SUPREME COURT OF QUEENSLAND

CITATION:	*Hamer & Anor v Parity Partners Pty Ltd* [2022] QSC 232
PARTIES:	**ADAM GLEN HAMER** (first applicant) **AND** **KATHRYN LISE HAMER** (second applicant) **AND** **KNIGHTSHALL PTY LTD (ACN 646 226 020)** (third applicant) **v** **PARITY PARTNERS PTY LTD** (respondent)
FILE NO/S:	5399 of 2022
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	25 October 2022
DELIVERED AT:	Brisbane
HEARING DATES:	13 May, 20 June, and 31 August 2022, with further written submissions supplied on 2 and 12 September 2022
JUDGE:	Freeburn J
ORDER:	**1. The application for the appointment of a receiver is dismissed.** **2. The parties be heard on the form of the orders and costs.**
CATCHWORDS:	PRACTICE AND PROCEDURE – REMOVAL OF RECEIVER – APPOINTMENT OF RECEIVER OF TRUST ASSETS AND UNDERTAKINGS - POWERS OF RECEIVER – where there is ongoing litigation whether trust assets in disarray or at risk – where the applicants alleges that the trustee is incompetent - where the applicants seek for a receiver to be appointed, without security, of all assets held or purportedly held by the present trustee – whether the trustee

is unfit to manage the trust – whether an independent and experienced receiver ought to be appointed to preserve the trust's assets pending the determination of the investors' rights and entitlements

Civil Proceedings Act 2011 (Cth), s 12

Australian Securities and Investment Commission v Cassimatis (No 8) [2016] FCA 1023, considered
Fordyce v Ryan [2017] 2 Qd R 240, considered
Martyniuk v King [2000] VSC 319, considered
Singh v Brisbane Sikh Temple (Gurdwara) Inc [2022] QSC 151, considered

COUNSEL: Mr G Handran KC and Mr MJ Downes (applicant)
Mr JW Peden KC and Mr DC Clarry (respondent)

SOLICITORS: Davey Associates (applicant)
RH Law (respondent)

REASONS

[1] The three applicants, Mr and Mrs Hamer and Knightshall Pty Ltd, are sophisticated or wholesale investors. In March 2021, they decided to invest in an unregistered managed investment scheme (the Fund). The object of the scheme was to acquire land at Beresfield in New South Wales and to fund the construction on that land of a cold store distribution facility. The objective was to lease the completed cold store to BDD Australia Pty Ltd, a company related to the Bega group (producers of Bega cheeses, Vegemite and Vitasoy products).

[2] Mr and Mrs Hamer invested $500,000 as trustees for their family trust. Knightshall Pty Ltd, as trustee of the Ian E Yeo Family Investment Trust, also invested $500,000. Various other investors contributed funds totalling approximately $3m.

[3] To say the least, the applicants are disappointed in their investment. They describe the project as a "*monumental failure*". They seek to remove the trustee of the Fund, Parity Partners Pty Ltd. On an interlocutory basis they seek to install a court appointed receiver in place of the trustee.

[4] It is common ground that the project has failed. Whilst land was acquired, and some construction was commenced, for various reasons the project cannot continue.

What remains to be done is to sell one of the two blocks of land (Lot 1) – one block already having been sold (Lot 2).

[5] Nevertheless, the applicants seek to place the winding up of the Fund under the control of a court appointed receiver in place of the trustee. The applicants put their case without any dilution:

> *Prima facie*, the trustee has: **demonstrated prolonged and inexcusable incompetence**; a patent inability to keep trust records which are true and correct; an unwillingness to get in trust property it contends was misappropriated; **appropriated funds** to a related party without apparent cause; failed to comply with production orders of this Court; **a deep and ongoing reluctance to share vital or timely information with beneficiaries**; a desire to prolong and **obstruct** any meeting of unitholders; and a willingness to **deal with property that is subject to an undertaking** given to this Court.[1]
>
> [footnotes omitted, emphasis added]

[6] In their outline the applicants said:

> The Fund is (and remains) in **jeopardy** so long the Respondent (**trustee**) controls it. Its sole director, Mr Garden, **is untrustworthy or incompetent, or both**; he (and therefore the trustee) is an **unsuitable character**.
>
> The Project has been a **monumental failure**. The trustee has resisted every attempt by the applicants and other unitholders to obtain information from trust accounts and trust documents. But **for their strenuous efforts they would remain in the dark**. The evidence they have forced to the surface establishes that, whilst the Fund was under Mr Garden's sole control, the trustee *inter alia*: (a) ignored the terms of the Fund; (b) was remiss in its core and fundamental duties; (c) was noncompliant and untruthful with the Court; (d) has and continues to mislead unitholders. Furthermore, many of Mr Garden's explanations stretch credulity too far.[2]
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> [footnotes omitted, emphasis added]

[7] In their more recent supplementary outline the applicants said:

> Despite the passage of time, the Fund remains in a state of disarray and in the hands of a trustee that represents a real and ongoing danger to the interests of the unitholders.[3]

[8] The application to remove the trustee is made by sophisticated investors who have made what they perceive to be a poor investment in an unregistered managed

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1 Applicants' Outline (filed 13 May 2022) at [3].
2 Applicants' Outline (dated 17 June 2022) at [2], [3].
3 Applicants' Supplementary Outline (31 August 2022) at [1].

investment scheme which is controlled by a trustee they no longer trust with their investment.

The Complaints

[9] The application started in the Applications List on 13 May 2022. It has occupied a number of hours since then. Mr Garden, the sole director of the respondent company was cross-examined.

[10] At the conclusion of the first hearing day on 13 May 2022, I asked the parties to, by way of a list, identify the misconduct alleged against the trustee, and the trustee's responses. That resulted in a list of 33 allegations of misconduct. There was little or no narrowing of the case so as to identify the real issues. An example is the last allegation of misconduct:

> Redacting bank statements to obscure payee of $10 on 31 August 2021 despite no units being issued in respect of that sum.
>
> Particulars
>
> There are no Units recorded in the Register.

[11] The response to that item is:

> The payment is not in respect of the issue of units but was made by a unitholder and the unitholder's identification has been redacted.

[12] It is unclear why an item with a substantive value of $10 was a basis for removal of a trustee, even if in combination with other complaints. Also obscured is any proper articulation of the precise allegation or the response to the allegation. For example, there is no explanation as to why the applicants were entitled to the identity of the payee for that sum. The assumption seems to be that the only valid basis for resisting disclosure is if units were issued.

[13] By the time of the last hearing day, 31 August 2022, the list of 33 complaints had expanded to 43 complaints. Thus, the court is asked to decide 43 separate issues of fact, on an interlocutory basis and based on affidavits which run to hundreds of pages.

The Legal Principles

[14] The applicants seek the appointment of a receiver pursuant to s 12(2) of the *Civil Proceedings Act* 2011 (Qld). Under that section the court has a discretion to appoint a receiver whenever it is just and convenient.

[15] Recently, in *Singh v Brisbane Sikh Temple (Gurdwara) Inc*[4] Applegarth J summarised the cautious approach to the exercise of the discretion:

(a) Before the jurisdiction to appoint a receiver is exercised, the court must be satisfied that the case in favour of appointment is strong.[5]

(b) The appointment of a receiver is a drastic remedy to be exercised with care and great caution.[6]

(c) Consistent with this approach, it has been said that "*no court will make such an order unless convinced of its necessity*".[7]

(d) This requires consideration of the adequacy and effectiveness of other remedies. The exercise of the jurisdiction to appoint a receiver rests upon the principle that no other remedy exists or is appropriate to protect the relevant right or interest of parties. In such a case, the court should intervene by the special remedy of a receiver.[8]

[16] And, the nature of the remedy was explained by Jackson J in *Fordyce v Ryan*:[9]

> It is trite that the court has wide reaching powers to appoint a receiver. The powers are sourced in the inherent power of the court and in statute. Section 12(1) *Civil Proceedings Act 2011* now contains the statutory power that "[t]he court may, at any stage of a proceeding, make an interlocutory order appointing a receiver if it considers it just or convenient".
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> However, the appointment of a receiver is made for a purpose, often to protect the property in dispute in a proceeding or to facilitate the sale and realisation of property for a particular purpose or for winding up of a partnership. In particular, the statutory power is recognised as interlocutory and not final in character. As is said in *Meagher Gummow and Lehane's Equity Doctrines and Remedies*, "[t]he appointment of a receiver by the court is necessarily an interim measure".

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4 [2022] QSC 151 at [21]-[24]. This was a case where the applicant sought, unsuccessfully, to have the court appoint a receiver to an association.

5 *National Australian Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 539 –541.

6 Ibid.

7 B*ernard Henricus Lamers (as trustee for the Ben and Debra Lamers Family Trust) v Arvind Pty Ltd [No 2]* [2019] WASC 491 at [13].

8 *McLean v McKinlay* [2004] WASC 2 at [35].

9 [2017] 2 Qd R 240 at [59], [60].

[17] There is wide jurisdiction to appoint a receiver where it is 'just or convenient' to do so.[10] The jurisdiction is commonly invoked where the property the subject of the action may be injuriously affected or dissipated before trial unless a receiver is appointed to preserve it. There are certain categories of cases where, in appropriate cases, the court will appoint a receiver.[11] One of those categories is to protect the assets of a deceased estate or a trust.[12] Such an appointment may be made where the trust is in a state of disarray.[13] As to that category of case Warren J said:[14]

> The general legal principle is that if misconduct, waste, or improper disposition of assets or that a trust is in a state of disarray can be shown, or if it appears that the trust property has been improperly managed, or is in danger of being lost or if it can be satisfactorily established that parties in a fiduciary position have been guilty of a breach of duty there is a sufficient foundation for the appointment of a receiver: Kerr on Receivers, 17th Ed at p13-p14. It is further observed in Kerr (at 5):
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> > "*Object of appointment*. A receiver can only be properly appointed for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons or person entitled thereto. The object sought by such appointment is therefore the safeguarding of property for the benefit of those entitled to it."
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> [footnotes omitted]

[18] However, where what is alleged against the trustee amounts merely to 'indiscretion', a receiver will be refused. But an appointment will be made against a trustee whose misconduct justifies removal. In such a case the appointment will often be made pending the removal and replacement of the trustee.[15] The question is whether there is a manifest abuse of trust, or a wasting of the property, or a habitual and speculative course of dealing which brings the property into danger.[16]

[19] It is not a proper ground for the appointment of a receiver that to do so would enhance the plaintiff's chances of recovery if successful in the action, although an

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10 See s 12(2) of the *Civil Proceedings Act 2011* (Qld). See also *University of Western Australia v Gray (No 6)* [2006] FCA 1825 (French J): "*The power of the court to appoint a receiver is statutory. It has its origins, however, as an equitable remedy…The class of circumstances in which such power may be exercised is not closed. Nor are the purposes for which a receiver may be appointed and the powers and conditions attaching to such an appointment*".

11 See the discussion in Meagher Gummow and Lehane's *Equity: Doctrines and Remedies* 5th edition at [29-050].

12 A court may appoint a receiver to a trust in order to protect trust property: *University of Western Australia v Gray (No 6)* [2006] FCA 1825 (French J).

13 *Martyniuk v King* [2000] VSC 319 at [14] (Warren J).

14 Ibid.

15 Ibid at [29-095].

16 Ibid.

order restraining the threatened disposal of assets may be made.[17] And, no authority suggests that the court's wide jurisdiction to appoint a receiver arises where the risks of the investment have materialised or where it can be established that the entity entrusted with the investment has performed poorly or incompetently. The court's role does not extend to underwriting investments, even where the investment vehicle is a unit trust.

[20] The applicants relied on *Parbery v QNI Metals Pty Ltd*[18] to argue that it was necessary for me to have regard to all of the evidence and to form a view on whether the applicants have sufficiently discharged their burden of establishing that there existed a sufficiently serious risk of the dissipation of assets. It was argued that assessment involved a qualitative evaluation of the evidence and the court's approach should be similar here. That is accepted, but the analogy with cases concerning interlocutory freezing orders is of rather limited assistance.[19] Nevertheless, in exercising its discretion, the court takes into account the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, and the rights of all the parties interested in the controversy and subject matter.[20]

[21] On that last point, it is worth noting that the applicants represent three of ten investors and roughly one-third of the invested capital.[21] The applicants submit that the three known investors support their application. As will be explained, a meeting of unitholders in June 2022 suggests that the majority do not support the appointment of a receiver.

[22] It is necessary to examine each of the 43 complaints. In doing so, in respect of each complaint, it is necessary to a undertake a qualitative evaluation of the evidence to

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17 See the summary in *Halsbury's Laws of Australia* at [325-2860].

18 [2018] QSC 107 (Bond J). The passages relied on were [39], [71]-[75], [115], [193], and [262]-[267]. Also relied on was the Court of Appeal's decision dismissing the appeal against that decision: *Palmer v Parbery* (2019) 136 ACSR 26 at [116]-[122].

19 For freezing orders, in the context of a good arguable case, the court is required to consider the risk or likelihood that the defendants' assets will be dealt with in such a way that a prospective judgment in the plaintiffs' favour will be wholly or partially unsatisfied: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 107 at [9].

