SUPREME COURT OF QUEENSLAND

CITATION:	*Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (No 2)* [2016] QSC 252
PARTIES:	**PRINCIPAL PROPERTIES PTY LTD** **ACN 072 279 675** (plaintiff) v **BRISBANE BRONCOS LEAGUES CLUB LIMITED** **ACN 010 798 679** (defendant)
FILE NO:	BS6489/12
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	7 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	14-22 September 2015, further submissions received 1 and 16 October 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The defendant pay the plaintiff the sum of $100.** **2. The parties make written submissions as to costs within 28 days.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where a call option for the sale of land from the defendant to the plaintiff was subject to development approval – where the call option required the development to have 149 car parking spaces for the defendant's use – where the plaintiff submitted a proposed development application to the defendant for approval, and the defendant withheld its approval – whether the proposal was for "Residential Development" as defined and required by the call option – whether there was an implied term that the proposed development application would properly identify sufficient car parking to allow compliance with the condition of the call option, and if so whether that term had been breached – whether the defendant's failure to approve the proposed development application breached or repudiated the call option

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the call option required the plaintiff to either give notice of termination or give notice that the option would continue and pay an extension fee – where the plaintiff did not give 0notice or pay the fee – where the defendant's breach in withholding approval of the development application prevented a condition precedent to the plaintiff's entitlement to exercise the call option being satisfied – whether the defendant was precluded from relying on the plaintiff's failure to give notice and pay the extension fee as bringing the call option to an end

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – LOSS OF PROFITS – where the plaintiff argued that as a result of the defendant's breach of contract it lost the opportunity to carry out the development and profit – where there was disputed evidence as to whether the required number of car parks was obtainable, the availability of finance to support the project, and whether the sale prices of the units were achievable – whether the plaintiff would have chosen to exercise the call option and carry out the development – whether the plaintiff would have obtained a development permit that met the requirements of the call option, particularly as to the number of car parks – whether the plaintiff would have been able to secure the purchase price of the land and obtain development finance, plus secure the pre-sales required to draw down on any construction finance – whether the sale of the project products would suffice to meet expenses – whether there was a loss of a valuable commercial opportunity in circumstances where overall the plaintiff was more likely to make a loss than to make a profit

Alghussein Establishment v Eton College [1988] 1 WLR 587, cited
Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602, cited
Attorney-General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988; [2009] UKPC 10, cited
Badenach v Calvert (2016) 331 ALR 48; [2016] HCA 18, cited
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, applied
Chaplin v Hicks [1911] 2 KB 786, considered
Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC 180, cited
Clark v Macourt (2013) 253 CLR 1; [2013] HCA 56, cited

Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32, cited
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, considered
Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd (2005) 194 FLR 322; [2005] NSWSC 1005, cited
DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd [2016] NSWCA 117, cited
Fitzgerald v Masters (1956) 95 CLR 420; [1956] HCA 53, distinguished
Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1; [1986] HCA 3, cited
Gladstone Area Water Board v AJ Lucas Operations Pty Ltd [2014] QSC 311, cited
Grocon (Victoria) Pty Ltd v APN DF2 Project Pty Ltd [2015] VSCA 190, cited
Hanflex Pty Ltd v NS Hope & Associates [1990] 2 Qd R 218, cited
HB Williamson Co v III-Eagle Enters (US District Court, S.D. Illinois, No Cv 0575–MJR–PMF, 25 February 2015), cited
Holmark Construction Company Pty Ltd v Tsoukaris [1988] ANZ ConvR 469, cited
Hooper v Lane (1859) 6 HL Cas 443; 10 ER 1368, cited
Longden v Kenalda Nominees Pty Ltd [2003] VSCA 128, considered
MAC Sales v EI DuPont de Nemours (US District Court, E.D. Louisiana, No Civ. A. No. 89–4571, 8 March 1996), cited
Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742; [2015] UKSC 72, cited
MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd [2005] NSWCA 39, approved
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer") [1993] 2 Lloyd's Rep 68, approved
New Zealand Shipping Company Ltd v Société des Ateliers et Chantiers de France [1919] AC 1, cited
North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd [2016] VSC 1, cited
Nycal Offshore Development Corporation v United States 743 F 3d 837 (Fed Circ, 2014), cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, applied
Parabola Investments Ltd v Browallia Cal Ltd [2011] QB 477, cited
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd [2014] 2 Qd R 132; [2013] QSC 148, approved
Qantas Airways Ltd [2004] ACompT 9, approved

Re London Celluloid Co (1888) 39 Ch D 190, cited
Re The Licensing Ordinance (1968) 13 FLR 143, cited
Reading Entertainment Australia v Burstone Victoria [2004] VSC 546, cited
Righi v Kissane Family Trust [2015] NSWCA 238, cited
Robinson v Harman (1848) 1 Ex 850; 154 ER 363, cited
Ruthol Pty Ltd v Tricon (Australia) Pty Ltd [2006] NSW ConvR 56-145; [2005] NSWCA 443, considered
Sharjade Pty Ltd v Commonwealth (2009) 15 BPR 28,443; [2009] NSWCA 373, cited
Southcott Estates Inc v Toronto Catholic District School Board (2010) 104 OR (3d) 784, cited
State of New South Wales v Stevens (2012) 82 NSWLR 106; [2012] NSWCA 415, applied
Suttor v Gundowda (1950) 81 CLR 418, followed
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8, cited
Tabet v Gett (2010) 240 CLR 537; [2010] HCA 12, cited
Takaro Properties Ltd v Rowling [1986] 1 NZLR 22, distinguished
TAS Distrib Co v Cummins Engine Co 491 F 3d 625, 632 (7th Cir, 2007), cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, applied
Vasiliou v Hajigeorgiou [2010] EWCA Civ 1475, considered
Wellesley Partners LLP v Withers LLP [2016] 2 WLR 1351, cited
Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd [2016] VSCA 187, cited
World Best Holdings Ltd v Sarker (2010) 14 BPR 27,549; [2010] NSWCA 24, cited

COUNSEL:	D Kelly QC and S Monks for the plaintiff G Thompson QC and D Skennar for the defendant
SOLICITORS:	Shine Lawyers for the plaintiff McCullough Robertson for the defendant

Introduction

[1] **Jackson J**: On 12 September 2011, the plaintiff submitted to the defendant a draft development application for its approval and to obtain its consent to lodge the application with the Brisbane City Council ("Council"). The defendant was the owner of the relevant land. Accordingly, no development application could be made without its consent.

[2] The plaintiff and defendant were then parties to a contract styled as a "Call Option" but which I will refer to as the "Call Option Deed". The Call Option Deed defined the "Land" as "[t]hat part of Lot 2 on Survey Plan 129189 … being Lot 2 on the plan attached in Schedule 2". Broadly speaking, that was the southern part of Lot 2 on Survey Plan 129189 bounded on the west by Fulcher Rd and on the east and south by other lots. The proposed boundary between the Land and the northern part of Lot 2

on Survey Plan 129189 to be retained by the defendant ran from the western point at Fulcher Rd towards the east along the southern face of the defendant's existing building known as the Broncos Leagues Club. Continuing to the east it picked up the dividing line between the existing car park and other buildings and a training field to the north.

[3] The Call Option Deed provided that the plaintiff would prepare and lodge a "Development Permit Application" (as defined) with a view to obtaining a "Development Permit" (as defined). If a satisfactory Development Permit was obtained the plaintiff was to be entitled to acquire the Land and to develop it, subject to the terms and conditions of the Call Option Deed.

[4] The subject matter of the Call Option Deed was more complex than sale of part of a parcel of land subject to development approval on conditions acceptable to the purchaser in two significant ways. First, the plaintiff was to develop the Land by the construction of residential units for accommodation and a conference facility. Second, the plaintiff was to construct new car parking spaces on parts of the transferred land to replace the number of car parking spaces that the defendant had on the Land before sale. The replacement car parking spaces were to be constructed on what I will describe as the "Vendor's Car Park". The plaintiff was to transfer or lease the Vendor's Car Park back to the defendant after practical completion.

[5] It will be necessary to consider some of the detailed provisions of the Call Option Deed. But for present purposes, the starting point is that plaintiff claims damages for breach of contract. Although the proceeding started as a claim for declaratory relief that the defendant unreasonably withheld and delayed its approval of the proposed Development Permit Application (and to sign the required consent to the application), a claim for damages is what remains.

[6] The amended statement of claim alleges, in effect, that the Call Option Deed provided for the parties to set up and maintain a "Committee" of representatives who were to approve the proposed Development Permit Application prior to lodgement with the Council. The Committee comprised one representative of the plaintiff, Geoff McFarlane, and one representative of the defendant, Geoff Kuehner. Under the Call Option Deed, in effect, the plaintiff was required to lodge a complying Development Permit Application with the Council on or before 30 September 2011.

[7] The plaintiff alleges that the proposed Development Permit Application it submitted to the Committee on 12 September 2011 was a complying application but that Mr Kuehner failed to agree to the Committee approving it for lodgement, in breach of contract by the defendant. The plaintiff alleges that as a result, it was unable to obtain a Development Permit that would have entitled it to exercise the Call Option to purchase the Land and to carry out the proposed development.

[8] The plaintiff further alleges that the defendant's continued refusal to cause its representative on the Committee to approve the proposed Development Permit Application was a repudiation of the contract. On 24 September 2013, the plaintiff gave notice renewing its demand that the defendant agree to provide its representative's approval to lodgement of the proposed Development Permit Application. The defendant did not do so. On 30 September 2013, the plaintiff elected to terminate the Call Option Deed, relying on the continuing neglect or refusal of the defendant as a repudiatory breach of contract.

[9] The parties appear to accept that the express provision of the Call Option Deed that the Committee must not unreasonably withhold its approval to a complying Development Permit Application involved an implied contractual promise by the defendant that its representative would not do so. Neither party submits that if the Committee unreasonably withheld its approval the plaintiff was free to lodge the proposed Development Permit Application as if the consent had been given.

[10] The defendant denies that the refusal or failure by the defendant's representative to approve the proposed application as submitted was a breach of contract on a variety of grounds.[1] Some of them go to whether the proposed application as submitted was a complying "Development Permit Application"[2] within the meaning of the Call Option Deed. They include an allegation that there was breach of an implied term as to the extent of the information required to be provided about the development of the replacement car parking spaces.

[11] Second, the defendant alleges that the Call Option Deed was no longer on foot when the plaintiff purported to terminate it for repudiation or breach of contract by the defendant.

[12] Alternatively, if the defendant was in breach of contract, the defendant denies that the breach of contract caused the plaintiff to suffer the loss or damage alleged.

[13] Finally, the defendant denies the amount of the loss or damage alleged by the plaintiff.

Long term accommodation

[14] The defendant alleges that a complying Development Permit Application must be for "Residential Development" within the meaning of cl 1.1 of the Call Option Deed and alleges that the proposed Development Permit Application was not for such development.

[15] Clause 16.1 of the Call Option Deed provided that the plaintiff must lodge a "Development Application", as defined, seeking approval which would allow issue of the Development Permit on or before the "Development Application Date", as defined. Such an application was defined to be the "Development Permit Application" in cl 1.1.

[16] Under cl 15.2 of the Call Option Deed, a function of the Committee of appointed representatives was to approve the Development Permit Application prior to its lodgement. The definition of "Development Applications" in cl 1.1 of the Call Option Deed included a development application, in respect of the Land, for "Residential Development".

[17] "Residential Development" was defined in cl 1.1 to include:

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1 I note that on 17 September 2015, during the trial, the defendant amended the defence to delete a number of grounds of defence.

2 By way of background, the *Sustainable Planning Act* 2009 (Qld), sch 3 defined the term "development application" and also the meaning of a "development permit". Using the language of the Act, the contemplated application was a "development application" for a "development permit", and no difference in meaning is to be taken from the composite expression "Development Permit Application" used in the Call Option. There are additional requirements contained in the definition of "Development Permit Application" in the Call Option Deed.

> "(a) residential development (comprising low, medium and/or high density, short and long term accommodation) as the most substantive of the uses (when compared to development comprising paragraphs (b) and (c) following); and
> (b) carparking; and
> (c) conference facilities."

[18] The defendant submits that the definition of Residential Development, properly construed, required that the application must include provision for long term accommodation. The defendant submits that the plaintiff's proposed Development Permit Application did not do so.

[19] The plaintiff submits that although the definition of Residential Development refers to "… short **and** long term accommodation", the conjunction "and" should be construed to mean "or", thus permitting the plaintiff to choose whether or not the development was to include any long term accommodation. Alternatively, the plaintiff submits that the proposed manager's residence incorporated in the plaintiff's proposed Development Permit Application constituted long term accommodation within the meaning of the definition of "Residential Development". Accordingly, short and long term accommodation were included in the proposed development.

[20] The starting point is consideration of the contractual text in its relevant context of the rest of the contract. A number of features should be noted about the structure of the definition of "Residential Development". First, the ordinary meaning of "residential development" in para (a) is expanded by inclusion of car parking and conference facilities in paras (b) and (c). Second, the use of residential development must be the most substantive use when compared to the uses of car parking and conference facilities. Third, the residential development is to comprise "low, medium and/or high density, short and long term accommodation".

[21] The words "low, medium and/or high density" qualify "short and long term accommodation". The content of the qualification is unclear. It could mean "low, medium and high density" or "low, medium or high density" but there may be other possible permutations. It is unnecessary to focus on that question, because the defendant's constructional argument does not turn on it.

[22] The defendant's constructional argument is that the words "comprising … short and long term accommodation" mean that there must be some long term accommodation in the development. The defendant submits that as a matter of ordinary meaning, and in context, the words "and long term accommodation" should not be read to mean "or long term accommodation". Although there are cases where "and" may be read as "or", this is not one of them. There is no absurdity in reading "and" as requiring long term accommodation.

[23] An illustration of the sort of absurdity that justifies reading a word as having a very different meaning to its ordinary meaning may be seen in *Fitzgerald v Masters*.[3] A clause provided that the parties incorporated a set of conditions so far as they were inconsistent with what had been agreed upon between them. The clause was construed to mean so far as they were consistent, not inconsistent, because "[w]ords

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3 (1956) 95 CLR 420.

may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency".[4] There is no absurdity in reading "and long term accommodation" in the definition in the present case as conjunctive, so that there must be some long term accommodation.

[24] Next, the list of possible alternatives in para (a) of the definition of Residential Development is made up of short term accommodation and long term accommodation only, and that list is not a lengthy one so as to engage or require an alternative rather than conjunctive meaning for "and long term accommodation". The qualifying words "low, medium and/or high density" most likely mean that the relevant accommodation is to comprise one or more of three densities of accommodation, in the two classes of short term accommodation and long term accommodation. Accordingly, in my view, this is not a case where there is a list of matters joined by the word "and" but the governing words have a dispersive effect.[5]

[25] The contractual context of the definition of "Residential Development" in the Call Option Deed included that:

(a) by cl 9 the defendant was entitled to refuse to consent to an assignment of the Call Option Deed to a competitor of the defendant;
(b) by cl 11 the plaintiff's rights as grantee extended to an option to include other land in the land to be acquired;
(c) by cl 12.1 the plaintiff was entitled to conduct investigations in the nature of due diligence;
(d) by cl 14.1(b)(iii) the defendant promised to use reasonable endeavours to promote and market the residential product in the development to the defendant's members;
(e) by cl 23.1 the defendant had the right to join in the project as a joint venturer;
(f) by cl 23.2 if there was no joint venture the plaintiff promised to pay an additional consideration of 5 per cent of profit in relation to each Stage of the Project by way of additional purchase price;
(g) by cl 24 the plaintiff gave the defendant a right of first refusal for the sale of any conference facilities or commercial office; and
(h) by cl 8.1 of the special conditions of the contract attached to the Call Option Deed the plaintiff promised to construct 149 car parks and to transfer them to the defendant after practical completion.

[26] These clauses and the defendant's status as the adjoining owner all gave the defendant an interest in what would comprise the development.

[27] The plaintiff seeks to rely on extrinsic facts in support of the conclusion that properly construed para (a) "Residential Development" can comprise short term accommodation only. The first fact is that the land was predominantly zoned Parkand. In my view, neither that fact, nor that the proposed application for a development permit would have been impact assessable, assists at all.

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4 (1956) 95 CLR 420, 426-427.
5 *Re The Licensing Ordinance* (1968) 13 FLR 143, 146-147.

