SUPREME COURT OF QUEENSLAND

CITATION:	*Leach v Ross & Anor* [2013] QSC 333
PARTIES:	**CRAIG JOHN LEACH** (plaintiff) **v** **PAUL MARK ROSS** (first defendant) and **BABES IN PARADISE PTY LTD (ACN 118 024 052)** **AS TRUSTEE OF THE BABES IN PARADISE TRUST** (second defendant)
FILE NO/S:	BS 5201 of 2010
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	31 July and 1, 2 and 7 August 2013
JUDGE:	Dalton J
ORDER:	**Judgment for the plaintiff**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – where the plaintiff wanted to open a brothel – where the Prostitution Licensing Authority (PLA) would not grant him a licence to run a brothel – whether the plaintiff and defendant owned the brothel business in equal shares EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – FIDUCIARY DUTY – where the plaintiff alleged that he and the defendant were prospective partners to run a brothel – where the defendant gave an undertaking to the PLA that the plaintiff would not play any part in the operation or management of the brothel – where no partnership between the plaintiff and defendant ever came into being – where entering into partnership depended on a contingency beyond agreement of the parties, being the granting of a licence by the PLA to the plaintiff– whether the defendant owed the plaintiff a fiduciary duty – whether the plaintiff breached such a duty by giving the undertaking to the PLA – whether the plaintiff is entitled to an account

Bell v Lever Bros. Ltd [1932] AC 161, 227
Chan v Zacharia (1983-1984) 154 CLR 178
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
Jones v Dunkel
Mackay v Dick (1881) 6 App Cas 251
M Young Legal Associates Ltd v Zahid [2006] 1 WLR 2562
News Limited and Ors v Australian Rugby Football League Ltd & Ors [1996] FCA 870
The Commercial Bank of Australia Ltd v G H Dean & Co Pty Ltd [1983] 2 Qd R 204
United Dominions Corporation Ltd v Brian Pty Ltd (1984-1985) 157 CLR 1

COUNSEL: P J Roney QC with B McGlade for the plaintiff
M R Bland for the defendants

SOLICITORS: Lillas & Loel for the plaintiff
QBM Lawyers for the defendants

[1] The plaintiff left the Federal Police force in 1997, involuntarily, because he had lost the confidence of the Commissioner. He began working as a builder in Sydney with his father as a partner but ran into dispute with his father, which later ended up in the Courts. After that relationship breakdown, he moved to the Gold Coast in 1999 and decided to open a brothel, having read in the newspapers that this was to become legal. He found premises he considered suitable and applied for a development application. This was refused. He challenged that decision in the Planning and Environment Court and lost. He found another premises – Upton Street – the premises the subject of this proceeding. He applied and obtained development approval. He applied for a licence to run the brothel from the Prostitution Licensing Authority (PLA), a body established by the *Prostitution Act* 1999 (Qld). He had to withdraw his application as he could not provide details of his financial ability to run a brothel due to the fact that somehow (unexplained) his father and the accountants who had acted for the building venture in Sydney prevented this. He applied again when he was able to provide financial details. On 8 June 2001 the PLA wrote to him and told him he was unsuitable to run a brothel. They wrote a second time to the same effect on 23 October 2002 and a third time on 14 November 2002. He then commenced judicial review proceedings in relation to that decision. The plaintiff discontinued this suit. He says this was on the basis that he was invited to re-apply for a licence. He is mistaken, at least, as to this, I find it was on the basis that his extant application was to be treated as alive and undetermined.[1] At some point, unspecified, he also became involved in litigation in the Supreme Court with the landlord of the Upton Street premises. In this proceeding the plaintiff claims to be entitled to half the value of a brothel which is licensed and run in the name of the defendants, and an account of profits.

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[1] See his solicitor's letter, p 256, exhibit 1, "Our client's licence application is back on foot", as a result of the settlement, and see exhibits 2 and 3 which show that at least in July and August 2004 the plaintiff understood the true effect of the settlement.

[2] The *Prostitution Act* contains a section which looms large in this litigation:

> "**81 Licensee not to operate brothel in partnership or in association with unlicensed person**
>
> (1) A licensee must not operate a licensed brothel in partnership with, or otherwise in association with, a person who is not also licensed to operate the brothel.
>
> Maximum penalty—200 penalty units or 5 years imprisonment.
>
> (2) For subsection (1), a person operates a brothel in association with another person if the person directly receives income from the brothel."

Credit

[3] The second defendant is properly a party to this proceeding, but had no independent role before me. The second defendant was incorporated in 2006 with the first defendant as its sole shareholder and director. The defendants were represented by the same solicitors and counsel at trial. There was no point taken that if relief were granted against one, it ought to be granted against both. I refer to the first defendant as defendant in this judgment. I have strong reservations as to the credit of both the plaintiff and the defendant. The defendant was particularly concerned not only about s 81 of the *Prostitution Act*, but also the fact that he had given an undertaking to the PLA to have no association with the plaintiff in relation to the business of the brothel. It is quite plain that much of his evidence was deliberately vague in order to avoid showing a breach of either s 81 or that undertaking, or at least to minimise those breaches which it was inevitable would come to light. The defendant to some extent admitted that – see for example t 3-93. As well, much of the defendant's evidence was abnormally vague, even beyond what might be accounted for by that consideration. It contained massive inconsistencies and sometimes diametric contradictions – see for example t 3-50, t 3-52, t 3-61 and tt 3-82-83.

[4] I thought that the candour of the plaintiff's evidence was also reduced by a desire not to admit to contraventions of the Act. The plaintiff's evidence-in-chief as to his leaving the Federal Police force was economical with the truth. He went to some lengths to explain that his redundancy, although involuntary, was due to budgetary considerations. When his counsel particularly led him to his having been under investigation for associating with known criminals he accepted that that was so, but did not make any connection with his involuntary redundancy, although that was the subject apparently under examination.[2] Further, I find that in his submission to the PLA in October 2002 he deliberately exhibited a document designed to threaten the PLA in quite a scandalous way. I see this as a preparedness to use dishonest means to obtain a licence which he knew he was having difficulty obtaining. It was submitted that there was other conduct in this latter vein, but I think that the other conduct was ambiguous.

