

SUPREME COURT OF QUEENSLAND

CITATION: *APGL (Palm Beach) Pty Ltd v Palm Beach Developments Pty Ltd* [2020] QSC 2

PARTIES: **APGL (PALM BEACH) PTY LTD (“APGL Palm Beach”)** ACN 113 479 744
(plaintiff)
v
PALM BEACH DEVELOPMENTS PTY LTD (“PBD”)
ACN 101 716 081
(defendant)

FILE NO/S: No 11759 of 2018

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 January 2020

DELIVERED AT: Brisbane

HEARING DATE: 14-17 October 2019

JUDGE: Flanagan J

ORDER:

- 1. It is declared that the plaintiff is entitled to the amount of \$3,000,000 presently held in the trust account of K & L Gates.**
- 2. The Court orders that the amount of \$3,000,000 and any interest that has accrued on that amount be released from the Trust Account of K and L Gates to the plaintiff in accordance with cl 2(c) of the deed entered into on or around 9 June 2016.**
- 3. The defendant’s counterclaim is dismissed.**
- 4. The Court will hear the parties as to costs.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the plaintiff purchased land from the defendant for the development of a two-stage residential complex – where the defendant lent the plaintiff money for the development – where the parties entered into a development agreement – where the defendant’s loan would be repaid under the development agreement – where the plaintiff contributed its own money to the development and

secured bank finance for the first stage of development – where the global financial crisis impacted the project – where the plaintiff’s parent company advanced money to the plaintiff that was used for the purposes of the project – where the plaintiff failed to secure additional finance for stage two – where the plaintiff sold the remaining land on an as-is-where-is basis – where there was a net loss on the project – whether the plaintiff breached the development agreement by failing to complete the project as originally envisaged – whether the defendant is entitled to a distribution of the proceeds on the sale of the project

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640, applied

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, applied

COUNSEL: J W Peden QC with B A Reading for the plaintiff
G D Sheahan for the defendant

SOLICITORS: K & L Gates for the plaintiff
Cronin Miller Litigation for the defendant

- [1] The facts in this case are for the most part undisputed. The primary issue is whether the plaintiff, APGL (Palm Beach) Pty Ltd (**APGL Palm Beach**), or the defendant, Palm Beach Developments Pty Ltd (**PBD**), is entitled to part or whole of an amount of \$3,000,000 presently retained in APGL Palm Beach’s solicitors’ trust account. The resolution of the issue turns upon the proper construction of a contract entered between APGL Palm Beach, PBD and Leyshon Corporation Limited (**LCL**) styled the “Development Agreement”.

Relevant factual background

- [2] The parties conferred in relation to an agreed statement of facts.¹ While the facts were largely agreed, there remains some discrete disputed facts. Where facts are disputed, I have identified and resolved those disputes below.
- [3] As identified by the parties, in general the facts may be considered chronologically in five stages, being:
- (a) Acquisition and Development Agreement;
 - (b) Initial funding;
 - (c) Construction of Stage 1 and the Global Financial Crisis (GFC);
 - (d) Renewed marketing effort in 2015 and the decision to sell the remaining land; and
 - (e) The dispute.

¹ Exhibit 18.

(a) *Acquisition and Development Agreement*

- [4] As at 2005, PBD owned a development site at Palm Beach (**Site**). On 29 April 2005, PBD entered into the Development Agreement with APGL Palm Beach² and LCL, which was an entity associated with APGL.
- [5] Pursuant to the Development Agreement, APGL Palm Beach purchased the Site and LCL agreed to carry out the development works in accordance with the terms of the Development Agreement (**Project**).
- [6] In essence, the Project was envisaged to be developed in two stages, with stage 1 comprising the construction of a residential tower (104 units) and a shopping centre (**Stage 1**) and stage 2 comprising a further residential tower and expansion of the shopping centre (**Stage 2**).³
- [7] I set out the relevant clauses of the Development Agreement below. In summary however, the general structure of the agreement is as follows:
- (a) The recitals refer to the respective roles of the parties, including Recital C, which identifies that PBD is to provide a level of mezzanine loan funding for the development and APGL Palm Beach will provide the equity funding required for the development.
 - (b) Clause 1 contains the definitions, which include the definitions of “Development Costs”, “Development Works”, “Initial Estimated Equity Required”, “Net Proceeds on the Sale of the Project”, “PBD Loan contribution”, “PBD Deposit”, “Project”, “Project Financiers”, “Project Funding”, “Project Objectives”, “Term”, “Total Development Cost” and “Total Equity Required for the Project”.
 - (c) Clause 2, comprising sub-clauses 2.1 to 2.11, sets out the mechanism for funding the Project, including the initial funding contributions by PBD.
 - (d) Clause 3 sets out the Project Objectives, risk and return for the Project, that the Project is non-recourse to PBD, and an indemnity in favour of APGL Palm Beach limited to the PBD Loan Proportion of any losses.
 - (e) Clause 4 deals with the appointment of LCL as the Development Manager to “manage, co-ordinate or carry out the Development Works”.
 - (f) Clause 5 deals with Project Funding and states, specifically, that LCL is responsible for arranging the funding.
 - (g) Clause 6 concerns the relationship between the parties.
 - (h) Clause 7 includes conditions precedent, including the reference to the need for the PBD Security to have been executed as a condition precedent to the Agreement.

² APGL Palm Beach was formerly known as Leyshon Palm Beach Developments Pty Ltd, which is the entity named in the Development Agreement.

³ The Project cashflow as at April 2005 (“April 2005 Cashflow”) that is Annexure B to the Development Agreement separates out the income and expenditure by the two stages: Exhibit 1, Tab 1 (Exhibit 1 is the Agreed Trial Bundle).

- (i) Clauses 8 and 9 deal with termination, calculation of Total Development Costs and calculation of the Return to PBD.
- (j) Clause 11 sets out the priority of payments out of the Net Proceeds of Sale of the Project. Clause 11.1(d) refers to the PBD Loan Contribution and clause 11.1(e) refers to the “Return” to PBD.
- (k) Clause 12 governs the grant, release and priority of the PBD Security.
- (l) Clause 22 includes mutual indemnities by each party to the other for losses caused to them by the other party.

(b) *Initial funding*

- [8] The initial funding for the acquisition of the land appears in the settlement statement on the date of purchase.⁴ The document headed “Source and application of funds” sets out the initial sources of funding.⁵
- [9] The document records the details of the cheques provided to the various parties.
- [10] After settlement, the position was as follows:
- (a) PBD had deposited the sum of \$2,220,384.75 in APGL Palm Beach’s solicitors’ trust account ;
 - (b) St George Bank also had agreed to provide a facility to APGL Palm Beach, which had a balance of \$7,777,000 that had been used to fund the purchase.
- [11] After settlement, development costs were incurred in progressing the Project. These costs are summarised on a month to month basis in a spreadsheet prepared on or around 13 February 2009 and referred to as the “Development Costs Spreadsheet”.⁶ This spreadsheet records, at the bottom, a series of rows entitled “Total”, “Bank funding”, “less Net Rent”, “Equity Required”, “80% APGF”, “20% PBD”.
- [12] By adding the figures in these rows, as at February 2008 the amount of “80% APGF Equity” totalled \$11,886,394 and the amount of “20% PBD Equity” totalled \$2,971,598. The amounts expended on development for March 2008 was \$1,611,069.
- [13] There is a dispute between the parties as to how various advances made by APGL’s parent company, Australian Property Growth Limited (**APGL Parent Co**) to APGL Palm Beach are to be treated in respect of “Development Costs” as that term is defined in the Development Agreement. APGL Palm Beach’s position is that these advances were loans from APGL Parent Co incurred to progress the Project and are therefore Development Costs. PBD’s contention is that these advances constitute APGL Palm Beach’s “equity contribution to the Project”. For reasons set out below, I find that these advances constituted loans from APGL Parent Co to APGL Palm Beach for development costs.

⁴ Exhibit 5, exhibit GMM-10 to the affidavit of Geoffrey Michael McMahon filed 14 October 2019, pages 4-7

⁵ Exhibit 5, exhibit GMM-10 to the affidavit of Geoffrey Michael McMahon filed 14 October 2019, page 6.

⁶ Exhibit 1, Trial Bundle, tab 51, page C10.

