SUPREME COURT OF QUEENSLAND

CITATION:	*Lien & Anor v Clontarf Residential Pty Ltd & Anor* [2018] QSC 94
PARTIES:	**WEI MING LIEN** (first plaintiff) and **HSUEH ING LIEN** (second plaintiff) and **HSUEH ING LIEN AS TRUSTEE FOR THE HSUEH ING LIEN FAMILY TRUST** (third plaintiff) **v** **CLONTARF RESIDENTIAL PTY LTD** **ACN 614 625 393** (first defendant) and **DAVID IVANOVIC** (second defendant)
FILE NO/S:	BS No 6244 of 2017
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2017, 31 October 2017 and 30 November 2017
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. It is declared that the Profit Share and Project Management Agreement dated 23 September 2016 was terminated on 3 July 2017.** **2. The first defendant cause to be cancelled and deregistered from the freehold land register the power of attorney registered as dealing no.**

718022127.

3. **The counterclaim be dismissed.**

4. **The parties be heard as to the form of the other orders to be made.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where joint venture – where contract provided that except as expressly provided no remuneration may be paid to a contracting party – where contract provided for forecast of expenses to be incurred in carrying out development project – where management committee of joint venture must approve expenses outside of forecast – where item in forecast for "JV Establishment Fees"– whether those fees may be paid as remuneration rather than as reimbursement of expenses incurred by project manager in managing the development

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – OTHER CASES – where joint venture agreement – whether implied term to act in good faith towards each other and in performance of contract and exercise of powers thereunder – whether breach of implied term of good faith

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – where alleged repudiation for multiple breaches – where alleged defendants demanded payment of joint venture funds for unauthorised disbursements – where alleged defendants refused to make adequate explanation of disbursements – where alleged defendants failed to disclose financial relationship with proposed recipient of disbursement – where alleged defendants sought payment of unauthorised referral fee to referring real estate agent – where alleged defendants refused to make joint venture records available – where alleged defendants purported to terminate appointment of plaintiffs appointee to joint venture management committee – where alleged defendants made unauthorised registration of power of attorney over joint venture land – where alleged defendants threatened to transfer land to

related entity of defendants – whether intention to fulfil the contract only in a manner substantially inconsistent with the obligations and not in any other way – whether repudiation of contract – whether termination by plaintiffs effective

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, cited

Clark v Macourt (2013) 253 CLR 1, cited

Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, cited

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, cited

Dainford Ltd v Smith (1985) 155 CLR 342, cited

Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (2014) 49 VR 86, cited

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 343 ALR 58, cited

Harman v Commissioner of Taxation (1991) 173 CLR 264, cited

Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, cited

Hurst v Bryk [2002] 1 AC 185, cited

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115, cited

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623, cited

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742, cited

Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199, cited

Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525, cited

Robinson v Harman (1848) 1 Exch 850; 154 ER 363, cited

Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45, cited

Ryder v Frohlich [2004] NSWCA 472, cited

Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR

359, cited

COUNSEL: N M Cooke for the Plaintiffs
S J Philips for the Defendants

SOLICITORS: Enyo Lawyers for the Plaintiffs
Aylward Game Solicitors for the Defendants

Jackson J:

[1] The claim and counterclaim in this proceeding arise out of a joint venture agreement made between the plaintiffs and the first defendant ("the contract"). The plaintiffs claim a declaration that they terminated the contract following a repudiation or breaches of contract by the first defendant, together with consequential relief by way of damages, any necessary account and other relief. The first defendant counterclaims a declaration that the contract is still on foot, together with consequential relief for specific performance and damages.

[2] The subject of the joint venture under the contract was the development of five lots of land owned by the plaintiffs, situated at 619, 625, 631 and 633 Main St and 45 Bell St, at Kangaroo Point. The proposed development was for the construction and sale of 80 residential units, made up by a mix of 1, 2 and 3 bedroom units, and a childcare centre. At the time of the contract, there were neither plans, nor any development application for the project, and neither of the parties had the financial means to carry it out.

[3] Broadly speaking, the plaintiffs were to contribute the land, at an agreed value, and the first defendant was to arrange finance, construction of the units and childcare centre and sale of the units and child care centre, as the project manager. The net profit on the project was to be shared equally, after deduction of specific agreed amounts for certain items between the parties as well as other items of income and expenses.

[4] As events transpired, the project ground to a halt before it really began, with the parties in dispute over payments proposed to be made by the first defendant as project manager and over an instrument offered by the first defendant to the plaintiffs by way of further security for the performance by the first defendant of its obligations. Although it will be necessary to return to the parties' pre-contractual dealings, it is convenient to begin with the terms of the contract.

Profit share and project management agreement

[5] Although dated 23 September 2016, it appears not to be in dispute that the contract was concluded when Annexure A was agreed, on 29 or 30 September 2016, and then the contract was executed by the plaintiffs on 30 September 2016.

[6] The plaintiffs are defined under the contract as the "Land Owners" and the first defendant as the "Project Manager". Clause 2 provides:

> " 2. THE PROJECT
>
> 2.1 With effect from the Date of Commencement the Land Owners and Project Manager shall commence the Project and thereafter the management, development and operation of the Project in accordance with the terms of this Agreement.
>
> 2.2 Prior to the Date of Commencement, the Project Manager has provided to the Land Owners the Feasibility Study."

[7] Also as defined, "Project" means the acquisition and development of the "Land" and "Feasibility Study" means the budget and plans attached to Annexure A thereto in respect of the Project and which describes, from time to time, the estimated requirements for the Project.

[8] Clause 4 provides, in part:

> "4. EQUITY CONTRIBUTION & PROJECT MANAGEMENT
>
> 4.1 Equity Contribution by Land Owners
>
> (a) The landowners agree that their Land is to be mortgaged by the Project Manager and or Project Financier which shall represent and constitute the sole equity contribution of them to the Project;
>
> …
>
> 4.2 Finance
>
> (a) Subject always to the terms hereof and unless otherwise agreed from time to time, the Parties will seek to be advanced by the Project Financier moneys for the purpose of the Project in accordance with the Feasibility Study;
>
> (b) Any moneys advanced pursuant to clause (a) hereof will be secured by the Land together with any guarantee to be provided by the Project Manager, if necessary, in favour of the Project Financier and such other security interest as may be required by the Project Financier **PROVIDED THAT** any guarantee to be provided will be provided by the Project Manager only.
>
> …
>
> 4.3 Application of Funds by Project Manager
>
> The Project Manager shall apply the funds advanced pursuant to Clause 4.2 in accordance with the Feasibility Study (or as otherwise determined by the Management Committee) and within a sufficient time to meet Project Costs as and when they fall due. The Project

Manager is unable to pledge credit or spending outside of those expenses contemplated by the Feasibility Study and in the event an expense has not been contemplated, payment is to be decided by the Management Committee in accordance with Clause 3.4.

4.4 Project Manager to Attend to Project

…

The Project Manager will make recommendations to the Management Committee on the choice of consultants and contractors and will disclose any financial association he may have with any such consultant or contractor.

4.5 Management in Accordance with Feasibility Study

The management of the Project by the Project Manager … will be conducted substantially in accordance with the Feasibility Study but subject to any lawful direction of the Management Committee."

[9] Clause 13 provides in part:

"13. GENERAL PROVISIONS

…

13.2 No Commissions, Salaries or Fees

Except as herein expressly provided, no salaries, fees, commissions or other remuneration for any services rendered in connection with the Project will be paid or payable to any of the Parties hereto or to any of their officers or employees."

[10] Clause 5 provides in part:

"5. PROJECT MANAGER'S FEES

The Project Manager will receive a fee of $249,600.00 pa plus GST payable in monthly instalments of $20,800.00 plus GST on the last day of every month provided instalments are not payable before development approval has been received and the first instalment is to commence on the first monthly drawdown of funds for the Project from the Project Financier…"

[11] Clause 3 provides in part:

"3. MANAGEMENT COMMITTEE

3.1 Establishment and Composition

Upon execution of this Agreement, the Land Owners and Project Manager shall establish a Management Committee for the Project

comprising two (2) persons, one of whom shall be on behalf of the Land Owners collectively with the Project Manager being the other person and shall be authorised to make determinations binding on the parties respectively.

3.2 Management Committee

The Management Committee shall meet as and when any member of the Management Committee shall decide and the quorum necessary for the transaction of business at such meetings shall be two (2) persons present in person.

3.3 Resolutions

Resolutions and determinations of the Management Committee shall be unanimous.

3.4 Powers

The Management Committee may only make determinations in respect of the following:

(a) approve any cost or expense for the Project involving an additional cost over the amount originally budgeted in the Feasibility Study for that item and such additional costs shall form part of the Project Costs;

(b) approve any substantial departures from or amendments to the Feasibility Study and Project Funding Statement;

(c) determine the continued viability of the Project and, if appropriate, its abandonment;

(d) consider and approve all aspects of the budget for the Project; …"

Attachment A

[12] Attachment A is in two parts. The first is a spreadsheet referred to as the "Feasibility Study". The second is a document from the second defendant addressed to John McLean of Ray White Bulimba dated 13 September 2016.

[13] A few points of interest emerge from the document dated 13 September 2016. First, it is agreed that the plaintiffs are to be paid $8,030,000 for the Land, as a purchase price, with $580,000 to be provided to pay out their current mortgage. Consistently with the amount of $8,030,000, but inconsistently with the amount of the payout of $580,000, the Feasibility Study provides for a mortgage payout of $530,000 with the land purchase price at $7,500,000. The explanation for the difference is that late in the negotiations the plaintiffs sought and obtained the first defendant's agreement to a further payment of $50,000 apparently intended by the first plaintiff and his wife for their parents.

