Supreme Court

New South Wales

Case Name:	Garawin Pty Ltd v 1A Eden Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 333
Hearing Date(s):	10, 12 & 13 May and 3 June 2021
Date of Orders:	25 March 2022
Decision Date:	25 March 2022
Jurisdiction:	Equity
Before:	Slattery J
Decision:	Order made for caveats to be removed. Injunction issued against all parties dealing with land distributed or partially distributed from the trust. Orders made for trustee to ascertain an appropriate provision for external liabilities.
Catchwords:	REAL PROPERTY – Torrens title – caveats – application to remove caveats – Real Property Act 1900, s 74MA(2) – real property development joint venture conducted through trustee company as trustee of a unit trust – plaintiff a 50% interest holder in the units in the unit trust – agreement to distribute the profits in specie in the form of lots of the development – distribution commenced but not completed – building under development the subject of defect proceedings – trust faced with unexpected external liabilities – further distribution suspended but plaintiff's permitted to mortgage undistributed lots – freezing orders made by consent against lots to be distributed to second defendant – lots distributed to the third defendant – caveats placed on all lots respect parties – plaintiff seeks removal of caveats to enable distribution – whether caveats bad in form – what if any ancillary relief should be granted if caveats are removed.

Legislation Cited:	Design and Building Practitioners Act 2020 Home Building Act 1989, s 18B Real Property Act 1900, ss 74MA(2), (3), 74P Trustee Act 1925, s 102
Cases Cited:	Barnes v Addy (1874) LR 9 Ch App 244 Burke v LFOT Pty Ltd (2002) 209 CLR 282 Christensen v Christensen [1954] QWN 37 Clark v Dillon SC Napier (1925) 26 GLR 201 Gissing v Gissing [1971] AC 886 Hohler v Aston [1920] 2 Ch 420 In the matter of 1A Eden Pty Limited [2021] NSWSC 82 Jones v Maynard [1951] Ch 572 Labouchere v Tupper (1857) 14 ER 670 Maddison v Alderson (1883) 8 App Cas 467 McBride v Sandland (1918) 25 CLR 69 Ottley v Gilby (1845) 50 ER 237 Re Cowin (1886) 33 Ch. D 179 Re Craig (1952) 52 SR (NSW) 265 Re Johnson (1880) 15 Ch. D 548 Re Oxley [1914] 1 Ch 604 Re Unit 2 Windows Ltd [1985] 1 WLR 1383 Spingett v Dashwood (1860) 66 ER 218 Stack v Dowden [2007] 2 AC 432 Steel v Dixon (1881) 17 Ch. D 825 Tanti v Carlson [1948] VLR 401 Thwaites v Ryan [1984] VR 65 Vacuum Oil Co. Ltd v Wiltshire (1945) 72 CLR 319 Walton's Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 White v Lady Lincoln (1803) 8 Ves 363
Texts Cited:	HAJ Ford and WA Lee, Principles of the Law of Trusts, (1990, 2nd edition, Law Book Co) PJ Butt, Land Law (7th ed 2017, Thomson Reuters) PW Young, C Croft, ML Smith, On Equity (2009, Thomson Reuters) RP Meagher, "Insolvency of Trustees" (1979) 53 ALJ 648
Category:	Principal judgment
Parties:	Plaintiff: Garawin Pty Limited ACN 074380715 First Defendant: 1A Eden Pty Ltd ACN 162152794 Second Defendant: Zaarour Investments Pty Ltd

	Third Defendant: Joesandra Pty Limited atf The Sleiman Family Trust ACN 130 126 206 Fourth Defendant: Christopher Robert Zaarour
Representation:	Counsel: Plaintiff: D. Weinberger Second, Third and Fourth Defendants: A. Davis Solicitors: Plaintiff: Ourania Konstantinidis, Dentons Second, Third and Fourth Defendants: Stephen Lewis Hedges, Walker Hedges Forestville
File Number(s):	2019/00350729
Publication Restriction:	No

JUDGMENT

1 The parties to these proceedings are three co-venturers in a property development which re-purposed a commercial/industrial building in North Sydney into strata residential apartments from 2013 to 2015. The building has since been occupied. But the Owners Corporation has sued the co-venturers, a related entity, and the builder in this Court's Building and Technology List, alleging that the building was defectively constructed ("the defect proceedings"). The co-venturers deny any defective construction and defend the defect proceedings, which have not yet been determined.

2 The first defendant, 1A Eden Pty Ltd ("1A Eden") is the joint venture vehicle. By a deed made on 12 March 2013 ("the 2013 deed") each of the three joint venturers, become unitholders of the 1A Eden Unit Trust ("the Trust") of which 1A Eden is the trustee. The joint venture parties are the corporate trustees of the respective family trusts of three individuals. The three joint venturers, their principals, their role in the proceedings and their respective interest in the Trust are as follows:

(1) The plaintiff, Garawin Pty Ltd ("Garawin") as trustee for the Moore Family Trust holds 50% of the units in the Trust. Mr Robert Moore is the principal of Garawin. And Garawin and Mr Moore are sometimes referred to in these reasons as "the Moore interests".

(2) The second defendant, Zaarour Investments Pty Ltd ("Zaarour Investments") as trustee for the Zaarour Family Trust holds 25% of the

units in the Trust. The principal of Zaarour Investments, Mr Christopher Zaarour has been joined as the fourth defendant. And Zaarour Investments and Mr Zaarour are sometimes referred to in these reasons as "the Zaarour interests".