20 Dal Pont, *Equity and Trusts in Australia*, 7th edition at [36.90].

21 The precise position is not particularly clear. There were two classes of units issued – ordinary and subordinated units. Some 11 separate unit certificates were issued to different investors. Certificates 1 and 4 were issued to the applicants here. The total of the ordinary certificates issued was $3.32m. That figure compares with the applicants' submissions which refer to $3.2m.

see if there is a serious case of misconduct. As was explained by Jackson J in *Fordyce v Ryan* the remedy is interlocutory in nature, so that the applicants are not required to conclusively prove misconduct as would be the case at a trial. That said, when it comes to assessing all of the evidence, it is necessary to bear in mind the principles stated by Applegarth J in *Singh v Brisbane Sikh Temple (Gurdwara) Inc* to the effect that the appointment of a receiver is a drastic remedy to be exercised with care and great caution.

Complaints 1 & 2: Non-Compliance with the Constitution

[23] The first two allegations of misconduct involve allegations of breach of the Constitution of the Trust Fund and are characterised by the applicants as "*mismanagement by the trustee, including of a critical condition of the Fund, and a concomitant ignorance of, or unwillingness to follow, the very terms which were supposed to bind the Fund*."[22] It is said that Parity Partners was "*recklessly indifferent*" to the terms of the trust.[23]

[24] Clause 2.1 of the Constitution of the trust provides that the Fund commences on the date subordinated units are first issued in accordance with clause 3.1. Clause 3.1 specifies that the first units issued by the trustee are subordinated units.

[25] In fact, the Fund commenced operating in March 2021. On 3 March 2021, the Constitution was executed, and an Information Memorandum was issued, and Parity Partners contracted to purchase the Beresfield property. Funds were raised from 22 March 2021.

[26] And so, whilst the commencement of the trust was specified to be the day when subordinated units were issued, which did not occur until 7 January 2022, the practical reality is that the Fund commenced in March 2021. However, there is no suggestion that:

(a) any funds received by Parity Partners before January were not regarded as valid investments in the trust;

(b) any acts taken before January 2022 were not properly acts performed in the course of the trust;

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22 Applicant's Outline, 13 May 2022 at [17].
23 Response to List of Trustee's Alleged Misconduct.

(c) the problem with the commencement date has put any assets of the trust in jeopardy.

[27] In short, the problem was a timing problem. The trustee proceeded with the trust without realising that the Constitution envisaged that the first act of the trust, and its date of commencement, was to be the date that subordinate units were issued.

[28] The applicants' complaint seems to assume that, because Parity Partners undertook certain tasks, such as issuing ordinary units to investors before the subordinated units were issued, and therefore before the designated commencement date under clause 2.1, Parity Partners was acting in breach of trust. It is doubtful that is accurate. The objective of clauses 2.1 and 3.1 is merely to specify a date of commencement. The fact that the date of commencement may not have arrived does not mean that the trust was not in existence. On the proper interpretation of the Constitution, the date designated as the date for commencement of the trust had no particular significance. The trust was established on the execution of the Constitution on 3 March 2021. At that point, the trustee agreed to act as trustee, and it was declared that the trustee held the assets on trust for the unitholders on the terms contained in the Constitution.[24] In fact, even the issue of the subordinated units by the trustee required that the trust exist and that the trustee commence its role and take the step of issuing the units.

[29] And so, as at 3 March 2021, the substantive position was that the trust instrument was signed, the trust was formed, there were the certainties of intention, subject matter and object, and the trustee commenced performing the trust. Thus, it is doubtful there was a breach of trust and, if there was a breach of trust, it was a technical rather than substantive breach. Certainly, the evidence does not demonstrate mismanagement, unwillingness to abide by the terms of the trust, or a reckless indifference to the terms of the trust. This allegation of misconduct provides no support for the drastic step of appointing a receiver.

[30] Another problem with these complaints is that the Constitution gives the trustee a wide discretion to determine whether to exercise, and if so, the manner, mode and time of exercise of its duties, powers and discretions in its absolute discretion.[25]

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24 See clauses 2.2 and 2.3 of the Constitution.
25 Clause 11.3 of the Constitution.

[31] The second complaint is similar. The applicants say that the trustee, Parity Partners, purported to issue ordinary units and issued unit certificates to third parties without any resolution of the trustee to do so. The applicants say that is a breach of clause 4.8 of the Constitution. Clause 4.8 is in these terms:

> 4.8 Date Units issued
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> (a) Units are taken to be issued on the date the Trustee records them in the Register having accepted the relevant application for Units and the Investment Amount required to be paid by the Applicant for the Units in that Class has been paid in accordance with clause 4.2. The date recorded in the Register must be no later than the date the Units were actually issued.
>
> (b) However, Units issued on a reinvestment pursuant to clause 16 are taken to be issued under an application which is deemed to have been received on the day the distribution is applied in payment for the Units.

[32] Nothing in that clause requires a resolution of the trustee to issue units. In fact, subject to the fulfilment of the preconditions,[26] clause 4.8 of the Constitution identifies two relevant dates:

(a) the date the units are recorded as having been issued; and

(b) the date the units are actually issued.

[33] The date of (a) must be not later than (b). In other words, the date recorded in the register cannot postdate the actual date of issue of the units. However, that leaves open the possibility that the units could be issued in May but be recorded in the register as having been issued in April. Presumably that tolerance of the 'backdating' of the register enables the trustee to later correct the register to ensure that investors interests are protected given that the period over which the units were held is relevant to the value of the units.[27]

[34] It follows that no breach of trust has been shown and this is not misconduct. Even if clause 4.8 were capable of the interpretation urged by the applicants, it is doubtful that a mere failure to make a resolution would qualify as misconduct of the kind justifying removal of the trustee.

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26 The preconditions are the acceptance of the relevant application for units and payment of the investment amount.

27 See, for example, clause 6.2 of the Constitution.

Complaint 3: Failure to Keep and Maintain an Up-to-Date Register

[35] The applicants contend that Parity Partners failed to keep and maintain an accurate up-to-date register.

[36] It can be accepted that Parity Partners was obliged to keep proper records.[28] Parity Partners argued that s 286 of the *Corporations Act 2001* (Cth) does not apply to unregistered corporations. However, that section **does** apply to companies. And it is the duty of a trustee to keep proper accounts.[29]

[37] It is plain that there were some errors in the register. However, Parity Partners contends that those errors have been corrected. There does not appear to be a serious dispute about that.[30]

[38] Incidentally, the nature of the errors alleged are as follows:

(a) The subordinated units were said to have been issued before the company that held them had been incorporated;

(b) The number of ordinary units issued on 27 April 2021 did not correspond with the application money paid in August and September 2021; and

(c) The subordinated units did not appear on the company's balance sheet.

[39] Those errors, which are now corrected, can be characterised as clerical rather than, as the applicants contend, deliberate, or as mismanagement, or unwillingness to abide by the terms of the trust, or a reckless indifference to the terms of the trust.

Complaint 4: Issue of Subordinated Units

[40] The fourth complaint is a claim that Parity Partners has issued subordinated units without any application, and without payment of application money, and without any verification of identity.

[41] However, as Parity Partners point out, an application for units can take whatever form the trustee requires or approves,[31] and the form of verification is subject to the

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28 *Corporations Act 2001* (Cth) s 286; clause 8.1 of the Constitution (the Trustee must maintain the Register).

29 See, for example, *Jacobs' Law of Trusts in Australia* (7th ed) at [1712].

30 Indeed, as explained above, the Constitution itself contemplates that some backdating of the register may be necessary.

31 Constitution clause 4.1.

absolute discretion of the trustee.[32] The subordinated units were issued to Blueball Highlands Pty Ltd, an entity related to Parity Partners. Thus, verification may well have been pointless and not required by the trustee. The units were issued to satisfy a debt. The existence and validity of the debt is not challenged.

[42] It follows that this complaint does not assist the applicants' argument that a receiver should be appointed.

Complaint 5: Deliberately False and Misleading Statements

[43] The fifth complaint of misconduct is in these terms:

> Further to (complaints [3] and [4]) making entries, or causing entries to be made, in the Register which were false and misleading, and known to be so.

[44] That is a strong claim. It is a claim of falsity with knowledge of the falsity. The particulars alleged are as follows:

> The falsity and knowledge of such is evinced by or is to be inferred from the following:
>
> (a) Mr Garden being the sole director of the trustee.
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> (b) Mr Garden (as sole director) being the party who resolved for the trustee to issue units on 30 June 2021 and 7 January 2022.
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> (c) In the knowledge of the matters recorded in those resolutions, Mr Garden not making appropriate entries or correcting, or causing appropriate entries to be made or corrected in, the Register.
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> (d) The allocation of units made by and recorded in each such resolution bearing different dates in the 'Date of Issue' in the Register.
>
> (e) The 'Date of Issue' of the Subordinated Units is before the unitholder was registered as a company under the Act.
>
> (f) Mr Garden is the sole director of the unitholder of the Subordinated Units.

[45] It can be seen immediately that it is difficult to infer deliberate, false, or misleading statements from that collection of allegations.

[46] Parity Partners respond to this allegation as follows:

> 1. See responses to Items 1 to 4 above.
> 2. Any errors in the Register were typographical and have been identified and corrected.

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32 Constitution clause 4.1.

3. Mr Garden did not cause any entries to be made in the Register knowing them to be false or misleading.

[47] In his second affidavit, Mr Garden explained the errors in this way:

> 33. As part of the Documents Proceeding and this proceeding, I came to learn that there were some errors in the dates recorded in the Register as follows:
>
> (a) the Unitholder that was issued certificate number 10, holding 250,000 units, was recorded as becoming a Unitholder on 27 April 2022 when in fact the payments were made to Parity's bank account as follows:
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> (i) two deposits of $100,000 on 3 September 2021; and
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> (ii) a deposit of $50,000 on 6 September 2021;
>
> (b) Bluebell Highlands Pty Ltd was recorded as becoming the holder of Subordinated Units on 22 November 2021, being certificate number 12, before the unit holder was incorporated.
>
> 34. I do not know any reason why these errors were made. As already deposed at paragraph 117(c) of the First Garden Affidavit, I did not instruct anyone to backdate the entries, or insert any date other than the date payment was received in full.
>
> 35. I have caused the Register to be corrected. Exhibited at **page 17 of Exhibit "JDG-2"** is a corrected Register, redacted to remove confidential information of unitholders other than the applicants in this proceeding and the Documents Proceeding.

[48] Of course, if Parity Partners had made deliberately false or misleading statements that would be a cause for serious concern.

[49] The problem is that there is really no evidence of deliberate falsehood. No contrary evidence was filed. As serious as the allegation was, the applicants' submissions did not return to the issue. Mr Garden was cross-examined for approximately 60 minutes. He was not cross-examined on that topic. It was not put to him that these were deliberately false entries.

[50] There is no basis upon which the court could safely conclude that these were deliberate false entries. No reason is proffered as to why Mr Garden would be motivated to do so. Nor do the errors seem to be attributable to anything other than careless bookkeeping. Certainly, no person who was entitled to units appears to have been denied units, and there is no allegation that any person's rights were substantively affected.

[51] As explained above, the nature of the remedy sought by the applicants is interlocutory in character. A qualitative evaluation of the evidence said to support this serious complaint does not establish even an arguable case of deliberately false entries.

Complaint 6: Inaccurate Records & Failure to Correct Errors

[52] The sixth complaint is that the trustee failed to keep and maintain accurate accounts or, further or alternatively, failed to correct errors. The particulars alleged are:

(a) The 30 June 2021 balance sheet records a loan from Parity Developments Pty Ltd for "*Land Deposit Reimbursement*" of $60,000.

(b) Parity Developments issued two invoices (Invoice no. 33 dated 1 July 2021 in the amount of $20,000 for "*Partial Reimbursement for deposit to purchase land for Beresfield Cold Storage Development*", and Invoice no. 35 dated 20 July 2021 in the amount of $40,000 for "*Final Reimbursement for deposit to purchase land for Beresfield Cold Storage Development*".

(c) Both invoices were paid, on 1 July 2021 and 20 July 2021 respectively.

(d) The 31 December balance sheet still records a loan from Parity Developments Pty Ltd for "*Land Deposit Reimbursement*" of $60,000.

(e) Separately, Parity Developments Pty Ltd also issued invoice no. 31 on 24 June 2021 in the amount of $100,000 (and was paid that amount that same day) for "*Partial Reimburstment* [sic] *of Land Deposit*".

[53] The response to that complaint is that the deposit under the purchase contract for the Beresfield Property was $160,000. That deposit was paid by a related company, Parity Developments Pty Ltd. The transactions record the debt owing by the trustee, Parity Partners to Parity Developments on account of Parity Developments payment of the deposit on Parity Partners' behalf. Parity Partners also say that no overpayment was made by the trustee to Parity Developments. They say that the draft financial statements are being finalised and will record the repayment of the deposit by the trustee to Parity Developments.

[54] That seems to be a logical explanation. Curiously, the complaint is not further pursued in submissions or in the evidence. Nor has it been withdrawn.

[55] Thus, the complaint appears to be adequately explained and does not establish a serious case of misconduct.