[14] Second, the document of 13 September 2016 provides for payment of $8,000 per month (to the plaintiffs), to start once the development application is approved and marketing is underway. That, too does not appear to be an amount provided for in the Feasibility Study, although nothing was said to turn on it.

[15] As well, the document of 13 September 2016 also provides that the purchase price for the land is to be paid prior to construction and it provides that the Project Manager is to fund 100 percent of the Project.

Feasibility Study

[16] The Feasibility Study is a rudimentary cashflow forecast of income and development costs for the Project, with the latter broken into seven separate groups of development cost items.

[17] As to income, it proposes that there will be 80 units in the development, made up of 30 one bedroom units, 30 two bedroom two level units and 20 three bedroom one level units, together with the childcare centre, for a total projected income on sales of $59,600,000. Over the whole of the 80 units, and leaving aside the child care centre, the average price is $576,250 per unit.

[18] The first group of development cost items is headed "Purchase and Management Costs". It includes the Land purchase price and amounts for accounting fees, the mortgage payout and the following item:

> "JV Establishment Fees $500,000.00"

[19] The fourth group of development costs is headed "Professional Services". It includes separate amounts for consultant services by surveyors, town planners, architects, environmental consultants, electrical consultants, building certifiers and civil designers. As well, it includes the following item:

> "Project Management Fees $350,000.00"

[20] The Project Management Fees relate to clause 5 of the contract, as set out above.

[21] The sixth group of development cost items is headed "Sales and Marketing Costs". It includes the following item, in part:

> "Real Estate Commissions and Marketing Costs… $2,400,000.00"

JV Establishment Fees

[22] The contract does not define or give further contextual insight as to the item comprising JV Establishment Fees. However, before the contract was finalised and executed the parties discussed that item. That conclusion follows both from the pleadings and from

the evidence. Neither of the parties submitted that the evidence was not admissible as an aid to construe the contract on this question.

[23] As to the pleadings, the defendants allege that on 6 July 2016 Mr Ivanovic said to the first plaintiff's wife, Alice Quek that "the JV Establishment Fee is payable to us to cover the costs that we will incur in apply[ing] for and successfully obtaining development consent". The plaintiffs admit that the subject was discussed at the meeting on 6 July 2016 but say that the effect of the words used was that "the JV Establishment Fee will be paid to the Project Manager for the costs incurred in the Project in applying for and successfully obtaining development approval". The difference in meaning lies in whether the Project Manager is to be paid remuneration for its own time and effort in applying for and obtaining development approval.

[24] As to the evidence, on 9 June 2016, the first plaintiff and Ms Quek met Jake Gould and Roger Carr of Ray White Bulimba at the offices of Ray White Bulimba. They discussed the appointment of Ray White Bulimba as exclusive agent to sell the land situated at 619, 625, 631 and 633 Main St and 45 Bell St, Kangaroo Point.

[25] On 11 June 2016, the plaintiffs signed and returned a document appointing Ray White Bulimba as exclusive agent in Form 6 under the *Property Occupations Act* 2014 (Qld) with additions.

[26] On 15 June 2016, the first plaintiff and Ms Quek met Mr Carr at the offices of Ray White Bulimba. Mr Carr raised the possibility of a "buyer" who would enter into a joint venture with the plaintiffs.

[27] On 17 June 2016, Mr Carr sent an email to Ms Quek that attached other emails including one from the second defendant requesting a mortgage payout figure to prepare a feasibility on the site.

[28] On 25 June 2017, Mr Carr sent an email to Ms Quek attaching what was described as a draft JV for her perusal. The attachment was a document described as an expression of interest by "MINC". It was a brochure extolling MINC's capabilities. At page 10 it contained a gross profit calculation for a proposed development on the site.

[29] On 6 July 2016, the first plaintiff and Ms Quek met with Mr Carr, John McLean and David Ivanovic at the premises of Ray White Bulimba ("6 July Meeting"). That was the only time that either of the plaintiffs or Ms Quek met Mr Ivanovic.

[30] On 18 July 2016, Ms Quek sent an email to Mr Ivanovic asking for further information. Mr Ivanovic replied to that email. He responded to the numbered questions contained in Ms Quek's email by interposing his responses in a different colour under the relevant questions, before returning the email as amended in his email to Ms Quek in reply.

[31] On 19 July 2016, Ms Quek sent an email to Mr McLean inquiring whether "MINC" would consider outright buying all of the properties.

[32] On 20 July 2016, Mr McLean replied to Ms Quek as to why the answer was "no". Incorrectly, Mr McLean suggested that there would be no mortgage over the Land for the duration of the agreement. However, Mr Ivanovic's response to Ms Quek's email of 18 July 2016 had made it clear that there would be such a mortgage.

[33] On 20 July 2016, Ms Quek responded with questions to Mr McLean's reply which were interposed in Mr McLean's email.

[34] On 21 July 2016, Mr Ivanovic responded to Ms Quek's queries to Mr McLean, again interposing his responses under Ms Quek's queries in a different colour.

[35] Meanwhile, also on 19 July 2016, Ms Quek had sent a further email to Mr Ivanovic with further questions. On 20 July 2016 Mr Ivanovic responded to that email, again interposing his responses in a different colour.

[36] On 27 July 2017, the first plaintiff and Ms Quek met with Mr Carr and Mr McLean at the offices of Ray White Bulimba and held a telephone conference with Mr Ivanovic ("27 July Telephone Conference").

[37] During this telephone conference Ms Quek says that she asked about the JV Establishment Fee. She says that Mr McLean said words to the effect that: "it's on every project they do, it's just a fee that they have." Ms Quek says that Mr Ivanovic said something similar. Ms Quek says that Mr Ivanovic also made clear that he would not be getting paid any money until the development application was approved.

[38] The first plaintiff also says that Mr Ivanovic and Mr McLean both said the JV Establishment Fee is just a fee that was charged.

[39] According to their evidence, none of the other participants at the 27 July Telephone Conference recalled that the effect of what was said was as Ms Quek and the first plaintiff recall it.

[40] Mr Ivanovic says that at the 6 July Meeting he explained that the JV Establishment Fees were the fees incurred by the Project Manager up until the development application was approved to cover the costs that the first defendant would incur in applying for and successfully obtaining development consents.

[41] Mr McLean says that at the 6 July Meeting Mr Ivanovic explained (further) that the JV Establishment Fee was for the cost and time the Project Management would incur up until development consent was granted and that the Project Management Fee would cover the Project Manager's time and costs after development consent was granted. However I have concerns about the reliability of Mr McLean's evidence, as discussed below.

[42] Mr Carr did not recall discussion about the JV Establishment Fees.

[43] Looking at the evidence overall, I accept that there was discussion about the item "JV Establishment Fees" at the 6 July Meeting and the 27 July Telephone Conference and that Mr Ivanovic and Mr McLean said at the telephone conference that it was an item or fee that was usually charged or words to that effect.

[44] Although it is not as clear, on balance, I do not accept that Mr Ivanovic or Mr McLean explicitly identified that the fee was for the Project Manager's remuneration for time and effort in applying for and obtaining development approval, but I do accept that it was explained as for the costs incurred in the Project in applying for and successfully obtaining development approval.

Referral Fee

[45] One of the disputes that have arisen is concerned with what has been described as a "Referral Fee" for Ray White Bulimba. The Referral Fee is an amount of $240,000.00 that the first defendant says is payable as a joint venture cost or expense to Ray White Bulimba.

[46] No reference is made to any Referral Fee in the contract. No reference was made to it in any of the numerous written questions and answers passing between Ms Quek and Mr Ivanovic and Mr McLean leading up to the contract.

[47] Neither the first plaintiff nor Ms Quek remembers any discussion about Ray White Bulimba being paid a Referral Fee at the 6 July 2016 Meeting or the 27 July 2016 Telephone Conference.

[48] As set out above, there is an item in the Feasibility Study for Real Estate Commissions and Marketing Costs in the group of the development costs for sales and marketing costs. However, that item represents commissions and marketing costs for the 80 units to be built. On the other hand, the Referral Fee, according to the first defendant, is a fee to be paid to Ray White Bulimba for its role in assisting the parties in reaching the joint venture agreement comprised in the contract.

[49] The first plaintiff and Ms Quek say they have no knowledge of any agreement to pay such a fee. Ms Quek says that on an occasion prior to execution of the contract, when Mr McLean attended at her house at Kangaroo Point to deliver some documents, she asked him how Ray White Bulimba was to be paid, given there was no sale of the properties and the Form 6 had expired. She says Mr McLean responded with words to the effect that Ray White Bulimba did not need to extend or sign another Form 6 as the plaintiffs did not have to pay them. They were not getting paid then but would get paid more on completion of the project by selling the units once they are built. The first plaintiff also says that he witnessed such a conversation between Mr McLean and Ms Quek.

[50] Mr McLean denies that conversation. He says that on 6 July 2016 he explained that a Referral Fee, which is the equivalent of the commission on the deal, would come out of the project costs and be payable by the joint venture. He says that at the on 27 July

Telephone Conference he again explained that the Referral Fee would come out of the project costs instead of being payable by the plaintiffs directly.

[51] Mr Carr says that he believes that Mr McLean brought up the Referral Fee at one of the meetings but is not sure which one.

