SUPREME COURT OF QUEENSLAND

CITATION:	*Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd* [2018] QSC 95
PARTIES:	**CLARENCE PROPERTY CORPORATION LIMITED (ABN 67 094 710 942) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE WESTLAWN PROPERTY TRUST (ASRN 095 611 804)** (applicant) **v** **SENTINEL ROBINA OFFICE PTY LTD ACN 608 262 291 AS TRUSTEE FOR THE SENTINEL ROBINA OFFICE TRUST** (respondent)
FILE NO/S:	BS No 4329 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27, 28 and 29 November 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. It is declared that there has been no default by the applicant within the meaning of the Co-Owners Deed as alleged in the "Notice of Breaches" signed by the solicitors of the respondent and dated 10 March 2017.** **2. The counterclaim be dismissed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where parties operate joint enterprise of commercially leasing a building – where contract requires parties to perform duties and exercise powers in dealings with 'utmost good faith' – where contract requires parties to disclose any conflicts of interest – where alleged applicant 'poached' employee of respondent – where alleged applicant appointed a director with potentially conflicting duties – whether applicant breached contractual

term requiring 'utmost good faith' by failing to make disclosures to respondent

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – OTHER MATTERS – where contract provided for buy-out mechanism on breach – where valuation to be conducted by party-appointed valuers – where valuer did not call for submissions from parties as provided in contract – whether provision for submissions facultative or mandatory – whether valuation is valid determination for purposes of buy-out mechanism

PARTNERSHIP – RELATIONSHIP BETWEEN PARTNERS – FIDUCIARY RELATIONSHIP – DUTY OF DISCLOSURE – where contract provided that not a partnership – where express contractual duty of 'utmost good faith' – whether alleged breach within scope of parties' joint enterprise

Aubanel and Alabaster Ltd v Aubanel (1949) 66 RPC 343, cited
Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd (2015) 90 NSWLR 367, cited
Bell v Lever Bros Ltd [1932] AC 161, cited
Bhasin v Hyrnew [2014] 3 SCR 494, cited
Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384, cited
Blisset v Daniel (1853) 10 Hare 493, cited
Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66, cited
Carter v Boehm (1766) 3 Burr 1905, cited
Cassels v Stewart (1881) 6 App Cas 64, cited
CGU Insurance Ltd v AMP Financial Planning Pty Ltd (2007) 235 CLR 1, cited
Chan v Zacharia (1984) 154 CLR 178, cited
Conlon & Anor v Sims (2008) 1 WLR 484, cited
Dean v MacDowell (1877) 8 Ch D 345, cited
Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (2013) 41 VR 636, cited
Grey v Pearson (1857) 10 ER 1216, cited
Holt v Cox (1997) 23 ACSR 590, cited
International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea [2015] NSWCA 363, cited
Lauvan Pty Ltd v Bega [2018] NSWSC 154, cited
Law v Law [1905] 1 Ch 140, cited
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314, cited
Links Golf Tasmania Pty Ltd v Sattler (2012) 292 ALR 382, cited
London and Mashonaland Exploration Co v New

Mashonaland Exploration Co [1891] WN 165, cited
Lumley v Gye (1853) 2 E & B 216, cited
Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268, considered
Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] 1 AC 469, cited
Moens v Heyworth (1841) H & W 138, cited
Mordecai v Mordecai (1988) 12 NSWLR 58, cited
Oliver Hume South East Queensland Pty Ltd v *Investa Residential Group Pty Ltd* (2017) 122 ACSR 183, cited
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited
Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd (1979) 144 CLR 596, cited
Sim v Howat [2012] CSOH 171, cited
Trimble v Goldberg [1906] AC 494, cited
Uzielli v The Commercial Union Insurance Company (1865) 2 Mar LC 218, cited
Vale Belvedere Pty Ltd v BD Cole Pty Ltd [2011] 2 Qd R 285, cited
Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd [2017] FCAFC 190, cited

COUNSEL: P O'Shea QC and F Lubett for the applicant
J Bell QC and T Pincus for the respondent

SOLICITORS: A J & Co for the applicant
Russells for the respondent

Jackson J

[1] The ultimate question in this dispute is whether the applicant is contractually obliged to transfer a half-interest as co-owner of land comprising a commercial office building known as "The Rocket" to the respondent. The applicant claims declaratory relief to the effect that it is not obliged to do so, either because it did not breach the contract between the parties as the respondent alleges, or because the contractual buy-out mechanism that would oblige the applicant to transfer the half interest to the respondent has not been validly engaged. The respondent counterclaims for relief by way of specific performance.

[2] The underlying questions fall into two parts: has the applicant breached the contract? If so, has the buy-out mechanism been validly engaged? There are other subsidiary questions that it is not necessary to mention at this point.

The parties

[3] The applicant is a corporation that is a public company. It is the responsible entity of the Westlawn Property Trust, a registered managed investment scheme under Ch 5C of the *Corporations Act* 2001 (Cth) ("CA").

[4] Peter Fahey is a director of the applicant and the chief executive officer. Prior to 18 February 2016, the other directors were James Dougherty, Geoffrey Shephard and Michael Dougherty. On that day, Anthony Tippett was appointed as a director.

[5] The respondent is a proprietary company that is trustee of the Sentinel Robina Office Trust. It is associated with the Sentinel group of companies, although the group was not precisely described by the evidence.

[6] Warren Ebert is the sole director and shareholder of the respondent. He describes himself as the managing director and chief executive officer of the group.

[7] Robina Projects Australia Pty Ltd ("RPA") is a proprietary corporation. It is a member of the group of companies known as the Robina Land Corporation group. That group was also not precisely defined in the evidence, however it is well known as the developer of Robina and chief land owner in the commercial area of the Robina town.

[8] Mr Tippett is a director of RPA and either a senior or chief executive officer of the Robina Land Corporation group.

Acquisition of The Rocket

[9] The Rocket is a 16 storey commercial office building located at 203 Robina Town Centre Drive, near the Robina Town Centre.

[10] On 25 September 2015, the respondent and the custodian trustee of the Westlawn Property Trust agreed to purchase The Rocket from RPA as tenants in common for the sum of $70,050,000.

[11] Also on 25 September 2015, the respondent and the applicant entered into a contract styled the "Co-Owners Deed" providing for the terms on which they were to acquire The Rocket from RPA and to hold it once acquired.

[12] On 16 October 2015, the purchase was completed.

Management of The Rocket

[13] The Co-Owners Deed contains a number of provisions that regulate the relationship of the applicant and the respondent as co-owners ("the co-owners") of The Rocket.

[14] First there are the terms that provide for the co-owners to make decisions through committees constituted under the Co-Owners Deed.[1]

[15] Second, there are terms that The Rocket is to be managed by a manager appointed under the Co-Owners Deed.[2] The manager so appointed was Sentinel Portfolio Management Pty Ltd ("SPM"), a company in the Sentinel group of companies.

[16] Initially, Richard White and Amy Cunningham were assigned roles in performing SPM's duties as the appointed manager.

[17] From 30 May 2016, Simon Kennedy was employed as national manager of the commercial and industrial portfolio of the Sentinel group. There were 15 or 16 properties in the portfolio at that time.

[18] In June 2016, Mr Ebert tasked Mr Kennedy to manage The Rocket and other commercial properties on behalf of the Sentinel group of companies. Mr Ebert asked Mr Kennedy and another to meet Mr Fahey over management of The Rocket. Thereafter, Mr Kennedy was involved in the management of The Rocket. He reported to Mr Ebert.

[19] On 1 July 2016, a company in the Sentinel group of companies, Shield Property Services Pty Ltd ("Shield"), employed Simon Kennedy as the national manager of the commercial and industrial portfolio of the Sentinel group. Mr Ebert is the sole director and shareholder of Shield. Shield employs staff who may be deployed among various companies in the Sentinel group.