Complaint 7: Failing to keep or maintain a schedule of trust property

[56] This complaint is: "*failing to keep or maintain a schedule of trust property*." The particulars are simple: "*Duty at general law*."

[57] In response, Parity Partners points out that the trust was established for the sole purpose of developing the Beresfield property and that, following the sale of one of the two blocks, Lot 1 is the last remaining real property of the trust, and that the Constitution does not require the trustee to keep a schedule of trust property.

[58] Certainly, the trustee has these relevant obligations:

(a) To adhere to and carry out the terms of the trust;[33] and

(b) To keep proper accounts and be ready to render them when called upon.[34]

[59] But those are not absolute obligations. In each case, an important issue is what the trust instrument requires. Here, the Constitution does require the provision of financial accounts and tax details,[35] and has provisions about meetings of unitholders,[36] but it does not require the trustee to keep a schedule of trust property.

[60] No arguable case of a breach of duty has been shown.

Complaint 8: Backdated Unit Certificates

[61] The applicants' eighth complaint is "*Issuing backdated Unit Certificate to Mr & Mrs Hamer.*" The particulars refer, without any elaboration, to "*s. 286 of the Act*"[37] and to "*Failing to keep proper records*."

[62] It is a mystery as to why a complaint of misconduct, said to justify the removal of a trustee, is expressed in such an oblique way. That said, the substance of the complaint appears to be that the unit certificate issued to Mr and Mrs Hamer was backdated. *First*, as explained above, backdating of the unit certificate would seem

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33 See *Jacobs' Law of Trusts in Australia*, 7th edition at [1704]
34 Ibid at [1713].
35 Clause 13 of the Constitution.
36 Clause 23 of the Constitution.
37 Presumably this is a reference to s 286 of the *Corporations Act 2001* (Cth).

to be consistent with the Constitution. The Constitution ensures that unitholders are not prejudiced by forward-dating of the register and, presumably, certificates.

[63] *Second*, Mr Garden deposes that the certificate issued to Mr and Mrs Hamer for 500,000 units is dated 23 March 2021.[38] That appears to be correct. The certificate exhibited to Mr Hamer's first affidavit is marked as "*Date of Issue: 23 March 2021*".[39] That same date was the day the payment was made for the units and the date shown in the register as the day of issue of the units.

[64] The applicants have not pursued this further in the evidence,[40] or in submissions, but the allegation of misconduct has not been withdrawn and remains as an issue for the court to decide. For the reasons stated, the allegation has not been made out.

Complaints 9, 10 & 11: Non-Completion of Financial Reports etc

[65] The ninth complaint is: "*Failure to finalise financial reports for FY21."* The particulars specified are: "*Clause 13.1(b) of the Constitution*."

[66] There is a disconnect between the obligation in clause 13.1(b) which relates to books of account relating to classes of unitholders and the alleged breach which relates to financial reports. There is no obligation in the Constitution for the financial reports to be finalised by a particular date. In any event, Mr Garden explains the delays in the preparation of the financial statements – which are partly attributable to this litigation.[41]

[67] The tenth complaint is: "*Failure to lodge tax returns for FY21 by 31 October 2021*." The particulars specified are: "*Clause 13.2(a) of the Constitution*."

[68] Clause 13.2(a) of the Constitution does not require FY21 tax returns to be lodged by 31 October 2021.[42] Nevertheless the tax regulations impose their own obligations on the trustee to lodge returns in time. For that reason, Mr Garden has instructed the trust's accountant to ensure that the ATO is aware of the delay in finalising the

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38 Mr Garden's second affidavit at [67].
39 Mr Hamer's affidavit at AGH-1 page 251.
40 Mr Garden's second affidavit was filed on 13 June 2022.
41 Mr Garden's second affidavit at [71]-[74].
42 It is possible that the person who drafted this complaint has confused the obligations in clause 13.2(a) and (b). They are different obligations. The first relates to the trust's tax returns. The second relates to a statement of necessary details for the purposes of each individual unitholder's tax return (see complaint 11). There is no express time requirement for the first. The latter is required no later than 4 months after the end of the financial year (i.e. by 31 October 2021 for FY21).

returns and an extension has been sought. In any event, once again, Mr Garden explains the delays – which are partly attributable to this litigation.[43] Those explanations are not challenged.

[69] The eleventh complaint is similar. The complaint is articulated in this way:

> Failure to provide unitholder tax statement to Mr & Mrs Hamer, and it is to be inferred from such failure to any other Unitholder, contrary to cl. 13.2(b) of the Constitution and despite repeated requests spanning more than 8 months.
>
> Particulars
>
> Email A. Hamer dated 9/9/21, 6/10/21, 13/10/21, 20/10/21.

[70] This complaint does have substance. Clause 13.2(b) requires the unitholder statements "*as soon as practicable after the end of the Financial Year,* ***but by no later than four months*** *after the last day of the Financial Year*" [emphasis added]. Plainly the intention is that the unitholders have sufficient information from the trustee so that the unitholders can themselves discharge their own tax return obligations.

[71] As to the "*repeated requests*" for the unitholder tax statements, the sequence of emails commences with Mr Hamer making an email request for the tax statement on 9 September 2021. Mr O'Dwyer, on behalf of Parity Partners' director, responded saying that he had spoken to the accountant who told him that the tax statement was possible by the end of September 2021. On 5 October 2021, Mr Hamer chased up the tax statement and complained about the absence of a distribution in July. Mr O'Dwyer replied on the same day saying that he understood that the trustee was in the process of preparing an update and the financials for all unitholders. Mr O'Dwyer copied in Mr Fenton and Mr Daniel, who were described as associates of the trustee. On the same day Mr Hamer replied saying he was disappointed with the response. In an email also sent to Mr Fenton and Mr Daniel he asked: "*Where is my money? Where are the monthly or quarterly statements? Where are the annual statements*?"[44] He said: "*while we are at it can you please provide an update on the current status of the investment*."

[72] On 6 October 2021, Mr Fenton responded in this way:

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43 Mr Garden's second affidavit at [75]-[79].

44 Punctuation was added.

> Thanks for the follow up. You are welcome to also give me a call at any time.
>
> Your funds have been invested as intended and the distribution payment for August and September 2021 was paid last week. I am finalising the next investor update that should be released this week.
>
> In terms of the annual financial statements for FY21, I recently inherited this and am waiting on a (sic) some information to get this finalised. I appreciate the urgency in getting this done.

[73] It will be noticed that these latest emails refer to 'annual statements' and 'annual financial statements'. It is difficult to know whether these are intended to reference the unitholder tax statements, or whether they refer to the financial statements for the trust, or whether the reference is to financial statements more generally because the preparation of those is a necessary prerequisite to the preparation of the unitholder tax statements.

[74] In any event, Mr Hamer was not placated. His email on the same day said that he was 'out of patience' with this investment. He listed a number of failings, principally a lack of communication, and requested a meeting of unitholders to require the trustee to adhere to its legal obligations as trustee. On 12 October 2021, Mr Hamer escalated the dispute in an email to Mr Fenton:

> It has been nearly 6 days now since I requested you arrange a unit holders meeting, I had provided 5 days for you to arrange this meeting. I have received no communication from you or advice that this is in play so I have written to Keystone Private as the holders of the Financial services licence advising them of your shortcomings as a trust manager and also advising we will be seeking to lodge a complaint against them as well. Further I have escalated the matter to our lawyers, ASIC and the AFSA.
>
> Please provide me with the contact details of all unit holders in the fund so I can arrange the meeting myself. I draw your attention to your obligations as trustee to supply me this information as set out in the trust deed/constitution.

[75] On 13 October 2021, two things happened. *First*, there was conversation between Mr Hamer and Mr Fenton. In an email sent a short time later Mr Hamer referred to his loss of trust in the management team for this investment. He said his preference was for a refund of his investment. He said that, if a refund was not possible, then he was seeking a unitholders meeting and answers to 15 questions at the meeting.

[76] *Second*, Parity Partners published an investor update which explained to all investors some bad news, including that the builder had left the site and there were slim prospects of having the builder return to site. They said that Bega remained

committed despite the anticipated delays. The investor update also said that the work to prepare the income tax return for FY21 was underway and was expected to be completed by 31 October 2021.

[77] There were then a series of email exchanges, including some answers to the 15 questions.

[78] The applicants characterise this exchange of emails as a request for the unitholder tax statements. The emails started in that way, but they quickly escalated to a wider complaint and an ultimatum that Mr Hamer's investment should be refunded and that, if it was not, he would arrange a unitholders meeting and, presumably, proceed with his various complaints.

[79] Before leaving this group of complaints, it is worth noting that in Mr Garden's third affidavit, filed on 17 June 2022, Mr Garden deposes that, on 16 June 2022, he had a conversation with Mr Jackson of Keystone Private Wealth Pty Ltd about finalising the tax return for the fund as well as providing unitholders with the information needed by them to complete their tax returns. Mr Jackson said he would do the work and estimated that it would take approximately three weeks.[45] No update suggests that the task has been completed. In any event, the delay is extraordinary and not properly explained.

Complaints 12, 13 & 14: Third Party Signatory

[80] The twelfth complaint is: "*Permitting a third party to unilaterally control, as sole signatory, the trust bank account, despite that party having no authority to withdraw funds without Mr Garden's approval*." The particulars are specified as: "*The third party was James O'Dwyer. O'Dwyer was not a director of the Respondent*."

[81] Of course, a corporate entity may well give a third-party authorisation rights for a bank account. The rights need not be held by a director or by any particular person. Frequently an accountant may hold those rights, sometimes an independent accountant or even a separate entity.[46] The fact that a third party holds the authorisation rights to a trust bank account is not, by itself, a legitimate complaint.

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45 Mr Garden's third affidavit filed 17 June 2022 at [17] and [18].

46 For example, specialist corporate trustees and fund administration services are often provided to even large financial institutions, banks and fund managers.

Much depends upon two things: the provisions of the trust instrument and the protections that are in place to ensure the funds are appropriately secure.

[82] Here, the applicants do not put their complaint on the basis that there were no proper protections in place, and so Parity Partners has not explained the procedures for authorising payments from the trust account.

[83] As to the trust instrument, Parity Partners explain that, in reality, James O'Dwyer was not a disinterested third party. He was the sole director of Protean Investments Pty Ltd, a 50% shareholder in the trustee. Protean was the entity responsible for raising equity capital through investors, and responsible for the accounting for the Fund until late 2021. Parity Partners also explain that, pursuant to clause 11.2(f) of the Constitution, the trustee may authorise any person to act as its agent or delegate to perform any act or exercise any discretion within the trustee's power on terms the Trustee thinks fit.

[84] It follows that this complaint does not form a basis for removal of the trustee.

[85] The thirteenth complaint is expressed in these terms:

> Leaving the same third party as sole signatory to the trust bank account for a period after Mr Garden discovered that the third party had transferred $600,000 without authority.
>
> Particulars
>
> The unauthorised transfer was made on 3 May 2021.
>
> When the transfer occurred there had only been a few payments from the trust bank account and that account only had $600,000 in credit, such that the identification of the $600,000 transfer on 3 May 2021 was something which was obvious to Mr Garden.
>
> Mr Garden discovered the transfer “in May” 2021.
>
> Mr Garden subsequently required join [sic] signatories for any transactions.
>
> The Respondent, by McInnes Wilson, wrote to Mr O'Dwyer by letter dated 14 October 2021.

[86] Parity Partners’ response to the complaint is:

> 1. The account authorisations were directed to be changed the same day to require joint signatures while the matter was investigated.

> 2. This is not a case of Mr O'Dwyer stealing $600,000 and the Trustee doing nothing about it. The payment was in partial repayment of an amount of $2,000,000 advanced from Devmin International Pty Ltd (**Devmin**) for the benefit of the Project. Whilst aspects of the transaction are the subject of a dispute between the Trustee and Devmin, the Trustee has always acknowledged that the $2,000,000 advanced by Devmin was received for the benefit of the Project. The Trustee has paid Devmin $2,000,000 on account of the monies advanced for the benefit of the Project, which includes the $600,000 paid by Mr O'Dwyer to Devmin.
>
> [footnotes omitted]

[87] And so, the primary allegation here is that an unauthorised transfer from the trust account occurred on 3 May 2021, and Mr Garden discovered the transfer sometime in May 2021, and only subsequently required the account to be operated by joint signatures. Mr Garden says that, in fact, he responded to require joint signatures on the day the transfer was discovered – on 5 May 2021.[47] That was done whilst the issue was investigated. That response is not contested.

[88] There is no basis upon which the court could find that Mr Garden's evidence is untrue or inaccurate. In the circumstances, there is no basis for this misconduct allegation.

[89] The fourteen complaint is nearly identical. In reality it merely adds a complaint about Mr O'Dwyer's alleged refusal to deliver up the trust accounts:

> Leaving the same third party as a signatory to the trust bank account for about 6 months after that party had transferred $600,000 without authority and had refused to deliver up trust accounts, despite request.
>
> Particulars
>
> Mr Garden did not remove Mr O'Dwyer as a signatory until 2 November 2021.

[90] Parity Partners' response adds this:

> 1. While it took some time to get all of the accounting records from Mr O'Dwyer, he did not refuse to give the records.
>
> 2. Mr O'Dwyer was not left as a sole signatory on the trust bank account. After Mr Garden discovered the $600,000 payment, joint signatures were required.

