NEW SOUTH WALES SUPREME COURT

CITATION:
John Nelson Developments Pty Limited v Focus National Developments Pty Limited [2010] NSWSC 150

JURISDICTION:
Equity Division

FILE NUMBER(S):
2008/281336

HEARING DATE(S):
8, 9, 10 and 11 December 2009

JUDGMENT DATE:
5 March 2010

PARTIES:
John Nelson Development Pty Limited (Plaintiff/First Cross-Defendant)
John William Nelson (Second Cross-Defendant)
Focus National Developments Pty Limited (First Defendant/First Cross-Claimant)
Gerrard Lester Toltz (Second Defendant)
Anthony Paul Adamo
Anthon

JUDGMENT OF:
Ward J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
C Wilson (Plaintiff/Cross-Defendants)
S Reuben (First and Third Defendants/Cross-Claimant)
Submitting Appearance (Second Defendant)

SOLICITORS:
Griffith Nicholson Lawyers (Plaintiff/Cross-Defendants)
CCS Legal (First and Third Defendants/Cross-Claimant)

Toltz Lawyers (Second Defendant)

CATCHWORDS:
CONTRACT – joint venture agreement – expert determinations under terms of contract – whether expert determinations binding on the parties – whether expert has an obligation to accord procedural fairness– effect of mistake on the part of the expert –– scope of guarantee under the contract – EQUITY – declaration as a discretionary remedy – RESTITUTION – total failure of consideration – recovery of contributions to a joint venture where joint venture agreement does not contemplate events which have occurred

LEGISLATION CITED:

CATEGORY:
Principal judgment

CASES CITED:
AGL Victoria Pty Limited v SPI Networks (Gas) Pty Limited [2006] VSCA 173
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
Andrews v Queensland Racing Limited [2009] QSC 364
Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1993) 176 CLR 344; [1993] HCA 45
Baumgartner v Barmgartner (1987) 164 CLR 137
Capricorn Inks Pty Limited v Lawter International (Australasia) Pty Limited [1989] 1 Qd R 8
Carbotech-Australia Pty Limited v Yates [2008] NSWSC 540
Enron Australia Finance Pty Limited (in liq) v Integral Energy Australia [2002] NSWSC 753
Fletcher Construction Australia Limited v MPN Group Pty Limited (unreported 14 July 1997), Rolfe J
Hogan v Baseden (1997) 8 BPR 15723
Holt v Cox (1997) 23 ASCR 590
Kanivah Holdings Pty Limited v Holdsworth Properties Pty Limited [2001] NSWSC 405
Kioa v West (1985) 159 CLR 550
Knox v Knox (16 December 1994, unreported, Young J)
Kriezis v Kriezis [2004] NSWSC 167
Legal & General Life of Australia Limited v A Hudson Pty Limited (1985) 1 NSWLR 314
Liquor National Wholesale Pty Limited v The Redrock Pty Limited [2007] NSWSC 392
L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486
Lumbers v W Cook Builders Pty Ltd (in liquidation) [2008] HCA 27
Malsbury v Malsbury [1982] 1 NSWLR 226
McKay & anor v McKay [2008] NSWSC 177

Mercury Communications Limited v Director General of Telecommunications [1996] 1 WLR 48
Morris v Morris [1982] 1 NSWLR 61
Muschinski v Dodds [1985] HCA 78; (1985) 160 CLR 583
Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal [1983] 1 All ER 34, [1983] 1 AC 854
Pan Ocean Shipping Co Ltd v Creditcorp Ltd [1994] 1 WLR 161 at 166; [1994] 1 All ER 470 at 475
Re Carus-Wilson and Greene (1886) 18 QBD 7
Rivers v Bondi Junction Waverley RSL Sub-Branch Limited (1986) 5 NSWLR 362
Sirtes v Pryer [2005] NSWSC 1082
Steele v Tardiani; (1946) 72 CLR 386; [1946] HCA 21
The Heart Research Institute Limited v Psiron Limited [2002] NSWSC 646
Triarno Pty Limited v Tridon Contractors Limited NSWSC (unreported 22 July 1992)
Xuereb v Viola (1989) 18 NSWLR 453

TEXTS CITED:
Meagher, Gummow & Lehane, Equity Doctrines & Remedies

DECISION:
1. A declaration that the first defendant is entitled to restitution in respect of the contributions it made pursuant to the Joint Venture Agreement with the plaintiff towards the costs of their failed joint venture project, those contributions amounting to $90,086.22 excluding GST.
2. An order that the second defendant pay to the first defendant the controlled monies held in its trust account referable to the proceeds of sale of the property the subject of the joint venture and any interest which has accrued thereon.
3. An order that any shortfall between the moneys held by the second defendant and the amount of $90,086.22 be paid by the plaintiff to the first defendant.
4. An order that the first defendant pay interest on the amount of the judgment debt from the date on which the sale proceeds were placed in the second defendant's trust account at court rates.
5 The plaintiff's statement of claim be dismissed with costs.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

EQUITY DIVISION

WARD J

FRIDAY 5 MARCH 2010

2008/281336 JOHN NELSON DEVELOPMENTS PTY LIMITED v FOCUS NATIONAL DEVELOPMENTS PTY LIMITED & ORS

JUDGMENT

1 These proceedings involve a dispute between the parties to a failed property development joint venture in Port Macquarie. The parties have already (unsuccessfully) invoked the dispute resolution provisions of their joint venture agreement in an attempt to resolve their dispute and in so doing further disputes have arisen. The disputes now before me concern whether the two separate expert determinations made during the course of that dispute resolution process are binding and whether, irrespective of the force of those expert determinations, the first defendant (Focus) is entitled to recover the contributions it made to the failed joint venture or otherwise to share in the proceeds of sale of the property the subject of that joint venture.

2 The plaintiff (JND), invoking the joint venture agreement (in which the parties agreed to share equally the costs and liabilities of the project) and relying on each of the expert determinations, claims that the sum of $142,529 is owing to it by Focus. JND seeks an order for payment of that amount both from Focus and its director, Mr Anthony Adamo, who was a party to and gave a guarantee under the joint venture agreement.

3 The second defendant, Mr Toltz, is the solicitor who acted for the parties in relation to the joint venture. By agreement between the parties, he holds the sum of $82,744, plus interest, in his firm's controlled monies trust account, that being part of the proceeds from the sale of the property which was to be developed as part of the joint venture. Both parties assert a claim to those trust account moneys. Mr Toltz has filed a submitting appearance and has taken no part (other than giving some evidence) in these proceedings. (Where I refer in these reasons collectively to 'the defendants', I refer only to Focus and Mr Adamo.)

4 Focus has cross-claimed seeking, inter alia, a declaration that it is entitled to restitution of, and that there is a resulting trust over, the contributions it made to the project costs pursuant to the joint venture agreement (which it seems to be accepted amounted to $90,086.22), on the basis that there has been a total failure of consideration for the said contributions. Focus seeks an order for the payment of those moneys as moneys had and received by JND. Alternatively, Focus seeks an order for the payment of an amount out of the proceeds of sale from the project (which, as I understand it, are said by Focus for the purposes at least of this alternative claim to include the sale of the property in question).

5 As indicated earlier, the parties have twice invoked the expert determination procedure provided for under their joint venture agreement. That procedure distinguishes between the determination of disputes in relation to legal issues under clause 15.3.1 (which are to be referred to a practising solicitor or barrister on the nomination of the President of the Law Society) and disputes in relation to financial or accounting issues under clause 15.3.3 (which are to be referred to a practising accountant on the nomination of the President of the Institute of Chartered Accountants).

6 As a prelude to its reliance on the said expert determinations, JND seeks declarations as to their binding force. The defendants, for their part, deny that either of the determinations is binding. They do so on two bases. First, that the respective experts did not determine a "dispute" as to matters falling within the relevant clauses of the joint venture agreement and, secondly, that what they did was not compliant with the contractual description of what they were required to determine. It is said, in both cases, that the resultant determination was 'beyond the realm of contractual contemplation' and, in any event, the result of reviewable legal error. In relation to the second of the expert determinations, it is further said that the expert failed to afford Focus procedural fairness (by entertaining certain communications with JND's then director, Mr John Nelson, without the knowledge of Mr Adamo and without affording Focus an opportunity, prior to the issue of the determination, to respond thereto).

7 The defendants contend that, as a matter of discretion, even if the determinations are binding as a matter of contract, the court should not grant a declaration to that effect in circumstances where there would be no utility to such a declaration (or, in the case of the first determination, where it is said that it is manifestly wrong as a matter of construction of the joint venture agreement).

8 The defendants further submit that, whatever the status of the determinations, this is a case in which there has been a total failure of consideration for the contributions made by Focus to the project costs and that Focus should have restitution in full of those amounts, relying upon the principle espoused in *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583 per Deane J.

9 Insofar as the claim made against Mr Adamo is concerned, Mr Adamo contends that the only guarantee that he agreed to give (other than that in respect of the initial land loan facility) was one which related to the provision of additional capital to the project (the precondition to which was not satisfied), or alternatively was limited to the financial obligations of Focus under the loan arrangements contemplated by the joint venture agreement, and thus does not extend to the liability now sought to be enforced against Focus in these proceedings.

Issues

10 The issues for determination are as follows:

(i) Is the expert determination made by Mr Graham Molloy on 17 March 2008 (the Molloy determination), as to the proper construction of various clauses of the joint venture agreement, binding on the parties?

(ii) Is the expert determination made by Mr Raymond Tolcher on 27 October 2008 (the Tolcher determination), as to the amount owing by Focus to JND as its half share of the project costs ($142,529), binding on the parties? (This requires consideration, inter alia, as to whether Mr

Tolcher was obliged to accord procedural fairness to the parties and, if so, whether he failed to do so.)

(iii) If either determination is binding as a matter of contract, should the court, as a matter of discretion, make any declaration to that effect?

(iv) Does the guarantee given by Mr Adamo extend to the claimed liability of JND the subject of these proceedings?

(v) Was there a total failure of consideration in respect of the project contributions made by Focus such that Focus is entitled to restitution of those contributions in full or there is a resulting trust in respect of the said contributions?

(vi) Alternatively, is Focus otherwise entitled to share in the proceeds of sale of the property which was to be developed as part of the joint venture?

Summary

11 For the reasons set out below I am of the view that:

(i) Binding nature of Molloy determination

12 The Molloy determination is binding on the parties as a matter of contract but does no more than to bind them to a particular construction of the said clauses on the face of the joint venture agreement insofar as that construction may be relevant to an issue between the parties (and in isolation from any particular factual scenario which might arise or have arisen).

13 The Molloy determination, to a large extent, construed the respective clauses in a vacuum, in the sense that Mr Molloy did not consider the operation of those clauses having regard to the *manner* in which the joint venture had come to an end nor did he address the validity of claims to restitution or otherwise of the kind brought in the current cross-claim.

14 Although Mr Molloy, in his reasoning, found that clause 3.1 continued to operate after the termination of the joint venture agreement, he did not have regard to the position if the joint venture underlying that agreement had been frustrated. (If I am wrong in that regard and the Molloy determination, properly read, did determine that clause 3.1 applies in the current circumstances to preclude recovery by Focus of its contributions, then I would decline to enforce it as a matter of discretion, as I consider it would be incorrect as a matter of law.)

15 In my view, the construction placed on the clauses reviewed by Mr Molloy does not determine the issues raised on the claim by Focus for restitution of the contributions made by it in the event that there

has been a total failure of consideration for those contributions. I consider that a declaration as to the binding nature of the Molloy determination (on what I might call the pure construction of the parties' agreement) will have no utility in circumstances where, as a result of what has transpired, the agreement will have no ongoing operation.

(ii) Binding nature of Tolcher determination

16 The Tolcher determination is not binding on the parties except, perhaps, insofar as it determines whether particular costs claimed to be project costs should be treated as such for the purpose of calculating each party's actual contribution to the project costs (and even then there is some uncertainty as to what precisely has been determined in that regard).

17 As to the quantification of the parties' respective project costs, it seems to me that Mr Tolcher has not made any final determination as an expert, as contemplated by the agreement, because, in its terms, the determination does no more than proceed on the stated assumption that the figures provided to the expert by Mr Nelson as to the parties' contributions to costs are correct (thus seemingly eschewing any attempt to make a final determination in that regard). (Mr Tolcher expressly reserved the right to amend the determination in that respect.)

18 Insofar as the Tolcher determination purports to find that Focus is liable to JND for a half share of the project costs (as opposed simply to determining a half share of the project costs and then calculating the shortfall between that amount and the amount of Focus' actual contributions – assessed by Mr Tolcher at $142,529), it is not binding on the parties because the issue of legal liability is not a matter within the scope of an expert determination under clause 15.3.3 of the joint venture agreement.

19 While I do not find that (absent any contractual duty) Mr Tolcher would have had a duty, acting as an expert, to accord procedural fairness to the parties (in that he was not performing a quasi-judicial function), and I am not satisfied that he otherwise assumed any such obligation (beyond an obligation to consider the parties' submissions and given them an opportunity to respond), it seems to me that there is a very real risk that he proceeded to make his determination on the misapprehension (induced, whether intentionally or otherwise, by Mr Nelson's communications in October 2008) that a revised spreadsheet setting out the parties' contributions to project costs had been agreed as between Focus and JND (whereas it had not been the subject of any such agreement). Had the Tolcher determination otherwise been binding in respect of the quantification of contributions to project costs, I would have exercised my discretion not to make a declaration to that effect.

(iii) Declaratory relief in light of above findings

20 As to the Molloy determination (which I consider the parties have contractually bound themselves to accept), I am not convinced of the utility of the declaration sought and I am concerned that such a

declaration would give rise to ongoing uncertainty and dispute between the parties. In particular, I cannot see utility in a declaration, in effect, as to the binding force of Mr Molloy's construction, in a vacuum, of various clauses in a joint venture agreement which makes no provision for what is to happen if, as is the case, the parties' joint venture is abandoned by them *prior* to the point at which the property the subject of the joint venture is acquired by the joint venture company.

21 As to the Tolcher determination, the only declaratory relief which might have been available, in my view, would be a declaration that any determination as to what cost items are to be treated as project costs is binding on the parties. Given the uncertainty as to precisely what that would entail (having regard to the fact that the determination itself expressly addresses only particular categories of disputed costs), I do not consider that there is any utility in the making of such a declaration.

(iv) Guarantee

22 I find that the guarantee given by Mr Adamo extends to all of the obligations of Focus under the joint venture agreement. Therefore, had I found that Focus was liable, under the joint venture agreement, to pay to JND an amount by way of reimbursement of project costs, then I would have held that this was a liability falling within the ambit of the guarantee.

(v) Claim for restitution

23 The decision of the parties to sell the property the subject of the joint venture agreement effectively brought the project to an end and removed the underlying substratum of the parties' agreement. The project thus failed without the fault of either party, both parties recognising that it was impossible for it to be carried further into effect.

24 The joint venture agreement, on its proper construction, did not make provision for what was to happen in those circumstances. In particular, it did not make provision for the allocation or apportionment of project profits or losses on the premature termination of the joint venture (other than if that occurred at an earlier stage than has here happened, ie as a result of a failure of the parties to obtain approval for the land loan facility) or indeed on any termination which did not involve the sale of the property (or, more precisely, the sale of something "from the project").

25 I find that there was a total failure of consideration in respect of the project contributions made by Focus. I consider that this is a case in which the principles espoused by Deane J in *Muschinski v Dodds* apply and that Focus is entitled to recover in full from JND the contributions it made towards the failed project. Those contributions (comprising interest payments on the land loan facility from 15 July 2006 as capital contributions to the joint venture (quantified at $61,141.72) and costs of $28,944.50) were ultimately conceded by JND (T 30) at $90,086.22.

(vi) Claim to proceeds of sale

26 In light of the above findings, this question does not arise.

27 There might have been a respectable argument that what was contemplated was that once the project got under way any proceeds of sale out of or from the project were to include the property that was to be developed as part of the joint venture even if the project had not reached the stage where the property had actually been acquired by the joint venture company in accord with the agreement. That would be consistent with the way Mr Adamo played a role in arranging the eventual sale of the property, without demur from Mr Nelson as to his involvement in that process (as opposed to the complaints made as to how Mr Adamo was arranging the proposed sale). However, such a conclusion would, as was acknowledged by Counsel for Focus, potentially afford a windfall gain to Focus. (Further, no claim for rectification of the agreement or based on estoppel to sustain such a claim was pleaded.)

28 On this issue, Mr Molloy's determination would seem to be binding on the parties, turning as it does purely on the construction of the relevant clauses of the agreement. Therefore had this issue been necessary to determine I would have found that Focus was bound to accept Mr Molloy's determination that it was not entitled to a share of the proceeds of sale of the property.

Background facts

29 JND was, at the time the parties entered into their joint venture agreement, the registered proprietor of a property in Port Macquarie. The property had been purchased in 2004 as vacant land, with a view to the development of a number of apartments on the land.

Initial discussions

30 At some stage in either late 2004 or mid 2005 (the parties' recollections differing on this point), discussions took place between the respective directors of JND and Focus as to the development of the land in Port Macquarie. According to the then sole director of JND, Mr Nelson, the initial discussion was in about November 2004; according to Mr Adamo, it took place in June 2005.

31 Broadly, Mr Nelson says that at that time he was looking to sell the land (T 21.49) (although it had not been put on the market as such), or to find someone to come into a joint venture development with him (affidavit June 2009) and that does not seem to be disputed. Mr Nelson accepts that Mr Adamo told him that he was not in a position to acquire the land and would not contribute any money to the cash flow for its development (T 22.30) but would be prepared to guarantee a loan for that purpose. His June 2009 affidavit quotes Mr Adamo as saying that this is what he would bring to the table. This is consistent with the contemporaneous documents.

32 Mr Nelson appears to base his recollection of the timing of this conversation on the date of a document which he says he sent the day after the meeting with Mr Adamo to his solicitor, Mr Victor Berger, setting out details of the proposed joint venture (Exhibit A). That letter bears a typewritten date but with what appears to be a handwritten '4' over the last (typed) digit of the year.

33 Mr Nelson could not explain why it was that the typewritten number appeared to have been overwritten in handwriting. However, insofar as it seemed to be suggested in the cross-examination of Mr Nelson that this evinced an attempt by Mr Nelson to backdate the letter, this does not make sense (since the month, as typed, on the letter was November and it is clear that by November 2005 the parties had already entered into their written joint venture agreement). No copy of this letter bearing any unamended typed date was produced. There is, therefore, no ready explanation for the overwritten numeral. Mr Berger, who might have been able to shed light on the date of the letter by reference to when the communication from Mr Nelson was received by him, assuming he retained a record of this on his file, was not called to give evidence.

34 Nevertheless, Mr Adamo's recollection of the date of his initial discussion with Mr Nelson, on the other hand, similarly seems to be based on the date of a document (in Mr Adamo's case, this being a letter he had sent in July 2005 with a proposal for consideration by Mr Nelson) which Mr Adamo placed as being sent shortly after his first meeting with Mr Nelson.

35 If, in fact, the initial discussion took place in late 2004 (as Mr Nelson suggests), then there would seem to have been a rather lengthy delay between the initial discussion and the formulation by Mr Adamo of a proposal for a joint venture in relation to the land. In the absence of evidence as to discussions or communications in the interim, this might suggest that it is more likely that the meeting took place in mid 2005 than late 2004 (since it seems somewhat unlikely that Mr Nelson would have waited some six months after the initial conversation without either putting some proposal to Mr Adamo or pressing for some formulation of any proposal by Mr Adamo for the development of the land or moving to place the land on the market for sale). Nevertheless, other than the haste with which the land loan facility was completed in late 2005, there is no evidence of any particular urgency on Mr Nelson's part, during the period late 2004 to mid 2005, in looking to put in place arrangements in relation to the sale or development of the land (which might have lent support to his recollection of the timing of his first discussion with Mr Adamo).

36 In any event, it was conceded that nothing turns on the time at which the initial discussion took place. At most, this might be something which would go to the credit of the respective witnesses. However, as there is no issue in the proceedings to which the divergence in the parties' recollections in this regard is relevant, and as both Mr Nelson and Mr Adamo seem to be basing their respective recollections on no more than a reconstruction of events by reference to particular written communications, I do not think any adverse inference should be drawn on either side as to this divergence in the evidence.