- [14] The Development Costs Spreadsheet records further expenditure on the Project from February 2008 to February 2009 of approximately \$33,803,514.⁷ During that same period, the Development Costs Spreadsheet records “Bank funding” of \$28,008,812 having been procured.⁸
- [15] On 16 February 2009, Mr Rundle of APGL Palm Beach sent to Mr Whitelaw of PBD a copy of the Development Costs Spreadsheet, noting that as at that time, the “total shortfall in equity from PBD is estimated at \$1,292,206 by 30 June 2009”.⁹

(c) Construction of Stage 1 and the GFC

- [16] Stage 1 was built with construction of the shopping centre finishing around December 2008 and construction of the residential units in Stage 1 being completed in around June 2009.¹⁰ The shopping centre space was anchored by a Coles supermarket.
- [17] From around September 2008, the GFC generally impacted on the availability of credit for the purchase of residential property on the Gold Coast. At that time, around 47 units were still for sale in Stage 1.¹¹
- [18] By September 2009 predominantly all of the construction costs of Stage 1 had been completed and most of the units sold.¹²
- [19] The last of the Stage 1 apartments was sold on 31 July 2012. After receipt of the net proceeds from that sale by St George Bank, as well as an additional debt reduction, the outstanding balance of the Stage 1 facility stood at about \$3,500,000 in October 2012.¹³ It was not until June 2017 that the Stage 1 facility with St George Bank was paid out in full by APGL Parent Co.¹⁴
- [20] As for Stage 2, APGL Palm Beach attempted to secure funding from St George Bank, however, it was informed that it would require a significant number of unconditional pre-sales before the bank would consider formally offering a second facility to it (approximately 45 unconditional presales of the 90 apartments available for sale in Stage 2).¹⁵ Nevertheless, APGL Palm Beach persisted and began marketing Stage 2 to secure these unconditional pre-sales.¹⁶
- [21] Mr Rundle was made redundant in November 2012¹⁷ and, by November 2013, all of the Stage 2 contracts were terminated due to the expiry of their sunset dates.¹⁸ From

⁷ Being the figures in the “Total” row of the Development Costs Spreadsheet forensic order March 2008 to January 2009.

⁸ Being the figures in the “Bank funding” row of the Development Costs Spreadsheet for March 2008 to January 2009.

⁹ Exhibit 1, Trial Bundle, tab 51, page C8.

¹⁰ Exhibit 14, affidavit of Mark Sterling Rundle filed 9 September 2019, paragraph 9.

¹¹ Exhibit 1, Trial Bundle, tab 9, page B4.

¹² Transcript of Proceedings on 14 October 2019, 1-47 lines 20-27.

¹³ Exhibit 9, affidavit of Giuseppe Guardala filed 9 September 2019, paragraph 16.

¹⁴ Exhibit 9, affidavit of Giuseppe Guardala, paragraph 17; Exhibit 5, affidavit of G McMahon filed 14 October 2019, paragraph 9.

¹⁵ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 19.

¹⁶ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 20.

¹⁷ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 26.

¹⁸ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 25.

Mr Rundle's redundancy, Mr McMahon (the Managing Director of APGL Palm Beach¹⁹) took over direct management of the Project.

(d) Renewed marketing effort for Stage 2 and the decision to sell the remaining land

- [22] By August 2014, a detailed three-phase marketing strategy had been developed for Stage 2, which included:²⁰
- (a) phase 1, being a 'soft launch' to the Gold Coast, Brisbane and interstate investment channels by late 2014/early 2015, with the goal of achieving at least 20 unconditional pre-sales during this phase;
 - (b) phase 2, being additional local and international marketing, with the goal of achieving at least 50 unconditional pre-sales by mid-2015; and
 - (c) phase 3, which would continue phases 1 and 2, with the addition of an onsite display suite, with the goal of achieving sell out of the Project by September 2016.
- [23] On 6 November 2014, APGL Palm Beach's amended development application for Stage 2 was approved by the Planning and Environment Court of Queensland.²¹ In 2015, various marketing efforts were undertaken, in accordance with another detailed marketing plan,²² which included the refurbishment of Stage 1, new signage, a new website, the distribution of marketing kits, computer generated images of Stage 2 and off the plan sales contracts.²³
- [24] In the meantime, Mr McMahon continued to correspond with St George Bank regarding finance for Stage 2. Mr McMahon asked St George Bank whether it could provide indicative terms on which it might offer finance for Stage 2 of the Project.²⁴ Indicative terms were offered in the form of a dot point email from St George Bank.²⁵
- [25] Despite the extensive efforts of the 'second' Stage 2 marketing attempt, APGL Palm Beach was only able to secure two unconditional pre-sales (from the same buyer). The plaintiff never secured finance for the Stage 2 construction.²⁶
- [26] One particular issue that impacted the Stage 2 marketing campaign was the resale prices of the Stage 1 apartments (which were being sold at the same time that APGL Palm Beach was attempting to pre-sell the Stage 2 apartments). Based on sales data, Mr McMahon calculated that the Stage 1 apartments were, on average, selling at a loss of 24% as compared to their purchase price.²⁷

¹⁹ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 1.

²⁰ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 30.

²¹ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 31.

²² Exhibit 1, Trial Bundle, tab 121, pages G50-G69.

²³ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 33.

²⁴ Exhibit 4, affidavit of Geoffrey Michael McMahon, paragraph 35.

²⁵ Exhibit 4, affidavit of Geoffrey Michael McMahon, paragraph 36; Exhibit 1, Trial Bundle, tab 67, page C74 and tab 68, page C76. .

²⁶ Exhibit 9, affidavit of Giuseppe Guardala filed 9 September 2019, paragraph 26 .

²⁷ Affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 39.

[27] Included within the agreed Trial Bundle are a number of board reports of Australian Property Growth Fund. I accept that these board reports constitute a contemporaneous record of APGL Palm Beach’s difficulties with respect to Stage 1, and its extensive marketing efforts with respect to Stage 2. The board reports record the following:

(a) On 9 September 2008 that:²⁸

“The above [sales] figures show that sales have been very slow in the past few months. Current macro economic conditions have seen property investors desert the market. Almost all major apartment projects ... are experiencing these conditions ... In the case of [the Project] ... there were several weekends where not one visitor turned up to the sales office ...”

(b) On 28 November 2008 that:²⁹

“Sales progress continues to be disappointing although not surprising in the current economic climate. There is no confidence in the market and hence a great reluctance to make investment decisions ... The tightening of lending criteria and the withdrawal from the ‘low doc’ market by most property lenders has severely curtailed the traditional ‘mum and dad’ property investor. ...Media advertising is almost fruitless ...”

(c) On 10 March 2009 that:³⁰

“Sales progress has improved considerably in recent months ... This is largely due to our Perth based sales ... Excluding the Perth investors, sales from our onsite project office or from the Gold Coast investment sellers/financial planners remain very slow ...”

(d) On 23 June 2009 that:³¹

“Sales progress continues to be solid with the majority of recent contracts coming from our Perth agent. ... The Stage One residential tower is scheduled to be complete by the end of June 2009...”

(e) On 8 September 2009 that:³²

“The majority of recent sales have come from our Perth agents. To date, they have introduced 32 buyers to our Stage One apartments ... We have taken 32 Expressions of Interest on Stage 2 apartments to date, 28 from Perth and 4 locally. Of these, 6 have signed contracts, all of which are still conditional. ...”

(f) On 30 March 2010 that:³³

“Sales of the remaining unsold units in Stage 1 continue to be slow. Rising interest rates, tighter lending conditions and poor investor

²⁸ Exhibit 1, Trial Bundle, tab 10, page B4.

²⁹ Exhibit 1, Trial Bundle, tab 11, pages B8-B9.

³⁰ Exhibit 1, Trial Bundle, tab 12, page B12.

³¹ Exhibit 1, Trial Bundle tab 3, page B16.

³² Exhibit 1, Trial Bundle, tab 14, pages B21-B22.

³³ Exhibit 1, Trial Bundle, tab 16, page B30.

sentiment are combining to keep demand subdued. ... We continue to market both our Stage 1 and Stage 2 stock from the sales office on site ... We are also producing a new brochure and newsletter for distribution ... Media advertising has proven fruitless in recent months ... We have also given agency appointments to Australian based selling organisations operating in China and South Africa who will offer our product to their databases ...”

(g) On 9 June 2010 that:³⁴

“Stage 2 sales progress has slowed in the past few months due to the factors mentioned earlier. Our Perth agent who is responsible for 25 of the Stage 2 contracts listed above has advised that they are finding it difficult to interest their investors in Gold Coast property in the present climate ... Notwithstanding this, they will continue to promote our product wherever possible. ... Our aim is to secure 50% pre-sales in Stage 2 plus substantial sellout of Stage 1 by late 2010 at which time we hope to commence construction of Stage 2.”

(h) On 13 December 2010 that:³⁵

“The Gold Coast property market is experiencing very difficult times at present. Residential property transactions are at their lowest level since 2000 ... There is also the spectre of an oversupply of apartments ... Due to the depressed market we have not actively promoted Stage 2 over calendar year 2010. ... We have 27 unconditional contracts and expect we will need at least another 20 before our financier will consider Stage 2 funding”

(i) On 30 March 2011 that:³⁶

“Due to the depressed market we have not actively promoted Stage 2 over calendar year 2010 or to date in 2011 ... We are presently working on minor redesign issues in Stage 2 which will be submitted to the Gold Coast City Council for consent ... When these changes are signed off, we will have to produce new selling material and documents and will then re-approach our selling agents ...”

(j) On 22 November 2011 that:³⁷

“We are now ready to restart our selling campaign for the summer and beginning of 2012. We have produced a new brochure and printed information, commissioned new artist’s drawings of the project, set up a new website and refreshed all the signage around the property. This material is being distributed ... We will continue to target Western Australia as a source of buyers ... The Gold Coast market remains extremely tough, particularly for ‘off-plan’ sales. ...”

(k) On 29 May 2012 that:³⁸

³⁴ Exhibit 1, Trial Bundle, tab 17, page B37.

³⁵ Exhibit 1, Trial Bundle, tab 19, page B48-B49.