[52] As previously noted, notwithstanding the range of subjects about which the parties exchanged emails before the contract was executed, the Referral Fee is not mentioned to in any of them.

[53] The only document referring to the Referral Fee that pre-dates the contract was an email from Mr Ivanovic to Mr McLean, sent on 26 July 2016, as follows:

> "John,
>
> As agreed and upon execution, please forward referral fee invoice for $240,000.00 inclusive of GST to MINC PMANS Pty Ltd (Project Manager).
>
> This amount is payable on settlement and is part of the establishment fee as seen in draft feasibility.
>
> Settlement could take up to 30 days."

[54] In my view, it is significant that this email was neither copied nor forwarded to the first plaintiff or Ms Quek. It is also notable also that Mr Ivanovic was promising that Ray White Bulimba would be paid an amount of $240,000.00 from the proposed JV Establishment Fees of $500,000.00. As discussed earlier, the first defendant's case is that those fees were intended to cover the Project Manager's remuneration for its own time and effort in applying for and obtaining development approval until the point of approval of the development application, according to both Mr Ivanovic and Mr McLean. If the Referral Fee was an amount payable as a joint venture expense, why was it payable from the JV Establishment Fees? Neither of these points were addressed by Mr Ivanovic or Mr McLean in their evidence and the first defendant neither pleads nor submits that the Referral Fee was part of the JV Establishment Fees.

[55] The first defendant submits that the explanation for not showing the email or a draft agreement relating to the Referral Fee that was prepared in Ray White Bulimba's offices to the first plaintiff or Ms Quek was that as a joint venture expense Ray White Bulimba only required the agreement of Mr Ivanovic on behalf of the Project Manager. I reject that explanation. At the time in question, the joint venture contract had not been finally agreed, so Mr Ivanovic had no authority from the plaintiffs under the contract. A close reading of the correspondence at the time suggests that the first plaintiff and Ms Quek were concerned about the level of the amounts for some of the proposed joint venture expenses.

[56] In my view, the inference to be drawn is that the agreement as to payment of the Referral Fee to Ray White Bulimba was made between Mr Ivanovic and Mr McLean without reference to the plaintiffs and deliberately not disclosed to them. I reject Mr McLean's evidence that the Referral Fee was explained to both the first plaintiff and Ms

Quek on both 6 July 2016 and 27 July 2016 and Mr Carr's and Mr Ivanovic's evidence to the extent that they might support Mr McLean's evidence. Those explanations are just not credible in circumstances where no document that was shown to or given to the plaintiffs before the contract was executed mentions the Referral Fee.

[57] In reaching that conclusion, I have not overlooked that:

(a) on 30 January 2017, the plaintiffs' accountant sent an email to Mr Ivanovic asking, inter alia, whether the $100,000 to be paid to Ray White was part of the item of $2,400,000 for real estate commissions and marketing costs was allowed in the Feasibility or an extra cost. Mr Ivanovic replied obliquely on the same day that Ray White had a $240,000 commission but had agreed to take $100,000 "for now" and leave the balance in the project for further payment and continued: "Yes the commission is allowed for [in] the [F]easibility".

(b) on 12 May 2017, in an email from the plaintiffs' solicitors to the first defendant's solicitors, the plaintiffs said that they were considering releasing the amount of $40,000 for the Referral Fee.

October 2016 – March 2017

[58] On 2 October 2016, Mr Ivanovic sent an email to Paul Buljevic of PBD Architects enquiring whether they were interested in the Project.

[59] On 13 October 2016, Queensland Finance Group wrote to the first defendant stating that a major bank had advised that they would be prepared to consider an application for the provision of financial accommodation to assist with the construction of 80 residential apartments plus 1,500 square metres of commercial/retail for a proposed facility limit of $28,000,200 on a first mortgage to assist with the development.

[60] Also on 13 October 2016, Commercial Mortgage Corporation wrote to the first defendant, care of Chifley Securities, confirming a loan approval to the first defendant in the principal sum of $2,250,000 to fund the development application and pre-sales of the residential/commercial development site and to repay the existing mortgage, to be secured by a first mortgage over the Land and with a guarantee by Mr Ivanovic. The term of the facility was proposed to be for 18 months.

[61] On 18 October 2016, PBD Architects sent a fee proposal to Mr Ivanovic for a project that would yield approximately 54 to 58 units. The proposal was broken into five phases. Phase 1 was for the concept sketches and were for the pre-development application for the fees of $19,280.00 plus GST. Phase 2 was for the development application submission and consultant coordination that is up to the point of preparation of the development application to the final preparation of the development application for the sum of $77,120.00 plus GST. Phase 3 was for the design development and construction certificate application, that is, up to the construction contract drawings, for the sum of $69,410.00 plus GST. Phase 4 was for the construction documentation, that

is, up to the completion of documentation suitable for construction purposes, for the amount of $84,830.00 plus GST. Phase 5 was for advice during construction, that is, to assist with construction issues during the works and to liaise with consultants. The amount was to be subject to negotiation.

[62] Two points should be made about this document. First, at no stage did the first defendant communicate its contents to the plaintiffs, as to the amount of the quoted fees. Second, PBD's understanding was that the site would yield 54 to 58 units, not the 80 units forecast by the feasibility. At no stage did the first defendant bring the drop in forecast of yield to the attention of the plaintiffs.

[63] On 17 November 2016, the plaintiffs' accountant, David Cowling, sent an email to Mr Ivanovic proposing to restructure the plaintiffs' interests in the joint venture for tax purposes. Ultimately, nothing came of the proposal.

[64] On 1 December 2016, Mr Ivanovic wrote to Mr Cowling, pointing out that more time would be need to be added to the Project following the plaintiffs' proposed changes for tax purposes.

[65] On 5 December 2016, Create Group Funding provided an indicative letter of offer for first mortgage finance funding to the first defendant for the sum of $1,400,000.00 for the purpose of using the funds to contribute to settling the security property, meaning to pay out the existing mortgage debt owed by the plaintiffs to their bank.

[66] On 3 January 2017, Mr Ivanovic sent an email to Ms Quek advising that the first defendant would be engaging the services of PBD Architects, but not enclosing the fee proposal.

[67] On 4 January 2017, the first defendant and Mr Ivanovic executed documents for a loan from Bellwether Capital Pty Ltd ("Bellwether") to the first defendant for the sum of $1,475,500.00 for a period of 18 months. The documents provided that the first defendant and the plaintiffs would be guarantors of the loan and mortgagors of the land to secure the loan. The documents were not executed by the plaintiffs at that time.

[68] On 5 January 2017, the first defendant's solicitors sent a copy of the loan documents and mortgage to the plaintiffs' solicitors for execution.

[69] Despite requests from the first defendant's solicitors, Bellwether's solicitors refused to amend the loan and mortgage documents so as to delete the plaintiffs as guarantors, as the plaintiffs and the first defendant had agreed between themselves under cl 4.2(b) of the contract. Bellwether's solicitors pointed to the limitation on the lender's rights against the plaintiffs as guarantors contained in special condition 10 of the proposed mortgage as follows:

> "The credit provider and transaction parties agree that, in circumstances where (a) an event of default occurs under this memorandum and (b) such event of default is not remedied in the manner required under this

> memorandum and (c) the credit provider exercises its power of sale as mortgagee in possession over the real properties described below and (d) the full proceeds of such sale(s) are paid to the credit provider in and towards the amount owing under the mortgage, the credit provider will not seek to recover any further amounts or shortfall from Wei Ming Lien and Hsueh Ing Lien in his own right and as trustee for the Hsueh Ing Lien Family Trust …"

[70] On 13 January 2017, Ms Quek sent an email to Mr Ivanovic protesting that the documents that had been delivered would secure a loan of $1,475,500.00 against the land and against the plaintiffs as guarantors.

[71] On 16 January 2017, PBD Architects sent an updated fee proposal to Mr Ivanovic.

[72] On 17 January 2017, the first defendant's solicitor sent an email stating that it was unreasonable for the plaintiffs to refuse to execute the guarantee and reserving his client's rights to seek urgent interlocutory relief and damages.

[73] On 17 January 2017, the first defendant's solicitor sent another email to the plaintiffs' solicitors stating that he was instructed to offer a guarantee over the shares of the first defendant to assist in getting the Project going.

[74] Following an inquiry from the plaintiffs' solicitor as to the value of the shares, the first defendant's solicitor sent an email on 23 January 2017 informing the plaintiffs' solicitor that the first defendant was a special purpose vehicle set up for the Project whose value was inherently based on the Project and its success. Put more simply, the first defendant had no assets apart from its interest under the contract.

[75] On 23 January 2017, Ms Quek sent an email to Mr Ivanovic suggesting that the way forward may be to get another funder.

[76] On 23 January 2017, Mr Ivanovic sent an email to Ms Quek stating that cl 10 of the mortgage document brought the loan within the scope of the contract, presumably meaning cl 4.2(b).

[77] On 25 January 2017, Ray White Bulimba raised an invoice to the first defendant for "commission" in the sum of $240,000 upon a "contract price" for the Land of $8,030,000, payable "at settlement", as to $100,000, with the balance "before construction commencement". This document was not shown to the plaintiffs by either Ray White Bulimba or the first defendant at that time, or until after this proceeding started.

[78] On 27 January 2017, following a request by Mr Ivanovic, Ray White Bulimba raised a revised invoice for commission on the transaction, reducing the amount payable at settlement to $40,000 with the balance payable before construction commencement. This document was not shown to the plaintiffs by either Ray White Bulimba or the first defendant, until 5 June 2017, in the circumstances set out below.

