SUPREME COURT OF QUEENSLAND

CITATION:	*Dawnlite Pty Ltd v Riverwalk Realty Pty Ltd & Ors* [2013] QSC 243
PARTIES:	**DAWNLITE PTY LTD (ACN 010 647 677)** **(plaintiff)** **v** **RIVERWALK REALTY PTY LIMITED (ACN 002 606 000)** **(1st defendant)** **AND** **ELDSURE PTY LTD (ACN 071 335 861)** **(2nd defendant)** **AND** **SAMEL HOLDINGS PTY LTD (ACN 114 423 755)** **(3rd defendant)** **AND** **INTEGRATED ASSET MANAGEMENT (QUEENSLAND) PTY LTD (ACN 117 065 264)** **(4th defendant)** **AND** **BROADBEACH RENTAL MANAGEMENT PTY LTD (ACN 075 025 900)** **(5th defendant)** **AND** **NRGC MERMAID BEACH PTY LTD (ACN 122 398 396)** **(6th defendant)** **AND** **NRGC COMMERCIAL PTY LTD (ACN 122 398 396)** **(7th defendant)** **AND** **NRGC REAL ESTATE GROUP PTY LTD (ACN 122 593 177)** **(8th defendant)** **AND** **TREVOR IAN MILLS** **(9th defendant)** **AND**

GLENN DAVID MILLS
(10th defendant)

AND

WANTANA PTY LTD (ACN 001 653 612)
(11th defendant)

AND

LYNNE ROBYN YALDWYN
(12th defendant)

AND

PHILIP JOHN L NICOLSON
(13th defendant)

AND

DAVID WILLIAM SOMMERVILLE
(14th defendant)

AND

ADAM JEREMY GAITER
(15th defendant)

AND

CHRISTOPHER JAMES HOLT
(16th defendant)

AND

TOHL PTY LTD (ACN 106 015 221)
(17th defendant)

AND

DAVID MILLS
(18th defendant)

AND

JARED KARL HODGE
(19th defendant)

AND

KIMBA EQUITY INVESTMENTS PTY LTD (ACN 101 847 198)
(20th defendant)

AND

MATTHEW GERARD STEINHOUR
(21st defendant)

FILE NO:	BS 8735 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	12 September 2013
DELIVERED AT:	Brisbane
HEARING DATES:	25- 28 February, 1, 4, 6 March 2013 Supplementary written submissions 7, 11 March 2013
JUDGE:	Justice Margaret Wilson
ORDER:	**1. Claim dismissed.** **2. Leave to the parties to make written submissions as to costs – the defendants' submissions to be provided by 4pm on 17 September 2013 and the plaintiff's submissions to be provided by 4pm on 19 September 2013.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where the plaintiff alleged that two oral agreements were made between it and the defendants – where the plaintiff alleged that the first agreement was for the plaintiff to provide $650,000 to be used to acquire two real estate businesses – where these businesses would in turn be consolidated with four existing real estate businesses owned or controlled by the defendants – where the plaintiff alleged that it would have an equity interest in the expanded group business reflecting the amount of its initial contribution – where the plaintiff alleged that under the first agreement, it would be paid the value of its initial contribution at the latest by 60 days after it gave notice of its requirement that that occur – where the plaintiff alleged that the second agreement was for the redemption and repayment of its investment by 30 June 2009 – where the defendants alleged that the first agreement was for the plaintiff to purchase two real estate businesses, with the mere possibility of merging with the four existing real estate businesses – where the defendants denied that the second agreement was made in the terms alleged by the plaintiff – where the merger was not effected – whether the plaintiff had proved that the first and second agreements were made in the terms alleged CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – AUTHORITY OF AGENTS – IN GENERAL – where the plaintiff alleged that the 9th defendant had the express or implied authority of the personal and corporate defendants to make the first agreement on their behalf – where the 9th defendant was a director of the each of the companies which ran the four initial group businesses –

whether the 9th defendant had implied authority to enter the agreement – whether the 9th defendant had ostensible authority – whether the defendants ratified the agreement

ESTOPPEL – GENERALLY – where the plaintiff alleged in the alternative that a series of representations in like terms to the alleged agreements were made by the defendants – whether the representations were made

County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193, cited
Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72, considered
Crowder v McAlister [1909] St R Qd 203, cited
Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 WLR 1213, cited
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, cited
Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd (1995) 7 BPR 14,551, cited
Helton v Allen (1940) 63 CLR 691, cited
Keighley, Maxsted & Co v Durant [1901] AC 240, cited
Lym International Pty Ltd v Marcolongo [2011] NSWCA, cited
Moore Park Gardens Management Pty Ltd v Chief Commissioner of State Revenue (2004) 56 ATR 155, cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, cited
Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1987) 8 NSWLR 270, cited
Watson v Foxman (1995) 49 NSWLR 315, considered
Watson v Swann (1862) 11 CB (NS) 756; 142 ER 993, cited
Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd [2011] 2 Qd R 582, cited

COUNSEL: PW Hackett, A Katsikalis for the plaintiff
VG Brennan for the defendants

SOLICITORS: Bernard Ponting & Co for the plaintiff
McMahon Clarke for the defendant

INDEX

MARGARET WILSON J:

INTRODUCTION

[1] This litigation arises out of an attempt to merge a number of real estate businesses which foundered in the wake of the severe downturn in the market which followed the Global Financial Crisis ("GFC").

[2] At all material times the plaintiff ("Dawnlite") was the trustee of the Bruce Adams Family Trust, of which Mr Bruce Adams and his wife Mrs Melinda Adams were beneficiaries. Mr and Mrs Adams were also the shareholders and directors of Dawnlite.

[3] The defendants were involved in various real estate businesses which carried on businesses as Elders franchises at material times. In the events relevant to this litigation, Mr (Trevor) Ian Mills ("Mr Ian Mills"), the ninth defendant, played a leading part.

[4] As the story began, there were four businesses carried on by one or more of the defendants – Elders Real Estate Ballina, Elders Real Estate Coolangatta/Tweed Heads, Elders Real Estate Palm Beach and Elders Real Estate Broadbeach (together referred to as "the Initial Group Businesses").

[5] Two further businesses were acquired with funds provided by the plaintiff, and they traded under the names Elders Commercial Gold Coast and Elders Mermaid Beach.

[6] There was an attempt to merge the original four businesses with the two new ones, and thereafter to acquire further businesses, all to be carried on under the umbrella of one company, NRGC Real Estate Group Pty Ltd, the eighth defendant.

[7] The plaintiff's claim is essentially for recovery of approximately $710,000 which it invested in the failed project, together with interest. Its claim has been formulated in contract and alternatively in estoppel.

[8] The plaintiff alleges two oral agreements– an agreement reached by Mr Adams and Mr Mills at the end of a car tour in about October 2006 for it to invest in four existing real estate businesses and ones that were subsequently acquired ("the First Agreement"), and an agreement reached at an executive committee meeting on 16 July 2008 for the redemption and repayment of its investment of $700,000.00 ("the Second Agreement").

[9] The plaintiff's estoppel case relies on a series of alleged representations in like terms to the alleged contracts.

[10] It seeks relief against Mr Mills, a large number of other natural persons, and a number of corporate entities.

[11] Counsel for the defendants accepted that at all material times Mr Adams spoke and acted on behalf of Dawnlite. On the other hand, Mr Mills' authority to bind the defendants, or at least the defendants who were natural persons, was disputed.

[12] The outcome of the case depends largely on credibility.

BACKGROUND

The plaintiff

[13] Mr Adams commenced working in the real estate industry in 1980.

[14] From December 1989 to November 2005 Dawnlite owned and ran a real estate business on the Gold Coast known as The Professionals Palm Beach. By a contract made in about October 2005 it sold that business to Samel Holdings Pty Ltd, the third defendant ("Samel"). Upon completion of the contract on 1 November 2005, Samel carried on the business as Elders Palm Beach. The vendor Dawnlite was subject to a restraint of trade for three years.

The Ballina business

[15] The first defendant Riverwalk Realty Pty Ltd ("Riverwalk"), as trustee for the Riverwalk Realty Unit Trust, carried on business in and around Ballina in northern New South Wales, under the name Elders Real Estate Ballina. Its directors were Mr Ian Mills (the ninth defendant), his brother Mr Glenn Mills (the tenth defendant), Ms Lynne Yaldwyn (the twelfth defendant), Mr (Philip) John Nicolson (the thirteenth defendant) and Mr David Sommerville (the fourteenth defendant).

[16] The directors of Riverwalk were in turn associated with various trusts on whose behalf the units in the Riverwalk Realty Unit Trust were ultimately held. In this regard, the plaintiff alleged, and the defendants did not admit, that those units were "ultimately owned and/or controlled" by Messrs Ian and Glenn Mills (the ninth and tenth defendants) in some undefined way through Wantana Pty Ltd (the eleventh defendant) which was the trustee of the Mills Family Settlement; Ms Yaldwyn; Mr Nicolson; Mr Sommerville; Mr Adam Gaiter (the fifteenth defendant) and Mr Shawn Bishop (the sixteenth defendant).

The Coolangatta/Tweed Heads business

[17] The second defendant Eldsure Pty Ltd ("Eldsure"), as trustee for the Riverwalk Realty Coolangatta Unit Trust, carried on business as Elders Real Estate Coolangatta/Tweed Heads. Its directors were Mr Ian Mills, Mr Glenn Mills, Ms Yaldwyn, Mr Ian Mills' son Mr David Mills (the nineteenth defendant), Mr Ian Mills' son-in-law Mr Christopher Holt (the seventeenth defendant) and, until 3 January 2006, Ms Melissa Young.

[18] The plaintiff alleged, and the defendants did not admit, that the units in the Riverwalk Realty Coolangatta Unit Trust were "ultimately owned and/or controlled" by Riverwalk as trustee for the Riverwalk Realty Unit Trust, Messrs Ian and Glenn Mills, Mr Holt (perhaps, in some undefined way, through Tohl Pty Ltd, the eighteenth defendant), Mr David Mills and the twentieth defendant Mr Jared Hodge (perhaps, in some undefined way, through the twenty-first defendant Kimba Equity Investments Pty Ltd).

The Palm Beach business

[19] The third defendant Samel Holdings Pty Ltd ("Samel"), as trustee for the Riverwalk Realty Coolangatta Unit Trust, acquired the Palm Beach business from the plaintiff. Its directors were Mr Ian Mills (until 20 December 2011), Mr David Mills (from 9 May 2007 to 2 March 2009), Mr Cameron Davis (until 23 August 2006), Mr Ryan Gaiter (from 2 March 2009 to 13 August 2010), and Mr Glenn Mills (from 13 August 2010 to 6 December 2012).

The Broadbeach business

[20] The Broadbeach business was carried on by the fifth defendant Broadbeach Rental Management Pty Ltd ("Broadbeach Rental"), all of whose shares were owned by the fourth defendant Integrated Asset Management (Queensland) Pty Ltd ("Integrated"). Riverwalk held 70% of the shares in Integrated, and Fourtwosixfoot Pty Ltd held the remaining 30%.

[21] Mr Ian Mills and the twenty-second defendant Mr Steinhour were directors of Broadbeach Rental and Integrated until 20 December 2011. Mr Ryan Gaiter was a director of Broadbeach Rental between 27 February 2009 and 13 August 2010, and Mr Glenn Mills was a director of both companies between 20 December 2011 and 6 December 2012. Mr David Mills, Mr Nicolson and Ms Yaldwyn have been directors of both companies since 20 December 2011.

[22] The plaintiff alleged, and the defendants denied, that Integrated held the Broadbeach business on trust for the Riverwalk Realty Unit Trust and Mr Steinhour.

Opportunities to invest

[23] Mr Mills promoted opportunities to invest in the Elders businesses. According to Mr Mark Jensen, who was a sales person at the Palm Beach office when the plaintiff was its proprietor, prior to the completion of Samel's acquisition of the Palm Beach business in November 2005, there was a gathering at the Wallaby Hotel at Mudgeeraba of "our whole sales team at the time" – Mr Ian Mills, Mr Glenn Mills, possibly Mr David Mills, Mr Graeme Roberts, Mr Des Mulvey, Mr Chris Holt and Mr Cameron Davies.

> *"Could you tell her Honour what was discussed or what you were told at that meeting?-- They said they had a really good - good company, that had a good culture and good team environment and that it was that good that you can actually invest in the company if you - it was your choice. If you wanted to invest in the company that you could invest.*

> *Were you told anything about their business at that point in time?-- They actually explained to me that they own the Elders business at Ballina and the Elders business at Tweed Heads.*
>
> *Now, was that the extent of the discussions on that occasion about investing in their business?-- Yes."*[1]

[24] Mr Jensen said that over the six month period after the business was purchased, Mr Mills mentioned on probably two or three occasions that it was a good company to work with and that it would be a good opportunity to invest money in it. He said that Mr Mills used to travel around the offices and discuss these matters privately.

[25] In the second or third quarter of 2006 Mr Mills and his wife had dinner with Mr Jensen and his wife at Oskars Restaurant at Burleigh Heads.

> *"Do you recollect what, if anything, you were told by Mr Mills at the Oscars[sic] meeting about investing in the business?-- Ian actually said that night that the business down in Ballina on a good year would return between 20 and 25 per cent each - in a good market and those profits would be shared with the people that actually owned part of the company and became registered shareholders.*
>
> *Do you recall anything else in particular about that meeting and investing in the business?-- He actually said it's probably never been a better time to invest in the company because they'd written a lot of - they'd written a lot of profit or they'd had a lot of write-offs - write-off a lot of losses at the time so it was a good time to invest in the company."*[2]

[26] Mr Jensen did not clarify what he meant by investing in 'the company", and Mr Mills said he could not remember whether they were speaking about just the Palm Beach business or the group [of four businesses].[3]

THE FIRST AGREEMENT

The First Agreement alleged by the plaintiff

[27] The plaintiff alleges that the following oral agreement was reached by Mr Mills and Mr Adams in or about late September 2006.

