NEW SOUTH WALES SUPREME COURT

CITATION:
Lahoud v Lahoud [2010] NSWSC 1297

JURISDICTION:
Equity

FILE NUMBER(S):
07/255809

HEARING DATE(S):
28 & 29 October 2010

JUDGMENT DATE:
10 November 2010

PARTIES:
Victor Lahoud (First Plaintiff/First Cross-Defendant)
Castle Constructions Pty Ltd (Second Plaintiff/Second Cross-Defendant)
Solidare Pty Ltd (Third Plaintiff/Third Cross-Defendant)
Joseph Lahoud (First Defendant/First Cross-Claimant)
Joseph Lahoud & Associates Pty Ltd (Second Defendant/Second Cross-Claimant)
Stephen Roger (Fourth Cross-Defendant to Second Cross-Claim)

JUDGMENT OF:
Ward J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
M Einfeld QC with S Philips (Victor Lahoud parties)
S Epstein SC (Joseph Lahoud parties)

SOLICITORS:
McLachlan Thorpe Partners (Victor Lahoud parties)
Robertson Saxton Primrose Dunn (Joseph Lahoud parties)
Ian Harold Congdon (Stephen Roger) (submitting appearance save as to costs)

CATCHWORDS:
PRACTICE and PROCEDURE
whether audit conducted pursuant to orders previously made is valid or should be set aside
whether audit in conformity with contract
whether an obligation of natural justice owed by auditor
HELD
audit was in conformity with contract as previously construed
no obligation of natural justice
receipt of submissions assumed at best an obligation to give due consideration and a reasonable opportunity to respond
there was no breach of any such duty
the sum repayable by Joseph Lahoud consequent upon the audit is $346,027.17
costs of the audit are the reasonable costs of the auditor in the conduct of the audit (including his costs of considering and responding to the various submissions put to him)
RESTITUTION
whether entitlement to a 'freestanding' award of interest for restitution of interest on sum retained in accordance with Terms of Settlement but repayable upon subsequent audit determination
HELD
no unjust enrichment
no restitution of interest

LEGISLATION CITED:
Civil Procedure Act 2005 (NSW)

CASES CITED:
Alati v Kruger [1955] HCA 64; (1955) 94 CLR 216
Andrews v Queensland Racing Limited [2009] QSC 364
Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1988) 164 CLR 662; 78 ALR 157; [1988] HCA 17
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485
Barber v Kenwood Manufacturing Co Ltd [1978] 1 Lloyds Rep 175
Boreland v Docker [2007] NSWCA 94
Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd (1990) 20 NSWLR 26
Capricorn Inks Pty Limited v Lawter International (Australasia) Pty Limited [1989] 1 Qd R 8
Chow and Ors v Yang and Ors [2010] SASC 96
Commercial Bank of Australia v Younis [1979] 1 NSWLR 444
Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51; 126 ALR 1; [1994] HCA 61
Commonwealth Homes and Investment Ltd v Smith (1937) 59 CLR 443
Commonwealth of Australia v SCI Operations Pty Ltd (1998) 192 CLR 285
Cornwall v Rowan (No 2) [2005] SASC 122
David Securities Pty Ltd v Commonwealth Bank of Australia [1992] HCA 48; (1992) 175 CLR 353
Delbridge v Low [1990] 2 Qd R 317

Dextra Bank & Trust Company Limited v Bank of Jamaica [2002] 1 All ER (Comm) 193
Enron Australia Finance Pty Limited (in liq) v Integral Energy Australia [2002] NSWSC 753
Farah Constructions Pty Limited v Say-Dee Pty Limited (2007) 230 CLR 89
Fletcher Construction Australia Limited v MPN Group Pty Limited (unreported, NSWSC, 14 July 1997)
Fryer v Sturt (1855) 16 CB 218; 139 ER 740 743
Gett v Tabet (2009) 254 ALR 504; [2009] NSWCA 76
Gould v Vaggelas (1985) 157 CLR 215
Haxton v Equuscorp (formerly Equus Financial Services Ltd) (ACN 006 012 344) (2010) 265 ALR 336; [2010] VSCA 1
Henville v Walker (2001) 206 CLR 459
Hermann v Charny (1976) 1 NSWLR 261
Hermann v Charny (1976) 1 NSWLR 261
Heydon v NRMA Ltd (No 2) [2001] NSWSC 445; (2001) 53 NSWLR 600
John Nelson Developments Pty Limited v Focus National Developments Pty Limited [2010] NSWSC 150
Karenlee Nominees Pty Ltd v Gollin & Co Ltd [1983] 1 VR 657
Kelly v Solari (1841) 9 M & W 53; 152 ER 24
Kioa v West (1985) 159 CLR 550,
Kleinwort Benson Ltd v Lincoln City Council [1998] 4 All ER 513, [1999] 2 AC 349
Lactos Fresh Pty Ltd v Finishing Services Pty Ltd (No 2) [2006] FCA 748
Lahoud v Lahoud [2006] NSWSC 126
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314
Lexane Pty Ltd v Highfern Pty Ltd [1985] 1 Qd R 446
Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27; (2008) 232 CLR 635; (2008) 247 ALR 412
McClelland v Burning Palms Surf Life Saving Club [2002] NSWSC 410
Morgan Equipment Company v Rodgers (No2) (1993) 32 NSWLR 467
Murdocca v Murdocca (No 2) [2002] NSWSC 505
National Australia Bank Ltd v Bond Brewing Holdings Ltd [1991] 1 VR 386
National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd (23 April 1997, unreported)
Pavey & Matthews Pty Ltd v Paul [1987] HCA 5; (1987) 162 CLR 221
PC Developments Pty Ltd v Revell (1991) 22 NSWLR 615
R v Companies Auditors Board; Ex Parte Viney (1978) 3 ACLR 745
Renard Constructions (ME) Pty Limited v Minister for Public Works (1992) 26 NSWLR 234
Roads and Traffic Authority v Ryan (No 2) [2002] NSWCA 128
Rodger, Carnie and Gilman v Comptoir D'Escompte de Paris (1871) LR 3 PC 465
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516 ; 185 ALR 335; [2001] HCA 68
Salib v Gakas; Newport Pacific Pty Ltd v Salib [2010] NSWSC 505
San Sebastian Pty Ltd v The Minister (1986) 162 CLR 340
SCI Operations Pty Limited and Aci Operations Pty Limited v Commonwealth of Australia [1996] FCA 1739
Seltsam Pty Limited v Ghaleb [2005] NSWCA 2008
Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue and another [2007] UKHL 34, [2007] 4 All ER 657

Sibley v Grosvenor (1916) 21 CLR 469
State Bank of New South Wales Ltd v FCT (1995) 62 FCR 371; 132 ALR 653
Sutcliffe v Thackrah [1974] AC 727
The Autothrepetic Steam Boiler Cp., Limited and Townsend, Hook & Co, In re an Arbitration between (1888) 21 QBD 182
Triarno Pty Limited v Tridon Contractors Limited (unreported, NSWSC, 22 July 1992)
Ucar v Nylex Industrial Products Pty Limited [2007] VSCA 181
Walker & Son & Brown, In re an Arbitration between (1882) 9 QBD 434
Wasada Pty Limited v State Rail Authority of New South Wales (No.2) [2003] NSWSC 987
Westdeutsche Landesbank Girozentrale v Islington London BC [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL
Woolwich Equitable Building Society v IRC (No 2) [1992] 3 All ER 737, [1993] AC 70
Xuereb v Viola (1989) 18 NSWLR 453
Ying v Song [2009] NSWSC 1344

TEXTS CITED:
Birks, Introduction to the Law of Restitution, Oxford Clarendon Press, 1985
Burrows (ed), Essays on the Law of Restitution, Oxford Clarendon Press, 1991
Finn (ed), Essays on Restitution, Law Book Co., 1990
Goff and Jones, The Law of Restitution, 4th ed, Sweet & Maxwell, 1993
Halsbury's Laws of England, 4th ed, vol 9, Butterworths
Mason, Carter and Tolhurst, Mason & Carter's Restitution Law in Australia, Butterworths, 1995

DECISION:
Declare that the Independent Auditor's Report dated 24 August 2010 is valid. Order that Joseph Lahoud pay the sum of $346,027.17 to Victor Lahoud. Order that Joseph Lahoud pay the reasonable costs of (or fees rendered by) the auditor in relation to the audit. Amended Second Cross-Claim brought by Joseph Lahoud and Joseph Lahoud & Associates be dismissed. Order that cross-claimants pay the fourth cross-defendant's costs of the cross-claim. To hear submissions on other costs orders as necessary.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

WARD J

WEDNESDAY 10 NOVEMBER 2010

07/255809 VICTOR LAHOUD & 2 ORS V JOSEPH LAHOUD & ANOR

JUDGMENT

1 **HER HONOUR**: Before me for hearing on 28 and 29 October 2010 were two opposing applications in relation to the outcome of an audit carried out by an accountant (Mr Stephen Roger) pursuant to orders I made last year in these proceedings (then numbered 3582/07).

2 The first is an application brought by way of Notice of Motion filed on 16 September 2010 by the plaintiffs in these proceedings (to whom I will refer for convenience as the Victor Lahoud parties) seeking declaratory and other relief against the defendants (the Joseph Lahoud parties) predicated on the validity of the audit. The second is a claim by the Joseph Lahoud parties pursuant to an Amended Second Cross-Claim, to which they have joined Mr Roger as the fourth cross-defendant, seeking declaratory and other relief as to the alleged invalidity of the audit on the basis that it was not in accordance or in conformity with the contract pursuant to which it was conducted (because Mr Roger failed to address the proper subject matter of the audit and/or because he denied the Joseph Lahoud parties natural justice).

3 No relief is sought directly against Mr Roger, who has filed a submitting appearance (except as to costs) and whose legal representative sought to be, and was, excused from attendance at the hearing (following confirmation from Senior Counsel appearing for the Joseph Lahoud parties (Mr Epstein SC) that no claim for damages or compensation was sought to be made against Mr Roger consequent upon any finding that might be made to the effect that there had been a breach by him of his contract of retainer in relation to the audit).

Background to the present applications

4 Briefly, by way of background, there were before me last year two separate proceedings, both involving the two brothers (Victor and Joseph Lahoud) and entities associated with each (in the case of Victor, those being Castle Constructions Pty Limited and Solidare Pty Limited; and in the case of Joseph, that being Joseph Lahoud & Associates Pty Limited ("JLA")). The current applications are made in what were referred to in the substantive hearing as the audit proceedings (formerly 3582/07 now 07/255809). (The other proceedings, referred to as the damages proceedings, are of no relevance for present purposes.) The two proceedings were heard together.

5 The history of the disputes between the parties is set out in some detail in my reasons for judgment published on 3 July 2009 in the substantive proceedings and I do not propose here to repeat that, other than as necessary for the purposes of the current applications.

6 On 6 February 2001, Terms of Settlement were signed by the parties recording an agreement for the dismissal by consent of proceedings then before the Industrial Relations Commission of New South Wales. Those Terms of Settlement (which in May 2005 were held by Palmer J to be binding on the

parties) provided, among other things, for the payment to Joseph Lahoud of the sum of $570,000 and for the parties to enter into a deed in accordance with their agreement but with the inclusion of some additional terms including a mutual release. In consideration for the entry into the Terms, the then proceedings were dismissed.

7 The sum of $570,000 coincided in amount with (and, as I accepted in the substantive proceedings, in Victor's eyes represented) Victor Lahoud's then estimate of a half share of the profits of the Cammeray property development in which the brothers had been involved (and over which they had been for some time in dispute). Joseph Lahoud did not accept that estimate.

8 Victor Lahoud had indicated to Joseph Lahoud, shortly before the Terms of Settlement were agreed, that the net profits of the Cammeray development would be in the order of $1.5 million. However, on the morning the Terms of Settlement were signed, certain "figures" were provided to Joseph Lahoud (which later formed part or all of Annexure "A" to the Terms of Settlement) that showed a lower profit for the project. Joseph Lahoud did not accept that those "figures" were accurate. His legal advisers told him that he could seek to have a provision included in the Terms of Settlement allowing for an audit and on his behalf they made such a request. The Victor Lahoud interests acceded to that request on the basis that there should be a right on both sides to elect to have an audit carried out.

9 Paragraph 1 of the Terms of Settlement thus came to include provision for either party "*to elect to have the figures audited*" (my emphasis) and for what was to occur by way of repayment or adjustment as between the respective parties once the outcome of any such audit was known. The provision for adjustment thus contemplated that one outcome of any audit was that the audited profit might be less than the profit calculation referred to in the Terms of Settlement.

10 Thus far, there seems to be no real factual dispute. Nor is there any dispute that the sum of $570,000 was paid to Joseph Lahoud on 6 February 2001. However, there is a dispute as to what that sum should now be seen as representing in the context of the question as to what amount is repayable by Joseph Lahoud if the Roger audit is valid.

11 Joseph Lahoud's evidence in cross-examination in the substantive proceedings as to his understanding of this amount focussed not on the relationship that this particular amount bore to the profits of the project but rather on the fact that it was "half of the figures in annexure A" – T 127.21. He accepted that the payment he received as half of the gross profit was in the order of $346,000 (T 134.36) but said that it did not matter to him how the components of the $570,000 were categorised in Annexure A - it was the total figure with which he was concerned (T 134.39). That evidence is consistent with the purpose of any audit under clause 2 being to produce a determination of the overall profits of the project (from which Joseph Lahoud was to recoup his half share), as I held in the substantive proceedings, since it is clear that what Joseph Lahoud maintained an entitlement to was a half share of the profits.

12 In the present context, the question as to what should be taken (objectively speaking) to have been understood by the parties as being represented by the sum of $570,000 paid in 2001 pursuant to the Terms of Settlement becomes relevant when considering what was meant by the words "said profit calculation" in clause 2 of the Deed, an issue addressed later in these reasons.

13 As I say, the sum provided for under the Terms of Settlement was duly paid. However, the parties were initially unable to agree on the terms of the deed to be entered into pursuant to paragraph 7 of the Terms of Settlement. There then arose a dispute as to whether there had been a repudiation by the Joseph Lahoud parties of the agreement recorded in the Terms of Settlement and that dispute was heard by Palmer J, who made orders in October 2005 for the execution of a deed by way of specific performance of the Terms of Settlement. A Deed of Settlement was (finally) executed on 5 February 2007, pursuant to the orders that had been made by his Honour in October 2005 (the delay occasioned by an unsuccessful appeal brought by the Victor Lahoud interests from his Honour's decision).

14 Clause 2 of the Deed of Settlement, which acknowledged the $570,000 payment, gave each party a right (in the same terms as had the Terms of Settlement) to elect to have an audit carried out. The Victor Lahoud parties almost immediately invoked that right and there was then a dispute as to whether there was a subsisting entitlement on their part to elect for an audit (notwithstanding the terms of the Deed) in the events which had happened and, if there were to remain a right to an audit under the Deed, as to what was to be the subject of the audit. Those questions came before me in the substantive proceedings (and the latter seemingly remains in dispute notwithstanding the findings I made last year).

15 The Joseph Lahoud parties (who had denied any subsisting entitlement on the part of the Victor Lahoud parties to an audit pursuant to clause 2 of the Deed) contended in the substantive proceedings that if there did remain any entitlement to an audit then this was to be limited to an audit of the "figures" contained in Annexure A to the Deed (as opposed to an audit of the profit of the Cammeray development to which those "figures" related).