[20] Mr Kennedy attended a number of weekly internal meetings at Sentinel's offices. Other members of Sentinel's commercial and industrial property teams would also attend. Mr Kennedy's employment and the time he spent in his role as national manager were not shown to be principally or even substantially devoted to The Rocket.

[21] In the course of his duties in connection with the management of The Rocket, Mr Kennedy met and had dealings with Tania Moore. She is a joint managing director of Knight Frank Gold Coast, real estate agents. Ms Moore is the senior person responsible for carrying out the duties for Knight Frank's appointment as the co-owners' leasing agent for The Rocket.

Applicant's appointment of Mr Tippett

[22] As stated above, on 18 February 2016, the applicant appointed Mr Tippett as a director. Mr Tippett has been a friend of Mr Fahey's since their school days. They have had business dealings since 2006. At the time of Mr Tippett's appointment and since, Mr Fahey believed Mr Tippett to be the person in charge or chief executive officer of the Robina Land Corporation group of companies.

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1 Clauses 3 and 4.
2 Clauses 12 and 13.

[23] Although Mr Fahey expected that Mr Tippett would have been a director of Robina Land Corporation group companies, he did not know of any particular directorships or that Mr Tippett was a shareholder in any of those companies. Similarly, although Mr Fahey knew that Janet Tippett was Mr Tippett's wife, and knew that Mr and Mrs Tippett had a company called Sunni Solutions Pty Ltd, he did not know any of the details of the directorships or shareholdings in that company.

[24] The appointment of Mr Tippett as a director of the applicant was not kept secret. It was information available on the applicant's website. No suggestion was made that Mr Tippett's appointment was not notified to ASIC as required by the CA.[3]

[25] However, the respondent, by Mr Ebert, did not know of Mr Tippett's appointment as a director until 2 March 2017.

Resolution of the rental guarantee issue

[26] Clause 44 of the contract of purchase provided, in part, as follows:

> "The Vendor and the Purchaser must use their best endeavours to obtain tenants for each of the tenancies listed as vacant in Annexure 2 and which remain vacant on the Date for Completion…
>
> For any of the tenancies… for which the Vendor has not… entered into a lease… the Vendor must pay to the Purchaser the current net rental $/m^2 payable plus the share of the recoverable outgoings… until the earlier of… that day which is twenty four (24) months from the Date for Completion; or … such time as… the tenant would commence payment of rent under a signed offer… not… accepted by the Purchaser…"

[27] In mid-2016 Mr Ebert requested that Mr Kennedy deal with the amount that may be payable by RPA to the co-owners under cl 44 ("rental guarantee issue").

[28] At a point that is not entirely clear on the evidence, Mr Kennedy informed Mr Ebert that Sentinel staff had calculated that the amount payable by RPA under cl 44 was $481,127.96 but that RPA disputed the calculation and asserted that there should be a credit of $121,166.76 against that sum, apparently for a not accepted offer for one of the tenancies.

[29] On 13 June 2016, Mr Kennedy spoke to Mr Fahey on the telephone about the rental guarantee issue.

[30] On 15 June 2016, Mr Kennedy sent an email to Mr Fahey with a copy to Mr Ebert and Stacey Ebert about the rental guarantee issue, setting out the background, the effect of cl 44, the details of the relevant offer made by a tenant, Stratus, that might affect the amount payable, and noting RPA's position that it had discharged its obligation by

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[3] *Corporations Act* 2001 (Cth), ss 201L and 205B.

obtaining the offer from Stratus which was not accepted. Mr Kennedy concluded with this request to Mr Fahey:

> "Given the ongoing relationship we'd prefer this not to end up as a legal dispute and are hoping you might be able to have a conversation with RLC [Robina Land Corporation] to resolve before it gets to that stage.
>
> I've gone through the above with Stacey and she is happy to discuss the contract position further if you want to give her a call."

[31] In context, Mr Kennedy's request was that Mr Fahey talk to Mr Tippett about the rental guarantee issue.

[32] On or before 20 September 2016, Mr Fahey spoke to Mr Tippett about the issue. He said to Mr Tippett that it would be easier if the parties could negotiate a net present value payout of any amount due under cl 44. Mr Tippett said that they should let Mr Kennedy (for the co-owners) and Marcus Weld (for RPA) work out the details and if the co-owners and RPA agreed, that would be it.

[33] On 20 September 2016, Mr Fahey sent an email to Mr Kennedy, setting out some information about his conversation with Mr Tippett, and suggesting that Mr Kennedy and Mr Weld meet to negotiate.

[34] Mr Kennedy and Mr Weld then negotiated. A series of emails passed between them during the period from 22 September 2016 to 24 October 2016.

[35] In October 2016, at a regular management meeting over The Rocket, Mr Kennedy informed Mr Fahey that he had reached agreement with Mr Weld and its terms. Mr Fahey said that he agreed on behalf of the applicant to bear its half share of the compromised amount under the proposed agreement.

[36] Mr Tippett had no involvement in Mr Fahey's decision to do so.

[37] Prior to 18 October 2016, Mr Kennedy expressed the opinion to Mr Ebert that the respondent should accept the proposed compromise. Mr Ebert, on behalf of the respondent, agreed to do so.

[38] On 18 October 2016, after receiving approval from both Mr Fahey and Mr Ebert, Mr Kennedy sent an email to Mr Weld attaching a draft settlement agreement in the form of a letter executed by Mr Ebert for execution by the other parties. After some minor amendments, a letter agreement in similar form was executed by Mr Fahey and Mr Ebert.

[39] RPA accepted the compromise agreement of the rental guarantee issue.

Applicant's employment of Mr Kennedy

[40] On 9 February 2017, Mr Kennedy met Ms Moore in a coffee shop in Brisbane City. Ms Moore said, inter alia, that Mr Fahey wanted to know what someone like Mr Kennedy was paid, that Mr Fahey was looking for someone like Mr Kennedy or with his skill set and would Mr Kennedy be interested.

[41] As a result of that conversation, on the evening of 9 February 2017, Mr Kennedy called Mr Fahey. Mr Fahey said he would call Mr Kennedy back in a couple of days.

[42] On 28 February 2017, as it turned out, Mr Fahey and Mr Kennedy met at a Robina shopping centre and discussed the possibility of Mr Kennedy being employed by the applicant's group of companies as the head of property management. On that evening, Mr Kennedy sent an email to Mr Fahey from his personal email address. Mr Fahey replied within two hours.

[43] On 1 March 2017, Mr Fahey sent an email to Mr Kennedy's private email address setting out the terms of an offer of employment as they had discussed it up to that time.

[44] On 2 March 2017, Mr Kennedy responded by email to the offer, saying that he would like to proceed and would call the following day to talk through the paperwork and timing.

[45] On 2 March 2017, Mr Fahey and Mr Kennedy discussed the offer further on the telephone. That evening, Mr Fahey sent a formal letter of offer by email to Mr Kennedy at his personal email address.

[46] On 2 March 2017, after receiving the formal letter of offer, Mr Kennedy informed Mr Ebert that he had another employment opportunity he was going to take up.

[47] On 2 March 2017, after conversations with Mr Ebert, Mr Fahey and Ms Ebert, Mr Kennedy sent his signed acceptance of the formal letter of offer to Mr Fahey by email.

Utmost good faith

[48] On 3 March 2017, Mr Kennedy tendered a letter of resignation to Mr Ebert. Mr Ebert said that the applicant was in breach of the co-owners agreement for offering to employ Mr Kennedy and for appointing Mr Tippett to its board of directors without advising him. Mr Ebert referred to the rental guarantee issue. Mr Kennedy said that the rental guarantee compromise was all done at arms' length and was commercial in nature. Mr Ebert asked Mr Kennedy whether he knew that Mr Tippett was a director of the applicant. Mr Kennedy had not known that before he looked at the applicant's web site in February 2017.