> Mr Mills agreed with Mr Adams (on behalf of the plaintiff Dawnlite) that in consideration of Dawnlite paying the amount of $650,000, reflecting the cost of acquiring the LJ Hooker Mermaid Beach and the Michael Lowing Real Estate businesses and some working capital in accordance with Mr Mills' direction ("Dawnlite's Contribution"):
>
> (a) Dawnlite's Contribution would be used to acquire the LJ Hooker Mermaid Beach and the Michael Lowing Real Estate businesses;
>
> (b) Those businesses would be consolidated with the Initial Group Businesses (Ballina, Coolangatta/Tweed Heads, Palm Beach and

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1 T 3-58.
2 T 3-59.
3 T 5-26 – 5-27.

Broadbeach) to create an expanded business ("the Expanded Group Business");

(c) Dawnlite would receive an equity interest in the Expanded Group Business reflecting the proportion of the total value of the Expanded Group Business represented by the amount of Dawnlite's Contribution ("Dawnlite's Initial Interest"); and

(d) Dawnlite would be paid the value of Dawnlite's Initial Interest, or in the alternative, the amount of Dawnlite's Contribution, at the latest by 60 days after Dawnlite gave notice of its requirement that that occur.[4]

The First Agreement alleged by the defendants

[28] The defendants concede that an oral agreement was reached between Mr Mills and Mr Adams in or about late 2006. Given their concession that at all material times Mr Adams spoke and acted on behalf of the plaintiff Dawnlite, they should be taken as conceding that an agreement was reached between Mr Mills and Dawnlite. They deny that the agreement was in the terms alleged by the plaintiff. They allege the agreement – which was reached in several conversations after the initial telephone conversations and the car tour – was in the following terms.

(a) Mr Adams would purchase;
  (i) the LJ Hooker Mermaid Beach business; and
  (ii) the Michael Lowing Real Estate business;
  ("the Adams Businesses")

(b) the Adams Businesses would be rebranded as Elders Real Estate businesses;

(c) Mr Adams and Mr Mills would form three companies ("the new companies") –
  (i) one to carry on the former LJ Hooker Mermaid Beach business;
  (ii) one to carry on the former Michael Lowing Real Estate business; and
  (iii) a third company which might be used as a holding company for the proposed merged businesses in the event that the other investors in the Initial Group Businesses agreed to the proposal to merge those businesses with the Adams Businesses into a single business.

(d) Mr Adams and Mr Mills would become:
  (i) the directors of the new companies; and
  (ii) the shareholders in the new companies;

(e) despite Mr Mills' proposed shareholding in the new companies, he would not have any beneficial interest in the Adams Businesses;

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[4] Third further amended statement of claim at para 18.

(f) in the event the other investors in the Original Group Businesses agreed to the merger proposal:
  (i) the Adams Businesses would form part of the Expanded Group Business; and
  (ii) Mr Adams would receive a shareholding in the Expanded Group Business represented by an issue of shares equivalent to the value of the purchase price paid for the Adams Businesses;

(g) unless and until the merger was carried into effect Mr Adams would manage the Adams Businesses;

(h) if the merger proposal was not carried into effect:
  (i) Mr Adams would continue managing the Adams Businesses;
  (ii) Mr Adams would be the sole beneficial owner of the Adams Businesses.[5]

Principal issues relating to the First Agreement

[29] The principal issues relating to the First Agreement are –

(a) Mr Mills' authority;

(b) what the plaintiff was to acquire in return for the Dawnlite's Contribution – an interest in the Expanded Group Business (as it alleged); or two stand alone businesses and, if those businesses were subsequently merged with the Initial Group Businesses, a proportionate ownership interest (by way of shareholding) in the Expanded Group Business (as the defendants alleged);

(c) the term alleged by the plaintiff that it would be paid the value of Dawnlite's Initial Interest, or in the alternative, the amount of Dawnlite's Contribution, at the latest by 60 days after it gave notice of its requirement that that occur;

(d) the admissibility of post-contractual conduct to determine the terms of the First Agreement.

Mr Adams contacts Mr Ian Mills

[30] By about September 2006, Mr Adams wanted to return to the real estate industry. He ascertained that a real estate business at West Burleigh which specialised in commercial properties, Michael Lowing Real Estate, was for sale. The initial list price was $500,000.00. He thought it was overpriced, but that it would be a good investment, at the right price.

[31] Mr Adams telephoned Mr Ian Mills to request a relaxation of the restraint of trade to allow him to re-enter the real estate industry, but only in the commercial industrial field. When he told Mr Mills that he was interested in acquiring the Michael Lowing business, Mr Mills said that the Elders Commercial franchise for

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5 Further amended defence at para 48.

the Gold Coast was available, and that they might be able to do something together. I accept Mr Adams' evidence that Mr Mills told him the LJ Hooker Mermaid Beach franchise was for sale.

[32] There were one or more further telephone conversations. They discussed the size of the Michael Lowing rent roll, the sales force, the premises, the lease and the asking price. Mr Adams said the asking price seemed a bit high, and he hoped he could acquire the business for less.

[33] Mr Mills suggested they might acquire and run the Michael Lowing business as a joint venture. Alternatively, it could be part of a planned group of businesses operating under an umbrella company and comprising the Initial Group Businesses and any future acquisitions. Mr Adams said he was not interested in a joint venture to carry on the Michael Lowing business as a stand alone business, but he was interested in exploring involvement in the group.

[34] Then in about October 2006 there was a car tour when Mr Mills and Mr Adams visited the offices at Ballina, Coolangatta, Palm Beach and Broadbeach.

The car tour

[35] Mr Mills picked up Mr Adams from his home at Palm Beach, and over the next four to five hours they visited the four offices – first Ballina, then Tweed Heads, followed by Broadbeach and Palm Beach. Mr Adams was impressed with the four offices.

[36] Mr Adams knew that the four businesses were run independently of one another. He knew that they were owned by different companies on behalf of trusts, and that through those companies and trusts Mr Mills had an interest in each. Mr Mills told him that the plan was to create a company to be called NRGC Real Estate Group, and that the existing businesses, together with future acquisitions, would be carried on under its umbrella. Mr Adams acknowledged in cross-examination that he knew that the merger was dependent on the agreement of all the shareholders, and that "it wasn't a certainty" that the companies or trusts would be rolled into one company.[6] Although he said a little later that it was his understanding that Mr Mills already had the agreement of all the shareholders, when he was asked what Mr Mills actually said in that regard, he could not do so, but instead responded in terms of an "indication…that the plan for the group was to create this parent company".[7]

[37] Mr Adams and Mr Mills were of similar age – Mr Adams approaching 58 and Mr Mills just 57. They discussed the proposed merger and how it would work. They discussed exit strategies – but their evidence of what Mr Mills said in this regard differed significantly.

[38] According to Mr Adams, he told Mr Mills that he did not know how long he would stay in the industry if he went ahead with investment in the group, and inquired what would happen if he wanted his money back. According to Mr Adams, Mr Mills replied –

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6 T 2-39.

7 T 2-40 – 2-41.

> *"No problem. All you've got to do is give us 30 to 60 days' notice and you [will/can] have your money back in full."*[8]

According to Mr Adams, Mr Mills said this as they went over Sexton's Hill at Banora Point, on their way to Ballina.

[39] Mr Mills said in his evidence in chief –

> *"We also talked about exit strategies for both of us because I think I'm a little bit younger than Bruce but very similar age and we discussed how - and I said, 'Well, because I'm a reasonably large shareholder, I don't believe I will be able to sell my shares straightaway, but I think with my family involved, I'd be quite happy to stay on as a passive shareholder by taking some more smaller role in the company'.*
>
> *Right. When you talk about exit strategies, what was said about exit strategies?-- Well, I said we'd only ever had one person want to sell their shares in our group before, and at the time we did have some cash and it was a $300,000 buy-back, which we did, but I said, 'When it comes the time', and I was thinking if it was going to be five to seven years time, 'If we give notice, we'll have to either have other existing shareholders take up their shares, remain passive shareholders or sell them to a third party'."*[9]

In cross-examination Mr Mills said that any talk of retirement was based around a retirement age of 65 or older, and that there was no discussion of a time frame for pay out from cash reserves. He denied that he said all Mr Adams had to do was to give 30 – 60 days' notice and he would get his money back in full.[10]

[40] According to Mr Adams, he told Mr Mills he thought the Michael Lowing business could be acquired for $375,000.00, and Mr Mills said he thought the LJ Hooker Mermaid Beach business could be bought for between $200,000.00 and $220,000.00. Mr Mills could not recall whether they discussed the possibility of purchasing the LJ Hooker Mermaid Beach business during the car trip or later. He knew it was available, as a few months earlier "one of [his] other partners who was a former LJ Hooker franchisee in Broadbeach" had told him it was for sale; they had looked into the possibility of purchasing it and decided not to do so.

[41] Nothing turns on precisely when the conversation about LJ Hooker Mermaid Beach occurred, as there was little difference in their evidence of its content. In any event, I accept Mr Adams evidence that they discussed it during the car tour.

[42] Mr Adams expressed the view that if they were to acquire a Gold Coast franchise, it should be located somewhere with a higher profile than an industrial estate in West Burleigh.

[43] They discussed what would be acquired if the Mermaid Beach business were purchased. It had a few rentals: using a multiplication factor of 3 for every dollar

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8 T 1-77 (examination in chief); T 2-43 (cross-examination).

9 T 4-49 – 4-50.

10 T 5-38.

generated, the rent roll was worth approximately $100,000.00. It had premises on the Gold Coast Highway which would provide the exposure they wanted. They would be paying an extra $100,000.00 - $120,000.00 for the lease and the location it would provide. The building had an upstairs section. They could move the commercial business (the Michael Lowing business) from West Burleigh to the Mermaid Beach premises, with the result that they would have only one rental commitment per month. They could combine the Mermaid Beach rent roll with the Elders Broadbeach rent roll and have it managed by Elders Broadbeach.

[44] They discussed the need to form new companies – one to acquire the Michael Lowing business and one to acquire the LJ Hooker Mermaid Beach business, in addition to the proposed umbrella company NRGC Real Estate Group.

[45] According to Mr Adams, when they arrived back at his place, they discussed the investment he might make. He said the following in his evidence in chief –

> *"We arrived back at my place, my home, and between Mr Mills and I we calculated that if I was to pay – sorry, if the Michael Lowing business was to be bought for $375,000, and the Hooker Mermaid Beach office was to be purchased – bought for $220,000, adding those two together, with a bit of working capital, that my investment would be in the vicinity of 6 to $650,000."*[11]
>
> *"But, of course, it was my understanding, it was quite clear really that what I would be doing is I would be putting my investment into NRGC Real Estate Group and then, that money would be dispersed out of that company to purchase these other two businesses."*[12]
>
> *"... I would get a percentage of the overall group that I would be investing my money in."*[13]
>
> *"...[Ian Mills] said to me that we would work out approximately what the value of the four businesses was and that it would represent around about 16 percent of the overall value of the NRGC Real Estate Group.*
>
> *And who was going to work that out, were you told? – But that was going to be put in the hands of the accountants, Emerson Randell Young."*[14]

He said that Mr Mills told him he would be made a director of the group – that he would run the commercial office and also assist in other offices, helping staff, property managers, finance, etc.[15]

[46] Mr Adams said that Mr Mills asked him what his thoughts were. He replied "I'm in," and asked where to place his money. Mr Mills replied that he would tell him

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11 T 1-81.
12 T 1-82.
13 T 1-82.
14 T 1-82.
15 T 1-83.

where to place his money, and that he would notify the accountants, who would handle setting up the companies.[16]

[47] In cross-examination, Mr Adams did not accept that the agreement he alleged was reached after the car tour. He gave this evidence of his understanding of what the agreement was about –

> *"Do you deny that the agreement was reached after the car tour in late 2006?-- What agreement?*
>
> *The agreement that you allege was between you and everybody else who is a defendant in this proceeding, or Mr Mills?- The agreement, as I saw it, was between Mr Mills and I that I would invest $650,000 into a company known as NRGC Real Estate Group.*
>
> *And you knew at that stage that that company did not exist?-- Of course. Because Mr Mills said to me that he would go ahead, instruct his accountants to draw up or incorporate the necessary companies."*[17]

[48] Mr Mills could not remember dropping Mr Adams back at his place, but he accepted that he must have done so.

[49] His evidence (in chief and in cross-examination) was that Mr Adams said he had $600,000.00 or $650,000.00 to buy the two businesses (Michael Lowing and LJ Hooker Mermaid Beach). They talked about the proposed merger, but that was going to take some time. Mr Mills suggested that two new companies be formed. Mr Mills would take some shares in the new companies to protect the Elders name. Mr Adams would lend money to the new companies, which would purchase the businesses. Mr Adams would not be acquiring an interest in the existing businesses, but if the merger went ahead, he would acquire an interest in the merged business, and would become a director of the umbrella company.[18] He said the discussion took place late in 2006, after the car tour.[19]

Mr Mills' authority

[50] In the statement of claim the plaintiff alleged that Mr Mills had the express or implied authority of the other personal defendants and Riverwalk, Eldsure, Samel, Integrated and Broadbeach Rental to enter into the First Agreement (and the Representations) on their behalf.[20]

[51] There was no evidence from which it could be inferred that the corporate defendants which ran the Initial Group Businesses authorised Mr Mills to enter the First Agreement in the terms alleged by the plaintiff. It could not be inferred from the mere fact that Mr Mills was a director of each of those corporate defendants that he had their actual authority to make the First Agreement on their behalf in the terms alleged by the plaintiff.

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16 T 1-83.
17 T 3-33.
18 T 4-51, 5-45 – 5-46.
19 T 5-46.
20 Third further amended statement of claim at para 20.

[52] The plaintiff alleged, and the defendants denied, that the Initial Group Businesses were carried on as a single business with Mr Mills as managing director. The evidence really established no more than that Mr Mills had an interest in and took a very active role in the running and promotion of all of the Initial Group Businesses, that he was on the look out for investment opportunities and potential investors, and that he was keen to see those businesses merge. However, at the time of the car tour, the Initial Group Businesses were still being conducted as discrete businesses, and their merger was then no more than a possibility, contingent on the agreement of those who ran and controlled them. Mr Mills was neither legally nor de facto the managing director of one composite business. He did not have authority to enter into the First Agreement on behalf of the Initial Group Businesses in the terms alleged by the plaintiff.