16 Annexure A (to both the Terms of Settlement and Deed of Settlement), which has been the centre of much attention on the current application, comprised a two page document headed "Costs" and 28 pages of what seem, on their face, to be what could best be described as supporting documentation (MYOB printouts and certain invoices) for the calculations set out in the preceding two page document.

17 Relevantly, for present purposes, that two page costs calculation set out a series of amounts totalling a sum of $4,745,875.02 (described as 'Total Cost', but which did not include all of the costs of the project, having omitted at least to include the stamp duty payable); a series of amounts producing a net sale proceeds figure of $5,437,929.36; and then the following:

Gross profit: 5,437,929.36

4,745,875.02

692,054.34

50% of gross profit = $346,027.17

Reimbursement = $223,402.90

$569,430.07

18 The last figure on the page (the $569,430.07 figure) as rounded up, provides the logical explanation for the $570,000 payment for which provision was made in the Terms of Settlement (and which was paid in February 2001) and seems to have been treated as such, at least by the Victor Lahoud parties. The thrust of Joseph Lahoud's cross-examination in the substantive proceedings was also to accept that this was the case. If so, then on the face of Annexure A the sum of $570,000 represents *both* a 50% share of the estimated gross profit of the project *and* a reimbursement of project costs shown as being attributable in some fashion to JLA. (I note that in cross examination in the substantive proceedings it seemed in effect to be put to Joseph Lahoud, and accepted by him, that the sum of $223,000 was for reimbursement of costs (T 174.29) with the balance representing a share of gross profit.)

19 In the determination of the substantive issues in the audit proceedings, I held that the Victor Lahoud parties *were* entitled to an audit pursuant to clause 2 of the Deed of Settlement and, relevantly for present purposes, that such an audit was to be of "the profits of the Cammeray project (and not merely an audit of the figures appearing in Annexure "A" of the Terms of Settlement alone)". In due course I made a declaration in those terms. The question so determined had been posed by agreement between the parties and the subject of submissions by both sides. If I may say so, the construction I placed on the meaning of clause 2 in that regard represented a considered view on my part and one which I had thought to be expressed in very clear terms.

20 Following that decision in July 2009, the parties (not without further dissension along the way) appointed Mr Roger to carry out the clause 2 audit. One of the matters of dissent was as to the terms of the instructions to be given to Mr Roger in the form of a joint letter of instructions and, in particular, whether it was to include a statement requested by the Victor Lahoud interests to the effect that "The Parties will not make submissions of any kind, nor interfere in any way with the conduct of the audit, except to respond to any query which you may have in the process of conducting the audit" (a statement to which the Joseph Lahoud parties now point as indicative of a desire of the Victor Lahoud parties effectively to shut Joseph out of the audit process).

21 The Victor Lahoud parties, exercising the liberty to apply that I had granted in July, then brought the matter back before me on 12 November 2009, seeking various directions as to the appointment of the auditor to carry out the audit and, in particular, a direction that the procedure to be followed in making the audit be determined by the auditor and a direction (along the lines that the Joseph Lahoud parties

had rejected) in relation to the ability or otherwise of the parties to make submissions to the auditor. On that occasion I directed (by consent) that the procedure to be taken in undertaking the audit was to be determined by the auditor. I also directed that Mr Roger be provided with a joint instruction letter in the terms of that which had been prepared but omitting the proposed limitation on the making of submissions to the auditor (the question whether the auditor considered it appropriate to call for or entertain submissions by the parties being, in my view, a matter of procedure for him to determine).

22 That joint instruction letter, dated 12 November 2009, provided, relevantly, as follows:

> Both parties hereby request that, pursuant to the orders of Ward J made on 31 July 2009, you undertake *an audit of the profits of the Cammeray Project*. (my emphasis)
>
> The manner in which the audit is to be conducted is entirely a matter for your determination.

23 Mr Roger then proceeded to conduct the audit (which took some 9 months and in the course of which he received various submissions from the parties) and published his conclusion in a document headed Independent Auditor's Report, dated 24 August 2010, the sub-heading to which was "Report on the Property Development Statement" under which appeared the following:

> I have audited the accompanying Property Development Statement [that being a document which had been prepared by the project development company's accountants, Castletons, and forwarded by them to Mr Roger on 2 October 2009 prior to the joint appointment letter and without the Joseph Lahoud parties' knowledge] … for the period from 1997 through to 2001.

24 The Audit Report identified a number of discrepancies in or adjustments to be made to the Property Development Statement (to which I will refer as the PDS), attached an Adjusted PDS disclosing a net development loss of $16,454.89 and concluded that:

> In my opinion, except for the effects on the Statement of the matters referred to in the preceding paragraph, the [PDS] gives a true and fair view of the profits of the Cammeray Project as required by Order 3 of Ward J dated 31 July 2009."

25 Not surprisingly, perhaps, given the history of the disputes between the brothers, issue was taken by the Joseph Lahoud parties throughout the course of the audit as to various aspects of the audit process; the Victor Lahoud parties generally took an opposing stance on those matters; there was an unedifying exchange of acrimonious correspondence throughout the course of the audit from both sides; and the Joseph Lahoud parties have not accepted that the outcome of the audit process is binding upon them. Hence the applications now before me.

26 In particular, the Joseph Lahoud parties contend that:

(i) it was an implied term of Mr Roger's retainer that, in his conduct of the audit, he would accord the parties natural justice and would not receive material relating to the audit from one party without ensuring that the adverse party was also provided with that material and given a reasonable opportunity to answer it (paragraph 8 of the Amended Second Cross-Claim);

(ii) the Audit Report "was not an audit of the profit calculation of $692,054.32 referred to in clause 2 of the Deed", as said to be required by the instruction letter (paragraph 11 of the Amended Second Cross-Claim) and, not being in accordance with the contract constituted by the Deed, does not give rise to any rights under the Deed (paragraph 12 of the Amended Second Cross-Claim);

(iii) alternatively, the Audit Report does not give rise to any rights under the Deed on the grounds that Mr Roger denied natural justice to the Joseph Lahoud parties (in that he received material relating to the audit from the Victor Lahoud parties without ensuring that the Joseph Lahoud parties were provided with that material and given a reasonable opportunity to answer it) (paragraph 13 of the Amended Second Cross-Claim).

27 The material with which it is said that the Joseph Lahoud parties were not provided and were not given a reasonable opportunity to answer was pleaded as being:

(a) the MYOB files identified in a letter dated 16 December 2009 from the Victor Lahoud parties to Mr Roger (contained at tab 56 of Exhibit 1 on the present applications); and

(b) a document entitled "Explanatory Notes and Disclosures" (contained in the attachment to the document at tab 115 to Exhibit 2 on these applications) and 'the source documents referred to therein'. (I should add that it is accepted that the quantum of the amounts the subject of complaint on this aspect of the matter is somewhere in the order of $17,000, in the context of a project the overall loss on which, as indicated in the Audit Report, is in the order of $16,000. Therefore, it is difficult to see how any error in the inclusion of this amount as an expense of the project could have materially affected the outcome of the audit.)

28 It is relevant to note that there is no allegation (and nor on the facts could there have been) that the Joseph Lahoud parties were not permitted to inspect the material itemised in paragraph 13(a) and (b) of the Amended Second Cross-Claim or to make submissions on such material. The complaint is that they were not given copies of the material (or some of the material, since they accept that they were provided with the Explanatory Notes statement itself) and as to the form in which some of the material was presented for inspection. There is also a complaint as to the manner in which a request for re-inspection of material was treated.

29 No complaint is made in the pleading as to any bias or collusion on the part of Mr Roger, although emphasis was placed (in the course of Mr Epstein's written and oral submissions) on what was said to have been the 'unilateral' and 'covert' provision of information to, and 'surreptitious dealings' with, Mr Roger (and an earlier nominated auditor) on the part of the Victor Lahoud parties or on their behalf. It was submitted by Mr Epstein that this had 'led' Mr Roger to "misconceive his proper function". It

was further asserted in submissions, though nowhere was it pleaded, that Mr Roger had been induced to 'acquiesce' in the Victor Lahoud parties' "tactics" (those allegedly being to shut out the Joseph Lahoud parties from effective participation in the audit process). Reference was also made to the steps taken by the Victor Lahoud parties in relation to the so-called Baker Taylor "audit" (the subject of comment in the substantive proceedings), this seemingly being put forward as indicative of a tendency on the Victor Lahoud parties' interests to seek to exclude participation by the Joseph Lahoud parties from any audit process.

30 In that regard, it hardly needs to be said that allegations of fraud or collusion between the auditor and the Victor Lahoud parties or of actual bias on Mr Roger's part would have needed to have been expressly pleaded in order now to be maintained. They were not. Although said to be put as 'context' from which I could draw certain conclusions as to the issue whether the audit was conducted in accordance with the contract (or to see how it was that Mr Roger had come to act otherwise than in conformity with the contract), it is hard to see this evidence as anything more than symptomatic of the ongoing suspicion and distrust on the part of the Joseph Lahoud parties towards the Victor Lahoud parties (which, of course, may well be mirrored on the latter's part). I accept the submission by Senior Counsel for the Victor Lahoud interests (Mr Einfeld QC) that those matters are irrelevant to the issues I presently have to determine. How Mr Roger came to determine what it is that he was required to audit seems to me to have nothing to with whether he audited what he was required to do in accordance with the contract.

31 The Joseph Lahoud parties say that if any amount *is* payable as a result of the audit it is limited to the sum of $346,027.17 (that being a half share of the difference between the amount described in Annexure A to the Terms of Settlement (and Deed) as the gross profit ($692,054.34) and the amount of the profit as audited (i.e. nil).

32 The Victor Lahoud parties, on the other hand, contend that Joseph Lahoud is liable to repay the whole of the sum of $570,000 (or, alternatively, $570,000 plus half of the audited loss of $16,454.89 on the basis that the losses were also to be shared by the brothers).

33 There is also a dispute as to what is meant by 'the reasonable costs of the audit' which are payable by Joseph Lahoud in the event that the audit is upheld as being valid (since it discloses a profit figure less than that in Annexure A). The Victor Lahoud parties, by their notice of motion, sought an order in that regard which would include their legal and other costs of preparation for the audit and not just Mr Roger's fees. Mr Epstein submits that the 'costs of the audit' relate solely to the costs of the auditor in carrying out the order (and that, in any event, I could not on the material before me perform any form of costs assessment as to the reasonableness of the other fees claimed).

34 Finally, a claim is made by the Victor Lahoud parties for interest on the sum of $570,000 (or the lesser sum of $346,027.17 if that be the appropriate figure) at Supreme Court rates from February 2001. It

was conceded by Mr Einfeld that there could be no contractual claim for interest until after the audit had concluded and a sum was determined to be repayable by Joseph Lahoud in accordance with clause 2 of the Deed of Settlement. The basis on which the interest claim for the period from 2001 was ultimately put was on a restitutionary basis. Interest has been calculated at a total of $519,996.16 (on the higher amount) or $315,671.58 (on the lesser amount) in accordance with a schedule handed up by Mr Einfeld. Mr Epstein denies that there is any 'free-standing' restitutionary right to interest.

Issues

35 The following issues now arise for determination:

1. Was the audit carried out otherwise than in accordance with the contract constituted by the Deed? In particular:

   (a) was the audit an audit of "the profits of the Cammeray project" as required pursuant to the orders that I made last year or was it an audit of something else (such as the PDS, as the Joseph Lahoud parties assert)?

   (b) was there an obligation on the part of Mr Roger to accord the parties natural justice in the conduct of the audit and, if so, was there a breach of that obligation?

2. If the audit is valid:

   (a) what is the amount payable under clause 2 of the Deed of Settlement by Joseph Lahoud ($570,000 or $346,027.17) (and is there any further amount payable by Joseph Lahoud referable to a share of the net losses as determined on the audit?)

   (b) do the "costs" of the audit for which Joseph Lahoud is liable include anything other than the costs of or fees rendered by the auditor?

   (c) are the Victor Lahoud parties entitled to interest in equity on the principal sum repayable as determined in (a) above from the date of the payment to him in February 2001 on a restitutionary basis and, if so, at what rate?

36 In summary, I am of the view that the audit was conducted in conformity and in accordance with the contract constituted by clause 2 of the Deed of Settlement and is not liable to be set aside. It was an audit on the "profits" of the development (that being the construction I had placed on the clause) and was determined in the manner Mr Roger seems to have considered, in the exercise of his expertise, most appropriate. (The fact that another auditor might have carried out that function in a different way is not to the point.)

37 I do not consider that Mr Roger, by reason of his appointment to carry out the audit, had an obligation to afford the parties natural justice in the conduct of the audit and nor did he by his conduct assume such an obligation. At the highest, I consider that, by calling for and/or receiving submissions from the respective parties, Mr Roger was required to give due consideration to those submissions and afford a reasonable opportunity to the opposing parties to respond to those submissions. I find that he did so.

38 I do not consider that Mr Roger had any obligation to provide the Joseph Lahoud parties with copies of the MYOB files referred to in paragraph 13(a) or the material referred to in paragraph 13(b); nor do I consider that the Joseph Lahoud parties were denied a reasonable opportunity to consider and answer the material referred to in paragraph 13(b) of the Amended Statement of Cross-Claim.

39 As to the remaining issues, I consider that the sum repayable by Joseph Lahoud pursuant to clause 2 of the Deed of Settlement consequent upon the determination of the audit is $346,027.17; that the costs of the audit which Joseph Lahoud is obliged to pay are the reasonable costs (or fees) of the auditor in the conduct of the audit (including his costs of considering and responding to the various submissions put to him); and that there is no entitlement to interest from February 2001 on the sum now repayable to Victor Lahoud (there being no injustice in the retention by Joseph Lahoud of the sum paid to him in February 2001 as part of the agreed resolution of the then Industrial Relation Commission proceedings until such time as the audit was completed). (A claim for interest under s 100 of the *Civil Procedure Act* 2005 (NSW) would lie from the date on which the cause of action for payment under the Deed arose, which in my view would be a reasonable time after the making of the audit determination and/or a demand for the amount payable under that determination.)

Issues

40 I turn then to the issues before me for consideration and, as its construction is yet again in issue, I first set out the relevant part of the text of clause 2 of the Deed of Settlement:

> …The [Victor Lahoud parties] *have provided written details of the profit calculation for the Cammeray Project which is Annexure "A" to the Terms of Settlement,* and as at 6 February 2001, verily believed that those details were accurate. *Either party may elect to have the figures audited* by an accountant to be agreed, or in default of agreement as nominated by the President of the Institute of Chartered Accountants. If on audit, the audited profit exceeds the said profit calculation, [Joseph Lahoud] is to be paid one half of the difference by [the Victor Lahoud parties]. *If the audit profit is less than the said profit calculation*, [Joseph Lahoud] will pay the [Victor Lahoud parties] one half of the difference. The reasonable costs of the audit are to be paid by [Joseph Lahoud] in the event that the audited profit figure is the same or less than the said profit calculation. (my emphasis)

41 At the outset, I also note that it seemed to be accepted by the parties (although the Joseph Lahoud parties do not accept that this has the consequence that there is no obligation to observe the principles

of natural justice) that in carrying out the audit Mr Roger was in the position akin to an expert or appraiser (and not an arbitrator as such), a distinction that is of some relevance when considering the existence of any obligation to accord procedural fairness in the conduct of his audit, for the reasons explained in my analysis of the relevant case law in *John Nelson Developments Pty Limited v Focus National Developments Pty Limited* [2010] NSWSC 150 (from [206]). There was certainly no suggestion that Mr Roger had been appointed to carry out an arbitration, as that process is generally understood, of the dispute as to the profits of the project.