[49] Clause 16 of the Co-Owners Deed is headed 'Miscellaneous' and deals with a number of different matters. The present case is centred upon cl 16.9(a). Clauses 16.9 and 16.10 relevantly provide:

16.9 Good faith and conflicts of interest

(a) Without limiting the generality of any other provision of this deed the parties agree that in the performance of their respective duties and the exercise of their respective powers under this deed and in their respective dealings with each other, they shall act in the utmost good faith.

(b) Without limitation to the provisions of clause 16.9(a), each Co-Owner must:

(i) declare any conflict of interest between its interest as a co-owner of the Property and the other business affairs of that Co-Owner's Group;

(ii) use all reasonable endeavours to manage its affairs so as to minimise the impact of any conflict of interest between its interest as co-owner of the Property and the other business affairs of that Co-Owner's Group.

(c) For the avoidance of doubt, no Co-Owner may use any information relating to a prospective tenant or a proposal to a prospective tenant for other purposes relating to other buildings in which it may have an interest.

16.10 No partnership

None of the parties intends by this deed or by virtue of entering into any collateral agreement to establish a partnership between the parties or to carry on business in common with the other parties with a view to profit.

[50] Much of the parties' submissions focussed upon the meaning to be given to the requirement in cl 16.9(a) that the parties shall act in the utmost good faith in their respective dealings with each other. Both parties relied on the reasons for judgment of Allsop P in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*,[4] where Allsop P said:

> "The 'utmost good faith' was agreed in their various legal instruments to be the standard of mutual behaviour expected in how the parties acted towards each other:
>
> (a) in the performance of their respective duties;
>
> (b) in the exercise of their respective powers; and
>
> (c) in their respective dealings with one another.
>
> These clauses should not be read narrowly. By the encompassing reference to 'in their respective dealings' in contracts preliminary to or concerned with dealings over an anticipated century of a commercial relationship, the

[4] [2010] NSWCA 268.

> parties can be seen to have been laying down a high standard of contractual fair dealing that they expected of each other. …
>
> The phrase 'good faith', or here, 'utmost good faith', takes its content from the particular contract and context in which it is found. It is, however, a phrase with ready available content as an English phrase and a legal expression. In a fiduciary or trust context, the phrase takes it content from the necessary trust, vulnerability and reliance central to such relationships and otherwise from the well-known incidents of such relationships. …
>
> The notion of good faith in the performance of contracts is one established by a number of cases in this court and is well-known to the law in both common law and civilian systems. …
>
> The usual content of the obligation of good faith that can be extracted from [the New South Wales cases]… is as follows:
>
> (a) obligations to act honestly and with a fidelity to the bargain;
>
> (b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;
>
> (c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.
>
> …
>
> The law or insurance has had a well-known and well-understood usage of the phrase 'utmost good faith' for over two centuries. It is an obligation that binds both insurer and insured. It is an obligation that has assisted in the efficient working of insurance markets in a practical way. In particular, the commercial working of the relationship between insurer and insured requires (pre-contractual) disclosure of material information in order that the risk can been assessed and priced on a sound footing and with appropriate despatch. Care should be taken not to transpose the meaning of the phrase in that commercial context to other contexts, whether as a matter of law or mere equivalence. Nevertheless, it is an example of positive disclosure of information being the step necessary to satisfy the normative legal standard."[5]

[51] Allsop P's reasons in *Macquarie International Health Clinic* related to an express contractual promise of good faith in similar terms to cl 16.9(a). However, that reasoning does not materially differ from similar reasoning about good faith in the performance of contract in other cases where there was no express contractual term.[6]

[52] Allsop P's reference in *Macquarie International Health Clinic* to the requirement of "utmost good faith" in relation to disclosure in the law of marine insurance is informative for the present context, because the respondent contends that the obligation

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5 [2010] NSWCA 268, [6]-[18].

6 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [287]-[291].

of utmost good faith required the applicant to make disclosure of its intention to approach Mr Kennedy to offer him employment and of its intention to appoint Mr Tippett as a director of the applicant before doing either of those things.

[53] Although the parties under the Co-Owners Deed expressly agreed that theirs was not a relationship of partnership, Allsop P's references to context are also informative in the present case because the contractual relationship of the parties was one as joint owners of an income earning commercial property carrying on a commercial leasing business of that property for profit. The structural analogy with partnership in some respects is apparent.

[54] Lastly, on the meaning of "utmost good faith", since 1984, the *Insurance Contracts Act* 1984 (Cth) has provided that "[a] contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith".[7]

[55] The meaning of "utmost good faith" in that context was raised in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*.[8] Gleeson CJ and Crennan J said:

> "We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity."[9] (footnote omitted)

[56] And Callinan and Heydon JJ said:

> "At the outset we should say that we agree with the Chief Justice and Crennan J that a lack of utmost good faith is not to be equated with dishonesty only. The analogy may not be taken too far, but the sort of conduct that might constitute an absence of utmost good faith may have elements in common with an absence of clean hands according to equitable doctrine which requires that a plaintiff seeking relief not himself be guilty of tainted relevant conduct. We have referred to the doctrine of clean hands because, as with another equitable doctrine, that he who seeks equity must do equity, it invokes notions of reciprocity which are of relevance here. That is not to say that conduct falling short of actual impropriety might not constitute an absence of utmost good faith of the kind which the

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7 *Insurance Contracts Act* 1984 (Cth), s 13(1).
8 (2007) 235 CLR 1.
9 (2007) 235 CLR 1, 12 [15].

> Insurance Act demands. Something less than that might well do so. Utmost good faith will usually require something more than passivity: it will usually require affirmative or positive action on the part of a person owing a duty of it."[10]

History and meaning of "utmost good faith"

[57] Because the parties urged submissions as to the effect of the requirement that the obligation to act in good faith is to act in the "utmost" good faith, it is appropriate to say something more of Allsop P's references to the history of the expression "utmost good faith".

[58] Although Allsop P said that the phrase "utmost good faith" has had a well-known and well-understood usage for over two centuries in the law of insurance, the earliest reference I have found to it in that context is in 1842 in the form of the Latin phase *uberrimæ fidei* in one of the reports of *Moens v Heyworth*.[11] However, as early as 1766, in the celebrated case of *Carter v Boehm*,[12] Lord Mansfield recognised the obligation of an insured to make disclosure of material information to the risk of the insurance as an obligation to "prevent fraud, and to encourage good faith".[13] And in 1865, Mellor J said in a marine insurance case, *Uzielli v The Commercial Union Insurance Company*, that "[a] contract of insurance was one which required the utmost good faith".[14]

[59] Nevertheless, authority at the highest level has questioned what "utmost" adds to the requirement of "good faith". The point was raised in 2001 in the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd*.[15] The question in that case concerned the operation of s 17 of the *Marine Insurance Act* 1906. Lord Clyde said:

> "The expression 'utmost good faith' appears to derive from the idea of uberrimae fidei, words which indeed appear in the sidenote [of the statute], but whose origin I have not been able to trace. The concept of uberrima fides does not appear to have derived from civil law and it has been regarded as unnecessary in civilian systems (*Professor T B Smith, A Short Commentary on the Law of Scotland* (1962), p 836, quoting M A Millner 'Fraudulent Non-Disclosure' (1957) 76 SALJ 177, pp 188–189). Indeed more recently the suggestion has been advanced in the Court of Appeal in South Africa that the concept should be jettisoned: *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419, 433. *Blackstone's Commentaries*, 4th ed (1876), vol II, Chapter 30, pp 412–413 states that the very essence of contracts of marine insurance 'consists in observing the purest good faith and integrity', but in *Carter v Boehm* (1766) 3 Burr 1905, 1910, Lord Mansfield refers simply to 'good faith'."[16]

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[10] (2007) 235 CLR 1, 77 [256].
[11] (1841) H & W 138, 143.
[12] (1766) 3 Burr 1905.
[13] (1766) 3 Burr 1905, 1911.
[14] (1865) 2 Mar LC 218, 219.
[15] [2003] 1 AC 469.
[16] [2003] 1 AC 469, 481 [5].