[53] There was no evidence that Mr Mills had the express authority of the other personal defendants to enter into the First Agreement. None of the defendants' witnesses was directly asked whether Mr Mills had authority to contract with Mr Adams on any basis. None of them said that he had such authority. Nor, in my view, was there evidence from which implied actual authority could be inferred.

[54] Mr Adams knew that the Broadbeach business was owned by Samel. Mr Mills told him that the Ballina business was owned by Riverwalk, that the Coolangatta/Tweed Heads business was owned by Eldsure, and that the Broadbeach business was owned by Integrated.[21] Mr Mills told him that he had an interest in each of those businesses, and that each of the businesses was "owned" by a number of people "through companies and trusts".[22] Mr Mills told him that several members of his family had invested in some of those businesses.[23] That is not evidence that the Initial Group Businesses were respectively "ultimately owned and controlled" by the personal defendants. Mr Mills may have told Mr Adams that he had already spoken with those people about the proposed merger,[24] but I am not satisfied that they had already agreed to it or that Mr Mills told Mr Adams they had done so.[25]

[55] Ostensible authority was not pleaded, although counsel for the plaintiff relied on it in submissions.

[56] Ostensible authority depends on a representation by the principal to a third party that the agent has the authority of the principal to enter into a transaction with the third party on the principal's behalf.[26] Where the principal is a company and the putative agent is an officer of the company, it is not enough that the representation comes from the officer: the source of the representation must be the company itself. In *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* Gibbs, Mason and Jacobs JJ said –[27]

> *"There are circumstances where the actual representation of authority may be made by the agent but in such cases it will be found*

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21 T 1-79.

22 T 2-39.

23 Third further amended statement of claim at para 17(b)(i); further amended defence at para 40(a).

24 T 2-39.

25 See para [36] above.

26 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503 per Diplock LJ.

27 (1975) 133 CLR 72 at 78. See also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 466 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

> *that the relevant representation is made by the principal (or by the person to whom the principal has given actual authority) either by a previous course of dealing or by putting the agent in a position or by allowing him to act in a position from which it can be inferred that his actual representation of authority in himself is in fact correct. It is therefore always necessary to look at the conduct of the principal (or the person to whom he has actually delegated authority).”*

[57] There was no evidence that the corporate defendants or the personal defendants held out Mr Mills as having authority to make the First Agreement on their behalf in the terms alleged by the plaintiff.

Admissibility of post-agreement conduct

[58] It was common ground that Mr Adams on behalf of the plaintiff and Mr Mills reached an agreement in or about late 2006, and that it was oral. They disagreed as to its terms. Whether they reached agreement in the terms alleged by the plaintiff is a question of fact.

[59] Evidence of post contractual conduct is relevant to whether they intended to form a binding agreement,[28] what they agreed and whether what they agreed was subsequently varied.[29] Post contractual conduct forms a basis for inferring what was agreed, as opposed to the meaning of what was agreed.[30]

Formation of companies

[60] NRGC Commercial Pty Ltd was incorporated on 26 October 2006. Two ordinary shares were issued – one to Dawnlite and the other to Mr Mills. The initial directors were Mr Adams and Mr Mills.

[61] NRGC Real Estate Group Pty Ltd was incorporated on 9 November 2006. Two redeemable preference shares were issued – one to Mr Adams and one to Mr Mills. The initial directors were Mr Adams and Mr Mills.

[62] NRGC Mermaid Beach Pty Ltd was also incorporated on 9 November 2006. One thousand ordinary shares were issued to NRGC Real Estate Group Pty Ltd. The initial directors were Mr Adams and Mr Mills.

Purchase of the Mermaid Beach business

[63] Mr Mills conducted the initial negotiations for the purchase of the LJ Hooker Mermaid Beach business, and asked Mr Adams to finalise them.

[64] Pursuant to a contract dated 18 November 2006, NRGC Mermaid Beach Pty Ltd purchased the business from Real Estate Network (Qld) Pty Ltd (which was controlled by Messrs Rossiter and Besanko) for $200,000.00.

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28 *Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd* [2011] 2 Qd R 582 at 596; *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551 at 14,562.

29 *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [17], [20], [21] – [25] per Spigelman CJ; *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 at [139], [143] per Campbell JA.

30 *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213 at 1229 per Browne LJ.

[65] Mr Adams had had previous dealings with a firm of solicitors McDonald Balanda & Associates. After consultation with Mr Mills, he arranged for them to handle the purchase. He arranged finance by the Bank of Queensland, with which Dawnlite had an established, amicable relationship.

[66] The deposit of $10,000.00 was paid to the vendor's solicitors' trust account by cheque drawn on Dawnlite's account with the Bank of Queensland. Mr Adams said in his evidence in chief -

> *"I thought at the time that maybe my funds should have been put into the company that we had opened, NRGC Real Estate Group, and then the funds should have gone from there to [the vendor's solicitors] but as things were sailing along reasonably comfortably, I did as Ian Mills instructed me to."*[31]

[67] Settlement took place on 15 December 2006.

[68] Mr Adams said the balance of the purchase moneys was paid to the same trust account out of a loan account set up by Dawnlite on instructions from Mr Mills. The amount actually paid at settlement reflected an adjustment on account of not all rent accounts being transferred to the purchaser.

[69] After settlement, the business was rebadged as Elders Mermaid Beach. The rent roll of 36 – 40 properties was immediately transferred to the Elders Broadbeach business.

Purchase of the Commercial business

[70] Mr Adams conducted all of the negotiations for the purchase of the Michael Lowing business.

[71] Pursuant to a contract dated 12 December 2006, NRGC Commercial Pty Ltd purchased the business from Michael Manning Lowing for $375,000.00. McDonald Balanda & Associates acted for the purchaser.

[72] Dawnlite paid the deposit and the balance of the purchase moneys into the vendor's solicitors' trust account – according to Mr Adams, on instructions from Mr Mills. The following exchange occurred between the defendants' counsel and Mr Adams in cross-examination –

> *"And at that stage, when you made those payments, you knew that there wasn't a single group under the parent - under the umbrella that you described before, didn't you? You knew that?-- I knew that it wasn't a - the one company but that was in the process of being organised by Mr Mills.*
>
> *And, once again, at that stage you knew that, notwithstanding the fact that it was in the process of being organised, there was a possibility that that might not occur?-- No. The discussion between Mr Mills and I was - the arrangement was that I was to look after the purchase of the businesses and he was to look after the incorporation of the three businesses - three companies."*[32]

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31 T 1-84.

32 T 2-51.

[73] After settlement on or about 1 February 2007, some moneys were refunded to the plaintiff because its bank had mistakenly made an overpayment. Relevant correspondence was sent to Mr Adams' personal post office box.

[74] The business was rebadged as Elders Commercial Gold Coast ("Commercial"). It continued to be conducted from the premises at West Burleigh formerly occupied by Michael Lowing – a decision made by Mr Mills and Mr Adams in response to staff counselling against the proposed move to Mermaid Beach.

[75] Mr Adams acted as manager of the Commercial business, and Mr Mills called in regularly to monitor progress.

Employment of Ryan Gaiter as financial controller

[76] In approximately mid February 2007 Mr Ryan Gaiter (a brother of the fifteenth defendant) was employed by Riverwalk (the Ballina company) as financial controller. There were then six offices – Ballina, Coolangatta/Tweed Heads, Palm Beach, Broadbeach, Mermaid Beach and Commercial. He continued to be employed by Riverwalk at all material times, although he did work for all the offices.

Meeting at The Glades 3 March 2007

[77] There was a meeting, chaired by Mr David Mills, at The Glades Golf Club at Robina on 3 March 2007 when the proposal to merge the Initial Group Businesses and the Mermaid Beach and Commercial businesses under an umbrella company was discussed. No formal minutes were taken.

[78] Mr Ian Mills gave evidence of the purpose of the meeting –

> *"Okay. The - what - what was the purpose of The Glades meeting?-- It was to get agreement in principle from all the shareholders to push forward.*
>
> *Okay. When you say 'push forward', what do you mean by 'push forward'?-- To formalise the rolling in of the various assets in various companies into the one umbrella company, NRGC Real Estate Group Proprietary Limited."*[33]

[79] Each of the personal defendants and Mr Adams attended the meeting. Mr Jensen attended on the invitation of Mr Ian Mills, although he was not an investor. Mr Ryan Gaiter was in attendance. Either shortly before or at the meeting, they were all provided with a series of documents prepared by the accountants Emerson Randell Young reflecting the proposed structure and the interests of the various investors.

[80] The first document was headed *NRGC Real Estate Group Pty Ltd Summary of Share Allocations*. A value was assigned to the investments of the operators of the various businesses based on 30 June 2006 balance sheet valuations and including acquisitions after that date. Adjustments were made to remove inter-entity investments, and share allocations were made reflecting proportions of the total adjusted valuation.

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33 T 4-57.

NRGC Real Estate Group Pty Ltd
Summary of Share Allocations
Based on 30 June 2006 Balance Sheet Valuations & Including Acquisitions Post That Date

		RRUT	RRCUT	Samel	B/Beach	CWI	MB/Com		
Net Assets		2,489,903	1,432,545	209,414	842,918	0	700,000	5,674,780	
Mills Family Settlement	368.00	60.70%	7.27%						
Yaldwyn	69.00	11.38%	7.27%						
Nicolson	102.25	16.87%							
Sommerville	23.00	3.79%							
Gaiter	22.00	3.63%							
Bishop	22.00-	3.63%							
TOHL			10.00%						
D&A Mills			10.00%						
Kimba			7.27%						
Adams							100.00%		
Steinhour					31.03%				
	606.25	**100.00%**	**34.55%**	**0.00%**	**31.03%**	**0.00%**	**100.00%**		
RRUT			65.45%		68.97%				
RRCUT				100.00%		100.00%			
		100%	100.00%	100.00%	100.00%	100.00%	100.00%		
Adjusted Net Assets (After removal of inter-entity)		2,489,903	494,878	0	261,561	0	700,000	3,946,342	
Total Shares to be issued		3,946,342							
Allocation %		63.09%	12.54%	0.00%	6.63%	0.00%	17.74%		
Allocation shares		2,489,903	494,878	0	261,561	0	700,000	3,946,342	
Shares allocated to:									
									% of NRGC
Mills Family Settlement		1,511,397	104,185	0	0	0	0	1,615,581	40.94%
Yaldwyn		283,387	0	0	0	0	0	283,387	7.18%
Nicolson		419,947	0	0	0	0	0	419,947	10.64%
Sommerville		94,462	0	0	0	0	0	94,462	2.39%
Gaiter		90,355	0	0	0	0	0	90,355	2.29%
Bishop		90,355	0	0	0	0	0	90,355	2.29%
TOHL		0	143,255	0	0	0	0	143,255	3.63%
D&A Mills		0	143,255	0	0	0	0	143,255	3.63%
Kimba		0	104,185	0	0	0	0	104,185	2.64%
Adams		0	0	0	0	0	700,000	700,000	17.74%
Steinhour		0	0	0	261,561	0	0	261,561	6.63%
		2,489,903	**494,878**	**0**	**261,561**	**0**	**700,000**	**3,946,342**	**100.00%**

The value assigned to Mermaid Beach/Commercial was $700,000.00, and the plaintiff's shareholding, which was shown against Mr Adams' name, was 700,000 shares or 17.74% of the shares to be issued. At that stage, the plaintiff had agreed to provide only $650,000.00. (The amount actually provided was a little less, on account of adjustments made on settlement of the purchases of Mermaid Beach and Commercial.) In cross-examination Mr Adams claimed not to have been aware that the document showed $700,000.00, and said the accountants' figures may have been wrong.[34]

[34] T 2-70.

[81] In another document headed *NRGC Real Estate Group Pty Ltd Summary of Shareholder Assets/Investments Post Merger* based also on the 30 June 2006 balance sheet valuations and including acquisitions after that date, the value of assets shown against Mr Adams' name was $600,000.00 or 15.6% of the total.

[82] Mr Mills raised the possibility of introducing further investors, and told those in attendance that they should all be on the lookout for new investors. Mr Adams understood that "his" (ie the plaintiff's) percentage shareholding in the group reflected the net assets in NRGC Commercial Pty Ltd and NRGC Mermaid Beach Pty Ltd. He did not seem concerned that the introduction of further investors would dilute "his" (ie the plaintiff's) percentage shareholding.[35]

[83] The proposal was discussed, and it was agreed in principle that the merger should proceed. No vote was taken, but there was no demur, and all the attendees who gave evidence agreed that such a decision was made. It was also decided that there should be an Executive Committee comprised of two people from each office to oversee the merger and to run the business until the formal structure was in place.

[84] The Executive Committee was formed either at or soon after the meeting at The Glades. Its membership varied over time but –

(a) from March 2007 it included all the personal defendants apart from Mr Sommerville and Mr Bishop;[36]
(b) from March 2007 to January 2009 it included Mr Adams; and
(c) from about July 2008, it did not include Mr Steinhour.

Ratification of the First Agreement?

[85] The plaintiff alleged that the personal defendants and the Original Group Companies ratified the First Agreement (and the Representations) and thereby Mr Mills' authority to make them. In submissions, counsel for the plaintiff argued that the ratification took place at the meeting at The Glades on 3 March 2007[37] (although in the statement of claim the plaintiff relied on a wider set of the facts, matters and circumstances).[38]

[86] However, as counsel for the defendants submitted, the only decisions made at that meeting were that, in principle, the merger should proceed, and that an Executive Committee be formed to oversee the merger and to run the businesses in the meantime. No-one expressly ratified the First Agreement in the terms alleged by the plaintiff (whether on his own behalf or on behalf of one or more of the Original Group Companies). Ratification of an agreement in those terms could not be inferred from the decisions actually made.