[91] Again, Mr Garden has provided detail in his affidavits,[48] and says that there was no refusal to give up the accounts, and that is where the evidence rests.

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47 See Mr Garden's second affidavit at [95].

48 See Mr Garden's first affidavit at [78]-[83] and second affidavit at [92]-[102].

Complaint 15: Insufficient Capital

[92] The fifteenth complaint is as follows:

> Proceeding with the Project, including the acquisition of the Land, without the Minimum Offer Amount or sufficient capital.
>
> Particulars
>
> The Minimum Offer Amount was $3.2 million.
>
> The amount required to complete the purchase was $3.6 million.
>
> The total contributions from investors before the purchase was $2 million.
>
> The total funds available to purchase the Land from contributions made by Unitholders or purported Unitholders was $1.45 million.
>
> The trustee accepted a further payment from Devmin International Pty ltd, as loan funds or, alternatively, without first agreeing terms, and in any case without issuing units.
>
> Title to the Land was transferred on 12 April 2021.
>
> The trustee, by Gadens, knew from in or about May 2021 that the cash-at-bank of the trust bank account stood at $320,000.
>
> The trustee admits there was an insufficiency of capital raised for the acquisition, construction, and development of the Project by stating words to that effect in a letter from McInnes Wilson to Jamie O'Dwyer, Holistic Property Group Pty Ltd.

[93] Parity Partners' answer is to this effect:

> 1. There was no requirement to raise the Minimum Offer Amount before the Project could proceed.
>
> 2. The Trustee executed the purchase contract on the basis of assurances by Mr O'Dwyer and his related entities that sufficient capital would be in place to complete the purchase and carry out the development.
>
> 3. The loan from Devmin was with Protean, or another entity associated with Mr O'Dwyer, with the funds to then be made available to Parity at Protean's cost until such time as they had raised the equity. The loan between Devmin and Protean was made after the purchase contract had been signed on the basis that Mr O'Dwyer and his related entities had not satisfied his assurances that sufficient capital to complete would be raised.
>
> 4. Mr Garden has over 30 years' experience in property development, with work both in Australia and internationally, and the decision to proceed at that time was soundly based and the funding arrangements not unusual.

[94] This complaint has the appearance of a negligence claim. What is alleged is that, in the circumstances, Parity Partners should not have proceeded with the development unless it had $3.2m or $3.6m in capital. However, the court is not in a position to

assess that. No evidence has been adduced as to what the minimum capital was, or whether the project could proceed if the capital fell short of $3.2m or $3.6m, or whether the assurances as to further capital or loans were reasonably relied on by Parity Partners.

[95] Contrary to the applicant's assumption, the project was always envisaged as requiring both equity subscribed by unitholders, as well as borrowings from external financiers.[49] Borrowings come with risks.[50] The investment had risks, many of which were notified to investors in the Information Memorandum. Of course, the risk that materialised in this case was not a lack of initial capital but rather the repudiation of the building contract by the builder after the building was roughly 20% complete.

[96] It is also important to bear in mind that the development was not static. From the time the Constitution was signed on 3 March 2021, funds were being raised, costs were being incurred and the contract to purchase the land was being negotiated and signed. As the project proceeded, and as the funds were raised, the costs of terminating and the costs wasted by terminating were likely to increase. Thus, if Parity Partners made a business decision not to proceed, that would have had financial consequences for the investors. On the other hand, if Parity Partners proceeded there were development risks. That business judgment is not easily assessed by the courts. In a similar context, Edelman J considered allegations of breach of duties by directors and trustees in *Australian Securities and Investments Commission v Cassimatis (No 8)*[51] His Honour took the approach that the relevant assessment as to whether the decision-maker has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.

[97] Here, it is impossible, even in a summary way, to conduct that balancing exercise. The applicants do not say when the decision not to proceed ought to have been

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49 See, for example, the *Information Memorandum* at Chapter 6 (Mr Hamer's affidavit at page 111 of the AGH-1).

50 Ibid.

51 [2016] FCA 1023 at [486]-[487]. His Honour followed that approach in *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 at [395]. See also *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 449-450.

taken. Neither party has adduced any reliable evidence, let alone expert evidence, which would enable the court to properly balance, at the relevant date, the risks and potential benefits of terminating as against the risks and potential benefits of continuing with the project. Certainly, there is no evidence which would enable the court to conclude even on an interlocutory basis that the business decision to proceed was an unreasonable one, let alone a decision that put the trust assets in peril.

Complaint 16: Failure to Report

[98] The applicants' sixteenth complaint relates to Parity Partners' alleged failure to report:

> Failure to keep the beneficiaries (investors) reasonably informed about the administration of the trust or trusts, or in relation to matters which affected or may affect the interests and entitlements of those beneficiaries.
>
> Particulars
>
> The trustee has failed to report to all investors that Ordinary Units were purportedly issued before the Fund commenced and, further or alternatively, without any resolution to do so.
>
> The obligation to report to the beneficiaries about those matters is at general law.

[99] The answer from Parity Partners' is: "*Again, as stated in response to Items 1 to 4, the Fund commenced at least by the issue of the first units. There was nothing of this kind to report.*"

[100] Thus, the point of the complaint appears to be that Parity Partners failed to report the misconduct alleged in complaints 1 to 4 (above) to the ordinary unitholders. The short answer here is that these are not breaches of the Constitution, and no provision of the Constitution requires the trustee to report alleged breaches to the ordinary unitholders.

Complaint 17: Failure to Arrange a Meeting

[101] The applicants' seventeenth complaint is: "*Failure to ensure meeting of Unitholders held within 2 months of request by unitholders*." The particulars are: "*Clause 23(a) of the Constitution*."

[102] There is no clause 23(a) of the Constitution. Clause 23.1 provides that the trustee may call a meeting of unitholders at any time. The trustee must do so if required by

the Act. The trustee may also, in its discretion, and at any time, postpone any meeting of unitholders.

[103] That clause does not assist the applicants.

[104] Of more assistance is Clause 23.2(a) which provides that the trustee must call and arrange a meeting of unitholders to consider and vote on a proposed resolution on the request of unitholders possessing at least 15% of the vote. When he requested a unitholders meeting in October 2021 it is likely that Mr and Mrs Hamer held at least 15% of the units. However, Mr Hamer does not appear to have ever proposed a resolution. He proposed that the trustee answer 15 questions at a meeting. But he did not propose, for example, a resolution that the trustee take any particular action.

[105] By 10 November 2021, though that problem had been remedied, the applicants joined with some other unitholders to request five different resolutions, including that the trustee resign. On 1 December 2021, the trustee called a meeting for 10 January 2022. The trustee noted that some of the resolutions may be invalid.

[106] On 7 January 2022, some three days before the proposed meeting, the trustee exercised the right to postpone the meeting. In doing so, the trustee explained that some of the unitholders had requested a postponement, some of the resolutions may be invalid, and stated that the trustee intended calling a general meeting in March 2022 and proposed that further information be provided by those who contended for the resolutions.

[107] Eventually, a general meeting of unitholders was held on 14 June 2022. This meeting was chaired by an independent chairperson, Ms Caroline Snow. Four of five resolutions were passed, but each were different from those that had been proposed in December. The resolutions passed were to the effect that the remaining lot (Lot 1) be sold by the trustee, that the trustee continue to oppose the appointment of a receiver in this litigation, the trustee consider declaring a dividend amount, and that the trustee specify a date for termination and winding up of the Fund.

[108] And so, whilst there was a significant delay, the voice of the unitholders was eventually heard. It is notable that the majority of the unitholders supported the trustee's resistance to the present application.

Complaint 18: Failure to Keep Proper Accounts

[109] The eighteenth complaint is that:

> Bank statements reveal $1,336,973.96 paid to Parity Developments Pty Ltd between May 2021 and November 2021, but all invoices produced pursuant only total $569,451.42, leaving $767,522.54 in explained payments to a related entity of the trustee.

[110] Parity Partners' response is that:

> 1. All amounts are explained and relate to project costs.
>
> 2. The relevant invoices from Developments are accompanied by invoices and progress claims issued by contractors engaged by Developments in respect of the Project.

[111] Mr Garden's explains the invoices in his affidavit.[52] The invoices there total $767,522 which matches the discrepancy alleged by the applicants.[53]

[112] The applicants' supplementary submissions then continue the complaint:

> …After the hearing on 13 May 2022, the trustee then produced some further supporting invoices for some of the unexplained payments, but even the trustee's belated explanation does not deal with all of the unexplained payments, nor does the explanation it purports to give for some of the unexplained payments adequality [sic] or satisfactorily explain those payments. Further the trustee does not even bother trying to explain why it failed to produce those invoices in the first place, how it was able to so readily produce them after (and during) the 13 May hearing, or why it has still failed to produce all the missing invoices despite orders compelling him to do so, and Mr Garden swearing two verification affidavits previously, is completely and utterly unexplained.[54]
>
> [footnote omitted]

[113] An underlying presumption in this complaint is that the applicants were entitled to a full explanation for each transaction in the course of the development. Counsel for Parity Partners conceded that the beneficiaries are entitled to an account. But it is to be doubted that on an application to appoint a receiver, the applicants, who comprise some of the beneficiaries, are entitled to demand explanations for various payments with a view to identifying breaches of trust sufficient to require replacement of the trustee.

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52 Mr Garden's Second Affidavit at [127]-[129]. The invoices there total $767,522.

53 At the hearing there was a discrepancy of a few dollars or cents, but I ignore that for present purposes.

54 Applicants' Supplementary Outline at [14].

[114] In any event, the explanations are largely satisfactory. Mr Garden explains the relevant invoices at paragraphs [127] to [129] of his second affidavit. In response, the applicants' solicitor has deposed that:

(a) One of the invoices, invoice 72, is dated 10 November 2021 but the list which accompanies it includes an invoice dated 23 November 2021;

(b) When items 87 and 106 in the list are corrected to reflect the actual amounts of the invoices, the list does not tally $370,000 but rather $374,596.78;

(c) Item 29, comprising a Ronan Fox Lawyers' invoice for $4,015, which is one of more than 100 invoices, has not been produced;

(d) Three other invoices have not been provided;

(e) There are queries in relation to the invoice for item 70;

(f) There is a $200 discrepancy in the total of the invoices provided ($767,722.54 and $767,522.54);

(g) There are a number of other queries raised by the documents.[55]

[115] Given the time and effort spent on scrutiny of the transactions, the discrepancies that remain appear to be relatively minor. At worst, the trustee's bookkeeping is less than ideal. However, it should not be forgotten that this particular inquiry started with an allegation that $767,522.54 in payments was unexplained. That challenge has been met, except for some relatively minor further details.

[116] It is also necessary to observe that the allegation made in the supplementary submissions (quoted above) itself suffers from a lack of particularity. The "*the unexplained payments*" are not identified. Similarly, for the 'inadequately explained payments' and the 'all the missing invoices.' Presumably the details are in Mr Davey affidavit. However, the impression gained is that there are no substantive amounts that are found to missing but rather more questions that arise from querulous and dissatisfied investors. A qualitative evaluation of the evidence does not assist the application. The relatively minor discrepancies are more indicative of sloppy bookkeeping than the substantive complaint that there was *"$767,522.54 in explained payments to a related entity*".

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55 Affidavit of Mr Davey filed 17 June 2022 at [16]-[22].

Complaint 19: Breach of Undertaking

[117] The nineteenth complaint is of breach of an undertaking to the court:

> In the face of an extant undertaking (given to the Supreme Court on 3 November 2021 in BS12733/21) "*not to sell, encumber, transfer or otherwise deal with the property at 15 Balook Drive, Beresfield, New South Wales ...* ", trustee:
>
> (a) Signed the "Certane Contract" on 24 December 2021;
>
> (b) Subdivided the existing lot into two lots (Lot 1 and Lot 2) on 31 March 2021;
>
> (c) Transferred Lot 2 to Baseunit No. 5 Pty Ltd on 19 April 2022.

[118] Parity Partners' answer to that complaint is in these terms:

> (i) The subdivision and sale of Lot 2 was recorded in the Indicative Term Sheet, which was referred to in, and authorised by, paragraph l(a) of the undertaking given to the Court on 3 November 2021.
>
> (ii) The Certane Contract was signed as part of the Refinance, which was referred to in, and authorised by, paragraph l(b) of the undertaking given to the Court on 3 November 2021. The Refinance was required in order to pay the $1,400,000 to Devmin:
>
> (a) as provided for in paragraph 2 of the undertakings given to the Court on 3 November 2021;
>
> (b) in satisfaction of a summary judgment obtained by Devmin on 3 December 2021 for payment of the $1,400,000;
>
> (c) in satisfaction of a statutory demand issued by Devmin to the Trustee on 7 December 2021 for payment of the $1,400,000 within 21 days.
>
> [footnotes omitted]

[119] The relevant undertaking to the court is recorded in an order of Applegarth J made on 3 November 2021. That order was made in a related proceeding where Devmin International Pty Ltd (Devmin) sued the trustee. The order made was to this effect:

> Upon the Applicant by its counsel giving the usual undertaking as to damages, and
>
> Upon the undertaking of the respondent by its counsel:
>
> 1. Not to sell, encumber, transfer or otherwise deal with the property at 15 Balook Drive, Beresfield, New South Wales, more particularly described as Lot 1 on DP 1268902, save and except for:
>
> a. upon the terms (or substantially similar terms) contained in the indicative term sheet exhibited at pages 254 to 263 to the affidavit of Jamie Duncan Garden, filed by leave on 3 November 2021 (the Reference); or
>
> b. otherwise, without first providing the Applicant with seven days' written notice of its intention to do so.