(3) The third defendant, Joesandra Pty Ltd ("Joesandra") as trustee for the Sleiman Family Trust holds 25% of the units in the Trust. Mr Joseph Sleiman is the principal of Joesandra. And Joesandra and Mr Sleiman are sometimes referred to in these reasons as "the Sleiman interests".

3 The general objective of the joint venture was that Garawin would supply the capital for the development of the property and Zaarour Investments and Joesandra would supply the building expertise.

4 In May 2017 the joint venturers agreed to distribute the profits of the joint venture by directing 1A Eden to transfer to them strata units in the property development at agreed values. They began to act upon their May 2017 distribution agreement. But their distribution was incomplete, when six months later, in November 2017, the Owners Corporation commenced the defect proceedings. Although the legal issues are more complex, in overview in these proceedings Garawin seeks to remedy what it claims are inequities arising from the partial distribution of the assets of 1A Eden to the joint venturers, before the resolution of the defect proceedings.

5 The principal relief Garawin seeks in these proceedings may be shortly described. To facilitate the purchase and development of the North Sydney property, the parties were of the view that it should be purchased by 1A Eden and thereafter developed into 34 apartments and two retail spaces for an expected profit of between $9 million to $10 million. The co-venturers preferred any profits to be distributed to the unitholders *in specie*.

6 By 19 May 2016, 26 apartments had been sold, leaving 8 apartments for distribution to the co-venturers subject to agreement as to the market value of these remaining apartments and any consequent financial adjustments. Garawin as the holder of a 50% interest in the Trust saw itself as entitled to claim four apartments. Zaarour Investments as the holder of a 25% interest in the Trust saw itself as entitled to claim two apartments. Joesandra as the holder of a 25% interest in the Trust saw itself as entitled to claim two apartments.

7 By 14 April 2018, the Sleiman interests and the Zaarour interests had received title to their respective two apartments, and the Moore interests had received the proceeds of sale of one apartment. 1A Eden holds the remaining three apartments designated to the Moore Trust as a bare trustee.

8 But the defect proceedings intervened in 2017. The Owners Corporation of the North Sydney property commenced those proceedings in the Technology and Construction List, alleging defects in the North Sydney property against ZS Eden, a company associated with the Zaarour interests and Cubic, the building sub-contractors.

9 On 7 June 2019 and 12 June 2019, the Zaarour interests lodged caveats over the three remaining units held in 1A Eden, namely Lots 3, 5 and 6, to prevent their transfer to the Moore interests. The primary relief that Garawin seeks in these proceedings (sometimes referred to as "the caveat proceedings") is the removal of these three caveats, allowing 1A Eden to transfer Lots 3, 5 and 6 to the Moore interests. Garawin seeks declaratory relief and that these three caveats be removed. The Zaarour interests oppose that relief and the Sleiman interests take a more nuanced position, not in full opposition to the relief sought.

10 This is the Court's second judgment in relation to this dispute. On 12 February 2021, Rees J delivered judgment in related proceedings in the Corporation's List (proceedings 2020/15422): *In the matter of 1A Eden Pty Limited* [2021] NSWSC 82. In those proceedings (sometimes referred to in this judgment as "the winding up proceedings"), her Honour declined to wind up 1A Eden, the corporate trustee of the Trust at the suit of the Zaarour interests. I gratefully acknowledge the detailed factual findings in Rees J's judgment that most helpfully provide the background to these proceedings, especially in relation to the formation of the joint venture, the construction and completion of the building on the North Sydney property and the agreement concerning the division of the proceeds. These reasons draw in part upon relevant findings in Rees J's judgment.

11 Mr A. Davis of counsel instructed by Walker Hedges Forestville represented Garawin. Mr D. Weinberger of counsel instructed by Dentons Lawyers represented the Zaarour interests and the Sleiman interests.

12 The following is a narrative of the relevant history. This is an interlocutory hearing, not a final hearing. So, the narrative below represents the Court's findings on the matters covered only to the extent that it represents uncontested facts and matters that are common ground. Otherwise disputes between the parties are identified. Some factual matters which are the subject of findings in Rees J's judgment have been incorporated as they do not now appear to be contested by the parties. And the context will also often indicate that only the parties' allegations are being recorded in these reasons.

Three Co-Venturers and a Development Property – 2013 to 2022

The Parties

13 Mr Zaarour and Mr Sleiman are both established builders of substantial construction projects. Mr Moore is a property developer. The acquisition and repurposing of the North Sydney property was the first project that Mr Zaarour and Mr Sleiman had undertaken with Mr Moore as coventurers. Mr Zaarour and Mr Sleiman had previously worked for Mr Moore as builders on his development projects.

14 Mr Zaarour, Mr Sleiman and Mr Moore all gave evidence. They were all credible witnesses although with differing degrees of reliability. The Court found Mr Sleiman and Mr Moore to be very frank and Mr Zaarour almost as much. Mr Zaarour was somewhat more self-interested in answering questions. Both Mr Moore and Mr Sleiman were readily able to make concessions to the Court and had good recollections of the underlying events, although it must be said that their recollections were not closely tested in cross examination because of the broad consensus as to the facts and the prior evidence and findings of Rees J in the winding up proceedings.