[28] The second fact is that the defendant was in debt and wanted to increase its revenue by a development on the Land so as to obtain patronage for the Broncos Leagues Club from the short term accommodation. It seems quite reasonable to say that the defendant did have that hope or expectation. But that would be a subjective expectation or intention. The subjective view or expectation of either of the parties does not assist in deciding the proper construction of "Residential Development".[6]

[29] In any event, to the extent that it might suggest that the defendant would want or expected short term accommodation in the development proposed, that fact would not support the conclusion that "and" should be read as "or" in the phrase "short and long term accommodation." If either short term accommodation or long term accommodation were permissible, the plaintiff would not have been obliged to propose any short term accommodation, which would not have been consistent with the suggested expectation.

[30] The third fact is that a plan was prepared by the plaintiff dated 21 April 2009 showing the proposed development on the Land as "Short Term High Density Residential" and that plan was presented to Mr Kuehner at a meeting at around that time. There was a second plan prepared by the plaintiff dated 9 September 2009 also showing the proposed development on the Land as "Short Term High Density Residential", which was also presented and discussed at a meeting with Mr Kuehner and others.

[31] The fourth fact is that a letter from the plaintiff to the defendant dated 23 June 2009 shows that the parties were working towards a list of agreed development types. In my view, this record of a particular stage in the pre-contractual negotiations would not assist upon the disputed question of construction.

[32] The defendant submits that none of the alleged extrinsic facts is admissible in aid of construction, because there is no ambiguity in the first place that would authorise the reception of extrinsic evidence on the question of construction.

[33] Whether an ambiguity is a precondition to the admissibility of extrinsic evidence is a vexed question of law not yet settled by the High Court. I considered the point in 2014.[7] The question was raised in 2015 in the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*.[8] As well, intermediate Courts of Appeal have touched on it since.[9] But the question has not been authoritatively settled. The current state of the law is carefully set out in "The Use of Extrinsic Evidence in Aid of Construction: A Plea for Pragmatism", a recent paper published by Bond J.[10]

[34] In any event, it is not necessary to decide in the present case whether ambiguity is a necessary condition to consider the extrinsic facts relied upon by the plaintiff. That is because the question of whether "and" means "or" arises in this case without having to resort to extrinsic evidence to raise an ambiguity. In my view, there is a plausible argument about the meaning of the relevant text on the face of the contract itself, so

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6 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461-462 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40].

7 *Gladstone Area Water Board v AJ Lucas Operations Pty Ltd* [2014] QSC 311, [154]-[168].

8 (2015) 256 CLR 104, 117 [52], 132-133 [110]-[112] and 134 [118]-[120].

9 *Righi v Kissane Family Trust* [2015] NSWCA 238, [44]; *Grocon (Victoria) Pty Ltd v APN DF2 Project Pty Ltd* [2015] VSCA 190, [85].

10 http://archive.sclqld.org.au/judgepub/2016/bond260516.pdf.

that relevant extrinsic evidence is receivable to the extent that it aids in construing the definition of "Residential Development".

[35] In my view, the only fact or facts relied upon that might affect the meaning of Residential Development are that before the Call Option Deed was made the plaintiff presented plans that described the proposed development as "Short Term High Density Residential".

[36] The plaintiff deployed a number of additional arguments in urging that "and" should be read as meaning "or". One was that it would detract from the possible short term accommodation use of the project if the plaintiff were required to include long term accommodation. This argument was not supported by evidence and, in my view, is not self-evident. Another argument was that the definitions in City Plan 2000 relating to residential development inform the proper construction of Residential Development. I do not accept that they do. There was no evidence either within the terms of the Call Option Deed or otherwise that the parties intended to pick up that meaning.

[37] The plaintiff's alternative contention is that the proposed manager's residence was sufficient to amount to long term accommodation for the purpose of the definition of Residential Development. The plaintiff's proposed Development Permit Application included a one bedroom plus study unit for a manager to live in. The plaintiff intended that both the unit and the management rights contract for the short term accommodation units would be sold. Thus, there would be a long term resident manager who would operate the short term accommodation business from the manager's unit.

[38] The defendant did not submit that the manager's residence would not amount to long term residential accommodation because it was not "accommodation" within the meaning of the definition. In my view, the proposed manager's residence was sufficient to amount to long term accommodation.

[39] Accordingly, it is unnecessary to decide whether the absence of long term accommodation would otherwise have produced a non-complying Development Permit Application because the development proposed was not Residential Development, as defined.

Separate approval for conference facilities

[40] As set out above, "Residential Development" was defined to include conference facilities.

[41] The proposed Development Permit Application contained an element within the building to be constructed that satisfied the description of conference facilities. The defendant alleges that a complying Development Permit Application for residential development, parking and conference facilities must apply for a separate approval by the Council as assessment manager for this distinct or specific use.

[42] I deal with this point further later in the context of the question whether the proposed Development Permit Application would have been approved without seeking a separate approval for the use of conference facilities. However, for present purposes the threshold question is whether there was any requirement under the Call Option

Deed that the Development Permit Application had to apply for approval of the conference facilities proposed as a separate use.

[43] It may be assumed that the plaintiff probably intended to sell the conference facilities. The plaintiff's claim for damages was presented on the basis that it did intend to do so although there was little or no specific evidence on the point. In those circumstances, approval for the conference facilities as a separate use might have been required.

[44] But there was no contractual obligation under the Call Option Deed for the plaintiff to sell the conference facilities or the management rights contract for the proposed development. As against the defendant, the plaintiff would have been entitled to conduct the businesses of managing the short term accommodation units and the conference facilities. In those circumstances, the conference facilities would have constituted an ancillary use.

[45] In my view, there was no contractual requirement under the Call Option Deed that the Development Permit Application had to apply for approval of the conference facilities as a separate use.

Car park condition – 149 car parking spaces

[46] The expression "Development Applications" in the Call Option Deed was defined in cl 1.1 to mean a development application "… incorporating sufficient car parking spaces within the development so as to allow compliance with the Car Park Condition…".

[47] The expression "Car Park Condition" was defined in cl 1.1 to mean "the condition in special condition 8.1 of the Contract."

[48] "Contract" was, in turn, defined in cl 1.1, to mean the contract annexed in Schedule 1 to the Call Option Deed. Special Condition 8.1 of the Contract as annexed provided:

> "The Purchaser warrants and represents to the Vendor and agrees that the Development Approval must contain a condition approving the use of at least the same number of car parking spaces as existed on the land as at 30 June 2009 (being 149 car parking spaces to the existing southern car park) (Car Parking Spaces)."

[49] The defendant alleges, and it is not in dispute, that at 11 September 2011 the plans to accompany the proposed Development Permit Application proposed 157 car parking spaces and three motorcycle parking spaces intended for the defendant's use. That number would have complied with the requirement of 149 car parking spaces.

[50] However, there is a serious dispute whether the plans truly could or would have been approved with the required 149 car parking spaces.

Implied term as to the Car Park Condition

[51] The amended defence alleges two implied terms of the Call Option Deed relating to the Car Park Condition.

[52] First, it alleges that there was an implied term that any proposed Development Permit Application would demonstrate compliance with Council car parking standards prescribed under the provisions of the Transport Access Parking and Servicing Planning Scheme Policy ("TAPS") of the Brisbane City Plan 2000. In the end, the defendant did not press for this implied term.

[53] Second, the defendant alleges that it was an implied term that the proposed Development Permit Application would be in a form that properly identified sufficient car parking within the development so as to allow compliance with the Car Park Condition of the Contract.

[54] The defendant alleges that this implied term was breached in two ways. First, because the plans contained in the documents accompanying the proposed Development Permit Application did not include any dimensions of the car parking spaces they did not properly identify sufficient car parking to allow compliance with the Car Park Condition. Second, the documents did not include a copy of the overall architectural site or car park plans showing all of the proposed and amended car parks to be included in the development.

[55] It assists to say something more about TAPS at this point. It has two component parts. The first is the Transport Access Parking and Servicing Planning Scheme Policy ("TAPS Policy"). The second is the Transport Access Parking and Servicing Code ("TAPS Code").

[56] The TAPS Code defines a list of Performance Criteria for compliance. It also identifies Acceptable Solutions.

[57] Section 5 of City Plan 2000 provided:

> "[The Performance Criteria] provide a statement of the outcome that the Acceptable Solution must achieve. A proposal not combined with an Acceptable Solution must provide sufficient information to demonstrate how the corresponding Performance Criteria has been met."

[58] An Acceptable Solution was thus not the only solution capable of addressing a Performance Criteria. As s 5 of City Plan 2000 expressly stated:

> "There may be other ways of complying with the Performance Criteria while still meeting the Code's Purpose…".

[59] The point is that according to City Plan 2000 an Acceptable Solution was not mandatory. The standards to be achieved were the Performance Criteria. Any implied term relating to the TAPS Code must accommodate the fact that even though it may contain an Acceptable Solution the Performance Criteria may be met in other ways.

[60] The defendant submits that the proposed application for approval by the Committee was required to be in a form that could or would be approved by the Council without further detail or information.

[61] However, it was common ground among the town planners and traffic engineers who were expert witnesses that a development application could be made properly within the meaning of the *Sustainable Planning Act* 2009 (Qld) without containing all of the information that might ultimately be required before a decision is made in the decision stage provided for under the legislation. In particular, the legislative scheme provides for an information and referral stage including a process for an "information request" to be made by the assessment manager.[11] By that process, the Council may request information and an applicant for development approval may respond to the request in such a way as to supplement the information included in the initial development application.

[62] The requirements for implication of a term in fact are most often sourced from the reasons for judgment of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[12] Subsequent High Court authority confirms their continuing relevance, most recently in *Commonwealth Bank of Australia v Barker*.[13]

[63] The defendant sought to rely on statements made by Lord Hoffmann in *Attorney-General of Belize v Belize Telecom Ltd*.[14] However, the recent decision of the Supreme Court of the United Kingdom in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*[15] reaffirms the stringency of the requirements for an implied term in fact and that there has been no watering down of the particular requirement that the postulated term is necessary to give business efficacy to the contract. In any event, that is the common law of Australia.

[64] The defendant submits that without an implied term that the proposed Development Permit Application would be in a form that properly identified sufficient car parking spaces that would comply with the Car Park Condition, the defendant would not understand how parking on its land would be accommodated and laid out, nor would it have any indication that part of its land was intended to be excavated back to the adjoining boundaries and what implications that might have. It submits that it would have nothing but the will of the plaintiff to rely upon.

[65] The defendant also submits that the implied term is reasonable and equitable, capable of clear expression and obvious in the sense that, if the parties had turned their minds to it, they would have agreed that a dimensioned plan of the car parking area would be given to the defendant for the Committee to review.

[66] Experience shows that many alleged implied terms founder on the rock of the requirement that the term is necessary to give business efficacy to the contract. Where the contract operates perfectly well without the alleged term it will rarely be necessary for business efficacy.

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11 *Sustainable Planning Act* 2009 (Qld), s 276(1).
12 (1977) 180 CLR 266, 283.
13 (2014) 253 CLR 169, 185 [21].
14 [2009] 1 WLR 1988, 1994.
15 [2016] AC 742, 755-756 [24], 757 [31], 765 [59]-[60] and 769-770 [77].

[67] According to the defendant's submissions, the implied term has the purpose, in effect, of providing information to the defendant as to how the agreed outcomes were to be achieved by the plaintiff as an information process before the defendant's representative on the Committee was to be obliged to consider the proposed Development Permit Application.

[68] The plaintiff submits that it should be accepted from cl (a)(ii) of the definition of "Development Applications", set out above at para [46], that the application material provided to the Committee for approval should have disclosed an intention to apply for a Development Permit Approval that would provide the defendant with at least 149 car parking spaces for the Vendor's Car Park.

[69] Turning to the context in which both cl 15.2 of the Call Option Deed and cl 8.1 of the Contract appear, the reasonable business person in the position of the parties would have been aware that any proposed Development Permit Application would have to be approved by the Council before the plaintiff would be able to exercise the Call Option. They knew also that the Development Permit would have to approve the use of at least 149 car parking spaces for the Vendor's Car Park for the Car Park Condition to be satisfied. These were outcomes dictated by the express terms of the Call Option Deed.

[70] The Call Option Deed was extensively negotiated by parties represented by lawyers. It included cl 21.10 that the deed contained the whole understanding of the parties relating to the subject matter of the deed. Although not conclusive, the ordinary meaning of such a clause is that the parties did not intend to make further promises as to the subject matters dealt with by the express provisions.

[71] In my view, the alleged implied term that the proposed Development Permit Application would be in a form that properly identified sufficient car parking spaces within the development so as to allow compliance with the Car Park Condition of the Contract should not be accepted.

[72] First, the term is not clearly expressed. The defendant's case is that a proposed Development Permit Application which does not include a dimensioned plan of the car parking areas does not properly identify sufficient spaces, or that an application that does not include a plan of all the car parks does not properly identify sufficient car parking spaces. It can be seen that the real work under the term alleged by the defendant is to be done by the word "properly".

[73] Second, in my view, the alleged implied term is not necessary to give business efficacy to the contract. If the plaintiff had obtained a Development Permit that provided for enough car parking spaces to comply with the Car Park Condition, or if the plaintiff had been unsuccessful in doing so, the defendant would have been protected by the Council's consideration of the proposed car parking spaces and the purpose of the Car Park Condition would have been fulfilled. It was not necessary that the defendant be concerned with how the result was achieved to give business efficacy to that provision.

[74] Alternatively, in my view, there was no breach of any implied term that the proposed Development Permit Application would be in a form that properly identified sufficient car parking spaces within the development so as to allow compliance with the Car Park Condition.

[75] The information provided by the plaintiff to the defendant as to the car parking spaces for the proposed Development Permit Application included:

(a) a letter from the plaintiff to the defendant dated 26 August 2011 attaching plans showing 99 (or 105) external and 53 internal car parks intended for the defendant's use. It showed that the proposal was for the car parking spaces to be over an area of the existing car park to the north and east of the Broncos Leagues building and on a lower level of the proposed new building;
(b) the proposed Development Permit Application submitted on 12 September 2011 contained plans described as a "Parking Schedule". The plan entitled "Site Plan Proposed" stated there would be 157 car parking spaces available to the defendant, comprising 53 described as "Ground Club Provided" and 104 described as "External Club Provided". The plan showed 104 outdoor spaces ("external car park"). Another plan described as "Ground Level" showed 53 car parking spaces in the area under the proposed building ("internal car park"); and
(c) The letter dated 13 October 2011, from the solicitors for the plaintiff to the solicitors for the defendant, enclosed a plan described as "Carpark Site Plan DA".

[76] In my view, the proposed Development Permit Application did include plans of all the car parking spaces and those plans did appear to show enough car parking spaces to comply with the Car Park Condition. The evidence was confined to the lack of a dimensioned plan.

[77] The plaintiff made detailed submissions to the effect that the defendant wrongly approached the question of the alleged implied term as to possible satisfaction of the Car Park Condition as though it was for the defendant to assess whether the Council as the assessment manager would approve the plaintiff's proposed Development Permit Application as to car parking arrangements. In my view, there was substance in the plaintiff's submissions on this point.

Failure to comply with clause 3.4

[78] Clause 3.4 of the Call Option Deed provided:

"**Call Option Extension Fee**

If this Call Option is not terminated and [sic] not been exercised as at the date 3 years after the date of this Call Option Deed (in this clause 3.4, "3 Year Date"), then the Grantee must, not later than the 3 Year Date, either:
(a) give written notice to the Grantor of termination of this Call Option, in which case the Call Option will be terminated; or
(b) give written notice to the Grantor that the Call Option is going to continue and pay to the Grantor, (or the Stakeholder if the law does not allow payment to the Grantor) the Call Option Extension Fee."

[79] The 3 Year Date was 4 November 2012.

[80] As at the 3 Year Date the Call Option Deed had not been terminated and the Call Option had not been exercised. It is not in dispute that the condition in cl 3.4 was not satisfied by giving either written notice of termination or written notice that the Call Option was to continue and payment of the Call Option Extension Fee.

[81] The defendant alleges that under cl 3.4 the plaintiff had an election to give either a written notice of termination or a written notice that the Call Option was going to continue and pay $100,000 plus GST if applicable. Because the plaintiff did not elect to continue the Call Option and pay, the defendant alleges that the plaintiff was unable to exercise the Call Option from the time when the 3 Year Date passed.

[82] The plaintiff alleges that the defendant's conduct in failing to approve the proposed Development Permit Application suspended the operation of cl 3.4. Second, the plaintiff alleges that any breach of its obligations under cl 3.4 did not give rise to a right on the part of the defendant to terminate or to treat the Call Option as being at an end and the plaintiff remained entitled to give notice under cl 3.4(b) and to pay the Call Option Extension Fee (until 30 September 2013 when it terminated the Call Option for repudiation or breach of contract by the defendant).