How the deal was to be structured

37 What Mr Nelson's initial correspondence (purportedly of November 2004) contemplated was the sale (to Focus) of 50% of the shares in JND and for JND then to borrow 65% of what Mr Nelson considered to be the current valuation of the land (namely $2.1 million), that being $1.365 million. The funds so borrowed were then proposed to be treated in the following way - $2 million was to represent the "agreed sale value"; $1.215 million of the funds was to be banked by Mr Nelson on exchange; $635,000 was to be treated as JND's "investment" in the project; and the balance of $150,000 was to be paid by JND (as to $100,000 as capitalised interest and $50,000 for stamp duty).

38 Thus, it was initially proposed by Mr Nelson that JND's investment in the project was to be $785,000 (the land itself being given a notional value for the purposes of the joint venture of $2 million) and that (out of the overall proceeds) JND would be entitled to notional interest on the $785,000 (at a proposed rate of 7.5%). No further funds were to be provided by JND in relation to the construction of the apartments in the development (those funds apparently to be borne by Focus). JND was to have a half share of all the profits from the project. (Ironically, had the joint venture proceeded in this way there would have been no question now as to whether Focus had any entitlement, through its shareholding of the company, to a share of the proceedings of sale of the property.)

39 In the witness box (T 23.7), Mr Nelson seems to have generalised the effect of the proposal. He was adamant that the "project was 50/50" but saw this as being achieved in the following way: "I would take out a loan and lend Adamo half, I would pay for it and he was to pay me back". (Mr Adamo denies that Mr Nelson had said that half the money from the land loan facility was effectively to be a loan from him to Adamo. In his affidavit, Mr Adamo asserted that interest paid on the loan was only to be a project expense if the conditions precedent for the development were met and Focus was thus to partake in the proceeds of sale – see his affidavit of 18 August 2009.)

40 Mr Nelson appears to have regarded the arrangement as one in which, as it was JND's land which was to secure the borrowing, the borrowing was to be "JND's" but that Focus would assume liability in due course for half of those borrowings and account would later be taken (on the ultimate profit share) of JND's contribution of the land to the project. JND's half of the borrowings was to fund the initial project expenses up to the point of construction. However, and relevantly in light of the way the project in due course proceeded, Focus was not to be responsible itself for funding the initial project expenses – that was to be a matter for adjustment in due course.

41 The project, as envisaged in Mr Nelson's letter to Mr Berger, did not proceed. What was agreed (as to the way in which the project was to proceed) was different in a significant aspect – namely that there was no upfront sale to Focus of any shares in JND (or of an interest in the land itself). This is consistent with Mr Adamo's account of a discussion with Mr Nelson in which the latter said to him

words to the effect "this is my land and until such time as development finance is available at which the joint venture can purchase the land, the land stays with me.". That also accords with the tenor of Mr Nelson's responses in the witness box as to his understanding of the position.

42 There was by this point a clear move by Mr Nelson away from his initial proposal that the ownership of the land be transferred (indirectly through the acquisition of shares in JND or directly by sale of land) to Focus at the start of the project.

43 Further, the documents, as executed, make it clear that the initial borrowing (rather than being one under which Mr Nelson or JND borrowed the funds and loaned half to Focus by way of its half contribution to the project) was one taken out jointly between the parties and for which Focus was equally liable.

44 There was also some confusion as to the way in which the advance of capitalised interest payments were to be treated. Mr Nelson's position was that, because they came from the initial borrowings on *his* land (T 20), they represented a payment by *him* (or JND). In fact, the initial borrowings were jointly obtained through the land loan facility and thus a payment out of those borrowings could only be seen as being a payment by Mr Nelson (or JND) alone if it were adopted as such by the parties.

45 Mr Adamo's proposal of 15 July 2005 (put forward for "discussion" by Mr Nelson) accepted that the profit would be shared 50/50 and contemplated that the interest on the initial loan would be treated as a project expense. That letter noted that there were two ways in which Focus would be interested in purchasing the site: an outright sale for $1.8 million or less (Focus being described as a "not overly willing purchaser in a depressed market") or a "joint venture with limitations", broadly described as encompassing, among other things, an agreed land value of $2 million and entry into a "co-venture agreement" on a 50/50 basis, with each co-venturer having 50% of the shares issued in the landowner company.

46 The letter contemplated refinancing the land at $1.4 million including $130,000 capitalised interest for 12 months (with Focus to be jointly liable for the loan) and said this would give Mr Nelson "say $420,000" with the balance of the money to be treated as a loan to the project. Mr Adamo referred to a deferred interest charge payable on completion of the project and offset against any unit JND might wish to purchase out of the development. On that letter was an annotation (in Mr Adamo's handwriting) to the effect that the Vendor (JND/Mr Nelson) did not want to issue shares in "his" company but rather wanted a joint venture between his company and Mr Adamo's company.

47 According to Focus, each party was thus to bring something to the joint venture – JND, its land; Focus, its financial support in relation to the borrowings to enable JND by refinancing the property to free funds out of the property for JND's own benefit and to enable interest payments to be made on the refinanced loan for the initial period in which steps were taken to get the project to the stage where

development and construction finance would be able to be obtained. This broadly accords with the thrust of the arrangement provided for in the JVA.

48 On that basis, Mr Adamo seems to have seen his assistance (at least initially) as confined to the giving of a guarantee to facilitate the refinancing of the then existing loan by way of the land loan facility. Consistently with Mr Nelson's recollection of the initial discussions, Mr Adamo says that that was all he told Mr Nelson he could bring to the table at the time (T 116).

49 It was put to Mr Nelson that Mr Adamo had never suggested that he would guarantee the whole of the payment of the project costs (T 36). Mr Nelson did not agree. He did not, however, refer to any conversation in which Mr Adamo had agreed to do more than bring to the table his guarantee of the loan (whichever loan that may have been) (T 37).

50 This evidence was emphasised in the context of the current dispute as to the scope of the guarantee. However, given that back in late 2004 or early 2005 the parties were only at the stage of negotiation of their arrangements, I find it difficult to place any weight on the initial statements by Mr Adamo as to the guarantee he could bring to the table, when construing the final written agreement containing the guarantee which he ultimately gave. It is the objective intention of the parties, as ascertained by the court, which is relevant in construing an agreement such as this and I note that at least in one respect, which is not disputed, Mr Adamo was apparently prepared to give a guarantee going beyond the initial land loan facility (clause 7.2.1(b)), which indicates that his position was not fixed in terms of the early negotiations.

Joint Venture

51 On 21 October 2005, JND (described as "Investor") and Focus (described as "Developer") entered into a formal Joint Venture Agreement (JVA). Mr John Nelson, then JND's sole director, signed the JVA on behalf of JND and also in his personal capacity as guarantor of JND's obligations under the JVA. Mr Adamo, as Focus' sole director, in turn signed the JVA on its behalf and also in his personal capacity as guarantor of Focus' obligations under the JVA. (I turn later to the scope of the said guarantee.)

52 In essence, the joint venture was for the redevelopment of the property into 22 lots, subject to the necessary development finance being obtained (that being separate from and later than the initial land loan facility which was intended to pay out the existing National Australia Bank loan and to enable the joint venture parties to fund the first $150,000 in interest and other expenses). The JVA contemplated that, once development finance was obtained and certain other conditions were satisfied (such as the s 96 modification – T33/34), the property would be acquired by a special purpose joint venture company. (Seemingly, that joint venture company was intended to be Focus, although this was not specified in the JVA.)

53 At the time of entry into the JVA, the land was subject to a mortgage to the National Australia Bank securing an amount of at least $825,000 (the ultimate pay-out figure for that loan being in the order of $852,000). The land already had the benefit of a development approval from the Port Macquarie-Hastings Council. There was subsequently a s 96 modification to modify the existing DA approval for 22 units. Mr Nelson stressed that it was Focus' opinion, but not the opinion of the architect, that until the s 96 modifications were done the plans could not be drawn up for sale (T 38.36). That may or may not have been the case. In any event, there is no dispute that after the commencement (and as part) of the joint venture, Focus arranged for such an application to be made (and that, when eventually sold, the purchaser had the benefit of that approval).

54 It is not disputed that the joint venture on which the parties embarked was comprised of a number of stages, the sequence of which was as set out in the JVA. Counsel for JND, Mr Wilson, submits that there were in essence only two stages in the joint venture: the first, being the obtaining of the land loan facility (to pay out the existing mortgage and to deal with the initial costs/funding of the joint venture) and the second being the development phase after the development finance was achieved and the other conditions satisfied. Mr Nelson (largely unprompted) explained in cross-examination his understanding of the various stages of the joint venture, there being at least three in his eyes: "Yes that was part of the development finance, the s 96 application and presales, the second stage. The first stage, I think to me, was securing the land loan. Then, we had the stage where we were going to see if it was viable to be sold. There is another stage after that, I would say, which would be obtaining the construction finance." (T 34.30)

55 Whether, broadly grouped, there were two or more stages in the project does not seem to me to matter. The relevant fact is that *until* the project reached the point at which the preconditions to acquisition of the property by the joint venture company were satisfied, the property remained in the ownership of JND. (This was to become significant when the joint venture failed, since the contention of JND (ultimately accepted by Mr Molloy) was that the proceeds of the subsequent sale of the property formed no part of any overall calculation or "wash-up" of the profits/losses of the project as between the two joint venturers *because* the property was never brought into the 'project', as such.)

56 In any event, it does not seem to be disputed that what was contemplated by the agreed project (as it went forward) was (first of all) that the parties were to seek approval for a land loan facility to discharge the existing debts and that the second main step was the modification of the development approval and the obtaining of development finance; with the final stage being the obtaining of construction finance (and construction of the units in accordance with the development approval). The JVA envisaged that there might be a sale of the property before the physical redevelopment of the land had taken place.

JV Agreement

57 Clause 3.1 of the JVA, which was expressed to be subject to clause 3.2, provided that JND and Focus would share the project liabilities in equal proportions. I set out these clauses in full later in my reasons. (Mr Adamo contended that what clause 3.2 meant was that he would be reimbursed in full *provided* that there was enough realised out of the property for that to happen.)

58 Clause 5 of the JVA contained a put and call option whereby, on satisfaction of the specified conditions precedent, the joint venturers would nominate the "company" as the purchaser of the property. (Clause 12 set out those conditions precedent, they being, relevantly, the obtaining of a construction certificate; approval for the development facility; and a minimum number of pre-sales.)

59 Clause 6.1 of the JVA provided for the parties to obtain a land loan facility to refinance the property owned by JND. The amount which the JVA contemplated would be obtained from such a facility was $1.365 million. (For that purpose, on about 23 December 2005, JND and Focus (together as borrower) entered into a Deed of Loan with Provident Capital Limited (as lender). However, the sum eventually advanced pursuant to that Deed was the lesser sum of $1,323,000.)

60 Clause 6.1.3, headed "Interest on Land Debt", provided that the venturers (JND and Focus) "as part of their obligations in 3.2" were to fund half the interest on the land loan, subject to clause 7.

61 Clause 6.15 noted that the joint venturers would provide guarantees (and Mr Adamo accepts that he did so in relation to the land loan facility).

62 Clause 7.1.1 provided that Focus was to pay all costs for approvals (which were to form part of the project costs). Clause 7.1.2 provided that Focus was to pay interest on the land loan facility *after* the amount of $100,000 (which was also to form part of the project costs).

Land Loan Facility (or initial debt refinance)

63 In early December 2005, Mr Adamo advised Mr Nelson as to what he considered would be the prospective project costs and financing. He wrote, by letter of 8 December 2005 (Exhibit 2, Tab 22), saying "You will require the following funds [$300,000] in order to obtain construction certificate and commence marketing". The letter referred to the assumption that 65% of the current land value would be borrowed ($1.35 million) and that the interest provision for 12 months should be $100,000. It went on to state that "As agreed and in consideration that [a related company to Focus] is granted the building contract Focus will be a joint guarantor to the revised facility". (Presumably that was a reference to the initial land loan facility.)

64 The land loan facility was obtained, as noted above, in December 2005 by way of Deed of Loan with Provident Capital. The finalisation of the loan transaction seems to have taken place with some haste.

By letter dated 21 December 2005, Bersten Pain, acting for the lender, wrote to Mr Toltz enclosing documents and noting that settlement was proposed for 12 January 2006. In fact, settlement took place on 23 December 2005, the very day on which the mortgagee's solicitors had certified that the transaction could proceed to settle – that certification seems to have been given early in the morning on that day (or at least the fax confirming this was sent to Gerrard Toltz at 9.25 am on 23 December 2005 - see fax header, Exhibit 2, Tab 24) with completion then scheduled at 3.30pm that afternoon. The reason for the apparent haste was not explained. (Mr Adamo, in his 27 May 2009 affidavit deposed to a conversation with Mr Nelson to the effect that his mortgagee was pressing him to refinance. However, Mr Nelson denied that this was the case.)

65 The actual advance was, however, $1.32 million (not the $1.35 million Mr Adamo had assumed would be required in early December 2005, nor the $1.365 million). The proceeds of that facility were disbursed (as confirmed in a letter dated 12 January 2006 from Mr Toltz) first to pay out the existing National Australia Bank mortgage (by then the payout figure being a sum of $851,720). Of the balance, a sum of $326,787.55 was paid to JND for its own purposes, with smaller amounts ($74,214.86 and $22,000) used or put into an account to fund, respectively, the payment of interest in advance on the loan facility and on account of working capital for the project.

66 Focus (though it seems to have raised no such complaint at the time) has subsequently argued that the shortfall in the amount of the land loan facility (and, more particularly, the shortfall in the amount utilised out of the proceeds to fund the advance interest payments and the initial working capital) prejudiced the project (and hence that the payment out to JND of the sum of $326,780.55 was at the expense of maintaining what had been proposed to be retained out of the facility to fund a greater amount of up-front interest payments and for working capital). The shortfall in question was $53,783.14. (Paragraph 31 of the cross-claim pleads that this amount was overpaid to JND out of the moneys to be used as working capital and interest payments. However, a claim for this amount was not pressed in argument before me.)

67 Mr Nelson says that the reason for the proportionate reduction in the amounts used to fund interest payments and working capital was that less than the loan amount as originally contemplated under the JVA (ie less than $1.365 million) had been obtained from Provident (and he asserts that Mr Adamo had agreed to the reduction).

68 There was a conflict of evidence as to the circumstances in which this happened. Mr Nelson said that, at a meeting in December 2005 with the solicitor acting on the joint venture (Mr Toltz), it was Mr Adamo who suggested the reduced payments. Mr Adamo denies that he agreed to the reduction of the amounts to be retained out of the land loan facility proceeds for the interest payments and working capital and says that he first became aware that this was to happen when he attended on settlement, by which time it was too late and he had no choice but to accept the position (T 123). (He did not raise this thereafter, apparently in an endeavour not to 'rock the boat'.) Mr Adamo thus says that the

reduction in the amount made available for interest and working capital was put to him as a *fait accompli*.

69 Mr Nelson says that the "only instructions [he gave] were that the residue of the money of *my land* that was engaged would go into my account, that is the only instruction I had. I had no idea of the other figures. It was agreed, not instructed" (T 41.37) (my emphasis). However, by the time that the Bersten Pain letter of 23 December 2005 had been written, setting out the payment details, the mortgagee must have been given directions as to how the loan money was to be paid out and it would be surprising if this had been done by Mr Toltz without any instructions. Mr Toltz gave evidence that normally he would issue a cheque direction to the lender but he did not do so in this matter. "It all happened very quickly. But there is no doubt that I authorised them to draw those cheques." (T 107.42). He could not recall who had instructed him to do so or when those instructions were given.

70 Mr Nelson, in cross-examination, suggested that Mr Toltz could be asked to confirm that at the December 2005 meeting the parties had agreed to modify their agreement ("Maybe someone could ring Mr Toltz and ask" - T 45; T 105) but when that suggestion was adopted, and Mr Toltz gave evidence as to the meeting, Mr Toltz had no recollection of the conversation attributed to him in paragraph 76 of Mr Nelson's 26 June 2008 affidavit (in which Mr Nelson deposed to a conversation in which he says Mr Adamo made the suggestion as to the reduction in the amounts drawn down for particular items). Mr Toltz' evidence largely supports Mr Adamo's account of events, at least to the extent that Mr Toltz says that if he had understood there to have been an agreement to vary the JVA in this regard then he would have made a note to do so. However, in circumstances where it may not have been necessary formally to record any such agreement to vary the disbursement of funds from the land loan facility, it seems to me that little can be drawn from the lack of a written note to this effect.

71 As with various of the factual disputes between the parties, ultimately I do not think anything turns on who it was that proposed the proportionate reduction or its effect on the success of the project.

72 Mr Nelson initially suggested in the witness box that he or his company had received less than $326,780 out of the land loan facility proceeds (even though receipt of this amount was admitted in the pleadings), but it seems he did so on the basis that he says he in fact used this amount for project costs (T 30). As to the shortfall, he said "But I put up $150,000 and there was $120,000 taken out to start with plus the other expenses. But there is $120,477 of my money put out" (T 43). Mr Nelson accepted that he could have put the moneys representing the shortfall in amounts for interest/working capital into the joint venture - "I could have yes I agree I could have. But we agreed not to" (T 44.20).

73 Mr Nelson, in his evidence in these proceedings, made it clear that he regarded the $100,000 advance interest payments which were to be paid out of the borrowings as being a payment by him for the purposes of the joint venture (though coming out of joint borrowings) (T 48) and says the second lot of interest after that time was for Adamo to meet - "I paid my first 6 months".

74 Focus guaranteed the borrowings under the land loan facility and it is not disputed that it also made financial contributions to the project. Focus has quantified those contributions at $90,086.22) (an amount which both the Tolcher determination and Mr Nelson, himself, have accepted) comprised of payments of interest on the land loan facility (totalling $61,141.72) and other project costs ($28,944.50)). Mr Nelson was critical of Focus' performance of its obligations in relation to the contribution to project costs but does not dispute that there was a financial contribution of about that amount by Focus to the project. Mr Adamo, for his part, accepted that, if the project succeeded, he would expect to have made a profit both as developer and as builder (T 119). (This seems to be suggested by JND to be of relevance in that there was a potential benefit for Mr Adamo's interest in the project over and above any share of the proceeds of sale of the property. However, that benefit was never realised.)

Failure of the project

75 Following the JVA, a s 96 application was lodged for the modification of the Development Approval and in due course this was approved.

76 By mid to late 2006, the feasibility of the project was placed in doubt. It is not suggested that this was due to any fault of the parties (other than to the extent that it is apparently Focus' present belief that the allocation of lesser amounts for the advance interest payments and the working capital exacerbated the financial difficulties subsequently encountered in relation to the project). Both parties accepted that the inability to secure a sufficient level (or indeed any) pre-sales for the project meant that construction finance could not be obtained and the project could not proceed.

77 Mr Nelson said in paragraph 32 of his affidavit that in mid 2006 he had a conversation with Mr Adamo in which it was agreed that, as presales had not been obtained and finance could not be secured, the property should be sold so as to minimise "our losses" (thus suggesting that the proceeds of sale of the property would be a matter relevant to take into account in ascertaining the overall losses of the project).

78 On 23 June 2006, a further Deed of Loan was signed in order to roll over the parties' loan obligations for a further period of 12 months, following the expiry of the period provided for under the initial Deed of Loan.

79 By email on 15 September 2006, Mr Adamo wrote to Mr Nelson, referring to the fact that he had scheduled payments from the joint venture account and through his company totalling $72,000 and stating that payments of interest or to anyone else thereafter would have to be shared as he did not have enough funds. He said that a property trust had in principle agreed to purchase the land for $2 million and that he was going to talk to Colliers to market the site for sale (thereby demonstrating a belief,

whether that be warranted or not, that he had a right to provide input (and an interest) in relation to what was to happen with the land as part of the further steps to be taken in relation to the project).

80 Mr Adamo set out in that communication the options as he saw them at that stage in relation to the project (Exhibit 2 Tab 33) – namely that development finance might be obtained; that there might be continuing finance; that the property might be sold to the property trust (which had expressed interest); and that Colliers might be approached to market the property for sale. (The tenor of this letter supports the view that Focus saw the property (and what was to be done with the property) as part of the project in which the parties were then still involved.)

81 Mr Nelson, in the witness box, did not recall the third of those options but, when pressed, he agreed that an option agreement had been signed in relation to the property and that a fee had been paid to a Mr McLean in relation to that option (T 49). That fee (originally sought in the sum of $50,000 and then reduced to $30,000) was a matter of contention between the parties at the time but not in issue before me. (There was also a dispute between Mr Nelson and Mr Adamo as to whether Mr Adamo should be noted as the vendor's agent on the contract for sale of the property which was prepared in course (T 52) (something Mr Adamo said had been done on their solicitor's advice) but again nothing turns on this.)