15 Although the Court formed a slightly less favourable impression of Mr Zaarour of the reliability of Mr Zaarour's evidence, his cross examination largely addressed issues concerning the building contracts involving ZS Constructions (Queenscliff) Pty Limited ("ZS Queenscliff") and ZS Constructions (Eden) Pty

Limited (“ZS Eden”).. Issues which this Court does not have to decide and which have been fully covered and been well traversed in Rees J’s judgment. In the limited area where the Court has been required to make additional findings based on contested evidence it has done so clearly preferring the evidence of Mr Moore where it conflicts with that of Mr Sleiman and Mr Zaarour. But the Court stresses that it regards all three witnesses as giving honest evidence to the best of their recollection.

16 Mr Zaarour’s and Mr Sleiman’s practice when undertaking construction projects has been to form a special purpose corporate vehicle for each project, using the first two letters of their surnames, such that the typical project was called “ZS Constructions (Location) Pty Limited”. Three such companies feature in the present contest: ZS Constructions (NSW) Pty Limited (“ZS NSW”), ZS Constructions (Queenscliff) Pty Limited (“ZS Queenscliff”), and ZS Constructions (Eden) Pty Limited (“ZS Eden”). From time-to-time Mr Moore and other parties referred to Mr Zaarour’s and Mr Sleiman’s building operations simply using the term “ZS”.

17 Mr Moore has a long career undertaking substantial property developments in the Sydney Metropolitan area. He conducts his enterprise, the Moore Development Group, from business premises on the North Shore of Sydney from where he employs a financial officer Ms Chen to manage the financial resources and accounting obligations of the Group. During the proceedings Mr Moore was involved in many other developments and is presently director of all the two dozen companies associated with present and past developments. One such company is Mr Moore’s Garawin, which is also the trustee of the Moore Family Trust. And another company which provides accounting services to his group is MoDog Pty Ltd (“MoDog”).

Agreement to Develop the North Sydney Property – 2012 to 2013

18 In late 2012 and early 2013 Mr Moore planned to purchase an office building at 1A Eden Street, North Sydney to convert it into a residential building. He decided to invite Mr Zaarour and Mr Sleiman to participate as coventurers. All three of them thought that the development project would probably make profits of the order of $9 million - $10 million. They agreed to proceed together.

19 They did not document their initial agreement. But the best uncontroversial evidence of what they agreed at the time is in the 2013 deed constituting the Trust. Mr Moore says that the general scheme of the venture was that Mr Zaarour and Mr Sleiman would pay $500,000 each to fund the deposit and Mr Moore would contribute by finding the costs of obtaining development approval, an area where he had well-established expertise. Mr Moore expected that once development approval was obtained, the value of the property would increase substantially and that the co-venturers would be able to use the revalued development to raise the funds for the balance of the purchase price and the construction work.

20 Mr Moore's further understanding was that Mr Zaarour and Mr Sleiman would undertake the building work on a 'cost only' basis and that Mr Moore would not charge his time to the project. Mr Moore said his understanding of the consensus was that his interests would be responsible for the back-office and administrative support and that Mr Zaarour and Mr Sleiman would be responsible for the building and construction work. According to Mr Moore the joint venture profit was to be divided 50% to Mr Moore and 50% to Mr Zaarour and Mr Sleiman together, after each side was reimbursed for the cost of the outlays they had committed to the project.

21 Mr Zaarour and Sleiman have a different version of the initial agreement. Mr Zaarour says that the initial arrangement required Mr Moore on the one hand, and Mr Zaarour and Sleiman on the other, to provide $250,000 each for a deposit on the acquisition of the North Sydney property. But it was allegedly agreed that the Zaarour interests would loan Mr Moore's half of the deposit to him. Mr Zaarour denies the parties agreed Mr Moore would be reimbursed for the costs of obtaining development approval. Mr Zaarour accepts that Mr Moore would provide financial and administrative support to 1A Eden and manage and operate its bank accounts, and that he and Mr Moore would not charge the development for their time.

22 The Court does not have to determine the differences between these versions in this hearing. But some of the remaining accounting disputes between these

parties have their origins in their different perspectives on their initial agreement.

23 The parties incorporated 1A Eden in January 2013. Mr Zaarour and Mr Moore were appointed as its directors. Of the four issued shares, one was issued to Mr Zaarour, one to Mr Sleiman and two to Mr Moore. As earlier indicated, under the March 2013 Deed the Trust was established as a unit trust with 1A Eden as the trustee. The 100 units in the trust were issued as follows, 25 to Zaarour Investments, 25 to Joesandra, and 50 to Garawin. All these companies acted as trustees of family trusts associated respectively with Mr Zaarour, Mr Sleiman and Mr Moore.

24 On 25 March 2013 the Zaarour and Sleiman interests assisted in funding the project. Each made a short-term loan to Garawin of $125,000, to be repaid in six months. The loan was to be repaid on 29 September 2013. The loan was extended.

25 The differences between the parties' understanding of their initial agreement and their differing expectations emerged soon after 1A Eden had acquired the site and construction commenced.

The March 2013 Deed

26 1A Eden and the first unitholders, Garawin (as to 50 units), Joesandra (at 25 units) and Zaarour Investments (at 25 units) executed the March 2013 Deed to establish the Trust with 1A Eden as trustee and the unit holders as beneficiaries of a "Trust Fund" which is a sum settled on the trustee together with "all monies and investments and property paid to or transferred to and accepted by the trustee as additions to the Trust Fund" and accumulations thereto. The March 2013 Deed contains several provisions relevant to the present contest between these parties. The unitholders are beneficially entitled to the Trust Fund "in proportion to the units registered in their names and all such units shall be of equal value" and each unitholder "is presently entitled to… a share in the capital of the Trust in proportion to the number of units held (one vote for each unit held) and shall be taken to be the owners of an equitable estate in proportion to the number of units held in any land that is owned by the Trust": clause 4.3. Therefore, subject to any agreement made

among unitholders, clause 4.3 gives each unitholder an equitable interest in each lot of the North Sydney property that is held by 1A Eden as part of the Trust Fund. This has implications for the parties' present arguments about the caveats.