2. To pay the Applicant the sum of $1,400,000 from the proceeds of the Refinance upon the Refinance being made available to the Respondent; and

3. To:

    a. within three business days, inform the Applicant of the expected date of completion of the Refinance; and

    b. inform the Applicant of any material change to the terms of the Refinance or the expected date of completion.

THE ORDER OF THE COURT IS THAT:

1. The Application filed 2 November 2021 is dismissed.

2. The Applicant pay the Respondent's costs of and incidental to the application.

[120] It can be seen that the order includes an exception to the undertaking to freeze the property. The order permits what it described as 'the Refinance'. Parity Partners say that the contract they entered into on 24 December 2021 was that excepted 'Refinance.' Further, by reference to the transcript of the hearing before Applegarth J, and the order itself, it seems that the freezing order had a limited shelf life. The objective was to quarantine $1.4m that Devmin maintained it was owed. And so, the order provided for a freezing of the property and an undertaking to pay the $1.4m from the proceeds of the Refinance. That all happened. The $1.4m was paid to Devmin. Devmin is pursuing the litigation against Parity Partners, but only for the interest.

[121] The scheme of the order, as the transcript discloses, was to ensure that the $1.4m was secured and then paid to Devmin. The order was effective to achieve that objective. Further, it is to be noted that, in their continuing litigation: (a) Devmin does not continue to pursue the $1.4m (it only continues for interest); and (b) Devmin does not contend that Parity Partners has breached the undertaking given to Applegarth J (or at least there is no evidence to that effect).

[122] An allegation of the breach of an undertaking to the court is a serious matter. However, the applicants have not established such a breach.

Complaint 20: Misleading the Court

[123] The twentieth complaint is of misleading the court and the beneficiaries:

> On 3 November 2021, in proceeding no BS12733/21, the Respondent relied in evidence on a letter dated 27 October 2021 yet failed to disclose to the Court the fact

that on 2 November 2021 it signed a contract for sale to sell Lot 2 to Baseunit No. 5 Pty Ltd (**Lot 2 Contract**), as a result of which it misled the Court, and further or alternatively the applicants.

Particulars

By letter from McInnes Wilson to Kelly Legal dated 27 October 2021, the Respondent offered an undertaking not to sell, encumber or otherwise deal with the property at 15 Balook Drive, except for (1) upon the terms (or substantially similar terms) contained in an attached Term Sheet: (2) otherwise, without first providing Devmin with seven days' notice.

On 2 November 2021, the Respondent entered the Lot 2 Contract.

On 3 November 2021, the Respondent gave undertakings to the Court in terms similar to that contained in the letter dated 27 October 2021.

The Respondent misled the Court, and further or alternatively Devmin, by seeking to rely on the inference that it had not undertaken any other dealings with respect to, inter alia, selling, encumbering, or otherwise dealing with the Land as at 3 November 2021 other than its entry, or proposed entry, into the Terms Sheet.

[124] This complaint centres on the related litigation involving Devmin. The applicants say that, in that related litigation, Parity Partners misled the court and misled the applicants because Parity Partners failed to disclose that on 2 November 2021 Parity Partners had signed a contract for the sale of Lot 2.

[125] The answer from Parity Partners is that it did disclose the sale of Lot 2. Parity Partners' response is as follows:

1. The subdivision and sale of Lot 2 was recorded in the Indicative Term Sheet, which was referred to in, and authorised by, paragraph l(a) of the undertaking given to the Court on 3 November 2021.
2. The email dated 27 October 2021 predates the date of the sale contract (which was 2 November 2021) and the term sheet (dated 31 October 2021) that was provided to the Court and Devmin on 3 November 2021, and which disclosed the subdivision and sale of the relevant parcel of land.
3. The undertaking offered by the Trustee in the letter of 27 October 2021 to avoid unnecessary costs (on a without prejudice basis) was rejected by Devmin and not given at that time. Upon the Trustee giving undertakings to the Court, the Court dismissed Devmin's application and ordered Devmin to pay the Trustee's costs of and incidental to Devmin's application.

[footnotes omitted]

[126] There is some confusion of parties. The related litigation was commenced by Devmin against Parity Partners. Devmin claimed to be owed $1.4m by Parity Partners. There is no evidence that the Devmin litigation was commenced for or on

behalf of the investors including the applicants.[56] Thus, whilst they may have been interested in the Devmin litigation, the undertakings given by Parity Partners in the Devmin litigation were not undertakings given to the applicants. Thus, there is a problem in the applicants' contention that Parity Partners' conduct in the Devmin litigation has misled the applicants. They were not parties to that litigation.

[127] That confusion of parties leads to another problem. It is difficult to identify exactly the obligation of disclosure that the applicants say was breached. There were plainly negotiations between Devmin and Parity Partners. On 27 October 2021, Parity Partners offered an undertaking which Devmin did not accept. That all occurred before the contract to sell Lot 2 was signed. As Mr Garden explains, Devmin's application for the freezing order was filed and served on 2 November 2021. That was the same day that Parity Partners signed the contract to sell Lot 2. When the matter came before Applegarth J, on 3 November 2021, His Honour expressed reluctance to make a freezing order. Eventually the order was made in a form that involved Parity Partners giving certain undertakings to quarantine the $1.4m but with the application being dismissed.

[128] Thus, it is difficult to know whether, in the course of that interaction:

(a) Parity Partners became obliged to disclose to Devmin that a contract to sell Lot 2 had been signed the previous day; or

(b) Parity Partners did in fact disclose to Devmin that a contract to sell Lot 2 had been entered into the previous day.

[129] Devmin has not given evidence in this proceeding.

[130] Importantly, the applicants make a serious allegation that Parity Partners has misled the court by failing to disclose the sale of Lot 2 and yet they have failed to identify why Parity Partners became obliged to disclose the sale to the court, or to Devmin, let alone the third-party/applicants. Thus, it is impossible for this court to find that Parity Partners was obliged to disclose the contract it had entered into the previous day, or that such an obligation was breached.

---

56 Mr Garden's second affidavit at [184] deposes that he became aware that Mr Hamer was the business partner of Todd Giraudo, a director of Devmin. But there seems to be no formal relationship.

Complaint 21: Misleading the Court (no. 2)

[131] The twenty-first complaint is similar:

> The Respondent, by Mr Garden, failed to disclose the Lot 2 Contract, as a result of which it misled the Court, and further or alternatively the applicants, Unitholders.
>
> Particulars
>
> The applicants, Unitholder applied in BS 1968/22 to the Court for inspection of trust records and trust accounts.
>
> In those proceedings, the Respondent relied upon evidence by way of an Affidavit of Garden sworn 22 March 2022.
>
> Under the heading "Current status of project", the Respondent misled the Court, and further or alternatively the applicants, Unitholders by seeking to rely upon the state fact or inference that the only sale which it had entered was the Certane Contract (see paragraphs 36 to 51).
>
> At the time, the Lot 2 Contract had been on foot for almost 5 months.

[132] Parity Partners give this answer:

> 1. The affidavit was sworn in urgent circumstances, addressed in Mr Garden's latest affidavit. Mr Garden intended to convey that the entire land was being sold. Mr Garden did not intend to mislead the Court by stating that "Parity has entered into a conditional contract with Certane CT Pty Ltd (Certane) for the sale of the Beresfield Property (the Certane Contract)."
>
> 2. At the time, the Trustee had entered into a conditional contract with Certane for the sale of part of the Beresfield Property (being the proposed Lot 1) on 24 December 2021. The Trustee had previously (in early November 2021) entered into a contract for the sale of the other part of the Beresfield Property (being the proposed Lot 2). By the time of swearing his affidavit, the whole of the Beresfield Property was being sold and this is what he intended to convey.
>
> [footnotes omitted]

[133] Again, the applicants make the complaint without identifying the duty owed by Parity Partners to disclose the sale.

[134] Nevertheless, it seems reasonably clear that Mr Garden's affidavit of 22 March 2022 in related proceedings was inaccurate. Mr Garden deposed that Parity Partners had entered into a conditional contract with Certane CT Pty Ltd for the sale of the

Beresfield Property. In fact, as Mr Garden explains, there were two separate contracts.[57] It was a mistake. However, the evidence does not establish that the intention was to mislead the court or the applicants.

Complaint 22: Misleading the Court (no. 3)

[135] The twenty-second complaint is substantially the same as the twenty-first and the same considerations apply.

Complaint 23: Non-Provision of Documents

[136] The applicants' twenty-third complaint is as follows:

> Further or alternatively to (Complaint [18]), the Respondent deposed, in an affidavit sworn on 24 March 2022 to verify compliance in BS 1968/22, that it had provided all documents required to be produced pursuant to the orders of Applegarth J made on 24 February 2022. This was at the time, and remains, incorrect.
>
> Particulars
>
> On 13 May 2022, the Respondent produced what was said, by its Counsel, but was not established to be an invoice from Parity Developments Pty Ltd.
>
> If the Respondent were to produce any invoices for the Unexplained payments to related parties, the deposition on 24 March 2022 was evidently incorrect.
>
> At the time, the Lot 2 Contract had been on foot for almost 5 months.

[137] Parity Partners' answer is as follows:

> This complaint concerns the further disclosure of certain invoices. Mr Garden swore his affidavit as to the disclosure of certain material to the best of his knowledge and belief at the time. After investigating Mr Hamer's concerns regarding the omission of certain documents, the relevant documents were either identified as having been produced, or were then produced, as set out in the response to item 18 above.
>
> [footnote omitted]

[138] Again, there is a lack of precision. The orders of Applegarth J required disclosure of, *first*, documents received or held by Parity Partners or on its behalf exclusively in its trustee capacity and, *second*, documents received or held by Parity Partners or on its behalf and also in another capacity and, *third*, documents received or held by Parity Partners, or on its behalf in its trustee capacity, jointly with another entity or entities.[58]

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57 See Mr Garden's second affidavit at [166]-[172].
58 See Mr Garden's second affidavit at [176].

[139] I am not sure what documents are comprehended by those three categories. The applicants' assumption appears to be that Parity Partners were obliged to disclose all documents in its power or possession. That may be what was intended by the reference to documents held 'in its trustee capacity.'

[140] In any event, many invoices have now been provided. The fact that some invoices are missing does not provide a strong ground for the appointment of a receiver.

Complaint 24: Misleading Statement Regarding Loans

[141] The twenty-fourth complaint is:

> Email from M. Fenton to A. Hamer on 20/10/21 states "trust does not any loans", when in fact balance sheets record two loans: one from Devmin, and one from Parity Developments.
>
> Particulars
>
> Balance Sheet - As at 30 June 2021, Current Liabilities, Loan - Parity Developments Pty Ltd (Land Deposit Reimbursement), $60,000; Non-current Liabilities, Loan - Devmin $1.4 million.
>
> Balance Sheet - As at 31 December 2021, Current Liabilities, Loan - Parity Developments Pty Ltd (Land Deposit Reimbursement), $60,000; Non-current Liabilities, Loan - Devmin $1.4 million.
>
> Certane loan funds were paid on or about 24 December 2021.

[142] Parity Partners' response is:

1. This complaint selectively quotes Mr Fenton's email, which must be read in context.
2. Mr Fenton's response was sent to address Mr Hamer's questions regarding the solvency of the Trustee. Mr Fenton's response was truthful and not misleading. The Trustee did not have loans that exceeded its assets, let alone overdue unsecured loans. This was communicated to Mr Hamer.
3. At the time of Mr Fenton's email, there was some sensitivity around the provision of unnecessary information to Mr Hamer because Mr Garden understood that Mr Hamer's business partner, Mr Giraudo (director of Devmin International Pty Ltd) was about to sue the Trustee as trustee of the Fund.

[footnotes omitted]

[143] In fact, the email does need to be looked at in context. Mr Hamer's email question was directed at the solvency of the trustee:

> An indication that the trust is not trading insolvent. I am aware that the Trustee has entered into unsecured loans to progress the project and has not honoured payment of interest on these loans or returned the loan capital.

[144] Thus, the query was whether the trustee was trading whilst insolvent. The evidence for that was an unidentified source who had informed Mr Hamer that the trustee had entered into unsecured loans in respect of which the trustee could not pay interest and was unable to repay the capital. In other words, the claim was that the loans exceeded the trustee's capacity to pay its debts.

[145] Mr Fenton's answer on behalf of the trustee was also focussed on the solvency of the trustee:

> The trust does not have any loans let alone overdue unsecured loans that exceed its assets. You would need to provide further information on the supposed loans that you are referring to for the trustee to make an assessment of this.