[87] On the plaintiff's case, Mr Adams knew no more than the identities of the companies which ran the Initial Group Businesses, and that those businesses were ultimately owned and controlled by a number of people. He did not know the identities of all the personal defendants: at most he knew the identities of a small

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35 T 2-68 – 2-69.

36 Mr Jensen was a member of the Executive Committee from its formation, which was before he became an investor: T 3-70.

37 Plaintiff's outline of submissions para 38.

38 Third further amended statement of claim para 20(d).

number them (through the sale of the Palm Beach business to Samel and what Mr Mills told him).

[88] If Mr Mills was acting on their behalf, he was acting on behalf of unidentified principals, not undisclosed principals. The distinction is important, because the doctrine of ratification does not apply to undisclosed principals.[39]

[89] But unless Mr Mills professed to be acting on the behalf of the putative principals[40] and unless those principals were ascertainable by the plaintiff when the agreement was made, the doctrine of ratification could not operate.[41] Neither of those requirements was proved to have been satisfied in this case. Of course, unless the plaintiff established that the first agreement was made in the terms alleged, the question of ratification would not arise.

The conduct of the business between The Glades meeting and the Executive Committee meeting on 16 July 2008

[90] The businesses were never legally consolidated, and the proposed shareholdings in NRGC Real Estate Group Pty Ltd were never issued. The funds Dawnlite had provided for the acquisition of the LJ Hooker Mermaid Beach and Michael Lowing businesses were recorded as loans in the accounts of NRGC Mermaid Beach Pty Ltd and NRGC Commercial Pty Ltd. Dawnlite remained indebted to its bank for the funds it had advanced for those acquisitions.

[91] After The Glades meeting the six businesses were nevertheless conducted as if they had been consolidated. The entities which owned the six businesses were referred to as "shareholders" in the merged business. The defendants conceded that the Executive Committee had the authority of the entities which owned the six businesses to do so – although they maintained, properly in my view, that it did not have the authority of the broader group of persons (natural and corporate) on whose behalf those entities owned the businesses.[42]

[92] The Executive Committee dealt with fairly routine matters such as the acquisition of office equipment, pay rises for staff, training, sales performance and property management issues, as well as major decisions such as the acquisition of further rent rolls and freehold premises and the admission of new investors. Its decision making processes were relatively informal. Most decisions were made by discussion and the absence of dissent. Sometimes votes were taken on major decisions. Before a meeting, Mr David Mills usually prepared a list of items for discussion, and during the meeting he took notes on his laptop computer. Sometimes material was cut and pasted from the agenda to the notes of the meeting. His notes were the only form of minutes kept. There does not seem to have been any formal adoption of the minutes at the next meeting; nor was there any evidence of anyone ever taking issue with their accuracy.

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39 *Keighley, Maxsted & Co v Durant* [1901] AC 240; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1987) 8 NSWLR 270 at 276 per McHugh JA.

40 *Crowder v McAlister* [1909] St R Qd 203 at 206 per Cooper CJ; *Moore Park Gardens Management Pty Ltd v Chief Commissioner of State Revenue* (2004) 56 ATR 155 at 160 per Gzell J.

41 *Kelner v Baxter* (1866) LR 2 CP 174; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1987) 8 NSWLR 270 at 276 per McHugh JA (preferring Willes J in *Watson v Swann* (1862) 11 CB (NS) 756 at 771; 142 ER 993 at 998 to Erle CJ at CB (NS) 769, ER at 998); Watts and Reynolds, *Bowstead & Reynolds on Agency* (19th ed, 2010) at [2-065]; Fisher, *Agency Law* (2000) at [6.5.4].

42 T 7-59.

[93] There was also another, differently constituted group, the Executive Directors Committee, which held a series of meetings.[43]

How the plaintiff's investment was treated

[94] The plaintiff invested further funds, which brought its total investment to $712,000.00.[44] I am satisfied that, after The Glades meeting, Mr Adams (on behalf of the plaintiff) paid moneys to NRGC Commercial Pty Ltd and NRGC Mermaid Beach Pty Ltd as follows:

> 26.03.07 $20,000.00 NRGC Commercial
> Paid as instructed by Mr Mills for use as working capital in that account.
>
> 03.04.07 $20,000.00 NRGC Mermaid Beach
> Paid as instructed by Mr Mills for use as working capital in that account.
>
> 02.05.07 $14,483.75 NRGC Commercial
> Paid as result of discussion with Mr Ryan Gaiter (financial controller) to bring investment up to $650,000.00.
>
> 30.05.07 $50,000.00 NRGC Commercial
> Paid as result of discussion with Mr Mills to bring investment up to $700,000.00. [45]
> Of that amount, $40,000.00 was transferred to other businesses on 5 June 2007 as follows –
>
> $15,000.00 to NRGC Broadbeach
> $25,000.00 to NRGC Mermaid Beach.[46]

[95] Mr Adams gave evidence that before the last $50,000.00 was invested, he asked for "something by way of confirmation in writing that [he] had put $700,000 into NRGC Real Estate Group."[47] I am satisfied that this was in the context of share certificates not having been issued and the plaintiff's bank requiring evidence of how the money it had advanced had been expended.[48]

[96] Mr Mills wrote to Mr Adams by letter dated 17 May 2007 on the letterhead of Elders Real Estate at Ballina. The letter was drafted by Mr Ryan Gaiter on instructions from Mr Mills.

> *"Dear Bruce,*
>
> *RE: Purchase of Shares in NRGC Real Estate Group Pty Ltd*
>
> *We write in relation to your interest in purchasing shares in NRGC Real Estate Group Pty Ltd. Your $700,000 investment has initially been placed in NRGC Mermaid Beach Pty Ltd and NRGC Commercial Pty Ltd on a loan basis, on which you will be paid*

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43 T 3-71.
44 Third further amended statement of claim para 33.
45 T 2-4, 2-63; see also Exhibit 1 doc H 5.
46 T 3-51; Exhibit 2; third further amended statement of claim para 33.
47 T 2-79.
48 T 5-3 (Ian Mills' evidence).

interest at a rate of 9% pa from the dates that the funds were deposited into our companies bank accounts. These loans will then be converted to equity in NRGC Real Estate Group Pty Ltd on 1 July 2007, using the 30 June 2006 balance sheet valuations already supplied by Emerson Randell Young.

If you accept the above proposal please sign where indicated in the presence of a witness.

Yours faithfully
Elders Real Estate
II Mills
Ian Mills
Managing Director

I Bruce Adams accept the above proposal.

---------- ----------
Bruce Adams Witness."[49]

[97] Mr Adams signed the acceptance in the presence of Ms Brenda Fleming, a property manager at the Commercial office. I accept his evidence that he returned it to the Ballina office. In cross-examination Mr Adams tried valiantly to reconcile the contents of the letter with the First Agreement alleged by the plaintiff.

"So do you agree - are you relying on this document as some sort of agreement, are you?-- Yes.

Right. So this was the agreement that you had with Mr Mills, was it?-- Yes.

And if the shares never issued in NRGC Real Estate Group then your money would just be treated as a loan in those two companies; is that right?-- The money was invested in NRGC Real Estate Group, $700,000.

In fact, that's exactly what happened, wasn't it?-- What's that?

The money - the money that you used to purchase NRGC Mermaid Beach Proprietary Limited was treated as a loan in the financial accounts of that company, wasn't it?-- You recall that I said before under instructions from Mr Mills, he instructed me where to put the money initially. I would have thought that I would have been - as the company had been incorporated that I would have been putting the money along the way or the full amount into NRGC Real Estate Group Proprietary Limited and then the money would be disbursed from there in order to purchase whatever was instructed.

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[49] Exhibit 1 docs H 5 and I 19.

You've seen the financial reports of NRGC Mermaid Beach Proprietary Limited for the year ending 30 June 2007, haven't you? You've seen-----?-- The financial reports?

Yes, the financial reports?-- Probably not for about five years.

Okay. But you do know that in those financial reports the money that you put into - to purchase, rather, Mermaid Beach, the Mermaid Beach business, is treated as a loan in NRGC Mermaid Beach Proprietary Limited, isn't it?-- I can't recall. If that was the case that would have been done by the accountants.

Okay. Have you given this document, or produced this document to anybody else?-- Produced it to anybody else?

Well, have you given it - have you handed it to anybody else?-- No.

Okay. You haven't relied upon this for any - for any loans or anything like that?-- No. No.

This document is inconsistent with the agreement that you say you reached with Mr Mills at the end of 2006, isn't it?-- No.

Okay. Where does it say in this document that you can get your money back on 30 to 60 days' notice?-- That was the agreement that Mr Mills said to me on the car trip to Ballina.

So this is inconsistent with what you say you agreed with Mr Mills in 2006?-- It's as well as.

And you asked for this document; that's correct, isn't it?-- I asked for a - something by way of confirmation in writing that I had put $700,000 into NRGC Real Estate Group.

But that's - see, that's not - I mean, we can argue about this if you want but that's not what this document says, does it?-- Well-----."[50]

[98] The "shareholders" received returns on their investments described as "monthly draws" and calculated as if interest on capital investments.[51] The records of such payments are incomplete. For example, the payments to the plaintiff shown in a schedule apparently prepared on behalf of the Executive Committee[52] do not tally with deposits shown in the (incomplete) bundle of the plaintiff's bank statements which was tendered.[53] The payments were made out of the account of whichever office had sufficient funds available from time to time.

[99] The sum of $17,323.71 was deposited in the plaintiff's bank account on 8 June 2007. The notation on the plaintiff's bank statement is –

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50 T 2-78 – 2-79.
51 Ian Mills T 4-64; Ryan Gaiter T 6-10.
52 Exhibit 1 doc F 193.
53 Exhibit 7.

"Int Apr Elderscgc".

According to Mr Adams, that was interest calculated at the rate of 9% per annum on the moneys he had invested up to 30 May 2007. He said that within a month or six weeks of the car tour, Mr Mills had suggested 9% per annum would be a fair interest rate on the money he put into the group.[54]

[100] On 11 July 2007 Mr Mills sent an email to Mr Ryan Gaiter, cc Mr Adams and others, in which he said (inter alia) –

> *"I have been thinking in regard to a monthly draw. Why don't we calculate showing 10.0% return on investors capital as a monthly draw.*
>
> *Eg Bruce Adams $700k @ 10.0% divide by 12 $5,833. Based on Bruces 15% shareholding this would mean our total monthly draw would be around $40k.*
>
> *This would ensure any shareholders with loans would have the cashflow to pay."*[55]

[101] Thereafter the plaintiff received payments calculated at the rate of 10 % per annum. I have been able to isolate the following payments in the period before 16 July 2008 from the schedule and the bank statements to which I have referred, but I cannot be sure there were not more.

07.08.07	Eldsure	$ 5,833.33
10.10.07	Eldsure	$ 5,833.33
08.11.07	Eldsure	$ 5,833.33
07.12.07	Samel Holdings	$ 5,833.33
06.02.08	Riverwalk	$ 5,833.33
07.03.08	Riverwalk	$ 5,833.33
15.04.08	Riverwalk	$ 5,833.33

[102] Other investors also received monthly payments calculated at 10% pa on their investments and described as "draws".[56]

The Commercial office

[103] The transfer of the commercial component of the Coolangatta/Tweed Heads business to the Commercial office was discussed soon after the purchase of the Lowing business was completed.[57] This was effected after The Glades meeting, probably in about May/June 2007. Mr Hodge, who had been employed at the Coolangatta/Tweed Heads office, moved to the Commercial office when the commercial rent roll was transferred there.

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54 T 2-83.

55 Exhibit 1 doc H 8.

56 Ryan Gaiter's evidence T 6-10, 6-20.

57 See emails dated 21 February 2007 at Exhibit 1 doc I 12.

New investors

[104] New investors were introduced.

[105] I have referred to discussions which took place between Mr Mills and Mr Mark Jensen in 2006, and to Mr Jensen's attendance at The Glades meeting. They had some further discussions, leading to a meeting at the Mermaid Beach office on or about 13 April 2007. Asked (during examination in chief) whether in the discussions leading up to that meeting on 13 April 2007 anything was said about withdrawal of any investment he might make. Mr Jensen replied –

> *"Ian Mills actually said if you ever wanted to sell - sell your investment in the business that someone would buy you out."*[58]

[106] The meeting on 13 April 2007 was attended by Mr Ian Mills, Mr Glenn Mills, Mr David Mills and Mr Jensen. Mr Jensen gave this evidence in chief –

> *"Could you tell her Honour what was discussed at that meeting and if you can now recall it who said what?-- It was basically an invitation to be formally asked if I wanted to actually invest in the NRGC group of companies.*
>
> *Was anything said to you about a level or amount of investment?-- Yes. I actually at the time said, 'Is' – 'How much money do I need to invest; would $500,000 be enough?' And at the time David Mills said 300,000 would be enough.*
>
> *And were you told anything by anyone at that meeting about how your investment would be structured?-- Yeah. What actually Ian said was that - that I'd - that I'd place the $300,000 in the company and that I would get a return of 12 per cent on the funds until June 30, 2007, and that I would - then the company - then I would be issued shares thereafter, immediately after that date."*[59]

In cross-examination Mr Mills agreed that the substance and effect of his discussions with Mr Jensen were that for an investment of $300,000 Mr Jensen would acquire an interest in a group that would own and control six real estate agencies.[60]

[107] At conclusion of meeting on 13 April 2007, Mr Jensen said he would have to speak with his wife. Later that day Mr Ryan Gaiter sent him an email in these terms (cc Mr Ian Mills) –

> *"Subject: Investment into NRGC Group*
>
> *Hi Mark,*
>
> *After discussions with Ian today he has asked me to email you the following proposal in relation to your $300,000 investment into the business. For simplification we thought it would be best to have your*

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58 T 3-63.
59 T 3-61.
60 T 5-56.

> *investment put through as a loan to the business to 30 June 2007, you would then have the option to purchase shares as of 1 July 2007. We would pay you interest on the loan monies at a rate of 12%. If this is suitable we will need to get a loan agreement drawn up, with the option in it.*
>
> *Please let me know if this is suitable so I can get the required paperwork sorted out ASAP."*[61]

[108] Within two days of the meeting, Mr Jensen told Mr Mills he wished to proceed with the investment, and Mr Mills said he would have a letter prepared.