³⁶ Exhibit 1, Trial Bundle, tab 20, page B56.

³⁷ Exhibit 1, Trial Bundle, tab 23, page B77.

³⁸ Exhibit 1, Trial Bundle, tab 25, page B90.

“We have recently lost two Stage 2 contracts and are at risk of losing considerably more. ... It is now apparent that we will not be able to deliver completed apartments within this 3 ½ year timeframe. Consequently, the buyers are able to terminate their contracts ... Selling off the plan units on the Gold Coast continues to be extremely difficult. ...”

- (l) On 11 September 2012 that:³⁹

“Stage 2 of the project is on hold until the Gold Coast property market recovers. Realistically, we do not expect this to happen until 2014-2015. Of the 26 pre-sales we had in Stage 2, 17 have now been officially terminated because of the contracts’ ‘sunset dates’. We expect the remainder to terminate by the end of the year.”

- (m) On 5 March 2013 that:⁴⁰

“Investigations have commenced on changing the Project’s Stage 2 apartment mix, floor layout, market niche, quality of finishes and fittings and feasibility. It is likely an amended Development Approval will be submitted to the Gold Coast City Council in the next few months to reposition Stage 2 so we will be ready to commence marketing once more favourable conditions return in the Gold Coast apartment market.”

- (n) On 17 September 2013 that:⁴¹

“All of these [Stage 2] contracts will be rescinded by 31 December 2013 ... Some improvements to the appearance of the Stage 2 construction site are currently being planned. These improvements include a new site fence, signage and temporary hoarding/fascia ...”

- (o) On 29 May 2014 that:⁴²

“The amended DA [for Stage 2] was lodged at GCCC on 9 May 2014. The main features to note in the Stage 2 proposed DA include... The next step in the process is to then apply to the Planning and Environment Court to amend the DA ... we are going to update the Project’s feasibility which will include obtaining a detailed building cost estimate ... We have decided to change the name of Pavillions and update its branding and logo ...”

- (p) On 3 September 2014, it was reported that:⁴³

“Significant market research and detailed design of the apartment layouts has been undertaken over the last few months. This has included many design meetings which involved a detailed review of the layout of each apartment type. ... The next major task of the design team is to complete the schedule of finishes and fittings. It is proposed to make the Stage 2 apartments better quality than Stage 1.

³⁹ Exhibit 1, Trial Bundle, tab 27, page B100.

⁴⁰ Exhibit 1, Trial Bundle, tab 30, page B112.

⁴¹ Exhibit 1, Trial Bundle, tab 33, page B123.

⁴² Exhibit 1, Trial Bundle, tab 37, pages B139-B140.

⁴³ Exhibit 1, Trial Bundle, tab 38, page B147.

A detailed Marketing Plan has been completed in conjunction with our marketing consultant, David Aubrey ... The main components of this report are as follows ... The marketing strategy has been divided into three main phases...”

(q) On 25 November 2014 that:⁴⁴

“The amended DA was formally approved by the Planning and Environment Court on 6 November 2014 ... GMP Management ... have been appointed as Project Manager for Stage 2 ... GMP and ourselves will continue to identify and meet with preferred builders ... The ‘soft launch’ of marketing the Stage 2 apartments will shortly commence as the Apartment Investment Summary Report has been completed ... It is hoped that investment sellers will be appointed to commence marketing the Stage 2 apartments over the Christmas/New Year period and/or in early 2015 ...”

(r) On 10 March 2015 that:⁴⁵

“The ‘soft launch’ of marketing the Stage 2 apartments has recently commenced. We have appointed four investment sellers to commence marketing the Stage 2 ‘investor’ apartments to their client database. One pre-launch function has been held by one of the investment sellers for their sales consultants and selected clients ... We are investigating offshore marketing options and may ‘exhibit’ Pavilions at a property expo in Hong Kong in late April ... The ‘off the plan’ sales contract has been prepared.”

(s) On 28 May 2015 that:⁴⁶

“The ‘soft launch’ of marketing the Stage 2 apartments commenced in February. To date this has only yielded two unconditional contracts which is obviously disappointing. The aim of the ‘soft launch’ was to generate at least 20 unconditional contracts from the investment sellers prior to committing to building an on-site display suite...Significant time and expense has been spent on developing the following suite of marketing collateral for the ‘soft launch’ ... The ‘soft launch’ has involved numerous marketing and promotion activities including ... The results of the ‘soft launch’ have been impacted by a combination of the following factors ...”

(t) on 14 September 2015 that:⁴⁷

“The documentation of the Stage 2 building design and services is now essentially complete. The project control group ... meetings have been put on hold until sufficient pre-sales are secured...The ‘soft launch’ marketing of the Stage 2 apartments commenced in February 2015. To date only 2 unconditional contracts have been secured which is obviously disappointing ... The results of the ‘soft

⁴⁴ Exhibit 1, Trial Bundle, tab 39, page B155.

⁴⁵ Exhibit 1, Trial Bundle, tab 40, page B162.

⁴⁶ Exhibit 1, Trial Bundle, tab 41, page B168.

⁴⁷ Exhibit 1, Trial Bundle, tab 42, page B174.

launch' have continued to be impacted by a combination of the following factors ...”

[28] A project marketing review dated 1 September 2015 was undertaken by Mr Aubrey.⁴⁸

[29] Early in 2016, APGL Palm Beach decided to market for sale the shopping centre, management rights and remaining development land that would have been the land for Stage 2. On 31 August 2016, the plaintiff entered into a contract for the sale of the remaining project on an “as is” basis. Settlement occurred on 12 December 2017. The gross sale proceeds were \$16,175,000.⁴⁹

(e) *The dispute*

[30] On 28 January 2016, Mr McMahon sent an email to one of PBD’s “stakeholders”,⁵⁰ in relation to APGL Palm Beach’s decision to sell the Project. Mr McMahon’s email read, relevantly:⁵¹

“This month, directors of APGF made the decision to on-sell the undeveloped Stage 2 site ... together with the retail and management rights to Stage 1 ... APGF will appoint a selling agent in the first quarter of 2016. The sale of the undeveloped ... site ... is expected to be completed by mid to late 2016 ...”

[31] On 24 March 2016, similar information was communicated by Mr McMahon to Mr Whitelaw of PBD, via email. Mr McMahon’s email to Mr Whitelaw read, relevantly:⁵²

“Attached are the ‘project to date’ accounts for Pavilions Palm Beach.

Also included is the calculation of the projected Return to Palm Beach Developments (PBD) in accordance with the Development Agreement (using a range of sale prices).

...

APGF has had to inject substantial equity in to the project which has significantly reduced PBD’s ‘equity’ [p]ercentage ...

As advised, the attached ‘project to date’ accounts and projections indicate there will be no Return payable to PBD ...”

[32] Attached to this email, among other documents, was the first iteration of the “Master Balance Sheet” and “Master Income Statement”.⁵³

⁴⁸ Exhibit 1, Trial Bundle, tab 122, page G70.

⁴⁹ Exhibit 3, affidavit of Geoffrey Michael McMahon filed 9 November 2018, paragraph 27.

⁵⁰ Exhibit 4, Affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 43.

⁵¹ Exhibit 1, Trial Bundle, tab 71, page C84.

⁵² Agreed Trial Bundle p C85.

⁵³ Agreed Trial Bundle p C87 and C87a.

[33] In May 2016, PBD lodged a caveat over the Project land.⁵⁴ It contended for two matters, being that APGL Palm Beach ought to:

- (a) grant a second mortgage to PBD to secure its “interest” in the Project; and
- (b) make available all funding to complete Stage 2, regardless whether the Project would make profit or provide any return to PBD.

[34] The parties agreed for PBD to withdraw the caveat in exchange for APGL Palm Beach agreeing to deposit \$3,000,000 of the sale proceeds of the Project in the trust account of K&L Gates pending resolution of all disputes. The agreement is documented in a deed.⁵⁵ The terms of that deed are not in dispute.

[35] On 30 October 2018, APGL Palm Beach commenced this proceeding.

The Development Agreement

[36] The Development Agreement is a commercial contract and is to be construed in accordance with the principles identified in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*⁵⁶ and *Electricity Generation Corporation v Woodside Energy Ltd*, where French CJ, Hayne, Crennan and Kiefel JJ observed:⁵⁷

“The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding ‘of the genesis of the transaction, the background, the context [and] the market in which the parties are operating’. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption ‘that the parties ... intended to produce a commercial result’. A commercial contract is to be construed so as to avoid it ‘making commercial nonsense or working commercial inconvenience’.
[footnotes omitted]”

[37] Clause 1 contains the following relevant definitions:

- “Development Costs” means all actual, anticipated and contingent costs of development including but not limited to Land Costs, commissions, leasing incentives, the cost of surrender of existing leases, application fees, the cost of negotiation or appealing the terms and conditions of approval, the cost of any court action against the Council or any submitter objecting to the development, the cost of any settlement with a submitter that might be negotiated including the purchase price together with any acquisitions costs paid to buy property in the vicinity owned by any submitter; the cost of

⁵⁴ Statement of claim paragraph 20, admitted by defence paragraph 7.

⁵⁵ Document 2 TB.A.65.