[79] On 30 January 2017, the plaintiffs' accountant sent an email to Mr Ivanovic asking, inter alia, whether $100,000 to be paid to Ray White was part of the item of $2,400,000 for real estate commissions and marketing was allowed in the Feasibility or was an extra cost. Mr Ivanovic replied obliquely on the same day that Ray White had a $240,000 commission but had agreed to take $100,000 "for now" and leave the balance in the project for further payment and continued: "Yes the commission is allowed for [in] the [F]easibility".

[80] On 30 January 2017, Devalign submitted a fee proposal to Mr Ivanovic for town planning services to undertake a pre-lodgement meeting with the Brisbane City Council for $1,100.00 and town planning work for a development application seeking a material change of use for a mixed use development for $9,900.00.

[81] On 8 February 2017, the first defendant by Mr Ivanovic addressed an undertaking to the plaintiffs, promising to execute a share guarantee and requesting in return the execution of the mortgage and loan documents.

[82] On 10 February 2017, the plaintiffs executed the mortgage and associated documents. One of those documents took a form headed "Statutory Declaration by Transaction Party". Clause 27 thereof provided:

> "I hereby authorise and direct (Disbursement Direction) the Credit Provider and/or Elliott May Lawyers of 23 Enoggera Terrace, Red Hill in the State of Queensland… to disburse the undermentioned Amount of Credit to be advanced by the Credit Provider under the Facility in the matter set out in the attached Disbursement Authority or as otherwise directed in writing by my solicitor, my financer broker, my agent or as I direct."

[83] The "attached" disbursement authority provided that the signatories consented to the retention of particular funds from the total advance of $1,475,500 and provided further:

> "Disbursement available to the borrower: $216,766.00"

[84] The first defendant submits that this document constitutes an agreement as between the plaintiffs and the first defendant for that amount to be paid to the first defendant. In my view, it was no such thing. It was an agreement operating as between the lender Bellwether and the signatories, in accordance with cl 27 of the statutory declaration.

[85] On 2 March 2017, Ms Quek sent an email to Mr Ivanovic requesting that in addition to the share guarantee proposed by the first defendant, Mr Ivanovic should give a personal security if the shares were not sufficient security value. Mr Ivanovic rejected that suggestion.

[86] On 16 March 2017, the lender's solicitors sent an email to the plaintiffs' solicitors, asking for details of how the sums to be disbursed, including the $216,766, were to be spent.

[87] On 17 March 2017, Ms Quek sent an email to the plaintiffs' solicitors, with a copy to Mr Ivanovic, requesting that they remind the lender's solicitors that supporting documents must be submitted prior to any disbursement of any amounts requested by the first defendant.

[88] On the same day, in response to that email, Mr Ivanovic sent an email to Ms Quek saying that if such a statement was sent to the lender's solicitors: "the deal will be dead in the water and the deal is done. We will not be seeking a third funder. We will be seeking to recover costs."

[89] Mr Ivanovic continued by proposing that the relevant amount ($216,766.00) could be deposited into the plaintiffs' solicitor's trust account before paying the first defendant, if Ms Quek preferred.

[90] Ms Quek responded, on the same day, by saying that during the signing of the loan documents it was explained to her mother that any disbursement of funds would be supported by the relevant documents.

[91] For reasons that are not explained by the evidence, there was further delay in settlement of the loan. It seems likely the delay was over the impasse as to the terms of the proposed share guarantee, but it is unnecessary to make any positive finding about that.

[92] On 30 March 2017, the first plaintiff sent an email to Mr Ivanovic alleging default by the first defendant.

[93] On 6 April 2017, Ms Quek sent an email to Mr Ivanovic asking him to remind the first defendant's solicitor that the $216,766 would go to the plaintiffs' solicitors as agreed on 17 March 2017.

[94] On 11 April 2017, the first defendant's solicitor sent an email to the plaintiffs' solicitor demanding disbursement of the $216,766 (on the assumption that it had been received by the plaintiffs' solicitors) as to $10,000 to the first defendant's solicitors and as to $206,766 to the first defendant.

[95] Thereafter, the parties fell into serious dispute as to whether the demand should be complied with and as to the first defendant's entitlements to deal with the funds represented by the amount of $216,766.

Implied terms and fiduciary obligations

[96] The plaintiffs allege that there were four implied terms of the contract that the first defendant breached and that the breaches amounted to a repudiation or sufficiently serious breach to entitle the applicants to terminate the contract. These contentions raise a number of legal as well as factual questions, not all of which were dealt with in the submissions of the parties.

[97] The implied terms alleged are:

(a) to act in good faith towards each other and in the performance of the contract and exercise of powers thereunder;

(b) to do that which is reasonably necessary to enable the other party to obtain the benefit of the contract;

(c) to act reasonably in the exercise of the powers under the contract including those powers in cll 8.1(a) and 9.2; and

(d) that the first defendant's authority to incur or pay for costs and expenses for the Project was restricted to costs or expenses properly incurred for goods or services that are reasonably necessary for the progress of the Project.

[98] The first defendant admits (b) and (c) but otherwise denies that the alleged terms were implied in the contract.

[99] Additionally, the plaintiffs allege that the first defendant was in a fiduciary relationship and owed fiduciary obligations to the plaintiffs, being:

(a) a duty to avoid a conflict between the interests of the plaintiffs and the interests of the first defendant; and

(b) a duty not to use its position to improperly pursue a gain or advantage for itself or someone other than the plaintiffs.

[100] The first defendant denies the alleged fiduciary relationship and obligations.

First threatened breach: JV Establishment Fees

[101] It is common ground that cll 4.4 and 3.4 of the contract require the first defendant to make recommendations to the Management Committee on the choice of consultants and contractors for the project and to disclose to the plaintiffs any financial association it may have with any consultant or contractor.

[102] On 5 June 2017, the first defendant's solicitors sent an email to the plaintiffs' solicitors attaching inter alia:

(a) the revised PBD fee proposal dated 16 January 2017 ("revised PBD Fee proposal");

(b) the revised Ray White Bulimba tax invoice to the first respondent dated 27 February 2017 ("Ray White Bulimba Tax Invoice"); and

(c) tax invoice number 20001 PMANS Services Pty Ltd to the first respondent dated 20 March 2017 ("PMANS Services Tax Invoice").

[103] Also on 5 June 2017, the first defendant's solicitor sent another email to the plaintiffs' solicitors attaching a list of nine tax invoices for legal fees issued by the first defendant's solicitors to the first defendant in the total sum of $12,783.51.

[104] Collectively, I will refer to the documents sent on 5 June 2017 as the "5 June 2017 Documents".

[105] The PMANS Services Tax Invoice was for "part payment of JV establishment fee pursuant to Annexure A" of the contract, in the amount of $120,000.

[106] The plaintiffs allege that in breach of:

(a) cl 4.4, the first defendant did not disclose the financial association between the first defendant and PMANS Services; and

(b) the implied terms, the engagement of PMANS Services as a consultant or contractor to the Project was not approved by the Management Committee.

[107] The first defendant denies the alleged breaches, because PMANS Services was not engaged as a consultant or contractor and because the JV Establishment Fees are payable to the first defendant as a properly payable Project Cost. It also submits that the PMANS Services tax invoice was payable to that company as Project Manager as the nominee of the first defendant.

[108] The last point may be dealt with briefly. Within the meaning of the contract, the "Project Manager" is defined to be the first defendant or its nominee. But there was no evidence or suggestion by the first defendant that PMANS Services was nominated to replace the first defendant as the Project Manager, and I note that cl 11 of the contract prohibits assignment without the written consent of the other party.

[109] As to the role of PMANS Services, the evidence at the trial provided no satisfactory explanation as to why that company invoiced the first defendant for any amount for the JV Establishment Fees. PMANS Services is a company of which the second defendant's son is sole director and shareholder. It performed no services for the Project.

[110] The second defendant raised the PMANS Services invoice. He said that he had his son's authority to do so. But he could not explain why he had done so. The most likely explanation seems to be that he wished to create the appearance that the amount to be drawn down against the item for JV Establishment Fees was payable to a third party. Perhaps he thought that was required before the first defendant was entitled to draw down funds against that item in Annexure A or did so because of Ms Quek's assertion on 17 March 2017 that any disbursement of funds should be supported by the relevant documents.

[111] Whatever the reason, it was not suggested at the trial that PMANS Services had any entitlement to the amount as a supplier to the Project. The first defendant's position was simply that it was entitled to nominate PMANS Services to receive the JV Establishment Fees as a sum payable to the first defendant for its trouble in carrying out the role of Project Manager, up to the point in the future after development approval is received when it will become entitled to Project Manager's Fees under cl 5 of the contract.

[112] One of the more difficult questions in the case is whether the first defendant was entitled to pay itself the sum of $100,000 from the advanced funds on account of the JV Establishment Fees under the contract. (Although the PMANS Services Tax Invoice was for $120,000, the amount advised in the 12 May Proposed Disbursements was $100,000.)

[113] Simply put, the plaintiffs' case is that the first defendant is not entitled to pay itself any sum by way of the JV Establishment Fees that does not represent a cost or expense actually incurred. In other words, it is not an amount by way of remuneration for the first defendant's services to the Project.