[5] Where possible I have looked to find corroboration for the evidence of both the plaintiff and the defendant either in documents, or in the evidence of independent witnesses. Where findings as to particular facts are based on credit, I give specific reasons, below.

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[2] cf t 2-44 ff, in cross-examination.

Agreements Between Plaintiff and Defendant

[6] While living on the Gold Coast the plaintiff met the defendant. They saw each other from time to time. They were friendly but not good friends. The defendant had also served in the Federal Police force. The defendant was also trying to set up a brothel. He was having difficulty finding premises. The plaintiff said that in June 2003:

> "I asked Paul if he would be interested in taking up a half-share in the premises [Upton Street]. The half-share would be – he would be required to pay the ongoing costs of the legal dispute with the [landlord] and any – any other costs that may be involved in his – his side of the application. We were to be partners, fifty-fifty, and any contributions that he had put into it or I put into it prior were to be refunded to either of us at the earliest convenience." – t 2-24.

As well, the defendant was to arrange finance for the fit-out – t 2-25. Contributions were to be refunded, "out of the business" – t 2-25.

[7] This is not very different from the defendant's version of the original bargain – t 3-39. The plaintiff and defendant engaged a firm of solicitors who wrote to the PLA explaining that they had both lodged separate applications for brothel licences and now advised that they wished to enter into business together. They asked what, if anything, the PLA might require of them, having regard to this change of plan.

[8] Then there was another change of plan. There is a document signed by both the plaintiff and the defendant[3] dated 13 July 2004 which reads as follows:

"AGREEMENT MADE BETWEEN
PAUL ROSS AND CRAIG LEACH
IN RELATION TO POSSESSION
OF PREMISES AT
37 UPTON STREET BUNDALL

Craig Leach agrees to relinquish all interests in the proposed brothel and all rights in relation to his lease and possession of premises at 37 Upton Street, Bundall to Paul Ross as of this date 13th July 2004. The subject premises are currently a warehouse with Gold Coast City Council approval and zoning as a brothel.

In return for his relinquishment Craig Leach will receive from Paul Ross the sum of $100,000 to be paid to Craig in full by 31st December 2004.

This agreement contains all of the agreed terms by both parties.

Craig Leach Paul Ross

Witness Witness

Dated this 13th day of July 2004"

[3] The parties apparently witnessed each other's signatures.

[9] In August 2004 there was another change of plan. The defendant told the plaintiff that he would not be able to pay the $100,000 by the end of that year. The plaintiff's version is that they agreed that the plaintiff would take up a "half-share in the future in the venture" – t 2-27. The plaintiff did not wish to continue to apply for a brothel licence at that stage and it was agreed that he would "come in later". The plaintiff says it was agreed that the money both had contributed to date would be paid back as early as possible from the net profits of the business – t 2-28. The plaintiff says they agreed that if the plaintiff decided some time in the future not to go ahead with his application for a brothel licence, or if he was not granted a brothel licence in the future, the two of them would get a licensed independent valuer to value the business and the plaintiff would be paid half the value – t 2-27.

[10] A few days later the plaintiff and defendant signed two more written agreements each dated 9 August 2004 to record the latest arrangement:

> "AGREEMENT BETWEEN PAUL ROSS AND CRAIG LEACH RE BROTHEL AT 37 UPTON ST, BUNDALL.
>
> I Paul Mark Ross hereby agree that I have a half-share in the brothel business at 37 Upton St Bundall. The other half of the business is owned by Craig Leach. This agreement has been made due to the fact that Craig Leach has been unable to obtain a brothel licence in the past but will continue to try to obtain a licence to operate as a legitimate partner.
>
> This document is a binding agreement between Paul Ross and Craig Leach and supersedes any previous written agreements.
>
> Paul Mark Ross
> 9 August 2004
>
> Glenn Middleton
> Witnessed
> 9/8/04
>
> Craig John Leach
> 9 August 2004" – p 264 of exhibit 1.

[11] And at p 265 of exhibit 1:

> "AGREEMENT MADE BETWEEN PAUL MARK ROSS AND CRAIG LEACH IN RELATION TO PROPERTY AT 37 UPTON ST BUNDALL
>
> It is agreed that Paul Ross owes to Craig Leach the sum of money equal to half the value of the proposed Brothel business at 37 Upton St Bundall (not to include freehold building value). This value is the value decided by a licensed valuer at the time of a subject incident. For the purpose of this agreement a subject incident is described as any situation affecting Paul's ability to carry on his position as licensed owner of the Brothel or any falling out of the two parties within this agreement.
>
> This agreement will be void when and if Craig Leach obtains his Owners License from the Prostitution Licensing Authority.

Paul Ross
Signed on the 9th day of August 2004

Craig Leach

Glenn Middleton
Witnessed
9/8/04"

[12] The plaintiff said he did not draft the 9 August 2004 agreements and that the defendant brought them to his house without warning and asked him to sign them. The witness was a Mr Middleton who just happened to be there at the time. On the other hand, the defendant said he was invited to a barbeque lunch at the plaintiff's house and that, after he had had a few beers, the plaintiff produced the two agreements and asked him to sign. Mr Middleton was called as a witness and supported the plaintiff's version. Also supporting the plaintiff's version in my view is the fact that the defendant admits it was he who prepared the 9 August 2004 agreement – t 3-40. He also prepared the receipts at pp 406 and 417 of exhibit 1. That is, generally it seemed that it was the defendant, rather than the plaintiff, who wished to document their relationship. Further, the two documents dated 9 August 2004 appear to me to be similar in typeface and style to that of 13 July 2004, and the receipt at p 417 of exhibit 1. This was put to Mr Ross. He claimed not to be able to comment on the typeface, and as to the style, he thought that any similarities in style might be accounted for by the fact that the plaintiff copied his original 13 July 2004 document. I prefer the plaintiff's evidence to that of the defendant on this issue.

[13] Neither of the August documents refer to repayment of contributions made from profits. I accept however that was part of the agreement between the plaintiff and the defendant, although there is no satisfactory explanation as to why it was not in the documents. This was the plaintiff's evidence – t 2-28. The defendant really did not give any credible version of what was the August agreement – see tt 3-76-77 – and tended to merge this conceptually, if not temporally, with what he alleged was a later agreement to re-substitute his obligation to pay the plaintiff $100,000, see below. In substance the defendant's evidence was that the monies the plaintiff had spent before any agreement between the two of them were to be repaid – see eg. t 3-85.