⁵⁶ (2015) 256 CLR 104, 116-117 [46]-[52] (French CJ, Nettle and Gordon JJ).

⁵⁷ (2014) 251 CLR 640, 656-657 [35].

obtaining and complying with local authority conditions of approval, the cost of obtaining and complying with the conditions of approval of all referral agencies and other statutory authorities, statutory fees and contributions, infrastructure charges, building approval costs, the cost of private certifiers, the cost of any necessary licences or permits, legal fees, construction costs, project management fees, consultants fees, town planning, bank interest, financing, selling costs, marketing, taxes (including company income tax at the prevailing corporate tax rate in respect of the Income from the Project assuming the Project is the only Project being undertaken by [APGL Palm Beach]), rates, GST (assuming the Project is the only Project being undertaken by [APGL Palm Beach]), land tax, any Project Introduction and Management Fee, the Development and Financial Management Fee, the cost of management of the existing retail complex, commissions on collection of rents, the cost of management, insurance, cleaning, maintenance, repair and day to day running costs of the existing complex, the cost of demolition of any improvements on the Land, the cost of any damages or liability arising out of litigation in respect of the Project (excluding litigation between the parties arising as a result of default by either party), the cost of reconfiguration of the Land into volumetric and strata titles and the establishment of the Body Corporate, the cost of any loss or expense damage or destruction which is not covered by insurance, and any other costs of development or maintenance and preservation of the Land, any other expenditure incurred by [APGL Palm Beach] or LCL as permitted by this Agreement in connection with the Project and the PBD Security Costs. For the purpose of clarification the Total Development Cost will include the PBD Initial Costs and the [APGL Palm Beach] Initial Costs but specifically excludes any administration or other costs incurred internally by [APGL Palm Beach] LCL or PBD and any costs or other amounts whatsoever payable to any party related to or associated with [APGL Palm Beach] or LCL unless those costs are specifically authorised by this Agreement or otherwise in writing by PBD.

- “Initial Estimated Equity Required” means the total initial estimated amount of cash as calculated by LCL to be contributed towards the acquisition of the Land that is not to be funded by the Project Financiers.
- “Losses” means the amount (if any) by which Total Development Costs exceeds Net Proceeds on the Sale of the Project.
- “Net Proceeds on the Sale of the Project” means the aggregate of:-
 - (a) net proceeds after selling costs and GST on the sale of all property associated with the Project; and
 - (b) all net rental and other income received during the course of the Project.
- “PBD Loan Proportion” has the meaning given in Schedule 4.

[38] Clause 1 of Schedule 4 sets out a formula by which the PBD Loan Proportion is calculated:

$$\begin{array}{l} \text{PBD Loan Proportion} \\ \text{(expressed as a percentage)} \end{array} = \frac{\text{PBD Loan Contribution}}{\text{Total Equity Required for the Project}} \times 100\%$$

- [39] “PBD Loan Contribution” is defined as the aggregate of:-
- (a) the amount contributed by PBD to the Initial Estimated Equity Required; and
 - (b) the PBD Deposit expended by Leyshon Developments; and
 - (c) any further advance made by PBD.
- [40] Clause 2 of Schedule 4 states that the Return on the PBD Loan Contribution to which PBD is entitled is determined by another formula:

$$\text{The Return} = \text{PBD Loan Proportion (expressed as a percentage)} \times \text{Cash Surplus}$$

- [41] Clause 4 of Schedule 4 states, relevantly:

“The Return is contingent in that it is only payable, in part or in whole, to the extent that a Cash Surplus exists.”

- [42] “Cash Surplus” is defined in cl 1 of the Development Agreement to mean “the amount by which the Net Proceeds on the Sale of the Project exceeds Total Development Costs and the retention amount provided for in clause 10”.

- [43] “Project” or “the Project” means the development of strata title apartments buildings and a retail commercial complex with associated car parking on the Land, the reconfiguration of the land into volumetric and strata titles, the leasing and sale of the separate allotments all in accordance with the Development Plans.

- [44] Clause 2 of the Development Agreement deals with Funding Contribution Allocation and Return and provides:

“2.1 Initial Contribution

PBD must at the settlement of the acquisition of the Land and as a precondition to the commencement of this Agreement, make available to [APGL Palm Beach] the proportion set out in Item 5 of Schedule 1 of this Agreement of the Initial Estimated Equity Required. In practice, the advance will be set off against the balance of the purchase price owing by [APGL Palm Beach] to PBD in its own capacity and in its capacity as trustee.

2.2 PBD Deposit

PBD will at settlement of the acquisition of the Land and as a pre-condition to the commencement of this Agreement, deposit the PBD Deposit into the trust account of the Trustee to be held by the Trustee in trust and applied subject to the terms of this Agreement in accordance with directions received from LCL as to the distribution of the PBD Deposit.

2.3 Investment of PBD Deposit

- (a) The PBD Deposit paid to the Trustee under Clause 2.2 will be held by the Trustee for the parties and applied by the Trustee in accordance with Clause 2.2

- (b) The PBD Deposit paid to the Trustee will be invested by the Trustee in an interest bearing account or deposit in the name of the Trustee with the National Australia Bank upon terms which permit the deposit to be available on thirty (30) days notice.
- (c) Interest earned on the PBD Deposit will be paid to PBD periodically as and when it is earned.
- (d) In the absence of any misappropriation by the Trustee, the Trustee will not be responsible for any loss occasioned by the investment of the PBD Deposit and the risk of any loss will be borne by the party ultimately entitled to the PBD Deposit.

2.4 Application of PBD Deposits

- (a) When [APGL Palm Beach] requires further funds to pay Development Costs the parties authorise the Trustee to pay [APGL Palm Beach] from the PBD Deposit an amount to ensure the existing PBD Loan Proportion is maintained with reference to the Total Equity Required for the Project; and
- (b) The Trustee is not authorised to distribute any of the PBD Deposit until such time as [APGL Palm Beach] confirms to the Trustee in writing that [APGL Palm Beach] then holds and has immediately available for that purpose, the balance (over and above the amount being contributed by PBD) of the Total Equity Required for the Project at that point in time.
- (c) This method for the drawdown of the Equity Deposit will continue during the course of the Project until such time as the PBD Deposit has been applied to Development Costs.

2.5 Procedure following application of Initial Estimated Equity Required and the PBD Deposit

- (a) When the PBD Loan Contribution has reached \$3,000,000.00, [APGL Palm Beach] may request further loan contributions from PBD the amount of which is to be calculated to ensure the existing PBD Loan Proportion is maintained with reference to the Total Equity Required for the Project.
- (b) PBD may, but is not required to provide further loan contributions.
- (c) [APGL Palm Beach] and/or LCL will provide PBD with as much notice as reasonably possible (and in any event no less than 30 days) with respect to any further loan contributions to be requested from PBD.

- (d) The PBD Loan Proportion will be diluted by application of the formula in Item 1 of Schedule 4 whenever further calls on equity are made in circumstances where the contribution from PBD is less than the then existing PBD Loan Proportion.
- (e) [APGL Palm Beach] will provide or procure any amount of the Total Equity Required for the Project not contributed by PBD in accordance with this clause.

2.6 Loan Funds

The PBD Loan Contribution will be paid by way of loan to [APGL Palm Beach].

2.7 Repayment of PBD Loan Contribution

Repayment of the PBD Loan Contribution will be made from the Net Proceeds on the Sale of the Project as set out in Clause 11.1.

2.8 The Return

The Return payable to PBD will be calculated in accordance with Schedule 4 of this Agreement and paid from the Net Proceeds on the Sale of the Project as set out in clause 11.1 and in accordance with the requirements of Schedule 4.

2.9 Payments of Return in Advance

[APGL Palm Beach] may in its discretion make advance payments of the Return to PBD as a loan repayable on demand and/or set off against future distributions of the Return if PBD is entitled to future distributions of the Return.

2.10 Fundamental Breach By PBD

The failure of PBD to provide [APGL Palm Beach] with the percentage set out in Item 5 of Schedule 1 of the Initial Estimated Equity Required or the PBD Deposit will be a fundamental breach of this Agreement entitling [APGL Palm Beach] to terminate this Agreement and seek alternative funding. In such event the PBD entitlement to the Return will cease and [APGL Palm Beach] will be entitled to claim against PBD for all damages, costs, expenses and Losses incurred by [APGL Palm Beach] consequent upon the breach by PBD of its obligations under this Agreement.

2.11 Fundamental Breach by [APGL Palm Beach]

The failure of [APGL Palm Beach] to make available the balance of the Total Equity Required for the Project as and when required is a fundamental breach of this Agreement which, in addition to any other rights or law accruing to PBD, entitles PBD to:-

- (a) make a demand for payment of the PBD Loan Contribution; and
- (b) for it to be paid within a period of 90 days.”

[45] Clause 3 deals with Project Objectives Risks and Returns and provides:

“3.1 Project Objectives

The Project must be carried out in accordance with the Project Objectives.

3.2 Risk and Return for PBD

- (a) This Agreement entitles PBD to the Return.
- (b) To achieve the Return, PBD must contribute the PBD Loan Contribution to [APGL Palm Beach].
- (c) Subject to Clauses 3.3 and 3.4, the PBD Loan Contribution and all additional loan contributions to [APGL Palm Beach] are contributed to the Project and may be used to meet Losses incurred in the Project.
- (d) [APGL Palm Beach] assumes the risks associated with the Development Works and the Project subject to a right of recourse to recover the PBD Loan Proportion of any Losses from the PBD Loan Contribution.