[60] Lord Hobhouse offered an explanation for the use of "utmost" in "utmost good faith", as opposed to "good faith" simpliciter:

> "It was probably the need to distinguish those transactions to which Lord Mansfield's principle still applied which led to the coining of the phrases 'utmost' good faith and 'uberrimae fidei', phrases not used by Lord Mansfield and which only seem to have become current in the 19th century. Storey used the expression 'greatest good faith'; *Wharton's Law Lexicon* 14th ed (1938), p 1020 'the most abundant good faith'; a Scottish law dictionary (*Trayner, Latin Maxims and Phrases*, 2nd ed (1876), p 590) used 'the most full and copious' good faith; some English judges referred to 'perfect' good faith (Willes J in *Britton v Royal Insurance Co* (1866) 4 F & F 905) and Lord Cockburn CJ to 'full and perfect faith' (*Bates v Hewitt*, LR 2 QB 595, 606). But 'utmost' became the most commonly used epithet and its place was assured by its use in the 1906 Act. The connotation appears to be the most extensive, rather than the greatest, good faith."[17]

[61] Another point made in *Manifest Shipping Co* is that the disclosure requirement under the statutory (or I would suggest common law) obligation in the marine insurance context differs as between the pre-contractual period and the period of contractual performance. As Lord Hobhouse summarised the case law:

> "These authorities show that there is a clear distinction to be made between the pre-contract duty of disclosure and any duty of disclosure which may exist after the contract has been made. It is not right to reason, as the defendants submitted that your Lordships should, from the existence of an extensive duty pre-contract positively to disclose all material facts to the conclusion that post-contract there is a similarly extensive obligation to disclose all facts which the insurer has an interest in knowing and which might affect his conduct. The courts have consistently set their face against allowing the assured's duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith."[18]

[62] More generally, the content of the duty of disclosure under the duty of utmost good faith in the insurance context was usefully surveyed by Kelly Godfrey in "The Duty of Utmost Good Faith – The Great Unknown of Modern Insurance Law".[19]

[63] It is unnecessary to expand further on that point in these reasons, beyond observing that the purpose of the pre-contractual disclosure obligation of utmost good faith by an insured to an insurer is to inform the insurer's decisions as to whether and the terms on which to take the risk of entering into the contract of insurance and as to the contractual price by way of premium to insure that risk.

[64] Another relevant context where, historically, reference was made to "utmost good faith" is in the law of partnership. In successive editions of *Lindley on Partnership*, it has

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17 [2003] 1 AC 469, 492 [44].
18 [2003] 1 AC 469, 496-7 [57].
19 (2002) 14 *Insurance Law Journal* 56.

been said by the authors that "the utmost good faith is due from every member of a partnership towards every other member".[20] That statement is repeated in the current edition.[21] Surprisingly, the case footnoted for the proposition in all editions, *Blisset v Daniel*,[22] does not use the expression "utmost good faith", as opposed to "good faith", simpliciter, at all.

[65] The first reference I have found in the partnership cases to an obligation of "utmost good faith" is in 1878 in *Dean v MacDowell*.[23] James LJ said:

> "It is quite clear that in partnership matters there must be the utmost good faith, and that there is to that extent a fiduciary relation between the parties."

[66] That statement was made in the context of a case where a partner in breach of the partnership articles failed to devote his full time to the business and started up another business.

[67] A number of cases stand for the proposition that in dealings between partners a partner's obligation of good faith or utmost good faith will require full disclosure of information, particularly where a dealing in the partnership interests or partnership property is involved.[24] But other misconduct by a partner may require disclosure, such as professional misconduct or matters that may go to partnership reputation.[25]

Content of a contractual promise of "utmost good faith"

[68] These reasons do not need to canvass the unresolved questions as to when a contractual obligation of good faith, either as a matter of contractual construction, or as a matter of an implied term, exists.

[69] It is more difficult to avoid discussion in the cases and in the academy as to the content of an obligation of "utmost good faith" or "good faith". In a now famous article, first given as an address in 1993[26] but updated in 2000,[27] Sir Anthony Mason said this in referring to relevant provisions of the *United States Uniform Commercial Code* and the *Restatement of Contracts, Second*:

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[20] The passage appears in the 1st edition (1860) at 492; from the 6th edition (1893) at 314 it is quoted in the report of *Law v Law* [1905] 1 Ch 140, 148; and in the 13th edition (1971) it appears at 335.

[21] *Lindley & Banks on Partnership* (Sweet & Maxwell, 20th ed, 2017) 629.

[22] (1853) 10 Hare 493.

[23] (1877) 8 Ch D 345, 350.

[24] *Law v Law* [1905] 1 Ch 140; *Sim v Howat* [2012] CSOH 171.

[25] *Conlon & Anor v Sims* (2008) 1 WLR 484, 518-515 [127]; *Oliver Hume South East Queensland Pty Ltd* v *Investa Residential Group Pty Ltd* (2017) 122 ACSR 183; *Lauvan Pty Ltd v Bega* [2018] NSWSC 154, [439]-[444].

[26] A F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing', speech delivered at The Cambridge Lectures of the Canadian Institute of Advanced Legal Studies at the University of Cambridge on 8 July 1993.

[27] A F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 69.

> "It is by no means clear what 'good faith' in the context of these provisions means. But it is probable that the concept embraces no less than three related notions: (1) an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties."

[70] The first notion is reflected in a well-known principle of Australian common law commonly associated with *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd*,[28] where Mason J said:

> "But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. As Lord Blackburn said in *Mackay v Dick* (1881) 6 App Cas 251 at 263:
>
> > 'as a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'
>
> It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v M'Donald* (1896) 7 QLJ 68 at 70–1:
>
> > 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'"

[71] There is also little controversy about the second notion. However, the third notion, and its content, is the subject of extensive debate, both here[29] and in the United States.[30]

[72] In the Australian context, some learned writers and a few of the cases have expanded on the content of an obligation of good faith. In particular, Dr Elisabeth Peden has widely published on the subject in a helpful way.[31] Overseas developments proceed, as

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[28] (1979) 144 CLR 596, 607.

[29] For example, E Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, 2003) 162-164 [7.5] and J Carter and E Peden, "Good Faith in Australian Contract Law", (2003) 19 *Journal of Contract Law* 155, 167-171.

[30] For example, a range of views among members of the United States academy is summarised in H Lücke, "Good Faith in Contractual Performance" in PD Finn (ed), *Essays of Contract* (Law Book Co, 1987) Ch 5, 160-165.