[109] Mr Mills sent Mr Jensen a letter dated 18 April 2007. Mr Jensen received it on 26 April 2007. It was in these terms -

> *"Re: Purchase of Shares in NRGC Real Estate Group Pty Ltd*
>
> *We write in relation to your interest in purchasing shares in NRGC Real Estate Group Pty Ltd. As discussed with you previously, your $300,000 investment would initially be placed in Samel Holdings Pty Ltd on a loan basis, on which you will be paid interest at a rate of 12% pa. This loan would then be converted to equity in NRGC Real Estate Group Pty Ltd on 1 July 2007, using the 30 June 2007[sic] balance sheet valuations of the group adjusted for outstanding settlements.*
>
> *If you accept the above proposal please sign where indicated in the presence of a witness."*[62]

On the day he received the letter, Mr Jensen signed it in the presence of Mr David Mills, who said he would send it to his father at the Ballina office.

[110] Mr Jensen paid the $300,000.00 by bank cheque payable to Samel the next day. The money he invested was used to buy a rent roll.[63] It was recorded in the accounts of Samel as a loan by Jensen Investments Pty Ltd.[64]

[111] The shares were not issued. Mr Jensen said in evidence in chief –

> *"Prior to June 30, 2007, I had a phone call from Ian Mills. He stated in that phone call that they couldn't fulfil their promise or their obligation in this letter, that they would have to issue shares at a later date due to the tax returns had not been done in the companies for a couple of years and they weren't in a position to issue shares, and a consequence of that, they - he said that he would prepare a document that Ryan Gaiter would type up where it would confirm that the moneys would be there on a loan basis with the option of buying the shares at a further date at 10 per cent interest, not the 12."*[65]

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61 Exhibit 23.
62 Exhibit 1 doc I 17.
63 T 4-62.
64 T 5-57.
65 T 3-65.

[112] He received a letter from Ryan Gaiter dated 21 September 2007.

> *"Re: Purchase of Shares in NRGC Real Estate Group Pty Ltd*
>
> *We write to confirm your interest and purchase of shares in NRGC Real Estate Group Pty Ltd. As discussed with you previously, your $300,000 has been invested in NRGC Real Estate Group Pty Ltd, on which you will be paid a monthly directors drawdown at a rate of 10% pa, as and when funds are available, with a balancing dividend paid in relation to profits at the end of the financial year.*
>
> *If you have any questions in relation to the above mentioned please do not hesitate to call me."*[66]

[113] The Executive Committee allowed other new investors – Sharen Carruthers ($50,000.00), Sandy Fletcher (either $150,000.00 or $100,000.00 – it is not clear on the evidence), Graeme Roberts ($300,000.00), Colin Wright ($50,000.00) and Ryan Gaiter ($100,000.00).[67] They were given letters, saying their money would be banked into certain bank accounts, and that they would be paid interest pending conversion of their investments into shares when NRGC Real Estate Group started on 1 July 2007. It was the Executive Committee which made decision to let someone invest.[68]

Acquisition of rent rolls

[114] Further rent rolls were acquired, and transferred to various offices.

> A residential rent roll acquired from The Professionals Coolangatta was transferred to the Coolangatta/ Tweed Heads office where it was managed with that office's existing residential roll.
>
> A residential rent roll acquired from Gibbs & Lynch was similarly transferred to the Coolangatta/Tweed Heads office.
>
> A commercial rent roll acquired from Gibbs & Lynch was transferred to the Commercial office.
>
> A rent roll was acquired from an agency at Nobby's Beach; the commercial component of it was transferred to the Commercial office and the residential component was transferred to the Broadbeach office.
>
> A residential rent roll acquired from Raine & Horne Palm Beach was transferred to the Palm Beach office.

Succession planning

[115] In late 2007 a succession planning proposal prepared by a solicitor was discussed, but the Executive Committee decided to leave it in abeyance.[69]

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66 Exhibit 14.
67 T 5-5; 4-61.
68 T 4-61, 5-58.
69 T 2-16 – 2-17; Exhibit 1 docs F 8-F 13.

Global Financial Crisis

[116] The GFC occurred in the second half of 2007. For a while, the business seemed to be unaffected by it.

[117] In about January or February 2008 a contract to purchase the freehold where the Mermaid Beach business was conducted was executed. The contract is not in evidence, and it is not clear which company was the purchaser. Completion was due in July 2008.[70]

[118] By about March 2008 a lack of confidence in the real estate market was apparent, which produced a lack of cashflow.[71] The monthly payment of investors' "draws" had to stop.[72]

Macquarie Bank

[119] Meanwhile, in January 2008 there were discussions with Macquarie Bank. On 11 February 2008 the Bank issued an indicative funding proposal,[73] and on 27 February 2008 it wrote to the directors of NRGC Real Estate Group Pty Ltd offering it a revolving line of credit facility to a limit of $6 million.[74]

[120] The facility was expressed to be for the purpose of consolidating the existing debt of the group and assisting with future rent roll acquisitions. In the indicative proposal it had been noted that the funds were required for the following purposes –

Amount	**Purpose**
400,000	Existing Ballina debt
442,000	Existing Tweed debt
1,400,000	Existing Palm Beach debt
1,400,000	Existing Broadbeach debt
$3,642,000	**Subtotal: Total Existing Debt**
220,000	Pay out Cameron Davis [director Palm Beach]
1,575,000	Acquire Professionals Coolangatta rent roll
664,000	Acquire Gibson Lynch residential rent roll
135,000	Acquire Gibson Lynch commercial rent roll
($500,000)	Shareholder contribution
264,000	Provision for future acquisitions (subject to loan conditions)
$6,000,000	**Total Facility Proposed**

[121] The offer was accepted.

[122] The facility was secured by fixed and floating charges over the assets and undertakings of seven companies – NRGC Mermaid Beach Limited, Eldsure Pty Ltd, Riverwalk Realty Pty Limited, Samel Holdings Pty Limited, Broadbeach

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70 Ian Mills' evidence T 5-4 – 5-5.
71 Ian Mills' evidence T 5-4 – 5-5.
72 Ryan Gaiter's evidence T 6-10, 6-20.
73 Exhibit 1 docs D 32-D 42.
74 Exhibit 1 docs D 1-D 31.

Rental Management Pty Ltd, NRGC Commercial Pty Limited and NRGC Real Estate Group Pty Limited, and guarantees and indemnities as follows –[75]

Unlimited guarantees and indemnities from the following six companies –

NRGC Mermaid Beach Limited

Eldsure Pty Ltd "acting alone and acting as trustee for The Riverwalk Realty (Coolangatta) Unit Trust"

Riverwalk Realty Pty Limited "acting alone and acting as trustee for The Riverwalk Realty Unit Trust)"

Samel Holdings Pty Limited "acting alone and acting as trustee for The Samel PB Unit Trust"

Broadbeach Rental Management Pty Ltd

NRGC Commercial Pty Limited

Guarantees and indemnities from the following individuals "limited to their percentage shareholding x $6 million" –

Trevor Ian Mills	$ 1,275,000.00
Glenn David Mills	$ 790,000.00
Lynne Robyn Yaldwyn	$ 363,000.00
Philip John Lyne Nicolson	$ 537,000.00
David William Sommerville	$ 121,000.00
Adam Jeremy Gaiter	$ 116,000.00
Shawn Robert Bishop	$ 116,000.00
Christopher James Holt	$ 184,000.00
David Mills	$ 184,000.00
Jared Hodge	$ 134,000.00
Bruce Adams	$ 895,000.00
Matthew Gerard Steinhour	$ 335,000.00
Mark Jensen	$ 384,000.00
Sharen Carruthers	$ 128,000.00
Colin Wright	$ 64,000.00

[75] Exhibit 1 docs D 43-D 61.

Graeme Roberts	$ 384,000.00

Mr Adams and the other guarantors duly executed the Deed of Guarantee and Indemnity, which was dated 3 March 2008

Mr Jensen's wish to withdraw his investment

[123] In early 2008, when the business took a downturn, Mr Jensen became nervous about his investment, and suspicious about how the business was being conducted. He gave evidence of being excluded from three or four Executive Committee meetings between February and June 2008 –

> *"… because I was starting to ask too many questions about where our money was, balance sheets, profit and loss statements. Basically the non-disclosure of the operation. That's why."*[76]

He had a private meeting with Mr Ian Mills and Mr David Mills at The Glades in April 2008 when he said he wanted his money back.[77]

[124] Ultimately, in October 2009, Jensen Investments Pty Ltd as trustee for the Jensen Family Trust commenced a proceeding in the District Court against Samel Holdings Pty Ltd for recovery of a loan of $300,000 plus interest.[78]

Mr Adams' wish to withdraw the plaintiff's investment

[125] Early in 2008 Mr Adams told Mr Mills that he wanted to reduce his shareholding in the group from $700,000 to $100,000. Mr Adams said this was in early January,[79] while Mr Mills thought it was five or six months before the July 2008 meeting of the Executive Committee.[80] Nothing seems to turn on the precise date. The following occurred in cross-examination of Mr Adams –

> *"You say that you wanted to leave - sorry, you wanted to reduce your shareholding in the group?-- In early '08 I did, yes.*
>
> *To 100,000-----?-- Yes.*
>
> *-----dollars; is that right?-- Yes, approx - yeah.*
>
> *Well, that would be 100,000 shares, wouldn't it?-- We hadn't been issued with any shares.*
>
> *So was your understanding at that time that the 100,000 shares that you were - sorry, the $100,000 that you were talking about you would get $600,000 back; is that right?-- Yes. I was prepared to look at a payment plan in relation to that - that was never documented - but when I approached Mr Mills early in January - early January '08 the panic in his voice and the consequent*

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76 T 3-73.
77 T 3-68.
78 Exhibit 24.
79 T 2-18.
80 T 5-14.

> *explanation, I sort of made the decision to leave it in abeyance for the time being in relation to my request. In the short term."*[81]

[126] By late June 2008 Mr Adams had become nervous about how the business was being run. He wanted to withdraw Dawnlite's investment, but still be involved in the business. He and Mr Hodge were exploring the possibility of purchasing the business of NRGC Commercial.[82]

[127] Mr Adams raised the withdrawal of the whole of his (that is, the plaintiff's) investment. He wrote to Mr Mills on 27 June 2008 –

> *"Please be advised that I wish to relinquish my holding, namely 700,000 shares in the company known as NRGC Real Estate Group as soon as possible.*
>
> *I would like to emphasise, this is nothing personal, and in fact to the contrary, there is a great bunch of people in our organisation. This is purely a commercial & investment decision, with my family very much in mind.*
>
> *You will recall Ian, it was my wish to greatly reduce my holding 6 months ago and you talked me out of it. That has now cost me nearly $18,000. The way I am financially structured, I can not afford this to continue, so again nothing personal, but I would like the matter resolved as soon as possible."*[83]

In cross-examination, Mr Adams said that as no shares had been issued, the letter should have referred to relinquishing "my holding, namely $700,000, in the company". He acknowledged that the letter did not say anything about repayment in 30 to 60 days, or refer to any agreement he had made with Mr Mills in late 2006 – but insisted that Mr Mills was aware of the agreement.[84]

[128] In examination in chief Mr Mills said he did not remember receiving this letter, but did not deny having done so.[85] I regard what he said as disingenuous. I formed the impression he was deliberately downplaying his appreciation of Mr Adams' desire to withdraw his investment. Further, I formed the impression he had been hoping to avoid the problem it would have posed by finding an acceptable way in which Mr Adams and Mr Hodge could take over the business of NRGC Commercial.

[129] Mr Mills raised Mr Adams and Mr Hodge's interest in doing so with "NRGC - Directors – Management" by email. There were issues of valuation of the rent roll, and existing securities over the rent roll and also the plant, equipment and fit-out.[86]

[130] Apparently without the express authority of the Executive Committee or other investors, Mr Mills emailed Mr Adams on 8 July 2008 in these terms –

> *"Bruce,*

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81 T 2-75 – 2-76.
82 T 2-86, 3-17 – 3-18.
83 Exhibit 1 doc I 65.
84 T 2-76 – 2-77.
85 T 5-7.
86 Exhibit 1 docs I 66 and I 67.

> *In light of you not wanting to remain in real estate long term and the complications of the mortgage over the commercial rent roll, I was thinking of a scenario that may be attractive to you and assuming Jared [Hodge] would be happy with the proposal.*
>
> *We guarantee you a draw at 10% each month on the basis that you stay on as a sales/leasing consultant whilst ever you desire.*
>
> *Your shares would be frozen in value and you would not receive any other dividend and they would be the first sold to any new or existing shareholder, but we would undertake to fully redeem your shares within 2 years.*
>
> *Jared [Hodge] would become sales manager of the business and I would expect that he would increase his shareholding over the next 2 years.*
>
> *In broad terms, this what I propose… subject to Director's approval.*
>
> *Let me know your thoughts."*[87]

[131] Mr Mills did not deny sending that email, but professed to have no recollection of doing so. He said its terms were familiar, and that he always spoke about such things with Mr Adams, but not with Mr Hodge.[88]

Mr Adams instructed solicitors

[132] At about that time Mr Adams instructed McDonald Balanda & Associates, solicitors, to act on his behalf. On 14 July 2008 those solicitors furnished him with draft Heads of Agreement providing for his resignation as a director and the sale of his [sic] shares in both NRGC Commercial Pty Ltd and NRGC Real Estate Pty Ltd [sic].[89]

THE SECOND AGREEMENT

The Second Agreement alleged by the plaintiff

[133] There was a meeting of the Executive Committee on 16 July 2008. The plaintiff alleges –

(a) that the Executive Committee resolved to redeem Dawnlite's interest in NRGC Real Estate Group Pty Ltd and its interest in the Expanded Group Business on certain terms ("the Redemption Decision"); and

(b) that the Executive Committee, on behalf of the proprietors of the Expanded Group Business, and Mr Adams, on behalf of Dawnlite, came to an oral agreement in the same terms as the Redemption Decision ("the Second Agreement").