Sale of property

82 The Port Macquarie property was sold in June 2007, with the benefit of the development application, as modified. The manner in which the purchase funds were distributed is the genesis of the present dispute.

83 By letter dated 1 May 2007 (prior to the sale), Focus wrote to JND in an apparent attempt to reach a resolution for the amicable distribution of the "net proceeds". The letter referred to many attempts to obtain project refinance (something not apparently disputed by JND) but said that, without presales, that project refinance could not be secured. It noted that the property could not be purchased by the joint venturers and went on to explain Focus' view, which was that the obligation of each joint venture partner ceased with the sale of the land and that all capital over and above the budgeted amounts should form the project costs. It referred to the deficiency in funding by reason of the shortfall from the project at the time the land loan facility was taken out ($53,786), which it was said had caused the parties to have to inject funds at an earlier time. It noted that the parties had agreed to sell the property and suggested a distribution of the net proceeds such that JND would receive $82,088 and Focus $30,744 after the payment of $30,000 to Focus (as a contra for the disputed broker's fee, that being, as I understand the evidence, a sum which Mr Adamo said was owing to him by the broker on another property deal) and after repayment of the land loan facility to the financier.

84 On 14 June 2007, a contract was signed for the sale of the property by JND to a third party for the sum of $1.9 million. The defendants admit that the sale was with their consent (paragraph 9 defence). As noted earlier, out of the sale proceeds, the sum of $82,744 was put into a controlled monies account held by the second defendant, pending resolution of what was described as the disagreement between the parties as to how the losses incurred in relation to the project were to be borne. The fundamental point of disagreement between the parties at that stage seemed to be whether the sale proceeds were to be taken into account in ascertaining the "losses" of the joint venture (by reference to clause 3.1 of the JVA, which provided that the parties were to be liable for project costs and to share liabilities in respect of the project in equal proportions).

85 Mr Nelson accepts that he (or his company JND) received $98,305 from the proceeds of sale plus a $10,000 fee and the balance of the deposit, being a total net sum of $286,397. Taking into account the sum obtained when the property was refinanced ($326,780) this meant a return to JND/Mr Nelson of some $721,482. Mr Nelson agreed that this was what he had obtained from the sale – "Yes it was my equity in the land yes" (T 58.37).

86 Mr Nelson confirmed in the witness box that it was (and remains) his opinion that the land was his and that the profits from sale were not to be shared, though he did not recall having said that to Mr Adamo (T 56.2 and 56.24). He agrees that Mr Adamo wanted his money back. He agrees that the position he has adopted is one which has had the effect that Mr Adamo had to contribute to the costs but could not get anything out of the land (T 57). Mr Nelson's general response to such a proposition is to say "I think we both had lost a lot of money" (T 50.32).

87 Mr Nelson acknowledged that dispute in his affidavit of 19 January 2009, when he says that one of the disputes was in relation to the appointment of the proceeds of sale. However, for some reason not clear to me, paragraph 8 of the Statement of Claim is not admitted (namely, the allegation that in May 2007 the parties "fell into a dispute" concerning the interpretation of some of the terms of the JVA).

88 The defendants contend that the sale of the property, with their consent, had a number of consequences: it prevented the project from proceeding (which was clearly the case); it terminated the obligations of the parties to the joint venture by mutual consent, as well as the obligations of Mr Adamo as guarantor (something not conceded by JND); and it caused the *project* to be abandoned or alternatively frustrated (thus seemingly distinguishing between the termination of the parties' contractual obligations and the frustration of the project) (para 11 Defence).

89 In paragraph 13 of the Cross Claim, the defendants similarly plead that there was a consensual discharge of the joint venture and that the JVA was abandoned or terminated, as a consequence of which (para 14) it is alleged that there was a total failure of consideration for Focus. (It is not contended that the JVA itself has been frustrated, as the decision not to proceed with the project was a consensual one.)

90 Counsel for Focus (Mr Reuben) submits that, the joint venture having terminated without fault on the part of either party (not contending for this purpose that the conduct of JND hastened the demise of the project), this amounted to a total failure of consideration entitling the defendants to restitution of their contributions to the project. It is in this sense that Mr Reuben says this dispute is not a question of the sharing of losses.

Dispute resolution process

91 First, the parties unsuccessfully participated in a mediation of their dispute, following which JND invoked the dispute resolution provisions in clause 15.3 of the JVA.

Legal determination

92 Clause 15.3.1 of the JVA provides that "any dispute relating to legal issues will be determined by [a] practising Barrister or Solicitor selected by the parties or if they cannot agree, then nominated by the President of the Law Society of NSW".

93 Clause 15.5 provides that the decision of the expert is to be final and binding on the parties. Clause 15.6 expressly provides that the expert does not act as an arbitrator.

94 To invoke the provisions of clause 15.3.1, JND wrote to the President of the Law Society, by letter dated 27 August 2007 (tab 69), informing him that the parties were in dispute regarding the "interpretation or intent of the contract, clause 3 entitlement and liability".

95 The 'dispute relating to legal issues', for the purposes of clause 15.3.1, was thus first articulated by JND as a dispute as to the proper construction of clause 3 of the JVA.

96 Mr Nelson noted in his letter to the Law Society that at that stage neither he nor Mr Adamo wished to have legal representation and they felt that the expert's determination of the intent of the contract clause 3 (entitlement and liability) was what they needed. "Does the intent of our contract mean that we as joint venture partners are meant to share equally the profit from the project and do we also as joint venture partners have an obligation to share equally the costs and liabilities of the project?"

97 Mr Molloy was in due course nominated by the President of the Law Society, by letter dated 16 September 2007, as the expert to determine that 'dispute'.

98 The defendants now say that there was no 'dispute' relating to the construction of the JVA, as such; rather that they had, in effect, jointly sought an opinion as to the legal construction to be placed on various clauses of the agreement (see para 14 of the defence). They submit that at the time of Mr

Molloy's nomination the parties were not in dispute in relation to any legal issues arising from the JVA (simply wanting to have an expert construe clause 3) and that there was no agreement between them as to the precise nature of their dispute (see para 4.3 of the defendants' Outline of Principal Contentions of Fact and Law dated 3 December 2009).

99 It nevertheless seems fair to say that at that stage JND was asserting that Focus (and/or Mr Adamo) was liable to contribute further sums to cover a one-half share of the project losses (calculated without reference to the proceeds of sale of the property) and Focus was asserting that it was either entitled to the return of its project contributions or the proceeds of sale of the property had to be taken into account when calculating project losses.

100 Although neither party had the benefit of legal representation in the process of expert determination conducted by Mr Molloy, it seems clear from the submissions made to him in due course by Focus (which expressly referred to and relied upon *Muschinski v Dodds),* that during the course of the process Focus had the benefit of some legal advice (and this was accepted in the witness box by Mr Adamo).

101 A preliminary conference was convened by Mr Molloy and held in his chambers on 12 December 2007. It was attended by each of Mr Nelson and Mr Adamo. At that preliminary conference, according to Mr Molloy's later reasons for determination, the parties invited him to "embark upon a financial analysis to determine which party owed what to whom". He declined to do so. Rather, during the course of what Mr Molloy considered to be a relatively lengthy preliminary conference, the parties apparently agreed to identify the task to be performed by Mr Molloy as the task of construing a considerable number of terms of the JVA.

102 The draft agenda/minutes of the 12 December 2007 meeting record that there was no representation for either party; note that the parties agreed that the "determinist" had been properly appointed; and described the general nature of the claims as "Construction of clauses 3.1, 3.2 [and many others]". The parties apparently also agreed at that meeting (para (f)) that Mr Molloy could determine any question that arises during the determination by reference and according to considerations of general justice and fairness, rather than according to law. The parties did not agree to any technical or legal advice being obtained and (rather surprisingly, given that the issue for determination was solely the construction of particular clauses) answered "No" to the question as to whether any issue of law was likely to arise. They agreed to the provision of written submissions and noted that the parties were to comply with s 37 of the Commercial Arbitration Act 1984 as if the determination was an arbitration pursuant to that Act.

103 Mr Reuben submits that if there was a dispute between the parties which was before Mr Molloy for determination it was "which party owed what to the other in the events that had happened arising from the premature termination of the Joint Venture" (para 4.6, Outline of Principal Contentions) and that Mr Molloy had misinterpreted his task. Mr Reuben says that what Mr Molloy was being asked to do (rather than determining a financial dispute in relation to the minutiae of contributions, as the Molloy

determination suggests) was to determine whether, in the events that had happened, the terms of clause 3 of the JVA had application or whether the law of restitution should apply. (I interpose to note that it is by no means clear that as at the date of the preliminary conference any question as to the applicability of restitutionary principles had yet been raised, this seeming to emerge for the first time in the submissions provided to Mr Molloy by Focus in January 2008.)

104 Insofar as Mr Reuben suggests that there was no dispute as to the construction, as a matter of law, of the particular clauses (the parties' correspondence not having expressly asserted differing views as to the construction of the contract at that stage), this seems to disregard the fact that there was a live dispute between the parties at least as to the interpretation and intent (and hence as to the potential operation) of the contractual provisions. In order to assist in determining that dispute, the parties had agreed, apparently at Mr Molloy's suggestion or instigation, that the task to be carried out by Mr Molloy should be for him to express a considered opinion on various clauses of the contract.

105 As I understand it, Mr Reuben submits that, in those circumstances, whatever it was that the parties were *in fact* agreeing that Mr Molloy should do, what they were *not* doing was following the procedure contemplated by clause 15.3.1 and hence that any determination by Mr Molloy is not a determination within clause 15.3.1 (and not one which is rendered binding by clause 15.5). I consider this submission later in these reasons. However, when outlining the factual background to the present dispute, I should note that it seems to me that the circumstances in which Mr Molloy was retained on 12 December 2007 by the parties (on the nomination of the President of the Law Society), to make a determination as to the proper construction of various clauses of the JVA, were such as to evince an agreement (or acceptance, however reluctantly that might have been on the part of Mr Adamo) by both sides that Mr Molloy's determination (whether or not strictly of a 'dispute' relating to legal issues within the meaning of that phrase in clause 15.3.1) should be treated as a determination pursuant to clause 15.3.1 and, hence, a determination to which clause 15.5 would in the ordinary course apply.

106 Therefore, whether or not there was any 'dispute' as to legal issues (and if so what it was) as at the time Mr Molloy was nominated to be the expert, it is clear that what the parties subsequently agreed when they met with Mr Molloy was not that he would make any determination as to who owed what to whom (or as to their legal liability inter se) but that he would be appointed as an expert to determine the proper legal construction of particular clauses in the document they had both signed.

107 Mr Reuben, quite fairly, says that the exercise carried out by Mr Molloy was basically that of the expression of an opinion, as a practising lawyer, as to the construction of various clauses of the JVA. (I might add that Mr Molloy seems to have been asked to do so (and largely to have done so) without reference to the actual events which had transpired.)

108 Nevertheless, I do not think it is open to Focus and Mr Adamo, having participated in a process which was formally commenced under clause 15.3.1 and having agreed the "issue" which Mr Molloy was to

determine, without at any stage prior to the determination suggesting that the way in which the issues had been identified with Mr Molloy would render this a determination outside the scope of clause 15, now to deny the binding force of the Molloy determination solely on the basis that there was no "dispute" as such.

Submissions

109 Both parties provided written submissions to Mr Molloy. Focus did so by letter dated 14 January 2008 which specifically invoked the principles espoused in *Muschinski v Dodds*.

Molloy determination

110 The Molloy determination was issued on 17 March 2008.

111 Mr Molloy referred in his determination to the length of time which had been required for the preliminary conference (which he regarded as unusual) and indicated that although the parties had wanted him to express an expert opinion on more than simply clause 3 of the JVA, he had not been prepared to do so. Mr Molloy expressly noted that both parties had urged him to embark on a financial analysis to determine which party owed what to whom but stated that he had declined at that point of time to "travel down that path".

112 In paragraph 11, Mr Molloy stated "... the issue as to who owes what to whom is not before me. The only issue before me is the construction of the various clauses of the Agreement". He then noted that he was very much aware of what had been said by Einstein J in ***T****he Heart Research Institute Limited v Psiron Limited* [2002] NSWSC 646 (by which I can only assume that he was referring to the need recognised by his Honour for parties to ensure that the expert acts within the scope of the agreement by which the expert is appointed – which seems to me is implicit in the observation by his Honour in that judgment that the seminal question in challenging a determination remains whether or not the expert has acted outside the scope of that agreement [at 23]).

113 Mr Molloy then turned to a consideration of the JVA, observing that this was not an easy contract upon which one could quickly obtain a firm grasp, there being a number of internal inconsistencies, references to missing documents and significant blanks (of which he gave some illustrations).

114 Broadly summarising the relevant findings, Mr Molloy determined that clause 3.2 of the JVA (which dealt with the determination of the proceeds of sale from the project) *did not* apply in circumstances where the project had not proceeded to finality (and thus where the proceeds from sale of the property did not form part of the joint venture in those circumstances) but that clause 3.1 *did* apply in those circumstances.

115 The defendants contend that what Mr Molloy should have determined was that neither clause applied – ie, that the agreement to meet project costs in equal shares only applied, and such liability would only arise, if there were proceeds of sale from the project out of which the project costs could be met.

116 As a matter of the construction, separately, of each of clauses 3.1 and 3.2 (ie in summary, Mr Molloy's finding that clause 3.1 contains an agreement on the part of the co-venturers to share liabilities equally and that clause 3.2 does not apply if the project is terminated before the property is transferred to the joint venture company), I do not consider that Mr Molloy's conclusion is manifestly incorrect (though I have noted earlier that an argument might have been made as to the scope of the words "from the project" in clause 3.2 to support a different finding as to the applicability of clause 3.1). The only criticism that I think could be made of the Molloy determination in this regard is that it does not expressly address what is meant by the words "subject to clause 3.2". However, it may be that this was an unstated part of Mr Molloy's reasoning and in any event, if (as they have) the parties have agreed, as part of their contract, to accept as binding the determination by a legal expert, then any failure to address or place weight on those words is a result each would ordinarily have to accept.

117 Strictly speaking, however, that does not necessarily determine the present dispute (even leaving aside the issue of quantum) because the question would be whether (or how) in the circumstances that have transpired, clause 3.1 itself has any operation.

118 On an analysis of the Molloy determination, it seems to me that Mr Molloy's reasoning included the conclusion that clause 3.1 continued to operate after termination of the agreement, though without addressing questions of frustration of the underlying joint venture or the like. That might raise the issue whether Mr Molloy, in so doing, went beyond what he had been asked to determine – namely, a question of construction of various clauses simpliciter. However, it seems to me that the expression of his opinion as to the ongoing operation of clause 3.1 was within the task Mr Molloy was asked to perform, particularly since any construction of individual clauses would have to have reference to the contract provisions as a whole.

119 Reviewing the process of Mr Molloy's reasoning in relation to the findings he made, Mr Molloy noted that the sequence of events to give effect to the project was set out in clause 4.1, commencing with the steps set out in clauses 4.1(a) to (e). Insofar as 4.1(c) was the securing of project finance by the development finance facility – defined as finance obtained to fund the project following the conditions precedent – he considered this to be illogical in that one of the conditions precedent was the requirement for the obtaining of contracts for presales (which itself could not take place, he said, without the property first having been purchased by the joint venture company – that, however, being subject to satisfaction of the conditions precedent). The next step in the sequence was the purchase of the property (that defined as being the land "with approvals").

120 Mr Molloy considered that the scheme of the project could work only if the development finance was in place prior to the purchase of the property and prior to the exchange of contracts for presales. He considered this to be circular, being of the view that the project finance could not logically be obtained without the satisfaction of conditions precedent, which themselves could not take place until after the purchase of the property by the company (which in turn could not take place until the project finance was obtained). Thus, he considered that the development finance facility was predicated on conditions precedent being satisfied, one of which was the approval of the development finance facility which could not occur *until* the conditions precedent were satisfied.

121 Mr Molloy made it clear that he had not taken into account the financial documents or any financial consequences that might flow from his determination.

122 What Mr Molloy was determining, therefore, was the construction of particular clauses in an agreement without reference to the particular factual circumstances which had led to the project not proceeding.

123 In that regard, Mr Molloy was of the view that there was "precious little in the Agreement that deals with the situation where the conditions precedent were not met and the project simply did not proceed, notwithstanding the contributions made by the parties." (I agree. I would go further to say that there was nothing in the contract dealing with that situation.) He nevertheless concluded (at para 35) that the terms of the financial contributions/obligations of the parties were governed by the Agreement notwithstanding that the project did not proceed to finality. (That conclusion, I note, does not take into account the particular circumstances in which the project did not proceed to finality in this case.)

124 With that background in mind, Mr Molloy had regard to clause 3.1. He did not refer to the opening words which made it subject to clause 3.2. He considered clause 3.2 to be "not terribly helpful" because it was predicated on the basis that the project would proceed to completion. His conclusion was that "as I read the Agreement, each party/joint venturer is obligated to contribute equally to the Project costs (as defined in Schedule 1)" including all costs/liabilities in connection with the financing of the project. (As a statement in isolation this is uncontroversial.) He noted that there was no provision in the agreement for the parties ultimately to contribute unequally to the project costs, although he recognised that there were clauses which required one or other party to make payments subject to the ultimate setting off of their respective contributions (thus there could be unequal contributions during the term of the venture).

125 Mr Molloy noted that the possibility that the project might not proceed to fruition was recognised in clauses 4.1.2, 6.1.4, 6.1.6(a) (i) and (ii) and 13. In paragraph 36, he expressed the view that the words "otherwise as provided in this Agreement" in clause 4.3.3 (dealing with termination of the project) were satisfied and met in circumstances where 4.1.2(a) was not met and/or clause 12 was not satisfied.

126 Importantly, in the present context, Mr Molloy stated his opinion that if the project did not proceed because one (or more) of those provisions was not satisfied then in those circumstances clause 3.1 required the parties to contribute equally to the project costs and liabilities in respect of but limited to the project – support for which he gleaned from clause 6.1.4 (see para 37).

127 He then said that in his view clause 3.2 did not apply and had no bearing upon the rights of the parties in the event that the project did not proceed to finality because (as was the case here) clauses 4.1(a)-(e) had not been met and thus clause 12 applied (see para 41).

128 In paragraph 43, Mr Molloy stated that the agreement continued until the project is completed by sale of the property prior to development or the sale of the units and payment of all liabilities as required by the termination of accounts. Secondly, he said that the agreement continued until the liabilities of the parties are satisfied each to the other within the terms of clause 3.1 even in circumstances where the project does not proceed to finality because one or more of the conditions precedent were not met.

129 He considered that clause 6.1.3 supported his construction of clause 3.1 as it obliged each party to bear half of the interest on the land loan facility such that Mr Adamo had the obligation to pay interest on the facility (after the initial $100,000 interest payment) and then could recover those payments of interest as part of the project costs, subject to any contribution on a net final accounting necessary to satisfy the equal contribution of parties under clause 3.1.

130 Mr Molloy further noted that clause 6.1.6(a)(i), which gave the claimant the option of discharging loans on the property by refinancing, assumed that the property would remain in the hands of JND at that stage.

131 Whether or not (with the benefit, perhaps, of legal advice at the time the issues for determination were agreed with Mr Molloy), the "dispute" for determination or the "legal issue" to which it related could more felicitously have been expressed, I find it impossible to conclude that Mr Molloy had misinterpreted the task allotted to him, when the document signed by each of the parties made it very clear what that he was being asked to express an opinion on the proper construction of particular clauses of the JVA (without specifying that he should do so by reference to what had in fact occurred).

132 However, to the extent that Mr Molloy's opinion as to the continued operation of clause 3.1 after termination of the project (see paras 36-41) is said to apply in the particular circumstances at hand (rather than simply operating as a determination that clause 3.1 has room for operation after the joint venture had been terminated) it seems to me that the failure to take into account the fact that there had been a total failure of consideration would render such a conclusion unsupportable.

Events after Molloy determination

133 After receipt of the Molloy determination, Focus took issue with the opinion expressed by Mr Molloy and sought to have him re-consider various matters. Mr Molloy's response, by letter of 16 April 2008, (in its terms suggesting that he regarded his appointment as having some official capacity) was to note that his task had been completed and that he was '*functus officio*' and to state that, without consent, his file was and would remain "complete and closed" (a matter the subject of further complaint by Mr Adamo, when he learnt that Mr Molloy had later acted inconsistently with the view he had there so firmly expressed and had proceeded to re-open his file and to express a further opinion without any such consent).