42 It was further accepted by way of general principle that, 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 or in conformity with the contractual contemplation of the parties in the sense considered in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314; and that apprehended bias is not sufficient (*Andrews v Queensland Racing Limited* [2009] QSC 364, McMurdo J). As no actual fraud or collusion was pleaded, the criticisms made of the so-called covert or surreptitious behaviour of the Victor Lahoud parties, whether or not they have foundation, seem to me to be irrelevant.

1. Was the audit in accordance with the contract?

(a) Was there a mistake as to the subject matter of the audit?

43 In *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657, at 671, (which was approved by McHugh JA in *Hudson,* at 335A), it was said that an expert determination will not give rise to enforceable consequences, if the expert is guilty of a "*mistake …as to the subject matter or terms or effect of the contract*". This is because a determination tainted by such a mistake is "*not in accordance with the contract*". The example often given in this context is of a rent review valuation/determination where the valuer makes a mistake as to the premises to be valued (as dealt with in *Hudson*).

44 What then is the mistake that is said to infect Mr Roger's audit and render it liable to be set aside? Although a number of issues were taken as to the audit process (including a dispute as to whether the contract provided for a 'statutory' audit or one carried out in accordance with the relevant statutory audit obligations (which was the approach seemingly adopted by Mr Roger) as opposed to an 'engagement' (not strictly an audit so-called) as an independent referee to determine the profit of the project in accordance with accounting standards and any necessary enquiries (of the kind which the first prospective auditor, Mr Cully Gower, said he was prepared to undertake) and a dispute as to whether the auditor had appropriately had regard to the correct auditing standard that would have been applicable to a statutory audit undertaken in the relevant period), what Mr Epstein in substance relies on for the assertion that what Mr Roger did was not in accordance with clause 2 of the Deed turns on the focus placed by Mr Roger on the PDS.

45 Mr Epstein expressed this criticism in a number of ways. In his written submissions, Mr Epstein submitted that the function of auditing a particular "profit calculation" for a particular property development project is not identical with the function of auditing a different "profit calculation" for that same project and that (Mr Roger having carried out an audit of the calculation in the PDS and not that set out in Annexure A) there was a material departure from his instructions. In oral submissions it was similarly emphasised that what Mr Roger was not entitled to perform was an audit on an 'entirely different profit calculation' to that referred to in clause 2 of the Deed of Settlement.

46 When asked what Mr Roger should have done, Mr Epstein's response was that he needed to have regard to the Annexure A profit figures and to perform his audit function by reference to those figures (and not by reference to the figures in the PDS furnished by the Victor Lahoud parties). Expanding on that, Mr Epstein said that what was required was that the subject matter of the audit should have been the profit calculation of $692,054.34 as contained in the Annexure A calculation and that Mr Roger was wrong to perform a statutory audit of a property development statement showing a loss of $13,000 and to perform that audit having regard to the then current auditing standards.

47 Mr Epstein seemed to accept that it would have been open to Mr Roger to determine what type of audit he was going to perform (T 70) or to choose to carry out the audit by reference to whatever auditing standards were applicable at the time (see T 69; T 74) or by way of an assurance engagement if he saw fit (T 74) (though it did seem that there was complaint at one stage as to this being treated by Mr Roger as an assurance engagement involving various parties); or indeed to carry out his audit in whatever manner he thought appropriate (T 75) *even* by reference, if he chose to do, to the PDS (T 75.49).

48 However, Mr Epstein's fundamental complaint was that the audit was not a determination of whether the profit described in clause 2 was a profit with which Mr Roger agreed (T 74.36). He submitted (drawing a distinction between profits and profit figures, which was a constant refrain during the course of address) that Mr Roger was not there "to determine what the profit was" but was there to "audit a profit which was the prima facie position". Thus, while he says that, consistent with my earlier rulings it was open to Mr Roger to introduce or have regard to a whole set of new items, he submits that it was not open to Mr Roger to 'disregard' the profit calculation of $692,054.34 or to treat as the subject matter of the audit the revised profit figures in the PDS.

49 Mr Epstein submits that nothing in my earlier judgment entitled an audit of anything other than the profit calculation figures or profit calculation in Annexure A (see T 71). At T 76, Mr Epstein submitted that nothing in what Mr Roger had been shown to have done confirmed that what he did was what he was required to do under clause 2 ("namely, audit someone else's profits, profit calculation or profit figures and describe whether he was satisfied with that").

50 Mr Epstein says that what Mr Roger did was to audit a profit calculation provided by the Victor Lahoud interests conformably with the framework for an assurance engagement. For the purpose of

demonstrating this, I was taken in some detail through what was said to be the full documentary record (Exhibit 1) to show that Mr Roger's understanding of what he was required to do was erroneous and that he had audited a profit calculation which did not conform to the profit calculation the deed required to be audited.

51 It seems to me what the submissions put for the Joseph Lahoud parties on this aspect of the matter boil down to is an insistence upon the auditor's audit focus being primarily on the "figures" in Annexure A (that being said to be the only legitimate starting point for the enquiry) and (whatever else the auditor may have been able to take into account when so doing and whatever process the auditor may have wished to adopt in so doing) that all the auditor could then properly do is to say whether or not he agreed with the profit calculation set out in those particular figures.

52 I expressed the view, during the course of argument, that if such a submission were to be accepted this might be said to be a triumph of form over substance, by which I meant that if the Annexure A 'figures', as they appear on their face to do, describe a profit calculation of $692,054.34 for the project and if the adjusted PDS, as on its face it does, describes a net loss of around $16,000, then confirmation by the auditor that the latter represents a true and fair view of the profits of the project must logically carry with it the conclusion that the auditor does not accept the former (Annexure A) profit calculation and thus does not agree that the profit of the project is the figure set out in Annexure A. Mr Epstein does not accept that this is a tenable view. He submits (as he did in the substantive hearing) that management can put before an auditor a range of numbers or interpretations of "profit", which may influence the auditor's ultimate conclusion. It seems to me thereby to be suggested that an auditor might legitimately express a variety of different views as to the profits of a project each being said to be a true and fair view, based on the materials before the auditor, of what the profit is (so as to suggest that one could not conclude what the profit was, for the purposes of the clause 2 audit, by reference to anything other than the Annexure A figures).

53 I expressed the view last year, in response to a similar submission by Mr Epstein (that the concept of *"profit"* is not sufficiently precise to make it susceptible to audit), though there directed to the question whether an audit of profits could have been intended by the parties at all, that I would have expected an auditor appointed to carry out an audit of the "profits" of the Cammeray development should be able to form a view as to what, ordinarily, would be regarded as the audited profit of a development project. I considered it a matter for the auditor appointed to determine what properly should be treated as project costs to be taken into account in determining the net profit of the project (by reference to accepted industry standards and having taken into account whatever submissions might be made). I remain of that view.

54 Moreover, to the extent that the auditor's views might be based on assumptions as to matters put to him by the Victor Lahoud parties, as reflected in the PDS, there is nothing to suggest that the Joseph Lahoud parties would not have been able to put forward submissions as to why those assumptions

should not have been adopted (such as to the percentage of shared costs as between the various projects or the like) and there was nothing to suggest that Mr Roger's view as to profit was not an acceptable view based on his expertise. Rather, what the Joseph Lahoud parties appear to cavil with is that he expressed a view as to the profits of the project at all (even though that is what I had concluded the audit under clause 2 required).

55 While the Audit Report might have been better expressed or headed, the conclusion expressed by Mr Roger can only fairly be read as a conclusion that the overall profit/loss of the project was accurately and fairly represented by the PDS as adjusted. In so concluding, Mr Roger has implicitly rejected the contention that the calculation in Annexure A represents a true and fair view of the profits of the project (to use the terminology adopted by Mr Roger in the audit report).

56 Mr Roger was apprised of the position taken by the Joseph Lahoud parties in relation to the subject matter of the audit. In his letter of 19 February 2010, he confirmed that he was treating the PDS as the 'starting point'. Mr Epstein suggests that this was not merely the starting point but the main focus of the enquiry. However, there is no suggestion that Mr Roger did not have before him all the relevant MYOB or other business records (including those in Annexure A) or that he had not reviewed those carefully with any other underlying source material. A data room had been set up and Mr Epstein, in a different context referred to the vast quantity of transactions or items to be reviewed. Mr Roger could hardly have failed to appreciate that there was a significant dispute as to the quantum, if any, of the profits made out of the project and that different calculations of the profit figures were in existence. In his audit report he confirmed that he accepted his responsibility was to express an opinion on a statement (PDS) based on his audit. To the extent that opinion necessarily encompasses a conclusion to the contrary of the statement in Annexure A, then it surely does not need to be articulated for the purpose of providing a valid response in conformity with the contract. A net loss of some $16,000 is clearly not a profit of $692,054.34.

57 In other words, it seems to me that what Mr Roger did was to approach the question as to how the overall project profit/loss was to be determined (and hence his "audit" of the profits of the project) by adopting as his starting point the calculations provided by the company's accountants in the PDS and then determining (by reference to source documents and with the benefit of submissions from the respective parties) whether in his view that reflected a true and fair view of the profit/loss of the project. In so doing, he had before him the calculation in Annexure A and the supporting documentation provided in Annexure A together with other material. The terminology used by Mr Roger in his response is unsurprising given that, as an auditor, expressing a view as to the true and fair representation of profits is what Mr Roger would commonly be asked to do as part of an audit of a company's accounts. However, it does not seem to me that this means that what he ended up doing (however infelicitously he may have expressed it) was other than expressing or making a relevant determination (after an audit process) as to the profits of the project. Mr Roger was aware (from the

letter at 165-166) that the purpose of his appointment was 'to audit the final outcome of the residential project'.

58 The fact that Mr Roger might equally have commenced his task by reference to other material (such as the financial statements of the company or the source material or the documents forming part of Annexure A) or without the benefit of the company's accountants' attempt to apportion or allocate the cost items referable to this particular project as between other projects in which the company was involved, seems to me to be irrelevant. In accordance with the joint letter of instructions, it was a matter wholly within Mr Roger's discretion to determine how best he considered that the audit exercise was to be carried out. In *Triarno Pty Limited v Tridon Contractors Limited* (unreported, NSWSC, 22 July 1992), Cole J held that where 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. Here, the parties expressly left the matter of procedure for Mr Roger to determine.

59 (Although in *Fletcher Construction Australia Limited v MPN Group Pty Limited* (unreported, NSWSC, 14 July 1997), Rolfe J, having referred to the decision of Cole J, commented 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", his Honour did not explain the basis on which there was said to be no doubt as to an obligation to afford natural justice in that instance and I do not understand such an obligation automatically to follow, having regard to what has been said in *Hudson*.)

60 Provided that in reviewing (or, if, as Mr Epstein contends, that be what he did, auditing) the PDS and expressing a view as to its accuracy, Mr Roger was in fact expressing his conclusion as to what was the net profit or loss of the project (which, after all, is what the PDS represented), then in my view he was carrying out the task he was instructed to do and in accordance with clause 2 of the Deed as I had construed it. (I had, last year, expressly rejected the suggestion that what the clause required was an audit of "figure" as opposed to "profits".)

61 It seems to me to be artificial to suggest that all Mr Roger was doing was auditing the 'figures' in the PDS and not the profits of the project when the latter was the very subject addressed by the PDS (and where, on the submissions advanced by Mr Epstein, a similar process directed principally to the figures in Annexure A would have been consistent with clause 2 as I had construed it). (Had the PDS been directed to a wholly different subject matter – say, only to one category of profit or loss in relation to the project or as to a different project or as to a different group entity and had Mr Roger not then gone beyond the contents of that document in his enquiries to address matters relevant to the profits of this particular project, then that might be a different matter. It would then seem arguable that this exercise would not have been of the profits of the project and hence not in accordance with the contract; such that the case might more readily fall within the category of mistake which Mc Hugh JA had given by

way of example in *Hudson* as vitiating an expert determination. However, there is no suggestion that this is what happened in this case.)

62 Insofar as the Joseph Lahoud parties take issue with the auditor making a determination as to the "profits" rather than the particular "profit figures", the Joseph Lahoud parties' position seems perilously close to seeking a re-agitation of the construction of clause 2 for which they had unsuccessfully contended in the substantive proceedings. This seems to me to be evident from their solicitors' letter of 16 November 2009 to Mr Roger. Notwithstanding that I had expressly construed the reference to an audit in clause 2 of the Deed of Settlement as "an audit of the profits of the Cammeray project and not merely an audit of the figures appearing in Annexure A to the Terms of Settlement", what was put to Mr Roger by the Joseph Lahoud parties' solicitors was that "The audit function under clause 2 of the Deed is to audit those profit figures" (and those profit figures to which the letter referred can only be those to which reference was made in the preceding paragraph of the letter, namely the profit calculation set out in the Terms of Settlement of $692,054.34, detailed calculations of which were said to have been annexed in the form of MYOB accounting records and otherwise).

63 I frankly struggle to see this as anything other than an assertion completely to the contrary of my earlier findings in that regard (by which Mr Epstein conceded the Joseph Lahoud parties are bound) nor, despite his best endeavours, was Mr Epstein able to persuade me otherwise. If the Joseph Lahoud parties considered that the construction I had placed on the clause in this regard was incorrect then they were well versed in the avenues for challenging that construction (as the history of this matter reveals) and could have done so. They did not do so and therefore any attempt to persuade Mr Roger to depart from the construction I had placed on that clause would itself be to suggest a departure from the terms of the contract constituted by the Deed (and, had Mr Roger accepted this submission, liable to render his audit open to challenge by the Victor Lahoud parties).

64 Mr Roger, in his letter of 19 February 2010, himself noted that while the 'starting point' of his audit was the version of the financial report (PDS) that had been provided to him by the Victor Lahoud parties, this is no way limited the extent of his 'audit procedures' and did not preclude him from reviewing data not currently disclosed in that report. There is no suggestion that he did not act as he had indicated he would in that regard.

65 JLA's letter dated 28 July 2010 expressed the view that the only 'legitimate' starting point was the profit figures provided in the Terms of Settlement themselves. Again, apart from this being a matter of process in my view, it harks back to the construction for which the Joseph Lahoud parties had unsuccessfully contended in the first place. It was for Mr Roger to determine the 'starting point' for his audit. His task, under clause 2 as construed by me, was *not*, as asserted in the letter, to audit "the profit figures provided in the Terms of Settlement" whether or not those figures might have provided a useful starting point for the audit but, rather, was to audit the profits of the project (as emphasised, correctly in

my view, by the Victor Lahoud parties' solicitors in their letter of 29 July 2010 and accepted by Mr Roger by his own letter of that date).

66 I am not persuaded that Mr Roger failed (by reference to the manner in which he approached his task having reference to the PDS and making adjustments he considered necessary to that document (following his review of the PDS, source documents and the like) to reflect his view as to the accurate statement of the profits/losses of the project) to carry out his audit in accordance with the contract.

67 Accordingly, the first basis on which the Joseph Lahoud parties challenge the validity of the audit report fails.

(b) Duty to accord procedural fairness?

68 The next question is whether Mr Roger had an implied contractual obligation to accord procedural fairness (whether arising by reason of the role he was contractually retained to perform having regard to the nature or requirements of that role or, as Mr Epstein also contended, as part of the implied duty that there seems no doubt as someone in the position of an expert, he had, to act honestly and impartially).