[14] Mr Middleton's evidence was that the matter was discussed when the documents were signed; both parties agreed that it had been forgotten, but that contributions were to be repaid as soon as funds were available from the profits of the business – t 2-63.

[15] There seems no commercial incentive for the plaintiff to defer the July obligation to pay $100,000 by December 2004, if he received nothing more than the chance to become a partner (at some distant time if he ever applied for and was ever granted a licence). The plaintiff's version is commercially sensible. By August 2004 he had contributed $100,000 or more and, as the July agreement shows, he was looking to recover it. The defendant was incurring, or was about to incur, significant sums by way of legal expenses, licensing fees and fit-out costs.

Finding as to Plaintiff's half-share

[16] In my opinion, the words of the 9 August 2004 agreement at p 264 of exhibit 1 are literally true, ie., that from that time, or perhaps from the earlier oral agreement a day or two before, the plaintiff and defendant owned the brothel business in equal shares. The first paragraph of that agreement acknowledges that it is made in circumstances where the plaintiff has been unable to obtain a licence. It is envisaged that one day he may obtain a licence, at which point in time he will become "a legitimate partner".

[17] In making this finding I have regard to the literal words of the document. I also have regard to the commercial sense of the matter. Prior to the August agreement, the defendant owed the plaintiff $100,000 and the plaintiff had no interest in the brothel. The defendant was unable to pay the plaintiff, and so they reached a substitute agreement. It makes no commercial sense to say that in substitution for a right to receive $100,000 by the end of 2004 the plaintiff agreed to receive that $100,000 at some indefinite time, with no arrangement as to interest, and take the chance that one day he might be granted a brothel licence so that at that point he could become a partner in the brothel business.

[18] The second written agreement of 9 August 2004 – p 265 of exhibit 1 – is consistent with that, in that it acknowledges that the plaintiff and defendant are entitled in equal shares to the value of the brothel business, not at any point in time, but on valuation, if they fall out, or if the defendant, the person who is able legitimately to carry on the business, is unable so to do. This second part of the agreement is expressed to end if the plaintiff obtained a licence, because then they could be partners.

[19] The third matter which strongly supports the idea that the plaintiff had an immediate present ownership of half the brothel business from August 2004 was the use of language by the parties. Throughout his evidence the plaintiff referred to his share in the brothel or the business, or his half-share. I am satisfied on the evidence of Mr Allen, and Mr Liprine (below) that the plaintiff offered to sell that share. There was some similar evidence given by Mr Middleton in that regard – t 2-64.

[20] I do not believe the plaintiff's evidence that it was also agreed that he had a right to a valuation if he could not get a licence to carry on a brothel. He could not explain how it was that that was directly contradicted by the terms of the documents signed – t 3-18. His assertion contradicts the clear words of the documents and the commercial sense of them, as just explained. It also sits uncomfortably with his evidence, and pleaded case, that he did not intend to apply for a licence again, in the short term at least, as at August 2004. The plaintiff wrote to the PLA withdrawing his application for a licence in July 2004. In his evidence, the plaintiff never abandoned the claim that he might one day re-apply for a brothel licence. However, my view is that at all times after settlement of his judicial review proceeding against the PLA, the plaintiff knew and believed there was little chance of his being granted a licence. In fact he has never re-applied. Interestingly, it was not pleaded in the twelfth further amended statement of claim that it was a term of the August 2004 agreement that the plaintiff would have a right to half the value of the business if he

could not get a licence – see paragraph 13B. And it was pleaded that it was a term that "for the time being the plaintiff would not seek such a licence".[4]

Undertaking Given to the PLA

[21] The defendant encountered difficulty in obtaining a brothel licence because the PLA was suspicious that the brothel which he wished to run would be in some way associated with the plaintiff. There were hearings before the PLA, and during a hearing in December 2005, on the advice of his barrister and solicitor, the defendant offered the PLA an undertaking that the plaintiff would "not play any part whatever in the operation or management of [the] brothel". It is noted that this has an effect which is considerably wider than the words of s 81 of the *Prostitution Act*.

[22] There was talk on the plaintiff's side of the case as to whether or not this undertaking was offered "voluntarily" or not. This seems to me to be beside the point. Obviously enough it was offered voluntarily, that is, the defendant was not compelled to offer it. Nonetheless, I accept the overwhelming evidence that had he not offered the undertaking he would not have received a brothel licence – t 3-55, t 3-56, t 3-57, t 3-58, and p 391 of exhibit 1. The defendant did not tell the plaintiff of this undertaking and I infer from his evidence – that he told a third party in the hope that they might tell the plaintiff – t 3-79 – that he realised that the plaintiff would be dismayed by it. It was suggested to the defendant that he deliberately withheld the information from the plaintiff and the defendant avoided answering that question – t 3-80. I infer that he did deliberately withhold the information.

Licence Granted and Brothel Opens

[23] By December 2005 the defendant had a brothel licence and the lease of the Upton Street property. The plaintiff said that he then took six months off work from January to June 2006 in order to physically fit out the brothel – t 2-30. He said he worked five days a week and was paid nothing for it. The extent of this work was not conceded by the defendant, he said that the plaintiff spent a couple of weeks working on the fit-out. The plaintiff said that through that time, he contributed various sums of money to rent and fit-out. These are pleaded at paragraph 26 of the latest statement of claim. The defendant's borrowing from the plaintiff and allowing the plaintiff to work fitting-out the brothel may well have breached the undertaking to the PLA. As well, I think the settlement reached in January 2009 tends to support the plaintiff's version of events (see below). I prefer the plaintiff's evidence as to his contributions by way of work and money in this time period.

[24] The plaintiff and defendant both said that the brothel began to trade in about June 2006 and that thereafter the plaintiff had no role in the brothel and received no profits from the brothel.