[31] E Peden, *Good Faith in the Performance of Contracts*, LexisNexis Butterworths, Australia, 2003, Ch 7; E Peden, "The Meaning of Contractual 'Good Faith'", (2002) 22 *Australian Bar Review* 235; JW Carter and E Peden, "Good Faith in Australian Contract Law", (2003) 19 *Journal of Corporate Law* 155; E Peden, "When

illustrated by the 2014 landmark decision of the Supreme Court of Canada in *Bhasin v Hyrnew*,[32] discussed in John McCamus's 2015 article, "The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Law".[33]

[73] Notably, the High Court has not entered upon this field of discourse in recent years. However, the role of reasonableness in the resolution of a question of contractual good faith recently drew the attention of the Full Court of the Federal Court of Australia in *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd*,[34] where the court said:

> "As Allsop P said in *Macquarie International Health Clinic* at [15], in the context of an express obligation of good faith, an objective element of reasonableness in fair dealing is appropriate, 'taking its place with honesty and fidelity to the bargain in the furtherance of the contractual objects and purposes of the parties, objectively ascertained'.
>
> His Honour, too, in *Paciocco* at [290] said that it is clear that a normative standard is introduced by good faith but that the legal norm should not be confused with the 'factual question' of its satisfaction and, moreover, that '[t]he contractual and factual context (including the nature of the contract or contextual relationship) is vital to understand what, in any case, is required to be done or not done to satisfy the normative standard'.
>
> Thus, particular kinds of unreasonable conduct may be found to exist, upon the evidence, as offending acceptable norms. However, this is not the objective assessment of reasonableness for which the appellant contends, namely involving consideration of whether due care and skill has been brought to bear in the exercise of the discretionary power to fix minimum prices and/or the objective reasonableness of the outcome of that exercise. Such an approach forms no part of an obligation or power, express or implied, of good faith and reasonableness in contract law. To the extent that the appellant pleads this formulation of an 'objective' approach to reasonableness, it is incorrect."

Dealings under the Co-Owners Deed

[74] The difficulty in the present case is introduced by the generality of the words in cl 16.9(a) requiring the parties to act in the utmost good faith in their respective dealings with each other. However, that part of the contractual text appears in its context. First, it follows reference to "the performance of [the parties'] respective duties and the exercise of their respective powers under [the] deed". Second, the contractual relationship of the parties under the Co-Owners Deed is as joint owners of an income-earning commercial property carrying on a commercial leasing business of that property

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Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability", (2005) 21 *Journal of Corporate Law* 226.

32 [2014] 3 SCR 494

33 (2015) 32 *Journal of Corporate Law* 103.

34 [2017] FCAFC 190, [184]-[186].

for profit. Third, the deed expressly provides for the mechanisms by which the property will be managed and how decisions that would otherwise require the concurrence of the parties are to be made.

[75] As a matter of construction, the obvious point that emerges from a consideration of the whole of the terms of the deed is that the obligation to act in utmost good faith is concerned with the relationship between the parties under the deed and their respective dealings with each other under the deed. It is not concerned with other matters.

[76] The respondent relies on the reasons of Hodgson JA in *Macquarie International Health* as leading to a wider construction, as follows:

> "Turning to the construction of the duty of utmost good faith in the HOA, it was submitted… that cl 15.4 of the HOA required utmost good faith only in the performance of duties and exercise of powers under the agreement, and in dealings between the parties; that the only relevant duties and powers were the requirements of cl 4.2(e) concerning the preparation of plans and specifications of the private hospital, the requirement of cl 5.2(a) concerning the location of the site, and the provisions of cl 6.3 concerning a joint working party (relating to ideas for the design and construction of the hospital and car park); and that accordingly the obligation of utmost good faith did not impose any requirements on Area Health concerning the development and location of facilities of RPAH.
>
> In my opinion, this would be far too narrow a construction of the duty of utmost good faith. The HOA was for a relationship which was to last 99 years, involving the expenditure of large sums of money by MHC and/or Macquarie on acquiring the leases and on construction of the car park and hospital, entered into at a time when there was not even certainty as to the sites to be leased. The HOA discloses the intention of both parties that the flow of persons between the hospitals be optimised (cl 4.2(e)(iii)), that there should be created a campus concept encouraging the movement of people between the private hospital and RPAH (cl 5.2(a)(ii)), and that ideas of all parties should contribute (cl 6.3(b)). Although these objectives are in the express terms of the HOA explicitly tied only to the siting, design and construction of the private hospital and car park, in my opinion they do inform the content of the obligation of utmost good faith, which is not confined to the performance of duties and the exercise of powers under the agreement, but extends to the dealings of the parties with each other. This view is confirmed by the pre-contractual dealings, and by the consideration that, other things being equal, the less the physical separation between the private hospital and RPAH (in terms both of distance and of impediments), the better these objectives could be realised to the advantage of both hospitals and in particular of the private hospital."[35]

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[35] [2010] NSWCA 268, [143]-[144].

[77] In my view, that analysis should be viewed as directed to the facts of that case. It should not be divorced from those facts to create a penumbral duty in law that would operate outside the scope of the contractual business between the parties.

[78] The analogous contexts of partnership and joint venture cases provide some assistance in carrying out the relevant analysis, in my view, because of the structural similarity of the interests of the co-owners under the Co-Owners Deed with those relationships.

[79] Partnership law cases deal with the scope of the fiduciary obligations owed by the partners in numerous cases of alleged conflicts between the partner's fiduciary duties and personal interests. So, a partner may not start a business in competition with the partnership business to which the partner is obliged to devote their energies. But there is no prohibition against the purchase of property and starting a new business outside the scope of the partnership business.

[80] Three cases illustrate these points. First, in *Cassels v Stewart*[36] Lord Selborne summarised the views of the House of Lords for rejecting the argument that the special position of partner imposed a fiduciary obligation in relation to the acquisition by one partner of the share of another partner, to the exclusion of the rest, because:

> "…this subject-matter here is in no sense a property or interest of the partnership. The share of an individual partner is his own property not the property of the firm".

[81] Second, in *Trimble v Goldberg*[37] the Privy Council rejected the argument that two of three partners in a land speculation and development partnership that held shares in a limited company that was carrying on the development were precluded from purchasing other land for speculation and development from the same vendor to the exclusion of the third partner. Lord MacNaghten said:

> "It seems to their Lordships that the… purchase was not within the scope of the partnership. The subject of the purchase was not part of the business of the partnership, or an undertaking in rivalry with the partnership, or indeed connected with it in any proper sense. Nor was the information on which it seems [the defendant] acted acquired by reason of his position as a partner, or even by reason of his connection with [the company]."[38]

[82] Third, on the other side of the line between what is within the scope of the partnership business and relationship and what is not, lies *Chan v Zacharia*[39] where the High Court held that a partner was precluded from obtaining for himself a renewal of a lease that was partnership property upon dissolution of the partnership. Deane J quoted a passage from the reasons of Dixon J in *Birtchnell v Equity Trustees, Executors and Agency Co Ltd*, as follows:

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36 (1881) 6 App Cas 64, 73-4.
37 [1906] AC 494.
38 [1906] AC 494, 499.
39 (1984) 154 CLR 178.

> "The subject-matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instrument or not, but also from the course of dealing actually pursued by the firm."[40]

[83] It is no surprise that the same approach applies in the context of joint venture agreements where the parties are not partners, notwithstanding that the relationship of co-venturers under a joint venture agreement will often be of a fiduciary character in some respects.[41]

Employment of Mr Kennedy

[84] The respondent contends that the employment of Mr Kennedy by the applicant was a breach of cl 16.9(a) because the applicant "enticed" or "poached" him to leave his employment as manager "secretly", meaning without disclosing its intention to do so to the applicant.

[85] It is useful to briefly analyse the legal background to the allegation of enticement or poaching.

[86] First, Mr Kennedy was an employee of the respondent's related company, Shield. Other than by contract, an employer has no right at common law to prevent an employee from resigning his or her position to take up employment elsewhere. As an employee, Mr Kennedy was not obliged to disclose to Shield or the respondent that he was considering or intended to take an opportunity for employment elsewhere.

[87] It is not alleged that Mr Kennedy acted in breach of his contract in resigning his employment by Shield to take up employment with the applicant or a related company of the applicant.