[83] In *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd*,[16] I considered the operation of cl 3.4. Essentially, I decided two points of present relevance. I held that cl 3.4 operated to give the plaintiff an election either to terminate or to continue. It did not provide for a third alternative whereby the plaintiff might do nothing but the Call Option continued. Second, nonetheless, I held that the defendant might be prevented from relying upon the failure of the plaintiff to give notice that the Call Option was going to continue and paying the $100,000 if the defendant in breach of contract had prevented the plaintiff from being able to exercise the option before expiry of the 3 Year Date.

[84] However, that decision was not a final determination of the question of the proper construction of the meaning of cl 3.4.

[85] The parties sought to re-ventilate some of the legal questions considered in my earlier judgment as to whether the defendant might be prevented from relying upon the failure of the plaintiff to give notice that the Call Option was to continue because the defendant in breach of contract had prevented the plaintiff from being able to exercise the Call Option before the expiry of the 3 Year Date.

[86] The plaintiff reaffirmed its reliance on the submission that its obligation to make an election under cl 3.4 was suspended. I do not propose to reconsider that question beyond confirming that the views I previously expressed have not altered.

[87] The defendant relied on a number of statements by judges warning as to the difficulty of the application of the legal "maxim" that a party cannot take advantage of its own wrong. I do not find any of those statements of assistance in the circumstances of this case. None of the cases in which such statements were made was like this case.

[88] If the defendant was in breach of contract in failing or refusing to agree to the approval of the proposed Development Permit Application and from that point in time the plaintiff was prevented from carrying out the steps required under the Call Option

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16 [2014] 2 Qd R 132.

Deed to satisfy the conditions precedent to the plaintiff's entitlement to exercise the Call Option, the defendant's position is difficult to accept. It requires a conclusion that the defendant, in breach of contract, was entitled to destroy the value to the plaintiff of the agreed contractual period before the plaintiff was required to make an election at the passing of the 3 Year Date.

[89] Two specific points should be made. First, this case has more in common with the kinds of case referred to in my earlier judgment, of an option giver preventing the holder from giving notice within the prescribed time and a party who by their default causes the failure of a contractual contingent condition, than it has to do with the cases relied on by the respondent for the limited application of the maxim that a party cannot take advantage of its own wrong.[17]

[90] Second, in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd*,[18] Palmer J reasoned as to the limited application of the maxim in reliance upon statements made in *Hooper v Lane*[19] and *Re London Celluloid Co*[20] that distinguished between undoing an advantage gained by a breach of contract and losing a pre-existing right not gained by a breach of contract. I should not be taken as necessarily accepting the validity of that distinction for all purposes. *The New Zealand Shipping Case*,[21] *Suttor v Gundowda*,[22] *Cheall v Association of Professional Executive Clerical and Computer Staff*[23] and *Alghussein Establishment v Eton College*[24] are all decisions of ultimate courts of appeal on the application of the relevant principles that did not turn on that distinction. In particular, in my view, the common law of Australia should be seen as exemplified by *Suttor v Gundowda*.

[91] Appellate discussion of the distinction relied upon by the defendant occurred in *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd*.[25] Giles JA said:

> "In *Broom's Legal Maxims*, 10th ed (1969 reprint) it is said at 191 that the maxim that no man shall take advantage of his own wrong is 'based on elementary principles' and 'admits of illustration from every branch of legal procedure'. Many illustrations are given beyond the construction of contracts, to the extent of treating estoppel in pais as 'referrable to the principle set forth in the maxim' (at 197). But the work recognises that the operation of the maxim is qualified, in particular citing at 199–200 Bramwell B in *Hooper v Lane*:
>
> > '… it seems to me that rule only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed. Thus, if A lends a horse to B, who uses it, and puts it in his stable, and A comes for it and B is away, and the stable locked, and A breaks it open, and takes his horse, he is liable to an action for the trespass

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17 *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2014] 2 Qd R 132, 145-147 [73]-[80].

18 (2005) 194 FLR 322, 348-350 [123]-[129].

19 (1859) 6 HL Cas 443, 461; 10 ER 1368, 1375.

20 (1888) 39 Ch D 190, 206.

21 *New Zealand Shipping Company Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, 8.

22 (1950) 81 CLR 418, 441-442.

23 [1983] 2 AC 180, 188-189.

24 [1988] 1 WLR 587.

25 [2006] NSW ConvR 56-145.

> to the stable, and yet the horse could not be got back, and so A would take advantage of his own wrong. So, though a man might be indicted at common law for a forcible entry, he could not be turned out if his title were good. So, if goods are bought on a promise of cash payment, the buyer on non-payment is subject to an action, but may avail himself of a set off, and the goods cannot be gotten back. So, if I promise a man I will sell him more goods on credit if he pays what he already owes, and he does so, and I refuse to sell, I may retain the money. So, if I force another from a fishing ground at sea and catch fish, the fish are mine; other instances might be given. It seems, therefore, that the maxim referred to is inaccurately applied by the Plaintiffs, and that it means that no one shall gain a right by his own wrong; and not that if he has a right, he shall lose it, or the power of exercising it, by a wrong done in connection with it'. (emphasis added).

Thus a party in breach of contract may be precluded from relying on a contractual entitlement arising from the breach, but will not be precluded from relying on a contractual entitlement which does not arise from the breach.

In *re London Celluloid Company* shares were allotted under a contract which had to be registered to legalise their issue as fully paid up, and in the contract the company promised to register it. The shares were transferred to directors of the allottee. The contract was not registered. When the liquidator required the directors to pay calls, they argued that the company was taking advantage of its own wrong by requiring payment of calls which would not have been payable if the contract had been registered. That the directors were not parties to the contract formed no part of the rejection of the argument, which was expressed by Bowen LJ at 206:

> 'The maxim that no man can take advantage of his own wrong must be carefully considered, and expressed in more precise terms, before it can be safely applied. It means that a man cannot enforce against another a right arising from his own breach of contract or breach of duty. The observations of Baron Bramwell in *Hooper v Lane* on this subject are very instructive. Now what is the wrong here? A breach of contract to register the agreement. Can a company excuse itself from doing its duty in enforcing payment in cash, by agreeing to register a contract which makes such payment unnecessary? If a company cannot contract to take something else than money, how can it hamper itself by a contract not to sue for the money? In the present case there is no contract not to sue, but only a contract to register the agreement, a contract which cannot be pleaded in bar to an action.
>
> To return to the maxim that a man cannot take advantage of his own wrong, we can see the point where it ceases to be applicable. Construing the maxim as I have said, the first question is, has the right to demand payment in cash been acquired through the breach of contract in question? Was it through non-registration of

> the contract that the liability to pay in cash arose? In my opinion it was not: the liability arose from taking the shares, although such liability might have been avoided in the one way pointed out by the section.'"[26] (citations omitted)

[92] Notwithstanding that statement, I repeat my acceptance of the statement of principle expressed by Hodgson JA in *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd*:[27]

> "Thus, as asserted in *Rudi's Enterprises*, where the parties have clearly stipulated for automatic termination upon the occurrence of an event which could occur either without the default of either party or with the default of one or other party, and if the event occurs through the default of one party, then, although in general terms this would mean automatic termination, the party whose default caused the event can be prevented from taking advantage of this by direct application of the principle that a party cannot take advantage of its own wrong, rather than through construing the contract contrary to its clear meaning."[28]

[93] The defendant submits that the obligations under cl 3.4 are independent of the obligation of the defendant to approve the proposed Development Permit Application and that they do not arise from any breach by the defendant, but from the independent operation of cl 3.4.

[94] The informing principle relied upon in making that submission is that a party will not be precluded from relying on a contractual entitlement which does not arise from the breach. However, that is not a complete statement of the principles operating in this area of discourse. The automatic termination of a contract for failure of a condition is not ordinarily described as a contractual entitlement, yet the preclusion of a party whose default causes the condition to fail from reliance on such a clause is clear.[29] Similarly, the legal rights of a person to terminate a contract for breach or anticipatory breach or to sue for damages for breach of contract by the other party are subject to limits based on the effects of breach of contract by the first party.[30]

[95] In the present case, the defendant contends that cl 3.4 operates in the same way as an automatic termination, except that the plaintiff might have given notice that the Call Option was to continue and paid the Call Option Extension Fee. In effect, the defendant is contending that if the contract was to continue it had an entitlement to the notice and the payment.

[96] I reject the submission that the defendant's entitlement to the notice and the payment are independent of the obligation of the defendant to approve the proposed Development Permit Application or that the failure of the plaintiff to give the notice and make the payment was not caused by the defendant's alleged breach of contract. Given the time based nature of the operation of cl 3.4 and the conditional nature of the plaintiff's right to exercise the Call Option, a failure or refusal by the defendant

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26 [2006] NSW ConvR 56-145, [21]-[23].

27 [2005] NSWCA 39.

28 [2005] NSWCA 39, [45].

29 *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2014] 2 Qd R 132, 145-146 [75]-[76].

30 *World Best Holdings Ltd v Sarker* (2010) 14 BPR 27,549, [59]-[63]; *Sharjade Pty Ltd v Commonwealth* (2009) 15 BPR 28,443, [46]-[73].

to approve the proposed Development Permit Application might always have affected whether the plaintiff would have an opportunity to exercise the Call Option or be able to do so without having to pay the Call Option Extension Fee.

[97] Second, the defendant submits that there would have been no advantage to the defendant in receiving payment of the Call Option Extension Fee because it was to be credited as part of the purchase price. I reject that that submission. It ignores that the plaintiff had the right not to exercise the Call Option. If it did not do so, and the Call Option Extension Fee had been paid, it was not recoverable.

[98] Further, had the plaintiff elected to give the notice to continue the Call Option and paid the fee in November 2012, still it would not have had the defendant's approval of the proposed Development Permit Application. The assessment process would not have begun. From the 3 Year Date there was only until 30 September 2013 before the Call Option Expiry Date would have been reached. Subject to extension under cl 17, by cl 4.2(a) the Call Option had to be exercised on or before 5:00 pm on the Call Option Expiry Date. As at the 3 Year Date, it was unlikely that the plaintiff would have been able to satisfy the conditions necessary to exercise the Call Option by the Call Option Expiry Date.

[99] The defendant submits that in any event, even if the defendant had approved the proposed Development Permit Application, it was likely that the plaintiff would have been required to elect to give the notice that the Call Option was to continue and make the payment. Having regard to the period from 30 September 2011 until the 3 Year Date of 4 November 2012 for obtaining the required Development Permit, it appears that the plaintiff was proposing to complete the acquisition of the land by November 2012. It is not clear that it would have been able to do so. It might have been able to do so. The chance it had, which was an opportunity promised to it under the Call Option Deed, was destroyed by the defendant's breach of contract.

[100] In my view, the correct conclusion is that the defendant is precluded from relying on the plaintiff's the failure to give notice to continue the Call Option under cl 3.4(b) as bringing the contract to an end.

Non-compliance with clause 17.2

[101] The defendant alleges that pursuant to cl 17.3(a) of the Call Option Deed the plaintiff could not exercise the Call Option unless the plaintiff complied with cl 17.2 and obtained the approval of the Local Authority for the "Reconfiguration Application" (as defined). The Reconfiguration Application was the application to reconfigure Lot 2 on Survey Plan 129189 into two or three lots comprising the Land and the balance not included in the Land.

[102] The plaintiff did not comply with cl 17.2 because it did not lodge the Reconfiguration Application with the Local Authority on a date that was not less than six months before the Call Option Expiry Date. Under cl 17.3(a) of the Call Option Deed the plaintiff's entitlement to exercise the Call Option was subject to the Reconfiguration Application being approved. If the condition was not satisfied prior to the Call Option Expiry Date, either party was to be entitled to terminate the Call Option Deed.

[103] However, the Call Option Deed was not terminated by either party because of the operation of cl 17.3. The plaintiff terminated the Call Option Deed on 30 September

2013 because of the defendant's continuing refusal to cooperate in the approval and lodgement of the proposed Development Permit Application.

[104] The defendant made no submission in support of its plea that non-compliance with cl 17.2 operated in defence of the plaintiff's claim. It is not necessary to consider it further or the plaintiff's allegations or submissions in response to the plea.

Conclusions on breach of contract

[105] In my view, the defendant's failure or refusal to agree to approval of the proposed Development Permit Application was a breach of contract. The breach was of cl 15.2 of the Call Option Deed that the Committee must not "unreasonably withhold or delay its approval" and must provide its approval or refusal within five days of the request for approval. There was also breach of the defendant's obligation under cl 16.5 of the Call Option Deed to sign as registered owner all forms, plans and other documents reasonably necessary to enable the plaintiff to make the application.

[106] None of the defences raised by the defendant as justifying that failure or refusal should be accepted. I have dealt with the substance of the grounds raised by the defence. Other points were not pressed by the defendant.

[107] The plaintiff alleges that the breaches were a repudiation or breach of contract justifying termination.

[108] A recent succinct statement of relevant principle was made in *DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd*:[31]

> "For the conduct of a party to constitute a renunciation of its contractual obligations it must be shown that the party is either unwilling or unable to perform its contractual obligations, that is, it has evinced an intention to no longer be bound by the contract, or stated that it intends to fulfil the contract only in a manner substantially inconsistent with its obligations and in no other way: *Shevill v Builders Licensing Board*; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*."[32] (citations omitted)

[109] No ground other than the unsuccessful defences already dealt with was raised by the defendant in answer to the conclusion that the defendant's continuing failure or refusal to approve the proposed Development Permit Application was a repudiation of the Call Option Deed by the defendant.

[110] Accordingly, in my view, the plaintiff has established that the defendant was in breach of and repudiated the Call Option Deed. The plaintiff terminated the contract comprised in the Call Option Deed on 30 September 2013.

Damages claimed

[111] In making its claim for damages for breach of contract, the plaintiff alleges only that it lost the opportunity to acquire the Land so as to carry out the development in the

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31 [2016] NSWCA 117.

32 [2016] NSWCA 117, [39].

proposed Development Permit Application. It alleges that was a valuable commercial opportunity.

[112] The plaintiff does not allege that there was any difference between the price to be paid for the Land and the value of the Land as at the time of the breaches of contract or when a contract of sale of the Land would have been completed. Nor does the plaintiff claim damages in the alternative based on a "reliance" loss measure[33] of expenses made or incurred that were wasted by the defendant's failure or refusal to proceed with the Call Option Deed.

[113] The particulars of the alleged loss contain a gross profit calculation of the profits that the plaintiff alleges it would have made if the proposed development had been carried out. This calculation is based on a calculation described as the "Feasibility" made by Mr McFarlane in December 2011. The plaintiff alleges that but for the defendant's breach it would have purchased the Land, undertaken the development and made the gross profit as set out in the particulars and the evidence from Mr McFarlane and its other witnesses, particularly Joseph Clune and Anthony Rossiter. It submits that the damages to which it is entitled should be assessed by finding that the lost commercial opportunity was to receive a benefit that was valuable, followed by an assessment on the "probabilities" that it would have made the alleged loss of profit.

[114] As particularised, the total amount of the alleged loss of profit was $7,476,880. In supplementary written submissions, the amount was reduced to $5,012,607, but that too is subject to a number of potential items of adjustment.

[115] In summary, the model of the Feasibility and the calculation followed by the plaintiff's particulars are set out below:

Category	Item Description	Amount ($)
Income		
	Sale price of 54 apartments (ex GST)	22,579,480
	Furniture packages	810,000
	Management rights	2,385,000
	Conference facilities	440,000
	GST collected - debit	(2,383,135)
Selling expenses		
	Selling fees	(865,078)
	Conveyancing on sales	(52,920)
	GST Input Tax credit - credit	83,454
Other Expenses		
	Land	(1,100,000)
	Duties Act	(43,425)

[33] See L L Fuller and W R Perdue, "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52.

	Conveyancing on Land purchase	(15,000)
	Consultants' fees	(3,427,485)
	Construction	(13,463,288)
	Rates and taxes	(43,789)
	Other	(1,081,202)
	Contingency	(502,305)
	GST Input Tax - credit	1,750,444
	Interest	0
Adjustments		
	Matrix Project Management deducted as expense twice - add	159,500
	Development Management Fee would not be payable - add	976,088
	Sales fees on units would be reduced by half - add	763,465
	GST adjustment	507,076
Total		**$7,476,880**

[116] The defendant challenges the claim for damages at many points. It will be necessary to deal with those challenges in more detail in due course. But it is as well to summarise relevant principles and some of the major questions raised first.