27 The Trustee holds the Trust Fund in trust for the unitholders upon the terms and subject to the provisions of the March 2013 Deed: clause 6. The Deed describes the duties of the trustee in clause 8 in the following terms: clause 8. These duties include duties, to manage the Trust in "a proper and efficient manner" (clause 8.1), to ensure that adequate insurance of all relevant kinds is taken out in respect of the properties of the Trust Fund (clause 8.2) and to keep proper books of account of "all sums of money received and expended by and on behalf of the Trust Fund" (clause 8.4). Importantly the trustee's duties include (in clause 8.3) an obligation to meet external liabilities, namely that the trustee shall:

> "[8.3] Deposit all receipts from the management development and operation of the Trust Fund into a separate bank account and shall pay all current expenses and outgoings with respect to the Trust Fund and provide such reserves for the future and contingent liabilities as the Trustee shall consider necessary."

28 This provision is hardly unexpected in a trust deed such as this. It requires the trustee to consider the future and contingent liabilities of the trust and to provide an appropriate level of reserves to meet those liabilities. The trustee is absent from these proceedings and is not itself heard through any argument for the observance of this clause during the present contest between the unitholders. But this clause nevertheless is part of the binding agreement that the unitholders made among themselves when they executed the March 2013 Deed. To the extent they presently either seek, or resist, relief it is a clause that they cannot ignore.

29 The trustee has the power with the prior consent of unitholders to make determinations concerning the income of the Trust Fund in each financial year and to distinguish between income and capital and to distribute income: clauses 9 and 10. At the end of each financial year the trustee will determine the net trust income as soon as practicable and distribute it amongst unitholders in accordance with their entitlements: clause 10. The trustee has

broad powers commonly seen in unit trusts of this type including the power to estimate the value of a component part of the Trust Fund and to appropriate it to satisfy the interest of any beneficiary or unitholder: clause 12.14. The trustee has the power to determine whether any real or personal property or any increase or decrease in the value of such property shall be treated as, or debited to, capital or income: clause 12.15. The trustee has the power to operate accounts with banks or other financial institutions (clause 12.16) to receive money and give receipts and discharges (clause 12.17), and to take such action "as the trustee shall think fit for the adequate protection of any part or parts of the Trust Fund" (clause 12.20). The trustee is authorised to appropriate *in specie* any portion of the Trust fund towards the share or entitlement of any beneficiary: clause 12.37.

30 The trustee has a right to be indemnified out of Trust assets (clause 17) which provides as follows:

> “17. Trustee to be Indemnified
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> The Trustee acting in good faith shall be entitled to be indemnified out of the Trust Fund in respect of all liabilities incurred by the Trustee relating to the execution of any powers duties authorities or discretions vested in the Trustee under this Deed and in respect of all actions proceedings costs claims and demands in relation to any matter or thing done or omitted to be done concerning the Trust Fund ***PROVIDED ALWAYS*** that the right of the Trustee to be indemnified in respect of any liability incurred by the Trustee or arising in or about the investment and administration of the Trust Fund in the conduct and management of any business forming part of the Trust Fund in the acquisition of any investment under any Contract entered into by the Trustee or by reason of the execution of any power duty authority or discretion vested in the Trustee shall be limited always to the assets of the Trust Fund in the hands of the Trustee for the time being and shall not extend to enable the Trustee to recover any loss or obtain reimbursement for such liability from any Unit Holder ”

31 The trustee has the power to distribute assets in accordance with clause 21 as follows:

> “21. Distribution of Assets
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> With the consent of the Unit Holders the Trustee may at any time and from time to time before the date of termination of the Trust out of the capital of the Trust Fund raise any sum or sums and pay the same, or subject to any limitation on any class of units distribute any trust assets in specie to the Unit Holders in proportion to the units registered in their names as at the date of the decision to distribute for their own use and benefit in addition to any income to which the said Unit Holders \may from time to time so be entitled.”

32 The trustee may convene meetings of unitholders: clause 25. The Deed provides for the remuneration of the trustee in clause 28. The Trustee is entitled to be reimbursed for expenses and costs properly incurred in acting as the trustee of the Trust Fund or otherwise incidental to the provisions of the March 2013 Deed and is also entitled to be remunerated for "the time and effort and expertise involved in discharging the trustee's duties, that remuneration however must be reasonable in all circumstances": clause 28.1.

33 Finally, decisions of the trustee are regulated by clause 36 of the deed as follows. The decisions of the trustee in exercise of any power conferred by the March 2013 Deed "may be made in writing and signed by the trustees or by a resolution passed at a meeting of the trustee, or by resolution of directors of a corporate trustee". In the event of a disagreement between the trustees or the directors, the matter for decision will be referred to a vote of all the trustees or directors (clause 36.1) and be decided by a majority (clause 36.2). But in the event of a deadlock the matter should be referred to mediation or arbitration.

Acquisition and Early Development of the Site – March 2013 to June 2014

34 1A Eden exchanged contracts for the acquisition of the North Sydney property on 27 March 2013 for $6.55 million. Under the contract 1A Eden paid a deposit of $1 million in two instalments, $500,000 by 4 April 2013 and the balance within 12 months. The contract provided for completion in 18 months. The Zaarour and Sleiman interests assisted in funding Mr Moore's half of the first instalment of the deposit.