69 Mr Epstein's submission is that the better view is that the implication of an entitlement to receive natural justice is to be made 'generally' in the case of expert determinations (not only those in which the receipt of submissions is contemplated or required) and further that this follows as a matter of course as soon as submissions are contemplated or required. That broad statement of principle does not seem to me to be supported by the authorities in this area, which I had cause recently to review in *John Nelson Developments,* nor does it sit well with Mr Epstein's observation in submissions that it is an open question whether an expert is bound by the rules of natural justice.

70 In *John Nelson Developments*, I observed that, in the absence of express agreement, the question whether an expert (or, for that matter, appraiser) is under a duty to accord procedural fairness had been said to depend on whether the task being carried out by the expert is in the nature of a judicial enquiry. I noted that, speaking extra-curially in 2007 to the Institute of Arbitrators, the Hon. Michael McHugh AC commented 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* (my emphasis) to receive submissions from parties then the rules of natural justice should apply (on the basis that the expert determination in that latter situation was then analogous to a quasi-judicial enquiry). This was the approach accepted by Einstein J in *Enron Australia Finance Pty Limited (in liq) v Integral Energy Australia* [2002] NSWSC 753, namely 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, i.e. 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)

71 I was not taken to any authority which suggested that in general it should be accepted that experts are required to afford natural justice (other than English authority to suggest that they have an implied obligation to act fairly as well as impartially). Rather, at least in Australia, the question turns on what role the expert is retained to play in the particular events in question.

72 Here, there is no suggestion that the parties were appointing Mr Roger as an arbitrator per se (although equally the clause itself does not refer to the appointment of an expert). Mr Epstein contends that the task Mr Roger was to be appointed to perform under that clause necessarily called for the making of submissions by the parties and the ruling on those submissions in some fashion – since he says that it would have been impossible to determine the profits of the project simply by reference to source documents. I am by no means convinced that that is the case. Leaving aside the complication as to the group company's business undertakings being contained in the central group records or accounts, there seems to me no reason why the auditor could not call for the production of documentary records and attempt an assessment on the face of those records. In any event the fact that the auditor might seek submissions (or perhaps more accurately information) from the company does not suggest to me that an arbitral or quasi-judicial process was contemplated.

73 Certainly, the clause would seem to indicate that the parties had in mind the appointment of someone with accounting expertise, given that the nomination of the party to carry out the audit was to be made by the Institute of Chartered Accountants. This suggests that more than a mere bookkeeping exercise was contemplated. Therefore, in the absence of a clear expression of intention to appoint an arbitrator for the purpose of carrying out the clause 2 audit, I would construe the appointment as being that of an expert not that of an arbitrator (and, hence, as not prima facie nor necessarily carrying with it the implication of a duty to accord natural justice in the conduct of the audit).

74 (I interpose to note that whether, as Mr Einfeld submitted, Mr Roger's position was more akin to that of an appraiser than an expert, seems to me to be immaterial since the obligations of expert and appraiser in this regard do not appear to be relevantly any different. In *Capricorn Inks Pty Limited v Lawter International (Australasia) Pty Limited* [1989] 1 Qd R 8, McPherson J in the Supreme Court of Queensland, relevantly contrasted an arbitration and an appraisement, saying of the former that "generally what must be in contemplation is that there will be an 'inquiry in the nature of a judicial

inquiry'. 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 noted that the arbitral function was to hear and resolve opposing contentions of the parties (as opposed to an appraisal or expert decision that typically would be made through specialist knowledge or skills, without any "requirement" or "obligation" of first hearing from the parties.)

75 It is not apparent on the face of clause 2 of the Deed of Settlement that the parties intended the task to be carried out by someone in Mr Roger's position to be analogous to a judicial enquiry. There was no provision for the preparation of evidence to be put before Mr Roger nor was there any reference to the hearing or receipt of submissions by him. Leaving aside the dispute as to the subject matter of the audit (and whether that was to be conducted as a "statutory audit" or by some other means as to the determination of profits), the conduct of an audit (limited or otherwise) is a process or function of the kind in which auditors and their staff must engage on a daily basis, without it ordinarily being suggested that (without more) they are carrying out a judicial or quasi-judicial function.

76 As noted earlier, it was suggested by Mr Epstein that to carry out such an exercise in this particular case it was necessary that there be submissions from the parties concerned. (To an extent that seems to have been predicated in part on the incorrect assumption that what was being audited was no more than the profit calculation of $692,054.34 and not of the profits themselves.) Mr Epstein suggested that without submissions from the parties an audit must necessarily produce the same result as that set out in Annexure A. I am not persuaded that this is necessarily the case. (Even apart from the fact that this suffers from the inconsistency between the premise on which it is based and my earlier findings, the exercise carried out by Mr Einfeld in his submissions – namely, to persuade me that the underlying documentation supported a conclusion that there were profits of considerably more than the $692,054.34 – ably demonstrates that there could be no foregone conclusion in this regard.) There is nothing to suggest that the audit function could not have properly been carried out on a review of documentary materials alone (including with such other documentary material as called for from the auditor). I do not accept that the mere fact that there was to be an audit of the profits necessitated the adoption of a quasi-judicial course of assessing opposing evidence of submissions.

77 In *John Nelson Developments*, I considered whether the fact that the parties had there followed such a procedure (without being "required" to do so) would give rise to an obligation on the part of the expert to afford procedural fairness (as Mr Epstein says is here the case) and, if so, what such an obligation would entail. I there expressed the view that 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 (and I have been told nothing that would lead me now to depart from that view). Here, however, there was no agreement between the Lahoud parties as to exchange of submissions (that being the very issue on

which there was contention before me on 12 November 2009). That was left to the expert to determine. Therefore nothing can be drawn from the parties' agreement in that regard.

78 As to the proposition that as soon as submissions are received from one party an obligation of procedural fairness to afford a reasonable opportunity to consider and respond thereto arises, I am not persuaded that the authorities support such a broad conclusion. It might well depend, for example, on the circumstances in which the submissions are received or the subject matter of those submissions. Each case would depend on the relevant facts in that regard. Here, Mr Roger does not seem to have done more than indicate a willingness to take into consideration responses that might be put to him on certain issues.

79 Mr Epstein also relied upon the line of cases he saw as parallel to this, involving expulsion of club members (referring to *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 410, and cases there discussed, from [80]). Those cases seem, however, to turn on the expectations arising out of membership of the voluntary associations in question and to have a juridical basis in the contractual relationship between the club members. Here, the relevant contract is that pursuant to which Mr Roger was appoint (which required him to carry out the task under clause 2 in accordance with my earlier orders). In the absence of an express contractual obligation there seems no reason to imply one into Mr Roger's contract of retainer, other than if (which I consider it does not) that arises as a consequence of the quasi-judicial nature of any tasks he has to perform under that contract.

80 Mr Epstein also submits that the implication of a requirement to accord natural justice arises from the term generally implied into expert determination clauses (that the expert carry out the task 'honestly and impartially' – *Hudson* at 335E; *Barber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyds Rep 175, at 181). He submits that this imports not only the bias rule but also the fair hearing rule (*audi alteram partem*) and that the contractual implication of such a term is justified by a similar analysis to that of Priestley JA in *Renard Constructions (ME) Pty Limited v Minister for Public Works* (1992) 26 NSWLR 234, at 225. Reference was made to the English authority in *Sutcliffe v Thackrah* [1974] AC 727, at 753, where the duty was formulated as being to act "fairly" and impartially.

81 The authorities in Australia, to which I referred in *John Nelson Developments*, do not go so far as to suggest that the duty to act honestly and impartially as an expert by implication imports a duty to accord procedural fairness in the sense of the fair hearing rule. (Indeed, if that were the case, then the analysis said to be required in *Enron* would surely have been otiose.) I am not satisfied that the position in Australia remains otherwise than as stated in *Hudson* and *Enron*, and as acknowledged in the address given by The Hon. Michael McHugh AC to which I have already referred. (There can be no need to imply a term, for reasons of business efficacy, that there be a fair opportunity to be heard in response to another party's submissions if there is no entitlement to a hearing in the first place.)

82 I was taken by Mr Epstein to what was said in *Kioa v West* (1985) 159 CLR 550, at 584. There, Mason J, as his Honour then was, said that the question is what the duty to act fairly requires in the circumstances of the particular case. His Honour referred to the discussion by Cole J in *Xuereb v Viola* (1989) 18 NSWLR 453, at 469, (as to whether there had in that case been non-compliance with a duty to afford natural justice). 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.

83 Even if the process by which Mr Roger invited and/or accepted submissions from the parties could be said to have imposed some obligation of procedural fairness, I doubt that in this instance it would have required more than giving each party a reasonable opportunity to consider and respond briefly to each other's submissions. (That opportunity was, I consider, given to the Joseph Lahoud parties for the reasons I set out below.)

84 Here, there were two instances where it was said that natural justice had been denied to the Joseph Lahoud interests. The first related to the non-provision of copies of MYOB files; the second to the non-inspection of certain documents relating to an additional $17,000 odd in claimed expenses for the project. I was taken, by Mr Epstein, in detail through a folder of documents which it was said established the position in that regard.

85 Broadly speaking, what happened was that Mr Roger, having received the initial (unilaterally provided) letter from Castletons enclosing the PDS and after having been appointed as auditor for the purposes of the audit required under clause 2, requested the provision of certain documents from the company and a data room in which those documents could be inspected was established. There is no dispute that Joseph Lahoud and his solicitor had access to the data room and inspected documents (including the very documents about which complaint is now made).

86 The Victor Lahoud interests objected to copies being taken, or to the transcription, of various documents produced by way of MYOB files, on the basis that these contained confidential information relating to other projects. Given the level of suspicion and distrust apparently between the brothers, this stance seems par for the course. Mr Roger seems to have accepted that this was a reasonable request as he made that limitation on the right of access known to the Joseph Lahoud parties. It was not shown to have prevented the latter in any practical way from making submissions in relation to the financials of the company. (I also understand that some of the MYOB documents relating solely to the Cammeray project were ultimately provided by way of copy to the Joseph Lahoud parties.)

87 What Mr Einfeld submitted, however, was that there was no obligation to create new documents or versions of documents for the Joseph Lahoud parties' benefit (for example, so as to prepare new MYOB documents from which confidential material was excised). That seems to me to be a not controversial proposition. While it might have been the case that an agreement of some kind could have been agreed had all parties been operating in an atmosphere of trust and co-operation or that a confidentiality regime of some kind could have been agreed between the legal representatives, the fact is that forever reason an accommodation of this kind was not reached or was not acceptable to one or both of the parties. The upshot was that the Joseph Lahoud parties were permitted to inspect, but not copy or transcribe, the relevant documents. (It does not seem to have been asserted that they could not inspect, draw conclusions from and make notes or provide submissions of those conclusions to the auditor.)

88 I am not persuaded that the inability to copy the MYOB files (particularly when the reason for that restriction seems not unreasonable) has been shown to have deprived Joseph Lahoud parties of the ability to consider those documents and to make submissions during the course of the audit process. It is by no means uncommon that in the commercial world due diligence processes carried out in a variety of contexts will proceed on the basis that data rooms are established where inspection of documents can take place subject to confidentiality regimes and from which copy documents cannot be taken. Limitations of this kind may well have made the audit exercise more time-consuming, inconvenient and costly, but that is not the relevant test.

89 As to the Explanatory Notes and source material referred to there, the evidence was that the Explanatory Notes document itself was prepared and provided to the Joseph Lahoud parties late in the course of the audit process, and that the Joseph Lahoud parties also had the opportunity to inspect and did inspect the source material (at least on 18 May 2010 and some of it perhaps much earlier). Their complaint is that when they saw the material they did not have the benefit of a copy of the Explanatory Notes document (though this was provided to them 2 days lateron 20 May 2010) and that the source material was contained in 4 folders and not tabbed at the time (which I am told made it more difficult for them to review the material and/or to match it up with the Explanatory Notes document when that was later received).

90 A request was made to re-inspect the documents. Issue was then taken to the fact that it was a Saturday when the solicitor responding for the Victor Lahoud interests sent an email confirming that access for the purposes of re-inspection would be permitted and when he did so reinspection was required to take place on the following Tuesday (ie one business day after receipt of the Saturday email). That generated more unedifying correspondence. (In this regard, I note that I cannot see any basis for a suggestion, if that is what is indeed sought to be made, that the solicitor deliberately sent an email on a Saturday in order in some way to make it difficult for inspection to take place – I suspect that the

explanation is simply that, not unlike many lawyers, Mr Thorpe found himself in the unenviable position of having to work over the weekend).

91 Complaint was made as to the one-off nature and time set for the re-inspection but in any event the reason that no re-inspection ultimately occurred seems to have been that the Joseph Lahoud parties then demanded (as a condition for re-inspection by them) that the documents in question be copied to them in advance (something inconsistent with the basis on which inspection had taken place throughout) and the Victor Lahoud interests did not accede to this condition. There, the matter was left.

92 Relevantly, I was not taken to any communication with Mr Roger to the effect that there was any issue in relation to the Explanatory Notes material that the Joseph Lahoud parties wished to raise or with which they were unable to deal in the absence of re-inspection of the documents (and, as already noted, the quantum of the items comprised by this material was relatively minor in the overall scheme of things). I cannot help but have sympathy for the proposition put by Mr Einfeld that this whole issue in relation to the Explanatory Notes document amounted to nothing but a 'hill of beans'.

93 For the Joseph Lahoud interests it is said (relying upon *Seltsam Pty Limited v Ghaleb* [2005] NSWCA 2008 and *Ucar v Nylex Industrial Products Pty Limited* [2007] VSCA 181) that they do not need to show any consequences that would flow from the departure from the requirements of natural justice other than if it were inevitable that the decision would be the same. Mr Einfeld, while he accepts this as a general principle, notes that for a decision infected by a departure from the rules of natural justice to be set aside the departure has to be material; a de minimis departure is not sufficient.

94 Here, I do not consider Mr Roger was bound by or had assumed a duty of procedural fairness akin to that which would be required of a judicial or quasi-judicial officer. I am not satisfied that there was any obligation to accord natural justice that went beyond the implied duty as an expert to consider the materials put before him honestly and impartially but in any event I consider that if there had been any such duty going beyond the implied duty, then it was limited to an obligation to permit the Joseph Lahoud parties a reasonable opportunity to review the relevant material and submissions made by the Victor Lahoud parties and to make submissions in response.

95 Had there been such a duty, I am not persuaded that it was breached. In particular, am not satisfied that there was an obligation to provide the Joseph Lahoud parties with copies of the MYOB files nor am I satisfied that the circumstances in which the Joseph Lahoud parties inspected the Explanatory Notes and source material and then sought (but ultimately did not take up) an opportunity to re-inspect that material amounts to a breach of any obligation to accord natural justice (whether that obligation be as limited as I think it would have been or otherwise). It seems clear that the Joseph Lahoud parties were more than capable of trawling through 4 folders of un-tabbed documents given the mountain of documents that must have been reviewed and generated over the course of all the litigation to date. (The thrust of the objection in this regard seems to have been that the Victor Lahoud parties did not

make the review task any easier – that may be so, but I am not satisfied that there was any deliberate attempt at obfuscation and nor was that suggested.)

96 I therefore find that the second basis on which the validity of the audit report was challenged by the Joseph Lahoud interests also fails.

97 Accordingly, my finding in answer to question 1 is that the audit report has not been shown to have been otherwise than in conformity and in accordance with the contract constituted by clause 2 of the Deed of Settlement and therefore that the audit report dated 24 August 2001 should not be set aside.