3.3 Non Recourse

The Project is non recourse to PBD and the liability for Losses associated with the Project is limited to the PBD Loan Proportion of any Losses with a maximum liability not to exceed the aggregate of the PBD Loan Contribution and any distribution of Cash Surplus to PBD.

3.4 Indemnity

PBD indemnifies [APGL Palm Beach] for a proportionate amount equal to the PBD Loan Proportion of Losses incurred in the course of the Project to a maximum liability not to exceed the aggregate of the PBD Loan Contribution and any distribution of Cash Surplus to PBD.”

[46] The “Project Objectives” are set out in Schedule 2 as follows:

- “1. To maximise Cash Surplus.
- 2. To maximise the Return on equity.
- 3. To maximise the mortgage debt on terms acceptable to LCL.
- 4. To assess fully the various alternatives for the development of the Project and make a decision as to whether the application to the Council should be for:-

- (a) a fully compliant code assessable development for a two stage retail, commercial and residential apartment complex; or
 - (b) a development of greater size or density that would require impact assessment and open up the opportunity for third party submissions.
5. To comply with Leyshon core values of excellence in customer service, the creation of quality products, honesty, integrity and professionalism in all endeavours.
 6. To brand the Project as a Leyshon Project.
 7. To sell all components of the Project as soon as reasonably possible on reasonable terms.”

[47] Clause 4.1 deals with the appointment of the development manager:

“4.1 **Appointment of Development Manager**

LCL will manage, co-ordinate or carry out the Development Works necessary for the implementation and completion of the Project in accordance with the terms of this Agreement and the Project Objectives. LCL warrants that it has and will exercise the skill, experience and expertise to manage, co-ordinate or carry out the Development Works to meet the Project Objectives. LCL will continue to carry out the Development Works until the completion of the Project.”

[48] The duties of the development manager are set out in cl 4.3:

“4.3 **Duties of the Development Manager**

LCL will at all appropriate times use its experience and exercise such supervision of the Project as may be necessary to enable the Project to be completed with all expedition in accordance with the Project Objectives. LCL will undertake and manage the day-to-day supervision and management of the Project including but not limiting the generality of the foregoing the tasks more particularly set out in Schedule 3.”

[49] Clause 5 concerns project funding. Clause 5.1 states:

“5.1 LCL will use its best endeavours to arrange for Project funding from the Project Financiers on the following terms:

- (a) a sum which when added to the Initial Estimated Equity Required is sufficient to acquire the Land and pay all costs of acquisition;
- (b) such further sums as may be required by LCL during the course of the Project for Development Works including construction of the Project;

- (c) Project funding for acquisition to be available by the date of settlement of the Land;
- (d) no guarantees required from the directors of LCL or [APGL Palm Beach];
- (e) Project funding is to be secured by mortgage or mortgages over the Land to be given by [APGL Palm Beach];
- (f) Project funding is to be on a non-recourse basis, so that the liability of [APGL Palm Beach] to the Project Financiers is limited to the Land and the Project;
- (g) save as aforesaid none of the parties will be obliged to offer additional collateral security for Project funding

or on such other terms as LCL may determine having regard to the Project Objectives (hereinafter called ‘the Project Funding’).”

[50] Clause 6.2 states:

“6.2 Nothing in this Agreement shall be considered or interpreted as constituting the relationship of the parties as a joint venture, a partnership, association or other relationship in which either of the parties may be liable generally for the acts or omissions of the other nor shall anything in this Agreement be considered or interpreted as constituting either party the general agent or any representative of the other.”

[51] Clause 7 deals with the commencement and conditions precedent with cl 7.1 providing:

“This Agreement will, subject to clause 7.2 take effect as and from the Commencement Date and shall continue for the Term unless terminated pursuant to clause 8.”

[52] Clause 11 deals with the distribution of proceeds on ultimate sale. Clause 11.1 states:

“11.1 The parties agree that the Net Proceeds on the Sale of the Project will to the extent there are funds available be distributed in the following order:

- (a) firstly, in payment of any amounts due and payable to discharge any mortgages to the Project Financiers which affect the title of the Project and which secure borrowings (if any);
- (b) secondly, in payment of any outstanding Total Development Costs including the Development and Financial Management Fee;
- (c) thirdly, for [APGL Palm Beach] to hold as the retention referred to in clause 10;

- (d) fourthly, in repayment of the PBD Loan Contribution on a pro rata basis where PBD receives that proportion of available Net Proceeds on the Sale of the Project which is equal to the PBD Loan Proportion; and
- (e) fifthly, to pay the Return to PBD.”

APGL Palm Beach’s Case

- [53] APGL Palm Beach asserts that as at 30 June 2018 the Total Development Costs of the Project exceeded the Net Proceeds on the Sale of the Project by approximately \$26,000,000. On APGL Palm Beach’s case, the Total Development Costs were \$101,251,665 and the Net Proceeds on the Sale of the Project were \$75,249,940.
- [54] As there was approximately a \$26 million loss on the Project, APGL Palm Beach’s primary case is that pursuant to cl 11.1 of the Development Agreement there are no Net Proceeds on the Sale of the Project after payment of the Total Development Costs and accordingly there are no funds available to be distributed to PBD.

PBD’s Case

- [55] As a general observation, PBD does not generally challenge the amounts of \$101,413,761 and \$75,249,940, but rather asserts that these amounts do not represent either the Total Development Costs or Net Proceeds on the Sale of the Project.
- [56] PBD’s counterclaim raises a number of contentions. Eight contentions are identified in PBD’s written submissions, together with an additional contention that APGL Palm Beach breached the Development Agreement by not completing the Project. These nine contentions may, in my view, be reduced to the four contentions identified in the written submissions of APGL Palm Beach as follows:
 - (a) the failure of APGL Palm Beach to make available the balance of the Total Equity Required for the Project as and when required constituted a fundamental breach of the Development Agreement, which entitles PBD to demand repayment of the PBD loan contribution of \$3 million (**the failure to fund issue**);
 - (b) PBD is entitled to payment of some portion of the sale proceeds of \$16,175,000 from the sale of the remaining parts of the Project in or about December 2017 in priority to APGL Palm Beach (**the priority dispute issue**);
 - (c) the true figure of the PBD loan proportion (expressed as a percentage) is 6.17%⁵⁸ (**the PBD Loan Proportion issue**);
 - (d) by operation of cll 3.2(d) and 3.3 of the Development Agreement⁵⁹ PBD’s liability under the Development Agreement in respect of Losses is no greater than \$1,604,306 and therefore it should receive from the retained sum of

⁵⁸ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraph 52.

⁵⁹ See [45] above.

\$3,000,000 the sum of \$1,395,694⁶⁰ (**the PBD Loan Proportion refund issue**).

The failure to fund issue

- [57] PBD did not provide any written submissions in relation to this issue. It was addressed briefly in oral submissions.
- [58] PBD's pleaded case is that by reference to cll 1, 3.1, Schedule 2 and cl 2.5(e) of the Development Agreement, APGL Palm Beach was contractually obligated to carry out the Project in accordance with the Development Plans and the Project Objectives. It was also obliged to provide or procure any amount of the Total Equity Required for the Project not contributed by PBD in accordance with cl 2.5.⁶¹
- [59] Further, by cl 7.1⁶² the Development Agreement was to take effect from the Commencement Date and to continue for the Term unless terminated under cl 8. By cl 1, "Term" was defined to mean the period from the Commencement Date to the completion of the sale of the last part of the Project.
- [60] As no right to terminate under cl 8 arose and as PBD was never requested to provide any further loan contribution for the purposes of cl 2.5, APGL Palm Beach fundamentally breached the Development Agreement by failing to provide or make available the balance of the Total Equity Required. As a result, PBD claims damages for breach of the Development Agreement in the amount of \$3,000,000 essentially because had the Project been completed, PBD would have been entitled to make a demand for payment of the PBD Loan Contribution.
- [61] PBD's pleaded case fails at every turn.
- [62] Even if PBD was able to establish the pleaded "fundamental breach"⁶³ by APGL Palm Beach of the Development Agreement, there is no allegation that the breach caused the alleged loss of \$3 million. Mr Sheahan of counsel, who appeared for PBD, conceded that there is no pleaded basis for establishing that the alleged breach caused the loss.⁶⁴ As pleaded, the alleged loss constitutes a repayment of the entire PBD Loan Contribution from the Net Proceeds on the Sale of the Project in accordance with cl 11.1 of the Development Agreement.⁶⁵ A fundamental difficulty is that PBD would only be entitled to such a distribution "to the extent that there are funds available".⁶⁶ The meaning of this phrase is considered in detail below, however, suffice it to say that PBD has neither pleaded nor sought to establish by any evidence that had the Project, including Stage 2, been completed there would have been any funds available. The Court has no basis at all to assess PBD's loss of

⁶⁰ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraphs 48-53.

⁶¹ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraphs 37-41.

⁶² See [49] above.

⁶³ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraph 42A.