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87 Exhibit 3.

88 T 5-11.

89 Exhibit 18.

[134] The alleged terms of the Redemption Decision and the Second Agreement were as follows –

> *"that Dawnlite's contribution, Dawnlite's interest in NRGC Real Estate Group and Dawnlite's interest in the Expanded Group Business fixed in the sum of $700,000 (**Dawnlite's Interest in the Expanded Group Business**) be treated as a loan repayable by 30 June 2009 and in the meantime that Dawnlite receive 10% pa interest paid monthly."*[90]

[135] The plaintiff alleges that the Second Agreement was made orally by Mr Mills, on behalf of the Executive Committee, communicating the substance of the Redemption decision to Mr Adams and enquiring whether he/Dawnlite was prepared to accept it in respect of Dawnlite's Interest in the Expanded Group Business, and Mr Adams' responding by orally accepting the Redemption Decision.

[136] The plaintiff alleges that the Redemption Decision and the Second Agreement were in part subsequently reflected in the minutes of the Executive Committee meetings on 16 July 2008,[91] 3 September 2008[92] and 21 October 2008,[93] and an email from Mr Mills to various recipients dated 25 September 2008 and entitled "Shareholders Update".[94]

The defendants deny the Second Agreement

[137] The defendants deny that the Redemption Decision and the Second Agreement were made, and deny that Mr Mills and Mr Adams said words to the effect alleged.[95]

Meeting of Executive Committee 16 July 2008

[138] The agenda for the Executive Committee meeting on 16 July 2008 included–

> *"4. Commercial office remaining NRGC or going it alone"*

and the minutes (headed "notes from the meeting") included –

> *"4. Commercial office*
>
> *a. Bruce[Adams] is looking to be bought out of the business completely within 12 months, with view to be out of it earlier if possible*
> *b. Bruce's money in the business is viewed as a loan only, with 10% variable paid monthly*
> *c. Jared [Hodge] to run the office, with salary package of $80k inc car allowance as of 1st August"*[96]

[139] Various persons who were present at the meeting gave oral evidence – Mr Adams, Mr Ian Mills, Mr Glenn Mills, Mr David Mills, Mr Ryan Gaiter, Mr Hodge, Mr Jensen, Mr Holt, Mr Nicolson and Ms Yaldwyn.

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90 Third Further Amended statement of claim para 65.
91 Exhibit 1 docs E 48-E 49.
92 Exhibit 1 docs E 52-E 53.
93 Exhibit 1 docs E 56-E 58.
94 Exhibit 1 docs I 77-I 78.
95 Further amended defence at para 84.
96 Exhibit 1 docs E 48-E 49.

Mr Adams' evidence of the 16 July 2008 meeting

[140] According to Mr Adams, when the relevant item on the agenda was reached, Mr Mills told the meeting that he (Mr Adams) wished to be bought out of the group.[97] He gave this evidence in chief –

> *"MR HACKETT: Mr Adams, when that agenda topic was discussed at the meeting can you tell her Honour who raised the topic at the meeting?-- Mr Mills.*
>
> *Can you tell her Honour as best you recollect it today, and if you don't recall the precise words the substance and effect of what he said to the meeting when he raised the topic?-- Mr Mills mentioned at the meeting that Bruce wishes to be bought out of the group.*
>
> *Did anyone else say anything in response to that statement?-- Not that I recall.*
>
> *Did Mr Mills elaborate on your wish to retire or be bought out of the group?-- Yes, he did.*
>
> *Could you tell her Honour what he said?-- He said that an arrangement would be made whereby I would receive my funds back in full by the 30th of June 2009 and in the interim that I would receive 10 per cent interest paid on a monthly basis on the capital.*
>
> *Did you or anyone else respond to that statement?-- I said I would be happy with that.*
>
> *And did anyone else say anything else on that topic at that meeting?-- No-one - no-one else - no."*[98]

This exchange occurred in cross-examination –

> *"And there was nothing said at that meeting that you would be paid out by the 30th of June 2009, was there?-- Yes, there was.*
>
> *Who said that?-- Mr Mills*."[99]

[141] Later in cross-examination Mr Adams was taken to paragraphs 65 and 67 of the original statement of claim, which was filed on 11 August 2009,[100] and further and better particulars of it dated 14 December 2009.[101] He agreed that these accorded with his instructions to his solicitor Mr Ponting.[102] Immediately preceding paragraphs referred to Mr Adams' letter to Mr Mills of 27 June 2008.[103] Paragraphs 65 and 67 were in these terms –

> *"65. In response to that letter, the Executive Committee decided, on behalf of NRGC Real Estate Group, that:*

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97 T 2-18.
98 T 2-19.
99 T 2-92.
100 Exhibit 9.
101 Exhibit 10.
102 T 3-34 – 3-40.
103 Exhibit 1 doc I 65.

(a) Dawnlite's interest in NRGC Real Estate Group be redeemed or acquired within 12 months after 16 July 2008 or earlier for the amount of $700,000;

(b) Dawnlite's interest in NRGC Real Estate Group would be treated as a loan in the meantime and receive 10% interest paid monthly (the Redemption Decision).

Particulars

The decision is to be inferred from decisions made at the Executive Committee meetings on 16 July 2008, 3 September 2008 and 21 October 2008.

……

67. The Redemption Decision was communicated to Mr Adams, and his acceptance of the Redemption Decision was communicated to the Executive Committee, by

(a) his presence at each of the meetings pleaded in paragraph 64[sic]; and

(b) his concurrence while attending those meetings in each of the decisions comprising the Redemption Decision."

Defence counsel had him acknowledge that it was not alleged in those paragraphs –

(a) that Dawnlite's interest in NRGC Real Estate Group and its interest in the Expanded Group Business was to be fixed in the sum of $700,000; or
(b) that the loan was repayable by 30 June 2009.[104]

The further and better particulars contained the following about the meeting on 16 July 2008 –

"A. There was a meeting of the Executive Committee on or about 16 July 2008;

B. The attendees at that meeting included at least by Mr Mills, Mr David Mills, Ms Yaldwyn, Mr Glenn Mills, Mr Nicholson, Mr Holt, Mr Ryan Gaiter, Mr Hodge and Mr Jensen;

C. At that meeting words to the following effect were used:

Bruce is looking to be bought out of the business completely within 12 months, with a view to be out earlier if possible;

D. Thereafter, Mr Mills said words to the effect of:

Bruce's money in the business is viewed as a loan only, with 10% variable paid monthly.

E. Mr Adams said words to the effect of:

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104 T 3-37 – 3-38.

I'm happy with that.

F. The agreement of the other Executive Committee members was manifest by the lack of any objection to the content of that discussion."

Mr Jensen's evidence of the 16 July 2008 meeting

[142] According to Mr Jensen, Mr Adams told the meeting

> *"that he wanted his money back out of the business, that he wanted to do other things with his money, and that he wanted to move on."*[105]

Mr Jensen said that there was "shock horror in the meeting" and that "hell broke loose". Mr Adams said that when he was invited to put money into the business, he had an agreement with Mr Mills that he could get his money back within 30 to 60 days. Asked about Mr Mills' response to that, Mr Jensen said –

> *"I think at the time Ian was pretty shocked as well, in that he actually said that he couldn't give the $700,000-odd or the $700,000 back immediately, that it'd have to be done by June 30, 2009, given that it was the end of that financial year. So they could do it – he could do it by then.*
>
> *And was anything – any other terms attached to that repayment? – Given that we all lost our interest payments, they used to be spasmodic, it was confirmed by Ian that 10 per cent would be paid interest per month on Bruce Adams' loan to the company.*
>
> *And did anyone else say anything about that topic at that meeting that you recollect? – They – again it was – yeah, there was a little bit of – people were upset, but Ian said that's what was going to happen."*[106]

Mr Jensen said that paragraphs 4(a) and (b) of the minutes accorded with his recollection of the meeting.[107]

[143] This exchange occurred in cross-examination of Mr Jensen –

> *"And at that meeting you say that Mr Adams said to the entire committee meeting that Mr Mills had told him he could ask for his money back on 30 to 60 days notice; is that right? – That's right. That's correct.*
>
> *And you were surprised by that; is that right? – Yes, I was.*
>
> *Because according to you, you were told that the only way that you could get your money back was if somebody bought you out? – That's 100 per cent correct, Mr Brennan, because Ian Mills had*

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105 T 3-67.
106 T 3-68.
107 T 3-68.

deals going everywhere with everybody all differently. It was never, never uniform or the same."[108]

Having described the informal way in which meetings were conducted and the dominant part played by Mr Mills at most meetings,[109] he said he did not recall any vote being taken in relation to Mr Adams' wish to have his money back out of the business.[110]

Mr Ian Mills' evidence of the 16 July 2008 meeting

[144] Mr Mills said in evidence in chief –

"Bruce informed us all that he wanted out and he wanted – he wanted to be paid out as soon as possible.

And what, if any, response was there from you or the other executive committee members?-- We were all taken a little bit by surprise."[111]

Despite counsel for the plaintiff's attempt to have Mr Mills clarify his answer, it remained unclear whether he was including himself in those who were surprised by Mr Adams' wanting to be paid out.

[145] Mr Mills recalled someone at the meeting asking –

"How are we going to do that?"[112]

and "some ideas" being discussed, including an orderly sale of assets to raise the necessary capital. When asked whether Mr Adams said anything about a timeframe in which he wanted to be paid out, Mr Mills said –

"Yes, he did. I've seen it documented but I can't pull it out of my head now what date it was. He did - he did give a time.

... And I think it was around 12 months."[113]

[146] In cross-examination Mr Mills denied that when Mr Adams asked for his money back, he (Mr Mills) said Mr Adams' investment should be treated as a loan repayable on 30 June 2009 with monthly interest at 10% in the meantime, and he denied that when he said that members of the Executive Committee agreed with him.[114] Counsel for the plaintiff took him to the minutes of the meeting,[115] in particular paragraphs 4(a) and (b). He acknowledged having received a copy of the minutes, and never having expressed any disagreement with them.

Other evidence of the 16 July 2008 meeting

[147] Mr Hodge recalled leaving the meeting with an understanding that Mr Adams' investment would be treated as a loan. He said paragraphs 4(a), (b) and (c) of the

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108 T 3-73.
109 T 3-75 – 3-76.
110 T 3-80.
111 T 5-12.
112 T 5-12.
113 T 5-12.
114 T 5-84.
115 Exhibit 1 doc E 48.

minutes recorded the substance of what was said.[116] He did not recall a vote being taken; rather there was an agreement in principle that it be treated as a loan, and that they would endeavour to work out a restructure to allow this to occur.[117]

[148] I accept that the others present at the meeting (Mr David Mills, Mr Glenn Mills, Mr Holt, Mr Nicolson, Ms Yaldwyn and Mr Ryan Gaiter) were all shocked by Mr Adams' wanting his money back, and that there was heated and lengthy discussion about how this might be achieved. They all received the minutes in due course, and none of them took issue with paragraph 4, whether by email or at any subsequent meeting. At trial they all seemed to accept that paragraph 4(a) was correct. But none of them accepted that an agreement in terms of paragraph 4(b) of the minutes was reached at that meeting, and none of them gave evidence that the date 30 June 2009 was expressly mentioned at the meeting.

[149] Paragraph 4 of the minutes was headed "Commercial office". None of these witnesses was questioned about paragraph 4(c). Its being juxtapositioned with paragraph 4(b) suggests that there was also discussion of the future conduct of the Commercial business, which had been the subject of some discussions between Mr Adams and Mr Mills in the weeks before the meeting.

[150] Importantly, none of those witnesses gave evidence of an agreement being made at that meeting –

(a) that Dawnlite's interest in NRGC Real Estate Group and its interest in the Expanded Group Business was to be fixed in the sum of $700,000; or

(b) that the loan was repayable by 30 June 2009.

Mr Adams' resignation as director of the three companies

[151] On 18 July 2008 Mr Adams resigned as a director of NRGC Commercial Pty Ltd.[118] I do not accept his evidence in cross-examination that Mr Mills had suggested he do so at the meeting on 16 July 2008.[119] There is nothing in the minutes to that effect, and no other witness gave evidence to that effect.

[152] He resigned as a director of NRGC Real Estate Group Pty Ltd and as a director of NRGC Mermaid Beach Pty Ltd on 31 July 2008.[120]

[153] However, he continued to attend and participate in Executive Committee meetings until December 2008.[121] One of the agenda items for the Executive Committee meeting on 3 September 2008 – "Does Bruce remain a director if he is no longer a shareholder?" – suggests he may not have told the other investors of his resignation as director of the three companies.

Receipt of interest payments after 16 July 2008 meeting

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116 T 3-98.
117 T 3-96, 4-6 – 4-7.
118 ASIC search results: Exhibit 1 docs A 61-A 62.
119 T 2-92.
120 ASIC search results: Exhibit 1 docs A 6 and A 7.
121 T 2-93.

[154] I have previously referred to the plaintiff's receiving monthly payments of $5,833.33 from 7 August 2007.[122] They were calculated at the rate of 10% pa on $700,000.

[155] There were no such payments between mid-April 2008 and the 16 July 2008 meeting. This was consistent with cash flow having dried up.

[156] Payments in that amount resumed in August 2008. At least four payments were made –

11.08.08	Samel Holdings	$ 5,833.33
10.10.08	Riverwalk	$ 5,833.33
19.11.08	Eldsure	$ 5,833.33
29.12.08	Riverwalk	$ 5,833.33.

Executive Committee Meeting 3 September 2008

[157] As I have noted, the agenda for the Executive Committee meeting on 23 September 2008 included the question of whether Mr Adams remained a director if he were no longer a shareholder. The minutes included the following –

> *"1. Previous meetings minutes read*
>
> *a. Bruce: interest repayments not getting met; wants paid by 4th of each month*
> *b. Business money within 90 days: wants it in 90 days*
> *c. Mark Jensen: wants money back out of the business Stay on as employee of the company*
> *d. Sandy [Fletcher] money back out of business*
> *e. With sales of Broadbeach and Mermaid, possible net result would be $1.0m cash to fund this."*[123]

[158] The Broadbeach business was to be offered for sale, and the possible sale of the Mermaid Beach freehold was foreshadowed.