Loss of a valuable commercial opportunity and damages

[117] The claim is for damages for breach of contract. The informing principles were confirmed in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[34] and summarised by Hayne J in *Clark v Macourt*[35] as follows:

> "… a plaintiff who sues for breach of contract is to be awarded as damages 'that sum of money which will put the party who has been injured … in the same position as he [or she] would have been in if he [or she] had not sustained the wrong for which he [or she] is now getting his [or her] compensation or reparation'. ... when a contract has been breached, the position in which the plaintiff is to be put, by an award of damages, is the position in which the plaintiff would have been *if the contract had been performed*."[36] (footnotes omitted, emphasis in original)

[118] The relevant principles for a case of alleged loss of a valuable commercial opportunity to make profits are those established by *Sellars v Adelaide Petroleum NL*[37] as follows:

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34 (2009) 236 CLR 272, 285-286 [13].
35 (2013) 253 CLR 1.
36 (2013) 253 CLR 1, 6 [7].
37 (1994) 179 CLR 332.

> "… [d]amages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s. 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued."[38]

[119] This approach is subject to the proviso that the plaintiff first:

> "… [s]hows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities."[39] (emphasis in the original)

[120] As discussed later, the effect of the *Sellars* methodology is that the loss of a valuable commercial opportunity is to be treated as if it were a distinct species of loss or head of damage. It is not always easy to ascertain when it is the appropriate method for assessing loss. In some cases concerning a contract of sale, and a contract by a developer to purchase land intended for development is one of them, an alternative approach that may be available is to measure the loss by the difference between the contract price and the value of the land.

[121] In some cases, the loss of a commercial opportunity is the loss of something that can only result in a benefit. In such a case, provided there was a real opportunity and the benefit has a measurable value, the *Sellars* methodology operates smoothly. But in other cases the commercial opportunity lost is of a risky nature where if the risks resolve in the plaintiff's favour the plaintiff will make a profit but if they don't the plaintiff will make a loss. Under the pre-*Sellars* methodology, the plaintiff would have been required to prove about those past hypothetical facts that it could and would have made the profits alleged.[40] If the court held that it was more likely than not that the plaintiff would have made a profit, the damages would have been assessed in the full amount of the likely profit. If the plaintiff was not able to show on the balance of probabilities that it could and would have made the alleged profit, it would receive nothing for the lost chance to do so.

[122] The *Sellars* methodology is not so easy to apply in such a case. If the lost commercial opportunity is valuable, the plaintiff is entitled to recover the value of the loss of commercial opportunity on the possibilities. Does this mean that a plaintiff can recover on a 30 per cent chance of making alleged projected profits, when the assessment entails that it was more likely than not that the profit would not have been made? What is to be done if it is more likely than not that the plaintiff would have actually made a loss? How does the *Sellars* methodology cope with the risk that a plaintiff would have lost money, not made a profit? It may seem surprising, but cases of authority have not dealt with these problems, so far as I am aware. The parties did not refer to any cases of assistance.

[123] A simple example will show that the factual context must affect the possible answers to these questions. In the mining exploration industry, a party may have developed a

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38 (1994) 179 CLR 332, 355.

39 (1994) 179 CLR 332, 355.

40 See, for example, *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 13.

prospect to a point where the commercial opportunity to further develop or exploit it was clearly valuable, because the interest could have been sold to a purchaser for a substantial sum. This is so even though the venture may have been inherently speculative and on the balance of probabilities it could not be said that the interest would have become a profitable producing mining operation. Such a case fits within the *Sellars* methodology as a loss of a valuable commercial opportunity to receive a benefit.

[124] When the lost commercial opportunity is the opportunity to engage in a specific property development project over a short term investment time frame, the picture might be similar. A project may be put together and sold, even though there are substantial hurdles as to whether it will ever prove profitable on the development being carried out. The question in such a case would be of the project's saleability, rather than its percentage prospects of making a profit at that stage . However, the plaintiff's case was not that it could have marketed and sold the project before carrying out the development in the present case. It was that its loss of opportunity was to carry out the development and make the profits from doing so.

[125] The overall assessment of the prospects of carrying out a development may be that there was a chance that the developer would have made a profit but it was just as likely or more likely they would have made a loss. The project may not have been saleable. Yet, if the planets had aligned, the developer may have made money. At the point of assessment, the developer may have significant sunk costs that would have been recoverable only from revenue gained by completing the project.

[126] According to the *Sellars* methodology, has such a plaintiff suffered the loss of a valuable commercial opportunity? One view is that if overall it is more likely than not that the plaintiff would have lost money, the plaintiff has not suffered a loss of a valuable commercial opportunity. If this view is not accepted, a plaintiff who was more likely to have made a loss than a profit would be compensated by receiving a percentage of the possible profits, while the losses that were more likely would be left out of account.

[127] For examples of cases concerning alleged loss of profits and an approach like the *Sellars* methodology, see *Takaro Properties Ltd v Rowling*,[41] *Holmark Construction Company Pty Ltd v Tsoukaris*,[42] *Longden v Kenalda Nominees Pty Ltd*,[43] *Reading Entertainment Australia v Burstone Victoria*,[44] *North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd*[45] and *Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd*.[46]

[128] A relevant starting point is *Chaplin v Hicks*,[47] both because it is a leading case on damages for breach of contract for a loss of a chance to obtain a pecuniary benefit and to point out the differences and similarities between it and the present case. Sometimes it is described as a case about the loss of a chance to win a beauty

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41 [1986] 1 NZLR 22.
42 [1988] ANZ ConvR 469.
43 [2003] VSCA 128.
44 [2004] VSC 546, [459]-[487].
45 [2016] VSC 1, [249]-[392].
46 [2016] VSCA 187, [292]-[343].
47 [1911] 2 KB 786.

contest.[48] It was more accurately identified by Gummow J in *Tabet v Gett*[49] as an opportunity to present for selection by the defendant theatrical manager in a competition with twelve prizes of a three year theatrical engagement. Two features emerge immediately. First, the chance or opportunity was only a chance of a benefit not a detriment. To put it into commercial language, it was a chance of profit, not a chance of profit or loss. Second, the contractual promise was to provide the opportunity, so it was precisely that breach that was to be compensated.

[129] The difference in the present case is that the lost commercial opportunity or chance was one to make a profit or loss, because of the nature of the development project that the plaintiff intended to undertake.

[130] The first loss of a commercial opportunity case similar to the present was *Takaro Properties*. In that case, the plaintiff claimed damages for the defendant minster's refusal of an application for approval of the foreign investment element of a rescue package intended by the plaintiff to redevelop its failing luxury fishing resort. The plaintiff alleged it lost the profits that were projected if the redevelopment had been carried out. One aspect of the redevelopment was that the plaintiff would construct and sell a number of holiday houses on its land for a profit. The primary judge held on the balance of probabilities that the plaintiff had proved that most of the relevant contingencies to be satisfied before it could have carried out the redevelopment and made the profits that were projected would have been satisfied. However, one of the risks was whether the plaintiff would have been able to sell the proposed holiday houses for specified prices. The primary judge held that he was not satisfied on the balance of probabilities that the postulated sales were achievable at those prices or that the plaintiff would have made a profit. The Court of Appeal held that he had asked the wrong question because the true question was "whether … a plaintiff would have had a chance of some success; and if so (whatever might seem to be the difficulty of assessment) what was the degree of chance against outright success taking into account any relevant contingencies."[50]

[131] No attention was paid in *Takaro Properties* to the consequences of a finding on the balance of probabilities that a loss was more likely than a profit. The leading judgment treated the primary judge's finding as a failure of principle.[51] Another judgment rejected the primary judge's finding as one that "leaves out any possibility of the ultimate success of the whole project" and held that experienced business entrepeneurs such as those who were associated with the rescue package "would [not] have become associated with the project to the extent that they were unless there had been some real chance of success".[52]

[132] In my view, *Takaro* does not justify the view that when determining whether there has been a loss of a valuable commercial opportunity to receive a benefit the risk of loss should not be taken into account. In my view, the better characterisation of that case is that the Court of Appeal overturned the primary judge's finding of fact that on the balance of probabilities the plaintiff was more likely to make a loss than a profit. Therefore, it was appropriate to consider the case on the basis that the plaintiff

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48 For example, *Norris v Blake (No 2)* (1997) 41 NSWLR 49, 67.
49 (2010) 240 CLR 537, 559-560 [48].
50 [1986] 1 NZLR 22, 63.
51 [1986] 1 NZLR 22, 63.
52 [1986] 1 NZLR 22, 69.

suffered a loss of a valuable opportunity and the question became what that value was, measured on the possibilities.

[133] In my view, that conclusion is supported by the fundamental principle that damages for breach of contract are compensatory, so that where a party sustains a loss by reason of a breach of contract, it is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. *Robinson v Harman*[53] is well known as the source and expression of that principle. As was said by Carter, Courtney and Tolhurst in a recent article:

> "That the 'rule in *Robinson v Harman*' plays a key role in the assessment of contract damages cannot be doubted. It has been described as the 'central' or 'ruling' principle."[54] (footnotes omitted)

[134] Where a plaintiff has lost the commercial opportunity to engage in a new business of a development project and there is a risk of profit or loss, the question of principle arises whether an assessment of the value of the opportunity on the possibilities that arrives at a proportion of the profits that might have been made can constitute damages that, so far as money can do it, place the plaintiff in the same situation as if the contract had been performed. In my view, if it is more likely than not that the plaintiff would have made a loss, such an assessment would be erroneous.

[135] In my view, that conclusion is supported by *Commonwealth v Amann Aviation Pty Ltd*[55] as a leading case on the application of the fundamental principle that damages for breach of contract are compensatory. The question in that case was whether Amman could recover damages based on the wasted expenditure it had made in performing the contract. Amman did not and probably could not have proved that it would have made profits if the contract had been performed to its end. The court held that in the circumstances Amman could recover on the basis of wasted expenditure, but some of the judgments discussed a qualification relevant to the problem in the present case. An argument against allowing damages measured by wasted expenditure was that a plaintiff might thereby recover an award of damages in excess of the amount that it would have made if it had made losses in performing the contract.

[136] The point was made in the reasons of Mason CJ and Dawson J as follows:

> "The corollary of the principle in *Robinson v Harman* is that a plaintiff is not entitled, by the award of damages upon breach, to be placed in a superior position to that which he or she would have been in had the contract been performed. In *L Albert & Son v Armstrong Rubber Co*, Chief Judge Learned Hand said:
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> > '… On those occasions in which the performance would not have covered the promisee's outlay, such a result imposes the risk of the promisee's contract upon the promisor. We cannot agree that the promisor's default in performance should under this guise

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53 (1848) 1 Ex 850, 855; 154 ER 363, 365.

54 J W Carter, W Courtney and G J Tolhust, "Issues of Principle in Assessing Contract Damages", (2014) 31 *Journal of Contract Law* 171, 171.

55 (1991) 174 CLR 64.

> make him an insurer of the promisee's venture.'"[56] (footnotes omitted)

[137] In considering a claim for damages for breach of contract based on wasted expenditure, a party who makes expenditure in order to earn receipts will ordinarily expect that the receipts will exceed the expenditure. Ordinarily, recovery of the expenditure will not put the plaintiff in a superior position than if the contract had been performed. However, if the contract is shown to be a loss-making venture, the plaintiff would not be compensated in an amount that would exceed what it would have made if the contract had been performed.

[138] Where the commercial opportunity that is lost is something that can only be a benefit, it may be valuable notwithstanding that the plaintiff had only a small opportunity or chance of receiving it. That is a case where the commercial opportunity has some value not being a negligible value. Of course, to find that a plaintiff has only a 10 per cent or 20 per cent chance of receiving a benefit postulates that if the chance had played out in the real world, most likely, the plaintiff would not have received the benefit. According to the chances, the result would most likely have been that the plaintiff suffered no money loss. Yet the *Sellars* methodology results in an award of damages. In that sense, the plaintiff may be in a superior position than if the chance had played out in the real world. But if the chance had fallen in the plaintiff's favour in the real world the plaintiff would have received the full amount of the benefit, not its value assessed on the possibilities. This analysis demonstrates, in my view, that the loss of the commercial opportunity to receive a **benefit** is a category of loss or head of damage, not just a measure of the loss of profits.

[139] It may seem surprising that there is little direct authority of assistance for the applicable principles in a case of the present kind under the "two-step analysis"[57] of the *Sellars* methodology. But the problem is not confined to the Australian common law.

[140] *Takaro Properties* may be taken to represent the law in New Zealand.

[141] In England and Wales, there have been similar but not identical developments of principle to the approach taken in *Sellars* in *Allied Maples Group Ltd v Simmons & Simmons*,[58] *Parabola Investments Ltd v Browallia Cal Ltd*,[59] *Vasiliou v Hajigeorgiou*[60] and *Wellesley Partners LLP v Withers LLP*.[61] To the extent that there are differences about causation and the standard of proof between the two lines of cases, the High Court recently said in *Badenach v Calvert*[62] that:

> "The onus of proving causation of loss is not discharged by a finding that there was more than a negligible chance that the outcome would be favourable, or even by a finding that there was a substantial chance of such an outcome. The onus is only discharged where a plaintiff can

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56 (1991) 174 CLR 64, 105.
57 S M Waddams, "Damages: Assessment of Uncertainties", (1998) 13 *Journal of Contract Law* 55, 66.
58 [1995] 1 WLR 1602.
59 [2011] QB 477.
60 [2010] EWCA Civ 1475.
61 [2016] 2 WLR 1351.
62 (2016) 331 ALR 48.

> prove that it was more probable than not that they would have received a valuable opportunity. To the extent that the majority in *Allied Maples Group Ltd v Simmons & Simmons* holds that proof of a substantial chance of a beneficial outcome is sufficient on the issue of causation of loss, as distinct from the assessment of damages, it is not consistent with authority in Australia..."[63]

[142] Of the English cases, I nevertheless mention *Vasilou.* In that case the plaintiff's claim, in part, was for loss of profits in carrying on the business of a restaurant. The primary judge concluded on the balance of probabilities that the plaintiff would have made the profits alleged and awarded them in the full amount. That was upheld in the Court of Appeal, but Patten LJ said:

> "The appellant's breach of covenant had made the operation of the restaurant a legal impossibility. As a result, it did not trade. There was therefore no doubt at all that the breach had caused the loss subject only to the quantification of that loss. The issues raised about the respondent's competence and the restaurant's prospects of success were not matters that went to causation at all. They were relevant at most to the assessment of how profitable (or not) the restaurant would have been had it been able to operate. If it would have been a commercial failure Mr Vasiliou could have received no more than nominal damages for the breach."[64]

[143] In the United States, it was said in 2015 in the United States District Court that:

> "Broadly speaking, all American jurisdictions require the party seeking recovery of lost profits must establish those lost profits 'with reasonable certainty."[65]

[144] It has also been said that "the epithet 'certainty' is overstrong, and that the standard is a qualified one, of 'reasonable certainty' merely, or, in other words, of 'probability.'"[66] Rather, "reasonable certainty means by preponderance of the evidence as in other civil contexts."[67]

[145] That rule replaced an earlier rule described by Caruso and Schaeffer,[68] thus:

> "In deciding whether lost profits have been proven with reasonable certainty, courts often distinguish between established businesses and 'new businesses' because new businesses must generally meet a higher evidentiary burden. For many years, the common law 'new business rule' stood as a formidable barrier to the recovery of lost profits by any business that did not have a track record of profits. At its peak, the new

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63 (2016) 331 ALR 48, 56-57 [41].

64 [2010] EWCA Civ 1475, [23].

65 *HB Williamson Co v III-Eagle Enters* (US District Court, S.D. Illinois, No Cv 0575–MJR–PMF, 25 February 2015), 12.

66 *TAS Distrib Co v Cummins Engine Co* 491 F 3d 625, 632 (7th Cir, 2007).

67 *MAC Sales v EI DuPont de Nemours* (US District Court, E.D. Louisiana, No Civ. A. No. 89–4571, 8 March 1996).

68 C D Caruso and B S Schaeffer, "Damages for Lost Future Profits in Franchise Disputes – Overcoming the New Business Rule and Establishing Reasonable Certainty" (2016) 36 *Franchise Law Journal* 1, 6.

> business rule approached per se status in many jurisdictions, meaning that a business without a track record of profits was categorically barred from recovering lost future profits, which were deemed too speculative as a matter of law 'for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.'" (footnotes omitted)

[146] The development of the law as to recovery of lost profits in the United States as a matter of legal history is entertainingly essayed by Lloyd and Chase in a recent article,[69] including the role played by the jury, the opposition of the famed Justice Joseph Story to the whole idea as a subject of "utter uncertainty" and the developments that followed until the 1891 decision of the Supreme Court of the United States in *Howard v Stillwell & Bierce Manufacturing Co*[70] where the reasonable certainty test was adopted.

[147] A recent illustration of the law as applied in the US at the level of the United States Court of Appeals may be seen in *Nycal Offshore Development Corporation v United States.*[71] It is not useful in the present case to explore the United States law further.