[114] The plaintiffs rely, in particular, on cl 13.2 of the contract, that provides:

> "13.2 No Commissions, Salaries or Fees
>
> Except as herein expressly provided, no salaries, fees, commissions or other remuneration for any services rendered in connection with the Project will be paid or payable to any of the Parties hereto or to any of their officers or employees."

[115] As previously set out, cl 5 of the contract expressly deals with the Project Manager's Fees and expressly provides for an annual amount of those fees to be paid by monthly instalments that are "not payable before development approval has been received".

[116] Accordingly, unless the "JV Establishment Fees" item in the Feasibility Study is also an amount of fees payable to the first defendant that is expressly provided in the contract, cl 13.2 would prohibit payment of any amount to the first defendant by way of remuneration from those fees.

[117] Taking the question to be answered as a matter of construction, a plurality in the High Court recently said in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*:[1]

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court

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[1] (2017) 343 ALR 58, 63 [16].

considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.

[118] The first defendant alleged and sought to prove that the subject matter of the JV Establishment Fees included such remuneration by reference to the discussions between the parties at the 6 July Meeting and the 27 July Telephone Conference. However, I have not accepted the evidence of the first defendant's witnesses to that effect.

[119] Alternatively, the first defendant alleged that it was an implied term of the contract that the JV Establishment Fees are payable to the first defendant or its nominee. The species of implied term relied upon is a term implied in fact, or ad hoc, of the kind for which *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[2] is treated as a leading case, as reinforced by recent authority.[3] Often the most important questions in ascertaining whether such a term should be implied is whether it is necessary to imply the term to give business efficacy to the contract.

[120] There is a distinction, in my view, between payment of the funds advanced under cl 4.2 of the contract to the first defendant as Project Manager, for it to apply under the authority conferred by cl 4.3 of the contract, and payment to the first defendant or its nominee of a sum for the first defendant's remuneration.

[121] It is not necessary to imply a term of the contract to conclude that the funds advanced under cl 4.2 should be paid to the first defendant to be applied by the first defendant as Project Manager under cl 4.3. That conclusion follows, in my view, as a matter of ordinary construction of the contract, without the need to resort to any implied term. To the extent that the plaintiffs allege that any funds advanced are to be placed under the control of the Management Committee and only to be dealt with in accordance with the decisions of the Management Committee, I reject the plaintiffs' case, as set out below.

[122] However, the implied term alleged by the first defendant is not only to the effect that the funds advanced under cl 4.2 should be paid to the first defendant to be applied by the first defendant as Project Manager under cl 4.3. It is that the only party who could be paid the JV Establishment Fees was the first defendant or its nominee. In context, the meaning alleged is that payment of the JV Establishment Fees is to be made to the first defendant or its nominee beneficially.

[123] In my view, the alleged implied term fails because it is not necessary to give business efficacy to the contract. Nothing requires, as a matter of necessity, that the first defendant is to be remunerated for its own work in arranging finance for and in preparing and lodging the development application. There is nothing uncommercial about the possibility that the first defendant was to "earn" its equity in the Project by the

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2 (1977) 180 CLR 266.

3 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 185-186 [21]-[22] and 201 [62]; compare *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, [18]-[26] which perhaps suggests a return of English law to the same principles.

services it was to supply as Project Manager up to the point of receipt of a successful development application without remuneration, in circumstances where it was making no injection of cash or property or other contribution, unless finance could not be arranged. Given that the Land was worth several million dollars, it does not seem a likely risk that the first defendant would have to contribute finance before the development approval stage, and in any event it seems uncontentious that the first defendant had no assets it could contribute if the Land could not be used to borrow sufficient funds.

[124] In my view, properly construed, the JV Establishment Fees item in the Feasibility is not an amount of fees payable to the first defendant that is expressly provided. On that basis, in my view, the defendant is not entitled to pay the sum of $100,000 or any other part of the $500,000 amount allowed for JV Establishment Fees in the Feasibility Study to itself or its nominee for remuneration for its time and effort in arranging finance for and obtaining development approval up to the point in time when the development approval is received.

[125] It follows that the first defendant was proposing to pay PMANS Services that amount as part of the 12 May Proposed Disbursements (defined below) in a way that would not be for an authorised expenditure under cl 4.3 on a Project Cost and would be in breach of cl 13.2.

Second threatened breach: Referral Fee

[126] The plaintiffs allege that the Ray White Bulimba Tax Invoice is not payable as a Project Cost because it is not provided for in the Feasibility Study, has not been approved by the Management Committee, and is not properly incurred for goods or services that are reasonably necessary for the purposes of the Project.

[127] The first defendant denies those allegations in its defence because the Feasibility Study makes provision for "Real Estate Commissions and Marketing Costs" and because during the 6 July Meeting Mr McLean explained the Referral Fee to the first plaintiff and Ms Quek, including that it would be paid by the Project Manager as part of the Project Costs.

[128] As to the first point, it was not in dispute during the trial that the Referral Fee was not included in the item for "Real Estate Commissions and Marketing Costs", because the amounts in that item are for the estimated selling costs of the 80 units to be constructed.

[129] As to the second point, I have found that Mr McLean did not explain the Referral Fee as alleged by the first defendant.

[130] In my view, it follows that the first defendant's agreement with Ray White Bulimba to pay a Referral Fee of $240,000 to Ray White Bulimba from project funds was not for an authorised expenditure under cl 4.3 on a Project Cost of funds advanced under cl 4.2 and the first defendant was proposing to pay the amount of $40,000 to Ray White Bulimba as part of the 12 May Proposed Disbursements in a way that would not be for

an authorised expenditure under cl 4.3 on a Project Cost and would be in breach of the contract.

Third breach: failure to provide information

[131] On 12 May 2017, the plaintiffs' solicitors requested, by email:

(a) particulars of the expenditure referrable to the amount of $216,766 that the first defendant demanded be paid to it by the plaintiffs' solicitors; and

(b) disclosure of documents relating to that expenditure;

[132] In response, on 12 May 2017, the first defendant's solicitor sent an email to the plaintiffs' solicitor stating that:

(a) $100,000 was for the JV Establishment Fee;

(b) $20,000 was for legal fees incurred to that date;

(c) $40,000 was for the (Ray White Bulimba) Referral Fee; and

(d) $56,766 was for town planners and architects as part payment of services

("12 May Proposed Disbursements").

[133] As well, the first defendant's solicitor contended that before the first defendant was prepared to release confidential information to the plaintiffs they were required to sign a confidentiality agreement. This requirement of the first defendant appears to have been raised earlier (sometimes it is referred to in the evidence as a non-disclosure agreement or "NDA"). It was not contended at the trial that in law the first defendant was either entitled to demand such an agreement or to withhold any information until such an agreement was signed.

[134] By way of further request, also made on 12 May 2017, the plaintiffs' solicitors requested:

(a) full and detailed particulars as to what entity was proposed to receive the JV Establishment Fee, what work was conducted to earn the fee and accompanying invoices, purchase orders and relevant materials;

(b) a copy of the file relating to the legal fees;

(c) all relevant documents relating to the Referral Fee; and

(d) itemised invoices and quotes and details of any work produced by any town planner or architect.

[135] As well, the plaintiffs' solicitor requested copies of all claims, correspondence, reports, studies, inspections, certificates and other documents relating to the Project.

[136] On 14 May 2017, the first defendant's solicitor sent an email to the plaintiffs' solicitor stating, inter alia:

(a) the plaintiffs did not have any lawful authority over the amount of $216,766, nor any veto power over how the monies were to be spent; and

(b) there was no obligation to provide any further information as to the breakdown of the amount of $216,766.

[137] The plaintiffs allege that the first defendant breached cl 4.6 of the contract and the alleged implied terms (a) and (b) because of the inadequacy of its responses to those requests for information made by the plaintiff.

[138] The first defendant denies the alleged breach because on 5 June 2017 it sent the 5 June 2017 Documents to the plaintiffs' solicitors and because under cl 4.6 it was only obliged to make copies available and was not obliged to send copies upon demand.

[139] As to the last of those points, the first defendant made no submissions at the trial.

[140] In my view, the plaintiffs were entitled to request and were entitled to access the relevant documents requested, to the extent that they existed.

[141] In a letter forwarded by email from the first defendant's solicitors to the plaintiffs' solicitors dated 4 July 2017 the first defendant's solicitors said that there were no further invoices or records held by the first defendant of the description requested by the plaintiffs.

[142] In another email from the first defendant's solicitor to the plaintiffs' solicitor sent on 24 August 2017, the first defendant's solicitor stated that the documents comprise several large lever arch folders of documents. Those documents were not tendered in evidence, or further identified at the trial, if they ever existed.

[143] Mr Ivanovic's position in giving evidence was that there were no further documents than those tendered.

[144] Some examples of documents that were not included in the 5 June 2017 Documents, were the PBD Architects fee proposal dated 13 October 2016, the Devalign or other town planners' fee proposals and earlier Ray White Bulimba invoices for the Referral Fee.

[145] In my view, the first defendant did breach cl 4.6 of the contract. However, it is true to say that the 5 June 2017 Documents comprised a number of the important documents relating to the dispute over the 12 May Proposed Disbursements. To that extent the breach was partially remedied.

[146] It is not necessary, at this point, to consider whether the first defendant's responses or lack of them also amounted to breaches of alleged implied terms (a) and (b).