35 After contested proceedings in the Land and Environment Court, 1A Eden obtained development consent for the project on 8 November 2013. The consent authorised the construction of 34 residential apartments and 2 retail spaces on the site. 1A Eden obtained finance to fund the balance of the purchase price and the building works.

36 On 29 January 2014, ZS Queenscliff was incorporated. ZS Queenscliff already had a building contract with a company in the Moore Development Group to build a block of residential apartments in Queenscliff. ZS Queenscliff held a contractor's licence under the *Home Building Act 1989* authorising it to do

residential construction work. Mr Sleiman was the sole director of ZS Queenscliff and Joesandra was its sole shareholder.

37 Construction work commenced in January 2014. Several consultants and contractors and related parties began invoicing 1A Eden and the Moore interests for work related to the project. The detail of these invoices and their work is not relevant for present purposes, but their general nature informs later disputes. An engineer, Wallace & Spratt Pty Limited, rendered invoices to the Moore Development Group in respect of the 1A Eden project. On 25 March 2014, Garawin rendered an invoice for $126,000 to 1A Eden for accountancy, administration, and overheads.

38 Garawin invoiced 1A Eden on 8 April 2014 for $570,405.39 for development application costs and management up to 27 March 2014. A detailed summary of internal expenses, external charges and consultants' fees accompanied this invoice. 1A Eden completed the purchase of the property on 11 April 2014. On completion, Garawin was reimbursed for all these costs associated with the development application. The Zaarour interests contended before Rees J that Garawin was not entitled to this reimbursement.

39 In May 2014, Core Sites Pty Limited ("Core Sites"), a company with established commercial ties to the Moore Development Group began to render invoices to the Moore Development Group in respect of management services rendered for the 1A Eden project. This became another source of dispute. The principal of Core Sites, Mr Rickard also worked part time for the Moore Development Group, charging for his services through Core Sites.

40 Mr Moore's understanding of the agreed arrangements was that Zaarour's approval for the payments was not required as the Moore interests had the role of administering the project. Mr Moore says the invoices rendered by Mr Rickard were not substantial for the work that Mr Rickard did.

41 On 6 June 2014, ZS NSW went into administration and, later, into liquidation.

The Contractual Arrangements for Construction

42 One of the structural reasons for the later building defects and for the distrust that developed between these parties is that Mr Zaarour and Mr Sleiman did

not take charge of the building and construction work themselves, through their own entities. Instead, another company Foris Pty Ltd trading as "Cubic Contracting" (Cubic) was engaged to do the building work for less than the original projected cost of the work. On 17 June 2014, Cubic submitted a tender for the conversion of the existing commercial building into residential apartments.

43 Mr Moore's company, MoDog invoiced 1A Eden on 30 June 2014 for administration charges of $20,592 for the period from 28 March 2014 to 30 June 2014 in the sum. Mr Moore claims an entitlement to charge such administration costs to the project before profit was calculated. The Zaarour and Sleiman interests take a different view about how such charges should be brought to account.

44 Mr Zaarour and Mr Sleiman created a new "ZS" company for this project, incorporating ZS Eden on 7 July 2014 with the assistance of Ms Chen. They were each appointed as a director and became equal shareholders.

45 On 8 July 2014, 1A Eden signed a building contract, as principal, and ZS Eden, as contractor. The contract sum was $6.705 million plus GST. However, ZS Eden did not then hold a contractor licence authorising it to do residential construction work as required under the *Home Building Act*. On 29 July 2012, ZS Queenscliff issued a letter of intent to Cubic. Cubic was awarded the contract for a lump of $6.7 million plus GST, with work to begin on 4 August 2012.

46 ZS Eden assigned the benefit of the building contract to ZS Queenscliff. Mr Zaarour says this was to avoid delays with the project financier. Mr Moore says the assignment occurred, apparently because ZS Eden could not obtain a licence as a related company ZS NSW was then in external administration.

47 Strangely, ZS Eden entered a sub-contract with Cubic for $6.79 million plus GST on 12 August 2014. The Zaarour and Sleiman interests apparently ignored or overlooked the assignment of the building contract to ZS Queenscliff.

48 Cubic executed the building and construction work. Cubic rendered progress claims to ZS Eden, which rendered identical claims to 1A Eden. On 19 September 2014, ZS Eden began making progress claims to 1A Eden, which were paid.

49 On 15 April 2015, Zaarour Investments began rendering invoices to 1A Eden in respect of consulting services. Contrary to the initial agreement not to charge the project for his time, Mr Zaarour says he approached Mr Moore and asked whether he could charge for his time in supervising Cubic. Apparently, Mr Moore agreed, and Mr Zaarour proceeded to charge some $3,000 a month. Mr Zaarour's company charged $61,600 in total. Mr Moore said he did not agree to pay Mr Zaarour fees for supervising Cubic. Although some invoices rendered by Mr Zaarour were paid – having been authorised by Mr Rickard – Mr Moore said that he only became aware of the invoices during these proceedings.

50 In May 2015, Mr Sleiman ceased to be a director of ZS Eden, and Mr Zaarour remained the sole director.

51 On 30 June 2015, MoDog rendered an invoice to 1A Eden for administrative charges for that financial year, totalling $82,768. Zaarour Investments also rendered an invoice for consulting services for June 2015, rendering no charge. A handwritten note on the invoice records "No charge due to partnership does deserve some free hours to assist in reducing total cost".