Financial dispute

134 JND then referred the matter to the Institute for the nomination of a person to determine the costs incurred in relation to the project and the parties' respective contributions thereto. JND did so by letter dated 27 March 2008, in which Mr Nelson wrote: "I am a partner in a joint venture development enterprise; it has been decided by an expert per clause 15.3.1 of our agreement that on finalising our partnership my partner owes me a considerable amount of money" (something, I interpose to note, that Mr Molloy had not in terms done in his determination – this seemingly being no more than Mr Nelson's expectation of what Mr Molloy's legal construction of the agreement would produce). Mr Nelson went on to say "Under our agreement clause 15.3.2 the exact amount payable to me has to be confirmed by an independent accountant as described above" and he requested the nomination of an expert for that purpose. Mr Tolcher was duly nominated for that purpose. (The actual referral of the matter to Mr Tolcher was not in evidence. It appears that there were one or more telephone conversations with Mr Tolcher in which he was requested to act as an expert – see Exhibit 2 Tab 79.)

135 According to his letter of 2 July 2008, (Exhibit 2 Tab 79) Mr Tolcher understood that he had been nominated "to determine a financial dispute which has arisen", which he noted "will involve the calculation of each Party's costs in respect of the Joint Venture." Mr Tolcher noted that he had not been provided with a copy of the JVA but had been provided with "a spreadsheet entitled 'Disbursement of Project Costs' which we are advised by Mr Nelson was prepared from the financial records of the Joint Venture Project". The letter further noted Mr Tolcher's understanding that an audit of the records and financial information was not required and that he was entitled to regard the records provided to him as accurate and correct. It also noted that he had requested the financial statements of the joint venture, as prepared by the joint venture accountant, and the legal determination referred to in clause 15.3.1 of the agreement (which documents he said had not yet been received by him).

136 Both Mr Adamo and Mr Nelson signed the letter confirming Mr Tolcher's engagement on the terms of the 2 July letter, albeit at different times. (Indeed, by letter dated 31 July 2008 (Exhibit 2 Tab 82), Mr Nelson wrote to Mr Tolcher suggesting that Mr Adamo might not send his cheque so as to "slow down" the action and offering in that case to pay Mr Adamo's share of the costs. In that letter, Mr

Nelson enclosed a newspaper clipping of a "similar deal" which it is said Mr Adamo had with another developer. Whether or not this had any impact on Mr Tolcher I do not know, but on 19 August 2008 Mr Tolcher did write to Mr Adamo in relation to a requested time frame for submissions and said that September was too far off to wait for submissions "since the matter was referred to me on 8 August 2008", that date seemingly referring to the date on which the engagement letter was signed by Mr Adamo.)

137 According to the defendants, the issue in dispute between the parties at that stage was the net indebtedness of the one to the other in accordance with all relevant provisions of the JVA taking into consideration all relevant factual issues, including "premature sale" of the property, (particulars (i) to para 17 defence). Mr Adamo emailed Mr Tolcher on 3 July 2008, stating that "I understand that your task is to determine who owes what to whom as a result of the joint venture termination". Mr Adamo conceded in the witness box (T 134) that he understood that Mr Tolcher was to determine the financial dispute. (Paragraph 24 of the cross claim pleads the Tolcher terms of reference as being "to determine a financial dispute as to who owed what to which party", calculating each party's costs and entitlements.)

138 However, Mr Reuben says that what Mr Tolcher was not in a position, under the JVA, to determine was any legal liability (as opposed to the quantum payable if such a liability was found to have arisen) between the parties.

139 An implied term of the contract of engagement is pleaded to the effect that Mr Tolcher should afford procedural fairness and a reasonable opportunity to review and respond to the parties' submissions (see paragraph 24 of the cross-claim). The circumstances in which such an obligation is said to be implied into the agreement are not clear.

140 It is submitted by Mr Reuben that the parties had agreed (tacitly at least) with Mr Tolcher the procedure for the exchange of written submissions. Certainly, both parties provided written submissions to Mr Tolcher and liaised with him as to the time frame for submissions. It does not seem to me to follow that an acceptance by an expert of written submissions from each party necessarily imports an arrangement whereby each should assume he or she would be permitted to comment on the other's submissions (though I accept that would no doubt be what the parties here assumed would occur, if for no other reason than that this was the procedure which had been followed by Mr Molloy, and would be the more common procedure to be adopted). Of course, that begs the question as to what would be regarded as the parties' submissions in that regard (miscellaneous communications clarifying or querying points not necessarily being 'submissions' in the sense that might be understood by that term in the context of an obligation of this kind.

141 It was not suggested that such an obligation would fall to be implied into the retainer agreement by virtue of the operation of the business efficacy rule. What Mr Adamo seems to be relying on is some

form of (unpleaded) conventional estoppel to preclude JND from denying that this was an implied term of the agreement or some sort of (again unpleaded) representation by Mr Tolcher that he would afford procedural fairness.

142 On this issue, as a matter of contract, I find that there was no implied obligation on the part of Mr Tolcher to afford the parties the opportunity to review and respond to each other's submissions, although the parties seem to have acted on the common assumption that this is what was to occur. (I consider in due course whether such an obligation was to be implied by reason of Mr Tolcher's appointment as an expert.)

143 Mr Adamo's submissions to Mr Tolcher were provided on 27 August 2008. Mr Adamo noted that JND's position was that project costs were to be shared 50/50 and that all proceeds were for its benefit, whereas Focus sought a 50/50 split on each. The letter noted that there was general agreement in relation to project costs except for the following matters – additional costs because of the initial "deficiency" of $53,785.14 from the land loan facility proceeds (said to be inconsistent with clause 6.1.2); an issue as to double counting; and a particular disputed payment of $4,050 (to MidWest).

144 Focus' submission was that, as clause 4.1 contemplated a sale before any development, there was therefore scope for clause 3.2 to apply even though the property had remained in JND's hands. Mr Adamo accepted a liability to pay 50% project costs, denied a liability to pay 50% of the project losses, and asserted an entitlement to 50% of the net proceeds. The letter stated that Focus had contributed $90,086.22 and appeared to accept a liability to contribute a further $96,862.72 towards project costs but this was in the context of a claim in relation to the net proceeds – Focus thus claiming an ultimate entitlement to either $94,621.80 or $212,089.50, depending on the figures adopted by the expert.

145 After receipt of initial submissions from the parties, Mr Tolcher wrote to the parties by letter dated 8 September 2008, and said: "For transparency I have enclosed a copy of the information provided to me by the parties. *I do not require further submissions from the parties*, however I require clarification of the costs paid by the parties." (my emphasis)

146 (I note that, notwithstanding Mr Tolcher's apparent view as to the need or desirability for transparency, this seems not to have extended to the direct provision to Mr Adamo of the spreadsheet material provided to Mr Tolcher by Mr Nelson (he leaving that to Mr Nelson to do) nor did Mr Tolcher provide to Mr Adamo all of the other material which had been forwarded to him by Mr Nelson.)

147 Mr Nelson had forwarded newspaper clippings to Mr Tolcher (unbeknownst to Mr Adamo) on two occasions (with the 31 July 2008 letter – Exhibit 2 Tab 82 - and as an attachment to a communication received by Mr Tolcher on 25 September 2008 – Annexure J to Mr Adamo's affidavit of 13 August 2009), apparently inviting an adverse view to be drawn from Mr Adamo's reputed involvement in other projects (conduct which Mr Nelson conceded in the witness box was not "wise"). There is no

suggestion that this material was copied to Mr Adamo despite the "transparency" to which Mr Tolcher had referred. (Mr Wilson notes that, similarly, there is no suggestion that all of Mr Adamo's correspondence was copied to Mr Nelson.)

148 In Mr Tolcher's 8 September 2008 letter, he noted the following four issues (three having been raised by Mr Adamo in his submissions), the fourth being a discrepancy in the spreadsheets provided to him by the parties:

> Focus' claim for credit for additional interest component by JND's withdrawal of funds in excess of those provided for in clause 6.1.2 of the JVA;
> Focus' claim that there had been a double counting of legal fees and stamp duty by JND;
> Focus' dispute as to a sum of $4,050 to MidWest Properties by JND; and that
> Payments in the two spreadsheets which had been provided to him by the parties did not accord.

149 Noting that there appeared to be some dispute between the parties as to the quantum of the joint venture costs and as to which party had paid certain costs, Mr Tolcher concluded (somewhat surprisingly to my mind, given that it would seem this was at least in part what he had been retained to determine and one would think that had the parties been able to agree on this part of the dispute there would have been no need for a referral to him in the first place) by asking: "would the parties please provide me with an agreed summary of the payments made from the joint venture account and an agreed summary of joint venture costs paid by each of the parties".

150 Mr Adamo's response to Mr Tolcher's letter (on 11 September 2008) was to itemise the costs in dispute, to state that it was common ground that he had only paid part of the subsequent interest and to assert that payment of interest was a cash flow issue irrelevant to the final calculations (that comment responding to Mr Nelson's claim for interest on the late or non-payment of instalments of interest by Mr Adamo). Mr Adamo noted that Mr Nelson had claimed interest on moneys owed to him and on disputed costs – neither of which he said were project costs. Relevantly, for present purposes, Mr Adamo advised Mr Tolcher that he would be overseas from 14 September to 25 October 2008 and might not be able to respond if further queries arose. Mr Tolcher was therefore clearly on notice that Mr Adamo might not be in a position to respond to issues in that period (and, by inference, that there might be a difficulty in agreement being reached on the issues in respect of which Mr Tolcher had requested that the parties seek agreement). He was also clearly on notice, in my view, that Mr Adamo anticipated (or at least might be anticipating) a right of response to anything further which might be raised either by Mr Tolcher or Mr Nelson in relation to the figures.

151 Mr Nelson sent a number of responses to the 8 September letter.

152 At Exhibit 2, Tab 88 is a copy of a letter expressly referring to that letter and to a telephone conversation with Mr Tolcher that morning. Mr Nelson stated that he was willing to make a concession "to make the experts decision easer and to finalize the matter [sic]" and responded to the

four matters raised, as to the fourth of which he said: "I will agree with Adamo's Spreadsheet costs of $90,086.22" and he attached an amended spreadsheet which he said "we now all agree with". That amended spreadsheet was not copied to Mr Adamo at that stage.

153 A further response by Mr Nelson to the 8 September letter (apparently received by Mr Tolcher on 25 September 2008) (Exhibit 2 Tab 91) included the statement "I agree with Adamo as follows", suggesting some form of agreement since the 8 September letter. That letter, from Mr Nelson, in its terms, appears to respond to the matters that had been raised by Mr Adamo in his 11 September letter.

154 In a further letter from Mr Nelson also received by Mr Tolcher on the same date (Exhibit 2 Tab 92) Mr Nelson wrote that the $10,000 (a disputed claim in relation to the project costs) was "just another toss in to slow the process" and had to be "the bottom of the barrel". He requested that the expert determination be made "ASAP" as there did not seem to be anything further of substance from Mr Adamo. Mr Nelson said that he had "just about exhausted" his submissions.

155 Yet a further letter from Mr Nelson responded separately to the issue in relation to the MidWest payment of $4,050 (Exhibit 2 Tab 93).

156 Between 9 October 2008 and the date of Mr Tolcher's determination, there was an exchange of communications between Mr Nelson and Mr Tolcher in relation to the question of the costs incurred. Mr Nelson had earlier provided one or more cash flow spreadsheets to Mr Tolcher. That correspondence was largely not provided to or reviewed by Mr Adamo until after his return from overseas and after the determination was made.

157 On 9 October 2008, Mr Nelson emailed Mr Tolcher attaching an "updated and much simpler cash flow", noting that he had added $22,840.26 to Mr Adamo's interests credit and some invoices mainly from the final settlement, stating that "I have agreed to Adamo's claim for expenses" and asserting that the $13,000 Mr Adamo claimed he had paid on 16 June 2006 was actually paid by Mr Nelson on 28 June 2006.

158 On 10 October 2008, Mr Tolcher commented to Mr Nelson on the spreadsheet (which led to Mr Nelson revising his calculations, seemingly in a manner favourable to Focus). Mr Tolcher also requested that Mr Nelson's secretary email to Mr Adamo the email and attachments in relation to the spreadsheet version 3 of the joint venture financial expenses.

159 A revised spreadsheet was emailed by Mr Nelson to Mr Tolcher on 12 October 2008. In that 12 October email, Mr Nelson said:

> You are correct. I had shown 13,000 as paid by me on 06.06.13 because I was charged that fee on settlement. If in fact Adamo did pay it as part of his 22,840.26 then it has been paid twice and as you pointed out a double up. If I accept and I do that he has paid it even though I

> have a receipt for it at settlement then I guess it has to be deducted from my contributions I have done. 22,840.26 less 13,000 leaves 9,840.26 which Adamo claims to be an interest payment this must be the payment on cash flow sheet therefore for 8.950.68. If I accept that he paid 22,840.26 then as you say it is a double up so I have added a credit for $8950.68 which was the actual payment. In summary I agree there was a double up. I have reduced my contributions by 21,950.68 to compensate for Adamo's credit for 22,840.26. I hope this clears the way for your determination.

160 In the context of Mt Tolcher's request that the parties seek to reach agreement on the joint venture costs, the above correspondence would be likely in my view to have been read by the reasonable reader (and I assume Mr Tolcher falls into that category) as conveying that the costs in the revised spreadsheet had in fact been agreed with Mr Adamo (who was by then overseas, who had not had discussions with Mr Nelson in relation to the matters in the September letter or the revised spreadsheet since the September letter, and who had not been copied in on the October exchange of communications). Mr Nelson, writing to Mr Tolcher to complain that the matter was dragging on for so long, had clearly said "I have attached an amended spreadsheet *which we now all agree with*" (my emphasis).

161 Mr Nelson explained this (T 73) on the basis that Mr Adamo had checked and responded to Mr Nelson's earlier submissions and that, of the four items raised in Mr Tolcher's letter, Mr Nelson had either accepted Mr Adamo's position (eg in relation to the MidWest payment) or Mr Tolcher had determined the issue against Mr Nelson (eg the claim Mr Nelson had made for interest on the money 'lent' to Mr Adamo), (though as to the latter, no such actual determination was made until some time after this email). Nevertheless, Mr Nelson did agree that Mr Tolcher had sought an agreement between the parties as to the costs and that there had not been any discussion with Mr Adamo in which the two had attempted to reach agreement as to that matter (T 75) and indeed there had been no discussion at all between the two on those costs after the 8 September communication on those costs.

162 Mr Nelson says (T 74.32) that, as Mr Adamo did not question any other part of the balance sheet (in his earlier submissions), that meant he must have been happy with it. Alternatively, Mr Nelson seems to suggest that his letter to Mr Tolcher meant, in effect, that he (Mr Nelson) now accepted or would agree with Mr Adamo's figures on the 4 items (T 75). However, in its terms, the letter says (tab 80) that "I agree with Mr Adamo as follows" and that "I have agreed with Mr Adamo what I could do and I believe I could not agree I hope I have made my reasons clear" and "Agreed with minor corrections as per attached information". Mr Nelson agrees that there was no separate agreement reached with Mr Adamo as to the revised spreadsheet (T 84; T 100).

163 On 13 October 2008, Mr Tolcher emailed Mr Nelson's secretary (Tab 95) asking that the final expenses 4 spreadsheet be provided to Mr Adamo. This seems to have been done by (or on behalf of) Mr Nelson but, strangely, with the unexplained excision or omission (from the email chain so forwarded to Mr Adamo), of the 10 October 2008 email (Exhibit 2 Tab 87) from Mr Tolcher to Mr Nelson in which the former said that he could not reconcile the two spreadsheets which had been provided by the parties. (Although nothing ultimately turns on this it would suggest, if done deliberately, that Mr Nelson may have been concerned to avoid the impression of there being ongoing

communication between Mr Tolcher and him; a matter which he might well have considered would cause suspicion in the mind of Mr Adamo – as it has clearly done.) The only reasonable explanation for the deletion of this sentence from the email as forwarded to Mr Adamo, seems to be that either Mr Nelson or his assistant, had chosen to remove that comment from the email chain and had manually deleted it on the computer.

164 On 14 October 2008, Mr Nelson emailed Mr Tolcher with his view as to why both investors were entitled to be reimbursed for interest on loans to the joint venture.

165 The above exchange of communications between Mr Nelson and Mr Tolcher in October 2008 is said in these proceedings to warrant a finding that there was a denial of procedural fairness. Mr Adamo says (and I accept) that he did not see any of these communications until some time after his return from overseas on 29 October 2008.

Further opinion from Mr Molloy

166 Prior to finalising his determination, Mr Tolcher sought clarification from Mr Molloy as to the issue whether the proceeds of sale formed part of the joint venture.

167 While Mr Nelson said that he believed he had known that Mr Tolcher was going to approach Mr Molloy before he did so - T 94 - he did not express this belief with any confidence in the witness box and it seemed to have been based simply on the fact that he had (later) agreed to pay the costs of that approach. I therefore can draw nothing from this evidence.

168 On 14 October 2008, Mr Tolcher wrote to Mr Molloy seeking advice as to his understanding of the Molloy determination "that the joint venture financial wash up should not include the proceeds of sale of the Property by reason that the project was incomplete when it was sold". Mr Tolcher noted that "One of the parties [presumably Mr Adamo] has suggested that even though the project was not completed, it nonetheless was sold and that definition of Project in the joint venture agreement included sale of the property prior to development", noting that the other party [presumably Mr Nelson] was arguing that, because the condition precedents were not satisfied and the project did not proceed, the consequence was that both parties should contribute to the project costs but that both parties did not share in the sale proceeds.

169 Mr Tolcher had an initial telephone call on 14 October 2008 with Mr Molloy (his file note of which is at tab 98) in which Mr Molloy apparently told him that the sale of the property was not "in the wash up". He was then provided by Mr Molloy (apparently unbeknownst to the parties at that stage) with a further opinion on 21 October 2008, confirming his view that the proceeds of sale did not form part of the project costs.

170 Mr Tolcher prepared a file note on 14 October 2008 of his discussion with Mr Molloy, in which Mr Tolcher wrote:

> The determination by Graham is clear
>
> > The sale of the property does not come into the wash up between the parties because the project was not completed
> >
> > Wash up only includes project costs incurred – there is not to be included the sale price of the property.

171 Mr Molloy's written response to Mr Tolcher's request for advice, on 21 October 2008, was that his initial thought had been that he was functus officio but that, on further reflection, he did not believe that principle applied "simply because the Expert Determination and your [Mr Tolcher's] involvement is part of the dispute resolution procedure as set out in clause 15 of the Joint Venture Agreement".

172 Mr Molloy then provided a further opinion, restating and summarising the conclusions he had reached, for Mr Tolcher's benefit. He referred to paragraphs 26, 31 and 33 of his determination and said that, where the project did not proceed because one or more of the prerequisites was not satisfied, "in those circumstances in my opinion clause 3.1 requires the parties to each contribute equally to the Project Costs and the liabilities in relation to the Project but limited to the Project"; adding that it was important to remember that clause 4.1.2 provided a clear contractual sequence of events and that the property did not become a joint venture asset or liability until it formed part of the project by purchase (something which, he said, could not happen until all the prerequisites in 4.1(a) – (e) were satisfied).

173 Mr Molloy referred to the definition of Project (as the acquisition of the development sale and any part of the activities) and said that if acquisition did not take place then, "as night follows day", the disposal of the property could not form part of the project. He said that as one did not get to 4.1.2(b) until one passed 4.1(a) – (e), then logically one did not get to clause 4.1.2(c) and thus it must follow logically that one did not get to clause 4.1(i) (that being predicated on the property becoming part of the joint venture by way of acquisition). Thus, if the company never acquired the property it remained in the legal and equitable ownership of JND and was not part of the financial wash-up adjustments.

174 Clause 4.1(i) was, he said, predicated on an assumption that the property was acquired pursuant to 4.1(f) and that thereafter on the further assumption that was forced to sell. He referred to para (a) of the definition of Project Costs (the purchase price of the property) and said that if it was not purchased, then it was not part of the project.

175 In paragraph 47 of his further opinion, Mr Molloy also noted that, JND, as investor, had the option under the JVA to refinance and to do that it needed to have title. He noted that the definition of property was the land after registration of plan of subdivision. He thus opined that the property did not form part of the project unless and until it was purchased by the company on trust for the joint venture under clause 4.1(f).