[148] The Supreme Court of Canada and intermediate appellate courts in that country do not appear to have closely considered the question.[72]

[149] In my view, under the *Sellars* methodology, where the postulated loss of a valuable commercial opportunity is the opportunity to engage in a business that might have made a profit or a loss, the category of loss or head of damage should only be recognised as compensable because it is concluded on the balance of probabilities that it had some value, either because it was marketable, or because if the contract had been performed the plaintiff would have been more likely to have made a profit than a loss.

[150] Consistently with those conclusions, in *Longden v Kenalda Nominees*, the plaintiff claimed damages for repudiation of an agreement to lease retail shopping premises. The plaintiff claimed damages for the loss of profits of the furniture business it would have conducted in the premises. The primary judge held that the plaintiff's proof of the profits that would have been made was unsatisfactory and held that no loss was proved. On appeal, the plaintiff submitted that even if the postulated business would have been unprofitable as a matter of probability that did not exclude the real possibility that the business would have made a profit. The Victorian Court of Appeal held that the "chance to conduct the … business … by itself … would not amount to a relevant loss because … the … business might not have generated sufficient income to cover its outgoings…".[73]

[151] There is a second embedded problem in applying the *Sellars* methodology in circumstances like the present case. The plaintiff would have had to overcome a number of hurdles before it would have been able to acquire the land, construct the

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69 R M Lloyd and N J Chase, "Recovery of Damages for Lost Profits: the Historical Development", (2016) 18 *University of Pennsylvania Journal of Business Law* 315.

70 139 US 199, 205-206 (Sup Ct, 1891).

71 743 F 3d 837 (Fed Circ, 2014).

72 See, for example, *Southcott Estates Inc v Toronto Catholic District School Board* (2010) 104 OR (3d) 784, [96]-[117].

73 [2003] VSCA 128, 16-17.

building and sell the units and other rights. If those hurdles are treated as contingencies that affect whether the breach of contract caused the plaintiff any loss, the plaintiff would have to show that it would have overcome each one on the balance of probabilities. If however, they are to be treated as factors which do not go to whether the plaintiff lost a valuable commercial opportunity to receive a benefit but what the value of the opportunity was, they would be matters to take into account only in arriving at an appropriate value by way of discounting the amount of the loss of profits that might otherwise have been earned. Neither *Sellars* nor the cases on which it was based, such as *Chaplin v Hicks*, answer this question.

[152] An illustrative example in a development project case is that the developer will usually have to obtain planning approval for the proposed development. In my view, there is no simple answer to whether the risk of not obtaining such an approval means that a plaintiff will be unable to prove on the balance of probabilities that it has suffered a loss of a valuable commercial opportunity to receive a benefit. *Winky Pop* was such a case, decided on its particular facts. But, in general, the fact that the chance of obtaining the development approval is less than 50 per cent would not mean that the lost commercial opportunity is not valuable.

Whether the plaintiff would have sought to acquire and develop the land

[153] Accordingly, although the plaintiff's case theory is that it is to be compensated for the loss of a valuable opportunity assessed on the probabilities, the question of causation of loss of a valuable opportunity is to be answered on the balance of probabilities. There were many contingencies that might have affected the existence and the amount of any loss of profits that the plaintiff would otherwise have made, but whether the plaintiff would have chosen to exercise the Call Option and sought to carry out the development is not a matter to be assessed on the possibilities. That question is to be answered on the balance of probabilities. The defendant submits that the plaintiff would not have done so, even if the defendant had co-operated in submitting the proposed Development Application.

[154] First, the defendant relies upon evidence that the plaintiff's director Mr McFarlane did not believe that the project would be successful. By November 2011, it was apparent to Mr McFarlane that the defendant would not cooperate in the process of submitting the application. Even by that time, it must have been doubtful to him that the defendant would voluntarily allow the project to proceed at all.

[155] On 15 November 2011, Mr McFarlane made a handwritten note. The reason for making the note is not clear. Although the meaning of all parts of it are not clear, it is clear enough that it was a working document as to strategies or options by which the plaintiff might resolve the dispute that had arisen. Mr McFarlane specifically recorded that what the "club" (the defendant) wanted was to "get their property back", meaning the land subject to the Call Option Deed.

[156] He also recorded his view that the current status was that the proposed hotel on the club's land would never proceed even if the plaintiff got to apply for a development approval. The defendant sought to rely on this note as proof that Mr McFarlane did not intend for the plaintiff to proceed with the project. In context, the relevant statement meant no such thing. It was merely a conservative starting point from which Mr McFarlane proceeded to analyse other possible options by which the

dispute could be resolved. Mr McFarlane rejected that it was written because the project was not financially feasible in his view, and I accept that was not his view.

[157] Next, the defendant submits that the plaintiff suffered no loss because it was not intending to be the developer of the land. Instead, the defendant submits that the plaintiff by Mr McFarlane intended that a related corporation of the plaintiff Principal Properties Holdings Pty Ltd ("PPH") would be the developer.

[158] There is a body of evidence that supports that contention. In particular, on 1 August 2011, the plaintiff's solicitor sent an email to Mr McFarlane confirming that PPH (not the plaintiff) would be nominated as the buyer of the land on exercise of the Call Option. Mr McFarlane was not able to recall why PPH was to be nominated.

[159] On 24 August 2011, PPH made an agreement in writing with Walter Ma, to fund consultants' fees and related expenses for the proposed development. That agreement provided that the parties agreed PPH would be nominated by the plaintiff to acquire the Land and PPH would be the developer. Mr Ma agreed to provide loan funds of $250,000 by not later than 23 September 2011. The $250,000 was to be applied for the sole purpose of paying costs associated with making applications for and pursuing the issue of a development approval and other approvals required to allow the project to proceed. If PPH were able to secure a satisfactory development approval, other approvals and "necessary capital" then Mr Ma was to be entitled to payment of $450,000 free of tax either in cash or by equity.

[160] On 6 September 2011, Mr McFarlane wrote to Mr Ma proposing a cashflow for receipt of the $250,000 in loan funds. Mr McFarlane attached a schedule of consultants' fees totalling $250,000. He also stated that he would set up a "new bank account in the name of Principal Properties Holdings Pty Ltd".

[161] Nevertheless, the fact is that PPH did not take over the proposed development. I infer that because the project stalled when the defendant refused to cooperate in lodging the proposed Development Permit Application, any assignment or transfer of the plaintiff's rights that may have been proposed did not proceed. It may have been a breach of the plaintiff's contract with Mr Ma dated 24 August 2011 had the plaintiff not nominated PPH as the acquirer of the Land and for the plaintiff to have proceeded as the developer. But, in my view, it would be incorrect to treat the plaintiff as not having suffered any loss or damage because it intended that PPH would take over as the developer when that intention was not carried into effect. As Mr McFarlane said in evidence, he would have sought the defendant's approval before doing so.

[162] Accordingly, it is necessary to consider the plaintiff's claim that it suffered a loss of a valuable commercial opportunity on the footing that if it could have done so the plaintiff would have proceeded to acquire and develop the Land, as Mr McFarlane said.

Risks of not making a profit

[163] The question whether the commercial opportunity lost by the plaintiff was valuable and the assessment of the value of the opportunity are to be answered having regard to the circumstance that any development would have been subject to a number of risks that might have prevented the plaintiff from making the alleged profits. The first risk was that the plaintiff might not have obtained a Development Permit that

met the requirements of the Call Option Deed. The second risk was that the plaintiff might not have been able to pay the purchase price of the Land. The third risk was that the plaintiff might not have been able to obtain development finance for the project to proceed. The fourth risk was that the plaintiff might not have been able to obtain enough pre-sales to satisfy the likely conditions as to pre-sales of any development finance. The fifth risk was that the plaintiff's expenses might have exceeded those budgeted for in the Feasibility. The sixth risk was that the sales of the project products and revenue from those sales would not be enough to meet the budgeted and any other costs.

[164] Some of these questions present as potential hurdles to the plaintiff making any profit *at all*. On the other hand, adjustments of the sales revenue or the expenses might only affect the *amount* of any profit to be made.

[165] In the present case, in my view, if it is concluded that overall the plaintiff was more likely to make a loss than it was likely to make a profit it should be concluded that the loss of the commercial opportunity to acquire the Land and develop the project was not a valuable opportunity. In addition, there is a series of successive questions raised in this case that could affect whether the plaintiff's loss of the opportunity to acquire and develop the Land as proposed was a loss of a valuable commercial opportunity. On the other hand, if the conclusion is that the plaintiff would have made a profit if the project had proceeded to completion, those risks may be risks that should only be taken into account as going to the measure or quantification of damages.

Development Permit

[166] The proposed development comprised three components:

> (a) a material change of use over the development site to allow the construction of short term accommodation building, including conference facilities and associated car parking;
> (b) reconfiguring the existing lot by a standard subdivision to create separate allotments for the Leagues Club and the development site followed by construction of the improvements; and
> (c) further reconfiguration of the lot for the development site by:
> (i) volumetric subdivision to create a separate lot for the Vendor's Car Park to be transferred back to the defendant; and
> (ii) subdivision of the remaining lot into a building format plan to create a community title scheme for the units.

[167] Planning for the Red Hill area was controlled by Brisbane City Plan 2000. In September 2011, part of the site was designated in the sport and recreation area and another part was designated in the parkland area. The proposed use of the site fell within the definition of short term accommodation. That definition provided that short term accommodation comprised "a use of premises for short term accommodation (typically not exceeding 2 weeks) for tourists and travellers, eg holiday cabins, motel, hotel (where it entails mainly accommodation), serviced apartments, guesthouse or backpackers hostel and caravan park…". That use was not one identified in the tables of assessment for either the sport and recreation area or the parkland area. The default level of assessment was therefore impact assessable –

generally inappropriate. It triggered the requirement for a development application to be made to the Council.

[168] The proposed Development Permit Application was prepared for lodgement with Council on or before 30 September 2011 to include all three components of the proposed development and so as to comply with the requirements for an impact assessable – generally inappropriate application.

[169] On 16 August 2011, the plaintiff and its consultants attended a pre-lodgement meeting with Council officers. The minutes of the pre-lodgement meeting stated that the Council did not consider that the proposal was ancillary to the sport and recreation use of the site but that it was still supportable subject to additional information being submitted with an application demonstrating compliance with City Plan 2000. The minutes identified additional information that the Council expected to find included in an application. Of particular relevance was the requirement that the application and proposal achieved no net loss of existing car parking.

[170] Summarising, the proposed Development Permit Application included the following features:

(a) a 54 room short term accommodation building and 137 square metre conference facilities and balcony;
(b) a lower ground level car park with 54 car parking spaces for the short term accommodation units;
(c) a ground level internal car park with 53 car parking spaces and an external car park with a total of 104 car parking spaces, comprising a total (external and internal combined) of 157 car parking spaces to be allocated and transferred to the defendant for the Vendor's Car Park.

[171] The defendant raised a number of contentions in support of the conclusion that the proposed Development Permit Application would not have been approved. Some of the grounds overlapped the defendant's contentions as to the contractual requirements under the Call Option Deed for a proposed Development Permit Application.

[172] The two main grounds were that:

(a) the proposed application failed to seek separate approval for conference facilities as a distinct and independent use; and
(b) the car parking arrangements provided for in the proposed application would not have been approved.

[173] In final submissions, the defendant focussed on the grounds related to the car parking arrangements under the proposed Development Permit Application, including a contention that the conference facilities may have triggered a requirement for additional car parking which may have diminished the scale of the proposed development.

Separate use for conference facilities

[174] As stated previously, the proposed Development Permit Application provided that the use would be short term accommodation (up to 54 units) and ancillary conference facilities.

[175] The proposed ownership of the conference facilities was not clearly dealt with by the evidence. From the Feasibility, the assumption was that the conference facilities would be sold for the sum of $440,000. However, whether they would be sold to an operator who would differ from the manager of the units or apartments was not stated.

[176] Clause 11 of the Contract provided that the plaintiff would not enter into a contract of sale, lease, agreement for lease, licence or other similar agreement with any third party for the sale or use of the conference facilities without first making a written offer to the defendant on the same terms. It envisaged that the defendant might be the purchaser. It was not apparently proposed that the defendant might be the operator of the short term accommodation business.

[177] It was at least contemplated that the development would be constructed in a way that would permit a permanent internal connection by way of access between the conference facilities and the defendant's existing Leagues Club building.

[178] In these circumstances, a town planner, Shane Talty, opined that an excision of the conference facilities from the short term accommodation component would constitute a separate use not ancillary to the short term accommodation use. Mr Talty opined that would require a separate material change of use application or component in the proposed Development Permit Application.

[179] On the other hand, another town planner, Greg Ovenden, opined that the proposed conference facilities, at approximately 200 square metres of floor area, were a minor facility that would accommodate small scale events such as seminars and meetings. Whilst the City Plan 2000 definition of a "Convention centre" could apply to small scale facilities, the proposed facilities could be included as an ancillary use for short term accommodation facilities. The creation of an independent tenure for the conference facilities would not result in a material change of use requiring separate approval. He noted that the whole proposal was already impact assessable and would be notified as including the proposed conference facilities. If there was any concern about the ability of the conference facilities to be separately titled and subject to third party management the parties acting co-operately could have simply amended the application to include the use of Convention centre. That would not have altered the level of assessment and introduced any additional assessment requirements that would have jeopardised prospects for approval.

[180] In the joint expert's report, the town planners agreed that the Development Permit Application could have been amended either before lodgement or post-lodgement to introduce the Convention centre use together with short term accommodation in the list of uses applied for.

[181] In my view, this was not likely to present any impediment to approval of the proposed Development Permit Application.

Car parking

[182] The defendant relies on a series of points about whether the proposed application, and the accompanying plans and reports, could have satisfied the Council sufficiently to approve them in that form because the proposed car parking spaces could not be seen to be, and in any event would not be, TAPS compliant for a range of Acceptable Solutions. The grounds relied on were:

(a) the documents were not in a form that properly identified sufficient car parking spaces;
(b) the documents did not include a copy of the overall architectural site or car park plans showing all of the proposed new and amended car parking spaces;
(c) the external car park shown in the documents was located in some areas across or abutting existing improvements such as retaining walls and garden beds around the perimeter; and
(d) the car parking spaces in the proposed application were not sustainable because:
    (i) the proposed driveway at the Fulcher Rd boundary was not wide enough;
    (ii) the access ramp along the southern boundary was less than 6.5 metres wide;
    (iii) one way circulation was proposed in a section of the external car park;
    (iv) there was insufficient identification of physical end island treatments within the external car park;
    (v) there were no car parking spaces provided for the proposed conference facilities;
    (vi) proposed car parking spaces were in locations where it would be difficult to manoeuvre in and out;
    (vii) the design lacked turnaround areas;
    (viii) some car parking spaces appeared to be shorter than 5.4 metres long; and
    (ix) two metre blind aisle extensions were not provided in the internal car park to enable manoeuvring to and from end car parking spaces.

[183] I have previously identified the documents that the plaintiff relied upon at and shortly after 30 September 2011 in relation to the alleged implied term as to compliance with the Car Park Condition.

[184] There was a contest between expert traffic engineers who gave evidence as to the number of obtainable car parking spaces. It will be necessary to deal with it in some more detail.

[185] Before doing so, I must mention that Andrew Douglas, a traffic engineer retained by the defendant, sought in many places to contend that information relevant to the assessment manager's function in deciding an application for a development permit was information that the defendant would "need to be aware of". This was an obvious attempt to support the defendant on a subject matter that was not opinion evidence within the area of expertise of a traffic engineer. That Mr Douglas did so was regrettable. It leads to me to discount his evidence significantly. It is fundamental

that an expert witness gives opinion evidence within expertise and impartially. Adopting an advocate's position on a subject matter outside expertise is strong evidence of lack of impartiality. As Goldberg J said:

> "Generally, whether an expert's opinion is confined to his or her area of expertise and whether experts state the factual basis upon which they have formed their opinion, are useful considerations in determining at what point an expert witness ceases to be impartial and has moved beyond the bounds of legitimacy into advocating for a party."[74]

[186] This echoed a view that formed part of the influential list of duties and responsibilities of an expert witness in a civil case formulated in *The Ikarian Reefer*,[75] as follows:

> "1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation…
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of an advocate…" (citations omitted)

[187] There were numerous traffic engineering expert reports. One was by Steven Williams. Three were by Mr Douglas. There was also a joint report. They ran in total to many hundreds of pages including annexures.