Alleged Agreement to Re-substitute Obligation to Pay $100,000

[25] The defendant said that in mid-to-late, probably late, 2005, after he had given the undertaking and received his licence, he had a telephone conversation with the plaintiff and told him that it was most unlikely that the plaintiff would ever receive

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[4] The trial had to be adjourned on the first day to allow the plaintiff to re-plead his statement of claim for the pleading at that point was so unwieldy, and so far from complying with the rules, that a fair trial could not have proceeded.

a brothel licence and that they should abandon the August 2004 agreement and go back to the previous agreement that the plaintiff have no interest in the brothel and the defendant pay the plaintiff $100,000.[5] The plaintiff reluctantly agreed.

[26] I find there was no such agreement. There is no document which supports the existence of the re-substitution agreement. Had there been such an agreement, why would the defendant not record the truth in the letter, which is at p 408 of exhibit 1, dated 3 November 2008? This letter refers in the last paragraph (in the past tense) to a signed agreement to pay $100,000. That must be a reference to the written agreement of 13 July 2004. That is the only such agreement signed by the parties. The defendant's re-substitution agreement was said to be oral. That the defendant refers to the 13 July 2004 agreement, and not to any later alleged oral re-substitution agreement, tends strongly to show that the oral re-substitution agreement was never made.

[27] It seems very unlikely that there was an agreement to return to the $100,000 obligation when it is realised that the end of December 2005 marked the time when the plaintiff began working to fit-out the brothel, and began contributing an amount which totalled more than $90,000 to that fit-out. That is not consistent with the re-substitution agreement sworn to by the defendant. Further, if there had been the re-substitution agreement asserted by the defendant in mid-to-late 2005, there would not have been a need for the defendant to conceal the undertaking given to the PLA from the plaintiff.

Plaintiff discovers Undertaking

[28] The plaintiff said that in or about November or December 2006 he was at the brothel and said to the defendant that he was considering applying for his brothel licence and taking up the half-share in the partnership. At this point the defendant revealed to the plaintiff that he had given the undertaking. The plaintiff said he was upset – tt 2-32-33. He said, "It would have been nice to know all this before I took six months off work and put $100,000 into the fit-out and had to sell my house". Having regard to the defendant's evidence about not revealing the existence of the undertaking to the plaintiff, and to the absence of any credible, contrary version given by the defendant, I accept the plaintiff's evidence about this.

[29] The plaintiff said that had he known that the defendant had been asked for an undertaking by the PLA he would not have consented to it being given – t 2-35. This was not explored with the plaintiff in cross-examination. I have doubt about it, not based on credibility, but on the analysis below, as to whether the giving of the undertaking was a breach of fiduciary duty.

[30] The plaintiff says that in consequence of the disclosure of the undertaking, he and the defendant went to see a solicitor, Mr Provest. The plaintiff says Mr Provest was the defendant's solicitor, and that seems right. The plaintiff says that Mr Provest gave advice that it would be too difficult to do anything about changing the undertaking. The plaintiff told Mr Provest about the August 2004 agreement. Mr Provest expressed displeasure about the existence of such an agreement and said that if there were an approach to the PLA then the defendant would end up "in some

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5 t 3-42, t 3-48, t 3-81 and t 3-93.

sort of hot water". According to the plaintiff, the defendant in this meeting, "… did agree that we had a partnership or an arrangement" – t 2-34.

[31] Mr Provest gave evidence. He said that he met with both the plaintiff and the defendant at various times during their dealings with each other, but he thought he had never been told that the plaintiff had a half-share in the brothel after the licence had been given to the defendant. He said he could not imagine how that would have been legal given the terms of the undertaking which he knew the defendant had given – t 3-55. He said he did recall learning at some point that the plaintiff had funded part of the fit-out after the undertaking had been given and was "appalled" – t 3-58. He believed that had a meeting, such as the plaintiff gave evidence of, taken place, he (Mr Provest) would expect to have remembered it – t 3-60. I accept Mr Provest's evidence and disbelieve the plaintiff about this meeting taking place.

[32] The plaintiff never tried to terminate the agreement he had with the defendant on the basis that the defendant gave the undertaking to the PLA – that is he did not do so at the time he found out about the undertaking, nor has he ever subsequently done so. When he was asked in cross-examination why he did not ask for repayments of his contributions to the business after the brothel opened in 2006, he replied that when he did inquire how the business was going he was told it was losing money. He added, "In the beginning, I sort of let it slide. It all changed after I found out the undertaking was given and it was going to be difficult for me to legitimise the partnership." – t 3-8. The change seems to have been that the plaintiff began to make attempts to extract himself from the arrangement he had with the defendant.

Efforts to Sell the Plaintiff's Share in the Brothel

[33] The plaintiff says that in February or March 2008 he met a Mr Jeff Allen and Mr Kevin Liprine, who were interested in buying the plaintiff's interest in the brothel– t 2-36. Both Mr Allen and Mr Liprine gave evidence. Mr Allen said that as a result of a conversation with the plaintiff in mid-2007 he went with Mr Liprine to see the defendant. Mr Allen said that the plaintiff told him he was going to have a family and wanted to "sell his half-share in the brothel" – t 2-56. It was not Mr Allen, but Mr Liprine who was "going to buy Craig's half-share" – t 2-50. Mr Liprine said that he went to see the defendant to buy Craig Leach's "50 per cent in the brothel" – t 2-58 – because Craig Leach had told him it was for sale – t 2-59. They visited Mr Ross at the brothel. Mr Ross was unco-operative. Mr Allen said he again visited Mr Ross at the brothel in the second half of 2008, this time by himself. He said this was after a meeting with the plaintiff, who told Mr Allen that the defendant wanted to sell his "half of the business" – t 2-51 – for $500,000 to $600,000. Mr Allen said that the defendant told Mr Allen that he wanted a lot more than that for his half-share in the brothel. Mr Allen considered the price too high.

[34] The defendant denied that Mr Liprine had ever visited for the stated purpose. He could recall that once, one person came to see if he (the defendant) was interested in selling all his ownership – that is 100 per cent – in the brothel. This version of events was put to both Mr Allen and Mr Liprine in cross-examination and they denied it. I prefer the evidence of Mr Allen and Mr Liprine to the defendant and accept that events occurred as they told me.