Repudiation alleged

[147] Simplifying, the plaintiffs allege repudiation by the first defendant, in:

(a) demanding payment of the $216,766 for the purpose of making the 12 May Proposed Disbursements;

(b) refusing to make any adequate or reasonable explanation for the 12 May Proposed Disbursements;

(c) failing to disclose the financial association with PMANS Services;

(d) seeking payment of the JV Establishment Fee to PMANS Services;

(e) intending to pay Ray White Bulimba $40,000 on account of the Referral Fee;

(f) refusing to make the records of the Project available;

(g) terminating Ms Quek's appointment to the Management Committee;

(h) registering the power of attorney over the land; and

(i) threatening to transfer the land to a related company.

[148] The plaintiffs also allege that those acts constituted breaches of the alleged implied terms and thereby also amounted to a repudiation.

Approval of Management Committee of all disbursements

[149] It can be accepted that the plaintiffs allege a complex case of repudiation by the first defendant. In part, they rely on the particular breaches of contract. However, in addition, they rely on further acts of alleged repudiation that are not said to be individual breaches of contract, per se.

[150] First, the plaintiffs allege that the first defendant was not entitled to possession of or to draw against the funds advanced without the prior agreement of the Management Committee, either generally or for the 12 May Proposed Disbursements.

[151] As to possession of the funds advanced, the plaintiffs rely on cl 4.2(c) of the contract, that moneys will be provided in amounts and at times reasonably required by the Management Committee to permit the progressive development of the Project. However, the plaintiffs had agreed to seek moneys to be advanced for the purposes of the Project by their execution of the loan documents for the Bellwether advance under cl 4.2(a) of the contract. There is no provision in the contract that money advanced to the Project Manager in that way is thereafter under the general control of the Management Committee.

[152] In my view, on the proper construction of the contract, the plaintiffs are not entitled to have the Management Committee oversee all payments to be made by the first defendant as Project Manager, before they are made. Clause 4.3 of the contract expressly provides that the Project Manager shall apply the funds advanced in accordance with the Feasibility Study. Consistently with that, the powers of the Management Committee under cl 3.4 are limited. It may only make determinations in respect of identified matters. As to costs or expenses, the Management Committee's role is limited to those "involving an additional cost over the amount originally budgeted in the Feasibility Study". It is inconsistent with those provisions to say that the Management Committee is to approve all items of expenditure.

[153] The 12 May Proposed Disbursements were ostensibly for amounts for items that appeared in the Feasibility Study within the amounts originally budgeted, except for the amount for the Referral Fee.

Unauthorised proposed disbursements

[154] As it turned out, however, the legal costs were neither $20,000 as advised on 12 May 2017 nor $10,000 (or thereabouts) as advised on 5 June 2017. The legal fees relevant to work for the Project (as opposed to other work) were agreed at the trial as being $3,234. However, that did not make that amount for legal fees a cost that had to be approved by the Management Committee before payment of the amount of $216,766 to the first defendant as funds advanced.

[155] Second, payment of $100,000 on account of the JV Establishment Fees to PMANS Services was not authorised. That was not a payment that the first defendant was entitled to make either to itself or to PMANS Services. However, that is not the same thing as saying that the plaintiffs are entitled to have any amount properly payable to a third party (or possibly the first defendant) for actual outlays as costs by way of JV Establishment Fees approved by the Management Committee before payment of the amount of $216,766 to the first defendant as funds advanced.

[156] Third, at the time of the 12 May Proposed Disbursements, there were no concluded fee agreements with either the architects or the town planners under which any fees were

payable. It seems at least arguable that the appointment of consultants was a matter for the Management Committee on the recommendation of the Project Manager – see cl 4.4 of the contract – although cl 3.4 otherwise limited the functions of the Management Committee in a way that would not include that matter. But, again, that did not make the amount of $56,766[4] an amount that had to be approved by the Management Committee before payment of the amount of $216,766 to the first defendant as funds advanced.

First Defendant's Notice to Remedy and Notice of Default

[157] On 11 April 2017, the first defendant's solicitors sent an email to the former solicitors for the plaintiffs directing that the sum of $216,766 be paid as to $10,000 to the first defendant's solicitors and as to $206,766 to the first defendant.

[158] On 18 April 2017, the first defendant's solicitors sent an email to the plaintiffs' former solicitors attaching a letter purporting to give notice under cl 8.1(a) of the contract for an alleged breach in failing to release the funds in accordance with the direction made on 11 April 2017 ("First Defendant's Notice to Remedy").

[159] On 11 May 2017 the first defendant's solicitors sent a letter by facsimile to the plaintiffs' former solicitors. The facsimile:

(a) purported to give notice under cl 9.2 of the contract ("First Defendant's Notice of Default");

(b) relied on the default in complying with the notice given on 18 April;

(c) notified that the first defendant was exercising its rights as power of attorney appointed under cl 10.7; and

(d) as attorney of the plaintiffs, directed the former solicitors for the plaintiffs to pay the $216,766 to the solicitors for the first defendant.

[160] Also on 11 May 2017, the first defendant's solicitors lodged a power of attorney appointing the first defendant as attorney for registration by the registrar of titles.

[161] On 14 May 2017, the first defendant's solicitors sent an email to the plaintiffs' solicitors:

(a) stating that the plaintiffs had no power or entitlement as to how the $216,766 was spent;

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[4] That amount was a balance amount of the funds advanced of $216,766 after allowing the other 12 May Proposed Disbursements. It did not represent any particular estimate of fees for town planners or architects.

(b) stating that the plaintiffs were not entitled to any further information concerning the 12 May Proposed Disbursements; and

(c) notifying that the first defendant had terminated Ms Quek's appointment as the plaintiffs' member of the Management Committee.

[162] On 20 June 2017, the first defendant's solicitors informed the plaintiffs' solicitors that the first defendant had instructed the first defendant's solicitors to transfer the Land to a company controlled by the first defendant.

[163] The plaintiffs allege that the first defendant had no entitlement to issue the First Defendant's Notice to Remedy or the First Defendant's Notice of Default, because the first defendant had no entitlement to possession of the $216,766 or to use it to make the 12 May Proposed Disbursements.

[164] In my view, the plaintiffs must fail on the first of those contentions. It follows that, in my view, the plaintiffs must fail on their alleged bases of invalidity of the notices. It is unnecessary to consider further whether the first defendant was entitled to use the $216,766, except to the extent that the first defendant's intention to make the 12 May Proposed Disbursements evinced an intention to perform the contract in a manner substantially inconsistent with its provisions and the first defendant's obligations.

Termination

[165] On 14 May 2017, the plaintiffs' solicitors sent an email to the first defendant's solicitors attaching a letter alleging breach of cl 4.6 of the contract and requiring the first defendant to remedy the breach ("Plaintiffs' Notice to Remedy"). The letter was also sent either by facsimile or post.

[166] On 27 May 2017, the plaintiffs' solicitors sent an email to the first defendant's solicitors attaching a letter alleging breach of cl 4.6 of the contract and requiring the first defendant to remedy the breach ("Plaintiffs' Second Notice of Default").

[167] As previously stated, the first defendant's solicitor's emails of 5 June 2017 partly remedied the breaches of cl 4.6.

[168] On 3 July 2017, the plaintiffs' solicitors sent an email to the first defendant's solicitors terminating the contract, in reliance on a number of stated grounds.

Implied terms (a) and (d)

[169] As previously stated, the alleged implied term (a), namely to act in good faith towards each other and in the performance of the contract and exercise of powers thereunder is disputed, as is the alleged implied term (d) that the first defendant's authority to incur or pay for costs and expenses for the Project was restricted to costs or expenses properly

incurred for goods or services that are reasonably necessary for the progress of the Project.

[170] Since 1993, there has been a significant jurisprudence and a large amount of academic discussion devoted to whether there is either generally, in the class of commercial contracts, an implied term of good faith in the performance of the contract under the common law of Australia, or whether such a term is implied in individual contracts as a matter of fact, or ad hoc.

[171] As far as the High Court is concerned, the question has not been decided. It was raised, in a cognate context in 1984 in *Hospital Products Limited v United States Surgical Corporation*,[5] but that case pre-dates developments, particularly in the New South Wales Court of Appeal, since 1993. The question was expressly not considered in 2002 in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*.[6] And it was expressly excluded from the discussion of principle in 2014 in *Commonwealth Bank of Australia v Barker*.[7]

[172] Since 1993, cases of authority propounding an implied term of good faith in commercial contracts whether as a class or individually have largely arisen in the Court of Appeal in New South Wales and the Full Court of the Federal Court of Australia. A recent example is in the latter court in 2015 in *Paciocco v Australia and New Zealand Banking Group Ltd*,[8] where Allsop CJ said:

> "…[Good faith] is a conception that has been recognised (though not by all courts in Australia) as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 (Renard Constructions); *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151; 146 ALR 1; [1997] FCA 558; Seddon N, Bigwood R, Ellinghaus M, *Cheshire and Fifoot's Law of Contract* (10th ed, Aust ed, 2012) at 10.41–10.47; cf *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [42] and [107]. Yet, good faith in the performance of contracts is well-known to the common law and to civilian systems. It is a good example of the presence of values in the common law. I repeat what I said in *United Group Rail Services Ltd v Rail Corporation (NSW)* (2009) 74 NSWLR 618 at [58] (in a commercial context of a clause expressly incorporating good faith):

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5 (1984) 156 CLR 41, 65-67, 95, 118, 121 and 139-141.

6 (2002) 240 CLR 45, 63 [40], 76 [89] and 94 [156].

7 (2014) 253 CLR 169, 195 [42] and 214 [107].

8 (2015) 236 FCR 199. Although there was an appeal to the High Court, the decision was affirmed without commenting on the discussion on this point: *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525.