[188] The defendant submits that Mr Douglas' third report estimated that in aggregate between 21 and 58 car parking spaces could be lost by application of TAPS. It accepted, however, that alternative solutions would be approved for some of these non-conformances with the Acceptable Solutions requirements. But the defendant has not identified which ones. Instead, it submits that there was a risk that some car parking spaces may be lost and that it is likely that the scale of the proposed development would have been reduced. It submits that would have been likely to adversely affect the financial viability of the proposed development.

[189] The plaintiff submits that Mr Douglas' evidence was affected by the advocate's role he adopted. Another point of this kind raised against Mr Douglas was his doubt as to the adequacy of the allowances for retaining wall widths and column widths in relation to plans produced by the plaintiff's witnesses. It must be accepted that Mr Douglas cannot give expert evidence as to the civil engineering design or adequacy, but he did not really do so on these points, in my view. The points he made were that if the design requires adjusting in these respects, there will be potential losses of car parking spaces. In principle, I accept the logic of that reasoning. The question is really how many car parking spaces might be lost. The report of Ashley Ruffin, a structural engineer, dealt with and answered most of the questions raised by Mr Douglas as to structural matters.

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74 *Qantas Airways Ltd* [2004] ACompT 9, [221]; referred to in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 2)* (2009) 174 FCR 175, 187-188 [40].

75 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68, 81-82.

[190] Another criticism of Mr Douglas' evidence made by the plaintiff was that he focussed on the Acceptable Solution provisions of TAPS, as previously discussed, but did not engage or consider whether there were other ways that the Performance Criteria could be met. In my view, this criticism is well made in some places. It adds to the air of partiality hanging over Mr Douglas' evidence.

[191] It was not in dispute between the expert traffic engineers that the Council would not have approved the car parking arrangements as shown on the plans attached to the proposed Development Permit Application but the request for information process might have been used to provide better plans for the Council to consider.

[192] In April 2015, Mr Williams provided an updated set of drawings for the car parking spaces that formed the basis for the traffic engineers' final opinions and were attached to the joint report. The drawings appear to show 154 car parking spaces in the areas intended for the Vendor's Car Park (although Mr Williams said that he recalled there were 156), divided between the external and internal spaces.

[193] In summary, Mr Douglas' view, as expressed in the joint expert report, was that the April 2015 set of drawings proposed by Mr Williams would have resulted in reductions from the number of car parking spaces proposed in them as follows:

(a) six to ten spaces to accommodate minimum dimensional requirements under TAPS Policy;
(b) three to six spaces to provide a 7.1 metre minimum clear driveway width and 2 metre landscape buffer from the southern boundary, plus a driveway of an appropriate width; and
(c) three to six spaces from the basement to meet the TAPS Policy dimensions.

[194] In his last report, Mr Douglas revisited the reductions from the same plans, concluding:

(a) six to 14 spaces would be lost in the areas of the external car park; and
(b) three to 12 spaces would be lost in the internal car park area at the ground level.

[195] The defendant's counsel covered these areas in some detail in a careful and skilful cross-examination of Mr Williams. However, in many respects Mr Williams' response was that although the dimension for the Acceptable Solution provided under TAPS was not met, still the Performance Criteria could be met. Following upon the detail, the defendant's counsel suggested to Mr Williams generally that ten or more car parking spaces might be lost if the Council otherwise approved the plan, but Mr Williams did not agree.

[196] However, Mr Williams did agree that there might be a loss of car parking spaces in relation to the absence of compliant disabled car parking spaces. Further, his answers to how an appropriate set down area would be provided for the short term accommodation unit building and how the intrusion of columns under the building into car parking spaces might affect the number of car parking spaces were incomplete.

[197] Doing the best I can with these materials, I consider it likely that there would have been some reduction in the number of approved car parking spaces from the 154 spaces proposed in the final set of plans produced by Mr Williams. Bearing in mind that a reduction of six car parking spaces for the Development Permit would not produce compliance with the Car Park Condition, there was a real risk that the plaintiff might not have been entitled to exercise the Call Option because the Car Park Condition would not have been complied with.

[198] There was evidence that in fact the number of existing car parking spaces was 157 car parking spaces which was more than the 149 car parking spaces agreed between the parties in the Call Option Deed. That difference might have affected the Council's attitude to the car parking spaces in the proposed Development Permit Application given the requirement stated at the pre-lodgement meeting that the proposal achieve no net loss of car parking. However, that was not a ground raised in the defendant's case as a specific reason why the Council would not have approved the plans prepared by Mr Williams, so I have put the point to one side.

[199] I assess the prospect of obtaining the required number of 149 car parking spaces for the Vendor's Car Park at just over 50 per cent.

Set back and retaining walls

[200] Two other points were advanced by the defendant as impediments to the plaintiff's prospects of obtaining Council approval of the proposed Development Permit Application. They concerned the relationship of different features to the boundaries of the site.

[201] First, Mr Williams' car park layout and design involved removing the existing retaining walls and replacing them with vertical retaining walls cut back to and located on the boundary between the proposed external car park and the adjacent land owned by the Council known as Gilbert Park.

[202] As a practical matter, it might have been difficult to construct the new retaining walls so close to the boundaries without cooperation from the Council and any other adjoining landowners in approving the plans. There was no evidence that dealt with this question in detail.

[203] Mr Ruffin's report dealt with the structural engineering feasibility of the proposed walls. It did not deal with whether the Council would approve the construction as a matter of building approval or what its attitude or other adjoining landowners' attitudes might be to construction on the boundary rather than setting the wall back onto the plaintiff's land.

[204] Retaining walls are subject to requirements imposed by the *Building Act* 1975 (Qld), the *Sustainable Planning Act* 2009 (Qld) and local government laws and planning schemes. A building development approval is required under the *Building Act* 1975 (Qld) for a retaining wall that has a height of more than 1 metre above the wall's natural ground surface.[76] A retaining wall under this height does not require building

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[76] *Building Regulation* 2006 (Qld) s 4, sch 1 item 3(1)(a)–(c). The 'height' includes the total height of the wall and of the fill or cut retained by the wall. 'Natural ground surface' for a building, device or structure means the ground surface located at the site of the building or structure on the day the first

approval[77] unless there is also a surcharge loading over the zone of influence or the retaining wall is closer than 1.5 metres to a building or another retaining wall.[78] Alternatively, or in addition, the building of a retaining wall may require planning approval to be granted.

[205] A report by Tom McKinney attached to Mr Talty's second report said that the Council's standard development conditions in relation to retaining walls were that all retaining walls abutting Council property are to be located 300 millimetres within the site.

[206] Overall, I accept that the there was a real risk that the Council's requirements for replacement of the existing retaining walls with the proposed new retaining walls may have been set back from the locations shown on Mr Williams' plans, but I am unable to conclude by how much.

[207] Second, the plans for the project located the access road for the car parks on the southern site of the proposed building adjacent to the boundary. The minutes of the pre-lodgement meeting between the plaintiff and Council officers recorded the possible requirement of a two metre wide landscape screening to residential areas.

[208] The provision of a two metre buffer zone is a consideration raised by Performance Criteria P3 of the Landscape Code.

[209] Mr Talty was of the view that Acceptable Solution A3.3 of the Landscape Code would have provided scope for the Council to require a landscape buffer along the southern boundary of the Land to adjoining residential properties and it was standard practice to provide landscaping along external boundaries in the majority of circumstances.

[210] Mr Ovenden was of the view that P3 did not apply because the site was not a residential area. Nor did Performance Criteria P8 apply to require provision of a visual screen to prevent overlooking into other properties. The 2 metre landscape buffer was not warranted in this instance, and the proposed development would not directly overlook the adjoining properties.

[211] The boundary in question adjoins a public walkway that runs from Fulcher Rd to Gilbert Park. The southern side of the walkway adjoins residential lots. The access driveway for those lots runs alongside the walkway.

[212] The evidence about the possible requirement of a 2 metre or less buffer zone was not fulsome. Neither viewpoint was shown to be more likely than the other in my view. But if the Council had required a buffer zone, it would quite possibly have significantly affected the design in relation to the proposed car parking spaces.

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plan of survey showing the relevant allotment was first registered: *Building Regulation* 2006 (Qld), sch 4 (definition of 'natural ground surface').

77 A retaining wall that does not require building approval is described as a 'self-assessable development': *Building Act* 1975 (Qld), s 21; *Building Regulation* 2006 (Qld) s 4, sch 1 item 3. 'Building work' includes 'building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure': *Building Act* 1975 (Qld) s 5(1). A 'structure' includes 'a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure': *Building Act* 1975 (Qld), sch 2 (definition of 'structure'). All building work is assessable development and requires a development permit unless it is exempt or self-assessable development: *Building Act* 1975 (Qld), ss 20–22.

78 *Building Regulation 2006* (Qld) s 4, sch 1 item 3(1)(a)–(c).

Purchase of the Land

[213] The plaintiff's case theory is that the purchase price for the Land of $1.1 million would have been funded by Mr and Mrs McFarlane or their companies, or possibly by a loan from others. The defendant submits that the plaintiff did not have and would not have been able to raise the necessary funds.

[214] Mr McFarlane did not give evidence of any liquid funds that he had or had arranged. Of course, long before the purchase price would have been payable, namely after September 2012, the defendant had refused to proceed under the Call Option Deed. So it would not be expected that Mr McFarlane and the plaintiff had finally arranged the availability of the funds. He suggested that apart from his wife he might have asked Mr Ma, or sought assistance from other lenders. The Feasibility assumed that the Land purchase would have been settled in November 2012.

[215] As to other lenders, in my view, the suggestion was not supported by any other evidence. The evidence relating to those lenders or possible sources of funds was that a senior lender would require an "equity" injection of $3 million by the plaintiff (including any by a mezzanine lender and the purchase price of the Land) and that a mezzanine lender would require an "equity" injection of $1 million or $1.1 million by the plaintiff for the purchase of the Land.

[216] As to Mr Ma, there was no evidence that he would have lent the purchase price. The investment of $250,000 actually made by Mr Ma was made under a written contract which expressly contemplated that the purchase of the Land would proceed without his lending any funds for that purpose. It does not support the suggestion that he would have provided further funds.

[217] Otherwise, the proposed source of funds to purchase the Land was from Mrs McFarlane by mortgage or sale of the family home at Fig Tree Pocket and by utilising other funds to which she had access.

[218] As at October 2012, a reasonable summary of her potentially available funds was:

Net house value	$750,000
Bank accounts	$163,000
Company funds	$36,000
Share portfolio	$30,000
Total	$979,000

[219] That was not enough. Mrs McFarlane suggested in evidence that another existing lender to the project, Mr Meier, might have been approached, but again there was no evidence of what his response might have been. She also suggested that she might have approached relatives.

[220] In cross-examination, the defendant challenged Mrs McFarlane's evidence that she would have lent her funds for the plaintiff's project. The defendant relied on an affidavit made by Mrs McFarlane in the context of a security for costs application in this proceeding where she said that she would not risk lending further amounts to support the plaintiff's claim in this proceeding as evidence that she would not have

agreed to fund the purchase of the Land in 2012. I nevertheless accept that Mrs McFarlane would have been willing to lend the funds she could have raised.

[221] The more telling point is whether there would have been enough. Although the shortfall is not great, if Mrs McFarlane had utilised all the available family assets to fund the acquisition of the Land, there must have been a real question as to how the family would have survived financially during the construction of the project before any profits may have been realised (as projected in May 2014).

[222] There is another point to be made about the acquisition of the Land. The Call Option Deed was structured so that the option had to be exercised before the Call Option Expiry Date. That was the date 24 months after the Development Application Date. In turn, that was subject to extension, if applicable, under cl 17. As well, after 4 November 2012, the plaintiff had to pay the Call Option Extension Fee under cl 3.4. As the plaintiff's Feasibility assumed that $1.1 million would be paid for the Land, I infer in the plaintiff's favour that the purchase price included the Call Option Extension Fee. The plaintiff's case was predicated on the hypothetical past fact that the Development Permit Application should have been lodged by 30 September 2011 and that following lodgement a Development Permit would have been granted within a year.

[223] Thus, the first time when the plaintiff might have been entitled to exercise the Call Option would have been on and from 30 September 2012. Consistently with that, the Feasibility assumed completion of the acquisition in November 2012. By cl 14.1(a) of the Call Option Deed the plaintiff's entitlement to exercise the Call Option was subject to, inter alia, securing the Development Permit and by cl 14.6 that condition could be satisfied when the plaintiff delivered the Development Permit to the defendant following its issue. Under cl 14.6(a), that condition could not be waived by either the plaintiff or the defendant.

[224] However, under cl 14.1(a)(ii) of the Call Option Deed, the plaintiff's entitlement to exercise the Call Option was also subject to its securing sale of 90 per cent of the residential units or apartments in the development. That condition was one that the plaintiff could waive under cl 14.6(b) of the Call Option Deed. However, the plaintiff's case was that it would have secured development finance on the condition that it secured pre-sales of 70 per cent of the units or as a condition precedent to draw down of the construction finance.

[225] Mr McFarlane did not expressly deal with the extent of pre-sales that would have been required in his evidence. Mr Clune said that for the purposes of the preparation of his feasibility study for submission to lenders ("Mr Clune's Feasibility"), which was set out in Annexure 3 of his report, he was asked to assume 100 per cent pre-sales. However, he considered that to be an unreasonable assumption and instead assumed pre-sales of 70 per cent. For present purposes, I am prepared to infer in the plaintiff's favour that Mr McFarlane would have been prepared to waive the benefit of cl 14.1(a)(ii) had the plaintiff been able to secure finance on terms like those proposed by John Taylor, with the assistance of the required additional funds from a mezzanine lender on terms like those proposed by Brendan O'Sullivan.

[226] The project senior lender would have required the Land to be acquired (as part of the plaintiff's "equity" contribution of $3 million) before allowing any drawdown of funds, as Mr Taylor said in his report and evidence. The plaintiff's case was that it

would have contributed the funds for the purchase of the land from the sources set out above. Those funds would not have come from the project lenders.

[227] Nevertheless, in my view, there was a reasonable prospect that and I infer that the plaintiff might have raised the purchase price of the Land by a combination of Mrs McFarlane's resources and other personal borrowings by Mr and Mrs McFarlane. But, on the evidence, the McFarlane family finances would have been sorely stretched and it would have been a near run thing.

[228] Again, I assess that prospect at just more than 50 per cent.

Development finance

[229] The plaintiff proposed that it would have obtained development finance to complete the project by a mix of borrowings to be funded by a senior lender and a mezzanine lender.

[230] The Feasibility was prepared by Mr McFarlane on 9 December 2011. It is clear that it requires adjustment. Importantly, it made no allowance for any interest on borrowings to finance the project, but there are other significant adjustments that both the plaintiff and the defendant submit would have had to be made.

[231] In addition to the Feasibility, the plaintiff relies on Mr Clune's Feasibility as a document that might have been provided to lenders. Mr Clune is a registered valuer who has broad valuation experience in a range of commercial property types as well as asset management and investment management experience.

[232] He was instructed to prepare the hypothetical feasibility study for submission to lenders in order to obtain finance to undertake the development as at 30 June 2012. The assumptions which he used to prepare the study included the cost and expense inputs provided by the Feasibility (with adjustments in some respects) and his own assessment of the sources of revenue.

[233] It will be necessary to return to his evidence on the question of revenue, but for present purposes the point is that Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation were relied upon by other expert witnesses on the question whether the plaintiff would have been able to obtain finance for the construction and completion project phases. For present purposes, it is appropriate to set out the summary of project returns he developed for submission to lenders at this point. With some omissions, a table reflecting Mr Clune's Feasibility appears below:

Category	Item Description	Amount ($)
Income		
	Sale price of 54 apartments (ex GST)	21,934,750
	Furniture packages	891,000
	Management rights	1,080,000
	Conference facilities	220,000
	GST in income debit	(2,095,068)

Selling expenses		
	Selling fees	(1,158,036)
	Conveyancing on sales	(52,920)
Expenses		
	Land	(1,100,000)
	Duties Act duties	(43,425)
	Conveyancing on Land purchase	(15,000)
	Consultants' fees	(2,379,926)
	Construction	(13,463,289)
	Rates and taxes	(45,969)
	Other	(759,202)
	Contingency	0
	GST Input Tax credits add	1,690,907
	Interest	(867,053)
Adjustments		
	Matrix Project Management deducted as expense twice - add	0
	Development Management Fee would not be payable - add	0
	Sales fees on units would be reduced by half - add	0
Total		**$3,836,769**

[234] In addition to that summary, Mr Clune noted that the peak debt exposure on the project would have been $16,938,270 as at May 2014 in month 23 of the feasibility study. That would have been immediately before settlements of sales of the apartments. The total amount of interest to be charged would have been $867,053. The "Loan to Value Ratio" would have been 70.21 per cent, based on the projected revenue of sales values and prices.

