisee to own and operate the Clontarf business. The increase in the capital value of the stores from the time AS&L and Mr and Mrs Stephens took over the business is, in my view, entirely attributable to the defendants' skill and expertise so the increase in value should be deducted from the present value to fairly represent the loss suffered by Shaykar. Shaykar is therefore entitled to the market value of the Clontarf business at the date it was taken over by AS&L being 14 August 2000. The Clontarf business should then be transferred to a company nominated by the franchisees, Mr and Mrs Stephens. Shaykar should be wound up pursuant to s 233(1)(a) of the *Corporations Act* 2001 (Cth).

[122] If there is any excess owing to Shaykar after the account of profits is taken, it should be used to repay the initial loans made to it by its shareholders with the exception of the loan of $40,000 made by Mr and Mrs Stephens as trustees for the Stephens Family Trust, the forgiveness of which was part of the consideration for the Morayfield Management Agreement. No provision for interest was made with regard to those loans. No interest rate should be implied.

Orders

1. The court declares that the third plaintiff is and has been the beneficial owner of the Clontarf Subway business and associated franchise and the Clontarf Baskin & Robbins business and associated franchise ("the Clontarf business").
2. The court declares that the third plaintiff is entitled to an account of profits of the Clontarf business from 14 August 2000 to the date of this order, 18 November 2011.
3. Mr Paul Vincent is appointed as Special Referee to take the account, in accordance with these reasons, pursuant to sub-rule 501(1)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). In accordance with sub-rules 502(1) and (3) of the

UCPR, it is directed that the Special Referee not hold a trial, but make such inquiries as he thinks fit to decide the questions in issue. Without limiting the generality of the preceding order, it is directed pursuant to sub-rule 502(1) of the UCPR that the Special Referee:

(a) may require the parties, or any of them, to furnish to him such documents and information as he thinks fit;

(b) may receive written submissions from the parties, in such manner as he thinks fit;

(c) may inform himself of any other fact, matter or circumstance, in such manner as he thinks fit;

(d) shall make such allowance for the personal exertions of the first and second defendants as he thinks fit (so long as it is consistent with these reasons); and

(e) shall not be bound by books of account and records to the extent that he considers them to be erroneous or unreliable.

4. In accordance with rule 506 of the UCPR, the remuneration of the special referee be on such basis as the parties may agree with the Special Referee in writing or, in default of such agreement, as may be fixed by the Registrar of this court.

5. The account of profits should be calculated by Mr Vincent in accordance with these reasons and the following principles:

(a) Shaykar is entitled to an account of the profits made by AS&L in respect of the Clontarf business from 14 August 2000 until the date of this order, 18 November 2011;

(b) Shaykar is entitled to the market value of the Clontarf business from AS&L as at 14 August 2000;

(c) From the sums referred to in 5(a) and (b) should be deducted:

(i) the cost of the unpaid labour contributed by Mr and Mrs Stephens from 14 August 2000 to 18 November 2011;

(ii) the proportion of the Subway settlement attributable to the loss claimed by Shaykar in respect of the Clontarf business, in the sum of $100,000.

(d) Mr Alborn should account to Shaykar for the proportion of the Subway settlement attributable to the loss claimed by Shaykar in respect of the Morayfield business, in the sum of $100,000, but only in so far as it acts as a set-off against any amount otherwise owing to Shaykar once the account of profits has been taken.

6. After the account is taken, any surplus remaining should be used to repay any outstanding loans made to Shaykar by its shareholders, as set out in [122] of these reasons for judgment;

7. Upon payment of any amount owing by AS&L to Shaykar after the account is taken, the Clontarf business should be transferred to a nominee of the franchisees, Mr and Mrs Stephens.

8. Once the steps set out in this order have been completed, Shaykar should be wound up.

9. The claim and counter-claim is otherwise dismissed.

10. I shall hear submissions on the appropriate form of order and costs.