Email 25 September 2008

[159] On 25 September 2008 Mr Mills sent an email headed "Shareholder Update: PRIVATE & CONFIDENTIAL" to 15 people – Mr Adams, Mr Glenn Mills, Mr Nicolson, Mr Sommerville, Ms Yaldwyn, Ms Sharen Carruthers, Mr Ryan Gaiter, Mr Adam Gaiter, Mr Bishop, Mr Holt, Mr David Mills, Mr Jensen, Mr Graeme Roberts, Mr Hodge and Ms Sandy Fletcher.[124] He began –

> *"The Directors of NRGC Real Estate are aware that several, if not all shareholders, are under financial stress due to the lack of dividend in the past few months."*

He then provided an update on what was happening in the business, including the Broadbeach rent roll being for sale, and continued –

> *"We reiterate that dividends are not guaranteed, but have been the norm for many years. We don't know everyone's financial position, but I can speak for Glenn and I as the largest shareholders. We have had borrow money that we needed to get through this tough time. I*

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122 Paragraph 101.
123 Exhibit 1 doc E 50.
124 Exhibit 1 docs I 77-I 78.

suggest that you speak to your bank to extend your loan and not be in default or paying high interest rate.

Your funds are safe. We will emerge stronger and more profitable than ever in the very near future.

The number 1 priority is to restore and catch up shareholder dividends.

We have come to an arrangement to convert Bruce's shareholding to a loan and will payout by 30th June 09 and we cannot guarantee anyone's funds back on demand, but will do our best restore income and return funds asap… pending the Broadbeach sale.

Let us all work through this tough time and marketplace, all doing our best to increase the income of the business … that will solve our problems." (Emphasis added)

[160] Mr Ian Mills gave evidence that the arrangement referred to was reached some time between the meeting on 16 July 2008 and the email of 25 September 2008. The following occurred during his examination in chief –

"….. When do you say you reached an arrangement with Mr Adams - you or the executive committee reached an arrangement with Mr Adams?-- Well, obviously just before then. I said, 'We will treat your equity as if it were a loan for the purposes of restoring your income on a preferential basis until such - until such - until such time as we can - we can buy your shareholding back', and I also said we couldn't guarantee, as it says in that paragraph, that we couldn't guarantee anyone's sums back but we were going to do our best to give him preferential treatment until such times as we could sell an asset to buy his shares back.

Okay. When do you say you reached that agreement with - or arrangement, rather, with Mr Adams?-- Well, sometime between the July meeting and the September e-mail.

See how it says the 30th of June '09 there, payout by 30th of June?-- Okay, yes.

Did you have a discussion with Mr Adams about the 30th of June 2009?-- That's what he nominated.

When did he nominate that?-- I can't be sure."[125]

[161] In cross-examination Mr Mills drew a distinction between an arrangement to treat the plaintiff's investment as a loan and an agreement to convert it to a "legal loan".[126]

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125 T 5-15 – 5-16.

126 T 5-87 – 5-88, 5-91 – 5-93.

[162] Asked how an arrangement differed from an agreement, he said –

> *"Well, an arrangement is something you are going - you have made plans to do in the future and we haven't - the decision hasn't been made.*
>
> *Well, may I suggest to you that the terminology you've used is, 'We have come to an arrangement', which seems to suggest in ordinary English that that arrangement has been made?-- It was subject to conditions.*
>
> *Where does it say that?-- It doesn't say. It's silent."*[127]

[163] The thrust of Mr Mills' evidence was that the Executive Committee could never have agreed to convert the investment to a loan in the technical sense because it never had the necessary capital. He said –

> *"There are two types of loans. There is the one that is the accountants' loan and the legal loan. This one was to treat the investment in the other companies, because Bruce wanted his money back, we said, 'We'll strike an interest rate to pay you because you want income and we will then investigate ways - until such times as we can raise the cash, we will do our best to continue and keep paying you the income on a preference basis.'*
>
> *Sorry, are you saying there is a distinction between, on the one hand, a legal loan and, on the second hand, an accounting loan?-- No. They're both the same.*
>
> *Ah. Could you explain the two different types of loans again because I've missed it?-- It was the terminology we used. It wasn't intended to be a loan. I could have said, or the executive committee could have said, 'We will pay you interest on your capital you introduced to the company until such times as we could buy your shares'. It was a figure of speech."*[128]

[164] Mr Mills was insistent that the arrangement was not reached at the Executive Committee meeting on 16 July 2008, and that Mr Adams did not nominate the date of 30 June 2009 at that meeting. He said they could not have agreed to it at that meeting because they needed time "to investigate things".

> *"Why is that?-- Because we didn't know how - how we could possibly do it. It wasn't possible we could agree to it at that meeting.*
>
> *So-----?-- It wasn't possible for us to agree to a loan that had a legal timeframe to it.*
>
> *So, Mr Mills, if another participant at the executive committee meeting of 16 July '08 told her Honour that the arrangement you*

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127 T 5-92.

128 T 5-87 – 5-88.

refer to on the first line of that paragraph was made at the 16 July meeting, you wouldn't agree with that person?-- No."[129]

[165] Mr Hodge agreed with the suggestion put to him in cross-examination that the arrangement to convert Mr Adams' shareholding to a loan which would be paid out by 30 June 2009 referred to in that email was reached at the meeting on 16 July 2008.[130] However, in re-examination he said he did not know whether the language "30 June 2009" was used at the July meeting.[131]

Mr Adams' further instructions to solicitors

[166] On 30 September 2008 Mr Adams instructed McDonald Balanda & Associates to prepare an agreement

"whereby my investment of $700,000 in the company NRGC Real Estate Group of which I am a director is treated as a Loan.

This loan is to be repaid to me in full no later than the 1st of March 2009. ...."

The instructions continued that in the interim interest was to be paid calendar monthly in the sum of $5,833.33, and that he needed to be "reimbursed" for the months of December 2007, April 2008, May 2008, August 2008 and September 2008.[132]

[167] In cross-examination Mr Adams agreed that repayment by 1 March 2009 was inconsistent with what he maintained had been agreed at the meeting on 16 July 2008, and said that he was nevertheless hoping to be paid out earlier. As for the interest rate, he said that prior to the meeting on 16 July 2008 it had been agreed that all investors should receive interest at the rate of 10%.[133]

Executive Committee Meeting 21 October 2008

[168] The Executive Committee met again on 21 October 2008. By then the number of investors wanting their money back had grown. The document headed "Agenda & minutes from meeting 21/10/08" contains the following –

*"**8. Shareholder Loan***

As I understand it is only Bruce, Sandy [Fletcher] & Graeme [Roberts]? that have requested to sell their shares .... Converted to loans. How do we fund without the sale of BB rent roll?

- *Order of people to pay out in the business?*
- *First and foremost: loans to existing shareholders = $208,000*
  - *1. Sandy $150,000*
  - *2. Graeme $300,000*
  - *3. Mark $300,000*

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129 T 5-93.
130 T 4-7.
131 T 4-8.
132 Exhibit 1 doc I 82.
133 T 2-102 – 2-104.

◦*4. Bruce $700,000*

TOTAL $1.45m

How do we fund this?"[134]

[169] Mr Adams said in cross-examination that he agreed to Ms Sandy Fletcher and Mr Graeme Roberts being paid out ahead of Mr Jensen and him because Ms Fletcher had breast cancer and Mr Roberts was "getting on in years and was looking to retire".[135] Ultimately, Ms Fletcher received her money back, but Mr Roberts did not receive his.[136]

The evidence of Ryan Gaiter, the financial controller

[170] According to Mr Ryan Gaiter, from the time Mr Adams said he wanted his money back, it was never in issue that he would be bought out. What was in issue was how it would be done. He agreed with the suggestion that it was never in issue that in the interim period Mr Adams would no longer be regarded as a shareholder but his investment would be treated as a loan.[137] He said that some of the investors, including Mr Adams, had borrowed money in order to invest, and were having difficulty servicing their loans. Mr Adams was not alone in wanting to withdraw his investment. The cash flow was insufficient to allow the payment of monthly draws to all investors. Payments were made to some, who had loans to service; in the circumstances those payments were referred to as "interest" rather than "draws". I accept that evidence.

Subsequent events

[171] The Broadbeach business was sold, and the sale proceeds were paid to Macquarie Bank.[138]

[172] Relations between Mr Adams and Mr Mills and the other investors deteriorated.

[173] The Mermaid Beach freehold was sold, completion of the sale taking place just before Christmas 2008. Mr Adams gave evidence of being concerned about the disbursement of the sale proceeds. He said he phoned Mr Mills after Christmas/New Year and asked him where all the money was going.

> *"His reply was, 'You're asking too many questions. What do you want to know that for?' And I reminded him that I was still involved in the group, I had money invested in the group and I felt that I had the right to ask. He said 'You've crossed the line. You are out.' And from that time onwards my name was deleted off all the e-mails and I was not invited to another executive committee meeting."*[139]

[174] On 13 January 2009 Mr Adams emailed Mr Mills –

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134 Exhibit 1 docs E 56-E 58.
135 T 2-99.
136 Mr Mills' cross-examination T 6-2, 6-3.
137 T 6-30.
138 T 5-16.
139 T 3-42.

> *"As discussed and agreed on several occasions in the past, the amount of $700,000 invested by me in NRGC Real Estate Group, is to be treated as a loan only, and is never to be converted to shares in the company or NRGC Real Estate Group."*[140]

[175] Mr Adams subsequently raised his concerns with Mr Ryan Gaiter, who gave him a copy of a bank statement for a Commonwealth Bank account styled "Elders Commercial Sales Trust Account" in the name of NRGC Real Estate Group Pty Ltd. It showed that the net proceeds of sale were transferred from an account styled "Elders Commercial Sales Trust Account" to that account. It showed relevant deposits of $65,000 and $240,653.67 on 24 December 2008, and the following withdrawals –

"29.12.08	*Riverwalk Realty Draw*	*$ 39,723.99*
02.01.09	*Macquarie Bank Princ Repayment*	*$ 18,000.00*
02.01.09	*Macquarie Bank Interest from 184 -*	*$ 43,474.27*
02.01.09	*Debit interest to 30 Dec*	*$ 5,553.16*
15.01.09	*Riverwalk Realty loan to Tweed*	*$ 2,000.00*
15.01.09	*Riverwalk Realty Loan from NRGC*	*$ 6,000.00*
15.01.09	*Commbiz Transfer loan to Ballina*	*$ 7,000.00"*[141]

[176] In late February 2009 Mr Adams emailed Mr Mills a proposal that he continue to manage the Commercial business for $1,000 a week.[142] On 3 March 2009 he and Mr Mills (as director of NRGC Commercial Pty Ltd) signed an agreement for Mr Adams to manage that business. The agreement was expressed to be on a week by week basis, terminable by either party on one week's written notice.[143] Mr Adams managed the Commercial business until January 2010. His wife worked in the office as property manager and his daughter worked there as a personal assistant and receptionist.

[177] The plaintiff commenced this proceeding on 11 August 2009.

[178] By letter dated 4 January 2010 Mr Mills gave Mr Adams one week's notice of termination of his employment.[144] The letter continued –

> *"As you are aware the Commercial Gold Coast office has been sold to JSH Commercial Pty Ltd with Jared Hodge managing the office from today through until settlement.*
>
> *Our solicitor has advised that we do not make any further payments to you as this will all be detailed in the forthcoming trial."*

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140 Exhibit 19.
141 T 3-49; Exhibit 12.
142 Exhibit 11.
143 Exhibit 4.
144 Exhibit 5.

[179] The sale of the Commercial office to Mr Hodge's company has not been completed. According to Mr Mills, this is because Mr Adams and Mr Jensen have refused to sign a release of Mr Hodge as a guarantor of the Macquarie Bank debt, and Mr Adams and Mr Hodge will not agree to a restraint of trade.[145] However, Mr Hodge's company has had access to the rent roll and its proceeds in the meantime.[146]

DISCUSSION

[180] As I said at the outset, the outcome of the case turns largely on credibility. In *Watson v Foxman*[147] McClelland CJ made some pertinent observations on the difficulties of proof facing a party relying on oral communications. His Honour said – [148]

> *" ... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.*
>
> *Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court 'must feel an actual persuasion of its occurrence or existence'. Such satisfaction is 'not ... attained or established independently of the nature and consequence of the fact or facts to be proved' including the 'seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding'*[149]*."*

[181] Mr Ian Mills was an astute and experienced businessman. He had managed the Ballina business for many years, while his brother Mr Glenn Mills, Mr Nicolson and Ms Yaldwyn concentrated on sales. I am satisfied that he was the driving force behind the establishment or acquisition of the other initial businesses – Coolangatta/Tweed Heads, Palm Beach and Broadbeach, the introduction of new investors and the proposed merger and restructure. He continued to play a dominant role after The Glades meeting. Members of the Executive Committee often made decisions by falling in with what he wanted. Until the downturn in the market following the GFC, the other investors were content to follow his lead. He was a shrewd, nimble operator, adept at maintaining control by force of his personality and elder statesman image, and by privately reaching different arrangements with

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145 T 6-7.

146 T 5-75.

147 (1995) 49 NSWLR 315.

148 (1995) 49 NSWLR 315 at 319. His Honour was addressing evidence of oral communications as the foundation for causes of action based on s 52 of the *Trade Practices Act* 1974 (Cth). However, what he said about the fallibility of human memory is applicable in many other contexts, including proof of the terms of an oral agreement.

149 *Helton v Allen* (1940) 63 CLR 691 at 712.

other, smaller and less experienced investors. Mr Mills gave his evidence carefully and in most respects it was consistent with other, objective evidence of what occurred. While I do not accept that he had no memory of some communications that sat awkwardly with his account of what occurred, I generally accept his evidence as truthful and reliable.