⁶⁴ Transcript of Proceedings on 17 October 2019, 4-27 line 47.

⁶⁵ See [52] above.

⁶⁶ Clause 11.1; see [52] above.

a commercial opportunity to have the PBD loan contribution repaid had the Project been completed as envisaged.⁶⁷

- [63] While PBD’s claim for breach wholly fails for this reason alone, it also fails because PBD has been unable to establish the pleaded breaches.
- [64] The first breach pleaded is of “the requirement to carry out the development of the Land in accordance with the Development Plans”.⁶⁸ I accept the submission of APGL Palm Beach that there is no clause in the Development Agreement which contains words to this effect. Further, even if there were such an obligation, it could not be equated to a requirement to complete Stages 1 and 2 of the Project “come what may”.⁶⁹
- [65] The second alleged breach is of the “requirement to carry out the development of the Land in accordance with the Project Objectives”.⁷⁰ Clause 3.1 merely required the Project to be carried out in accordance with the “Project Objectives”. The clause cannot be construed as requiring APGL Palm Beach to complete the Project irrespective of the circumstances. Clause 3.1 does not in terms impose any obligation upon APGL Palm Beach. To the extent there is any obligation on any party to the Development Agreement to carry out the Development Works, such an obligation rested with LCL pursuant to cll 4.1, 4.2, 4.3 and 4.5.⁷¹ Clause 4.5 expressly required LCL in performing and providing services and work required in terms of the Development Agreement to “use its best endeavours exercising due skill and judgment in the performance of its obligations under this Agreement to secure the completion of the project in accordance with the project objectives at the earliest possible time”. LCL is not a party to the present proceedings and there is no pleading by PBD alleging any breach of cll 4.1, 4.2, 4.3 or 4.5 of the Development Agreement.
- [66] The third alleged breach is that the sale of the remaining parts of the Project by APGL Palm Beach constituted a wrongful constructive termination of the Development Agreement by reason that it was not a termination permitted under the Development Agreement’s terms.⁷² I have already referred above to the definition of the word “Term” in cl 1 of the Development Agreement. The Development Agreement was to terminate on the completion of the sale of the last part of the Project. As correctly submitted by APGL Palm Beach:⁷³

“The Development Agreement was therefore validly and lawfully concluded upon the sale of the project by the plaintiff, because that is what clause 7.1 contemplated that the Term of the Agreement would be; there was no ‘wrongful constructive termination’ of the

⁶⁷ *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2018] 2 Qd R 584, 587-588 [13] (P McMurdo JA, Philippides JA and Boddice J agreeing).

⁶⁸ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraph 41(a).

⁶⁹ Plaintiff’s Final Trial Submissions filed 17 October 2019, paragraph 11.

⁷⁰ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraph 41(b).

⁷¹ See [47]-[48] above.

⁷² Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraph 41(c).

⁷³ Plaintiff’s Final Trial Submissions filed 17 October 2019, paragraph 25.

Development Agreement by reason only of the sale of the project, given the wording of clause 7.1 and the definition of the word Term.”

- [67] The fourth alleged breach is of cl 2.5(e) of the Development Agreement.⁷⁴ Clause 2.5(e) required APGL Palm Beach to provide or procure any amount of the Total Equity Required for the Project that was not contributed by PBD in accordance with cl 2.5. Clause 2.5 is set out in full in paragraph [43] above. I accept, as submitted by APGL Palm Beach, cl 2.5(e) has nothing to do with an alleged obligation on the part of APGL Palm Beach to complete the Project come what may, nor does it have anything to do with the sale of the Project.⁷⁵ Further, there is no evidence before the Court that cl 2.5(e) has been triggered. There is, for example, no evidence that APGL Palm Beach ever requested PBD to make a further loan contribution, nor is there any evidence that PBD failed to comply with any such request. It follows, therefore, that cl 2.5(e) having not been triggered, there was never a requirement on the part of APGL Palm Beach to provide or procure any amount of the Total Equity Required for the Project not contributed by PBD.⁷⁶
- [68] PBD has failed to establish any of the alleged breaches by APGL Palm Beach.

The priority dispute issue

- [69] PBD asserts that it is entitled to payment of the whole or some proportion of the PBD Loan Contribution. The relevant clauses of the Development Agreement for consideration are cll 2.7, 3.2 and 11.1, which I have set out above. Prior to considering these clauses, it is convenient to outline the evidence relevant to APGL Palm Beach’s identification of the Total Development Costs, the Net Proceeds on the Sale of the Project together with the evidence that supports the finding made above that the advances made by APGL Parent Co to APGL Palm Beach were loans for the payment of Development Costs.
- [70] The starting point is the evidence of Mr McMahon. He has been a director of APGL Palm Beach since it was registered in 2005. The person who was originally involved in the Project was Mr Rundle whose position became redundant in November 2012. Thereafter Mr McMahon became more involved in the Project. It was Mr McMahon who caused a spreadsheet to be prepared that records the income and cost from the inception of the Project to 30 June 2018. According to Mr McMahon, as at 30 June 2018, the Project had recorded cumulative losses of \$26.163 million.⁷⁷ The spreadsheet is entitled “APGL (Palm Beach) Pty Ltd Income Statement Project To Date 30 June 2018”.⁷⁸ This document was referred to in the evidence as the “Master Income Statement”. The document deals with the years ending 30 June 2005 through to 30 June 2018. It lists sales income, other income and expenses together with operating expenses. The cumulative profit/loss before tax entry shows a overall loss of \$26,163,822. The last 12 rows on the

⁷⁴ Amended Defence and Further Amended Counterclaim of the Defendant filed 18 October 2019, paragraph 41(d).

⁷⁵ Plaintiff’s Final Trial Submissions filed 17 October 2019, paragraph 30.

⁷⁶ PBD’s evidence is in fact to the contrary: Exhibit 16, affidavit of James Rohan Whitelaw filed 26 September 2019, paragraph 20.

⁷⁷ Exhibit 3, exhibit GMM-08 to the affidavit of Geoffrey Michael McMahon filed 9 November 2018; see also Exhibit 1, Trial Bundle, tab 77, page D1.

⁷⁸ Exhibit 3, exhibit GMM-08 to the affidavit of Geoffrey Michael McMahon filed 9 November 2018.

spreadsheet contains entries including “APGF equity”, “Total APGF equity” and “PBD ‘loan contribution’”. There are two further rows for “PBD ‘Loan Contribution’ Proportion (%)” and “PBD ‘Loan Contribution’ Share of (Return)/loss”. Mr McMahon explained these entries as follows:⁷⁹

“The document described as the Master Income Statement is in fact two spreadsheets, one of which is described as an income statement and the other is described as a balance sheet. On the master income statement spreadsheet, below the ‘Total (Profit)/Loss after tax’ row, there are an additional 12 rows of figures that, to the best of my recollection were added into that spreadsheet as being my understanding in consultation with Mr Taylor, of how certain terms in the Development Agreement might be calculated. Having now had the benefit of legal advice (in respect of which I do not waive any privilege) and reviewing the Development Agreement more closely, I accept that those calculations, to the extent that they are my calculations of what the terms might mean, appear to be incorrect, as a matter of a proper interpretation of the Development Agreement. I accept that this is a matter for this Court and not for me.”

- [71] Mr McMahon recalls that in or about 2008 Mr Rundle said words to the effect that APGL Palm Beach’s initial projected equity contribution was going to be insufficient to cover the projected cost of Stage 1 of the Project, such that additional funding from APGL Parent Co would be required.⁸⁰ The funding provided by APGL Parent Co over the course of the Project is, according to Mr McMahon, recorded in a spreadsheet referred to as “APGL (Palm Beach) Pty Ltd Balance Sheet Project to Date 30 June 2018” under account codes 32140 and 41140.⁸¹ Mr McMahon stated that from the start of the Project, APGL Palm Beach sought to obtain as much funding as possible from St George Bank in order to fund the Project. Where such funding could not be obtained from St George Bank, it was obtained from APGL Parent Co. No interest has ever been charged by APGL Parent Co to APGL Palm Beach, nor was any security sought. According to Mr McMahon, it was effectively a come and go facility with the funds at call.⁸² Mr McMahon further referred to an extract of the APGL loan account in the general ledger from 2005 to 31 December 2017. This loan account details loans from APGL Parent Co to APGL Palm Beach in respect of the Project. For example, it records that APGL Parent Co advanced \$3,118,461 on 27 May 2005 to finance the purchase of the land from PBD.⁸³
- [72] Mr McMahon explained in cross-examination that the reason these loans were not referred to in board reports was because no costs were charged against these loans.⁸⁴
- [73] Mr McMahon explained that the funds advanced by APGL Parent Co to APGL Palm Beach were only for the purpose of paying for costs of the Project and they were used for that purpose.⁸⁵ He explained that for the purposes of the Project

⁷⁹ Exhibit 5, affidavit of Geoffrey Michael McMahon filed 14 October 2019, paragraph 16.

⁸⁰ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 12.

⁸¹ Exhibit 4, affidavit of Geoffrey Michael McMahon filed 9 September 2019, paragraph 12.

⁸² Exhibit 5, affidavit of Geoffrey Michael McMahon filed 14 October 2019, paragraph 7.