[235] Mr Taylor gave evidence by report based on Mr Clune's Feasibility model as well as other information. The other information included:

(a) the Feasibility;
(b) that 70 per cent of the units would have been sold off the plan and 100 per cent would have been sold by practical completion;
(c) that the construction costs were as assessed by a quantity surveyor at a figure lower than the price from the proposed builder, Matrix;
(d) that Matrix and the plaintiff had agreed a construction price of $13,463,289 as a guaranteed maximum price and the costs would not have exceeded that amount; and

(e) that the plaintiff had available to it up to $3 million in equity (which I assume included $1,100,000 for the Land acquisition and up to $2 million to be provided by a mezzanine lender).

[236] Mr Taylor was of the view that considering the background of the plaintiff, the $3 million "equity", 70 per cent pre-sales and fixed price building contract, funding would have been available from multiple sources from senior lenders such as a major bank or Suncorp or Bank of Queensland or other lenders. He expressed the opinion that among the conditions that would have been imposed by a senior lender, there would have been conditions requiring the $3 million "equity" to be injected prior to any drawdown of loan funds, pre-sales of 70 per cent of the units, the provision of a builders bond by a bank guarantee for the construction period plus four months for 20 per cent of the building contract sum and other conditions that are not presently relevant. The rate of interest would have been approximately 7.08 per cent.

[237] Additionally, Mr O'Sullivan gave expert evidence by report as to mezzanine finance that would have been available to the plaintiff. He was the director of a large and active provider of mezzanine finance in Australia over the relevant period. The firm has funded multiple projects in Brisbane.

[238] He too was provided with Mr Clune's Feasibility and was asked to assume that senior debt would have been available on the terms set out in the report of Mr Taylor. However, he was asked to assume that the plaintiff had an equity of $1 million available to it, not $3 million as Mr Taylor had assumed. Mr O'Sullivan's opinion was sought on the prospect of a mezzanine lender providing the $2 million required.

[239] Mr O'Sullivan expressed the opinion that the development feasibility model prepared by Mr Clune showed a return on costs of 21 per cent (as a development margin) which he considered to be more than reasonable having regard to his assessment of the risks having been substantially mitigated by the circumstances discussed in paras 8.7 through to 8.18 of his report. He concluded that the plaintiff's development would have represented an "attractive opportunity" for a provider of mezzanine finance to participate in the funding. In particular, he considered that the pre-sale hurdle required as a condition precedent to exercise of the Call Option largely removed the market risk from the transaction. Of course, if 90 per cent of the units had been pre-sold even before the plaintiff acquired the Land, the financial risk of the project would have been substantially reduced. This was a higher degree of financial certainty than any other witness assumed for the purposes of their opinion.

[240] In my view, the plaintiff may have been able to obtain development finance.

[241] I assess the probability of obtaining sufficient development finance at 70 per cent.

[242] However, in my view, there remains a significant question whether the finance available to the plaintiff would have been enough to enable completion of the project.

Pre-sales

[243] The plaintiff's case theory assumed that there would be sufficient pre-sales for the development to proceed in accordance with the contractual and development finance conditions. As previously mentioned, cl 14.1(a)(ii) of the Call Option Deed required that there be pre-sales of 90 per cent of the residential units or apartments in the

development, as a condition precedent to the plaintiff's entitlement to exercise the Call Option but I have found that the plaintiff wold have waived that requirement.

[244] Logically, it might have been easier for the plaintiff to market the development for sales off the plan if the Development Permit and construction finance had been secured. Even if that were not correct, the point for present purposes is that the plaintiff would have been required to sell 70 per cent of the units before it would have been able to draw upon any finance package in order to progress or begin construction of the development.

[245] There was some variance in the evidence of the plaintiff's witnesses on this point. As stated, Mr Clune assumed pre-sales of 70 per cent. Mr Taylor also assumed that as the level of pre-sales to be achieved as a condition precedent to any drawdown under a senior lender's facility. However, in expressing his opinion as to the availability of mezzanine finance of $2 million to make up the $3 million "equity" that a senior lender would have required, Mr O'Sullivan assumed that the 90 per cent level of pre-sales required by cl 14.1(a)(ii) of the Call Option Deed would be achieved. For present purposes, I will infer in the plaintiff's favour that a level of 70 per cent would have been enough.

[246] Even so, it did not appear that Mr Clune or anyone else on the plaintiff's part had given close consideration as to how the pre-sales would be achieved. When asked about the time by when he had assumed they would be achieved, Mr Clune said that the pre-sales would occur over a two year window, impliedly meaning between 30 June 2012 and 30 June 2014.

[247] Such an assumption was flawed. As Mr Clune agreed, it would have been a condition of a construction finance package that the required level of pre-sales (which he took to be 70 per cent) be achieved before any draw down of the facility could commence.

[248] Would pre-sales have commenced until the plaintiff had a development approval? Until then, there could be no real confidence as to what the units or apartments to be built and sold off the plan would constitute. Mr Clune's model assumed that the period of the loan would end when settlements of all sales took place, in May 2014. The construction period was to commence from the assumed date of development approval, somewhere between June 2012 and September 2012.

[249] Mr Clune did not allow a relevant period for pre-sales to occur between the hypothetical date of development approval and the date for commencement of drawdowns on the proposed loan facility for the purpose of paying consultants or the builder for construction. Unless those pre-sales could have been achieved in a very short period of time, or before the time it was proposed that the Development Permit would issue, the assumed realisation date of the sales, May 2014, is flawed. The evidence did not deal with the potential impact of that change in assumptions.

[250] More importantly, a critical assumption is whether the pre-sales condition would have been achieved. On this point, Mr Clune gave relevant evidence orally. As well, there was a report from Norling and Associates that dealt with demand for the units in the proposed Development Permit Application documents. In general, that evidence supported the conclusion that there would be a ready market for the units. On the other hand, Diana Howes, a marketing or demand side expert, gave contrary evidence.

[251] The report from Norling and Associates was tendered as part of the proposed Development Permit Application submitted to the Committee for approval. Neither of the makers of the report was called to give evidence in support of the opinions expressed in it. As the parties called expert witnesses who gave evidence dealing with the matter otherwise, in my view, it would be inappropriate to act on the contents of the Norling and Associates report on any dispute on this question.

[252] The plaintiff's proposed development was that the 54 units would be operated as a short term accommodation of approximately 50 units.[79] It was not envisaged that there would be a mix of units that would be occupied by their owners together with a letting pool operated for short term accommodation. Thus, the purpose of ownership of a unit was limited to investment in income producing property. That investment purpose would be dependent for its success upon the success of the operation of the proposed accommodation business.

[253] Mr Clune considered that the buyers of the apartments would be "mum and dad type investors". The Call Option Deed provided that the defendant would assist in marketing the units to Broncos' members. The occupants would be "travellers … people coming to Brisbane with vehicles that they need to park for an extended period … visiting family from interstate". It would also be "Broncos supporters coming to games" and attract "an element of patronage … attending conferences at the Broncos Leagues Club." Mr Clune expressed the opinion that "[t]his product really won't be difficult to sell."

[254] Ms Howe's evidence did not go only to whether the units would sell as investment units to be put into a permanent letting pool for the proposed accommodation business. She gave a report and oral evidence based on her opinions as to the demand for short term accommodation at the subject site. Her opinion on that point was distinctly unfavourable to the development. She professed a solid and in-depth understanding of the drivers of what makes a good investment proposition in residential, mixed use or short term accommodation markets. On more than one occasion, she expressed the opinion that there was no driver of demand for the proposed short term accommodation facility at the site, such as nearby tourist facilities or a hospital or the like. In her view, there was no driver for a tourism market in Red Hill.

[255] As well, in her opinion, no investor would have been confident in purchasing an off the plan short term accommodation proposition where a management rights entity (accommodation operator) was not in place.

[256] The evidence of Mr Clune to the contrary effect seemed to be based on his view of the comparison between the plaintiff's proposed development and other short term accommodation facilities or hotels, particularly "The Chasely" and "Central Cosmo" located in Toowong and Milton respectively. In my view, the comparison between those properties and the proposed development was strained.

[257] Central Cosmo is a purpose built accommodation building located adjacent to the Park Road restaurant and shopping precinct. It is within walking distance of Suncorp

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79 The difference in number is accounted for because a small number of the units were dual key units that could be operated as a 2 bedroom unit.

Stadium and has ready access to both the City and the South Bank precinct. There are other accommodation facilities nearby.

[258] The Chasely is a converted office building that operates as a short term accommodation facility. It is located on the corner of Coronation Drive and Chasely St directly opposite the south-east corner of the Wesley Hospital campus. It is also on a major bus route to the City and not far from the Toowong shopping precinct.

[259] By comparison, as Ms Howe said, there is no obvious adjacent or nearby driver of demand for an accommodation facility of approximately 50 units or apartments for letting at Fulcher Rd, Red Hill. The plaintiff's witnesses suggested that the Broncos Leagues Club might have been the driver, having regard to the entertainment and conference functions that occur there. I was not persuaded by that evidence.

[260] A related question is the assumed selling prices. The Feasibility was based on achieving a total sales revenue of $24,837,428 for the units. That amount was broken down as between the one bedroom units, other one bedroom units with studies, and a few twin key units. As well, separate amounts were provided for the sale of the management rights and the conference facilities.

[261] Mr Clune's Feasibility assessed the total sales revenue at $24,125,750. The details of the differences between the breakdown of his sales and the breakdown of sales within the Feasibility are not of great significance. An important benchmark, however, is that Mr Clune assessed that the average value of the units or apartments would be $6,978.90 per square metre. He arrived at that value by a direct comparison method of valuation with sales in Central Cosmo and The Chasely. In particular, a sale in Central Cosmo analysed to $6773.00 per square metre. Mr Clune considered that the plaintiff's proposed development would be superior.

[262] Mr Clune did not accept that the value of an investment in a unit in the proposed development would be largely determined by the revenue that investment would generate. He accepted that this would be a "component", but considered that purchasers would also form a view as to the value of these units relative to other apartment investments in that area.

[263] To the extent that a higher quality of building or fitout might generate a higher revenue in a competitive market against an older property, I accept that the relative value of the units might be affected. However, I do not accept that a purchaser of a unit in the project would be much influenced by the quality of other units in the area that might be available for long term occupation. In my view, there is an obvious weakness in valuation of "residential" properties by a direct comparison method if the property to be valued is not in fact available for long term occupation by the owner or the owner's tenant but is to form part of an inventory of units to carry on a short term accommodation business. Once that is the basis of the investment, the value must be driven by the prospects of the letting or accommodation business being considered, not by enjoyment of the property by a long term occupier, whether as owner or tenant.

[264] In this respect, I consider that Mr Clune's methodology for valuing the units had a weakness because he did not and was not able to consider the prospects of the proposed business. Such an approach is inferior in principle to a methodology which pays close attention to demand, as was followed by Ms Howe. In my view, there is

no logical justification for an investor to pay an amount to acquire a purely income-producing property on a basis that is not determined by the likely income that the investment will produce. It was not apparent from Mr Clune's evidence that he took such an approach.

[265] The evidence of Mr Hulcombe was that the value of the proposed units was considerably lower than that opined by Mr Clune. The comparison was as follows:

Description	Clune	Hulcombe	Difference
One-bedroom	$18,108,750	$12,690,000	($5,418,750)
One-bedroom + study	$1,017,500	$540,000	($477,500)
"Two-bedroom"	$2,808,500	$1,950,000	($858,500)
Total	$21,934,750	$15,180,000	($6,754,750)

[266] These marked differences stem from differences in methodology and as to the units to be sold. The methodology is the more significant point. Although Mr Hulcombe had regard to sales of other investment accommodation units he did not value by a direct comparison method to derive a dollar per square metre price to be applied and then adjust for the different units in the subject development as did Mr Clune. Instead, the values arrived at by Mr Hulcombe reflected his view of the units taken as yielding a 4.5 per cent market return on likely income as derived from Ms Howes' report. He had regard to sales of other investment accommodation units in selecting the market return to be adopted.

[267] In my view, Mr Hulcombe's methodology is to be preferred to Mr Clune's methodology. This is because it flows from a view as to the likely income that the letting units in the proposed development will make and the market return that an investor would expect on the purchase price to be paid for an investment in a unit solely for letting, as opposed to emphasising the bricks and mortar comparison of the proposed units to units in other short term letting unit buildings.

[268] There are, however, two logical difficulties with accepting Mr Hulcombe's evidence as to the value of the letting units. The first is that if the total value of the units to be sold was $15.1 million, the project would never have been profitable. There is no reason to think that the plaintiff would ever have proceeded to sell the units by pre-sales at a price level that would cause the project to fail.

[269] Second, although the true value of the units may have been less than the plaintiff's proposed prices that is not the loss of a valuable commercial opportunity on which the plaintiff's case theory is predicated. The plaintiff's case theory is that it lost the commercial opportunity to acquire and develop the Land to sell the units at the prices proposed in the Feasibility or something like them. Although a reduction in the prices may have increased the likelihood of sales, including pre-sales, that was not the plaintiff's case.

[270] In the result, in my view, it was not proved to have been likely that the pre-sales at prices assumed by Mr Clune or in the Feasibility would have been achieved so as to satisfy the requirement that 70 per cent of the units were pre-sold in time for the

necessary draw down of construction finance in accordance with the plaintiff's development proposal.

[271] In my view, the possibility of the plaintiff obtaining the required pre-sales to comply with the conditions of the development finance was about and no more than 40 per cent.

Budgeted expenses

[272] The budgeted expenses were dealt with in a number of the feasibilities and models tendered in evidence.

[273] Mr Clune prepared a further gross profit calculation based on his feasibility and further assumptions he was requested to make by the plaintiff ("Mr Clune's Gross Profit Calculation") which was set out in Annexure 4 of his report. The single biggest difference between Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation appears in the sale price of the management rights, although there are other significant items such as the calculation of interest. It is unnecessary to deal with all the differences. The points of present relevance are dealt with below.

[274] It is appropriate to first to set out Mr Clune's Gross Profit Calculation, reflecting the changes he made from his feasibility based on assumptions he was instructed to make by the plaintiff:

Category	Item Description	Amount ($)
Income		
	Sale price of 54 apartments (ex GST)	21,934,750
	Furniture packages	891,000
	Management rights	2,300,000
	Conference facilities	220,000
	GST in income debit	(2,095,068)
Selling expenses		
	Selling fees	(1,269,516)
	Conveyancing on sales	(52,920)
Expenses		
	Land	(1,100,000)
	Duties Act duties	(43,425)
	Conveyancing on Land purchase	(15,000)
	Consultants' fees	(2,379,934)
	Construction	(13,463,289)
	Rates and taxes	(46,391)
	Other	(726,282)

	Contingency	0
	GST Input Tax credits add	1,696,231
	Interest	(470,754)
Adjustments		
	Matrix Project Management deducted as expense twice - add	0
	Development Management Fee would not be payable - add	0
	Sales fees on units would be reduced by half - add	0
Total		**$5,379,402**

Senior debt financing costs

[275] Mr Clune's Gross Profit Calculation allowed an establishment fee for the senior debt finance of $20,000. Mr Taylor, as a banker of expertise and experience, allowed an establishment or "application" fee of $60,000. Mr Taylor's view should be accepted.

[276] Mr Clune's Gross Profit Calculation allowed $33,000 for a report or reports by an independent valuer. Mr Taylor allowed $40,000 for a report or reports by an independent valuer to the senior lender on value of the project. His view is to be preferred, but only the difference should be added to the expenses as there would not have been a reason for a further or additional valuation report to have been obtained so far as the evidence revealed.

Mezzanine debt financing costs and interest

[277] One of the two significant changes made between Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation was the different assumption made as to financing. In Mr Clune's Feasibility he assumed that the project would be debt financed. The interest of $867,053 reflected that. However, for Mr Clune's Gross Profit Calculation he assumed that there was an "equity" injection of $3 million. That had the effect of reducing the interest payable to $470,754. But it left any fees or interest payable for the unfunded "equity" unaccounted for.

[278] Thus, Mr Clune's Gross Profit Calculation did not allow for an establishment fee for a mezzanine lender. Mr O'Sullivan, as an experienced mezzanine finance lender, stated that an establishment fee of 1.5 to 2 per cent would be charged. The mean value of $35,000 should be added to the expenses in the Gross Profit Calculation.

[279] Mr Clune's Gross Profit Calculation did not allow for interest for the mezzanine finance. Mr O'Sullivan stated that the rate would have been between 18 to 22 per cent. The mean value would be approximately $800,000 which is to be added to the expenses in the Gross Profit Calculation. It was not in dispute that should be done for this amount.