2. What amount is payable by Joseph Lahoud pursuant to clause 2 of the Deed consequent upon the audit?

98 Having determined that Mr Roger's audit is valid and not liable to be set aside, the next series of questions relates to the amount now to be paid to the Victor Lahoud interests as a consequence. Three issues have been raised in that regard.

(a) Is the principal sum repayable $570,000 or $349,027.17?

99 What amount is now payable by way of repayment of the February 2001 sum paid to Joseph Lahoud depends upon what is meant by "the said profit calculation" in clause 2 of the Deed of Settlement (against which the differential from the audit profit calculation is to be assessed).

100 Mr Einfeld says that it means the calculation of profit which can be drawn from the material forming part of Annexure A (namely a figure of around $1.14m) such that the amount repayable is now at least $570,000. Mr Epstein says that the relevant figure is that described as "gross profit" on the second page of Annexure A (namely $692,054.34) such that the maximum amount now repayable would be the sum of $349,027.17.

101 Me Einfeld relies upon the matters leading up to execution of the Terms of Settlement as the matrix of facts by reference to which the later Deed is to be interpreted. (Mr Epstein himself advocated such a course when the substantive proceedings were before me for hearing in that he then submitted that I was able (and ought) to look outside the four corners of the Deed of Settlement to construe it, even absent any ambiguity in its terms).

102 In my earlier judgment I expressed the view (at [447]) that, once the conversation between Victor and Joseph Lahoud on the morning of 6 February 2001 was taken into account (as it seemed permissible to do having regard to what Beazley JA had said in *Boreland v Docker* [2007] NSWCA 94, when treating (at [72]) the fact of a known and communicated desire of one party as a relevant objective fact), what was intended by the audit provision was to enable both Joseph Lahoud and Victor Lahoud to have independent verification, if either so chose, of the net profits of the Cammeray project.

103 On the present application, reference was made (by both sides) to the observations of Campbell J (as his Honour then was) when determining an indemnity costs application and claim for interest on costs made by the Joseph Lahoud parties in the proceedings which had been before Palmer J (*Lahoud v Lahoud* [2006] NSWSC 126). There, his Honour had made reference, when recounting the background to the application, to the sum of $570,000 as being the best calculation that Victor Lahoud could make, at the time, of half of the profit of the Cammeray development. (Similarly, I have noted above that the $570,000 represented Victor Lahoud's then estimate of a half share of the profits of the project.) Mr Einfeld submits that this is a recognition of the object of clause 2. Mr Epstein submits, rather, that it was simply an observation by his Honour drawn from the pleading then before him. Whatever be the case in that regard, I do not read his Honour's judgment as expressing any concluded view on the construction of clause 2, nor was it suggested that it did.

104 It certainly seems to have been Victor Lahoud's position for some time that if the outcome of an audit was that a half share of the audited profit was less than $570,000 then he would be entitled to the difference between that sum and the audited half share. When the matter was before me in 2009, there was in evidence a letter dated 1 November 2002, from Tillyard & Callanan then acting for Victor Lahoud asserting: "Our client's position is that, whichever client be successful in the current proceedings, whether in the Industrial Relations Commission or in the Supreme Court of New South Wales, our client is at least entitled to any difference between the sum of $570,000 and the actual amount independently audited should it be less". However, there is no suggestion that the Joseph Lahoud parties ever accepted this premise.

105 Clause 2, on its face, seems to me to draw a distinction between the "written details" of the profit calculation (belief at the relevant time as to the accuracy of which was affirmed by the Victor Lahoud parties' in that clause) and the "profit calculation" as such. The expression "profit calculation" seems to me in its common sense meaning to refer to the outcome of a review or assessment of the written details (or source material) from which the calculation is made. There is no "calculation" as such in pages 3-37 of Annexure A. The only calculation is contained in the first two pages and results in the (somewhat confusingly described as "gross") profit figure being shown as $692,054.34.

106 True it is (as Mr Einfeld demonstrated by an analysis of the documents forming part of Annexure A), that a careful review of those documents reveals apparent duplication and that, taking the documentary entries on face value and reviewing the apparent duplication of entries, one can arrive mathematically at a profit figure of around $1.14 million. However, that is not readily able to be seen as the 'calculation' to which reference s made in the words "the said profit calculation" since no such "calculation" was then apparently recorded. The only 'calculation' as such on the face of Annexure A is that comprised in the entries on the first two pages of the Annexure. The question as to the accuracy of that calculation was the very reason for the audit.

107 Taking into account the context in which this clause came to be part of the Terms of Settlement in the first place (and thence included in the Deed) I nevertheless consider that the words "the said profit calculation" must have been intended to refer to the calculation of profit contained at the top of page 2 of Annexure A and not the calculation that might more accurately have been derived from the balance of that Annexure nor the pay-out figure at the bottom of that page. I think that such a construction is supported by the fact that Annexure A itself attributed the sum of $223,000 odd to the reimbursement of costs borne by Joseph Lahoud's company. Any calculation of profit would logically be one which excluded the costs borne by either party. It cannot in my view have been intended to compare an audited profit figure with something that was not on its face a calculation of profit as such (i.e. it would make no sense to compare audited profits with gross revenue).

108 Moreover, if the intent (as I accept it was) was that the brothers (and their corporate entities) were to share in the net profits/losses of the project (and the audit process was to facilitate this) it would make no sense for a payment representing reimbursement of costs borne by one party (and taken into account in determining the overall profit/loss) to be treated as an amount which was then repayable as part of a 'profit' adjustment.

109 I find that, on the proper construction of clause 2 of the Deed, what the Victor Lahoud parties are entitled to on the outcome of the audit is a half share of the difference between $692,054.34 and nil. (I say 'nil' and not a negative $16,000 because there is nothing on the face of clause 2 to suggest that it was intended to encompass a negative profit, ie a loss.) Rather, the clause (and the parties' relevant conversation prior to entry into the Terms of Settlement) seems to assume that there was a profit (and that the only question was as to how much of a profit).

(b) Costs of the Audit

110 The notice of motion filed by the Victor Lahoud parties seeks to recover as part of the "reasonable costs of the audit" legal and other costs incurred by them in the preparation for the audit process. It was submitted that an analogy could be drawn from certain cases which suggest that the costs of a reference may include costs of the relevant party's preparation for the reference and not just the costs of the referee (Mr Einfeld there referring to *Walker & Son & Brown, In re an Arbitration between* (1882) 9 QBD 434 and *The Autothrepetic Steam Boiler Cp., Limited and Townsend, Hook & Co, In re an Arbitration between* (1888) 21 QBD 182, and see also *Fryer v Sturt* (1855) 16 CB 218; 139 ER 740, at 743.) Those cases, however, did not seem to me to be of great assistance.

111 Insofar as there was at first also suggested to be an analogy with the position of orders for the costs of proceedings, Mr Einfeld ultimately presses that analogy (as I understand it) only in the event that I were to find (which I have not) that the appointment of Mr Roger to conduct the audit was of a quasi-judicial character (so as to import an obligation to accord natural justice). In any event, I do not consider the analogy with costs of the proceedings to be of particular assistance in this regard, given

that orders in relation to those costs are the subject of the very specific costs regime provided for under the Rules and therefore use of such an expression could be assumed to be commonly understood as relating to the parties' respective costs. I am not satisfied that audit costs fall within the same category (nor was it made clear to me whether they are treated in the accounting profession under a similarly applicable regime) so as to enable me to conclude that the parties' objective intention when adopting this expression was to go beyond the auditor's own costs.

112 I consider that the words "costs of the audit" should be construed as referring to the costs of the process as carried out by the auditor (since the word "audit" focusses attention necessarily on the process itself). What would one ordinarily expect the cost of such an audit to be? In my opinion this would be the cost of paying the auditor to carry out the audit; not the costs of one's own preparation for the audit nor the costs of taking steps to enforce the audit or to have a direction as to the terms of the letter of instruction to be issued to the auditor.

113 The conclusion that, here, all the parties were dealing with was the external auditor's costs seems to me to accord with what on the face of the Terms of Settlement they were doing – namely, agreeing to a compromise whereby somebody independent of the court process and of the parties themselves would determine the dispute (as to what Joseph's half share of the profits would be) using his or her expertise and would be paid for that expertise. There is nothing to suggest the parties intended that the party in whose favour an adjustment was made would recoup his or its own costs of the audit process at the expense of the party against whom the adjustment was made.

114 (There is also an issue as to how I could determine on a factual basis the reasonableness of the costs incurred in relation to the audit but not in the conduct of the audit itself. Mr Epstein pointed, among other things, to the potential for double counting insofar as the legal costs appeared to include time referable to the contested application before in me November last year which would themselves have been dealt with by orders in the proceedings.)

115 Accordingly, the claim by the Victor Lahoud parties to costs beyond those of Mr Roger referable to his conduct of the audit fails.

116 In passing, I note that the only instance I have managed to uncover in the authorities where consideration was given to the meaning of the words 'costs of an audit' (albeit in a different context) was in *R v Companies Auditors Board; Ex parte Viney* (1978) 3 ACLR 745, where O'Bryan J made the observation that the costs of an audit there could be measured by reference to the hours worked on the audit and the hourly rates of the auditor concerned (and did not make reference to other costs external to the auditor in question). That would seem to be consistent with the view I have taken of the commonsense meaning of the expression used in the clause. (As I do not rely on this authority for the view to which I have come to in relation to the clause and which I have expressed above, I did not see

it as necessary to draw the parties' attention to it or to seek further submissions on that issue before handing down these reasons.)

(c) Restitutionary claim for interest

117 As noted, the claim for interest is put on a restitutionary basis, it having now been determined that the moneys paid to Joseph Lahoud in February 2001 (or such part of those as are repayable as a result of the audit) have been retained by him for his own benefit (and Victor Lahoud has been deprived of the use of those moneys) over that period until now. Part of the transcript of the substantive proceedings was handed up as part of the submissions on this claim, in which Joseph Lahoud had accepted that the moneys paid to him in February 2001 had been deposited by him and that he had had the use of those moneys.

118 There was no suggestion that the claim for interest was covered by the release contained in the Deed of Settlement but for completeness I note that it would not seem to have been encompassed in that release. Clause 7 of the Deed of Settlement provided for a mutual release from all claims that the parties "have or may have against each other but for those which may arise from or relate to this Deed". Insofar as the claim for interest on the moneys acknowledged to have been paid to Joseph Lahoud arose once the profits of the project had been determined by the audit provided for under clause 2 of the Deed, then it would seem that the claim for interest was one at least relating to the outcome of the audit under the Deed (giving the width generally accorded to the verb "to relate").

119 Mr Einfeld relies upon the cases in which equity has made an award of interest on a restitutionary or compensatory basis where one party has had the use of the other party's money over time (such as *Alati v Kruger* [1955] HCA 64; (1955) 94 CLR 216; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue and another* [2007] UKHL 34, [2007] 4 All ER 657*; Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL*; National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (23 April 1997, unreported); *State Bank of New South Wales Ltd v FCT* (1995) 62 FCR 371; 132 ALR 653; *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285.)

120 It was accepted by Mr Einfeld that the monies paid by Victor Lahoud to Joseph Lahoud in 2001 would not attract interest under s 100 of the *Civil Procedure Act* since there was no contractual right to recovery of any money until after the outcome of the audit. It was, however, submitted that equity may award interest on monies of which another party has had the use of over time and may do so by way of a "freestanding" award. Mr Einfeld submits that the modern approach is that the court will not require a precedent restitutionary right to which interest may be super-added (there citing *National Australia Bank,* per Mason P; *Heydon v NRMA Ltd (No 2)* [2001] NSWSC 445; (2001) 53 NSWLR 600*,* [15], per Mason P and *Sempra Metals Ltd v Inland Revenue Commissioners,* per Lord Hope at [25] and Lord Walker at [179]).

121 It was submitted that the fact that the primary obligation of Joseph Lahoud to repay monies to Victor Lahoud (in the event that the audited amount is less than $570,000) has its genesis in a contractual dealing does not answer the proposition that Victor Lahoud paid $570,000 in 2001 on account of what was then thought to be Joseph Lahoud's share of the profits of the venture. The Victor Lahoud parties rely upon the use of the moneys paid to and retained by the Joseph Lahoud parties as indicating not only the enrichment of Joseph (enrichment by the mere fact of the receipt and retention of such moneys being a matter not doubted on the authorities; *Westdeutsche; Sempra; National Australia Bank; State Bank v FCT*) but also as establishing that such retention is unjust for the purposes of the claim of restitution.

122 The Victor Lahoud parties did not initially point to any additional element (beyond the retention and use of the moneys as entitling them to restitution).

123 In support of the alleged 'freestanding' right to restitution, the Victor Lahoud parties rely upon the following passages from *Sempra*, per Lord Hope, at [25]:

> There is no need to pursue these arguments any further in this case. The question whether there is an unjust factor has already been settled. As the European Court of Justice has explained, there was no legal ground for the retention of the enrichment. The unjust enrichment principle supports the free-standing cause of action to recover interest, which is the measure of the enrichment. It has not been suggested that a restitutionary award by way of interest would give rise to injustice, so long as it was appropriately calculated.

and per Lord Walker, at [179]:

> … The same principle has been applied by differently constituted divisions of the Court of Appeal of New South Wales and by the Full Court of the Supreme Court of South Australia (see *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600, *Roads and Traffic Authority v Ryan* (No 2) [2002] NSWCA 128, *Cornwall v Rowan (No 2)* [2005] SASC 122). In the first of these cases Mason P (at 604–606) cited from his judgment in *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (23 April 1997, unreported). Having set out a long catalogue of cases in which the *London, Chatham and Dover* rule had been bypassed, Mason P continued:
>
> > 'Passing [the London, Chatham and Dover case] like ships in the night, these cases proceeded upon the obvious principle that, when A retains money owned by or owing to B over a period of time, A derives a benefit (at B's expense) usually measurable by what A would have had to pay in the market to borrow that sum for that period. Since this benefit is derived without justification and at the expense of the person to whom the principal sum was due, we should now recognise it as an unjust enrichment. It stands independently of, but appurtenant upon the obligation to pay, the "principal" sum.'
>
> He also noted the doubts as to a 'free-standing' right to interest expressed in the High Court in *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316–317.

124 It is indeed the case that, in *Sempra,* separate proceedings (from those proceedings establishing the entitlement to restoration of the principal sum paid over initially) were brought in relation to restitution for the interest on the principal, and to this extent it can be said that there was a 'freestanding' right to bring a claim for interest. However, in *Sempra,* it had already been established in previous proceedings

that there had been no entitlement to the use and retention of the principal sum, which lay the foundation for the claim for interest.

125 Similarly, in both *Heydon* and *National Australia Bank,* the principal sum upon which interest was claimed had been paid in circumstances where it had later been decided that the recipient of the payment was not entitled to the receipt of the principal sum and was obliged to repay it (in *Heydon,* it was the repayment of money paid over under a judgment which was later overturned on appeal and in *National Australia Bank,* it was in relation to moneys paid over under what was later determined to be a void loan agreement). Accordingly, the disentitlement to the retention of the principal sum provided the foundation for the claim for interest to represent the *unjust* use or retention of a sum of money which ought not to have been in the hands of the defendants in the first place.

126 The reasoning of Mason P (especially the passage cited above in *Sempra*) makes it clear that there is an "obvious principle" that it is only when the principal sum (upon which interest is claimed), has been retained and the party retaining it has benefited from receipt of the moneys without justification that such enrichment is recognised as unjust enrichment in the relevant sense. As explained by Mason P, where the principal has been retained unjustly, then there stands independently of, but appurtenant to the obligation to pay, the "principal" sum, a claim for interest representing the benefit or use of the money over the period of time for which it was unjustly retained.