176 Mr Tolcher sent a copy of that further opinion to the parties on 24 October 2008 and requested that the parties pay equally the costs of Mr Molloy's invoice for that further opinion.

Tolcher determination

177 Mr Tolcher provided his written determination on 27 October 2008. He proceeded expressly on the basis of Mr Molloy's advice that the proceeds from the sale of land did not form part of the project (or the "financial wash-up", to use Mr Molloy's words); he also proceeded on the stated assumption that the listed project costs identified in Annexure A thereto were correct (which Mr Adamo notes include mediation expenses and expert determination costs); and he determined that Focus owed JND the sum of $142,529. In the course of that determination, Mr Tolcher accepted that the contribution made by Focus to the joint venture was $90,086.22.

178 The Tolcher determination noted that there were two substantive project cost items (interest 6/6/08 $13,000 and interest 6/6/08 $8,950.68) – which JND had agreed to record as paid by Focus. The methodology adopted by Mr Tolcher was stated to be that the Project Costs itemised in Annexure A were divided by two to obtain the notional share of each of the parties; from which was deducted the contributions by Focus; and the shortfall was the amount determined to be payable).

179 In paragraph 6.2.1, Mr Tolcher accepted that the JVA requirement that Focus pay interest after the first $100,000 was a cash flow timing issue and not a basis of liability (accepting Mr Adamo's submission in that regard). In paragraph 6.3.1, Mr Tolcher allowed nothing in respect of JND's claims that interest should apply to delays in payment of interest or other project costs.

180 Accordingly, in terms of actual findings as to project costs (as opposed to arithmetical calculations) Mr Tolcher's determination expressly addressed only a limited number of issues. That said, it was submitted by Mr Wilson that, by adopting Annexure A, Mr Tolcher had implicitly determined that the items listed therein were project costs for the purposes of the calculations carried out by him and there is force in that submission. Nevertheless, if reliance is now to be placed on the binding nature of the determination, it seems to me that there is some uncertainty as to precisely what was determined.

Events after Tolcher determination

181 Mr Adamo wrote to Mr Tolcher on 29 October 2008 setting out the basis on which he disagreed with the determination and expressing concerns as to Mr Nelson's costings. (Mr Nelson's subsequent response to Mr Tolcher, referring to Mr Adamo's letter, was again dismissive of Mr Adamo's conduct - "why tolerate this".)

182 Mr Adamo noted (apparently by reference to the 8 September letter of Mr Tolcher) that Mr Tolcher had been going to determine the accuracy of the project costs by mutual agreement of the parties (and thereby the sharing thereof); that the project costs claimed in Mr Nelson's submission on 8 September had been $392,625.68; that Mr Adamo's contribution had been stated as $67,185.96 in respect of interest project costs; that Mr Adamo's response of 11 September putting his actual contribution at $90,086.22 had now been accepted but that, on his return from overseas, he had received a revised summary with costs of $476,638.78 and that he had been denied the right to challenge, correct or accept those changes.

183 Mr Adamo noted that Mr Nelson's 13 October memorandum had reduced project costs to $454,688.10, on the basis of which the determination had been made. He said that he had not agreed to some of the original costs (as set out in his letter of 11 September) and had not been given an opportunity to respond in relation to the additional costs. Mr Adamo also said that the expert had not responded to certain items in his 11 September letter.

184 Mr Adamo's further objection to the determination, as noted in this letter, was that there could not be an apportionment of project costs without an apportionment of net proceeds of sale.

185 Mr Tolcher wrote to Mr Nelson on 4 November 2008 asking him to respond to Mr Adamo's comments in relation to the land tax issue. He also wrote on that date to Mr Adamo, responding directly to Mr Adamo's letter, in which he declined to change his reasons but invited Mr Adamo to verify the costs with Mr Nelson and stated that he would amend his report if necessary. (Mr Adamo did not do so.) Mr Tolcher's letter stated "I have relied on the project costs as identified by Mr Nelson as per Annexure A. My report states the project costs listed in Annexure A as an assumption. Should the factual position be that the particular project cost items were either more or less than as listed in Annexure A then my report will need to be amended accordingly".

186 Mr Nelson responded to Mr Tolcher's email of 4 November 2008, enclosing information in relation to the land tax payable by the joint venture and asserting that the decision was binding, commented that "with due respect Adamo has not even paid your fees yet or been good enough to reimburse me for paying them for him so why tolerate this… there has to be an end" referring to how he said Mr Molloy had put it "when Adamo tried the same tactic" and attaching a copy of Mr Molloy's "functus officio" email.

187 Mr Nelson also sent a fax to Mr Tolcher (Annexure E to Mr Adamo's affidavit of 13 August 2009) referring to interest on money lent to the joint venture and enclosing a copy of a letter of 6 November 2004 in terms of the initial meeting he says he had had with Mr Adamo.

Subsequent events

188 To complete the background to this application, a sequestration order was made against Mr Nelson on 14 October 2009 (vol 2 tab 110) (based on an act of bankruptcy committed on 19 May 2009). Mr Nelson's evidence was that he ceased to be a director of JND in May 2009 (that roughly coinciding with the date of the act of bankruptcy relied upon for his sequestration). The ASIC company extract which was tendered in the proceedings recorded Mr Nelson's cease date as a director as 14 May 2009 but there was in evidence a search which disclosed that in ASIC's records as at 10 November 2009, Mr Nelson remained as a current director. Accordingly, either the notification as to Mr Nelson's cessation as a director was not lodged on a timely basis or, if lodged, was not promptly processed within ASIC (which seems unlikely in that there would have to have been about a six month delay) or else the time at which Mr Nelson ceased as a director was backdated on the company records.

189 Confronted with this discrepancy in the witness box, and with the fact that (in a part of his affidavit sworn after May 2009, which was not formally read in the proceedings) Mr Nelson had previously averred that he was a director of JND at a date after May 2009, Mr Nelson had no explanation. It was suggested to Mr Nelson in cross-examination, in effect, that he had modified (or backdated) the date on which he ceased to be a director in order to place it prior to the act of bankruptcy. Mr Nelson denied that this was the case (T 32). As ultimately nothing turns on this evidence, it seems to me that it is not necessary to make any finding in relation thereto.

Claims now made

190 JND's claim for relief is made on the basis that Focus' indebtedness (and hence Mr Adamo's liability under the guarantee) arises pursuant to the JVA, the Molloy determination and the Tolcher determination. The relevant obligation identified in the JVA in that regard is the provision in clause 3.1 that the parties will share equally the project costs.

191 No claim in debt, or for damages for breach of a contractual obligation to pay certain amounts when due, is pleaded as such. The claim by JND is, broadly summarised, a claim simply that clause 3.1 of the JVA obliged each party to share the project costs equally; that Mr Molloy has determined that clause 3.1 applies (and clause 3.2 does not apply) in circumstances where the project has not proceeded; that the Tolcher determination has quantified those amounts; and therefore that those amounts are payable now that the project is at an end.

192 As Mr Molloy recognised, clause 3.1 does not impose an obligation to pay that half share at any particular time, whether during the course of the project or afterwards, but seems to relate to an overall adjustment in due course of the project costs. Other than specific costs which were to be met by one or other of the joint venture parties, it seems that the JVA left it to the parties to work out who was to bear the costs on a day to day basis.

193 Clause 3.1 seemingly operated to determine how (as between the joint venturers) account was to be taken at an appropriate time of their respective contributions. It is not surprising, therefore, that clause 3.1 was expressed to be subject to clause 3.2, which set out the sequence in which the respective costs of the project were to be borne (or adjusted between the parties). Clause 3.2 assumed that those costs, as adjusted, were to be met or recouped out of the proceeds of sale from the project. Clause 3.2 is therefore predicated on there being something from which the allocation of costs and liabilities can be achieved.

194 Clauses 3.1 and 3.2 therefore together put in place what might be described as an arrangement for a final adjustment as to the costs to be met by one or the other, once the project was completed and there were proceeds of sale from the project (which presumably would represent the end of the project unless a partial sale was envisaged), from which such an adjustment could take place.

195 Relevantly, for present purposes, this is not a case where the plaintiffs are seeking to *set aside* an expert determination. Rather, it is a case where the plaintiffs, being party to an expert determination, now seek to enforce that determination.

196 Apart from the fact that the defendants say that there was no determination of legal liability which could ground an application for enforcement (there being simply an opinion by Mr Molloy as to the construction of various clauses and a determination by Mr Tolcher at best as to the arithmetical calculation of amounts which would be relevant if there was a determination of legal liability), the consequence of this being a proceeding to enforce (not to set aside) the respective determinations, is (the defendants say, and I accept, having regard to the authorities considered below) that they are in a position to raise an issue of error in relation to the determinations themselves even if that could not otherwise have been raised had the application been one brought by them in the first instance to set aside the determination.

Basis on which an expert determination may be impugned

197 In *Legal & General Life of Australia Limited v A Hudson Pty Limited* (1985) 1 NSWLR 314, the Court of Appeal considered the circumstances in which an expert determination could be rendered ineffective by reference to an error on the part of the expert.

198 At first instance ([1984] 1 NSWLR 1), Waddell J had drawn a distinction between an error in the application of valuation principle or a mistake in calculation, neither of which would affect the binding nature of the valuation, and an error resulting in the valuation not being in conformity with the contract, which his Honour considered would render it ineffective to bind the parties.

199 On appeal, his Honour's decision was reversed, Mahoney and McHugh JJA holding that his Honour had erred in finding that the valuer had made the error in question (said to have been an error in taking a mezzanine floor area into account in determining the rental value of the premises); Priestley JA

reaching the same result on the basis that the plaintiff had not discharged the onus of proving that the valuer had taken the mezzanine area into account.

200 McHugh JA, having examined the relevant authorities, distilled from them [at 335-6], the following as to the circumstances in which mistake on the part of an expert would justify the setting aside of the expert's determination:

> the question whether an expert determination is binding depends in the first instance on the terms of the contract, express or implied;
>
> a determination obtained by fraud or collusion can usually be disregarded (for almost certainly it would be the case that in such a case there had been no valuation in accordance with the terms of the contract; it being easy to imply a term that the determination must be made honestly and impartially);
>
> it will be difficult, and usually impossible, to imply a term that the determination can be set aside on the basis of mistake or because it is unreasonable, since, by referring the decision to an expert on the basis that the decision will be final and binding, the parties will be said to have agreed to accept the expert's honest and impartial decision, relying on the expert's skill and judgment, and have agreed to be bound thereby;
>
> *the critical question in cases where it is alleged that the expert has made a mistake is whether the determination was made in accordance with the terms of the contract* – if the mistake is of a kind which shows that the determination is not in accordance with the contract (such as where a valuer values the wrong premises), then the determination may be rendered ineffective; if the mistake is as to the application of the expert's judgment or as to what the expert has or has not taken into account, this is not a matter which affects the binding nature of the determination. (my emphasis)

201 As his Honour, much later when speaking extra-judicially in an address to the Chartered Institute of Arbitrators (Australia) Limited on 30 April 2007, noted, the statements of principle he enunciated in *Legal & General* have been recognised as well settled (referring to the judgment of Palmer J in *Kanivah Holdings Pty Limited v Holdsworth Properties Pty Limited* [2001] NSWSC 405, [at 48]). More recently, in *AGL Victoria Pty Limited v SPI Networks (Gas) Pty Limited* [2006] VSCA 173, the Court of Appeal in Victoria held that the principles outlined by McHugh JA in *Legal & General* remain applicable.

202 Mr Reuben relies upon what was said by Mason P, with whom Priestley JA agreed, in *Holt v Cox* (1997) 23 ASCR 590 at p597, namely that:

> A close reading of McHugh JA's judgment in *Legal & General* indicates that his Honour was not propounding the view that a valuation will stand regardless of error. Rather, he was making the point that mistake is not itself a ground of vitiation: see also *Wamo Pty Limited v Jewel Food Stores Pty Limited* (1983) ANZ Conv R 50.

203 There, Mason P said that the critical question was whether the mistake was such as to render the valuation one which was not in accordance with the terms of the contract. In the *AGL* case, Nettle JA noted [at 51] that a mistake may "be of such a nature that the resultant determination is beyond the

realm of contractual contemplation – *beyond anything which the parties may be supposed to have intended to be final and binding* – and therefore susceptible to review". (my emphasis)

204 In *Holt v Cox*, at first instance ((1994) 15 ACSR 313), Santow J held that where there was a direction to the expert (in that case the auditor) to determine the fair price for shares compulsorily acquired, the expert was entitled to adopt his or her own methodology for so doing and that any mistakes in the methodology adopted by the expert were "mistakes in the course of doing what the contract required". It was a matter for the expert to make his or her determination in the manner in which, as a matter of his or her expert opinion, it was appropriate to do so (at 333). There, however, his Honour observed that a valuation made contrary to the principles of valuation might not produce what was contractually demanded in that case (a 'fair value').

205 However, relevantly, for present purposes, in *Legal & General*, McHugh JA noted (at p 336) the distinction between cases where a party sought an equitable remedy to enforce an agreement to abide by an expert determination (in which case reliance on a defence based on mistake could be made) and a case seeking a common law remedy (where a defence of mistake would only lie if the express or implied terms of the contract permitted). Hence, his Honour recognised that it would be open to a court in equity to decline to enforce an expert determination even though it might be binding on the parties as a matter of contract between them.

Duty to accord procedural fairness?

206 As to whether the expert is under a duty to accord procedural fairness, in the absence of express agreement this depends on whether the task being carried out by the expert is in the nature of a judicial enquiry. In his address to the Institute of Arbitrators, the Hon Michael McHugh AC observed that the fact that a determination was being carried out as an expert and not as an arbitrator pointed against the rules of natural justice being generally applicable to expert determinations but considered that there was a strong case for saying that where the expert was required to receive submissions from parties then the rules of natural justice should apply (on the basis that the expert determination was there analogous to a quasi-judicial enquiry).

207 In *Enron Australia Finance Pty Limited (in liq) v Integral Energy Australia* [2002] NSWSC 753, Einstein J noted at [111-113] that:

> It is plain that when one is examining the conduct of a judicial or quasi-judicial hearing, there is an expectation of impartiality and adherence to procedural fairness (or what was formerly referred to as natural justice).
>
> However, where what is involved falls outside the realm of judicial or quasi-judicial determination, the issue is whether the principle of procedural fairness can be or should be maintained…
>
> It is of assistance to address this issue by first asking whether the … task is to be seen as that of an arbitrator, ie a quasi-judicial determination which will automatically invoke the

> principles of impartiality, *or whether the task is merely that of an expert*, valuer or appraiser. (my emphasis)

208 This is consistent with the authorities referred to by the Hon Michael McHugh AC, in his 2007 address referred to above, commencing with *Re Carus-Wilson and Greene* (1886) 18 QBD 7, where the Court of Appeal in England (considering the question whether an umpire appointed to make a valuation in circumstances where the respective valuers appointed by each party had disagreed was an arbitrator, decided the issue by reference to whether the umpire was bound by the rules of natural justice) drew a distinction between the conduct of an arbitration (an enquiry of a judicial nature to be worked out in a judicial manner) and the appointment of a person to ascertain a matter, not for the purposes of settling a dispute but of preventing disputes (the latter such appointment, by inference, not being seen by the court as one for the carrying out an enquiry to be worked out in a judicial manner); and *Capricorn Inks Pty Limited v Lawter International (Australasia) Pty Limited* [1989] 1 Qd R 8, where McPherson J in the Supreme Court of Queensland at [15], contrasting an arbitration and an appraisement, said of the former that "generally what must be in contemplation is that there will be an 'inquiry in the nature of a judicial inquiry'" and where, on appeal, the Full Court was of the view that there was no right on the part of the parties to be heard where the relevant enquiry was being carried out by the accountants acting as experts not as arbitrators. Thomas J there noted that the arbitral function was to hear and resolve opposing contentions of the parties (as opposed to an appraisal or expert decision which typically would be made through specialist knowledge or skills, without any requirement or obligation of first hearing from the parties).

209 Mr Reuben pointed out that in *Fletcher Construction Australia Limited v MPN Group Pty Limited* (unreported 14 July 1997), Rolfe J, after referring to and seemingly concurring with the decision of Cole J in *Triarno Pty Limited v Tridon Contractors Limited* NSWSC (unreported 22 July 1992) (where Cole J had held that if the parties had not agreed the procedure for the expert to follow it was then a matter for the expert and not the court to determine), added that:

> In devising procedures the expert is no doubt obliged to ensure that he or she affords natural justice to both parties but, subject to that, he or she is to enter upon the determinative task as an expert and not as an arbitrator

though without explaining the basis on which there was said to be no doubt as to an obligation to afford natural justice in that instance.

210 Here, the JVA was silent as to the procedure to be adopted by an expert in determining a dispute whether that be a dispute under clause 15.3.1 or 15.3.2. Absent agreement between the parties, in accordance with *Triarno*, the procedural requirements for the determination would therefore be a matter for the expert to determine.

211 There was no requirement under the JVA for the experts to seek submissions from the parties before making their respective determinations.

212 Does the fact that the parties followed such a procedure (doing so, at least in the case of Mr Tolcher, apparently without any express agreement as to the procedure to be followed) give rise to an obligation on the part of the expert to afford procedural fairness and, if so, what would such an obligation entail in the case at hand?

213 An agreement between the parties that there should be an exchange of submissions might lead to the conclusion that the expert, acting in good faith and impartially, would be obliged (at the very least) to read and to consider those submissions. Insofar as the expert determination procedure adopted by the parties encompassed them having an opportunity to respond or reply to each other's submissions, it might be thought that, as part of an obligation to good faith, the expert would have an implied obligation to afford each party an opportunity to consider matters put forward by the opposing parties in advance of any determination by the expert.

214 To that extent, while it does not seem to me that the enquiry for which provision was made in either clause 15.3.1 or 15.3.2 was analogous to a judicial enquiry, an agreement between the parties (and the respective experts) for the exchange of submissions would bring the enquiry somewhat closer to that of a quasi-judicial enquiry and on balance might be thought to impose an obligation on the respective experts to afford a proper opportunity for each party to respond to the submissions of each other before a determination was made – something which could hardly be done if there were *submissions* (as opposed to ongoing communications) made by one party which were not provided to the other.

215 That said, while it is clear in the case of the Molloy determination that the procedure involved the provision of written submissions, that was not something specifically addressed or noted in the confirmation by Mr Tolcher of his retainer. At best, an agreement that both sides could make written submissions is something which could only be inferred from the fact that that is what they subsequently did and the communications as to the time frame for submissions. It is difficult in those circumstances to imply into the agreement any particular terms in relation to procedural fairness of the kind alleged.

216 In any event, I doubt that procedural fairness in this instance required more than giving each party an opportunity to consider and respond to that which represented each other's formal submissions. Mr Tolcher seems to have regarded that part of the process as at an end by 8 September 2008, which suggests that he did not regard (and does not seem to have treated) the communications thereafter as being in the nature of "submissions".

217 I should also note that there seems to be no procedural unfairness in Mr Tolcher having sought independently to inform himself of matters he considered relevant to the dispute from Mr Molloy, having regard to what was said by Cole J in *Triarno*.

Reasons

218 With the above in mind, I address each of the issues for determination in the present case as follows.

(i) Is the Molloy determination binding?

Was there a determination of the correct dispute?

219 The main basis on which Mr Reuben submits the court ought to refuse the relief sought in respect of this determination is that Mr Molloy refused to make a determination of the dispute relating to the legal issue which was referred to him, *namely the dispute as to which party owed what to the other in the events that had happened*.

220 It is submitted that because Mr Molloy failed to make any determination of *that* matter (which was admittedly in dispute between the parties), that being something which it is said formed the basis of the terms of his retainer, the Molloy determination was not in conformity with the enabling contract under which he was appointed.

221 From a factual perspective I cannot accept that the determination of who owed what to whom formed the basis of the terms of the eventual retainer. Those terms were clearly set out in the agenda countersigned on 12 December 2007. Whatever the parties had thought was to be the case before that date, the fact that thereafter Mr Molloy did not determine who owed what to whom cannot render the Molloy determination something outside the contractual contemplation of the parties as at 12 December 2007.

Was there a dispute at all?

222 In the Outline of Contentions prepared by Mr Reuben it was suggested that the expert had failed to make any determination of a point of law. I cannot accept that this is the case, since the Molloy determination clearly addresses the points of law identified in his retainer, namely the proper construction of particular clauses of the JVA. In oral submissions, this argument was refined and a distinction was drawn by Mr Reuben between the situation where a dispute as to the construction of an agreement is referred to a legal expert (which Mr Reuben would, I think, concede falls within clause 15.3.1 as a dispute relating to legal issues) and the situation (which is said to be the case here) where what is referred to the legal expert is a joint request for advice as to the construction of an agreement (where the parties may not have turned their minds to, and therefore may not strictly be in dispute as to, the proper construction of the relevant clauses of their agreement, even though they are in dispute as to what may flow from the operation of those clauses as properly construed, ie here as to the liability for project costs following the premature termination of the project provided for under that agreement).