Mr Cossart, Mr Ma and the advisory directors

[280] The plaintiff made an agreement in writing with Cossart Investments Pty Ltd dated 24 June 2011 for James Cossart to prepare a list of investors to be approached in relation to raising funds by debt or equity. The remuneration was to be 5 per cent of funds raised.

[281] The defendant submits that an amount of 5 per cent should be added to any costs of funds because of this agreement. I do not agree. The plaintiff's case was conducted on the footing that other finance could have been arranged without Mr Cossart's assistance or having to pay Mr Cossart 5 per cent on funds raised.

[282] I have previously referred to Mr Ma's role as a lender to the project under his contract with PPH. The loan of $250,000 that he made was to be in return for repayment of $450,000 or equity (both free of tax) of that value.

[283] As to the $250,000 loan, that amount is reflected in Mr Clune's Gross Profit Calculation by the allowance for the consultants' fees that it was in fact used to pay. The plaintiff submits that the repayment in excess of $250,000 is not an expense and does not have to be brought into account for the gross profit calculation. I do not comprehend why it is not an expense that would have to be met from project revenues if PPH had taken over the project. There was no evidence as to whether it is an amount that the plaintiff is still liable to pay. But that is not the point. The gross profit calculation should be adjusted by deducting the amount of $200,000 for the interest Mr McFarlane agreed to pay to Mr Ma for the $250,000 loan to fund consultant's fees.

[284] The plaintiff also had agreements made in 2009 with John Lyons, Mark Grey and Doug Merritt to become advisory directors of the plaintiff. The proposed project was much larger at that time. The advisory directors were to receive an annual fee of $36,000 and an 8.3 per cent profit share from relevant projects. The advisory directors' agreements were not confined to the project at Fulcher Rd, and neither were the amounts payable under them.

[285] The status of their entitlements at the time of the trial was unclear. Mr McFarlane explained that any amounts to be paid by way of profit share was not included by way of expense in the feasibilities he prepared because it was to come out of profit.

[286] It does not seem to me that those amounts should be deducted from the gross profit calculation. They were not apparently an external expense specific to this project.

Council approval fees

[287] The Feasibility, Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation made no allowance for council fees for infrastructure as conditions of any approval.

[288] The defendant submits that a sum of $440,400 should be added to the expenses for the Gross Profit Calculation for those fees. Mr McFarlane said that the possibility of the project bearing fees per unit had been considered and they would not be imposed because the development was to operate as a 4 star hotel style of accommodation. There was also evidence to that effect from Mr Ovenden, as a town planner, on the basis that the development was a similar development to another where he had had that experience. That was not contradicted by any of the other witnesses. The plaintiff submits that the fees would not have been imposed because the project would

have been treated as a 4 star accommodation development which attracted a concession.

[289] I am prepared to accept that submission in the absence of any contrary evidence. No amount should be added to the expenses of the gross profit calculation for this item.

Development management fee

[290] The Feasibility allowed an item for "Development Management" of $976,088 calculated at 7.25 per cent on construction costs. The plaintiff's particulars add this item back to the Gross Profit Calculation on the basis that the fees would not have been incurred because the function would have been performed by Mr McFarlane. Mr McFarlane gave evidence that he would have done so.

[291] Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation allowed a 2 per cent development management fee, resulting in an expense of approximately $318,000.

[292] The plaintiff submits that this amount should be added back to reduce the expenses of the gross profit calculation.

[293] Given that the McFarlane family finances were going to be stretched to find the purchase price for the Land and that there is no suggestion there was another source of income for Mr McFarlane, it is reasonable to assume that some cash flow would have been required for his family living expenses. In other words, in my view, the suggestion that the development management fee can be added back without any provision to remunerate Mr McFarlane for his services is unrealistic. Mr Clune said that the amount he allowed represented a market-related development management fee. In my view, that amount should be allowed.

Agent's commission

[294] The Feasibility allowed agent's commission for selling the units and furniture packages at the rate of 6.6 per cent, with half to be paid at time of sale and half on settlement. The plaintiff's particulars allege that the plaintiff and the agent who was to be employed agreed that half of the amounts of the profits of the agent after payment of the expenses connected with the sales would have been returned or allowed to the plaintiff (except for the sale of the management rights), in the amount of $763,465.

[295] Mr Clune's Gross Profit Calculation allowed agent's commissions at the rate of 3.3 per cent, totalling $836,410.

[296] The plaintiff submits that half of that amount, $418,205, should be added back to the gross profit calculation because that was the effect of the agreement made by the plaintiff and the agent, Mr Merritt.

[297] The defendant submits that the agreement was illegal and would not have been carried into effect. I do not find it necessary to resolve the legality argument as the real question is what would have happened in fact.

[298] The basis of the 3.3 per cent for agent's fees was Mr Clune's opinion that the rate would be reasonable because although 5 per cent might be necessary for product that is difficult to sell, this product won't be difficult to sell. At the prices he proposed,

Mr Clune's views as to the ease of selling were opposed by the effect of Ms Howe's views. Those views included that an investor would not be confident purchasing off the plan a short term accommodation proposition where there was no management rights entity in place and that there was no measurable demand for short term accommodation at the project's location. I do not accept Mr Clune's optimism that the product would not be difficult to sell at the proposed prices.

[299] There was no other evidence that the selling costs would be as low as 3.3 per cent. Mr McFarlane said that he and Mr Merritt entered into a handshake agreement for a fifty-fifty split on the commission (whether or not after deducting expenses), but not that Mr Merritt agreed to do so at a rate of commission of 3.3 per cent.

[300] I do not consider that it is appropriate to add $418,205 back to the gross profit calculation.

Additional interest on the senior debt

[301] The Feasibility and the plaintiff's particulars did not allow for any interest. Mr Clune's Feasibility allowed interest of approximately $867,000. Mr Clune's Gross Profit Calculation allowed interest of approximately $471,000.

[302] The defendant submits that $867,000 should be allowed for interest. I consider that would be an error. Mr Clune's Feasibility assumed that there was no "equity" contribution, so the interest calculation included the $1,100,000 for acquisition of the Land and the $2 million to be contributed by a mezzanine lender on the plaintiff's case. It would be an error to add the interest for either of those components to the gross profit calculation, particularly when the interest and fees payable to the mezzanine lender are yet to be added.

[303] There should be no additional interest.

Matrix Project Management Fee

[304] The plaintiff submits that the Feasibility allowed this fee of $159,500 twice. Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation corrected any error so no change to them is required on this point.

Sales revenue

[305] In part, this question is the same as that raised by whether the plaintiff would have been able to achieve the 70 per cent level of pre-sales that a senior lender would have required as a condition precedent to any draw down on the construction finance facility package.

[306] However, there are four relevant additional matters. First, the plaintiff would have been required to sell all 53 of the proposed letting units and the manager's unit, not only approximately 37 or 38 of them as required to achieve the 70 per cent. Second, the plaintiff would have been required to achieve the sales prices set by Mr Clune's evidence or similar. Third, the plaintiff would have been required to sell the manager's unit and the management rights contract. Fourth, the plaintiff would have been required to sell the conference facility.

Balance of the letting units

[307] As to the sale of the balance of the letting units, the same considerations apply as in the discussion of pre-sales, except that the plaintiff would have had the construction period to sell the balance of the units.

[308] In my view, had the plaintiff been able to finance the project and achieve the required levels of pre-sales, it would have had a greater likelihood of selling the balance of the letting units over the construction period remaining than of getting the pre-sales in the relatively short period allowed in the Feasibility.

[309] Nevertheless, from the earlier discussion it is apparent that I have serious doubts that the projected revenue of $21,934,750 (ex GST), or a sum approaching that amount, was ever achievable.

Manager's unit and management rights

[310] As to the manager's unit, it was included in the proposed unit sale prices as a one bedroom and study type unit and does not require a separate allowance for the purchase price. At this point, it is relevant only to recognise that the value for the management rights does not include any amount for the manager's unit itself because that has been separately allowed for.

[311] As to the contract for the management rights, the Feasibility assumed that they would achieve a sales revenue of $2,385,000. Mr Clune's report expressed the view there was not a reliable value for the management rights. He opined that management rights businesses generally trade at a range of between four and five times earnings. At four times earnings, $2,385,000 would reflect an assumed earnings before interest and tax ("EBIT") of $596,250.

[312] Mr Rossiter's report assumed a letting business based on 50 units rented in the short term accommodation market at an occupancy rate of 73.32 per cent. It projected EBIT (described as net profit in the report) of $507,004. However the expenses allowed were only $69,625 calculated on the basis that the two person management team to operate the business were not salaried. In other words the EBIT calculations do not provide for the cost of all the inputs necessary to operate the business. Even so, there is a significant shortfall between that amount and the assumed EBIT for a four times multiplier value.

[313] A difficulty with Mr Rossiter's assumption as to occupancy is that it was based on the assessment of demand in the report of Norling and Associates previously mentioned. For the same reasons as mentioned before I am unable to give it much weight.

[314] But more importantly, as Mr Clune's report recognised, there was no trading basis to support the hypothetical EBIT. As previously discussed, the better view of the evidence is that there was no significant demand for short term letting units at the location that would support the assumed letting business' occupancy rate. Even so, Mr Clune's Gross Profit Calculation for the project assumed a sale price of $2,300,000 for the management rights. I am unable to accept that amount. No expert witness supported it. Mr Clune's Feasibility allowed the sale price of $1,080,000 for submission to lenders.

[315] The defendant allowed $1,080,000 as the value of the management rights in its submissions as to the calculations of the values for the plaintiff's loss of opportunity claim. There was no basis for this amount in the defendant's evidence, either through Ms Howe or Mr Hulcombe. There was, however, evidence from Ms Howe in her report projecting the likely income from the proposed letting business in comparison to Mr Rossiter's projections of the same. She allowed $550,137 per annum less than he did. That reduction would wipe out the EBIT of $507,004 Mr Rossiter arrived at for the management rights business.

[316] Accordingly, it may well be that the defendant's allowance of $1,080,000 for the value of the management rights is too high. However, I will adopt it for the purposes of the assessment of the plaintiff's gross profit calculation. That reduces Mr Clune's Gross Profit Calculation by $1,305,000.

Conference facilities

[317] As to the conference facilities, the Feasibility allowed $440,000 for the sale. Mr Clune's Feasibility and Mr Clune's Gross Profit Calculation both adopted $220,000. Mr Clune said in the text of his report that he allowed $200,000 exercising what he described as a "professional judgment" but no other basis for that value appeared in the evidence.

[318] The defendant allowed nothing on the basis that the plaintiff did not lead evidence as to an intended sale. In my view, that is not a good point. Whether sold or not the value of the conference facility should be reflected in the gross profit calculation as at the time of the construction and sale of the units. I will proceed on the basis of Mr Clune's evidence but with the qualification that I do not give it great weight on this point.

Adjusted Gross Profit Calculation

[319] As appears from the previous discussion, some of the doubts about the evidence cannot be reflected by simply adjusting Mr Clune's Gross Profit Calculation. However, to the extent possible and taking into account the matters dealt with above, an adjusted gross profit calculation appears below:

Category	Item Description	Amount ($)
Income		
	Sale price of 54 apartments (ex GST)	21,934,750
	Furniture packages	891,000
	Management rights	2,300,000
	Conference facilities	220,000
	GST in income - debit	(2,095,068)
Selling expenses		
	Selling fees	(1,269,516)
	Conveyancing on sales	(52,920)

Expenses		
	Land	(1,100,000)
	Duties Act duties	(43,425)
	Conveyancing on Land purchase	(15,000)
	Consultants' fees	(2,379,934)
	Construction	(13,463,289)
	Rates and taxes	(46,391)
	Other	(594,464)
	Contingency	0
	GST Input Tax - credit	1,696,231
	Interest	(470,754)
Adjustments		
	Matrix Project Management deducted as expense twice - add	0
	Development Management Fee would not be payable - add	0
	Sales fees on units would be reduced by half - add	0
	Senior debt financing costs	(47,000)
	Mezzanine debt financing costs	(35,000)
	Mezzanine debt interest	(800,000)
	Mr Ma's interest	(200,000)
	Mr Cossart and the advisory directors	0
	Council approval fees	0
	Additional interest	0
	Management rights reduction - deduct	(1,220,000)
	GST collected reduction - credit	110,909
Total		**$3,320,129**

[320] The critical assumption in that calculation is that the units would sell at the estimated prices or near them. Looking at the evidence overall, in my view that conclusion is not justified. On the balance of probabilities, in my view, the plaintiff was more likely to lose money than it was likely to make profits because the proposed sale prices were not achievable. I reach that view because I prefer and was persuaded by the evidence of Mr Hulcombe and Ms Dawes in preference to that of Mr Clune and Mr Rossiter.

Conclusions

[321] In accordance with the reasoning set out previously, did the plaintiff suffer the loss of a valuable commercial opportunity?

[322] In my view, the Feasibility, the plaintiff's particulars and Mr Clune's Gross Profit calculation suffer from essential flaws that must be adjusted before the question whether there was a valuable loss of a commercial opportunity can be answered.

[323] In particular, the proposed selling price of the management rights at $2,350,000 was completely unrealistic in my view. Mr Clune's opinion was that they were only worth $1,080,000. The only evidence that supported the higher value was Mr Rossiter's calculation of the EBIT of the proposed letting business that I have concluded was based on unsupported opinion and failed to take into account a significant part of the real costs of such a business. Second, there was no evidence to support the Feasibility's proposed selling price of the conference facilities at $440,000. Mr Clune's opinion was $220,000. Third, significant expense items for mezzanine interest ($800,000), Mr Ma's interest ($200,000) and debt financing costs on senior and mezzanine financing ($82,000) were left the Feasibility, the plaintiff's particulars and Mr Clune's Gross Profit Calculation. With those adjustments, a more realistic view of the gross profit calculation to be considered is as I have set out above, rounded to $3.3 million.

[324] The value of the loss of the commercial opportunity to make those profits was ultimately dependent on the prospect that the realisable selling prices of the units and furniture packages would be the sum of $21,934,750 (ex GST) and $891,000, namely $22,825,750, taking Mr Clune's Gross Profit Calculation based on Mr Clune's Feasibility and his evidence in support of it. Put simply, that was a prediction that purchasers would be found who would on average pay $463,319 for a one bedroom or one bedroom plus study furnished unit for the right to participate in the proposed short term accommodation business. Those owners would not be able to use the units for personal long term accommodation. Their income would depend on the success of the accommodation business. There was no well-known operator of such a letting business who was being proposed to market the units. There was no guarantee or indemnity of the income from the letting business such as one sometimes sees in proposals to operate strata title rooms or units as an hotel. There was no obvious driver for demand for such a business such as a nearby large hospital.

[325] Had the plaintiff been required to reduce prices significantly to achieve sales, say 15 per cent, it would have lost money not made a profit. Because of my preference for the evidence of Ms Howes and Mr Hulcombe over the evidence of Mr Clune and Mr Rossiter on the likely demand for and corresponding value of the units, in my view, overall that was the more likely outcome.

[326] Adopting my reasoning as to whether there was a loss of a valuable commercial opportunity in those circumstances, I find that there was not.

[327] However, if I am wrong in that conclusion, drawing together some of the many threads, it is possible to summarise the important conclusions.

[328] Having regard to the many contingencies, the possibilities of the plaintiff making $3.3 million gross profit would have to be discounted for a number of factors. Simple

probability theory applied to the chances of the plaintiff obtaining a complying Development Permit (50 per cent), acquiring the Land (50 per cent) and achieving the pre-sales (40 per cent) would result in an overall possibility of 10 per cent of that amount before discounting for any other risks including the financing and sales risks. While it may be mathematically correct to do so, I consider that this approach fails to recognise that the underlying assessments of chances are necessarily very broad brush. Accordingly, rather than pursue the arithmetic in that way, in my view, it is better to recognise the uncertainties and the impossibility in a case like the present of arriving at a reasonable result by calculation.

[329] In the circumstances, I would award the plaintiff the sum of $330,000 as a global assessment of the amount of damages to be awarded for the loss of the valuable commercial opportunity to acquire, develop and sell the Land if I have erred in the conclusion that the plaintiff did not suffer the loss of a valuable commercial opportunity.

[330] In the result, the plaintiff has succeeded on the claim for breach of the Call Option Deed as a breach of contract. However, the plaintiff has failed to prove that it suffered loss or damage by reason of the breach of contract. There should be judgment for the plaintiff against the defendant for nominal damages of $100.[80]

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[80] *State of New South Wales v Stevens* (2012) 82 NSWLR 106, 113-114 [32]-[37]; *Hanflex Pty Ltd v NS Hope & Associates* [1990] 2 Qd R 218, 228-229.