127 McHugh and Gummow JJ, in *SCI* (from [72]), raised doubts as to the existence of a 'freestanding' right to restitution of interest but went on to explain that even if such a principle were to be accepted it would not apply in the situation in *SCI,* where the legislative context in which the payments were made was such that the initial payment of the money and its retention had been authorised by statute and so it could not be said that there was any injustice in the retention of such moneys.

Sempra Metals v Her Majesty's Commissioners of Inland Revenue

128 In *Sempra*, following a decision in 2001 of the Court of Justice of the European Communities to the effect that certain provisions of the United Kingdom's corporation tax regime (involving advance corporation tax) were contrary to EU law, a claim was made for financial loss sustained by reason of the payment of advance corporations tax which could have been deferred until mainstream corporation tax became payable on the subsidiary's profits. The claim was put on three bases: an action for damages for breach of statutory duty; a restitutionary claim for repayment of tax unlawfully exacted, according to the *Woolwich* principle (*Woolwich Equitable Building Society v IRC* (*No 2*) [1992] 3 All ER 737, [1993] AC 70); and a restitutionary claim for money paid under mistake of law.

129 What the subsidiary had lost was the time value of what it had paid in advance corporation tax for a period which could vary from some months to several years.

130 The House of Lords held (Lord Scott of Foscote and Lord Mance dissenting) that there was jurisdiction to award compound interest where the claimant was seeking a restitutionary remedy for the time value of money paid under a mistake. Two of their Lordships (per Lord Hope and Lord Nicholls) held that the restitutionary award could be made under the court's common law jurisdiction. Lord Walker held that it was recoverable in the court's equitable jurisdiction. The enrichment there was said to consist in the payment of a sum of money prematurely; the opportunity to turn money to account during the period of the enrichment being the benefit that the revenue was presumed to have derived from money in its hands.

131 In circumstances where the claimant had demonstrated an ability to borrow money at rates or on terms more favourable to it than those available in the ordinary commercial market, the claim for restitution was measured by reference to an award of compound interest at conventional rates calculated by reference to the rates of interest and other terms applicable to borrowing by the government in the market during the relevant period.

132 Lord Hope (having referred to Lord Goff of Chieveley's discussion in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, at 530, [1999] 2 AC 349, at 372–373 as to the development of a coherent law of restitution) went on to say (from [22]):

> Throughout his speech he was addressing a common law remedy, not one that was available in equity. I think that it can now be taken as settled that, under the *Kleinwort Benson* principle, a cause of action at common law is available for money paid under a mistake of law: see the *Deutsche Morgan* case [2007] 1 All ER 449 at [62]. *I also think that the time has come to recognise that the court has jurisdiction at common law to award compound interest where the claimant seeks a restitutionary remedy for the time value of money paid under a mistake.*
>
> Recognition that restitution is a common law remedy raises questions about the limits that must be set to it which would not arise if it was available only in equity. *The enrichment must, of course, have been 'unjust'.* Andrew Burrows *The Law of Restitution* (2nd edn, 2002) pp 48–50 has argued that the claimant must identify positive reasons for restitution if he is to be entitled to this remedy: see also my own observations in the *Kleinwort Benson* case [1998] 4 All ER 513 at 561, [1999] 2 AC 349 at 408–409. It has been suggested, from the civilian perspective, that the underlying principle is the absence of a legal ground to justify retention of the benefit: see *Shilliday v Smith* 1998 SC 725 at 727 per Lord President Rodger; Jacques Du Plessis 'Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions' (2005) 122 SALJ 142, pp 154, 180–181. In the *Kleinwort Benson* case [1998] 4 All ER 513 at 538, 541, [1999] 2 AC 349 at 382, 385 Lord Goff also accepted that the common law, having recognised the right to recover money paid under a mistake of law, must identify particular sets of circumstances in which, as a matter of principle or policy and to protect the stability of closed transaction, recovery should not be allowed. (emphasis added)

and from [25];

> *... The question whether there is an unjust factor has already been settled. As the European Court of Justice has explained, there was no legal ground for the retention of the enrichment. The unjust enrichment principle supports the free-standing cause of action to recover interest, which is the measure of the enrichment.* (emphasis added)

133 Lord Nicholls similarly found that restitution could be made in respect of the benefit conferred by the use of money over time and went on to consider how the value of that benefit should be measured (from [101]):

> In principle this claim is unanswerable. The benefits transferred by Sempra to the Inland Revenue comprised, in short, (1) the amounts of tax paid to the Inland Revenue and, consequentially, (2) the opportunity for the Inland Revenue, or the government of which the Inland Revenue is a department, to use this money for the period of prematurity. The Inland Revenue was enriched by the latter head in addition to the former. The payment of ACT was the equivalent of a massive interest free loan. Restitution, if it is to be complete, must encompass both heads. Restitution by the Revenue requires (1) repayment of the amounts of tax paid prematurely (this claim became spent once set off occurred) and (2) payment for having the use of the money for the period of prematurity.

and from [112];

> …If the House takes this opportunity I venture to repeat there can only be one answer on this important question of law. Nobody has suggested a good reason why, in a case like the present, an award of compound interest should be denied to a claimant. An award of compound interest is necessary to achieve full restitution and, hence, a just result. I would hold that, in the exercise of its common law restitutionary jurisdiction, the court has power to make such an award. I agree with the thrust of Mummery LJ's observations on this point in *NEC Semi-Conductors Ltd v IRC* [2006] EWCA Civ 25 at [172]–[175], [2006] STC 606 at [172]–[175]. To that extent I would depart from the decision on the *Westdeutsche* appeal.

134 Lord Walker observed that the state of English law as regards interest in respect of restitutionary claims (considered as a genus) had been at least as confused as that in respect of compensatory claims (from [166]). Lord Walker went on to state (from [176]);

> …The Court of Chancery was more generous in giving interest on restitutionary awards, as appears from the judgment of Malins VC in *Re Maria Anna and Steinbank Coal and Coke Co, McKewan's case* (1877) 6 Ch D 447 at 455–456 (upheld by the Court of Appeal, without a reasoned judgment on this point, at 462). Interest was ordered as of course against a fiduciary agent who failed to account (see *Harsant v Blaine, Macdonald and Co* (1887) 56 LJQB (NS) 511, followed by the High Court of Australia in *Bayne v Stephens* (1908) 8 CLR 1). But at equity too there were anomalies: in particular a personal restitutionary claim to recover a mistakenly paid legacy seems not to have carried interest, although a proprietary restitutionary claim did so: see *Re Diplock's Estate, Diplock v Wintle* [1948] 2 All ER 318 at 339, [1948] Ch 465 at 506–507 (following, on the personal claim, *Gittins v Steele* (1818) 1 Swan 199, 36 ER 356, a decision of Lord Eldon LC) and [1948] 2 All ER 318 at 365–366, [1948] Ch 465 at 558 (on the proprietary claims). *Gittins v Steele* was discussed by Lord Goff and Lord Woolf in the *Westdeutsche* case [1996] 2 All ER 961 at 976–977, 1010, [1996] AC 669 at 694, 730.

and stated at [178];

> The crucial insight in the speeches of Lord Nicholls and Lord Hope is, if I may respectfully say so, the recognition that what Lord Nicholls calls income benefits are more accurately characterised as an integral part of the overall benefit obtained by a defendant who is unjustly enriched. Full restitution requires the whole benefit to be recouped by the enriched party: otherwise 'the unravelling would be partial only' (see Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1998] 1 All ER 305 at 315, [1997] 1 WLR 1627 at 1637 per Lord Nicholls).

135 His Lordship referred to (at [179]) the principle applied by the Court of Appeal of this Court in *Heydon* and *Roads and Traffic Authority v Ryan* (*No 2*) [2002] NSWCA 128, and by the Full Court of the

Supreme Court of South Australia in *Cornwall v Rowan (No 2)* [2005] SASC 122 and then cited what had been said by Mason P in *Heydon,* at 604-606:

> Passing [the *London, Chatham and Dover* case] like ships in the night, these cases proceeded upon the obvious principle that, when A retains money owned by or owing to B over a period of time, A derives a benefit (at B's expense) usually measurable by what A would have had to pay in the market to borrow that sum for that period. Since this benefit is derived without justification and at the expense of the person to whom the principal sum was due, we should now recognise it as an unjust enrichment. It stands independently of, but appurtenant upon the obligation to pay, the "principal" sum.

though also noting the doubts as to a 'free-standing' right to interest expressed in the High Court in *SCI*, at 316–317. Lord Walker went on to say (at [180]);

> …I wish to add a word about terminology. In the course of argument the expression 'disgorgement interest' was frequently used, sometimes (if I understood counsel correctly) as a synonym for restitutionary interest, sometimes as a species of restitutionary interest, and sometimes in contrast to restitutionary interest. It is hard to make progress through that sort of confusion. There is a clear need for a vocabulary, generally understood and accepted, to distinguish between (1) proprietary claims which may involve tracing in equity (as in A-G for Hong Kong v Reid [1994] 1 All ER 1, [1994] 1 AC 324); (2) personal claims for an account of profits (that is, for a sum equal to the profits actually made by the defendant); and (3) personal claims for interest which represents (in a more or less conventional way) the benefit which the defendant is presumed to have derived from money in his hands.

National Australia Bank v Budget

136 In *National Australia Bank*, a restitutionary claim for interest upon a sum of money paid over under a void loan agreement was recognised as being available in principle (although ultimately denied in the circumstances of the case, due to misleading and deceptive conduct of the lender). Mason P (from 369), having set out the views later cited in *Sempra* referred to the decision of Wilcox J in *State Bank v FCT* and said:

> In State Bank of New South Wales Ltd v Federal Commissioner of Taxation (1995) 132 ALR 653 at 659-661, Wilcox J referred to some of these [incremental and principled developments of the common law]. He held that "in ordering a payment of money by way of restitution, a court has power to include something by way of interest, where this is necessary to do justice between the parties" (at 660). Indeed he went further and awarded interest with respect to a discrete sum that had been "retained" but repaid before proceedings were instituted (see at 656, 663). In SCI Operations Pty Ltd v Commonwealth (1996) 139 ALR 595, Beaumont and Einfeld JJ indicated concurrence with Wilcox J in State Bank. I would do likewise. (emphasis added)

137 In *National Australia Bank*, Handley JA reserved the point for other consideration. Sheller JA (at 382) made reference to the decision of Wilcox J in *State Bank v FCT* and that of the Full Federal Court in *SCI Operations Pty Limited and Aci Operations Pty Limited v Commonwealth of Australia* [1996] FCA 1739, although did not finally decide the point.

State Bank v FCT

138 In *State Bank v FCT*, in a not so dissimilar fact situation to the present, the Bank had sought restitution of the benefit of moneys it paid into a holding account whilst the Bank's tax liabilities were determined through litigation, according to an agreement by which the moneys would be repaid to the bank if it was successful in the litigation. The litigation was subsequently settled and the Tax Office repaid the sum of money initially paid over by the Bank. At the outset of his Honour's reasons, Wilcox J noted that Counsel for the Bank accepted that, for the Bank to recover the interest it would have to demonstrate that the Commissioner was under a legal obligation to repay the moneys that were paid (at 656). His Honour then went on to consider the application of the *Woolwich* principle although concluded that nothing was said in that decision which supports the award on interest on sums repaid under restitution (at 658).

139 Wilcox J then went on to consider previous cases in which an award of interest had been made (from 659) (his Honour there citing cases such as *Rodger, Carnie and Gilman v Comptoir D'Escompte de Paris* (1871) LR 3 PC 465 – award of interest on moneys paid pursuant to a court order that was set aside on appeal; *Sibley v Grosvenor* (1916) 21 CLR 469 - repayment with interest of money spent by the purchasers in respect of instalments of the purchase price and the making of improvements to the property where an order for rescission of a contract for the sale of a farm was ordered because of fraudulent misrepresentations made by the vendor's agent; *Delbridge v Low* [1990] 2 Qd R 317 - simple interest awarded for a sum remaining payable to purchasers after repudiation of a contract for the purchase of a house, the amount forfeited by them by reason of their repudiation; *Commonwealth Homes and Investment Ltd v Smith* (1937) 59 CLR 443 the High Court affirmed an order requiring repayment with interest of subscription moneys following a voidance of an allotment of shares, although there was no stated basis upon which interest was awarded; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446, McPherson J of the Queensland Supreme Court ordered payment of interest on moneys payable to a defaulting purchaser following rescission by the vendor of a contract for sale of real estate. The situation was similar to that encountered by Derrington J in *Delbridge*.)

140 His Honour acknowledged that none of those authorities laid down an authoritative principle that was applicable nor did they precisely cover the situation in *State Bank v FCT* (at 660), his Honour there noting the absence of specific discussion in Goff and Jones, *The Law of Restitution*, 4th ed, Sweet & Maxwell, 1993; Birks, *Introduction to the Law of Restitution*, Oxford Clarendon Press, 1985; *Halsbury's Laws of England* (4th ed, vol 9, paras 630-98), Finn (ed), *Essays on Restitution*, Law Book Co., 1990; nor Burrows (ed), *Essays on the Law of Restitution*, Oxford Clarendon Press, 1991.

141 Wilcox J went on to say:

> Notwithstanding these circumstances, it seems to me that the decided cases suggest the existence of a general principle that, in ordering a payment of money by way of restitution, a court has power to include something by way of interest, where this is necessary to do justice between the parties. *Rodger* and *Sibley* can only be explained on that basis. *CCA* and *Hungerford* perhaps fall into a different class; in both cases the court was concerned to assess an unliquidated sum, being a loss or damages sustained, and in *CCA* this was being done under a special statutory provision. *Johnson* perhaps presents a difficulty, but it is noteworthy

that the Judicial Committee rejected the argument, in support of the decree for interest, "that Johnson, who was a trader, must have made a profit by the use of the money"; not by reference to legal principle but because there was "no proof of it": see at 822. The inference is that, if there had been proof, interest would have been allowed. It seems to me that the only basis upon which that could be so, given the then recent decision in *London, Chatham and Dover Railway Co,* is that a claim for restitution of moneys is different from a claim for debt under a contract. So it is, of course. The principle underlying the modern law of restitution is unjust enrichment, the purpose being, in the words of *Halsbury* at para 630, "to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep". The emphasis is on the position of the beneficiary, not the loss sustained by the claimant. The same point was made more fully in Goff and Jones at 12:

> Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff. Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow. "Unjust enrichment" is simply the name which is commonly given to the principle of justice which the law recognises and gives effect to in a wide variety of claims of this kind.

This notion is reflected in a passage in the judgment of Deane J in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-7 ; 69 ALR 577 in which he said the concept of unjust enrichment:

> constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.

At a later stage of his reasons, Deane J related this conceptual approach to the determination of the quantum of compensation. He said at CLR 263; ALR 609:

> What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or "enrichment" actually or constructively accepted.

I propose to apply this approach. However, before doing so, I should deal with a submission from counsel for the respondents to the effect that the concept of restitution has no application to the present case because, unlike the situation in *Woolwich,* the moneys paid by the bank and the applicant were not paid as tax; they were paid by agreement into a bank account pending resolution of the dispute about liability for tax. There being an agreement, counsel argue, there was no element of compulsion.