223 As I understood Mr Reuben's submissions on this point, any opinion provided by Mr Molloy on the proper construction of the JVA was not the determination of a "dispute" within the meaning of clause 15.3.1 of the JVA and hence has no binding status on the parties, whether that opinion be correct or incorrect as a matter of law (and whether the parties agreed, as they clearly did, to seek such an opinion).

224 That argument, it seems to me, does not turn on whether there was any mistake by the expert rendering the determination something other than in accordance with the contract (such as where a valuer makes a mistake as to the identity of the premises to be valued). Rather, this submission is to the effect that what was referred to the expert in the present case was not a dispute relating to legal issues within clause 15.3.1 at all; rather it was no more than a joint request for advice unaccompanied by any agreement that the parties would accept that advice as binding on them in respect of the matters of construction therein addressed – somewhat akin to a non-binding expert determination of a matter of law.

225 In principle, I think there is some force to that submission. If the parties have together agreed to obtain an independent legal opinion as to what their agreement means, this would not of itself necessarily be predicated upon there being a "dispute" as to that matter. They might simply not know the answer to a particular question and be jointly seeking independent advice on that point.

226 However, the difficulty I have with such a submission in the circumstances of this case is that the parties seem to have approached the expert determination on the basis that it was one falling within the procedure provided for under the JVA. JND clearly invoked clause 15.3.1; Focus accepted that the procedure had been invoked and accepted the subsequent nomination of Mr Molloy; and *both* parties agreed to the recasting by Mr Molloy of the issue for determination by him. At no time prior to the Molloy determination did Focus assert that, as so recast, the issue to be determined by agreement with Mr Molloy would not be binding on either party. This would suggest that a conventional estoppel argument could have been invoked by JND, though none was pleaded as such.

227 In any event, I consider that the conduct of the parties in jointly retaining Mr Molloy to determine the issues itemised in the retainer they signed, following on from the invocation by JND of the expert determination procedure, should be taken as evidencing an agreement or acceptance by conduct that each would treat the determination as if it were of a dispute relating to legal issues for the purposes of clause 15.3.1 of the JVA.

Was the Molloy determination correct as a matter of law?

228 The second main basis on which Focus challenges the Molloy determination is, in effect, its correctness as a matter of law. It is submitted that the Molloy determination adopts a perverse construction of the

JVA insofar as it applies clause 3.1 in the absence of clause 3.2 and misinterprets or misconstrues the relevant phrases of the contract or their application.

229 Reliance was placed by Mr Reuben on what was said in *Mercury Communications Limited v Director General of Telecommunications* [1996] 1 WLR 48 at 58, namely that if there is an error on the question of the construction of the relevant agreement and the expert makes a determination on the basis of an incorrect interpretation, then the expert does not do what he or she was asked to do. There, however, the issue for determination was not the very issue in respect of which the error of law was said to have been made.

230 Here, Mr Molloy was asked, as a legal expert, to construe certain clauses of the JVA. If he made an error of law in that regard (by disregarding words or by misconstruing phrases in the agreement as is submitted), this surely is an error of judgment of the kind of which the parties should be taken to have assumed the risk. His skill and judgment in construing provisions of a contract are the very matters on which the parties have placed reliance and, if he has erred in that regard, that is a risk the parties must be taken to have accepted. Therefore, I do not consider the reasoning in *Mercury* to be of assistance.

231 In his 2007 address, to which I have previously referred, the Hon Michael McHugh AC posed what seems to me, with respect, to be a very pertinent example in this regard. Having expressed the opinion that a determination (which the parties have agreed is to be final and binding) cannot be set aside on the bare ground that it is against the overwhelming weight of expert opinion or is unreasonable having regard to other expert opinion, Mr McHugh noted that legal problems submitted for expert determination frequently raise such a problem. He postulated the case where the expert was faced with a decision of an intermediate appellate court (which would be binding on a first instance judge) which the expert considered to be wrong; and found it difficult to accept that the expert would not be acting in accordance with the contract in refusing to apply the intermediate appellate decision where the expert believes that the ultimate appellate court in the jurisdiction would overturn that decision. Indeed, he went so far as to say that an expert determiner would in his view be entitled not to follow authority of an ultimate appellate court but, rather to apply a wider principle expressed by courts of high authority in other jurisdictions, if in his or her expert opinion the wider principle represented the true state of the law (pp18/19).

232 Here, what Mr Molloy was asked to do was to construe various clauses of the JVA. He did so. If he made a mistake in the construction of the contract (by applying the wrong legal principles or by placing too little or too much weight on the wording of particular clauses) it is nevertheless hard to see that this renders his determination something beyond the realm of contractual contemplation, (as opposed, for example, to the situation where he might have had regard to, and construed, the wrong clauses of the contract or a superseded version of the contract).

233 The relevant clauses, which it is said Mr Molloy misinterpreted or misconstrued, are clauses 3.1 and 3.2. Those clauses provided as follows:

> 3.1 *Subject to Clause 3.2* the Venturers [JND and Focus] agree that their rights to capital and net proceeds and their liability to meet Project Costs and liabilities in respect to the Project shall be in equal proportions. … (my emphasis)
>
> 3.2 The Joint Venturers agree that the proceeds of sale from the Project will be disbursed in the following sequence:
>
> (a) Firstly, to the financier under the Finance Facility;
> (b) Secondly, in payment of all Project Costs;
> (c) Thirdly, in repayment of the Second Mortgage;
> (d) Fourthly, in repayment of the Secured Equity Mortgage in the ratio of the capital contributions of the Joint Venturers;
> (e) Fifthly, to the Joint Venturers in equal shares.

234 Clause 4.1 provided that the Project "shall include" various matters, the first of which (sub-clause (a)) was obtaining the Land Loan Facility (for which provision was made in clause 6.1), followed by additional steps (some expressed to be conditional on other matters) and including in sub-clause (i) the sale of the Property prior to development. The "Project" was thus a very broad definition encompassing all aspects, it would seem, of the proposed development from the time the parties commenced working together on the project and at least from the time application was made for the land loan facility.

235 As noted above, the land loan facility was obtained in 2006 and the proceeds from that refinancing were disbursed as contemplated under the JVA (other than for the reduction of the amounts to be applied to fund initial interest payments and working capital) by clause 6.1.2. The "Project", therefore, had clearly commenced. However, the property was never acquired by the joint venture company, it remaining in the ownership of JND. Mr Molloy accepted the submission of JND that, in those circumstances, clause 3.2 was inapplicable, there being no sale "from the Project", as such.

236 While I think there was an argument open on the terms of the JVA that sale "from the project" encompassed a sale, by consent between the joint venture parties, of an asset the subject of the project even though held in one of the joint venturer's hands, this was not a construction pressed before me and, in any event, if the parties are bound by Mr Molloy's construction to the contrary my view would be relevant (if at all) only if there was reviewable error or it was relevant to the question of discretion. I simply raise this because it seems to me that to some extent the construction placed by Mr Molloy on the opening words of clause 3.1 (read together with clause 3.2) ignores the question as to what was meant by the words "proceeds of sale from the Project". The expression used in clause 3.2 was not 'proceeds of sale of the property' but proceeds of sale *from the project*.

237 "Project" was, in effect, defined as being something which included the initial step of obtaining the land loan facility. The project had therefore commenced by the time at which the property was sold. Although the property had not been transferred to the joint venture company, it surely would not have

been open to JND (once the land loan facility had been obtained on the security of the property) unilaterally to decide to sell the property and hence render the project incapable of performance (at least without exposing itself to a variety of claims from its joint venture partner). JND had bound itself, in the circumstances provided under the JVA, to transfer the property to the joint venture company such that when that happened it would become in a direct sense part of the joint venture. It is therefore not surprising that, once the decision was made (jointly) that the project was not feasible, there was consultation (even if not, as Mr Nelson says there was not, an actual agreement for the sale of the property) as to the sale of the property.

238 There is nothing in clause 3.2 to specify that the "sale from the project" is to be a sale by the joint venture company of the property once transferred to it. It is conceivable that clause 3.2 also encompassed the notion of a sale by JND of the property at any stage after the project had commenced (at which time the property, already the subject of the project, might be said to have formed part of the project even though still in JND's ownership) but before its transfer to the joint venture company. In that sense, perhaps a further possibility when construing the respective clauses is that the words "Subject to" in clause 3.1 operate so as to inform what is meant by the words "proceeds of sale from the project", linking the agreement to share costs to an agreement that ultimately Focus would share in the sale of the property the subject of the project.

239 Mr Molloy did not read the opening words of clause 3.1 (which in their terms stated that the agreement contained therein was "subject to clause 3.2") as precluding a finding that the agreement in clause 3.1 to share Project Costs and liabilities applied even though clause 3.2 had no operation (due to the early termination of the project).

240 The real criticism made of the Molloy determination by the defendants is that it failed to make any determination as to whether, *in the events which had happened*, clause 3 of the JVA should apply (or whether there was any claim in restitution) but was merely an interpretation of the JVA "absent the prevailing conditions that applied relating to the premature sale of the property". (To be fair to Mr Molloy, a "pure" construction of the various clauses in isolation of what had transpired seems to have been precisely what he was asked to do.)

241 Focus' contention, which I think has merit, is that the agreement to share equally the project costs was predicated on the assumption that the proceeds of sale from the project would be disbursed in payment of all project costs. It is submitted by Mr Reuben that Mr Molloy failed to take into account the fact that the obligation to contribute equally to project costs and liabilities was expressly made "subject to" clause 3.2 (and, in particular, the ability recognised in sub-clause 3.2(d) for Focus to participate in the capital or net proceeds of the project).

242 As noted earlier, Mr Molloy construed clause 3.1 as obliging Focus to bear half of the project costs. In his further opinion, made at Mr Tolcher's request, Mr Molloy confirmed that it was his view that the

proceedings of sale of the property were not part of the financial wash up (which had to be determined on the basis that each party contributed equally).

243 (I note here that there can be no suggestion in my view that the further Molloy opinion was binding as a contractual matter on the parties – it being well and truly outside the contractual contemplation of the parties. An interesting point thus arises as to whether, if Mr Tolcher's determination was based on an incorrect construction by Mr Molloy in late October, Mr Tolcher's determination can be binding (applying the *Mercury* case referred to earlier). The answer, I think, is that if Mr Tolcher proceeded on the basis of a construction of the agreement which (by virtue of the Molloy determination) the parties were bound to accept then the fact that he obtained that understanding through a separate opinion obtained from Mr Molloy to the same effect should not affect his determination.)

Proper construction of clause 3.1 JVA

244 Had the issue of construction of the JVA been before me, rather than the question of the effectiveness of the Molloy determination, I would have approached the exercise by striving to give some meaning to the opening words of clause 3.1 (which the Molloy determination does not appear to do). This is not easily done, since it is not clear how the parties intended that the agreement between them in clause 3.1 (as to the equal proportions in which their rights in relation to the capital/net proceeds on the one hand and their obligation to meet project costs and liabilities on the other hand) was to be made subject to the agreement contained in clause 3.2 (as to the sequence in which payments from the proceeds of sale from the project were to be disbursed).

245 It is clear (not only from the point of view of workability of the joint venture but also by reference to clauses 6.1.3 and 7.1.2) that some part at least of the project costs would be required to be incurred or paid prior to the stage at which any sale of the property by the joint venturers was contemplated. It is not apparent that the parties contemplated any proceeds of sale arising from the project in any other way. Therefore, compliance with clause 3.2 surely cannot have been a pre-condition to any obligation as between the parties to make contributions towards the project costs in equal proportions.

246 This lends considerable support to the view that clause 3.1 was doing no more than indicating how, once the property was sold (after the steps envisaged in 3.2), the parties' actual overall contributions were to be adjusted. I accept Mr Reuben's submission that the agreement of the parties that the costs/liabilities would be shared on a 50/50 basis was thus one which was predicated on the assumption that the proceeds of sale of the property would also be shared on that basis (after payment out of the costs itemised in clauses 3.2 (a) – (d)).

247 Of course, if the meaning of "Subject to" in the opening words of clause 3.1, means (as the words themselves suggest when read with the opening words of clause 3.2) 'subject to the agreement that (inter alia) profits be shared 50/50' (rather than 'subject to the operation of clause 3.2), then it is hard to see why they were necessary at all. In other words, it does not seem to be necessary to say, in effect, I will only agree to bear the costs 50/50 if you agree, after payment out of various costs, to share the proceeds of sale from the project 50/50, when the parties were signing an agreement containing both terms – hence any such condition was satisfied at the same instant that it was stated.

248 Conversely, if those words were intended to operate such that, absent the completion of each of the steps in clause 3.2(a) – (d), there was no agreement to share equally the costs and liabilities of the joint venture, then one would have thought the parties would take care to state exactly that (and to provide a mechanism for recoupment of costs already borne in the expectation that clause 3.2 would have applied).

249 I should add that I would have placed little weight on the fact clause 3.2 specified the disbursement of four separate sets of costs before the distribution of proceeds of sale (in the sense that it seems to me that clause 3.2 could have operated if there were no costs falling within one or other of those sub-clauses - for example, if by the time it was applied there were no project costs remaining to be paid such that 3.2(b) could not apply). The reason clause 3.2 becomes arguably inoperative is simply that there are (on the construction adopted by Mr Molloy) no "proceeds of sale from the Project" to be distributed.

250 On any view, there is a degree of ambiguity as to the terms of the contract in this regard. When one looks to the surrounding matrix of facts, does that shed light on what was the parties' common intention at the time they entered into the JVA?

251 Mr Nelson says that he had been looking to sell the property (though his enquiries at that stage seem to have been of a relatively informal kind, the property not having been marketed for sale as such); Mr Adamo says that he had made it clear to Mr Nelson that he could provide assistance to enable a development loan to be secured but could not provide any funds up front; and the manner in which the funds obtained under the land loan facility were to be disbursed seems to have been intended largely to discharge JND's mortgage debt over the property (and replace it with a debt assumed by both parties) and to provide JND with a lump sum payout (which, as it transpired, was just under half the amount of the then mortgage debt over the property).

252 Therefore, on a rough and ready estimation, it would seem as if the financial arrangements produced the result that JND's contribution to the joint venture of the property (which it owned in its own right) was to be in part met by Focus' contribution to the securing of the loan, by means of which JND obtained a substantial cash sum and Focus became jointly liable for the new mortgage debt. (I note that

JND says it used the cash sum for the purposes of the joint venture and, in particular, to make up defaults by Focus in its obligations under the joint venture, but this does not affect the fact that, by the taking out of the land loan facility as part of the joint venture project, JND received a monetary benefit and thus the arrangement was not one in which the parties were contemplating that JND would put in the whole of its property for no contribution in return from Focus other than a guarantee of the land loan facility.)

253 Turning then to look at the arrangement from Focus' perspective, what benefit was Focus to receive from its assumption of liability for the repayment of a substantial loan secured over the property and its agreement to meet the first $100,000 in interest repayments on the loan and to share the costs of progressing the joint venture? The answer seems to be that it contemplated it would share in the profits (or losses) when the property was sold (with the benefit, it was hoped, of the development proposed to be undertaken of the land). It seems commercially unlikely that Focus would have entered into such an arrangement if it had understood it was expected to bear the risk not only that the project might not be as profitable as expected but, further, that if for no fault of either party the project was unable to proceed (after it had expended considerable sums) it could not recoup any of its costs out of a sale of the property at that stage but JND could.

254 Unclear as the wording of the contract is, I think it more likely than not that the proper construction of clause 3.1 is that it operates to indicate how the parties' respective shares in the overall project were ultimately to be calculated if the project proceeded to the stage where an adjustment of contributions could be made as part of the division of the sale proceeds (and, hence, only if and insofar as clause 3.2 operates).

255 If so, and JND is correct in its submission that clause 3.2 does not operate at all, in circumstances where the project has not reached the stage where the property has been transferred to the joint venture company, then the logical result would be that there is nothing in the JVA which governs the way in which costs are to be borne (and losses are to fall) in the present circumstances.

256 The real problem seems to me to be that the parties did not apparently turn their minds to the possibility that the project might fall through at a stage after the land loan facility had been obtained but before the property was transferred to the joint venture company for the purposes of the agreement (and hence before any on-sale of the property by the joint venture company, whether before or after its development took place).

257 Here, what clauses 3.1 and 3.2, read together, seem to have contemplated was that when the final accounting was to take place between the parties the equal sharing of costs and liabilities was to be balanced by an equal sharing (after costs and liabilities had been met) of whatever proceeds came out of the joint venture – including the sale of the property the subject of the joint venture. Therefore if, as Mr Molloy has concluded, there is no room for operation of clause 3.2 in circumstances where the joint

venture has been prematurely terminated and the property has been sold by JND before it was transferred to the joint venture company, then I would have been inclined to conclude that clause 3.1 itself has no operation and the parties are left to whatever their rights may be in the absence of any assistance from their contract in that regard.

258 However, the question of construction of the JVA simpliciter is not what is before me. As a matter of contract, the Molloy determination is binding on the parties absent fraud or collusion (neither of which was suggested).

259 What the parties, by a combination of clauses 15.3.1 and 15.5, have done is to accept the risk that an expert appointed to determine a dispute relating to legal issues (or, as here, to determine the proper construction of various clauses of the contract), acting bona fide and impartially, might in the exercise of his or her judgment come to an incorrect result as a matter of law.

260 That does not mean that, if the issue were to come before the court on a different question, the expert's determination would be binding on the court, but it seems to me that the effect of the parties' agreement is that such a determination would be final and binding means that it is not open to a party to contend for a different construction.

261 Accordingly, I consider the Molloy determination to be binding on the parties at least to the extent that it provides a determination of the construction of clauses 3.1 and 3.2 on the face of the contract and without reference to the events which transpired.

Scope of the Molloy determination

262 That said, the Molloy determination is limited in scope – as explained by Mr Molloy. What he was not purporting to do, was to determine who owed what to whom. Effectively, what Mr Molloy was providing was an advisory opinion as to the construction of various clauses. He did not seemingly turn his mind to the application of those clauses in the context of the claim to which Focus had adverted for restitution in respect of the contributions made by it to the project (nor for that matter did he make any finding as to any claim by JND for breach of a contractual obligation by Focus to make any payments which may have fallen due under the contract or for any debt arising out of a subsisting obligation, if there be any, to make any further payments following the premature termination of the joint venture project) which may have impacted on the ultimate determination of legal liability. This is a relevant matter to take into account when I consider issue (iii).

(ii) Is the Tolcher determination binding?

263 The Tolcher determination is in a somewhat different category, both because it is alleged that there was a failure by the expert to accord procedural fairness to Focus and because there is an issue as to

whether, as a matter of fact, Mr Tolcher in fact determined what he was asked to determine (as opposed to proceeding on the basis of an assumption that the spreadsheet material produced by Mr Nelson represented the parties' agreement as to the amount of costs they had incurred and carrying out a simple mathematical evidence of calculating what a notional half share of the total costs would be and the shortfall or excess in what had been paid by each of the two parties).

264 It is submitted by Mr Reuben that Mr Tolcher's retainer, being under clause 15.3.2 of the JVA, authorised him only to determine a dispute relating to financial or accounting issues, *not* to make any determination of legal liability as between JND and Focus. I agree.

265 The specific criticisms made by Focus of the Tolcher determination are as follows:

(i) that Mr Tolcher did not follow the tacitly agreed procedure for exchange of written submissions and engaged in a series of one-sided communications with Mr Nelson, independent of Focus, at a time when Mr Tolcher was on notice that Mr Adamo was intending to be out of the country – which it is said amounts to a denial of procedural fairness;

(ii) that it was outside the scope of Mr Tolcher's retainer for him to apply for a further legal expert determination by Mr Molloy without prior consultation with the parties – again, it seems, a criticism on the basis of a denial of procedural fairness; and

(iii) that it was flawed as a matter of fact and failed to take into account the total contribution made by Focus.

266 Mr Reuben submits that the Tolcher determination is flawed in a number of respects and that Focus was deprived of the opportunity to make submissions to Mr Tolcher as to the matters the subject of Mr Molloy's further opinion (namely, the submissions that Mr Molloy had misconstrued the JVA and had failed to apply the law of restitution so as to prevent an unjust enrichment of JND at the expense of Focus).