⁸³ Exhibit 5, exhibit GMM-10 to the affidavit of Geoffrey Michael McMahon filed 14 October 2019.

⁸⁴ Transcript of Proceedings on 14 October 2019, 1-55 lines 9-24.

⁸⁵ Exhibit 5, affidavit of Geoffrey Michael McMahon filed 14 October 2019, paragraph 8.

development costs were recorded in the Finance One system. For example, there would be a builder's invoice that would be inputted into the Finance One system and it would originally go into the work in progress ledger and would not be expensed until it was appropriate to do so according to accounting standards.⁸⁶

- [74] Mr McMahon is an experienced managing director, having degrees in both commerce and economics. He was, in my view, a credible witness. I accept his evidence that the nature of the advances from APGL Parent Co to APGL Palm Beach were loans and not in the nature of contributions of equity. I also accept that these loans, with one exception which I deal with below, were only for the purpose of paying the development costs of the Project.
- [75] Mr McMahon's evidence is supported by the evidence of Mr Taylor who was the Chief Financial Officer of APGL Palm Beach. Mr Taylor is familiar with the Finance One system. He describes it as a sophisticated program that has the capability of accounting for multiple property developments and multiple companies within a group.⁸⁷ Within the Finance One system a chart of accounts was established for APGL Palm Beach which included a general ledger and relevant subsidiary ledgers. One specific subsidiary ledger was described as the "WIP" ledger which was established as a perpetual ledger within the plaintiff's accounting system as it recorded all transactions from the inception of the Project in 2005 to 30 June 2018. The WIP subsidiary ledger contains a detailed breakdown of cost items applicable to the Project.⁸⁸ In examining the accounts, Mr Taylor identified that some of the legal costs expensed for the years ending 30 June 2016, 30 June 2017 and 30 June 2018 were not in fact Development Costs as defined by the Development Agreement as they related to the present dispute with PBD. These legal costs totalled approximately \$162,096 and have been taken off the "Total Development Costs" for the purposes of ascertaining the "cash surplus" relevant for PBD. As correctly identified by Mr Taylor, however, given the overall shortfall of some \$26,000,000 these legal costs are immaterial to the overall outcome. After deducting the sum of \$162,096 for non-allowable legal costs, the Total Development Costs according to Mr Taylor are still in the region of \$101,000,000. As the Net Proceeds of the Sale of the Project are \$75,249,940, there remains an overall loss of some \$26,000,000.⁸⁹ From an analysis of the Finance One system, Mr Taylor, as Chief Financial Officer, is able to affirm that the advances from APGL Parent Co to APGL Palm Beach have at all times been treated as loans for the payment of Development Costs and not as contributions of equity.⁹⁰
- [76] In oral evidence, Mr Taylor confirmed that those items identified in the Finance One system as Development Costs "were certainly costs associated with the development of the project".⁹¹ Mr Taylor also, consistently with Mr McMahon's evidence, explained that the last 12 rows on the Master Income Statement did not reflect the accounting records in the Finance One system, but rather constituted a

⁸⁶ Transcript of Proceedings on 14 October 2019, 1-55 lines 38-45.

⁸⁷ Exhibit 10, affidavit of Michael James Taylor filed 9 September 2019, paragraph 7.

⁸⁸ Exhibit 10, affidavit of Michael James Taylor filed 9 September 2019, paragraph 8.

⁸⁹ Exhibit 10, affidavit of Michael James Taylor filed 9 September 2019, paragraphs 24 and 25.

⁹⁰ Exhibit 11, affidavit of Michael James Taylor filed 14 October 2019, paragraphs 3-5; exhibit 12, affidavit of Michael James Taylor filed 15 October 2019, paragraph 5.

⁹¹ Transcript of Proceedings on 15 October 2019 2-37 lines 27-29.

separate exercise conducted by him and Mr McMahon.⁹² In cross-examination, Mr Taylor expressly rejected any notion that the APGL Parent Co loans constituted an injection of equity into the Project.⁹³ Mr Taylor stated that the money borrowed from APGL Parent Co was for the purposes of paying costs that APGL Palm Beach incurred in the course of the Project.⁹⁴

[77] Mr Taylor also impressed me as a witness of credit and I accept his evidence that the advances from APGL Parent Co to APGL Palm Beach constituted loans for the purposes of payment of Development Costs.

[78] The above finding of fact that the advances from APGL Parent Co to APGL Palm Beach were loans for the purposes of paying development costs does not resolve whether the sum of \$75,249,940 constitutes the Net Proceeds on the Sale of the Project and the sum of approximately \$101,000,000 constitutes Total Development Costs in accordance with the Development Agreement.

[79] APGL Palm Beach identifies the following sub-issues:⁹⁵

- (i) What are the Net Proceeds on the Sale of the Project?
- (ii) To what extent are those Net Proceeds on the Sale of the Project “funds available”?
- (iii) Assuming that there are “funds available”, what amount is caught by cl 11.1(b) of the Development Agreement?
- (iv) If the amount caught by cl 11.1(b) is nil, what is the entitlement under cl 11.1(d) of the Development Agreement?

(i) What are the Net Proceeds on the Sale of the Project?

[80] It is not in dispute that in or about December 2017 APGL Palm Beach received the sum of \$16,175,000 (together with rent and other income). Of this sum \$13,400,000 was repaid to APGL Parent Co on or about 21 December 2017.⁹⁶ PBD asserts that the sum of \$16,175,000 received by APGL Palm Beach in or about December 2017 (together with rent and other income in the sum of \$324,342) constitutes the Net Proceeds on the Sale of the Project that were “funds available to be distributed” for the purposes of cl 11.1.⁹⁷ APGL Palm Beach denies this, asserting that the Net Proceeds on the Sale of the Project were \$75,249,940.⁹⁸

[81] PBD submits that by reference to the plain meaning of the words “funds available (to) be distributed” APGL Palm Beach upon receipt of the \$16,175,000 had funds which were available for distribution. PBD submits:⁹⁹

⁹² Transcript of Proceedings on 15 October 2019 2-40 lines 15-34, 2-41 lines 37-45 and 2-42 lines 16-20.

⁹³ Transcript of Proceedings on 15 October 2019 2-40 lines 36-38.

⁹⁴ Transcript of Proceedings on 15 October 2019, 2-43 lines 33-37.

⁹⁵ Plaintiff’s Final Trial Submissions filed 17 October 2019, paragraph 68; these four sub-issues cover Issues 1, 2, 4 and 5 identified in the Defendant’s Outline of Submissions, paragraphs 25-69 and 76-83.

⁹⁶ Amended Reply and Further Amended Answer filed 17 October 2019, paragraph 30IC(c).

⁹⁷ Amended Defence and Further Amended Counterclaim filed 18 October 2019, paragraph 30IB.

⁹⁸ Amended Reply and Further Amended Answer filed 17 October 2019, paragraph 30IB(d).

⁹⁹ Defendant’s Outline of Submissions filed 17 October 2019, paragraph 32.

“... There is no reason to equate the concept of ‘funds available’ to the concept of a ‘Cash Surplus’ as defined in clause 1 of the [Development Agreement]. That is defined as meaning, relevantly ‘the amount by which the Net Proceeds of Sale on the Sale of the Project exceeds Total Development Cost’.”

[82] PBD further submits that cl 11.1 should not be construed as requiring a threshold of a Cash Surplus in order for there to be a distribution of Net Proceeds on the Sale of the Project.¹⁰⁰ I do not accept these submissions. In my view, the submissions ignore the meaning given to “Net Proceeds on the Sale of the Project” by the Development Agreement.¹⁰¹ The definition in terms refers to “net proceeds after selling cost and GST on the sale of all property (emphasis added) associated with the Project” together with “all net rental and other income received during the course of the Project”. The proceeds of the sale of the remaining parts of the Project in December 2017 cannot be isolated from proceeds of the previous sales involving Stage 1 and the rental and other income received.

[83] By reference to Mr Taylor’s evidence outlined above, I find that the Net Proceeds on the Sale of the Project are \$75,249,940.

(ii) To what extent are those Net Proceeds on the Sale of the Project “funds available”?

[84] PBD’s reliance on the words in cl 11.1, namely “to the extent that there are funds available”, is misplaced.

[85] Construing the Development Agreement as a whole, those words are only referable to the funds that are available to be distributed after Total Development Costs have been taken into account. This construction is consistent with cl 11.1(b), which prioritises the payment of “any outstanding Total Development Costs”. Such outstanding costs are prioritised by cl 11.1 over any repayment of the PBD Loan Contribution. As correctly submitted by APGL Palm Beach:

“These words, ‘outstanding development costs’, obviously infer that Total Development Costs incurred to the date of the ultimate sale were intended to have already been accounted for and subtracted from the Net Proceeds on the Sale of the Project, before the distribution pursuant to cl 11.1(a) begun; that is why the word ‘outstanding’ is used.”¹⁰²

[86] According to the evidence of Mr McMahon and Mr Taylor, the Total Development Costs were \$101,251,665. It follows that the Total Development Costs were greater than the Net Proceeds on the Sale of the Project by \$26,001,725. It follows that there are no “funds available (to) be distributed” pursuant to cl 11.1 of the Development Agreement.