Dispute as to Monies Owing to Plaintiff

[35] According to the plaintiff, before the first attendance of Mr Allen on Mr Ross, the plaintiff and the defendant discussed "that we should, perhaps, consider buying each other out." – t 2-37. The defendant offered to give the plaintiff $200,000 for his share – t 2-37 – according to the plaintiff. The plaintiff did not think that was sufficient consideration and offered to buy the defendant's "half-share" – t 2-37. He thought this was around mid-2007. He said he offered as much as half-a-million dollars but the defendant would not accept it. In this state of impasse the plaintiff asked a lawyer friend to come from Sydney to the Gold Coast to attempt mediation between the plaintiff and the defendant. This attempt failed.

[36] The plaintiff then consulted a solicitor – Mal Chalmers – who wrote on behalf of the plaintiff, to the defendant, demanding an amount of $278,000 owing for "set-up costs for a licensed brothel which you run". The letter asserts that the amount was invested by the plaintiff in the business. The response is a letter written by the defendant dated 3 November 2008, (pp 408-9 of exhibit 1). It begins:

> "[The plaintiff] has not invested any money in the business that I conduct. You should be aware that the Licence I hold is subject to an undertaking that [the plaintiff] not play any part whatever in the operation or management of the brothel. [The plaintiff] did loan to me amounts totalling $91,683."

[37] The defendant admitted that he was being careful in wording this letter so as not to make any admissions which he thought would jeopardise his brothel licence – t 3-93. His letter goes on to say that he has repaid $63,500 of the $91,683 loan, and gives details of dates and amounts totalling $63,500, including an amount of $48,500 on 12 October 2008. A payment of $48,500 did occur. It was made in cash, in a carpark. The plaintiff signed a receipt – p 406 of exhibit 1. The plaintiff acknowledged that $48,500 was paid, but denied the other payments alleged in the letter of 3 November 2008 were made to him. The other payments were said by the defendant to have been made in cash, and he obtained no receipts.

[38] The plaintiff's evidence as to the $48,500 payment was most unimpressive. He said that he was mystified as to why the defendant would give him the cash. He said all the defendant said was, "This will keep you going for a while." The plaintiff said that he signed a receipt and, still mystified, was careful to stipulate to the defendant, "This has got nothing to do with my half-share." – t 3-10. When he was pushed as to whether or not he understood the money went to reduce the amount owing to him he said, "As I said, he gave it to me in cash. He didn't explain what it was, what it was for. All <u>he</u> qualified was that it was nothing to do with my half-share in the business." – t 3-11 (my underlining). That is he attributed the qualification to the defendant rather than himself, as he had in his earlier evidence. I regard the plaintiff's evidence that he did not know why the defendant was paying him $48,500 as dishonest. I have no doubt that he regarded the payment as part of the monies owing to him by the defendant. I disbelieve his evidence that he ascertained, or that the defendant stipulated, that the money was not referable to the plaintiff's half-share, in circumstances where he did not ascertain what the money did relate to, and was prepared to sign a receipt for it.

[39] The defendant's letter of 3 November 2008 continued that he acknowledged responsibility to pay what remained outstanding of the $91,683 loan monies and then said:

> "I acknowledge that while establishing the brothel at 37 Upton Street I obtained the benefit of the work [the plaintiff] did on his account in the years prior to my involvement including, Local Government Approval, Architectural Drawings, Hydraulic Drawings and other work preparatory to the establishment of the brothel.
>
> Whilst I am under no legal obligation to make any payment to Mr Leach and I am keenly aware of my obligations to comply with my undertakings to the Prostitution Licensing Authority, I am in fairness to Mr Leach prepared to make him an ex-gratia payment in the sum of $150,000 to settle the matter.
>
> Let it be noted that an agreement to compensate Mr Leach for the money spent prior to my involvement was $100,000. This agreement was signed off on by both parties."

[40] A follow-up letter dated 30 November 2008 from the defendant makes it clear that the total amount being offered is $150,000, not $150,000 together with outstanding loan amounts. So on the defendant's figures, he was offering to pay monies which would bring the total paid to the plaintiff to around $213,000 ($63,000 and $150,000).

Settlement Agreement 20 January 2009

[41] In January 2009 the plaintiff initiated proceedings against the defendant in this Court – No. 631/09. The claim was for $282,848 as monies owing pursuant to an agreement. Mr Chalmers assisted the plaintiff in drawing the statement of claim but it bears the plaintiff's own name and signature. The statement of claim is to the effect that between 2004 and 2006 [sic] there was an agreement made between the plaintiff and defendant as to monies spent on the set-up of a business. The agreement is said to have been oral and to the effect that the plaintiff and defendant would contribute capital to the set-up and operation of a business which would be repaid after the business was operating. A list of expenses which bears no resemblance to the list of expenses at paragraph 26 of the current statement of claim is included. It seems, from the brief descriptions given, to list items spent before the first of the agreements between the plaintiff and defendant, ie., items bought when the plaintiff was establishing the brothel on his own account. The amounts against these items seem approximate. An amount of $40,000 is claimed for the plaintiff's labour and building during fit-out. An additional unparticularised amount of $92,000 is claimed as "fit-out". It was accepted by the plaintiff that this last amount, whatever minor numerical variations there are, is the amount spent by the plaintiff after the brothel was licensed – ie., it is conceptually the same amount as that at paragraph 26 of the current statement of claim, and the amount of $91,683 acknowledged as owing by the defendant's letter of 3 November 2008 (p 408, exhibit 1) – see t 3-14.

[42] Proceeding 631/09 was filed on 19 January 2009, but not served. On 20 January the plaintiff and the defendant met in the presence of Mr Chalmers and the defendant paid the plaintiff $170,000. It was in cash, in a sports bag. On 22 January 2009 Mr Chalmers filed a notice of discontinuance in proceeding 631/09. The plaintiff's

case in this proceeding was that the settlement between the plaintiff and the defendant on 20 January 2009 was only in relation to monies owing, and was not in relation to the subject matter of the plaintiff's half-share in the action. The defendant says it was to settle the whole of the dispute between them. This part of the defendant's version is bound up with his assertion of the agreement to re-substitute the obligation to pay $100,000, which I reject. Even so, I look to see what was the subject matter of the settlement of 20 January 2009.