[182] Mr Adams was not in the same league as Mr Mills. He was an experienced real estate salesman and through Dawnlite, which was the trustee of his family trust, he had previously owned and run a small business, The Professionals Palm Beach. He was flattered by Mr Mills' suggestion they might embark on an investment together, and he was not averse to risk taking. He seized the opportunity with alacrity, but with little attention to detail. In examination in chief Mr Adams gave his evidence with confidence, care and some precision. He was cross-examined from about midday on the second day of trial until shortly before lunch on the third day. There was a marked difference in his presentation on the third day of trial. By then he seemed wearied by the whole process, overtly somewhat suspicious of defence counsel, and determined not to harm his case by the answers he gave. He answered many questions by professing to have no recollection of the matters on which he was being questioned. Overall I do not think that Mr Adams was deliberately dishonest in his evidence, but I think even his evidence in chief was unreliable in critical respects about the agreements he alleged.

The first agreement

[183] The discussions which resulted in an oral agreement between Mr Adams and Mr Mills in about late September 2006 grew out of Mr Adams' wish to re-enter the real estate industry and Mr Mills' desire to expand the group of businesses with which he was associated. From Mr Adams' perspective, those discussions were about immediate investment in two businesses (the Michael Lowing business and LJ Hooker Mermaid Beach) and, in the longer term, participation as an investor in the merged business. From Mr Mills' perspective, they were about immediate expansion by the acquisition of two new businesses and longer term development by the merger of the various businesses under an umbrella company.

[184] The merger was a mere aspiration, not even at the embryonic stage of development. I am satisfied that Mr Adams knew that the Initial Group Businesses were operated discretely by different entities, and that he knew that while Mr Mills had an (undefined) interest in all of them, they were "ultimately owned and controlled" by different groups of people. I am satisfied that Mr Mills told him that the merger was dependent on the agreement of all the "shareholders" and that it "wasn't a certainty" that it would occur. In other words, the merger was no more than a proposal which was dependent on the agreement of the entities which owned and operated the four businesses and, realistically, of those who stood behind those entities.

[185] Mr Mills had neither the actual nor the ostensible authority of the entities which operated the Initial Group Businesses or those who stood behind them, to make representations or enter into the First Agreement on the terms alleged by the plaintiff. And he was too canny to have done so.

[186] I am satisfied that they agreed to proceed with negotiations to acquire the LJ Hooker Mermaid Beach and Michael Lowing businesses. If they could reach agreement on price with the vendors, Mr Adams (ie the plaintiff) would provide the necessary

funds. These two new businesses would be included in the merger proposal, on the basis that if the merger eventuated, they would form part of the merged business and Mr Adams (ie the plaintiff) would be issued with shares in the merged business reflecting his proportion of the total value of the merged business. Unless and until that occurred, none of the defendants would have any beneficial interest in the new businesses.

[187] I am satisfied that they agreed on the formation of three companies – one to acquire each new business and one to be used as the umbrella company if the merger went ahead.

[188] They discussed "exit strategies" if the merger went ahead. I accept that Mr Mills described what had happened in the past when investors wished to withdraw their investments – they had been bought out by others. I find that, whether or not he gave some time frame within which that had previously occurred, he did not represent to Mr Adams, let alone give a binding undertaking, that he could have his money back on 30-60 days' notice.

[189] The parties' subsequent conduct was largely consistent with the agreement between Mr Mills and Mr Adams being in the limited terms I have found. The three companies were formed. The LJ Hooker Mermaid Beach business was acquired by one of the companies with funds provided by the plaintiff, and the Michael Lowing business was acquired by another of the companies with funds provided by the plaintiff. It was not until the meeting at The Glades on 3 March 2007 that representatives of the Initial Group Businesses and Mr Adams on behalf of the two new businesses agreed in principle to merge the businesses.

[190] The moneys the plaintiff had provided for the acquisition of the Mermaid Beach and Michael Lowing businesses appeared as loans in the accounts of NRGC Commercial Pty Ltd and NRGC Mermaid Beach Pty Ltd. The plaintiff received monthly payments of interest initially at the rate of 9% pa and subsequently at the rate of 10% pa. The investments of others were treated in a similar if not identical fashion.

[191] None of the investors was ever issued with shares – none of them was ever a shareholder in the technical sense. But, as Mr David Mills said, they used to refer to themselves as "shareholders" and "directors", but never as "lenders".[150]

[192] The finances of all the companies were managed as if there had been a de facto merger. If one business needed cash but there was none available in its accounts, then cash that was available in another business was used. It is perhaps surprising that they were content for their affairs to be conducted as if the merger had taken place. But the market was buoyant and expansion was in the air until the effects of the GFC began to bite, and to do so savagely.

[193] The monthly payments to investors, in the plaintiff's case $5,833.33, ceased when the impact of the GFC was felt, the last payment being made in mid-April 2008.

[194] Mr Mills' behaviour did not change. For example, in April 2008 when Mr Jensen wanted to withdraw his investment, he and his son Mr David Mills held a private

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150 T 6-48.

meeting with Mr Jensen, and in early July that year he engaged in correspondence with Mr Adams about Mr Adams and Mr Hodge taking over the Commercial business.

[195] Mr David Mills continued to record proceedings of the Executive Committee by taking notes on his laptop computer during meetings, and subsequently emailing them to the other investors. The minutes were often in abbreviated form, and their language was somewhat loose. Given the way in which meetings continued to be conducted, with matters only occasionally being put to a vote, this is unsurprising.

[196] Mr Adams' own subsequent conduct was inconsistent with a representation by Mr Mills, let alone a binding promise, that he could have his money back on 30-60 days' notice. There is no evidence that he (or anybody else) raised the issue of withdrawal of an investment at The Glades meeting. Mr Adams signed his acceptance of the proposal in Mr Mills' letter to him dated 17 May 2007 despite its containing no mention of his having his money back on 30 – 60 days' notice. In cross-examination he agreed that the letter accorded with his agreement with Mr Mills, and it was only when it was pointed out to him that it contained nothing about his having his money back on 30-60 days' notice that he said that had been agreed on the car tour. There is no evidence that he raised it in January 2008 when he told Mr Mills that he wanted to reduce his investment. He did not mention it in his letter to Mr Mills dated 27 June 2008. There was no reference to it in the Heads of Agreement prepared by his solicitors in early July 2008. He did not give evidence of raising it at the meeting on 16 July 2008, and I am satisfied that he did not do so. The minutes of that meeting record his stated wish "to be bought out completely within 12 months, with a view to be out of it earlier if possible", and in his own evidence in chief he said that Mr Mills told the meeting that "Bruce wish[ed] to be bought out of the group".

[197] Mr Jensen was the only witness who gave evidence that Mr Adams told the meeting on 16 July 2008 that Mr Mills had told him he could have his money back on 30-60 days' notice. In rejecting his evidence in this regard I take account of the unlikelihood that it was correct given the absence of such evidence from anyone else including Mr Adams, the possibility that he was mistaken in his recollection as to the occasion when Mr Adams said this, and his own hostility towards Mr Mills stemming from the loss of his investment and the unresolved litigation in the District Court.

[198] The plaintiff has not satisfied me on the balance of probabilities that Mr Adams and Mr Mills made the First Agreement in the terms alleged by the plaintiff. I am not satisfied that Mr Mills made the representations alleged, let alone a binding commitment as alleged.

The second agreement

[199] I am satisfied that paragraph 4(a) of the minutes of the Executive Committee meeting on 16 July 2008 is an accurate summary of what Mr Adams told the meeting he wanted (interpreting the references to Mr Adams as references to the plaintiff).

[200] In the changed economic environment, the investors all faced the prospect of losing their investments, and, in some cases at least, ongoing liabilities to their banks.

They were understandably nervous and distressed when Mr Adams told them he wanted to withdraw his investment. I am satisfied that there was anxious and heated discussion about Mr Adams' demand and whether there was any way in which it might be satisfied.

[201] However, I do not accept Mr Mills' evidence that he was taken by surprise,[151] given Mr Adams' letter to him of 27 June 2008.[152] I do not accept his evidence that he had no recollection of receiving that letter or of sending the email of 8 July 2008[153] about Mr Adams and Mr Hodge taking over the Commercial business. I think it is more likely that he sent the email to encourage them to take over the Commercial business, and to deflect Mr Adams from withdrawing his investment. What may have surprised him at the meeting were the apparent strength of Mr Adams' resolve and the reactions of others.

[202] I am satisfied that, consistently with the dominant role he had played in the affairs of the business to that point and with the way meetings of the Executive Committee were customarily conducted, Mr Mills took the lead in responding to Mr Adams' demand.

[203] I do not accept Mr Adams' evidence that Mr Mills said at the meeting on 16 July 2008 that an arrangement would be made whereby he would receive his funds back by 30 June 2009 and that he would be paid monthly interest at 10% pa in the interim. Nor do I accept Mr Adams' evidence that he responded that he would be happy with that.

[204] I am satisfied that Mr Mills said words to the effect that the $700,000 investment should be treated as a loan, that it was not possible to pay it back immediately, and that interest on it should be paid monthly at the rate of 10% pa. I am satisfied that no vote was taken and no binding agreement was reached. At most, there was an agreement in principle that this should occur, and that they would endeavour to work out a restructure to allow it to occur.

[205] After The Glades meeting, the plaintiff's investment and those of others had been loosely referred to as shareholdings in the group. However, despite the intermingling of the affairs of the various businesses, the merger had never actually been effected and the shares had never been issued. The plaintiff's investment had been recorded as a loan in the accounts of NRGC Mermaid Beach and NRGC Commercial and interest had been paid monthly, first at the rate of 9% pa and later at 10% pa, until April 2008. The interest had been paid out of the accounts of whichever companies in the group had funds available when payments were due, and at least to that extent the investment had apparently been treated as a loan to the whole group.

[206] Paragraph 4(b) of the minutes of the meeting on 16 July 2008 recorded that the plaintiff's investment "is viewed as a loan only, with 10% variable paid monthly". That was not necessarily inconsistent with how it had previously been treated, except that the payment of interest had ceased because of lack of cashflow.

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151 I note Mr Jensen's evidence that Mr Mills "seemed pretty shocked": T 3-68.

152 Exhibit 1 doc I 65.

153 Exhibit 3.

[207] Everyone but Mr Adams and Mr Jensen denied that there was any agreement for repayment by 30 June 2009. I do not think that any significance should be attached to the fact that no one took issue with the minutes, because on their face they did not reflect an agreement for repayment by 30 June 2009.

[208] I have already rejected Mr Jensen's evidence that Mr Adams told the meeting that Mr Mills had told him he could have his money back on 30-60 days' notice. For similar reasons, I reject his evidence that Mr Mills told the meeting that repayment would have to occur by 30 June 2009 and that "he could do it by then."

[209] What occurred after 16 July 2008 is consistent with no binding agreement for repayment by 30 June 2009 having been made at the meeting, and with ongoing efforts to find a way of satisfying Mr Adams' wish to withdraw the plaintiff's investment.

[210] Interest payments resumed from August 2008. At its meetings in September and October 2008, the Executive Committee discussed Mr Adams and others' wishes to withdraw their investments and possible ways of funding this. What occurred at those meetings was inconsistent with an agreement having been reached at the meeting on 16 July 2008 in the terms alleged by the plaintiff. And the minutes of those meetings are not reflective of such an agreement having been reached on 16 July 2008.

[211] I am satisfied that, outside Executive Committee meetings, Mr Mills worked to find a solution, and that in doing so he had one or more discussions with Mr Adams.

[212] In considering what significance should be attached to the email of 25 September 2008, a number of matters should be borne in mind. The true meaning of what was being conveyed is to be ascertained objectively, rather than subjectively by reference to Mr Mills' evidence of what he intended to convey by the words used. But resort can be had to the context in which the email was written in order to ascertain its true meaning, and what Mr Mills said about the circumstances in which the Executive Committee found itself is evidence of that context. The explanations Mr Mills gave are relevant to the assessment of his credibility. To conclude that he was being deliberately evasive or untruthful in what he said about the distinction between an arrangement and an agreement and in what he said about the arrangement not being a "legal loan" may be unduly harsh. He was an astute businessman, hitherto successful in the real estate industry, but he was not a lawyer. Like all the other investors, he showed little understanding of legal niceties and paid scant attention to them in communications.

[213] That email was styled a "Shareholder Update" and began by referring to the "Directors of NRGC Real Estate" (rather than the Executive Committee) being aware that shareholders were under financial stress because dividends had not been paid. It was the first document to refer to repayment by 30 June 2009. It made no reference to the Executive Committee meeting on 16 July 2008, and was silent as to when the arrangement to convert the plaintiff's shareholding to a loan to be paid out by that date was reached.

[214] The plaintiff's case as pleaded was that the Second Agreement was an oral agreement made at the meeting on 16 July 2008, and that it was subsequently reflected in part in the minutes of the Executive Committee meetings on 16 July

2008, 3 September 2008 and 21 October 2008 and the email of 25 September 2008. The email is not reflective of such an oral agreement having been made on 16 July 2008. It is no more than consistent with Mr Mills' ongoing efforts to find a way out of the mire in which all the investors found themselves.

[215] Further, even if Mr Mills said at the meeting on 16 July 2008 that an arrangement would be made whereby Mr Adams would receive his funds back by 30 June 2009 and that he would receive interest at 10% pa in the meantime, the other investors (apart from perhaps Mr Jensen) clearly did not endorse that proposal. In the circumstances, Mr Mills clearly lacked the authority to bind the other defendants to this proceeding. There is no evidence that he had their authority to reach such a binding agreement at any subsequent time.

[216] The plaintiff has not satisfied me on the balance of probabilities that either the Redemption Decision or the Second Agreement alleged by it was made at the Executive Committee meeting on 16 July 2008.

CONCLUSION

[217] The plaintiff has failed to prove that the First Agreement was in the terms it alleges, and it has failed to prove that Mr Mills made representations to like effect. It has failed to prove the making of the Second Agreement in the terms it alleges. Accordingly, a breach of these agreements has not been established, and its contractual claim must be dismissed. As the plaintiff has not satisfied me that the representations were made in the terms alleged, its estoppel case must also fail. The plaintiff's claim should be dismissed.

[218] I will hear the parties on the form of the order and as to costs.