> …[G]ood faith is not a concept foreign to the common law, the law merchant or businessmen and women. It has been an underlying concept in the law merchant for centuries: L Trakman, *The Law Merchant: The Evolution of Commercial Law* (Rothman 1983) at p 1; W Mitchell, *An Essay on the Early History of the Law Merchant* (CUP 1904) at pp 102 ff. It is recognised as part of the law of performance of contracts in numerous sophisticated commercial jurisdictions: for example Uniform Commercial Code §1–201 and § 1–203 (1977); *Wigand v Bachmann-Bechtel Brewing Co* 118 NE 618 at 619 (1918); E A Farnsworth, *Farnsworth on Contracts* (Aspen 3rd Ed 2004) Vol 1 at pp 391-417 § 3.26b; International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* 2004, Rome, Art 1.7 (www.unidroit.org [Ed 3 May 2010]); R Zimmerman and S Whittaker (Eds) *Good Faith in European Contract Law* (CUP 2000). It has been recognised by this Court to be part of the law of performance of contracts: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 263-270; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91; *Burger King Corporation v Hungry Jack's Pty Ltd* at 565-574 [141]-[187]; and *Alcatel Australia Ltd v Scarcella* at 363–369 …
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> The usual content of the obligation of good faith that can be extracted from cases such as *Renard Constructions*; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church (Archdiocese of Sydney)* (1993) 31 NSWLR 91; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; and *United Group Rail Services Ltd* is an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained."[9]

[173] In my view, it is unnecessary to scrutinise the cases more closely in order to decide the question whether there is an implied term of good faith in performance of the contract in the present case. A number of factors support the implication. First, at least from the time of making the contract, in my view, the parties were in a fiduciary relationship.

[174] Second, the powers of the first defendant to manage the Project (under cll 4.4 and 4.5) and to make payments of the funds advanced (under cl 4.3) leave the plaintiffs

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9 (2015) 236 FCR 199, 272-273 [287]-[288].

vulnerable to excessive expenditure by the first defendant. Although the first defendant promised to arrange finance (under cll 4.2(a), 4.4 and 3.4) and to be responsible for the funding of the Project (under cl 4.2(d)) and to bear responsibility for any Project losses (under cl 6.2), the plaintiffs' land is to be security for the funds advanced (under cll 4.1(b) and 4.2(b)). The first defendant was and is a company without any assets other than its interest in the contract.

[175] Third, there are significant express and implied residual powers conferred on the parties by way of the Management Committee's functions (under cll 3.1, 3.2 and 3.4) or jointly where their cooperative decision making ability is vital to the success of the Project. In a real commercial sense, a functioning relationship of the parties on those matters is necessarily one of confidence and trust.

[176] In the context of this contractual relationship, adopting the appropriate criterion of necessity for implication of a term in fact in an individual contract ("necessary 'to give business efficacy' to the contract"[10]), in my view, the conclusion should follow that there is an implied term of the contract that the parties act in good faith towards each other and in the performance of the contract and exercise of powers thereunder, subject to one possible qualification.

[177] The qualification relates to the alleged implied term (d) that the first defendant's authority to incur or pay for costs and expenses for the Project is restricted to costs or expenses properly incurred for goods or services that are reasonably necessary for the progress of the Project. This implied term is a negative reflection of the extent of the authority conferred on the Project Manager (under cll 4.3 and 4.4 of the contract) and would operate as a constraint by way of implied negative stipulation upon the contractual right or power of the first defendant to make payments (under cl 4.3 of the contract) in accordance with the Feasibility Study. The implication of such a negative term is the converse of an agent's contractual duty to carry out the principal's instructions, which is not to exceed those instructions and act without authority.[11]

[178] The possible qualification as to implication of (a general) implied term (a) of the contract that the parties act in good faith towards each other in the performance of the contract and exercise of powers thereunder is that if there is an implied term (d) limiting the first defendant's power to pay expenses under cl 3.4 to reasonably necessary costs or expenses of the Project, it may be unnecessary to imply the more general implied term (a), at least in relation to the subject matter of implied term (d). However, this contention was not advanced by the first defendant and it would be inappropriate, in my view, to consider it further.

Breach of the implied terms

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[10] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 189 [28].

[11] Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2013) [11.2].

[179] Accepting that implied term (a) that the parties act in good faith towards each other in the performance of the contract and exercise of powers thereunder was a term of the contract, did the first defendant breach implied term (a) or the admitted implied terms (b) or (c) previously identified?

[180] In my view, it did so in two important ways. First, in my view, it was a breach of the implied terms for the first defendant to propose payment to Ray White Bulimba of the amount of $40,000 under the 12 May Proposed Disbursements on account of the Referral Fee.

[181] Second, in my view, it was a breach of the implied terms for the first defendant to propose payment to PMANS Services of the amount of $100,000 under the 12 May Proposed Disbursements on account of the JV Establishment Fees.

[182] Third, there was a less important breach in the proposal to pay $20,000 or $10,000 to the first defendant's solicitors, when there were not tax invoices for work under the Project for more than about $3,400. However, it was not ultimately established that the intention was to pay tax invoices that were not for authorised work and the solicitors would have received any payments into their trust account unless there was a specific authority to pay or pay towards particular invoices.

Repudiation

[183] The general principles for assessing whether a party has breached a contract, so as to permit the other party to elect to terminate the contract, were discussed in some detail in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,[12] where the High Court held that a developer breached a joint venture somewhat similar in structure to the present case, inter alia, by failing to progress the proposed development and failing to keep proper records of its dealings on behalf of the joint venture. Understandably, the plaintiffs sought to present their case in a similar way.

[184] However, the present case raises different and additional questions. *Koompahtoo* was not a case of repudiation by conduct that evinces an unwillingness or inability to render substantial performance of the contract that is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the parties' contract.[13] But the present case is pleaded and was submitted to be a repudiation of that kind.

[185] A leading case is *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*.[14] Mason CJ referred in that case to a number of earlier authorities dealing with repudiation where there is an intention not to be bound by the contract entitling the other party to treat the

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[12] (2007) 233 CLR 115.

[13] (2007) 233 CLR 115 [44], 142 [58] and 145-146 [68].

[14] (1989) 166 CLR 623.

contract at an end.[15] Not all formulations of the principle are identical. One adopted by a majority of the court in *Laurinda* refers to an "intention to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way".[16] That is sufficient for this case.

[186] The case law reinforces that repudiation is not found lightly.[17] Second, that is particularly so if the alleged repudiation is based on a misconstruction of the contract, if the party who is or will be in breach is prepared to act on the court's view of the proper meaning. Third, some case law suggests that the contractual principles permitting an innocent party to terminate a contract for repudiation by the other party do not apply to partnerships.

[187] As to the third point, in *Hurst v Bryk*[18] Lord Millett queried whether a party to a partnership contract could terminate the contract for the other party's breach.[19] It is unnecessary for me to consider the point in detail. Where, as here, the contract is, in commercial substance, between only two parties, some of the potential problems do not arise. But, in any event, it is enough for present purposes that the Court of Appeal of New South Wales considered that the ordinary contractual principles of termination for repudiation can apply in *Ryder v Frohlich*.[20]

[188] As to the second point, a number of cases have found that conduct intimating or in breach of contract based on a wrong construction may not amount to a repudiation.[21] *Dainford Ltd v Smith*[22] is a leading case. The question is whether insisting on an erroneous construction amounts to a fixed intention not to be bound by the contract's provisions in the future.[23]

[189] As to the first point, "an allegation of repudiation of contract in a civil case does not involve an assertion that the alleged repudiator subjectively intended to repudiate his obligations."[24]

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15 (1989) 166 CLR 623, 633-634.

16 (1989) 166 CLR 623, 634, 643 and 666.

17 (1989) 166 CLR 623, 657.

18 [2002] 1 AC 185.

19 [2002] 1 AC 185, 194-196.

20 [2004] NSWCA 472, [133]. See also *Johnson v Snaddon* [1999] VSC 243; on appeal [2001] VSCA 91 and P Latimer, "Repudiation of Partnership Contracts" (2016) 42 *Australian Bar Review* 170.

21 For example, *Highmist Pty Ltd v Tricare Ltd* [2005] QCA 357.

22 (1985) 155 CLR 342.

23 (1985) 155 CLR 342, 350, 365-366.

24 (1989) 166 CLR 623, 657; see also 647-648 and 658-659.

[190] Whether there is a repudiation of the kind in question is an inference depending on the facts of the case. In my view, the inference should be drawn in the present case, based on the cumulative effect of a number of the breaches and asserted intentions of the first defendant.

[191] In particular, two matters that are prominent, in my view, are the first respondent's intention to pay the Ray White Bulimba Referral Fee and to pay itself remuneration by way of the JV Establishment Fees. In each of those matters, the facts, as I have found them, entail not only that the first respondent proposes to apply the funds advanced contrary to cl 4.3 (and as to the $100,000 PMANS Services payment to cl 13.2) but that it made arrangements to do so apparently so as to keep the true facts from the plaintiffs.

[192] Those matters were not only threatened breaches of the express terms of the contract. They were also breaches of implied terms (a) or (d). The breaches of implied term (a), in particular, are matters that destroy the mutual relationship of good faith that is the basis of a joint venture relationship that is either a partnership or as closely analogous to a partnership as in the present case.