[43] The plaintiff said this agreement was made in the presence of Mr Mal Chalmers, and that the plaintiff said during the course of negotiations which led to the making of this agreement, "If there's any settlement here, it's got nothing to do with my half-share. [The defendant] agreed. Paul said it's got nothing to do with your half-share." That is, the plaintiff's case is that the amount was only to do with repayment of his contributions. The plaintiff's evidence was that there was quite some discussion as to this – tt 2-40-42 – so that nobody could be mistaken about it. His evidence was that the solicitor participated in this conversation and confirmed to the defendant that the document had nothing to do with the plaintiff's "half-share".

[44] Mr Chalmers was not called by either party. The plaintiff's solicitor gave evidence that he had engaged a private investigator to look for Mr Chalmers. He found he was semi-retired and working one day a week – Wednesday – at a firm of solicitors. The solicitor then rang that firm of solicitors on a Monday, leaving a message for Mr Chalmers to call him back. Mr Chalmers did not call back and so then, on a Thursday, when it might be inferred Mr Chalmers would not be at work, the solicitor rang again and was told that Mr Chalmers was not at work. The solicitor apparently did not renew his efforts. In my view, this was not an adequate attempt to find Mr Chalmers.

[45] Mr Chalmers was apparently the plaintiff's solicitor originally. As well, it might be thought that he would be more naturally called by the plaintiff in this case because, according to the plaintiff, Mr Chalmers' evidence would support the plaintiff's case, rather than the defendant's case. I have considered the operation of the rule in *Jones v Dunkel*. In this case I do not feel that I can more confidently draw any inference as the result of Mr Chalmers not giving evidence before me. It seems unfair to attribute his failure to appear as a witness to the plaintiff in circumstances where what is shown on the evidence is that the plaintiff's solicitors made inadequate attempts on his behalf. Thus, I am left with no corroboration of the evidence of the plaintiff set out above, and for reasons explained I put little weight on his uncorroborated word.

[46] It seems that fairly soon after 20 January the plaintiff raised the matter of his half-share with the defendant, as the defendant sent him a text message saying:

> "I'm having eye surgery in Sydney so have been unavailable. Your message does not make sense as you have been reimbursed an agreed amount totalling $236,500 to compensate you for your prior involvement. I am the sole owner of the business and have now invested over $680,000 in funding. I am not looking for a partner."

[47] On 3 March 2009 a similar message was sent:

> "Craig I don't know what it is you hope to achieve by your phone calls but I can't help you any more. The settlement document you signed reimbursing you for money and time invested is final."

[48] The plaintiff says these messages were sent in response to telephone calls he made leaving messages that he wanted to sell his half-share. The defendant said that the messages left by the plaintiff were to the effect that the plaintiff had found a buyer for the whole of the brothel business and was in fact just passing on a good business opportunity to the defendant. This seems inherently unlikely given the poor state of relations between the plaintiff and the defendant at this stage and beyond belief when one considers the substance of the text messages sent by the defendant. I disbelieve the defendant about this. In any event, I doubt much can be made of this evidence. The circumstances in which conduct subsequent to the making of a contract can be used to interpret its terms are limited.[6] Even accepting that the settlement agreement of 20 January was partly written and partly oral, the evidence amounts to not much more than assertion and counter-assertion on the part of parties whose credit is in issue.

[49] There is a signed document dated 20 January 2009 in the following terms:

> "RECEIPT FOR FINAL PAYMENT ON MONIES PAID TO MR CRAIG LEACH FOR PERSONAL LOAN AND COSTS ASSOCIATED WITH BROTHEL
>
> Paul Ross has paid to Craig Leach the sum of $170,000 being for the following:
>
> Final payment on personal loan $28,183.
>
> Ex-gratia payment to Craig Leach for monies he spent prior to my involvement in the Brothel at 37 Upton St, Bundall. These costs include Local Government approval, Architectural Drawings, Hydraulic Drawings and other work and costs preparatory to the establishment of the Brothel
>
> $141,817
>
> Total Monies paid $170,000
>
> I Craig Leach acknowledge receiving $170,000 cash for final payment for Personal Loan and Brothel set up costs.
>
> Paul Ross
> Director
> Babes in Paradise Pty Ltd
> T/A Utopia in Paradise
> 2/37 Upton Street
> Bundall Qld 4217
>
> Dated 20/1/09
>
> Craig Leach
> C/- Mal Chalmers Solicitors
> 2/28 Palm Beach Avenue
> Palm Beach Qld 4221
>
> Dated 20/1/09"

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6 Lewison, The Interpretation of Contracts 4th ed 3.15; *The Commercial Bank of Australia Ltd v G H Dean & Co Pty Ltd* [1983] 2 Qd R 204, 209-210.

[50] The receipt in its terms acknowledges "final payment on personal loan $28,183." Together with the amount of $63,500 this amount totals $91,683, the amount which the defendant asserted in the 3 November 2008 letter was the amount of the loan he took from the plaintiff – see paragraph 1 of that letter. In evidence the plaintiff denied that this mathematical fact had occurred to him – t 3-16. I disbelieve this and find that, on the strength of the plaintiff's having signed the receipt of 20 January 2009, and the receipt for $48,500 on 12 October 2008, the other payments asserted by the defendant in the letter of 3 November 2008 (with the $48,500, totalling $63,500) were made.

[51] As discussed, the plaintiff agreed that the amount of $91,683 in the 3 November 2008 letter from the defendant was in effect the same amount as is quantified as $92,000 in the plaintiff's statement of claim in 631/09. A consequence is that the claim in 631/09 was dishonest to the extent that $63,500 of that amount had already been paid by the plaintiff. No 631/09 also included an amount of $40,000 for work during the fit-out. There was no evidence that the parties had agreed to be paid for this. The amounts claimed for initial (as opposed to fit-out) costs in No 631/09 seem approximate, ie., they are round figures. If $103,000 (63,000 + 40,000) is deducted from the amount claimed in No 631/09 ($282,848), one is left with an amount of $180,000, approximately. It is near enough to the amount paid on 20 January 2009 ($170,000) to indicate that the payment of $170,000 might genuinely be referable to a claim for all past expenses. I accept that the weight of this mathematical conclusion is somewhat limited, as the figure paid was the result of compromise and negotiation. However, there is no evidence that the figure paid on 20 January 2009 had any relation to half the value of the brothel business, or that the parties had any discussions about what that value ought be, at, or immediately prior to, the settlement of 20 January. Discussions between the plaintiff and the defendant more distant to that time put the value of the half share (very imprecisely) between $200,000 and $600,000, see above. Because the defendant asserted the agreement to re-substitute the obligation to pay $100,000, he did not assert the payment of $170,000 bore any relation to the value of half the business.