52 On 8 July 2015, ZS Eden assigned its rights, title and interest in the building contract to ZS Queenscliff. Thereafter ZS Queenscliff made progress claims to 1A Eden rather than ZS Eden. Mr Zaarour claimed in the proceedings before Rees J that the provisions of the assignment were never acted upon.

Completing the Development – November 2015

53 Building works progressed throughout 2015 and on 18 November 2015, the strata plan was registered. The Owners Corporation, Owners - Strata Plan No. 92226 was formed. The North Sydney Council ("the Council") issued an interim occupation certificate for the building on 9 December 2015. Residents began moving into the building. On 22 January 2016, MoDog invoiced 1A Eden for further administrative charges of $47,520 since 1 July 2015. Cubic rendered its

final invoice on 26 April 2016.The Council issued a final occupation certificate on 19 May 2016.

54 Mr Moore, Mr Zaarour, and Mr Sleiman, together with Mr Rickard and Ms Chen met on 19 May 2016 to discuss distributing the development profits. Most apartments had, by this time, been sold and the net proceeds of sale used to repay the project financier. The co-venturers agreed at this meeting to distribute the profits of the venture by transferring the remaining unsold apartments to the unitholders of the Trust. But $500,000 of Mr Sleiman's distribution was to be in cash.

55 There is substantial evidence to suggest that the co-venturers agreed to transfer out of 1A Eden: (a) Lots 1 and 2 to Mr Sleiman's interests; (b) Lots 3, 4, 5 and 6 to Mr Moore's interests; and (c) Lots 26 and 27 to Mr Zaarour's interests.

56 Mr Moore proposed that the final distribution of the apartments occur after a development application to change the use of Lots 1 to 6 had been approved. If approved, the change of use would benefit both Mr Moore and Mr Sleiman by increasing the value of the apartments being transferred to each of them, and thus needed to be factored into the final distribution of profit.

57 The $500,000 was transferred to Mr Sleiman's interests on 19 May 2016. MoDog applied for development consent to change the use of Lots 1 to 6 from serviced apartments to residential apartments, on 10 June 2016, which was approved on 9 September 2016.

The Agreed Final Profit Distribution – May 2017

58 In her judgment Rees J explained the arrangements that she found that the co-venturers made about the distribution of their profits:

> [40] In about February 2017, financial statements for the 1A Eden Unit Trust for the 2016 financial year were signed by Mr Moore and Mr Zaarour. A tax return was lodged, declaring a profit of $7,457,952, to be distributed to Mr Sleiman's company ($1,865,488), Mr Zaarour's company ($1,864,488) and Mr Moore's company ($3,728,976).
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> [41] In May 2017, Mr Moore asked Ms Chen to prepare a Distribution Schedule of the unitholders' entitlements, so that the unitholders could receive their entitlements under the trust deed. Ms Chen prepared a spreadsheet, referred to by the parties as a "Distribution Sheet". For each of the 36 lots in

> the strata plan, the cost of land, stamp duty, legals and building was apportioned to the unit based on the unit entitlements in the strata plan. The total cost of each unit was thereby calculated. According to the spreadsheet, the net profit on the project was $7,826,220 such that Mr Zaarour and Mr Sleiman were entitled to receive $1,956,555 each and Mr Moore was entitled to receive $3,913,110. Notional sale prices were then attributed to the unsold lots in the Distribution Sheet. According to Mr Moore, these figures had been agreed at the meeting in May 2016. Consistent with what had been discussed in May 2016, the Distribution Sheet proceeded on the basis that Lots 1 and 2, with a combined notional sale price of $1.32 million, would be transferred to Mr Sleiman as his share in the profit on the development. Lots 3 to 6, with a combined notional sale price of $2.985 million, would be transferred to Mr Moore for his share of the profit. Lot 27, with a notional sale price of $1 million and Lot 36, with a notional sale price of $800,000, would be transferred to Mr Zaarour.
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> [42] On 23 May 2017, Mr Moore attended a meeting with Mr Zaarour, Mr Sleiman, Ms Chen and Mr Rickard. Those present agreed that the values attributed to Lots 1 to 6, 27 and 36 were appropriate and – taking into account the $500,000 already paid to Mr Sleiman – Lots 1 and 2 would be transferred to Mr Sleiman, Lots 3 to 6 would be transferred to Mr Moore and Lots 27 and 36 would be transferred to Mr Zaarour. Some funds were retained by 1A Eden, to pay stamp duty on the transfers, as well as retention monies in respect of Cubic.
>
> [43] On 23 November 2017, Mr Sleiman and Mr Zaarour signed a letter from 1A Eden to a financier in respect of Lots 5 and 6 which, it will be recalled, were apartments to be transferred to Mr Moore. By the letter, Mr Sleiman and Mr Zaarour confirmed that Lots 5 and 6 could be used by Mr Moore as collateral security. The letter stated:
>
> > 'Given the commercial benefit resulting from the completed development whereby all beneficial owners have been allocated a percentage of the residual stock. The residual stock has been apportioned to each respective owner as their profits from the transaction.'
>
> It would thus appear that, at the date of this letter, Mr Zaarour and Mr Sleiman were satisfied that the profits from the development had been appropriately allocated to each of the stakeholders and no issues of accounting then arose."