[88] Second, the legal protection afforded by the common law to an employer against another employer enticing an employee to leave their existing employment to go to work for the other employer is usually that associated with the 1853 decision of *Lumley v Gye*,[42] being the tort of the new employer of inducing breach of contract by the employee in leaving the original employment. It is not alleged that the applicant induced Mr Kennedy to breach his contract of employment either with Shield or the respondent.

[89] What was it, then, that the respondent alleged constituted the breach of cl 16.9(a)? At the highest level of generality, the contention might be that cl 16.9(a) prohibits either of the parties from employing an employee of the other party without prior disclosure. So

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[40] (1984) 154 CLR 178, 196, quoting *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 407-408.

[41] *New Zealand Netherlands Society "Oranje" Incorporated v Kuys* [1973] 1 WLR 1126, 1130; GMD Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (Clarendon Press, 1995), 250-255; WD Duncan, *Joint Ventures Law in Australia* (The Federation Press, 2nd ed, 2005), 64-68.

[42] (1853) 2 E & B 216.

stated, in my view, the obligation would be too broad, because it is not concerned with the relationship between the parties under the deed and the dealings that occur under the deed.

[90] The respondents pleaded case of breach of cl 16.9(a) is narrower. In effect, it is that:

(a) Mr Kennedy was an employee of Shield;

(b) Shield is part of the respondent's "Co-Owner's Group" within the meaning of the Co-Owners Deed;

(c) Mr Kennedy attended weekly or fortnightly meetings concerning management of The Rocket;

(d) the applicant enticed Mr Kennedy to leave Shield's employ;

(e) that was in the course of the co-owners' respective dealings with each other within the meaning of cl 16.9(a);

(f) Mr Fahey knew that Mr Kennedy "held an important role… in relation to aspects of Sentinel's business including the Property"; and

(g) the applicant did not disclose to the respondent its intention to entice Mr Kennedy to leave the employ of the respondent's Co-Owner's Group.

[91] There is no dispute that Mr Kennedy was an employee of Shield.

[92] Shield was a member of the "Co-Owner's Group" under the Co-Owners Deed if, relevantly, it was a related corporation of the respondent. Although that may not be established by the evidence, I will assume that it is.

[93] Although the applicant disputes that it enticed or secretly enticed Mr Kennedy to leave his employ with Shield, in my view, that is what it did. There was some sensitivity shown by Mr Fahey in giving evidence about his approach to Mr Kennedy. First, he suggested (although not by the time he gave oral evidence) that the applicant had made public or made known that it was looking to employ a head of property. I do not accept that it did so. Second, he suggested that he was only making enquiry of Mr Kennedy through Ms Moore to find out what was Mr Kennedy's remuneration (at Shield) to ascertain information about remuneration for such a position. I do not accept that was the substance of what he asked Ms Moore to do. Third, he suggested that it was Mr Kennedy who approached him about possible employment. But that was inconsistent with Ms Moore asking Mr Kennedy whether Mr Kennedy would be interested in the position. In my view, these unjustified suggestions by Mr Fahey betray that his real aim was to employ Mr Kennedy.

[94] There is no dispute that Mr Fahey acted secretly in the sense that the discussions between him and Mr Kennedy were confidential and not disclosed to anyone else, on the evidence, until after Mr Kennedy had received Mr Fahey's formal offer.

[95] In my view, in so dealing with Mr Kennedy, the applicant was not acting in or in a way that had any regard to the interests of the respondent, in the sense that Mr Fahey's conduct was engaged in purely in the interests of the applicant, and without any concern for whether the respondent would be inconvenienced or damaged by the applicant enticing Mr Kennedy away.

[96] In my view, the evidence also supports the finding that Mr Kennedy held an important role in relation to the management of The Rocket for the appointed manager, SPM and for the respondent as co-owner.

[97] For example, in June 2016, at the time of Mr Kennedy's appointment, Mr Tippett on behalf of the Robina Land Corporation group had communicated to Mr Fahey that a number of the tenants at The Rocket were dissatisfied with the management. It seems that Mr Kennedy's assignment to management of The Rocket was integral to changes being made that addressed that dissatisfaction.

[98] As a second example, in late 2016, Mr Fahey was moved to congratulate Mr Kennedy for his role in securing the National Disability Insurance Agency as a new tenant for The Rocket and in dealings with an outgoing tenant, the Gold Coast City Council.

[99] However, the critical question remains, namely, whether the applicant's offer of employment to Mr Kennedy occurred in the course of the co-owners respective dealings with each other within the meaning of cl 16.9(a).

[100] In my view, it did not. The point sought to be made by the respondent against that conclusion was that Mr Kennedy "held an important role… in relation to aspects of Sentinel's business including the Property". In other words, the point is that to entice Mr Kennedy away might impair or interfere with the business of managing The Rocket to the co-owners mutual advantage. And so it might, although the respondent's case at trial was not that it had done so.

[101] Nevertheless, in my view, enticing Mr Kennedy away was not done in the course of the co-owners dealings with each other. In this context, it is important to keep in mind that, by cl 16.10, the relationship of the parties under the Co-Owners Deed was expressly not that of partners. Their relationship was structured under that deed to serve the commercial purposes of each of them for a joint enterprise where their dealings entailed a joint business operated for them by an appointed manager. Otherwise, they were both operating autonomously as property investors and managers. Extension of the protean concept of "utmost good faith" into areas outside the course of their relationship under the Co-Owners Deed would potentially curtail the autonomy that each of them would otherwise enjoy.

[102] Nothing, for example, expressly prohibited either the applicant or the respondent from acquiring another site and developing it in competition with the co-owners business in

relation to The Rocket under the Co-Owners Deed, thereby damaging their joint business including the respondent's interests as co-owner. But on the face of it, to do so would not be a dealing with each other between the applicant and the respondent under the Co-Owners Deed.

[103] Similarly, in my view, the fact that enticing Mr Kennedy away from his employment might negatively affect the co-owners' business in relation to The Rocket under the Co-Owners Deed and the respondents' interest as co-owner did not transform that conduct into a dealing with each other under the Co-Owners Deed.

[104] Accordingly, in my view, the applicant's enticing of Mr Kennedy away from his employment by Shield did not constitute a breach of cl 16.9(a) of the Co-Owners Deed.

Appointment of Mr Tippett as a director

[105] The respondent makes an array of allegations of matters that the applicant ought to have disclosed to the respondent relating to Mr Tippett's other interests or appointments or those of his wife. They are that:

(a) Mr Tippett was intended to be appointed as a director of the applicant and after his appointment was a director of the applicant;

(b) Mr Tippett was a director of RPA;

(c) RPA owned the Robina Professional Centre and The Base; and

(d) the identity of the shareholders in RPA and in Sunni.

[106] However, the respondent did not advance any reasoning why that broad range of matters was required to be disclosed. The sting of the array of allegations is that Mr Tippett's other interests or appointments gave rise to a "conflict", because he is a director of and has a financial interest in companies in the Robina Land Corporation group and because companies in that group are competitive or potentially competitive with the applicant and respondent's business in respect of The Rocket.

[107] There is a factual dispute about the extent of the alleged competition or potential competition and the extent of the applicant's knowledge of some of the alleged facts about Mr Tippett's interests and appointments. But the problem may be analysed in the first instance on the assumptions that there was competition or potential competition between the co-owners' business under the Co-Owners Deed and that of the Robina Land Corporation group.