[52] The plaintiff could not really explain why the settlement of 20 January 2009 would not have dealt with all matters outstanding between the parties – "I was treating it as two separate issues" – t 3-14. One reason was that perhaps he realised the difficulties (potential loss of licence) he might cause for the defendant and himself if he asserted ownership of a half-share in the brothel as he has in this case. There were certainly suggestions to that effect in his evidence. And that must have been a foreseeable likelihood for both the plaintiff and the defendant at all material times.

[53] The statement of claim in proceeding 631/09 alleges at paragraph 9, "The relationship between the plaintiff and the defendant has broken down and there has been a falling out between the parties to the agreement". It is hard to see what that allegation is relevant to except the words of the August 2004 agreement. Still, the document has signs of incomplete editing – see for example paragraph 6(i). The only claim it expressly articulates is a claim for monies paid to set up the business.

[54] Thus all three documents which bear upon the settlement of 20 January – the receipt, the letter of 3 November 2008 and the statement of claim – tend to the conclusion that what was settled was the claim for expenses. The other evidence tends to support that. I find that to be the case. No *Anshun* point was taken by the defendant in this proceeding.

[55] I find that the defendant is in breach of his obligations to pay the plaintiff an amount equal to half the value of the Upton Street brothel business. A question arises as to the date at which that value ought to be assessed. The plaintiff's evidence was remarkably prevaricating about when he and the defendant "fell out". At one point he accepted that it was his case in this Court that there was a falling out in 2006 on his discovery of the undertaking given to the PLA – t 3-13. However, he claimed that there was no falling out until he issued proceeding 631/09. At one point in his evidence the plaintiff claimed that the test for whether the parties had fallen out was whether they could still work together. Presumably he meant work together in the event that he was ever granted a licence. The evidence as to this is sparse. It seems to me that the plaintiff did not reach a point when he could not have worked with the defendant until January 2009 and accordingly I find that is when the parties fell out for the purposes of the August 2004 agreement. Essentially the plaintiff asked for specific performance of the promise to value the business as at that date, or an order for damages in lieu thereof. I will ask the parties to bring in draft orders as to this, if they can agree on terms, so much the better.

Account

[56] The plaintiff ran a case that because he and the defendant stood in the relation of prospective partners at all material times, the defendant owed him a fiduciary duty and breached it when he gave the undertaking to the PLA in order to obtain the brothel licence. The plaintiff says therefore that the licence, or the benefit of it, belonged in equity to him and that he was entitled to the profits (or alternatively half the profits) that the brothel made. The plaintiff asked for an account to ascertain what those profits were.

[57] I must confess to having some scepticism as to whether or not the true facts as to the business relations between the plaintiff and defendant are reflected in the evidence given at trial. As noted above, both parties said that after the brothel was opened the plaintiff played no part in the business and received no profits from it. Of course, it was in neither party's interest to say anything different; to do so would be to admit to an offence pursuant to s 81 of the *Prostitution Act.* Notwithstanding my scepticism, I am duty-bound to act on the evidence in the case and not speculate, and in my view the evidence falls short of establishing that there was ever an extant partnership between the plaintiff and the defendant, having regard to the definition of partnership at s 5(1) of the *Partnership Act* 1891 – "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit." The better view is probably that partners do not need to share profits in order for there to be a partnership.[7] Nonetheless, in this case I accept there is no evidence that the plaintiff played any part in carrying on the business of the brothel and it is clear that there must be a carrying on of a business in common for there to be a partnership.[8]

[58] The evidence then establishes that the parties had a contractual relationship in terms of the August 2004 agreement. It contemplated that they might – if the plaintiff was ever granted a brothel licence – become partners. They were, however, not partners.

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7 Joske, The Law of Partnership, 1957 pp 6-7 and *M Young Legal Associates Ltd v Zahid* [2006] 1 WLR 2562; Fletcher, "Partnership: Principals Who Do Not Share Profits" (2006) 80 ALJ 815 and Fletcher, The Law of Partnership in Australia, 9th ed, p 37 ff.

8 See Joske, above.

Chan v Zacharia[9] deals with a case in which partners were held to owe fiduciary obligations after a partnership had been terminated, but during the time its affairs were being wound up. It does not deal with the case of prospective partners. *United Dominions Corporation Ltd v Brian Pty Ltd*[10] does deal with a factual situation concerning prospective partners. That was a case in which a number of persons joined together to engage in a commercial joint venture and, at a time when drafts of the written venture were circulating between them, the parties advanced monies to a common fund and one of the parties lent to one of the other parties to the prospective venture. The lending was for the purpose of the venture and a mortgage was taken which contained a clause securing the debt not just of the venture, but of all monies owed by one party to the other on any account.

[59] At pp 5-6 Gibbs CJ records the argument advanced before the High Court that statements in texts on partnership to the effect that fiduciary obligations were owed not just between partners, but between "persons negotiating for a partnership, but between whom no partnership as yet exists" were not supported by authority. Gibbs CJ discusses the various authorities cited. Two old cases he regarded as "clear authority for the proposition that a person who is negotiating for himself and his future partners as an agent for the intended partnership, and who clandestinely receives an advantage for himself, must account for that advantage to the partnership when it is formed." He had regard to the statement by Lord Atkin in *Bell v Lever Bros. Ltd*[11] to the effect that "an intending partner" owed a duty of utmost good faith like a person proposing a contractual insurance. Gibbs CJ's conclusion was "… it is unnecessary to decide whether persons negotiating for a partnership always stand in a fiduciary relation; I have no doubt that they may sometimes do so." – p 6. In *UDC v Brian* there was no doubt that a fiduciary duty was owed because, in the words of Gibbs CJ, the relationship between the parties was, "… if not one of partnership, … one between persons who, intending to become partners, had already embarked on the partnership venture, of which the execution of the mortgage was an incident."