59 Thus, a key meeting took place on 23 May 2017 at which the co-venturers agreed upon the values attributable to the eight lots being distributed and the transfer of Lots 1 and 2 to the Sleiman interests, Lots 3, 4, 5 and 6 to the Moore interests and Lots 27 and 36 to the Zaarour interests.

The Defect Proceedings Commence – November 2017

60 By late 2017 the Owners' Corporation were complaining that defects had begun to appear in the building. These included serious complaints that the door frames and jambs on the entry door to each apartment did not comply with fire standards. 1A Eden's early response was partly driven by its view that

the estimated cost of repairing the defects was little more than $100,000, the defects liability period had not expired and 1A Eden had retained sufficient funds from Cubic to cover the cost of remedying the alleged defects.

61 But the Owners' Corporation was not satisfied with Cubic's and Mr Zaarour's response to the complaints. So, on 30 November 2017 the Owners' Corporation commenced the defect proceedings against 1A Eden, ZS Eden, ZS Queenscliff and Cubic, seeking rectification of the building defects. ZS Queenscliff appears to have been initially joined because of the assignment to it of the building contract.

62 The Owners' Corporation became aware of the proposal for 1A Eden to distribute the eight un-sold apartments to the co-venturers and sought freezing orders over the assets of 1A Eden in the defect proceedings.

63 Raising and sustaining 1A Eden's defence costs for the defect proceedings exposed divisions between the co-venturers. Piper Alderman provided an initial cost estimate and requested $30,000 on account of fees. On 7 December 2017, 1A Eden paid $30,000 to Piper Alderman's trust account. Mr Zaarour was the co-venturer nominated to give instructions to Piper Alderman on behalf of 1A Eden. He commenced sending Piper Alderman's invoices to Ms Chen for payment from 1A Eden's funds. But by March 2019 1A Eden lacked sufficient liquidity to fund the defence. To overcome short-term disagreements Mr Moore stepped in and funded the litigation from his own resources without assistance from either the Zaarour interests or the Sleiman interests. This inequitable situation was addressed during the hearing, as is explained below.

64 By this stage the partial distributions to the Sleiman interests and the Zaarour interests had already taken place, as had the sale of one of the units (Lot 4) dedicated to the Moore interests. This situation led to a series of discussions between the three co-venturers to try and reach a common position. Mr Zaarour and Mr Moore have put on slightly different versions of those discussions, which ultimately led to the signing of a deed of indemnity to support freezing orders made in the defect proceedings. Those differing versions are set out below.

65 Mr Sleiman recalls at that meeting a conversation in words to the following effect:

> "Mr Moore: This is bloody ridiculous. How can they freeze $7,000,000.00 worth of assets for a trumped up charge by the Owners Corporation. It is a bloody disaster.
>
> Mr Zaarour: What do you think we should do about it?
>
> Mr Moore: It's got to be listed. This has the potential to send me broke. I can't allow it to stay.
>
> Mr Sleiman: What do you mean? It is only a few Units and you have them mortgaged already. It's not taking them it just sits there.
>
> Mr Moore: You don't understand. It is a default under the Mortgage. I would have to tell the Mortgagee and even if I didn't they would find out. That would then trigger defaults under my other Mortgages and it would be a disaster and they would all fall over like dominos. $100,000,000.00 worth of assets are at risk before of this.
>
> Mr Zaarour: What can we do about it?
>
> Mr Moore: We have to get Piper Alderman to release them. I will tell them to make an application."

66 Some days later after this he says there was a further meeting between Mr Sleiman, Mr Zaarour and Mr Moore, in which words to the following effect were said:

> Mr Moore: Piper Alderman have said we only need to put up security to the value of $950,000.00 then the Freezing Order can be lifted. Chris, your Lot 27 doesn't have a Mortgage on it, it is just sitting there, not doing anything. I want you to put it up as security in this matter as it is worth over $1,000,000.00.
>
> Mr Zaarour: Why my Unit and why only me?
>
> Mr Moore: Your Unit is the only Unit unencumbered and one security is sufficient, it will get me out of trouble.
>
> Mr Zaarour: But that is not fair, I am the only one at risk and the only one putting up the security. Why should I have to take all the risk?
>
> Mr Moore: Come on Mate, I am not going to leave you high and dry. I will cover my share, you know I am good for it. Anyway, it is a trumped-up claim. Joe is your partner and you know that you won't have any trouble with his share.
>
> Mr Sleiman: Of course, Chris, you know that I will cover my share.
>
> Mr Zaarour: Yeah, I know Joe I am not worried about that. Okay Rob, it if will get you out of trouble. Let's put up Unit 27 and everyone will cover their share.
>
> Mr Moore: Of course, we will all cover our share. I'll let Piper Alderman know."

67 Mr Moore recalls a slightly different discussion to the following effect that occurred on or about December 2017 or January 2018:

> "Mr Sleiman: Guys, I need to sell my units. How can we get rid of this freezing order?
>
> Mr Moore: Well the freezing order should be for about $1 million not $6 million. What we can do is offer up one of the units as security. I can't because all of my units are mortgaged.
>
> Mr Sleiman: Can't you re-mortgage or something? Neither [Mr Zaarour] nor I want to put up our units.
>
> Mr Moore: But you're the builders. This is your issue. I am constantly having to put money in to fund the legal fees.
>
> Mr Zaarour: OK, I guess I can put up unit 27.
>
> Mr Sleiman: Thanks [Mr Zaarour], that's great! I'm so happy now!
>
> Mr Moore: Thanks [Mr Zaarour], but like I said these building issues are your responsibility".