[146] The applicants rely on the first phrase: "*The trust does not have any loans*…". Their interpretation involves construing the first phrase as if there was a full stop after the word loans. Even without having regard to the context, the first sentence is at least as capable of being construed as if there were commas after the word 'loans' and after the words 'unsecured loans.' The context makes it tolerably clear that Mr Fenton was not saying that the trustee had no loans but was saying that there were no loans that exceeded the trustee's assets.

[147] There is something quite artificial in this complaint. Mr Hamer does not say that he was misled by that sentence. No person says that they were misled into thinking that the project would not involve finance. Finance was always envisaged.[59] This complaint appears to be pedantry rather than of substance.

Complaint 25: False Statement Regarding Sufficient Funding

[148] The applicants' twenty-fifth complaint is as follows:

> Email from M. Fenton to A. Hamer on 20/10/21 states "trustee raised sufficient funds to proceed with the project" when in fact it had not.
>
> Particulars

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[59] See, for example, the Information Memorandum at page 96 of exhibit AGH-1 to Mr Hamer's affidavit: "*Use of Funds raised…To pay interest costs (and any relevant fees) to the Fund's financiers*." See also clause 3.4 of the Information Memorandum headed 'Borrowings' which expressly refers to a proposed debt facility for $7.9m.

See (Complaint [15]).

[149] This complaint appears to be the same as complaint 15.

[150] Parity Partners' response is as follows:

1. This complaint selectively quotes Mr Fenton's email, which must be read in context.

2. It was within the discretion of the Trustee to proceed with the Project if it considered sufficient funding had been raised to do so. The response to Item 15 above explains why the Trustee decided to proceed with the Project.

3. Mr Fenton's response was truthful and not misleading.

[footnotes omitted]

[151] It is necessary to look at the context. In the Information Memorandum the minimum offer amount was $3.2m. However, in the Key Features section potential investors were advised:

> If the Minimum Offer Amount is not raised by the Target Date, or such other date as determined by the Trustee, then the Offer may not proceed. If that occurs, then any Application Money will be returned as soon as practicable by the Trustee. Interest will not be paid on returned Application Money.

[152] An identical paragraph appears in clause 2.2 of the Information Memorandum.

[153] Thus, the trustee had a discretion to proceed or not if the Minimum Offer Amount was not achieved by the Target Date or some extended Target Date. Parity Partners did not have an obligation to cease the project and to return Application Money if the Minimum Offer Amount was not achieved. The trustee exercised a discretion to proceed. That was a business decision. No evidence establishes that the business judgment was unreasonable.

[154] Of course, the applicants seek to establish that it was false for the trustee to say that the trustee had raised sufficient funds to proceed. It is impossible to make that finding, or to infer falsity, or to conclude that there is a reasonable case of falsity on the basis of an evaluative assessment of the evidence.[60]

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[60] Counsel for the applicants referred me to cases which demonstrate that, on an application like this, the court should have regard to direct proof as well as inferences based on facts from which a prudent sensible commercial person can properly infer a danger. Counsel also contended that the task for the court was to undertake a qualitative evaluation to see if the applicants have made out a sufficient case to justify appointing a receiver. See the Applicant's Supplementary Outline at [4], [5].

Complaint 26: Subordinated Units

[155] The twenty-sixth complaint is:

> Email from M. Fenton to A. Hamer on 20/10/21 states, in response to a question as to whether subordinated units had been issued, "The constitution does not oblige the trustee to disclose this information", without disclosing that no such Units had in fact been issued.

[156] Parity Partners' response is:

> 1. This was not the question asked. The question was:
>
> > "*Why the trustee has not yet issued the sub ordinated shares or if they have to whom have, they been issued.*"
>
> 2. The Constitution does not require disclosure of such reasons or the identity of unitholders. The Trustee treated the identity of unitholders confidential information that was not to be disclosed.
>
> 3. The response is not misleading.
>
> [footnotes omitted]

[157] Parity Partners are right that the question asked by Mr Hamer was not whether subordinated units had been issued but rather why the subordinated units had not been issued, but, if they have, who they have been issued to. That said, the response was capable of few different interpretations. In saying that "*The constitution does not oblige the trustee to disclose this information*", Parity Partners could have been saying that they were not obliged to disclose whether or not the subordinated units were issued, or they could have been saying that they were not obliged to disclose the reason why the subordinated units were not issued, or they could have been saying that they were not obliged to disclose the identity of the subordinated units. Or it may have been a combination.

[158] In any event, it is hard to discern a misleading statement from a parsing of this exchange of emails. Indeed, the reality appears to be that Mr Hamer knew that the subordinated units had not been issued. That seems to be clear from the beginning of the question. Again, there is no allegation that anybody was actually misled or that any person acted on the answer to the question. In my view, the evidence merely shows that Parity Partners was refusing to provide the requested information. Nothing in the Constitution obliged it to respond. An evaluation of the evidence does not sustain a serious case of misleading conduct.

Complaint 27: Access Codes & Passwords

[159] The twenty-seventh complaint is:

> Failure to provide the information, access codes and passwords necessary to access the Xero cloud-based accounting platform maintained by the Trustee.
>
> Particulars
>
> The Fund had a Xero subscription, paid monthly.
>
> No access details were provided, whether that method of production was an alternative or not, where trust documents were not otherwise produced for inspection.

[160] Parity Partners' response to the complaint is:

> 1. The Trustee is not obliged to disclose this information by the terms of the Order.
>
> 2. The disclosure of the access codes and passwords for the accounting platform maintained by the Trustee (Xero) would have given the Unitholder unfettered access to confidential information.
>
> [footnotes omitted]

[161] This is a recurrent problem. The applicants appear to assume that they are entitled to whatever information they request. The Constitution does not give them an unfettered right to access all information held by Parity Partners. Such an unfettered right to information, presumably at any time, would impose a significant burden on the trustee. The court should not read such a burden into the Constitution without clear words.

Complaint 28: Vouchers

[162] The twenty-eighth complaint is:

> Failure to provide all vouchers relating to any payments made to Parity Developments Pty Ltd.
>
> Particulars
>
> See (Complaints [18] and [23])

[163] Parity Partners' response is:

> 1. See responses to items 18 and 23 above.

[164] This complaint adds nothing of substance to complaints 18 and 23.

Complaint 29: No Current Statement

[165] The twenty-ninth complaint is:

> Failure to provide any current statement of position of the trust, as to its assets and liabilities.

[166] Parity Partners' answer is:

> 1. The requirement was to produce a copy of documents already in the Trustee's possession, not to create new documents.
>
> 2. A copy of the most recent statement of assets and liabilities was provided.
>
> [footnotes omitted]

[167] Nothing in the Constitution requires production of such a statement. Possibly the applicants rely on the order of Applegarth J made on 24 February 2022.[61] However, nothing in that order of the court required Parity Partners to create a current statement of position of the trust and to produce it to the applicants. The orders were for production of documents in existence. That is clear from the way the order is expressed: "*the respondent* [Parity Partners] *permit the applicants, by their solicitor, to inspect the documents in the respondent's possession or under its control…in the categories…*".

Complaint 30: No Schedule or List of Property

[168] The thirtieth complaint is:

> Failure to provide any schedule or list of Trust property.
>
> Particulars
>
> Duty at general law to keep a schedule of [sic, or] list of trust property.
>
> Trustee was ordered to produce schedule or list of trust property by the orders of Applegarth J.
>
> No schedule or list of trust property was produced.

[169] Parity Partners response is:

> 1. A schedule of trust property was not maintained for the reasons given in response to Item 7 above.
>
> 2. As no schedule of trust property was maintained, there was no schedule to disclose.

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61 That order is at page 368 of ex JDG-2 to Mr Garden's second affidavit.

[footnotes omitted]

[170] There was no duty to keep or maintain a schedule or list of trust property. That topic is discussed above in relation to complaint 7. And, the order of Applegarth J does not require production of documents. The order merely requires production of documents within Parity Partners' power or possession.

Complaint 31: Non-Provision of Bank Statements

[171] The thirty-first complaint is:

> Failure to provide all bank statements for any account operated by the Trustee or in relation to the Fund since March 2021.
>
> Particulars
>
> The most recent bank statement for account number 678 820 ends on 31 December 2022.
>
> The most recent bank statement for account number 684 408 ends on 25 February 2022.

[172] Parity Partners' response is:

> 1. The most recent bank statements received from the bank were produced.
>
> 2. The order was for production of documents in the trustee's possession or control at a point in time, there was no ongoing duty of disclosure.

[footnote omitted]

[173] That response appears to be correct. Nothing in the order suggests that it imposed a continuing obligation on Parity Partners. It was an order for disclosure of specific documents and there is no reason to import the continuing obligation of general disclosure pursuant to rule 211 of the *Uniform Civil Procedure Rules 1999*.

Complaint 32: Redacting Bank Statements

[174] The thirty-second complaint is:

> Redacting bank statements and draft management accounts to obscure payee of $61,000 on 1 April 2021 despite no units being issued in respect of that sum.
>
> Particulars
>
> There are no Units recorded in the Register.

[175] Parity Partners' response is:

> 1. The payment is not in respect of the issue of units but was made by a unitholder and the unitholder's identification has been redacted.
>
> [footnote omitted]

[176] It is sufficient to say that the applicants do not point to any specific obligation owed by Party Partners to disclose the identity of the payee. Mr Garden says that the identity of the unitholder is confidential information, and there seems to be no dispute about that. In any event, Mr Garden provides an explanation of the payment.[62]

Complaint 33: Obscuring a Payee of $10

[177] The thirty-third complaint involves a nominal sum:

> Redacting bank statements to obscure payee of $10 on 31 August 2021 despite no units being issued in respect of that sum.
>
> Particulars
>
> There are no Units recorded in the Register.

[178] Parity Partners response is:

> 1. The payment is not in respect of the issue of units but was made by a unitholder and the unitholder's identification has been redacted.
>
> [footnote omitted]

[179] Again, it has not been established that the applicants are entitled to this information. In any event, Mr Garden has provided an explanation for the payment of $10,[63] as well as an explanation of the confidentiality of the information.[64]

Complaint 17A: Barlow DCJ's Freezing Order

[180] Complaint 17A is one of 10 complaints made after the initial 33 complaints. These further 10 complaints were added in a document entitled Amended list of Trustee's Misconduct filed on 18 August 2022. Complaint 17A is in these terms:

> Barlow DCJ making a freezing order in relation to the assets of the Fund because of the conduct of the Trustee. Which order was continued by Porter DCJ on 9 June 2022.
>
> Particulars

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62 See Mr Garden's second affidavit at [214].
63 See Mr Garden's second affidavit at [45].
64 Ibid.

Order of Barlow DCJ made on 3 June 2022 in BD850/22

Order of Porter DCJ made on 9 June 2022 in BD850/22

[181] Not surprisingly, on 22 August 2022 the solicitors for Parity Partners asked for particulars:

> Is the applicant relying on the mere making of the order as going to jeopardy, or is it the "conduct of the trustee" that is relied upon? If the latter, then please provide particulars of the conduct relied upon to establish jeopardy of the assets.

[182] The response from the solicitors for the applicants was to refuse to respond to this request, and to several other of the new complaints. In short, the applicants said:

(a) Parity Partners had refused to answer the applicants' queries and concerns;

(b) Parity Partners advanced a non sequitur fallacy that it required evidence in order to seek instructions about an allegation which is identified with particulars;

(c) Fair notice had been given as to the form and nature of the allegations, and Parity Partners had an opportunity to respond.

[183] Of course, a freezing order is a species of interlocutory order. The application was brought on urgently on short notice. No final determinations were made by Barlow DCJ. It is true that His Honour thought that Parity Partners' proposal to dispose of Lot 1 was an "*apparent breach*" of the order made by Applegarth J on 3 November 2021,[65] and His Honour said he did not understand Parity Partners' suggestion that the undertaking was no longer extant. That issue was discussed above regarding complaint 19.

[184] It would be unsafe to proceed on the basis that preliminary views expressed by a judge on an interlocutory application can be relied on as evidence of misconduct justifying the appointment of a receiver, especially when the application was made urgently without affording the respondent an opportunity to properly explain its actions. In fact, having heard the explanation, and having viewed the transcript of the hearing before Applegarth J, the view reached above is that the complaint of breach of the undertaking has not been made out.

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65 His Honour expressed the view that the defendant's conduct since it gave the undertaking demonstrates a blasé attitude to undertakings it gave to the court.

[185] Indeed, it is difficult to see what this complaint adds to complaint 19. The result is a complaint that has not been particularised but is based on some preliminary views expressed during the course of an interlocutory application for a freezing order brought on short notice. Evaluating the evidence does not sustain a serious case of misconduct.

Complaint 18A: Payment of $20,000

[186] Complaint 18A is in these terms:

> Payment of $20,000 to administrations of Parity Developments Pty Ltd on or prior to 1 June 2022 without a proper basis in circumstances where the trustee has made a claim against Parity Development Pty Ltd for damages in the amount of $4,400,000 for breach of the development co-ordination agreement. Such payment was made in circumstances where the Respondent had no obligation to do so, and where the payment was not in the best interests of the beneficiaries of the Fund.
>
> Particulars
>
> Declaration of Independence, Relevant Relationships and Indemnities dated 1 June 2022
>
> Second Report to Creditors of Canlux Pty Ltd (formerly Parity Developments Pty Ltd)

[187] The complaint is that $20,000 has been unjustifiably paid.