[193] A contextual fact as to the first respondent's intention to fulfil the contract is that from 14 October 2016, the first defendant was aware that its proposed architects for the Project, PBD Architects, understood that the site would yield 54 to 58 units, not the 80 units forecast in the first defendant's spreadsheet in the Feasibility Study in the contract. The reduction in forecast yield from 80 units to 58 units, or fewer, presents as a substantial issue, one that might have threatened the viability of the Project. At the least it would have required a complete review of the forecast income and cost of development in the Feasibility Study. The first defendant's response to PBD Architects understanding was not to tell the plaintiffs about it at all. However, this fact was not alleged either as a basis for the alleged repudiation or as a breach of contract, except as a ground precluding the first defendant from relying upon alleged breaches of contract by the plaintiffs, so does not directly figure in the conclusions I have reached on the question of repudiation.

[194] Some of the other facts alleged to constitute repudiation by the first defendant are more equivocal as to an intention to fulfil the contract only in a manner substantially inconsistent with the first defendant's obligations and not in any other way. Although I have found that the first defendant breached cl 4.6 in failing to make records of the joint venture available to the plaintiffs on demand, the breach was partially remedied. Absent the more serious threatened breaches and breaches of implied term (a) I would not treat the breach of cl 4.6 as repudiatory.

[195] Similarly, the first defendant's conduct in issuing the First Defendant's Notice to Remedy, the First Defendant's Notice of Default, terminating Ms Quek's appointment to the Management Committee, registering the power of attorney over the land; and threatening to transfer the land to a related company has equivocal aspects.

[196] The validity of the notices is not, in itself, a question that must be answered when considering repudiation. The purported removal of Ms Quek from the Management Committee, registering of the power of attorney and threat to transfer the land to a

related company were all unjustified, in my view. However, they do not have the same significance, in my view, as the threatened breaches of contract and breaches of implied term (a).

[197] In any event, in my view, overall the inference should be drawn that the first defendant evinced an intention to fulfil the contract only in a manner substantially inconsistent with the first defendant's obligations and not in any other way and thereby repudiated the contract.

Termination

[198] Although the plaintiffs letter terminating the contract dated 3 July 2017 did not terminate the contract on the ground of the first defendant's repudiation, it was not disputed at the trial that the plaintiffs were entitled to rely on the alleged repudiation as a ground to terminate the contract, as a matter of law.[25]

[199] The existence of the contractual provisions for notice to remedy and notice of default does not preclude the plaintiffs from relying on the alleged repudiation as a ground justifying the termination of the contract.

[200] Accordingly, in my view, the contract was terminated and the parties were discharged from future performance of their executory obligations under the contract from 3 July 2017.

Alleged serious breach of contract by the plaintiffs

[201] The plaintiffs allege in the alternative that the first defendant's breaches of contract were serious breaches of intermediate terms of the contract justifying the termination. Having regard to the findings I have made on the plaintiffs' case of repudiation, it is unnecessary to further consider this alternative.

Damages

[202] The plaintiffs claim damages for breach of contract. In final submissions the amount that they sought by way of damages is the amount of $356,865.88. That amount was submitted to be the total amount of the fees disbursement, applications fees and brokerage fees on the Bellwether disbursement authority.

[203] In my view, that amount is not a loss suffered by the plaintiffs by reason of the first defendant's breach of contract. It is part of the amount borrowed by the first defendant from Bellwether that is secured against the Land and the plaintiffs have guaranteed, as part of the overall advance of $1,475,500.

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[25] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359; Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2011) 453-456 [10-16].

[204] The loan is not loss of the plaintiffs that was suffered by reason of the first defendant's breach of contract. It was an amount borrowed in accordance with the contract.

[205] The plaintiffs plead a claim for damages in the sum of $865,000, being approximately[26] the amount of the loan of $1,475,500 less the amount received by the plaintiffs to pay out their prior mortgages and the additional sum of $50,000, totalling $580,000, together with a credit allowed of $30,000 for interest saved by the plaintiffs on the amount of $580,000.

[206] This is a claim for damages on the principle of *Commonwealth v Amann Aviation Pty Ltd*,[27] namely for damages in the amount that would restore the plaintiffs to the position as if they had not entered into the contract. Such a claim is an unusual claim for damages for breach of contract, because compensatory damages for breach of contract are awarded on the principle associated with *Robinson v Harman*,[28] namely that the plaintiff is to be put into the position as if the contract had been performed.[29] Where a plaintiff has made a bad bargain, it may be that no loss is suffered because the contract would have been unprofitable, in any event.

[207] *Amann Aviation* operates as a partial exception to this conventional application of principle. Where a plaintiff cannot show what the loss of profit on a contract would have been, but the defendant does not show on the balance of probabilities that the contract would have been loss making, the plaintiff may be compensated for loss of the bargain by an award of damaged similar in amount to the amount that would restore the plaintiff to the position as if it had not entered into the contract, on the ground that its expenditures would have been recouped.[30]

[208] There was evidence at the trial that supports the conclusion that the Project was likely to fail and be loss making. Relevant factors would have been that the scope of the Project in the Feasibility would have been reduced from 80 units to 54 to 58 units, there was no evidence of the likelihood of obtaining a development approval, there was no evidence as to what the likelihood of obtaining the necessary pre-sales for the Project, there was no evidence as to the likelihood of the first defendant being able to obtain construction finance, the first defendant was a company and the second defendant was an individual with no prior experience as a developer on a project of this kind or magnitude, the first defendant was a company of no financial substance, there was no evidence that the first defendant was a member of a corporate group of substance and the second defendant (as guarantor) was an individual without assets.

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[26] There is a difference in the calculation of $500 because the loan amount in the statement of claim is alleged to be $1,475,000 instead of the amount of $1,475,500.

[27] (1991) 174 CLR 64.

[28] (1848) 1 Exch 850; 154 ER 363.

[29] *Clark v Macourt* (2013) 253 CLR 1, 11 [26] and 30 [106].

[30] (1991) 174 CLR 64, 82-89, 104-108 and 165-166.

[209] But the first defendant did not contend at the trial that the Project would have been loss-making, in any event. It specifically pleaded that any expense which the plaintiffs have incurred would have been recouped through the profits of the Project.

[210] In my view, it is not permissible in the present case to refuse an award of damages on the *Amann Aviation* basis. It was not in issue or established at the trial that the contract would have been loss making if it had been performed.

[211] Accordingly, the plaintiffs' claim for damages, as pleaded, must be allowed. However, I reduce the amount of the damages claimed for two reasons. The first is that on the evidence at the trial the sum of $318,634.12 was retained at settlement by Bellwether. There is no evidence that this amount has been advanced or disbursed to the first defendant. If it has not, the amount of the damages should be reduced by that amount. Second, there should be a larger credit for interest avoided by the plaintiffs on the sum of $580,000 to the date of judgment, by increasing that credit to the amount of $42,000.[31]

[212] The resulting assessed amount of damages for breach of contract would be $534,865.88, calculated as follows:

1,475,500.00
–580,000.00
–42,000.00
–318,634.12
$534,865.88

[213] In the result, I have decided not to give final judgment on the amount of damages at this point, to allow the parties the opportunity to deal with the amount of $318,634.12. If that amount has not been advanced by Bellwether to the first defendant, the damages suffered by the plaintiffs should not include it. But if the contrary is true, the damages as otherwise assessed should be increased by that amount. The present difficulty has arisen where neither of the parties adverted to the point during the trial.

[214] It is appropriate to declare that the contract was terminated on 3 July 2017, given that I am not able to finally determine the question of damages at this point.

[215] The plaintiffs apply for an order that the amount of $216,766 in court should be paid out of court to the plaintiffs, in partial satisfaction of the damages to be awarded to the plaintiffs. The first defendant submits that sum should be paid to it as money lent to it by Bellwether before the contract was terminated to which it is entitled. Assuming that

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[31] Representing an approximately 12 month period at 7% compounding monthly.

I can make an order that the funds be paid out of court to the plaintiffs,[32] there is a question whether that should be done, in any event. As a result of this judgment, there may be a question as to the first defendant's solvency and therefore a question whether its assets should be paid in favour of one creditor.

[216] I decline to make that order at this stage of the proceeding.

Other relief

[217] In final submissions, the plaintiffs sought an order for the taking of accounts on the footing of wilful default. However, that order is not sought in the statement of claim and the basis for an order to take an account on that footing is not articulated in the pleading or in submissions. In any event, I do not understand what use such an account would serve. The first defendant has not had any joint venture funds made available to it as yet from which to make expenditure, on the evidence. Second, the damages that have been awarded are calculated as if to permit the plaintiffs to restore themselves to the position before they entered into the contract.

[218] The final subject matter of relief sought is in the form of injunctions. Because the contract was terminated on 3 July 2017, the first defendant had and has no ongoing right to act as attorney in relation to the Land. There should be an injunction requiring the first defendant to remove the power of attorney from the register.

[219] I am conscious that the result of the trial does not resolve the parties' positions. If the contract was a partnership, it would be appropriate to make orders to wind up the partnership. If it was a joint venture falling short of partnership, similar orders by appointment of a receiver to deal with the assets and liabilities and to distribute any remainder can be made. But orders seeking that relief are not sought in the proceeding.

Counterclaim

[220] Because the plaintiffs have succeeded on the claim that the contract is terminated and for damages for breach of contract, it follows that the counterclaim for specific performance of the contract and other relief must be dismissed.

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

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[32] *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 49 VR 86; 116 [86]; *Harman v Commissioner of Taxation* (1991) 173 CLR 264, 272.