Mistake

267 Turning to the third issue first, as to the factual matters in respect of which the Tolcher determination is said to have been flawed, Focus notes that:

* Mr Tolcher says he relied on information directly provided to him by the parties and all correspondence had been copied to the respective parties (paras 2.1.1-2.1.2), whereas Mr Reuben says that the material final document which was provided to Mr Tolcher and on which he based his determination had not been provided to Focus prior to the determination (a matter

which does not go to the substance of the determination but to the question of procedural fairness);

* Mr Tolcher says that he had sought the agreement of the parties as to the factual amounts claimed to have been paid by each (para 5.1.1) and proceeded on an assumption as to the correctness of the list of project costs identified in Annexure A (which had been prepared by JND to the exclusion, Mr Reuben says, of Focus) (a matter which might go to the substance of the determination but in any event goes to the procedural fairness issue);

* Mr Tolcher did not make any determination as to the contribution by Focus to the interest holding costs in the land loan facility in respect of the land wholly owned by JND, from which Focus derived no benefit, including interest charges on the cash amount provided to JND, which Mr Reuben says clearly amounts to an unjust enrichment of JND at the expense of Focus (a matter which goes to the substance of the determination not to procedural fairness).

268 For the reasons set out above in relation to the Molloy determination, the fact that Mr Tolcher may have failed to take into account certain matters, such as the total contribution which Focus claims to have made (or, for that matter, may have misapplied any relevant financial or accounting principles) is not a basis on which his determination could be set aside, unless it was a mistake of the kind that meant the valuation was not in accordance with the contract. Absent actual fraud or collusion, an expert determination will be rendered ineffective and liable to be set aside only if it is affected by a mistake which renders it not in accordance with the contractual contemplation of the parties. Apprehended bias is not sufficient (*Andrews v Queensland Racing Limited* [2009] QSC 364, McMurdo J.

Procedural fairness

269 It is said that Mr Tolcher denied Focus procedural fairness in failing to provide an opportunity for itto respond to submissions and the new information, in failing to allow submissions in relation to the legal basis for apportioning the project costs, and in having approached Mr Molloy unilaterally and without authority. (In relation to the latter, however, there is clear authority that (in the absence of anything to the contrary in the parties' agreement) an expert can inform himself or herself as he or she thinks fit - see *Triarno*.)

270 As to the complaints made of lack of procedural fairness, the most substantive seems to be that the expert received (and took those into account before Focus had a proper opportunity to respond thereto) various submissions and communications from JND. Mr Tolcher certainly received further communications from Mr Nelson after the initial exchange of submissions between JND and Focus (which he later arranged to be forwarded to Mr Adamo). He also received various other communications during the process which he did not suggest should be copied to Focus (from which it

is said by Mr Wilson that I should infer these were ignored by him as irrelevant to the issue before him).

271 No actual fraud or collusion was pleaded. For his part, Mr Tolcher seems to have been conscious of the need (or desirability) to ensure that Mr Adamo was aware of the further material forwarded to him whether by way of submission or simply communication, but he does not appear to have considered it necessary to confirm with Mr Adamo that he had in fact received the material or whether he wished to comment on it before issuing his determination.

272 The scope for unfairness to arise with this course of action is illustrated by the fact that there is a reasonable argument, having regard to the correspondence between Mr Tolcher and Mr Nelson, that Mr Tolcher's determination was based on a belief on his part that the revised spreadsheet figures had actually been agreed by Mr Adamo in accordance with his request that the parties attempt to reach agreement as to the project costs paid by each (which was clearly not the case).

273 What Mr Tolcher ultimately did was to issue a determination which was expressly based on the assumption that the figures contained in Mr Nelson's revised spreadsheets were accepted by Mr Adamo as correct and to save time, to raise the prospect of an amendment to the determination if those figures were incorrect, and then, in effect, to invite the parties to raise with him any queries.

274 On balance, I am of the view that the failure of Mr Tolcher to ensure that Focus was given the opportunity, prior to the making of his determination, to consider and comment upon the revised spreadsheet produced by JND is not a basis on which his determination could be set aside, for the reason that I do not consider Mr Tolcher was bound by or had assumed a duty of procedural fairness akin to that which would be assumed of a judicial or quasi-judicial officer. (Had I been of the contrary view, I would not have considered it to be to the point that Mr Adamo was given an opportunity to respond *after* the determination had been made because Mr Tolcher having already in effect made his determination on the express basis of the material forwarded by Mr Nelson and in those circumstances I would have found there to be procedural unfairness.)

275 The earlier communications by Mr Nelson, casting aspersions on Mr Adamo's character, seem to me to fall within a different category. No actual bias was alleged. It may be that these could have given rise to a reasonable apprehension of bias. However, the existence of a reasonable apprehension that an expert might not bring an impartial and unprejudiced mind to the determination of the issue before him or her is not something which has been said to be sufficient to set aside an expert determination on the traditional formulation of the test (what being required in this context being actual fraud or collusion or a mistake which takes the expert's determination outside the scope of the contract) (see McMurdo J in *Andrews v Queensland Racing*).

276 However, as I apprehend it, it is not the fact of the ex parte communications, as such, which is in issue, rather it was submitted by Mr Reuben that the non-disclosure of these communications amounted to a denial of natural justice or procedural fairness since Mr Adamo was deprived of the opportunity to respond thereto.

277 Mr Wilson, in his submissions, noted that the requirements of natural justice vary according to the circumstances and nature of the case and that, as posed by Mason J, as his Honour then was, in *Kioa v West* (1985) 159 CLR 550 at 584, the question is what the duty to act fairly requires in the circumstances of the particular case. Reference was made, in that regard, to the decision of Cole J in *Xuereb v Viola* (1989) 18 NSWLR 453 at 468-9, there considering a reference under Part 72 of the Supreme Court Rules (where there was no issue as to whether a duty to afford natural justice had arisen but the question was whether there had been a non-compliance with that duty). His Honour said that:

> In essence it [natural justice] means fairness between the parties. If an allegation is put by one party against the other, the other should have the chance to respond. Yet the process of responding is not interminable. For once a party is aware of the case or argument or fact asserted against him, natural justice is usually satisfied by giving to his opponent the opportunity to respond. … If issues are clearly defined, particularly if they be of a technical nature, and if each party is given a full opportunity to place before the referee that which it wishes in relation to those issues, it does not necessarily follow that there is a denial of natural justice by not permitting each then to respond to any new material advanced by the other. Particularly is that so where the referee is a person of technical competence able to understand and evaluate the material placed before him by each party.

278 It seems to me that the real question here is whether the communications in question raise an allegation relevant to any issue to be determined by the expert to which Mr Adamo in fairness should have had, and was deprived of, an opportunity to respond by the non-disclosure of those communications. According to Mr Nelson, the communications were made because he was upset. The only potential relevance they might have had to the financial or accounting issues was as to a fee claimed to have been paid to a third party; the suggestion being that there had been some such payment the subject of criticism in relation to another project in which Mr Adamo was involved. While this seems to me to be a matter irrelevant to the question whether the present claim made in the matter before the expert was a valid claim for payment of a project cost, this was an allegation to which Mr Adamo may well have chosen to respond had he been aware of it.

279 That said, I do not consider that Mr Tolcher owed a duty of procedural fairness (as an expert) which was breached in failing to inform Mr Adamo of the communications in question and to give him an opportunity to respond thereto. In the absence of evidence that this actually affected the expert's determination, I do not see it as a basis on which Mr Adamo could set aside the determination.

280 As to the second aspect on which it is alleged there was a lack of procedural fairness, namely the request for a further opinion by Mr Molloy, Mr Wilson relies on what was said by Cole J in *Xuereb*, at 469-470, cited with approval by Brereton J in *Carbotech-Australia Pty Limited v Yates* [2008] NSWSC

540 at [39], to the effect that a referee may, subject to any directions of the court, conduct proceedings and inform himself or herself in such manner as he or she thinks fit.

281 It was a matter for the parties, or absent agreement between them, the expert, as to how the determination process should be conducted. Similarly, in the absence of any provision in the JVA, or any agreement between the parties and Mr Tolcher pursuant to which Mr Tolcher was appointed, restricting Mr Tolcher from seeking a legal opinion from Mr Molloy, I see no denial of natural justice solely by reason of the fact that Mr Tolcher had sought guidance from Mr Molloy as to the legal interpretation of the agreement.

282 What is pleaded, however, is that, if otherwise enforceable, the Tolcher determination proceeded on a mistake of law (insofar as it was based on Mr Molloy's explanation of his determination) and would thus amount to the unjust enrichment of JND at the expense of Focus (para 33).

283 If Mr Tolcher, having acted on the basis of a wrong interpretation of the contract, as a matter of law, this might well have an impact on the effectiveness of Mr Tolcher's opinion (since, on any view of the matter, the parties did not bind themselves to accept a subsequent determination by Mr Molloy made not at their request and without their involvement). However, as noted earlier, to the extent that all Mr Molloy did was confirm and restate his earlier opinion, and the parties had bound themselves to accept that as a final and binding opinion, there would be a reasonable argument that it would not have been open to Mr Adamo to contend for a different construction of the relevant clauses and hence he has not been deprived of any real opportunity to contest Mr Molloy's interpretation in the context of the determination with Mr Tolcher.

284 Was there a lack of procedural fairness in Mr Adamo not being afforded an opportunity to make submissions to Mr Tolcher as to the perceived errors of Mr Molloy's October opinion?

285 Having regard to the fact that Focus had already had an opportunity to make submissions to Mr Molloy as to the proper construction of the JVA, and was bound, as between itself and JND, to accept the Molloy determination as binding, and having regard to the fact that there was no restriction in the JVA or in the circumstances in which Mr Tolcher was appointed precluding him from seeking legal advice as to the meaning of the agreement, I do not consider that there has been a lack of procedural fairness constituted by the fact that Mr Tolcher did not seek submissions from the parties on the matters the subject of Mr Molloy's further legal opinion.

286 I do not consider that, as an expert, Mr Tolcher had an implied duty to afford natural justice or procedural fairness and I do not consider that he assumed such an obligation. However, what does trouble me is the very real possibility that he proceeded to issue his determination on the misapprehension (induced, intentionally or otherwise, by Mr Nelson) that the revised spreadsheet

(Annexure A) had been in fact agreed between the parties. A determination produced by a misrepresentation on the part of one party would surely not be enforced in equity.

287 There is no evidence as to what Mr Tolcher believed when he issued his determination (ie whether he held the (mistaken) belief that Mr Adamo agreed with the contents of Annexure A), since Mr Tolcher was not called to give evidence in the proceedings. However, the sequence of events (following Mr Tolcher's request that the parties seek to reach agreement and in particular Mr Nelson's response with the "agreed" revised spreadsheet) is such that the reasonable reader would in my view apprehend that Mr Adamo and Mr Nelson **had** reached agreement as to the costs breakdown set out in the revised spreadsheet. Accordingly, I consider that Mr Nelson's correspondence was likely to mislead Mr Tolcher (in circumstances where no such agreement had been reached and Mr Nelson seems simply to have decided he was prepared to accept Mr Adamo's position on items which had been the subject of dispute).

288 Insofar as what I am being asked to do is to enforce a determination which I have real concerns was based on a misapprehension induced (knowingly or otherwise) by Mr Nelson (namely to declare that it is binding and, by reference to the contractual agreement contained in clause 3.1 that the parties would share the project costs equally, to order the payment by Focus of a sum of money based on the said determination), I consider that would be a miscarriage of my discretion.

289 In that event, I do not think that the matter reaches this point, as I do not consider, for the reasons set out below, that the Tolcher determination in fact "determines" in any real sense the quantum of each party's contributions to the JVA. Rather, at best, it determines the disputes between the parties as to what costs should be treated as part of the original project costs and how mathematically the shortfall (assuming an equal contribution) would be calculated (although the latter would hardly have required a financial expert – it being determined by application of the very simple methodology outlined by Mr Tolcher in his written determination).

Was there a final determination?

290 The defendants say that Mr Tolcher did not determine the dispute as to the financial indebtedness, rather that he merely apportioned the project costs, including interest on the land loan holding costs, having no regard to the income of the project and the recovery of those costs out of the proceeds of sale of the land.

291 What Mr Tolcher was asked to determine was each party's contribution to the project losses. Both parties seem to have assumed that would provide an answer to the question "who owed what to whom". Unfortunately, it did not.

292 At the heart of the financial or accounting dispute referred to Mr Tolcher were two basic issues: what were the project costs and what was each party's actual contribution to the project costs. It was conceivable that some issues relevant to that determination might involve both legal and financial questions. So, for example, where there was a dispute as to how any interest payable on the land loan facility was to be treated, it is conceivable that this could involve both reference to the proper construction of the definition of "project costs" in the JVA and an application of relevant accounting principles to determine the proper treatment of that cost item. I see no reason why Mr Tolcher's determination of what was to be included under the rubric of project costs (such as the proper treatment of interest paid on that proportion of the land loan facility which was paid out to JND at the commencement and therefore not directly attributable to the project, for example) could not be binding on the parties, as would be his determination of the accounting treatment to be accorded to certain cost items (such as his disallowance of double counting).

293 Mr Tolcher expressly disclaimed the exercise of carrying out an audit of the claimed project costs – by which I understand was meant that the process of verifying that particular cost items were correctly invoiced or itemised and had in fact been paid, as claimed by one or both of the parties, would not be determined. This led, however, to the request by Mr Tolcher for the parties to seek to agree as to who paid what in respect of the project costs and ultimately to his determination being predicated on the express assumption that Annexure A (which attributed the itemised costs to one or other party) was correct.

294 If, in fact, what Mr Tolcher was being asked to determine (at least in part) was the quantum of each party's contribution to the overall project costs, then to that extent he has made no such determination. The so-called determination begs the question because it assumes that the spreadsheet in Annexure A has correctly recorded what each party contributed to the project costs. The total recorded in that Annexure A represents the quantum determined by Mr Tolcher. What then has Mr Tolcher determined? In substance, apart from his disallowance of certain costs, he has done no more than to say that, if Annexure A correctly attributes the costs as between the two parties, then the arithmetical sum of those costs is a particular figure.

295 Even leaving aside the challenge to the determination based on procedural fairness, there is to my mind a real doubt as to whether (on the question of quantum of each party's contribution to the project costs) there has been any "determination" of a dispute of the kind the parties must have contemplated when the JVA was entered into and when the dispute was referred to Mr Tolcher.

296 It seems to me that, for the expert accountant appointed to determine a financial dispute as to the quantum of each party's contribution to the project costs to do so simply by assuming the correctness of a breakdown of costs provided by one party (who presented that breakdown as being "agreed" in some fashion by the parties), must necessarily involve an abdication of the very exercise of skill and judgment which his appointment as an expert required. Not only is there nothing to indicate that the

expert turned his mind to the question of whether the quantification of each party's contribution to the project expenses was correct, in fact he expressly disavows having done so.

297 Therefore, the only part of Mr Tolcher's determination which seems to involve any determination as such, is the conclusion he has made as to characterisation of certain amounts to project costs or not as the case may be (such as whether project costs included interest on late payments by Focus, whether they included interest on the privately disbursed moneys over the land loan facility) and, perhaps, implicit in his adoption of Annexure A, his acceptance of the listed costs in that Annexure as representative of proper project costs. (To the extent that the latter involved a legal question, no issue was taken with the determination in this regard.)

298 What it purported to do, namely to make a finding as to a sum owing by Focus to JND under the JVA, was something which Mr Tolcher was not competent to do. At most he was in a position to identify what items fell within the project costs, as defined, verify that those amounts had been paid, and quantify the proportion of project costs which had been paid by each of the parties, all presumably to be done by reference to his expertise as an accountant. Mr Tolcher seems to have carried out the first of those tasks by reference to Mr Nelson's spreadsheet, though expressing an opinion as to certain categories of item; not to have carried out the second task at all (but to have referred that back to the parties for agreement) and then to have carried out the arithmetical exercise based on the assumption that the quantum of the respective project costs (as identified in the spreadsheet) had been agreed between the parties. To that extent, his determination does not in its terms purport to be a binding determination and in my view should not be accepted as such.

299 I therefore find that the Tolcher determination is not binding on the parties other than (perhaps) as to what costs are to be treated as included within the definition of project costs.

(iii) If either determination is binding, should the court as a matter of discretion refuse the declaration sought?

300 As noted by Mr Reuben, the grant of a declaration is a discretionary remedy (Mr Reuben citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2). There, the High Court said that declaratory relief will not be granted if the question is hypothetical or the relief will produce no foreseeable consequences for the parties. Another ground for refusing declaratory relief, to which the authors of *Equity Doctrine & Remedies* (4th edn) R Meagher, D Heydon, M Leeming (2002) at [19-130] have adverted, is that no good purpose will be served by granting it – citing *Rivers v Bondi Junction Waverley RSL Sub-Branch Limited* (1986) 5 NSWLR 362.

301 In relation to the Molloy determination, it was submitted that the court should refuse to exercise its discretion to grant a declaration where the conclusion reached in the determination is clearly wrong. I am not persuaded that it is the case that the Molloy determination is clearly wrong (if the Molloy

determination is read as being restricted to the construction of particular clauses in isolation, rather than the operation of the contract as a whole in the circumstances which have arisen).

302 Declaring that the Molloy determination (as so limited) is binding on the parties would not amount to a finding that Mr Molloy's construction of the contract is correct as a matter of law (simply that the parties had agreed to accept it as such) nor would it require the court to endorse what, on balance, I have found to be an incorrect application of the contract clauses in the particular circumstances of this case. Rather, it would simply acknowledge what the parties had agreed would be the case – that they would, as between themselves, be bound by a determination made in good faith by an impartial expert (implicitly accepting that it might not accord with what a court would determine) insofar as such a construction might be relevant. To hold otherwise would, in my view, undermine the process of expert determination.

303 I understand the force of the comment by the Hon McHugh AC that there is a natural judicial reluctance to uphold a decision which is regarded as unreasonable (or, here, to declare binding a determination of the construction of the contract with which I respectfully disagree). However, I am conscious also of the fact that it is well accepted in the context of expert determinations that parties choosing this means of alternative dispute resolution (whether for disputes involving legal or other issues) do so accepting that the expert may make errors of judgment or principle which will not be susceptible to review by the courts at a later stage.

304 Accordingly, I would have been prepared to make the declaration sought as to the binding nature of the Molloy determination as to the construction of the various clauses of the agreement but for my concern that to do so will confuse the real issue between the parties and that it will be of no real utility.

305 In my view all that the Molloy determination does is to bind the parties to accept a particular construction of the relevant clauses of the contract in isolation of any other claim that the parties may have in relation to the termination of their joint venture. What the Molloy determination, relevantly, held was that clause 3.2 does not apply in the absence of a concluded project and that clause 3.1 (not being subject to clause 3.2 in those circumstances) is capable of operation after the project is at an end (in relation to the financial wash up of the matter).

306 Here, it is accepted that the project is at an end and that it came to an end when the parties agreed that the further pursuit of a development of the property was no longer feasible. While the sale of the property by consent did not operate to frustrate the contract (since the doctrine of frustration does not operate to discharge parties to a contract from their contractual obligations where the act said to be the frustrating event is the result of self-inducement by one or both of the parties; *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 521; [1994] 2 WLR 39 at 45; [1994] 1 All ER 20 at 26; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah*

Blumenthal [1983] 1 All ER 34, [1983] 1 AC 854), it clearly rendered impossible the ongoing performance of the parties' joint venture and made otiose the underlying purpose of the JVA.

307 What the defendants/cross-claimant contend is that in these circumstances (whether or not the contract remains on foot) there was a total failure of consideration, giving rise to an entitlement on the part of Focus to restitution of the payments it made towards the failed project or that the contributions made by it are held on a resulting trust for its benefit. I consider this claim below. However, in the context of the claim for declaratory relief, it is relevant to note that Mr Molloy did not address that question.

308 I am concerned that the grant of a declaration as to the binding nature of the Molloy determination will give rise to uncertainty as to how and whether Mr Molloy's construction can operate in light of my findings on the cross-claim.

309 Such a declaration would not, for the reasons considered below, preclude Focus from raising a claim for restitutionary or other relief consequent upon the failure of the joint venture. Nor would it necessarily result in a finding that Focus/Mr Adamo pay a certain amount to JND.