[188] The Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) is a form lodged by registered liquidators and voluntary administrators with ASIC. The objective is to inform ASIC and the company's creditors of any relevant interests held by the liquidator or administrator.[66] Here, the DIRRI lodged with ASIC by the administrators of Parity Developments Pty Ltd notifies that Parity Partners, a related entity, has provided the administrators with an indemnity of $20,000 "*to cover our initial remuneration and disbursements associated with the administration of the Company*". The money is said to be held on trust and will not be drawn until such time as it is approved by the creditors or the Court. The indemnity is not to be relied on unless insufficient funds are realised in the administration.

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66 *Corporations Act* 2001 (Cth) ss 436DA, 449CA, 506A & Form 531. The Australian Restructuring Insolvency & Turnaround Association (ARITA) publishes a code which provides a guide to liquidators and administrators on the relevant form.

[189] Parity Partners contend that there is no proof that the $20,000 has been paid. I do not think that is right. The DIRRI, which is in evidence, clearly records that the $20,000 has been paid by Parity Partners. However, that sum has been quarantined. And it may not be called upon.

[190] The real difficulty is that there is no basis upon which the court can conclude that the payment was unjustified. One could envisage many situations where a company may legitimately and properly provide such an indemnity for the administration costs of a related company. It may well be in the interests of the beneficiaries/investors for such an indemnity to be given so that the assets of the related company are distributed in an orderly way.

[191] Parity Partners requested particulars of the circumstances which showed that the giving of the indemnity was not in the best interests of the beneficiaries/investors. That was met by the refusal to supply particulars, which is explained above.

[192] Thus, the court is left with an assertion by the applicants that the mere giving of the indemnity is unjustified. That is not a sufficient basis to conclude that there is a serious case of misconduct. The applicants contend that:

> The allegation is based on the administrators' DIRRI and the trustee chose to leave it uncontradicted, and actively refused to answer questions about its provenance posed in correspondence several months ago. Thus, the Court can infer for the purpose of this application that the payment happened as alleged.[67] The payment cannot be justified for three reasons. *First,* it was voluntary; the trustee was under no obligation and does not fall under the trustees' right of indemnity. *Second,* the payment is not in the interests of the beneficiaries. *Third*, in circumstances where the trustee has made a claim in the administration (now liquidation) of Parity Developments in the amount of $4,400,000.[68]
>
> [footnotes omitted or edited]

[193] It is necessary to deal with each aspect of that submission.

[194] *First*, in my opinion, it is an unsatisfactory approach for the applicants to seek to appoint a receiver on the basis that the trust assets are imperilled by the misconduct of the trustee, when the misconduct allegations are not properly particularised, and yet to require detailed explanations of transactions connected to the unparticularised allegations, and to complain about the absence of detailed explanations. On the

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67 The footnote here refers to *Jones v Dunkel* (1959) 101 CLR 298.

68 Applicants' Supplementary Outline at [15].

other hand, Parity Partners have a concern that very many aspects of their conduct are subject to detailed and sustained scrutiny. They have been required to prepare detailed affidavits. Explanations continue to be demanded in circumstances where the allegations against them lack precision. That difference in approach is an undercurrent running through this proceeding.

[195] *Second*, I reject the idea that, relying on the principle in *Jones v Dunkel,*[69] the court can infer that "*the payment happened as alleged*". In broad terms, the unexplained failure by a party to give evidence, to call witnesses, or to tender documents or other evidence may (not must) in appropriate circumstances lead to an inference that the uncalled evidence or missing material would not have assisted that party's case.[70] Parity Partners' explanation for not providing evidence is explained. They required proper particulars of the allegation of misconduct. And, even if not explained, what is it that the court can infer? The applicants say that the court can infer that "*the payment happened as alleged*". But that is so vague as to be meaningless. The concept seems to be that the payment was unreasonable or inappropriate for some unstated reason.

[196] *Third*, the phrase used in this complaint, namely "*the payment was not in the best interests of the beneficiaries of the Fund*" is a phrase used in a number of the complaints.[71] It is of no assistance. The phrase begs the question '*why?*' If the applicants' contention is that Parity Partners' entry into a particular transaction was not in the interests of the beneficiaries, then it is obliged to say why. In the absence of an explanation as to 'why', Parity Partners is left to speculate as to whether the price was too high or too low, or there was too little or too much security, or that there is some other unreasonable feature. Parity Partners ought not be required to speculate.

[197] *Fourth,* the relevance of Parity Partners' claim against Parity Developments is not explained or clear.

[198] For those reasons, this complaint does not comprise a serious case of misconduct.

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69 (1959) 101 CLR 298.
70 Heydon, *Cross on Evidence* 10th ed at [1215]; *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 & .
71 For example, the phrase is used in complaints 18B and 18C.

Complaint 18B: McInnes Wilson Loan

[199] Complaint 18B is expressed in this way:

> Payment of $683,469.19 to McInnes Wilson on 2 February 2022 by way of "Loan MJL" (the "**McInnes Wilson Loan**").
>
> Despite being ordered to do so by the orders of Applegarth J made on 24 February 2022 and subsequently the orders of Burns J made on 13 April 2022:-
>
> (a) No accounting records, or any other documents, were produced which revealed the existence, terms or purpose of the McInnes Wilson Loan;
>
> (b) No accounting records, or any other documents, were produced which recorded the McInnes Wilson Loan in any way;
>
> (c) No trust documents were produced identifying that any security was granted for the McInnes Wilson Loan.
>
> Such payment was made in circumstances where the Respondent had no obligation to do so, and where the payment was not in the best interests of the beneficiaries of the Fund.

[200] It is not clear, but there seems to be two unparticularised allegations here. One is that the payment itself is improper in some way. The second is that documentation of the transaction was not produced pursuant to orders of Applegarth J and Burns J made on 24 February 2022 and 13 April 2022 respectively. However, the precise allegation of misconduct is unclear. In their email of 22 August 2022, the solicitors for Parity Partners said:

> We have not received your client's evidence of this transaction, as requested by our emails of 19 August 2022. If there is no evidence of the alleged payment to McInnes Wilson described as "*Loan MJL*", then please confirm that it is not a matter about which we need to be concerned and obtain instructions. If it is pressed, then please identify for us, so that we can get instructions and prepare evidence in reply if necessary, the circumstances relied upon to assert that the payment was not in the best interests of the beneficiaries.

[201] That request was met with the refusal explained above.

[202] One can see from this request, some doubt that there was in fact such a transaction or payment. Of course, a person who alleges misconduct against a trustee should provide the best particulars it can. That has not been done. Instead, the applicants have made a vague allegation, refused to supply details or to articulate the misconduct with any precision, and to then rely on an alleged failure to explain.

[203] As counsel for Parity Partners pointed out, the Constitution gives the trustee broad powers, Clause 11.1 provides that:

> Subject to this Constitution, the Trustee has all the powers in respect of the Trust that it is possible under the law to confer on a trustee and as though it were the absolute owner of the Assets acting in its personal capacity.

[204] Clause 11.2 provides for specific enumerated powers:

> Without limiting clause 11.1, the Trustee's powers include the power to do the following:
>
> (a) Acquire and invest in any property…
>
> (b) …
>
> (p) Lend all or any money at any time forming part of the Assets to any person with or without the security of any property, including where the amount of any such loan is in excess to the value of the secured property…

[205] Given that Parity Partners possesses those wide powers, it was essential for the applicants to say exactly what Parity Partners did to exceed its powers or what specific conduct comprised misconduct. It is not sufficient to say that the trust was never constituted to engage in money lending, or even to describe the transaction as 'puzzling'.[72] More fundamentally, it was at least necessary for the applicants to identify the particular transaction. To conclude that there is a serious case that Parity Partners breached the order of Applegarth J it would be necessary to evaluate the evidence to see if it could be concluded that:

(a) There was a transaction and that documents exist recording that transaction;

(b) The documents were in Parity Partners' possession or under its control as at 3 March 2022;

(c) The documents fell into one or other of the 16 categories listed in the schedule to the order of Applegarth J.

[206] No evidence enables me to conduct that evaluation or to form those conclusions.

[207] The order of Burns J made on 13 April 2022 is not in evidence. Presumably it adopts the orders of Applegarth J.

Complaint 18C: Payment of $100,000

[208] Complaint 18C is in these terms:

> Payment of $100,000 to O'Shea & Partners on 13 May 2022, the solicitors then acting for Parity Developments Pty Ltd. Such payment was made in circumstances

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72 Applicants' Supplementary Outline at [20]-[21].

> where the Respondent had no obligation to do so, and where the payment was not in the best interests of the beneficiaries of the Fund.

[209] Again, this was a complaint where Parity Partners requested particulars. They asked for evidence of the transaction,[73] and identification of the circumstances relied on to assert that the payment was not in the best interests of the beneficiaries, and the circumstances supporting the allegation that the trustee was in breach of the undertaking to the court. As explained, particulars were refused.

[210] In any event, this complaint was the subject of the limited cross-examination of Mr Garden.[74] Mr Garden explained that O'Shea & Partners were the solicitors for Parity Partners as well as Parity Developments Pty Ltd. It is difficult to see any evidence of misconduct in the payment of legal fees, or money on account of legal fees, to the law firm on behalf of either entity.

Complaint 19A: Payment of Legal Fees

[211] Complaint 19A is related:

> In the face of an extant undertaking (given to the Supreme Court on 13 May 2022 in this proceeding) "*not to dispose of the assets of the trust other than in the ordinary course of business and in accordance with the Constitution*", the Respondent:-
>
> (a) Paid $100,000, to O'Shea & Partners on 13 May 2022, the solicitors then acting for Parity Developments Pty Ltd.
>
> (b) Paid $20,000 to the administrators appointed to Parity Developments Pty Ltd on or before 1 June 2022
>
> Particulars
>
> (Complaints [18A] and [18C])

[212] The $100,000 sum is discussed above. Counsel for Parity Partners contended that the order made by the court on 13 May 2022 excluded or allowed for the payment of legal expenses.[75] That is not correct. However, the order does record an undertaking by Parity Partners "*not to dispose of the assets of the trust other than in the ordinary course of business and in accordance with the Constitution*."

[213] The applicants appear to concede that this payment was made before the undertaking. Despite that concession the allegation that the payment was made in

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73 By asking for 'evidence' of the transaction it seems that Parity Partners was really asking for details of the transaction. But it may be that the applicants did not take that view.

74 Transcript T1-33.

75 Transcript at T1-91 line 12.

breach of the court undertaking seems to remain. Certainly, it has not been withdrawn.

[214] In any event, no evidence demonstrates that the payment of these legal costs was not in "*the ordinary course of business*" or at least impliedly within the undertaking. This litigation is a significant enterprise, as is obvious. There have been numerous court appearances and very lengthy affidavits filed by both sides. Without at least some evidence the court would hesitate to conclude that the payment was not properly in the ordinary course of business and was not in accordance with the Constitution.

[215] Importantly, as with several other allegations of misconduct, this breach of the court undertaking is alleged in an abstract way. The applicants or their solicitors do not assert that, by the court undertaking, it was intended that the trustee was not entitled to be legally represented in this litigation or that it was not entitled to pay its lawyers. One suspects that reasonable practitioners in the position of the solicitors at the time the undertaking would assume that Parity Partners' legal costs were comprehended by the expression 'ordinary course of business.' And, of course, it is doubtful that any court would make an order stifling a litigant's capacity to obtain and pay for legal services.

[216] The $20,000 payment is canvassed in complaint 18A above. Again, without evidence, it is difficult to conclude that there is a serious case that the payment was not in the ordinary course of business and in accordance with the Constitution.

Complaint 23A: Bank Balance Representation

[217] Complaint 23A is as follows:

> The Respondent misled the Court on 13 May 2022 by instructing its Counsel to represent to Court that "*There's cash bank* [sic] *of about $1 million*" (the "**Bank Balance Representation**") in circumstances where that representation was false, because the total balance of the only two bank accounts operated by the Respondent was, as at 13 May 2022, only $715,843.95.
>
> Particulars
>
> T1-30:24 (13 May hearing)

[218] This allegation was made on 18 August 2022. On 22 August 2022, the solicitors for Parity Partners emailed the applicants' solicitors asking for particulars:

> We have not received your client's evidence of bank balance was $715,843.95 as at 13 May 2022 (as your clients assert and rely upon), or identification of the circumstances relied upon to assert the respondent mislead [sic] the Court. Could you please provide that information as soon as possible, so that we may take instructions from our client and, if necessary, prepare evidence in rely [sic] accordingly.

[219] As explained, the request for details was refused.

[220] The applicants' supplementary outline repeats complaint 23A. In essence, the applicants' counsel says that Parity Partners, through its counsel, misled the court on 13 May 2022 (the first hearing day of this application). The misleading statement was that Parity Partners at that time had "*about $1m*" in 'cash at bank' assets at that time. Counsel for the applicants contends that Parity Partners had only $715,843 in 'cash at bank' assets when the misleading statement was made. An allegation of misleading the court is a serious allegation.