…
I hold that, as a matter of general principle, subject to any special circumstances or agreement and independently of any statutory provision, interest may be awarded in a case like the present. However, both the awarding and the quantum of interest are dependent upon the circumstances of the case, so it will be necessary for me to consider the argument of the respondents arising out of the 1984 agreement in determining what interest (if any) may be awarded, on a restitution basis, in this case. I will postpone that task until I have dealt with the applicant's two other bases of claim.

142 Relevantly, for present purposes, despite Wilcox J having found that a claim can be made for interest in circumstances where money has been retained unjustly, his Honour found that the money retained by

the Tax Office had not been retained unjustly in the circumstances where the money was paid by the Bank in accordance with an agreement that the money was to be paid over and retained by the Tax Office until the liability had been determined it having been further found that there could be no term implied into the agreement that interest was to be paid on the sum, (at 666). Wilcox J stated (from 667):

> *As the law of restitution is based on the concept of unjust enrichment, it is important to take into account the fact that any benefit gained by the Commonwealth by the presence of the bank's (and the applicant's) money in the Trust Fund was a benefit gained by it pursuant to an arrangement that was suggested by the bank and that conferred substantial advantages on the bank*. It is true that the arrangement would never have been necessary if the Commissioner had appreciated that the bank was not bound to pay sales tax because of s 114 of the Constitution. Perhaps the Commissioner should have appreciated this, but the bank had not put that argument to him. Apparently, the bank paid sales tax without demur until the *Nimrod case*. The objection it was taking in 1984 was ultimately rejected by the High Court in another case, *FCT v Totalisator Administration Board of Queensland* (1990) 170 CLR 508 ; 96 ALR 321. Apparently, the bank did not take the s 114 point until about 1987. The bank's change of stance resulted in the abandonment of the Supreme Court action and the commencement of a fresh action in the High Court. This must have postponed the resolution of the dispute to a date later than that contemplated in 1984. Having regard to all these matters, *I do not think it can be said that there was any element of injustice in any benefit the Commonwealth derived from possession of the funds in the period up to the High Court's decision*. I reject the applicant's claim, whether based on restitution or trust, insofar as it relates to the period up to 25 February 1992. I also reject the claim for s 51**a** interest prior to that date. Interest under s 51**a** may be awarded only in respect of the period after the commencement of the cause of action. In the present case the cause of action arose on 25 February 1992 when the High Court's decision gave rise to an obligation to repay. (my emphasis)
>
> After 25 February 1992, a different situation obtained. There was no longer any doubt about liability. The money held by the Commonwealth in the Trust Fund — Other Trust Moneys Account ought to have been promptly refunded. The parties had agreed, back in 1984,that "if the bank is successful in the present proceedings, the moneys paid into the Trust Fund will be remitted in full". Although a new proceeding had been substituted, this remained the bargain. In fact, as recounted above, it was not until 4 December 1992 that the first payment ($420,161.86) was made and 26 April 1995 that the remaining $143,959.08 was paid. It seems to me that the retention of these sums during those periods represented an unjust enrichment of the Commonwealth at the expense of the applicant.

Commonwealth of Australia v SCI Operations

143 As noted earlier, doubt as to the free-standing nature of a right to restitution in the form of interest was raised by McHugh and Gummow JJ in the High Court decision in *SCI* (at 316-317). In *SCI,* the respondents had imported goods on which they paid customs duty under the *Customs Act* 1901 (Cth) and the *Customs Tariff Act* 1987 (Cth) and brought proceedings to recover overpaid amounts of duty with interest. The claim before the court was only as to the claim for interest (the overpayment of duty having been repaid).

144 In relation to the claim for interest on the basis of unjust enrichment, McHugh and Gummow JJ stated (from 316, [72]):

> Independently of their reliance upon s 51A as the source of curial authority to award the interest they seek in these proceedings, *SCI and ACI assert a "free-standing" right to the*

recovery of interest where the defendant has had the use of the plaintiff's money in circumstances which indicate an unjust enrichment at the expense of the plaintiff. The existing state of authority does not favour acceptance of such a broad proposition.

The present is not a case where the assertion is that the appellant's breach of contract or negligence has caused the respondents to pay away or the appellant to withhold money and as a result the respondents have been deprived of the use of the money so paid away or withheld. Nor do the respondents seek an award of damages representing compensation for a wrongfully caused loss of their money, which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money.

It is true that in the administration of its remedies, equity followed a different path to the common law with respect to the award of interest. In cases of money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary, the decree might require payment of compound interest. However, in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, the House of Lords answered in the negative the question whether, where statutes, of which s 51A(2)(a) is a local example, provide for orders for payment of simple but not compound interest upon common law claims, equity, in its auxiliary jurisdiction, will supplement the statute by providing for an award of compound interest.

In other instances, equitable relief might involve the payment of simple interest. As an element in the relief administered upon rescission of a contract under which the plaintiff had paid over moneys to the defendant, the order might require the defendant to make the repayment with interest calculated from the date of the initial payment. Relief against forfeiture by a vendor of payments under an instalment or terms contract might require repayment with interest from the dates the respective instalments were paid. An account of profits would carry interest. Conversely, a party seeking equitable relief may be obliged to do equity by the payment or repayment of moneys with interest. A purchaser who, after the date fixed for completion, seeks specific performance will be treated in equity as having been in possession from the completion date and, in general, will be required to offer the vendor interest on the purchase price from that date. *However, the present litigation does not involve the administration of any equitable relief and so call for consideration of the issue whether it was unconscientious of the appellant to make the refunds on 3 June 1994 without the addition of payments on account of interest.*

Moreover, even if it be accepted, despite the present state of authority, that there be a principle of the width advanced by SCI and ACI, it could not apply in the present case. The collection of the duty in question in the period before the making of the CTCO was required by statute. Such entitlements as SCI and ACI enjoyed in respect of repayment were the product also of statute. The restitutionary considerations which are present in various areas of the law cannot "purport to override statute by claiming a superior sense of injustice to parliament's". (my emphasis)

Heydon v NRMA Ltd (No 2)

145 In *Heydon*, an order was made for the payment of interest to achieve restitution of the benefit or use of money paid over under a judgment which was later overturned on appeal. Mason P repeated the above passage (from [15]) and then went on to address cases decided since his Honour's decision in *National Australia Bank*. Mason P recognised (at [16]) that the Full Court decision in *SCI* to which he had referred in *National Australia Bank*, had been reversed by the High Court in *SCI*. Mason P noted that the High Court's decision in *SCI* turned upon a statutory abrogation of any right to interest in the *Customs Act*, although Mason P did acknowledge McHugh and Gummow JJ's adverse comments (at 316-317) in relation to the notion that there is a "free-standing" right to recover interest in a common

law restitutionary claim and their Honours' view that the existing state of authority did not favour acceptance of such a broad proposition.

146 Mason P distinguished McHugh and Gummow JJ's comments in *SCI* on the basis that it was not clear whether those comments in their Honours' judgment formed part of the essential reasoning nor whether their Honours would reject every claim for interest auxiliary to a restitutionary claim. Since such discussion was not considered to form part of the reasoning of the other members of the High Court, Mason P considered himself able to maintain the position he had taken in *National Australia Bank*. Mason P then considered cases where interest had been awarded upon moneys repaid under the principles of restitution in the specific instance where money had been paid in accordance with a decision later overturned on appeal, there referring to the following comments of Brooking J (at 597) in *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386;

> ... the principle on which the courts have for centuries acted is that when an erroneous judgment or order is overturned, whether by means of appeal or by any other procedure, the court will achieve a just result by requiring anything that has been taken from him by the other party by virtue of the wrong decision to be restored. Interest is for this purpose treated as the fruit of money and he who has had the use of money will not be heard to say that there were no fruits. The principle is, as it was in the reign of the first Elizabeth (Eyre v Woodfine Cro Eliz 278; 78 ER 533), one of restitution or restoration. The court is seeking to restore to one party what it has wrongly taken from him and given to the other. It does not seek to restore the successful party to his former position by awarding damages to compensate him for loss flowing from the erroneous judgment or order. (my emphasis)

Chow v Yang

147 Finally, I should note that in *Chow and Ors v Yang and Ors* [2010] SASC 96, the South Australian Court of Appeal found that it was appropriate to award interest upon a sum of money which was repaid in restitution where there was a failure of consideration (in the context of failed transfer of a business where relations had broken down between the purchaser and vendor, but the purchase price had already been paid, at [10]). Nyland and Gray JJ (with whom Vanstone J agreed) said:

> However, in the exercise of his discretion as to interest the Judge overlooked a material fact. That fact was the payment by Mr Chow to Mr Yang of $473,400.00 prior to 11 June 2004. Mr Yang has had the use of this money since that date. The amounts that Mr Yang outlaid in increasing the stock levels and paying suppliers was substantially less than the amount of $473,400.00. Counsel for Mr Yang conceded that this fact was material and had been overlooked. Counsel contended, however, that in any event the Judge's refusal to award interest was appropriate.
>
> We disagree. We have reached the conclusion that the Judge erred in declining to award interest in favour of Mr Chow. *Mr Yang has had the benefit and use of the moneys that should have been repaid. Interest should be paid on that amount from the date of payment of the moneys until the date of judgment. Otherwise Mr Yang will have received a windfall, an unjustified betterment.* (my emphasis)

Conclusion as to ability to claim for a free-standing award of interest by way of restitution

148 As is apparent from the above review of the relevant cases, there is certainly authority which supports a claim in restitution of the kind which has been brought by the Victor Lahoud interests. Relevantly, while I place weight on the seriously considered dicta of McHugh and Gummow JJ in *SCI,* in the absence of a definitive ruling by the High Court on this issue Mason P's decision in *Heydon* remains binding authority on me and supports the availability of a claim for interest on the basis of restitutionary principles notwithstanding that the claim brought is 'free-standing' in the sense referred to in *SCI.* (I refer in this regard to the guidance given in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, at 492; *Gett v Tabet* (2009) 254 ALR 504; [2009] NSWCA 76; *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89, as to the precedential weight of appellate dicta, as discussed in *Ying v Song* [2009] NSWSC 1344, from [14].)

149 Therefore, had I otherwise been satisfied as to the factual foundation for the restitutionary claim made for interest by the Victor Lahoud interests, I would have followed the reasoning of Mason P in *Heydon* and that of Lord Walker in *Sempra* and allowed the claim for interest at the commercial interest rates claimed. However, it is not necessary for me to make any final finding of that kind, since I am not satisfied that the retention of the funds by Joseph Lahoud over the period from February 2001 at least up to a reasonable time for payment from the time of the audit in August 2010 amounts to an 'unjust' enrichment (though it clearly has been an enrichment).

"Unjust" enrichment?

150 In *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27; (2008) 232 CLR 635; (2008) 247 ALR 412, Gummow, Hayne, Crennan and Kiefel JJ, in their joint judgment, stated (at [85]):

> The second point to be noted is that unjust enrichment was identified as a legal *concept* unifying "a variety of distinct categories of case". It was *not* identified as a principle which can be taken as a sufficient premise for direct application in particular cases. Rather, as Deane J emphasised in *Pavey & Matthews*, it is necessary to proceed by "the ordinary processes of legal reasoning" and by reference to existing categories of cases in which an obligation to pay compensation has been imposed. "*To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate*". (my emphasis)On the contrary, what the recognition of the unifying concept does is to *assist* "in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a *new or developing category of case*" (emphasis in original)

151 More is required than proof of a retention of a benefit, that is there must be some additional factor rendering retention of the benefit 'unjust' in the relevant sense. This is clear from what was said by Deane J in *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221 and in *Lactos Fresh Pty Ltd v Finishing Services Pty Ltd (No 2)* [2006] FCA 748, and from the recognition in *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353, at 378-379, (by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) that:

> … it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the

> existence of a qualifying or vitiating factor such as mistake, duress or illegality. (my emphasis)

152 That restitution, on the basis of unjust enrichment, will be available only where a recognised 'unjust' factor has been established, was again affirmed by the High Court in *Farah Constructions v Say-Dee*, where Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ stated at [150]-[151];

> First, whether enrichment is unjust is not determined by reference to a subjective evaluation of what is unfair or unconscionable: recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation [1988] HCA 17;* (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; *David Securities Pty Ltd v Commonwealth Bank of Australia [1992] HCA 48;* (1992) 175 CLR 353 at 379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ. In *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 at 379, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ gave as instances of a qualifying or vitiating factor mistake, duress or illegality. … Further, principles respecting fiduciary duty have been said to be foreign to unjust enrichment notions because the unjust factors are commonly concerned with vitiation or qualification of the intention of a claimant Edelman, "A Principled Approach to Unauthorised Receipt of Trust Property", (2006) 122 *Law Quarterly Review* 174 at 177-178.

153 Unjust enrichment is not a "definitive legal principle according to its own terms"; *David Securities,* at 378-379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

154 In *Lumbers v Cook*, Gummow, Hayne, Crennan and Kiefel JJ, at [80] said that;

> … where one party (in this case, Builders) seeks recompense from another (here the Lumbers) for some service done or benefit conferred by the first party for or on the other, *the bare fact of conferral of the benefit or provision of the service does not suffice to establish an entitlement to recovery*… (my emphasis)

155 Mason, Carter and Tolhurst, in *Mason & Carter's Restitution Law in Australia*, state, in a passage which has been approved by Campbell J in *Wasada Pty Limited v State Rail Authority of New South Wales (No.2)* [2003] NSWSC 987, at [16], (with respect to the same passage in the earlier 1995 edition), at [166]:

> 'Unjust' is the 'generalisation of all the factors which the law recognises as calling for restitution'. Because we need to search for recognised factors, examination of which involves an analysis of case law, the reference to 'injustice', as an element of unjust enrichment, is not a reference to judicial discretion. Normal judicial processes are involved and it is only in cases where there is no recognised basis for saying that injustice has arisen that problems can arise.

156 More recently, in *Haxton v Equuscorp (formerly Equus Financial Services Ltd) (ACN 006 012 344)* (2010) 265 ALR 336; [2010] VSCA 1, the Victorian Court of Appeal, after extensively reviewing the High Court's discussion concerning the availability of restitution on the basis on unjust enrichment in Australia, (referring to *Pavey & Mathews*; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662; 78 ALR 157; [1988] HCA 17; *David Securities*; *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51; 126 ALR 1; [1994] HCA 61; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 ; 185 ALR 335; [2001] HCA 68; *Lumbers v Cook*, considered) went on to state (at [127]):

> The High Court's *post*-Pavey *elaboration of unjust enrichment signals a caveat against loose applications of overly general principles and associated "idiosyncratic notions of unfairness*". It appears inconsistent with unjust enrichment as the independent category of law advocated by jurists exemplified by Professor Birks. *In Australian law, no general principle of unjust enrichment permits restitution simply because the defendant retains a payment made without any legal basis. Rather, generally speaking, the circumstances must invoke an established category or the claimant must make a case for the extension of relief to a novel context*. (footnotes omitted) (my emphasis)

157 The absence of a factor rendering retention of the benefit (or the relevant enrichment) 'unjust' for the purposes of a claim in restitution was determinative of the claimant's inability to establish an entitlement to interest upon moneys paid over in *State Bank v FCT*. There, similar to the circumstances that apply here, the payment of the money upon which interest was claimed was in accordance with an agreement for the payment of such money, its receipt, or the obligation to repay being conditional on the outcome of certain proceedings regarding the liability to pay such money under taxation legislation. In circumstances where the money was paid in accordance with an agreement, and thus retained in accordance with the agreement, then at least until there was an obligation to repay the money, it could not be said that such money was unjustly retained, irrespective of the determination of the tax liability to pay such money, as the parties had otherwise agreed that such money could be retained for so long as it took to determine such liability.