[60] The joint judgment of Mason, Brennan and Deane JJ is similar in that it does not lay down a rule that in every case prospective partners, or prospective joint venturers, will owe each other a fiduciary duty, but that such a fiduciary relationship:

> "… can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement."[12]

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9 (1983-1984) 154 CLR 178.
10 (1984-1985) 157 CLR 1.
11 [1932] AC 161, 227.
12 Above, p 12.

[61] In my opinion, the factual circumstances here differ significantly from those in the above cases. At no material time did a partnership between the plaintiff and defendant come into being. At all material times such a partnership would have been illegal because it was prohibited by statute. This was never a case where the plaintiff and defendant were negotiating towards a partnership which would come into being when they agreed upon the terms of the partnership. Whether or not these parties could enter into partnership with each other depended upon a contingency which was not able to be controlled by either of them: the granting of a brothel licence to the plaintiff. At the time of the August 2004 agreement, the likelihood was that such a licence would not be granted to the plaintiff. He had been refused three times, and had no present plans to make a further application. Thus, a partnership agreement between the plaintiff and defendant was not imminent in a temporal sense; was not something which lay within the power of the parties to bring about by agreement, and was not something which could realistically be viewed as likely.

[62] At the time of the August 2004 agreement significant monies had been spent by the plaintiff, but they had been spent on his own account before any question of partnership with the defendant arose. Recognising the financial contribution the plaintiff had made, but also recognising the reality that the plaintiff and defendant could not presently be partners, the parties entered into a different type of contractual arrangement: one which gave the plaintiff and defendant ownership in capital asset of the brothel business and rights to retrieve this capital value in the event of certain contingencies (which they called subject incidents). There was no doubt an implied term in the August 2004 agreement that each party would do all things necessary to give the other party the benefit of the contract – *Mackay v Dick.*[13] Thus if the defendant had, say, done an act which would have destroyed whatever chance the plaintiff had of obtaining a brothel licence, the plaintiff would have had a remedy at common law – there was no need for resort to equity.

[63] In all these circumstances, I do not think that the relation between these parties in these circumstances was a fiduciary one.

[64] Even if I am wrong about that, I do not regard the giving of the undertaking to the PLA as a breach of any fiduciary obligation. It was recognised in *Chan v Zacharia* that:

> "Fiduciary relationships may take a wide variety of forms and may give rise to a wide variety of obligations. Ordinarily, in determining whether a constructive trust of particular property has arisen as a consequence of the existence or breach of a fiduciary obligation, it is necessary to identify the nature of the particular fiduciary relationship and to define any relevant obligations which flowed from it …" – p 195, per Deane J.

[65] Deane J went on at p 196 to discuss the fact that the provisions of a partnership agreement can modify the fiduciary duties owed between partners, even to the point of excluding them. Mason J made similar comments in *Hospital Products Ltd v United States Surgical Corporation:*[14]

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13 (1881) 6 App Cas 251.

14 (1984) 156 CLR 41.

> "The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship … the nature of the curial intervention which is justifiable will vary from case to case. In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case. The often-repeated statement that the rule in *Keech v Sandford* applies to fiduciaries generally tends to obscure the variable nature of the duties which they owe. The rigorous standards appropriate to a trustee will not apply to a fiduciary who is permitted by contract to pursue his own interests in some respects. Thus, in the present case the so-called rule that the fiduciary cannot allow a conflict to arise between duty and interest cannot be usefully applied in the absolute terms in which it has been stated." – p 103 (footnotes omitted).

[66] In the same case Gibbs CJ said:

> "I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are often of different types, carrying different obligations … Moreover, different fiduciary relationships may entail different consequences as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease: see *Re Biss; Biss v Biss, Griffith v Owen* and *Chan v Zacharia.*" – p 69 (footnotes omitted).

[67] There is discussion by both Gibbs CJ and Mason J in *Hospital Products* of the case of *Biss v Biss* which is particularly relevant here because it laid down a rule, which the High Court accepted, that while a trustee who has acted to take a renewal of a lease (rather than take it for the beneficiaries) will hold a renewed lease on a constructive trust irrebuttably, a partner who does the same thing will not do so, even though a partner owes a fiduciary obligation. In the case of a partner, the presumption of a constructive trust is rebuttable. This is not determinative of the matter here, but illustrative of the point that fiduciary obligations are flexible, and will be moulded in any case by the facts and in particular the contractual arrangements between the parties – see on this point *News Limited and Ors v Australian Rugby Football League Ltd & Ors.*[15]

[68] In this case there was no common enterprise being carried on between the plaintiff and the defendant. The defendant ran the brothel, he bore the expenses, had the management and decision-making power, he kept the profits. He was in charge of its finances and its accounts. He had no duty to share any of these rights and obligations with the plaintiff. In all these matters he was acting in his own interests. This was all pursuant to the agreement between the parties and to do otherwise would have been illegal, for it would have meant that the parties were carrying on a business in partnership in contravention of s 81 of the *Prostitution Act.* The defendant's fiduciary obligations therefore must have been much modified, assuming, contrary to my view, that they existed at all.

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15 [1996] FCA 870, p 155 ff under the heading, "The Fiduciary Principle".

[69] It is true that, knowing he had the advantage of money and time spent by the plaintiff before his involvement, the defendant gave an undertaking to the PLA in order to get the licence which would allow him to exploit the business opportunity which the brothel presented. But the contractual arrangements between the parties were that the defendant was entitled to exploit that business opportunity on his own account until such time as the plaintiff gained a licence. It seems to me unlikely that the plaintiff would ever have gained a licence, particularly after his conduct in October 2002 threatening the PLA. However, assuming the plaintiff might have persuaded the PLA he was a person of suitable character to run a brothel, the requirement for the undertaking given by the defendant would fall away. The undertaking was given to counteract the PLA's concern that the defendant might associate with the plaintiff in operating the brothel. The PLA saw this as undesirable because it saw the plaintiff's character as unsuitable. The defendant's giving of the undertaking did not make it any more or less likely that the PLA would change its view of the plaintiff's suitability. In the unlikely event that the PLA did change its view of the plaintiff's character, that change of view would logically result both in the plaintiff obtaining a licence and the undertaking being otiose. In these circumstances it does not seem to me that the giving of the undertaking was a breach of any fiduciary duty which the defendant owed the plaintiff.

[70] I will hear the parties as to costs.