[108] The fact of such competition or potential competition did not preclude Mr Tippett from being a director of the applicant and a director of companies in the Robina Land

Corporation group under the general law.[43] That is a different thing from the situation where a director engages in conduct intended to depreciate the value of and progress of the company's business in favour of some other undertaking.[44] As was said in *Blyth Chemicals Ltd v Bushnell*[45] by Dixon J, in an analogous context:

> "…the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to his future conduct arises."[46]

[109] In the end, the alleged competition or potential competition in the present case came down to three allegations:

(a) a Robina Land Corporation group company, RPA, was the vendor of The Rocket to the parties;

(b) a Robina Land Corporation group company owns another, admittedly much smaller lower rise, commercial office building nearby, called the Robina Professional Centre;

(c) a Robina Land Corporation group company, RPA, owns the nearby site of a future development like The Rocket, called The Base.

[110] As to (b), the respondent alleges further that SEE Civil is a prospective tenant who is looking at space in The Rocket and the Robina Professional Centre as alternatives.

[111] Looking at the matter more broadly, it does not seem to me that the potential or risk that Mr Tippett as a director of the applicant might become aware of information about The Rocket that would be useful to the Robina Land Corporation group of companies was such as to require the applicant to disclose Mr Tippett's proposed appointment to the respondent before making that appointment, or be in breach of cl 16.9(a).

[112] The purposes that the respondent submits would be served by such a disclosure were that the respondent would have the opportunity to:

(a) object and seek to persuade the applicant not to appoint Mr Tippett;

(b) seek to have the applicant put in place appropriate measures to identify and address any conflicts of interest; and

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43 *London and Mashonaland Exploration Co v New Mashonaland Exploration Co* [1891] WN 165; *Bell v Lever Bros Ltd* [1932] AC 161, 195.

44 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81-82; *Aubanel and Alabaster Ltd v Aubanel* (1949) 66 RPC 343, 346-347; *Mordecai v Mordecai* (1988) 12 NSWLR 58, 64; *Links Golf Tasmania Pty Ltd v Sattler* (2012) 292 ALR 382.

45 (1933) 49 CLR 66.

46 (1933) 49 CLR 66, 82

(c) be alert for actual or potential conflicts in making decisions about the rental guarantees and management of The Rocket.

[113] As to (a), the applicant submits, bluntly, that it was none of the respondent's business whether the applicant appointed Mr Tippett as a director. I agree.

[114] As to (b), no evidence was led by the respondent as to what the appropriate measures might be, or as to why the respondent has been denied the opportunity to suggest to the applicant to put in place any such measure. There was no evidence that the respondent attempted to do so, after learning of Mr Tippett's appointment as a director, no later than 2 March 2017.

[115] As to (c), there can be no question that since the respondent learned of Mr Tippett's appointment as a director of the applicant, it has had the opportunity to be alert for any actual or potential conflicts. However, in effect, it alleges that before it became aware of Mr Tippett's appointment there was an actual or potential conflict raised by his appointment in relation to the rental guarantee issue and compromise.

[116] The relevant facts about the rental guarantee issue and compromise agreement were:

(a) as at October 2016, the co-owners contended that Robina Projects (a Robina Land Corporation group company and vendor of The Rocket to the co-owners) owed $460,136.13 to the co-owners on account of the rental guarantee under the contract to buy The Rocket;

(b) as at that time, RPA contended that the amount owing was $332,320.16;

(c) the difference, $127,815.97 related to rental payable under tenancies which Robina Projects contended were for tenants that RPA had found;

(d) before the agreement was made, Mr Fahey on behalf of the applicant spoke to Mr Tippett on behalf of Robina Projects, and they agreed that Mr Kennedy and Mr Weld should meet to resolve the dispute;

(e) before Mr Kennedy and Mr Weld negotiated, Mr Fahey informed Mr Kennedy of his discussion with Mr Tippett in the email sent on 20 September 2016;

(f) an agreement was reached between the parties' representatives, being Mr Kennedy for the co-owners and Mr Weld for RPA;

(g) the agreement was that RPA would pay an amount equal to the present value of half the disputed amount ($63,907.99);

(h) in October 2016, at a regular management meeting, Mr Kennedy told Mr Fahey that Mr Kennedy had negotiated the compromise with Mr Weld that

RPA would pay the present value of half of the disputed amount ($63,907.99);

(i) Mr Fahey informed Mr Kennedy that the applicant would agree to bear its share of the shortfall; and

(j) Mr Tippett had no involvement in Mr Fahey's decision on behalf of the applicant.

[117] In my view, nothing in those facts required the applicant to disclose Mr Tippett's appointment as a director of the applicant to the respondent under cl 16.9(a) before the matter of the rental guarantee compromise was decided upon by the respondent.

[118] Otherwise, the respondent tendered no evidence as to any management decision concerning The Rocket which required the applicant to disclose Mr Tippett's appointment as a director of the applicant to the respondent under cl 16.9(a).

SEE Civil

[119] As foreshadowed above, the respondent alleges a separate breach of cl 16.9(a) in the applicant's failure to disclose to the respondent by the end of January 2017 that Mr Tippett was a director of the applicant and that a Robina Land Corporation group company of which Mr Tippett was a director was or was potentially in competition with the co-owners for the business of a prospective tenant, namely SEE Civil.

[120] Again, the respondent makes an array of allegations as to the interests or appointments of Mr Tippett that raise a potential "conflict", but the sting of the alleged breach in relation to SEE Civil is as I have just stated. Although relied on as a separate breach of cl 16.9(a), the alleged failure to disclose is again focussed on disclosure of Mr Tippett's appointment as a director of the applicant.

[121] The respondent alleges that Mr Tippett became aware of SEE Civil as a prospective tenant for the Robina Land Corporation group company as a director of the applicant.

[122] The relevant facts relating to SEE Civil were:

(a) from 24 February 2017 and 28 February 2017 SEE Civil was a prospective tenant for space in The Rocket and Robina Professional Centre respectively;

(b) SEE Civil independently approached Knight Frank as a leasing agent for both buildings;

(c) there is no evidence that Mr Tippett learned of SEE Civil as a prospective tenant for the Robina Professional Centre because he was a director of the applicant; and

(d) even if had he done so, Mr Tippett would have been bound by the obligations of a director of the applicant under the *Corporations Act* 2001 (Cth), preventing him from misusing that information.[47]

[123] In my view, nothing in those facts required the applicant to disclose Mr Tippett's appointment as a director of the applicant to the respondent under cl 16.9(a).

Conclusions on the claim

[124] It follows, in my view, that none of the allegations made by the respondent that the applicant breached cl 16.9(a) of the Co-Owners Deed is made out. The applicant is entitled to declaratory relief that it was not in breach of contract as the respondent alleged in the defence.

Counterclaim

[125] The counterclaim turns on the alleged breaches of cl 16.9(a) of the Co-Owners Deed that are the subject of the claim. It must be dismissed, in view of my conclusions upon the claim. However, against the possibility that I am wrong in those conclusions it is appropriate to deal with one of the additional issues raised upon the counterclaim and the answer to the counterclaim.

[126] The respondent alleges that:

(a) each of the alleged breaches of cl 16.9(a) was a breach of a material provision of the Co-Owners Deed.

(b) on 10 March 2017 it gave written notice of each breach to the applicant specifying the breach and requesting that the same be remedied within 20 business days thereafter ("default notice"); and

(c) the applicant failed to rectify each relevant breach and it was thereby in 'Default' within the meaning of cl 1.1 of the Co-Owners Deed.

[127] The applicant contends that the written notice did not properly or sufficiently raise the breaches relied upon in the defence and that it failed to identify what the applicant was required to do to rectify any relevant breach.

[128] For present purposes, these points may be left aside.

[129] On 12 April 2017, the respondent alleges that it gave notice in writing to the applicant stating that it desired to exercise its rights under cl 11 of the Co-Owners Deed, nominating Mr Tristan Gasiewski as its independent valuer and requiring the applicant to nominate another independent valuer, within 15 business days.