[221] Counsel for the applicants relies on two affidavits of Mr Davey as demonstrating the misleading statements and the 'cash at bank' assets. In an affidavit filed on 23 May 2022 – shortly after the 13 May hearing – Mr Davey said this:

> 53. The most recent bank statements produced by the Respondent show:-
>
> (a) A balance of $6,525.97 in one account (page 311 of the Hamer Exhibit); and
>
> (b) A balance of **$1,100,000** in the other account (page 314 of the Hamer Exhibit).[76]
>
> 54. A copy of a Settlement Statement dated 19 April 2022, which the Respondent produced on 22 April 2022 in relation to the sale of Lot 2 on DP1281012 ('**Lot 2**') appears at pages 104 of exhibit DGD-1. The Settlement Statement records that $979,635.30 was to be paid to the Respondent from the sale.
>
> 55. On the basis the matters referred to in paragraphs 53 and 54 above, I believe that the Respondent ought to have cash at bank of $2,086,161.27 or thereabouts.
>
> 56. On 13 May 2022, the Respondent, by its Queen's Counsel Mr Peden, stated to this Honourable Court (COR Freeburn J) that, in respect of the assets of the Trust, '*There's cash at bank of about $1,000,000, I think, and a receivable …*'
>
> 57. As at the date of this my Affidavit, no explanation has been given for the shortfall between paragraphs 55 and 56, unless the 'receivable' Mr Peden was referring to is in the order of $1 million, which in any case is not recorded in any documents I have inspected, as being produced by the Respondent, nor is any

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76 The actual Westpac bank statement states the closing balance of $1.1m as at 31 December 2021.

> transaction, by which what ought to have been cash at bank, become a 'receivable'.
>
> [emphasis added]

[222] Thus, Mr Davey's evidence was that at least $1.1m was held by Parity Partners in its bank accounts. Mr Davey says that another $979,635 was expected to have been deposited into the bank accounts in a settlement statement, with the result that nearly $2.1m should have been in the accounts. He complains that no explanation had been proffered as to why the bank accounts recorded only $1.1m in 'cash at bank' rather than $2.1m. In his affidavit filed on 17 June 2022 Mr Davey continued that complaint:

> 54. Paragraph 239(ii) [of Mr Garden's affidavit] reveals that the Respondent has cash at bank of only $1,258,255. Mr Garden provides no explanation of the shortfall between that amount, and the amount calculated at paragraphs 53 to 57 of my affidavit sworn on 23 May 2022.

[223] On that evidence, the amount held by Parity Partners in 'cash at bank' assets in May 2022 were approximately $1.1m and by June 2022 it was $1.25m. None of that sustains counsel for the applicants' submission to the court that in May 2022 the 'cash at bank' assets were only $715,843. In fact, Mr Davey's evidence is that the 'cash at bank' assets were slightly understated by counsel for Parity Partners. It follows that the evidence does not establish the serious allegation made.

[224] There are two other problems with the allegation. *First*, the hearing on 13 May 2022 was brought on urgently. Mr Hamer's affidavit included some 366 pages of exhibits and was filed by leave. Counsel for Parity Partners had not had sufficient time to digest, let alone take instructions and respond to the material. He candidly sought more time, and an adjournment was granted. In those circumstances, where there was insufficient time to take proper, detailed instructions, the court should treat statements like this as having a degree of imprecision.[77]

[225] *Second*, paragraph 239 of Mr Garden's second affidavit, which Mr Davey relies on to show that the 'cash at bank' was only $1.25m, is important but is largely ignored in the submissions. That paragraph discloses that Parity Partners holds as trust assets:

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77 It was not argued but it may be that a vague expression like 'about $1m' may not be misleading if the true amount were roughly 70% of that sum. Much would depend on the context.

(a) the project land, said to be worth between $3.8m and $4.2m;

(b) cash at bank of $1.2m; and

(c) $160,000 in funds held in solicitors' trust accounts.

[226] That is a total asset pool of roughly $5.35m. The mortgage over the project land was approximately $1.5m. None of that appears to be disputed. In very broad terms that means that, at the time counsel for Parity Partners explained to the court, during a hearing on short notice, that the cash at bank was "*about $1m*", the overall net trust assets were approximately $3.8m. That rather puts in context what counsel for Parity Partners told the court concerning the assets of the trust.

[227] In all the circumstances, there is certainly no serious case that what Parity Partners' counsel told the court on 13 May 2022 was misleading. The evidence of the applicants' own solicitor does not support the complaint.

Complaint 23B: Submissions in the District Court

[228] Complaint 23B is as follows:

> The Respondent, in an application for a freezing order brought against the Respondent in BD850/22, instructed its solicitor to represent to the District Court on 1 June 2022 that:
>
> (a) "*So there's no immediate risk of dissipation of assets even if my friend's affidavit evidence got up to that standard, which we say it would not. There's no immediate risk*"
>
> (b) "*…There's no immediate risk of assets dissipation*"
>
> (c) "*…yes, your Honour, but theres* [sic] *– we submit there's no evidence of a risk of dissipation for the purposes of defending* [sic] *the processes of the court*"
>
> in circumstances where both the Respondent, and Mr Hocking, knew that it had in fact given notice (in this proceeding) on 25 May 2022 of an intention to enter into an agreement for the sale of the Land.
>
> Particulars
>
> 1 June Devmin Transcript T1-2:32-34, T1-2:40, T1-11:1-2
>
> Findings of Barlow DCJ in 3 June Devmin Judgement Transcript T2:15 to T4:17

[229] At the core of this complaint, as with the previous complaint, is what was said to the court during the course of an application brought on very short notice. The complaint here seems to duplicate complaint 17A above.

[230] In any event, the quotes referred to are subject to two relevant observations. The *first* is that the submissions were largely about the state of the evidence tendered by Devmin. That is the point of Mr Hocking's statements "*even if my friend's affidavit evidence got up to that standard*" and "*we submit there's no evidence of a risk of dissipation*". The *second* is that what was being discussed was an "***immediate** risk of dissipation*". The proposed entry into a contract for the sale of real property, which had been notified to the applicants, is not shown to be an immediate risk of dissipation. Indeed, given that notice was given of the proposed contract, the likelihood was that the contract would need to be entered into, and then there would be period between contract and settlement, and then possibly quarantined assets. None of that demonstrates an immediate risk of dissipation of assets.

[231] It follows that there is no serious case that the District Court was misled by the submissions on 1 or 3 June 2022.

Complaint 23C: Notice of Contract

[232] Complaint 23C is:

> The Respondent failing to inform the District Court in BD850/22 on either 1 June 2022 or 3 June 2022, that it had given notice of an intention to enter into an agreement for the sale of the Land on 25 May 2022.
>
> Particulars
>
> 1 June Devmin Transcript
>
> 3 June Devmin Transcript
>
> 3 June Devmin Judgement Transcript T4:8-12

[233] This complaint largely duplicates earlier complaints.

Complaint 26A: Failing to Inform the Beneficiaries

[234] Complaint 26A is:

> Failing to inform the beneficiaries:-
>
> (a) that these proceedings were not simply to appoint a receiver to the Fund, but also sought the removal of the trustee, declarations as to whether the Fund was properly constituted and that the Assets are held only for the ordinary unitholders (and not the subordinated unitholders who were to, and did, vote at the meeting of unitholders).
>
> (b) that the Trustee had successfully resisted an application for a freezing order brought by Devmin in BD850/22 on 1 June 2022;

(c) that the Trustee had unsuccessfully resisted a further application for a freezing order brought by Devmin in BD850/22 on 3 June 2022;

(d) that Barlow DCJ in his reasons for judgement in granting the freezing order on 3 June 2022 in BD850/22 was critical of both the Trustee's honesty and its conduct;

(e) about this proceeding, by providing any of the material filed, until 4:44pm on the day before the meeting of unitholders, and thus failing to give the unitholders adequate time to consider the material.

Particulars

Notice of Meeting dated 3 June 2022

[235] On the eve of the 14 June meeting of unitholders, Mr Garden sent each unitholder an email which:

(a) Attached the document filed in this proceeding and entitled 'Response to List of Trustee's Alleged Misconduct'. That is the document prepared and filed at my request which lists the original 33 allegations of misconduct alleged against Parity Partners as well as the responses to those allegations.

(b) A hyperlink to the following documents:

(i) the originating application;

(ii) the affidavit of Mr Hamer filed on 13 May 2022;

(iii) the affidavit of Mr Davey filed on 23 May 2022;

(iv) the consent of the receiver to act;

(v) the affidavit of Mr McKinnon (the proposed receiver);

(vi) the first affidavit of Mr Garden;

(vii) the second affidavit of Mr Garden.[78]

[236] By accessing those documents and using those hyperlinks, the unitholders had access to all of the substantive material filed in this proceeding to that point. Further, by providing a copy of the 'Response to List of Trustee's Alleged Misconduct' each unitholder had access to a summary of each of the (then) 33 separate allegations of misconduct.

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78 See Mr Garden's third affidavit at [5].

[237] The applicants' first complaint in paragraph (a) is that Parity Partners failed to inform the beneficiaries that in these proceedings Parity Partners sought the removal of the trustee as well as declarations as to whether the Fund was properly constituted and as to whether the Assets were held only for the ordinary unitholders. However, even assuming that Parity Partners were obliged to inform the unitholders of those matters, the unitholders did have access to the originating application. Assuming they had an interest, they could have read all 21 paragraphs of the Originating Application.

[238] The applicants' complaints numbered (b), (c) and (d) assert that Parity Partners were obliged to disclose Parity Partners' successful resistance to a freezing order sought by Devmin in the District Court on 1 June 2022, its unsuccessful resistance to such an order on 3 June 2022, and the comments made by Barlow DCJ which were critical of Parity Partners, albeit during the course of an interlocutory application brought on short notice. The applicants do not explain why Parity Partners was obliged to disclose those elements of different litigation. Certainly nothing in the Constitution required Parity Partners to explain or report to unitholders, let alone to report all the machinations of litigation in which it was involved. In any event, Mr Hamer was entitled to raise any issues at the meeting.

[239] The complaint numbered (e) complains that the material sent to unitholders was sent too late. It was sent at 4.44pm the previous day. This complaint assumes that Parity Partners was obliged to send the material. Nothing in the Constitution required that disclosure. Even if it was sent late, as counsel for Parity Partners points out, there is not suggestion that any unitholder asked for more time to consider the material.

Conclusions: Appointment of a Receiver?

[240] As explained at the outset, it will be just and convenient to appoint a receiver where, absent such an appointment, the trust property is imperilled. A receiver may also be appropriate where the trust is in a state of disarray, or where the trust property has been improperly managed, or where the misconduct or breaches of duty of the trustee places the trust assets in danger.[79]

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79 This is intended only as a broad summary of the principles stated earlier.

[241] As can be seen, the applicants have levelled every possible criticism they can at Parity Partners. The applicants have trawled through all of the email, the documents they have obtained, and all transcripts of this proceeding and related proceedings in order to demonstrate the misconduct of Parity Partners. The allegations made have spanned a range from very serious allegations to a quite trifling claim.[80] That trawling exercise has yielded very little. Only one of the 43 complaints has demonstrated substance. That is complaint 11 comprising a failure to provide unitholder tax statements. Some other complaints reveal some lack of attention and errors.[81] More importantly, there is no substance to the large number of serious complaints.[82]

[242] That limited yield illustrates the overall impression which is of an unregistered managed investment scheme which is likely to have failed because of problems with the builder. Attempts to sell the property and to wind-up the trust have also met with problems, one of which is that the trustee has been under siege from the applicants.

[243] The applicants prosecuted all 43 complaints. They also submitted that, looking at the totality of the complaints, there was a serious case that the misconduct and breaches of Parity Partners was of such a character as to place the trust assets in danger. That submission is not accepted. None of the more significant complaints has been shown to have any substance. To the limited extent that a serious case was shown, it was limited to errors and poor bookkeeping.

[244] In the circumstances I am not satisfied that:

(a) the case in favour of appointment is strong;

(b) applying appropriate care and caution, the drastic remedy of appointing a receiver is inappropriate;

(c) there is no convincing case that a receiver is necessary.[83]

[245] Other remedies are likely to be perfectly adequate and effective. Only one parcel of land needs to be sold in order to liquidate the assets of the trust. The accounts will need to be attended to. Parity Partners has offered to consent to orders which would

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80 See complaint 33.
81 For example, complaints 1, 2, 3 and 21.
82 For example, complaints 5, 18 to 22, 24, 18A to 23A, 23B and 23C.
83 See the discussion above in paragraph [15].

involve two additional directors being appointed in place of Mr Garden and for the parties to give cross-undertakings.[84]

[246] In the circumstances, it is not appropriate to appoint a receiver. The appropriate order would seem to be that, upon Parity Partners and Mr Garden undertaking that two directors be appointed in place of Mr Garden, the application be dismissed.

[247] I will hear the parties on the form of the orders and on costs.

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84 This offer was treated by the applicants as a tacit concession that a receiver was appropriate: see the applicants' reply to the respondent's supplementary outline. I do not interpret the offer in that way. It is a recognition that further steps are required to wind up the trust and a genuine attempt to progress that process.