158 Subject to considering the mistake issue later raised by the Victor Lahoud paries, that seemed to me to be the case here: money was paid by the Victor Lahoud parties in order to resolve the pending Industrial Relations Commission dispute, in the knowledge that some or all of that money might not ultimately be found to represent any part of the net profit share Joseph was to obtain from the project, and subject to the obligation on the part of Joseph Lahoud to repay the difference upon an audit indicating that the profit was less that the figure originally assumed. According to the terms of the agreement, there is no obligation to repay any difference until the outcome of the audit, and so it can only be then that it could be said that any retention of the money is unjust. Accordingly, if interest were to be payable on the basis of unjust enrichment it could only be in respect of the period from the time the audit was completed and the lesser profit amount determined, triggering the obligation to repay an amount under clause 2 of the Deed.

159 However, after the close of the hearing an argument was put forward to the effect that there was a relevant 'unjust factor' beyond the retention of the benefit itself. That argument arose in the following circumstances.

160 The restitutionary basis for the interest claim, as set out above, was not articulated until oral submissions in reply at the close of the hearing (the claim having earlier been put more broadly as a claim for interest in equity without reference to any principle of unjust enrichment). Therefore, in fairness to the Joseph Lahoud parties, Mr Einfeld proposed that Mr Epstein be given an opportunity to consider and respond to that submission in writing after the close of the hearing. I gave directions to facilitate that process and included in those directions an opportunity for a reply to any submissions so

made by Mr Epstein. I did not at that stage include in the directions provision for Mr Einfeld's submissions on the unjust enrichment basis for the claim in interest to be put in writing (as Mr Epstein had been appraised of the submission in the course of argument and did not seek to have it reduced to writing).

161 However, upon further consideration of the issue so raised, I amended those directions in chambers so as to encompass the provision (before any submissions by Mr Epstein) of written submissions by the Victor Lahoud parties addressing a matter that I was not confident had been separately addressed in oral submissions, namely as to what the Victor Lahoud interests contended was the factor that rendered unjust the retention by Joseph Lahoud parties for the purposes of the claim in restitution for interest in relation to that amount. I did so because it was not clear to me whether the Victor Lahoud interests were relying upon any particular matter (other than the fact of retention of the moneys) as rendering the enrichment 'unjust'.

162 It was in this context that written submissions were received after the close of the hearing from both sides.

163 As clarified by the supplementary submissions on interest served by the Victor Lahoud parties, the entitlement to interest from 2001 on any amount that Joseph Lahoud was obliged following the audit to repay, was maintained on the basis that on the basis that equity has an ability to award interest on monies of which another party has had use over time by way of a 'freestanding' award (relying on the reasoning of Mason P in *National Australia Bank* and *Heydon* and what was said by the House of Lords in *Sempra*). However, it did not seem to be suggested that an entitlement to restitution depended on any factor beyond that of the retention of the principal sum. The enrichment of Joseph Lahoud (by the receipt of the monies and their deposit in an interest-bearing account) was said to be unjust because Victor Lahoud had thereby had no access to the funds in the interim. The 'unjustness' to which the Victor Lahoud parties pointed, therefore, was the fact that Joseph Lahoud had earned interest over the period and that Victor Lahoud had been deprived of the opportunity to earn interest over that same period.

164 Mr Epstein, in response, submitted in summary that it was necessary that an 'unjust factor' (beyond the mere fact of receipt of the funds) be present in order for the retention of the benefit to be *unjust* in the relevant sense. For the reasons set out above, I agree.

165 It was not until written submissions were served in reply to Mr Epstein's submissions on interest that any such factor was identified. It is now submitted that was renders unjust the retention by Joseph Lahoud of the benefit (in terms of the opportunity to earn interest) on whatever sum is now repayable is that the original sum of $570,000 was paid to Joseph Lahoud under the mistaken belief that the profits from the Cammeray project would be substantial.

166 The issue of mistake was not raised in oral address nor was it raised in the written submissions provided in accordance with my amended directions (those having been made in circumstances where the parties' attention had specifically been drawn to the question as to what was contended by the Victor Lahoud parties to be the relevant factor rendering the alleged enrichment unjust). The Joseph Lahoud parties have therefore not had the opportunity to consider or respond to that submission. (It might be thought to be the ultimate irony if they were to be deprived, by reason of the manner in which this submission has now been articulated, of a reasonable opportunity to respond to such a submission in the context of an application in which they complain of a denial of procedural fairness in another forum.)

167 Had I been minded to accept the position now advanced by the Victor Lahoud interests in relation to the interest claim, I would have felt it necessary to provide the Joseph Lahoud parties with a reasonable opportunity to address me in relation to the submission based on the alleged mistake. As it is, I do not accept that submission and hence I did not see the need to invite yet a further round of written or oral submissions on the point.

168 The reason that I do not accept that a mistaken belief of the kind to which the Victor Lahoud parties have now adverted is sufficient to render unjust the benefit obtained by the Joseph Lahoud parties from the retention of the moneys in question over the period from 2001 is that I do not accept (on the evidence before me both at the substantive hearing or on the present application) that any such mistake was causative of the payment.

169 The submission now put to me is that, when the $570,000 was paid pursuant to the Terms of Settlement, both Joseph and Victor Lahoud were operating under the mistaken belief that the Cammeray project had made a substantial profit (the dispute between them being as to the amount of that profit), a belief that, upon the subsequent findings of the auditor, was found to be mistaken. It is asserted by the Victor Lahoud parties that it was in the mistaken belief that a substantial profit had been made that Victor Lahoud agreed that $570,000 (representing his estimate of half the profit) should be paid to Joseph Lahoud at the time.

170 Reliance is placed on equity's power (as a court of good conscience) to award interest in circumstances where to do otherwise would lead to unjust enrichment. It is said that, whilst equity will not mend bad bargains, it will nonetheless intervene where the parties have acted upon a mistaken premise (there relying upon *PC Developments Pty Ltd v Revell* (1991) 22 NSWLR 615, at 626). In support of this submission, the Victor Lahoud parties rely upon what was said in *Murdocca v Murdocca (No 2)* [2002] NSWSC 505 by Campbell J (as his Honour then was) (from [7]):

> Equity has a broad jurisdiction to order the payment of interest whenever a person who is under an equitable obligation to pay a sum of money fails to do so. In *Hungerfords v Walker* (1989) 171 CLR 125, at 148 Mason CJ and Wilson J said:

> Equity has adopted a broad approach to the award of interest. It has long been accepted that the equitable right to interest exists independently of statue: *Wallersteiner v Moir [No.2]* [1975] QB 373. Equity courts have regularly awarded interest, including not only simple interest but also compound interest, when justice so demanded, eg money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary: *La Pintada* [1985] AC at 116.

> Some examples of the circumstances in which the equitable jurisdiction to award interest has been exercised are set out in Mason and Carter *Restitution Law in Australia*, page 959-964. They include requiring a defaulting fiduciary (including a defaulting trustee) to pay interest, and requiring payment of interest when effecting *restitutio in integrum* when a contract is rescinded. If a mortgagor came to equity to redeem, and had not given adequate notice of intention to redeem, equity would require the payment of interest in lieu of notice (Ashburner's *Principles of Equity*, 2nd ed. Page 215). Equity treats an equitable charge on land as bearing interest, even if there is no specific agreement to pay interest (*In Re Drax; Savile v Drax* [1903] 1 Ch 781). See also *Hermann v Charny* [1976] 1 NSWLR 261, at 269 per Hutley JA, with whom Glass and Samuels JJA agreed.

171 It is submitted that where there has been established some disentitlement (whether such disentitlement be by way of unjust enrichment or other equitable principles) to the sum upon which interest is claimed, an award of interest will be made.

172 One of the categories of case in which it is recognised that the facts give rise to a prima facie obligation to make restitution, as noted in *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (at p 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ), is the receipt of a payment which has been made under an operative mistake. In *David Securities* the High Court unanimously rejected the notion that such a mistake need be fundamental but emphasised at [43], the requirement that the mistake be causative.

173 To establish a right to restitution on the basis of a mistake, the plaintiff must not only have held the relevant mistaken belief (whether that be a mistake of fact or law) but also the mistake must be causative of the payment or conferral of the benefit (*David Securities,* per Mason CJ, Deane, Toohey, Gaudron, at 378-379 and per McHugh JJ, at [43] making it clear that the prima facie entitlement to recover moneys paid under a mistake depends upon the appearance that the moneys were paid by the payer "in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys").

174 A plaintiff may be relevantly mistaken, and entitled to restitution, even where the mistaken belief is his or her own fault, *provided* that payment was made as a result of the mistake (*Commercial Bank of Australia v Younis* [1979] 1 NSWLR 444, at 450; *David Securities*; *Kelly v Solari* (1841) 9 M & W 53, at 59; 152 ER 24, at 26, per Parke B).

175 In *Kelly v Solari*, Baron Parke noted in this regard:

> *If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may,*

> *generally speaking, be recovered back*, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. (my emphasis)

176 As I noted in *Salib v Gakas; Newport Pacific Pty Ltd v Salib* [2010] NSWSC 505, at [328], in *David Securities* the High Court did not expressly address the appropriate test for causation in this context, remitting the case to the trial judge to determine whether the payments were made 'because of' the mistaken belief (*David Securities,* at 386), but I considered that it could be inferred, from the High Court's rejection of the requirement that the mistake be fundamental in nature, that the question would turn on whether the mistake was a 'significant' or 'dominant' cause of the relevant payment. By way of analogy in *Gould v Vaggelas* (1985) 157 CLR 215, at 216, per Wilson J; at 250-251, per Brennan J; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340, at 366, per Brannan J; *Henville v Walker* (2001) 206 CLR 459, at 493, per McHugh J, the test was whether the mistake was *a reason* for the enrichment.

177 On the evidence before me in the substantive proceedings, it is clear that both parties held (or at least expressed to each other) the belief that the Cammeray development had resulted in a profit; the dispute being as to the amount of the profit. Both parties seem to have held the view that the profit was at least in the order of $1.14million, a half share of which would be $570,000. Joseph Lahoud believed it was considerably more.

178 On one view, the relevant mistake might well be said to have been a mistaken belief that the project had made a profit at all (though that is not the mistaken belief which the Victor Lahoud parties now contend was the operative cause of the payment). However, the request by the Victor Lahoud parties for there to be a mutual right to elect for an audit (which would not have been necessary had there been no prospect that the project had made a loss or less of a profit than the stated amount) and the provision in the Terms of Settlement for what was to happen if the audited profit were to be less than the profit calculation in Annexure A) indicates very clearly that at least Victor Lahoud must have had in mind the possibility (however likely or unlikely he may have considered that to be) that the outcome of the audit would be that the project was found not to have made a profit in the order of $1.14m or more. With that in mind, he nevertheless chose to enter into an arrangement whereby Joseph Lahoud was to have the benefit of the interim payment until such time as an audit resulted in an obligation to repay some or all of that amount and did so without making any provision for what was to happen in relation to any interest on the moneys. He did so in the context of a settlement of the proceedings then on foot.

179 In those circumstances, even accepting that there was a mistaken belief as to the amount of profits that had been earned from the project, it seems to me that the mistake was not causative of the payment in that I would infer that the payment was made in order to compromise the then proceedings and thus was a voluntary payment in the sense referred to in *David Securities*. In effect, the Victor Lahoud parties chose to make the payment, knowing that there was a risk that it might represent more than half of the profit (if any) of the project on the basis of an arrangement whereby the principal amount was to be adjusted in accordance with an audit process if either party elected to have such an audit. In the

meantime, there is nothing to suggest that it was not the intention of the arrangement that Joseph Lahoud should have the benefit of use of the moneys in question.

180 Indeed, insofar as it might be said that the Victor Lahoud parties took the risk (based on an erroneous assumption or prediction that, upon an audit in the future, the profits from that Cammeray project would be confirmed as being substantial) when agreeing to pay the sum of $570,000 sum, there might have been available to the Joseph Lahoud parties an argument that the parties were not operating under a mistake of fact as presently existing but instead were operating under a misprediction as to the outcome of future events. A mere misprediction will not give rise to a basis for unjust enrichment (*Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26, at 32; *Dextra Bank & Trust Company Limited v Bank of Jamaica* [2002] 1 All ER (Comm) 193). However, it is not necessary for me to consider such an argument in light of the view I have taken as to the non-operative nature of any mistaken belief of the kind adverted to by the Victor Lahoud parties.

181 The payment was made in the context of settlement of the Industrial Relations Commision proceedings then on foot and was expressly made in recognition of the fact that the profit calculations were incomplete or inaccurate. The parties made express allowance for further determination of the profit figure, by way of audit (as was ultimately done). The fact that they may not have turned their minds to the interest effect if such an audit were to be delayed (as it was by a combination of events) for a considerable period) is not to the point. Bearing in mind that it is not necessary for the mistake to be fundamental, but rather that it must be causative of the payment, for a claim in restitution to lie in this context, I find it difficult to accept that the asserted mistake was causative of the payment. The operative cause of the payment seems to me to have been the agreement to settle the proceedings then on foot.

182 Absent the existence of any causative mistake, in my view it cannot be said that there is anything that warrants the conclusion that would be inequitable or unconscionable for the Victor Lahoud parties now to bear the burden of the outcome that interest is not repayable on the sum to be repaid, to borrow the words of Mahoney JA in *PC Developments*, at [626].

183 Therefore, having had regard to the exchange of supplementary submissions, I remain of the view expressed earlier above that the retention of the benefit of the moneys in question by Joseph Lahoud (though with hindsight it certainly operates to Victor's financial disadvantage) is not unjust for the purposes of the claim in restitution.

184 (For completeness, I note that the finding that there has been no relevantly *unjust* retention of the benefit of moneys, due to the fact of the agreement by which it was agreed that Joseph Lahoud should have and retain the benefit of such a sum, points to another issue which was not directly addressed during the oral submissions – namely, whether a claim for restitution can be made at all given the contractual context of the dispute. Mr Einfeld submits that the contractual background to the dispute does not preclude a claim for interest in equity (having regard to the *Hermann v Charny* (1976) 1

NSWLR 261 and *Morgan Equipment Company v Rodgers (No2)* (1993) 32 NSWLR 467). However, there is authority for the proposition that restitution is not available in a contractual situation where the contract is still on foot if such restitution would otherwise subvert the parties' contractual allocation of risk (*Lumbers v Cook*). That said, given the view I have reached as to the enrichment not being unjust I do not need to consider the question whether to grant interest in these circumstances would have been to subvert the contractual risk in this situation.)

Orders

185 For the reasons set out above, I make the following declarations and orders:

1. A declaration that, on the proper construction of clause 2 of the Deed of Settlement dated 5 February 2007 and having regard to the Independent Auditor's Report dated 24 August 2010 completed by Mr Stephen Roger, the first defendant (Joseph Lahoud) is liable to repay to the first plaintiff (Victor Lahoud) the sum of $346,027.17 and to pay the reasonable costs of the audit (those costs being the costs of or fees rendered by Mr Roger as auditor).

2. Order that Joseph Lahoud pay the amounts referred to in the declaration made in 1 above.

3. Dismiss the Amended Second Cross-Claim.

4. Order the cross-claimants to pay the fourth cross-defendant's costs of the Amended Second Cross-Claim.

186 I will otherwise hear from Counsel as to any further costs or other orders to dispose of the Notice of Motion.

****

LAST UPDATED:
10 November 2010