(iii) Assuming there are ‘funds available’, what amount is caught by cl 11.1(b) of the Development Agreement?

¹⁰⁰ Defendant’s Outline of Submissions filed 17 October 2019, paragraph 35.

¹⁰¹ This definition is set out in [37] above.

¹⁰² Plaintiff’s Final Trial Submissions filed 17 October 2019, paragraph 78.

- [87] This issue raises for consideration the meaning of “any outstanding Total Development Costs” in cl 11.1(b) of the Development Agreement. APGL Palm Beach pleads that on the proper construction of the Development Agreement the words “outstanding Total Development Costs” include all Development Costs still owing on the APGL Parent Co loan.¹⁰³ Alternatively, APGL Palm Beach pleads that all amounts owing by it to APGL Parent Co comprising the relevant loan are “financing” that is unpaid and therefore “outstanding”.¹⁰⁴ Part of the definition of “Development Costs” includes “financing”.
- [88] PBD asserts that the repayment made by APGL Palm Beach to APGL Parent Co are not “Development Costs” for the purposes of the Development Agreement. PBD further submits that the advances were not loans, but rather constitute APGL Palm Beach’s contributions of equity to the Project. I have already found above that the advances from APGL Parent Co to APGL Palm Beach were loans for the purposes of paying for Development Costs. Two further matters should be noted in relation to this finding. First, Mr Whitelaw, a director and secretary of PBD, ultimately accepted in cross-examination that the ledgers and balance sheet evidenced an inter-company loan account between APGL Parent Co and APGL Palm Beach.¹⁰⁵ The second observation is that PBD contends that the evidence of Mr Rundle that he understood the respective parties’ contributions to be equity in the Project should be preferred.¹⁰⁶ This contention cannot be accepted because Mr Rundle’s general understanding of the nature of the advances to APGL Palm Beach does not overcome the fact that the advances were contemporaneously recorded in the relevant ledgers and balance sheet as loans.
- [89] APGL Palm Beach will only be entitled to the retained \$3 million in priority to PBD if the repayment of the loans to APGL Parent Co are “in payment of any outstanding Total Development Costs” in accordance with cl 11.1(b). Clause 11.1(a), which gives priority to the payment of any amounts due and payable to discharge any mortgages to the Project Financiers, does not apply to these advances: no security was sought or obtained by APGL Parent Co in respect of the loans to APGL Palm Beach. The lengthy definition of “Development Costs” is set out at [37] above. The definition commences with wide words that, in my view, seek to capture all of the costs of development. Development costs “means all actual, anticipated and contingent costs of development including but not limited to”. The definition then identifies specific items either by reference to their actual nature or by reference to costs of a specified item. For example, “application fees”, “legal fees”, “project management fees”, “consultant fees”, “bank interest”, “financing” and “taxes” are identified as specified items, which is to be contrasted with items that are defined by reference to costs, for example, “the cost of surrender of existing leases”, “the cost of obtaining and complying with local authority conditions of approval”, “selling costs” and “the cost of management”. When construed in this way, the definition of “Development Costs” is not limited to the actual, anticipated or contingent cost of “financing”. The use of the words “but not limited to” in the introductory words to the definition of “Development Costs” does not support PBD’s submission that:

¹⁰³ Amended Reply and Further Amended Answer filed 17 October 2019, paragraph 30HA(c)(iv).

¹⁰⁴ Amended Reply and Further Amended Answer filed 17 October 2019, paragraph 30HA(c)(v).

¹⁰⁵ Transcript of Proceedings on 16 October 2019, 3-13 lines 9-35.

¹⁰⁶ Transcript of Proceedings on 15 October 2019 .2-54 line 40, 2-55 line 45 2-57 lines 30-452-58 lines1-30.

“Any moneys advanced to APGL Palm Beach from APGL Parent Co were not costs incurred, but funding to pay costs incurred.”¹⁰⁷

[90] I accept the submission of APGL Palm Beach that the introductory words to the definition would capture the repayment of amounts of finance owed. The definition is not in terms limited to the costs of financing. As correctly submitted by APGL Palm Beach:¹⁰⁸

“... This would be a strained and incorrect interpretation of these words for two reasons:

- (a) First, the relevant words do not say ‘the cost of financing’. Rather the only relevant word used is ‘financing’. In the plaintiff’s submission, this was obviously intended to mean that the repayment of financing was a Development Cost within the meaning of the Development Agreement. That interpretation makes sense because otherwise the situation would be that the repayment of loans, including to St George Bank, were not a Development Cost of the project – that is illogical; and
- (b) Second, immediately prior to the word ‘financing’ in the definition of Development Costs are the words ‘bank interest’. Accordingly, it is obvious that the definition was intended to capture both the repayment of financing and the payment of bank interest, and that both of these items were Development Costs.”

[91] Further, as a matter of commercial reality, it would be a surprising result that the repayment of inter-company loans for the purposes of paying Development Costs is not itself a Development Cost. This conclusion is not affected by the following words contained in the definition of “Development Costs”:

“... any other expenditure incurred by [APGL Palm Beach] or LCL as permitted by this Agreement in connection with the Project with the PBD Security Costs. For the purpose of clarification the Total Development Costs will include the PBD Initial Costs and the [APGL Palm Beach] Initial Costs but specifically excludes any administration or other costs incurred internally by [APGL Palm Beach] LCL or PBD and any costs or other amounts whatsoever payable to any party related to or associated with [APGL Palm Beach] or LCL unless those costs are specifically authorised by this Agreement or otherwise in writing by PBD.”

[92] This general exclusion seeks to exclude administration or other costs incurred internally by APGL Palm Beach and the other parties to the agreement. The reference is to “costs incurred internally” and does not in terms exclude from the definition of Development Costs “financing”.

(iv) If the amount caught by cl 11.1(b) is nil, what is the entitlement under cl 11.1(d) of the Development Agreement?

¹⁰⁷ Defendant’s Outline of Submissions filed 17 October 2019, paragraph 41.

¹⁰⁸ Plaintiff’s Final Trial Submissions filed 17 October 2019, paragraph 86(a)-(b).

[93] This issue may be dealt with briefly.

[94] PBD identifies its entitlement under cl 11.1(d) as follows:¹⁰⁹

“Using the available Net Proceeds on the Sale of the Project as contended for above of \$16,175,000 and the PBD Loan Proportion of 6.17%, PBD is entitled to a payment in distribution in accordance with cl 11.1 of \$1,017,525 as claimed by PBD.”

[95] I have already found that the Net Proceeds on the Sale of the Project is not \$16,499,342 as asserted by PBD, but rather \$75,249,940. As the Total Development Cost is approximately \$101,000,000, the Project incurred an overall loss of approximately \$26,001,725. Accordingly, there are no funds available to be distributed pursuant to cl 11.1(d). Its claim in this respect should therefore be dismissed.

[96] I accept Mr McMahon’s evidence that even with the repayment of \$13,400,000 to APGL Parent Co on 21 December 2017, the outstanding balance of the loan owed by APGL Palm Beach to APGL Parent Co is at least \$20,211,763.¹¹⁰ As this outstanding amount is captured by cl 11.1(b) as “outstanding Total Development Costs”, there are no funds available for the purposes of the repayment of the PBD Loan Contribution in accordance with cl 11.1(d).

The PBD Loan Proportion issue

[97] In my view, this issue is otiose. As far as cl 11 is concerned, the PBD Loan Proportion is a contractual mechanism used to calculate the repayment of the PBD Loan Contribution and the payment of the Return. However, there is to be no distribution under cl 11 because there are no funds available. The precise percentage of the PBD Loan Proportion is therefore academic in the present circumstances.

The PBD Loan Proportion refund issue

[98] PBD’s reliance on cll 3.2(d) and 3.3 is misplaced. Those clauses concern APGL Palm Beach’s right of recourse against PBD and PBD’s correlative liability to APGL Palm Beach. Clause 3.2(d) gives APGL Palm Beach a right to recover from the PBD Loan Contribution the PBD Loan Proportion of any Losses, that is, “the amount by which Total Development Costs exceeds Net Proceeds on the Sale of the Project”. Under cl 3.3, PBD’s liability for Losses is commensurate with the PBD Loan Proportion and in any event capped at the PBD Loan Contribution plus any distribution. By merely establishing the extent to which it is liable to APGL Palm Beach under cl 3.2(d), PBD is not entitled to the residue of the PBD Loan Contribution, as its pleading implicitly suggests. PBD can only receive a refund under cl 11: cl 2.7. There is to be no distribution under cl 11.

Disposition

¹⁰⁹ Defendant’s Outline of Submissions filed 17 October 2019, paragraph 75; Amended Defence and Further Amended Counterclaim filed 18 October 2019, paragraph 301.

¹¹⁰ Exhibit 5, affidavit of Geoffrey Michael McMahon filed 14 October 2019, paragraph 11.

1. It is declared that the plaintiff is entitled to the amount of \$3 million presently held in the trust account of K and L Gates.
2. The Court orders that the amount of \$3 million and any interest that has accrued on that amount be released from the Trust Account of K and L Gates to the plaintiff in accordance with cl 2(c) of the deed entered into on or around 9 June 2016.
3. The defendant's counterclaim is dismissed.
4. The Court will hear the parties as to costs.