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47 *Corporations Act* 2001 (Cth), s 183.

[130] On 8 May 2017, the applicant nominated Ms Lisa Murdoch of JLL Gold Coast as its valuer for the purposes of cl 11 of the Co-Owners Deed, without prejudice to its contention that there had been no breach of a material provision.

[131] On 15 May 2017, the applicant and the respondent executed a joint instruction to Mr Gasiewski and Ms Murdoch under cl 11.3 of the Co-Owners Deed. The respondent sent a copy to Mr Gasiewski. The applicant failed to send a copy to Ms Murdoch within one month of having been given the default notice.

[132] The respondent alleges that the applicant thereby failed to join in the making of the request to both valuers in accordance with cl 11.3, within the required time, so that Mr Gasiewski was entitled, as the sole valuer, to proceed to make a determination of the net proceeds of sale for the purposes of cll 11.7 to 11.17 of the Co-Owners Deed.

[133] On 3 July 2017, Mr Gasiewski delivered his determination under cl 11 of the Co-Owners Deed in the sum of $33,800,000, by email sent from Mr Gasiewski to the applicant and the respondent.

[134] On 6 July 2017, the respondent notified the applicant that the respondent wished to purchase the applicant's default interest for that sum and nominated another company as the purchaser, relying on cl 11.10 of the Co-Owners Deed.

[135] Clause 11.10 provides as follows:

> "Within 10 Business Days after the delivery to it of the determination of the Valuers or the Umpire, as the case may be, a Co-Owner may give notice to the Defaulting Co-Owner that the Co-Owner (or its nominee, being part of the Co-Owner's Group) wishes to purchase the Default Interest at a price equal to the Net Proceeds of Sale as determined in accordance with this clause 11. If no such notice is given within that 10 business day period, the right conferred upon the Co-Owner under this clause 10 shall lapse."

[136] The determination of the valuers to which reference is made in cl 11.10 is that provided for by cl 11.7 of the Co-Owners Deed as follows:

> "The Valuers shall deliver their determination of the Net Proceeds of Sale to both Co-Owners within one month of their appointment…"

[137] If the applicant failed to make a request in accordance with cl 11.3 then Mr Gasiewski as the valuer nominated by the respondent was entitled to proceed to make a determination of the net proceeds of sale as provided for in cl 11.4.

[138] Clauses 11.8 and 11.9 provide, in part, as follows:

> "The Valuers shall call for and, if submitted, consider submissions from the parties…

> The Valuers… shall act as experts and not as arbitrators and their respective determinations will be final and binding on the parties."

[139] It is common ground that Mr Gasiewski did not call for any submission from the parties before delivering his purported determination of the net proceeds of sale to both parties.

[140] Whether a valuation made for the purposes of a contract between parties is binding upon those parties depends on the terms of the contract, express or implied. A leading case is *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*[48] where McHugh JA said:

> "The terms of the contract usually provide… that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision."

[141] However, in an earlier passage in that case, McHugh JA said:

> "… the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied."[49]

[142] That approach has now been followed in many cases.[50]

[143] Prima facie, because Mr Gasiewski did not follow the requirements of cl 11.8, he did not determine the net proceeds of sale in accordance with cl 11 and his determination was not a determination that was final and binding on the parties. However, the respondent submits that conclusion does not follow, because the requirement that the valuers shall call for submissions is "facultative not mandatory".

[144] In my view, the question should be approached by construing the text of cl 11.8 in the context of cl 11 and having regard to what was said by the plurality in *Ecosse Property Holdings Pty Ltd v Gee Dee Pty Ltd*:

> "It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it."[51](footnotes omitted)

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48 (1985) 1 NSWLR 314, 335.

49 (1985) 1 NSWLR 314, 335.

50 For example, *Holt v Cox* (1997) 23 ACSR 590, 595-596; *Vale Belvedere Pty Ltd v BD Cole Pty Ltd* [2011] 2 Qd R 285, 292-295 [24]-[31]; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2013) 41 VR 636, 644-646 [17]-[22]; *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367, 385-386 [74]-[78]; and *International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea* [2015] NSWCA 363, [96].

51 (2017) 343 ALR 58, 63 [16].

[145] First, the language of cl 11.8 is not facultative. It does not provide that the valuer may call for submissions from the parties. On the contrary, the language is mandatory, that "the valuers shall call for… submissions" and that "the valuers shall… if submitted consider submissions". Second, it was not necessary to provide that the valuers were permitted to either call for or, if provided, consider submissions, if those matters were not truly required.

[146] It may be accepted that absent a contrary provision, a valuer appointed as an independent expert is not required to value having regard to the parties' submissions or to give the parties or either of them a hearing. But, it is also true that, in the absence of express provision to the contrary, there is no need to provide expressly in the contract that the valuers are permitted to do those things.

[147] Third, the classification of cl 11.8 as facultative or mandatory is a conclusion of the kind that may mask the true question, namely, on the proper construction of the contract, what is the consequence of non-compliance with cl 11.8 upon the determination of the net proceeds where the valuer does not call for and does not receive submissions from the parties?

[148] The last point is illustrated by the analysis of the comparable question of the distinction formerly between mandatory and directory statutory conditions made in *Project Blue Sky Inc v Australian Broadcasting Authority*.[52] The principles of construction of contracts and statutes have a common origin, as Lord Wensleydale's famous statement of the "golden rule" of construction illustrates.[53]

[149] Although it is correct to say that the consequence of non-compliance with cl 11.8 is a matter of the proper construction of cl 11, no reasoning based on the text or in principle was advanced by the respondent to support the distinction that it submits should be made. On the other hand, there are both textual and logical considerations which do not support that distinction. First, "Net Proceeds of Sale" is defined to mean the proceeds of sale which the "Default Interest" would be expected to realise upon a sale in the ordinary course of business in the open market between a willing but not anxious purchaser and a willing but not anxious vendor. The "Default Interest" is defined to mean the interest in the property held by the "Defaulting Co-Owner". That is to say, the applicant's interest in the present case.

[150] Second, the postulated sale under cl 11 is one that cl 11.3 expressly recognises might be considered by different valuation methodologies. Clause 11.3 expressly provides how to determine the valuation methodology if the parties cannot agree on it. Third, cl 11.8 does not provide merely that the valuers must call for submissions from the parties. It expressly provides also that the valuers must consider those submissions, if made.

[151] Considered together, those provisions make it clear that the parties are to have an opportunity to make submissions on the question of the value to be arrived at on determining the net proceeds of sale upon an hypothetical sale, in response to a call for submissions to be made by the valuers. That opportunity amounts to a significant right

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[52] (1998) 194 CLR 355, 390 [93].
[53] *Grey v Pearson* (1857) 10 ER 1216, 1234.

to be heard. There is no apparent reason why a determination that is made in violation of that right should be regarded as one that was determined in accordance with cl 11 for the purposes of cl 11.10.

[152] In my view, it follows that if the applicant was guilty of default as defined in the Co-Owners Deed, and Mr Gasiewski was appointed to determine the net proceeds of sale in accordance with cll 11.1 and 11.4, he did not deliver a determination of the 'Net Proceeds of Sale' arrived at in accordance with cl 11 to the parties within one month of his appointment, because he did not call for submissions from the parties. It follows that, in any event, the respondent was not entitled to give a notice to the applicant that it wished to purchase the applicant's interest at a price equal to the net proceeds of sale as determined in accordance with cl 11 by Mr Gasiewski.

[153] However, it is unnecessary to make a declaration to that effect because the counterclaim must be dismissed in any event.

Relief

[154] There will be a declaration in the form sought in the statement of claim.

[155] The counterclaim will be dismissed.

[156] I will hear the parties on costs.