310 JND claims that the defendants are indebted to it by reason of a combination of the respective determinations. However, the basis of the liability must be sourced in some contractual or other obligation and cannot be found simply in an accounting expert carrying out an arithmetical calculation (even if this had been binding on them). Mr Tolcher was not qualified, nor was he appointed, to determine legal issues relating to liability. How then is the liability said to arise? The claim was not pleaded as one for a debt arising under clause 3.1 of the JVA or as a claim for damages for breach of a contractual obligation to make payment of project costs at some stage prior to the joint venture was brought to an end. (If the latter, then there would have been insufficient evidence for me to determine whether there was a default in payments by Focus, as JND contends, or not – or, for that matter, what damage would have been sustained as a result.)

311 Mr Reuben submits that these proceedings are an attempt to enforce a claim under a contract which has long since been brought to an end. Whether or not the JVA is at an end (or remains on foot until the final wash up between the parties), and hence whether what the court is now asked to do is to enforce the JVA or simply a claim for damages for breach of the JVA, it is submitted by Mr Reuben that it is for JND to prove its case (it bearing the onus of proof) and that it cannot do so simply by reliance on either or both of the expert determinations.

312 Put another way, Mr Molloy declined to accept appointment as an expert to determine the question of legal liability as to who owed what to whom; he simply construed various clauses of the agreement and did so without addressing (or being in his retainer agreement asked to address) Focus' claim for restitution of payments made by it by way of contribution to the project. Mr Tolcher, whose determination I have found not to be binding on the parties, in any event, did no more than quantify the

liability that he assumed had arisen in accordance with the interpretation of the contract by Mr Molloy. There has at no time been a determination as to the legal liability of Focus/Mr Adamo to JND as a result of the expert determination process or otherwise, nor does their agreement to abide by an expert determination of the dispute as to legal liability assist JND (since that particular dispute was not referred to anyone).

313 Mr Wilson submits that there were continuing obligations owed by each of the parties to the other when the joint venture came to an end in October 2006. He submits that the parties were required to finalise their obligations by working out 'who owed what to whom', citing *Chan v Zacharia* (1983) 154 CLR 178 at 183. Insofar as this suggests that what JND is now seeking is a winding up or accounts to be taken of a partnership constituted by the joint venture, a claim for relief of this kind was not pleaded (and the question whether there was a partnership between the joint venturers when one was expressly disclaimed in the JVA was not argued before me). However, I accept that in the absence of the doctrine of frustration, it is open to JND to contend that the JVA could still operate to determine the parties' liabilities on the termination of their joint venture. The difficulty is that the contract makes no provision for what is to occur in these circumstances, a matter I consider in the context of issue (v) below.

314 In light of the above issues, I do not consider that a declaration as to the binding nature of the Molloy determination either would have utility or should now be made.

315 As to the Tolcher determination, for the reasons outlined earlier, I consider that it was binding only to a limited extent (and that there is uncertainty as to precisely what is that extent).

316 On one view there might be utility in a declaration as to the quantum of the parties' respective contributions, that utility being in the ultimate resolution of the matters raised by the cross-claim (ie as to what contributions should be treated as having been made by Focus to the project). However, in light of the findings I make on the restitution claim it seems to me it is not necessary to grant specific declaratory relief in relation to the only part of the determination which is in my view capable of being binding on the parties (as opposed to that part which is not a determination in accordance with the contract, being predicated on an assumption or purporting to determine issues of legal liability).

(iv) Does the guarantee given by Focus cover liability of the kind claimed in these proceedings?

317 JND relies upon a guarantee given by Mr Adamo under clause 7.2.1(b) of the JVA which provided that:

> The Second Guarantor [Mr Adamo] hereby guarantees the due and punctual performance by the Developer [Focus] of all its obligations under this Agreement

318 In its terms, therefore, one need simply ascertain that there was an obligation under the JVA on the part of Focus to make a particular payment and Mr Adamo could be said to have guaranteed that payment. The provision of a guarantee of the obligations of Focus was contemplated in the recitals to the JVA (recital 3) and Focus was expressly obliged under clause 6.1.5 to provide a guarantee from Mr Adamo (though that guarantee might reasonably be read as relating to the land loan facility only).

319 Mr Reuben submits that the guarantee provided by Mr Adamo under clause 7.2.1(b) is not one which extends to all obligations of Focus under the agreement (notwithstanding the express terms of clause 7) but, rather, is limited to the guarantee of the land loan facility and costs associated with that. Reliance is placed on the heading to clause 6 to that effect. Clause 6 itself is clearly related only to the land loan facility. However, clause 7 is more generally headed "Capital Obligations and Guarantee".

320 Mr Wilson contends that the reference in clauses 7.2.1(a) and (b) to the guarantors' respective obligations as being more fully set out therein indicates the overarching nature of the guarantee and that it is not to be narrowly construed.

321 The set out of clause 7 is somewhat confusing in this regard. Each of clauses 7.1.1, 7.1.2 and 7.1.3 has its own sub-heading. Clause 7.1.3, which immediately precedes 7.2.1(a) and (b), is headed "Refinance Option". However, I do not think clauses 7.2.1(a) though to 7.2.8 are easily read as being limited to the situation in which there is a refinancing of the project in order to meet a requirement for additional capital. Rather clauses 7.2.1-8 appear to be best described as part of an unheaded clause dealing with the "Guarantee" referred to in the header to clause 7 (that being as, it would seem, an additional (though seemingly related) topic to the parties' "Capital Obligations").

322 In my view there is no basis to read down the broad words of clause 7. The fact that Mr Adamo initially indicated a willingness to proffer a guarantee only as to the land loan facility takes the matter no further, particularly in circumstances where what was ultimately provided went beyond that and extended to any development finance obtained. I find that the guarantee given by Mr Adamo extends to any obligation of Focus under the JVA. If, therefore, Focus has an obligation under the JVA to pay any amounts to JND then that would be covered by the guarantee.

323 Is there any such obligation? Clause 3.1, in its terms, contains an agreement that the losses of the project will be shared 50/50. Mr Reuben submits that this litigation is the pursuit of a claim for loss and/or damage arising out of entry into the joint venture and that, for the guarantee to cover such a claim, it would be necessary for there to be express words in the guarantee for such an indemnity. The effect of the clause may well be to provide an indemnity for half of the losses of the project but any primary obligation for those losses can only arise under clause 3.1 of the JVA. That is an obligation of Focus and it is an obligation which I consider to be covered by the guarantee. Accordingly, if JND is able to establish that Focus is in breach of an obligation to pay its share of the project costs to it, then the claim against Mr Adamo should in principle succeed.

324 Whether Focus (and hence Mr Adamo) is liable in the circumstances to pay any further amount by way of its share of project costs (in the circumstances which have transpired) is something I consider in the context of issue (v). (I note that it is submitted that there has been a total failure of consideration in respect of the guarantee as well as in respect of the liability to pay project costs.)

(v) Has there been a total failure of consideration and, if so, what flows therefrom?

325 From as early as the submissions he put forward to Mr Molloy in January 2008, Mr Adamo on behalf of Focus has asserted that this was a situation in which *Muschinski v Dodds* applies and that there has been a total failure of consideration for the contributions made by Focus. JND contends that there was no failure of consideration; rather this is simply a case where the project lost money, both parties having carried out various tasks and expended monies towards a failed project and, in effect, the losses should not simply lie where they fall – rather, Focus should be required to account (on a final wash up) for the moneys for which it would have been liable on a final adjustment had the project proceeded to finality (or at least had proceeded to a sale of the property out of the joint venture).

326 Where a joint venture fails for no fault of the parties, the parties may be entitled to recover their initial contributions to the venture, or to take a share in the remaining pool of assets in proportion to their contributions. In *Muschinski v Dodds* Deane J at pp 618-620 said:

> Both the common law and equity recognise that, where money or other property is paid or applied on the basis of some consensual joint relationship or endeavour which fails without attributable blame, it will often be inappropriate simply to draw a line leaving assets and liabilities to be owned and borne according to where they may prime facie lie, as a matter of law, at the time of the failure. Where there are express or implied contractual provisions specially dealing with the consequences of failure of the joint relationship or endeavour, they will ordinarily apply in law and equity to regulate the rights and duties of the parties between themselves and the prima facie legal position will accordingly prevail. Where, however, there are no applicable contractual provisions or the only applicable provisions were not framed to meet the contingency of premature failure of the enterprise or relationship, other rules or principles will commonly be called into play. *If, in the last-mentioned case, the relevant relationship is merely contractual and the contract has been frustrated without fault on either side, the present tendency of the common law is that contributions made should be refunded at least if there has been a complete failure of consideration in performance:* cf. Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1942] UKHL 4; (1943) AC 32; Denny, Mort and Dickson Ltd. v. James B. Fraser and Co. Ltd. [1944] UKHL 3; [1944] AC 265, at p 275; and, generally, Treitel, The Law of Contract, 6th ed. (1983), pp.695ff. … *If the relevant relationship is not a partnership but takes the form of a contractual joint venture for the pursuit of some commercial advantage, a similar prima facie rule of equity applies in the event of the premature collapse of the joint venture and the consequent preclusion of the attainment of the commercial advantage, namely, that, to the extent that the joint funds allow, the joint venturers are entitled to the proportionate repayment of their capital contributions to the abortive joint venture. This is so notwithstanding that it was the common understanding or agreement that the funds advanced were to be applied for the purposes of the joint venture and that the return from them would take the form, not of a repayment of capital contributed but of a share in the proceeds of the joint venture when it was carried to fruition:* cf., e.g., Allen v. Kent (1957) 136 A (2d) 540, at p 541; Ewen v. Gerofsky (1976) 382 NYS (2d) 651, at p 653; Legum Furniture Corporation v. Levine (1977) 232 S E (2d) 782, at pp 785-786, and

> cf., generally, "Joint Ventures", Corpus Juris Secundum, vol.48A, pp 452-453, 463. (my emphasis)
>
> The prima facie rules respectively entitling a fixed term partner to a proportionate repayment of his or her premium and a contractual joint venturer to a proportionate repayment of his or her capital contribution on the premature dissolution of the partnership or collapse of the joint venture are properly to be seen as instances of a more general principle of equity. That more general principle of equity can also be readily related to the general equitable notions which find expression in the common law count for money had and received (cf. Moses v. Macferlan (1760) EngR 713; (1760) 2 Burr 1005, at p 1012 [1760] EngR 713; (97 ER 676, at pp 680-681); J. & S. Holdings Pty. Ltd. v. N.R.M.A Insurance Ltd. [1982] FCA 78; (1982) 61 FLR 108, at p 120) and to the rationale of the particular rule of contract law to which reference has been made (cf. Fibrosa, at pp.61ff. and esp. at p.72). Like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct (cf. Story, Commentaries on Equity Jurisprudence, l2th ed. (1877: Perry), vol. 2, par. 1316; Legione v. Hateley (1983) 152 CLR at p 444). The circumstances giving rise to the operation of the principle were broadly identified by Lord Cairns L.C., speaking for the Court of Appeal in Chancery, in Atwood v. Maude (1863) LR 3 Ch App, at p 375: where "the case is one in which, using the words of Lord Cottenham in Hirst v. Tolson (1850) 2 Mac. & G. 134 [1850] Eng R 313; (42 ER 52), a payment has been made by anticipation of something afterwards to be enjoyed (and) where ... circumstances arise so that future enjoyment is denied". Those circumstances can be more precisely defined by saying that the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do: cf. Atwood v. Maude, at pp 374-375 and per Jessel M.R., Lyon v. Tweddell (1881) 17 ChD 529, at p 531.

327 The reasoning in *Muschinski v Dodds* has been applied by courts in situations where a joint venture has failed without attributable blame to either party and (often due to the dissimilarity and inequity in capital contributions at the time of the failure of the joint venture) it would otherwise be considered unconscionable for one party to the joint venture to assert his or her strict legal rights over the joint venture property (*Baumgartner v Barmgartner* (1987) 164 CLR 137*; Malsbury v Malsbury* [1982] 1 NSWLR 226*; Morris v Morris* [1982] 1 NSWLR 61*; Kriezis v Kriezis* [2004] NSWSC 167*; Sirtes v Pryer* [2005] NSWSC 1082*; Knox v Knox* (16 December 1994, unreported, Young J)*; Hogan v Baseden* (1997) 8 BPR 15723*; McKay & anor v McKay* [2008] NSWSC 177).

328 Brereton J in *McKay & anor v McKay*, noted at [30] that “the fundamental principle in this area of discourse is the restoration of contributions upon failure of the substratum of a joint venture”. His Honour considered that to allow one party to retain the benefit of the other’s contribution in return for paying out the other, would be “inconsistent with the basal concept of a return of the contributions on failure of the joint venture”.

329 In *Liquor National Wholesale Pty Limited v The Redrock Pty Limited* [2007] NSWSC 392 at [42], Brereton J recognised that the principle explained by Deane J in *Muschinski v Dodds* at 618-620 has potential application in commercial joint ventures:

> Nor has it been suggested that there was a true partnership or contractual joint venture between the parties. The case has been approached and argued on the basis that they were not partners and that the overall arrangement between them, while consensual, was a non-contractual one. That does not mean, however, that particular rules applicable to regulate the rights and duties of the parties to a failed partnership or contractual joint venture might not be relevant in the search for some more general or analogous principle applicable in the circumstances of the collapse of the consensual commercial venture and personal relationship in the present case.

and citing from Deane J's judgment (in the extract quoted above) as to the prima facie rules entitling partners/joint venturers to a proportionate refund of premium or capital contribution on the premature dissolution of the partnership or collapse of the joint venture.

330 It is of course necessary first to establish whether the joint venture agreement between the parties has otherwise dealt with the situation where the joint venture fails as observed by Deane J in *Muschinski v Dodds*.

331 The fact that the contractual obligations under the JVA may not have been frustrated for the purposes of the common law doctrine of frustration does not preclude the operation of the principle in *Muschinski v Dodds*. That the contract has not been frustrated is, however, relevant to any restitutionary claim, insofar as such a claim would not be available where it would overturn an existing allocation of risk or limitation of liability previously established by the parties' contract (*Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27, at [79] and [126]; *Steele v Tardiani*; (1946) 72 CLR 386; [1946] HCA 21; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 at 166; [1994] 1 All ER 470 at 475).

332 Here, however, in my view the existing contractual provisions (which I have considered above) do not apply to determine how the parties' rights and obligations are to be determined in the present circumstances.

333 I am of the view that it is clear that there has been a total failure of consideration for the promises given by Focus and Mr Adamo, respectively.

334 In *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344; [1993] HCA 45, Deane and Dawson JJ recognised that a payment made, expressly or impliedly, in contemplation of a particular return may be recovered if the agreed return does not materialise; the notion of what constitutes a total failure of consideration looks to the benefit bargained for rather than any benefit which might have been obtained in fact. Their Honours said at p378:

> The critical question on this aspect of the present case is whether the consideration for which Mrs Dillon paid the stipulated fare to Baltic wholly failed. *That consideration was not, for the purposes of her action in unjust enrichment, the contractual promise which she received from Baltic*. Technically, it can be argued that Baltic's bare promise to provide the pleasure cruise

> itself represented some consideration for Mrs Dillon's fare and that, that being so, it is wrong to say that the consideration for the prepayment wholly failed. *As has been said, however, the law of unjust enrichment is concerned with substance rather than technical form. If a bare promise to provide consideration were regarded as the provision of consideration, "there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled". Prima facie, where a simple promise of future performance is involved, the law of unjust enrichment looks to the future performance and not the bare promise as the relevant consideration*. Thus, the consideration for which Mrs Dillon paid the fare was the substance of Baltic's contractual promise, namely, the actual provision of the components of the promised fourteen-day pleasure cruise upon the "Mikhail Lermontov". If all that Mrs Dillon had relevantly received had been Baltic's bare promise, unperformed and unenforced, the consideration for the whole of the fare would have wholly failed. (my emphasis)

335 There is no dispute that Focus/Mr Adamo have made substantial contributions to a joint venture, the consideration for which has wholly failed. They anticipated (and bargained for) a benefit in terms of a share of the proceeds of sale of the land which was to be developed (and potentially in any profit from construction costs). The sale of the property in 2007 made such a benefit wholly unobtainable. It seems to me unconscionable for JND to seek to retain the whole of the contributions made by Focus to the project in circumstances where it otherwise retains the whole of the proceeds of sale of the land.

336 Mr Adamo's affidavit of 30 November 2009 attached documents in relation to his calculation of the contributions made by Focus of $90,086.22 to the joint venture. Mr Adamo was not challenged on that material. The costs were accepted by JND (and by Mr Nelson in the witness box). On an application of the principles in *Muschinski v Dodds* they are recoverable from JND.

(vi) Is Focus entitled to any share of the proceeds of sale of the Port Macquarie property

337 The final issue is whether, in the alternative to the claim for restitution, Focus is entitled to participate in the proceeds of sale from the joint venture project at least to the extent of recovering the contributions made by it towards the project costs from the proceeds of sale. (I have considered above the possibility that the proceeds of sale from the project might (contrary to the Molloy determination) extend to the proceeds of sale of the property in the hands of JND.)

338 There would be no such contractual entitlement to share in the sale of the property the subject of the project, as at the time the project was terminated, unless "proceeds of sale from the project" included sale of the property not yet transferred to the joint venture company. Mr Molloy determined that this was not the case and the parties agreed to accept his determination as binding.

339 In the circumstances it is unnecessary for me to determine this issue given the finding I have made in (v) above. Had it been necessary, I would have said the parties were bound by the Molloy determination in this respect.

Conclusion

340 On JND's claim, I find that the Molloy determination is binding as a matter of contract between the parties insofar as it construes particular clauses (in isolation of the events which occurred) but not otherwise. It does not determine the ultimate issue of liability in relation to JND's claim for monies in respect of project costs or Focus' claim for recovery of its contributions to the project costs.

341 If the reasoning underlying Mr Molloy's determination suggests that clause 3.1 of the JVA operates in the present circumstances (an issue which it does not appear Mr Molloy addressed and which it seems he was not asked to address) then I would with respect find that to be in error and, in circumstances where this is an attempt by JND to enforce Mr Molloy's determination, I consider that in equity it would be open to me to decline to enforce the determination for that reason.

342 I find that the Tolcher determination is not binding insofar as it purports to determine a liability on the part of Focus to pay moneys to JND (and, in any event, is not binding insofar as it amounts to no more than an adoption of figures on the stated assumption that those figures correctly record the parties' respective contributions to project costs).

343 I find that JND has not established that Focus is liable for the amount it claims, in circumstances where the agreement to bear project costs equally was one which operated during the course of the project but the agreement made no provision for what was to happen when the project came to a premature end and was abandoned by the parties.

344 I dismiss JND's claim.

345 On the cross-claim by Focus I am satisfied that the project was treated by both parties as having come to an end with the sale of the property. Once the property was sold it was impossible for the project to proceed and in that sense the purpose of the JVA (though not the contract itself) was clearly frustrated. The JVA has no provision which deals with determining how the parties' rights and liabilities were to be adjusted following termination of the joint venture in these circumstances. The parties in their agreement dealt with what was to happen if the project failed at an earlier stage, but seem not to have contemplated the situation where the project failed *after* the land loan facility was obtained but before satisfaction of the condition precedent necessary for exercise of the put and call option.

346 I find that Focus is entitled to recovery of the amounts paid by it towards the project costs, in circumstances where the underlying substratum of the joint venture has failed without fault by either party, there has been a total failure of consideration for the making of those contributions and it would be unconscionable for JND to retain those contributions.

347 JND has accepted that those contributions total $90,086.22 excluding GST (and Mr Tolcher has confirmed the arithmetic accuracy of such a calculation). Accordingly, there should be an order for recovery of that amount.

Orders

348 I make the following orders:

1. A declaration that the first defendant is entitled to restitution in respect of the contributions it made pursuant to the Joint Venture Agreement with the plaintiff towards the costs of their failed joint venture project, those contributions amounting to $90,086.22 excluding GST.

2. An order that the second defendant pay to the first defendant the controlled monies held in its trust account referable to the proceeds of sale of the property the subject of the joint venture and any interest which has accrued thereon.

3. An order that any shortfall between the moneys held by the second defendant and the amount of $90,086.22 be paid by the plaintiff to the first defendant.

4. An order that the first defendant pay interest on the amount of the judgment debt from the date on which the sale proceeds were placed in the second defendant's trust account at court rates.

5 The plaintiff's statement of claim be dismissed with costs.

349 I propose to order costs in favour of the first defendant on its cross-claim. I will hear any submissions as to the appropriate form of the orders and as to costs.

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LAST UPDATED:
5 March 2010