68 There is little conflict between the parties on the essential agreement leading to the consent orders in the defect proceedings. The parties agreed: that each of the units being discussed was worth more than $1 million; Mr Sleiman promised to guarantee his share; Mr Zaarour offered his unit on the basis "we all share the risk". The agreement did not result in any alteration to the freezing orders made in the defect proceedings, nor have they been altered since.

The 14 December 2017 Deed of Indemnity

69 On 14 December 2017, the parties executed a Deed of Indemnity ("the 2017 Deed"). The 2017 Deed is brief:

> "Introduction
>
> A. The Trustee is the trustee of a unit trust, the 1A Eden Unit Trust (the Trust). The units in the Trust are held by Garawin, Joesandra and Zaarour Investments, in each case as trustee of a separate trust as set out in the "Parties" section of this deed (collectively "the Unit Holders"). The Trust was established, and dealings with the property of the Trust (the Trust Fund) are governed, by a trust deed dated 12 March 2013 between the Trustee and the Unitholders (the Trust Deed).
>
> B. Pursuant to clause 17 of the Trust Deed, the right of the Trustee to be indemnified in respect of liability incurred by the Trustee is "limited always to the assets of the Trust Fund in the hands of the Trustee for the time being and shall not extend to enable the Trustee to recover any loss or obtain reimbursement for such liability from any Unit Holder".
>
> C. On 14 December 2017, in connection with litigation between The Owners - Strata Plan No 92226 and the Trustee (being Supreme Court proceedings no. 2017/00362562) (the Proceedings), the Trustee and the Unit Holders determined that the Unit Holders would indemnify the Trustee on the terms of this deed in connection with the Trustee's alleged liability the subject of the Proceedings. The parties have executed this deed in order to give effect to that determination.

> Operative clauses
>
> Grant of indemnity
>
> Each of the Unit Holders hereby agrees to indemnify and keep indemnified the Trustee against any loss or damage incurred or suffered by the Trustee in connection with or arising from an order made in the Proceedings, to the extent such liability is not otherwise met by the Trustee from the Trust Fund.
>
> Indemnity is separate and continuing
>
> The indemnity given by this deed is a separate and continuing indemnity and inures for the benefit of the Trustee separately from and in addition to any indemnity to which the Trustee may otherwise be entitled pursuant to the Trust Deed, at law or in equity.
>
> Trust Deed does not limit indemnity
>
> Nothing in the Trust Deed, including the provision of clause 17 of the Trust Deed, shall abrogate or limit the scope of the indemnity granted by this deed.
>
> Limitation on revocation of indemnity
>
> The indemnity granted hereunder is irrevocable except:
>
> with the consent of the plaintiff in the Proceedings; or
>
> with the leave of the Supreme Court of New South Wales."

70 On 18 December 2017, 1A Eden gave an undertaking to the Court in the defect proceedings "not to sell, charge, transfer or encumber" Lot 27 and should it wish to, sell, charge, transfer or encumber Lot 27 it should pay into Court the sum of $950,000 (or in the case of an encumbrance the amount secured by Lot 27). The Court also noted the December 2017 Deed. Thus, Lot 27 and the deed of indemnity were offered as security by 1A Eden for its performance of any rectification works. Although it will be noted that the December 2017 Deed does not secure the indemnity over any property of the parties to it. The Court also ordered that day that a joint expert be appointed to inspect the building works, identify any defective work and specify the work required to remedy such defects.

71 On 9 February 2018, after reviewing the available evidence, the Owners' Corporation discontinued the defect proceedings against ZS Queenscliff. But the Moore interests hold out the possibility that they may pursue a claim against ZS Queenscliff for any residual losses arising out of the defect proceedings.

72 By the first half of 2018 differences between Mr Zaarour and Mr Moore were becoming stark. Whether or not, for example, 1A Eden should bring

proceedings against ZS Queenscliff was a matter on which they had different positions. In the meantime, in March 2018, Core Sites was continuing to invoice 1A Eden for $92,850 for fees due for reviewing and negotiating defect issues and MoDog for administrative charges.

73 The May 2017 distribution agreement was substantially implemented in April 2018. Given the amount in issue in the defect proceedings it is perhaps surprising that the Owners Corporation did not seek to place further restraints upon this distribution. Nevertheless, on 12 April 2018, 1A Eden transferred Lots 1 and 2 to Joesandra and Lots 27 and 36 to Mr Zaarour Investments. Rees J was understandably puzzled in her judgment as to how Lot 27 was transferred to Zaarour Investments given the general restraints on dealing with Lot 27 in the 18 December 2017 defect proceedings orders, presumably this was by on form of waiver.

74 Garawin also derived some benefit from the distribution agreement. On 14 April 2018, 1A Eden sold Lot 4 for $750,000 and the net proceeds were paid to Garawin on 28 May 2018. Thus, the only part of the distribution agreement not performed by June 2018 was the transfer of Lots 3, 5 and 6 to Garawin. This meant that the May 2017 profit distribution agreement, an agreement which is prima facie specifically performable, then lacked fundamental mutuality. It had been partly performed for the benefit of the Zaarour interests and the Sleiman interests but without equivalent performance for the benefit of the Moore interests. At the hearing the apparent injustice in this situation clearly rankled Mr Moore and for good reason.

75 By the end of March 2019, 1A Eden had no more working capital, although it still held the retention monies for Cubic. Mr Zaarour and Mr Sleiman objected to Mr Moore running down 1A Eden’s liquid funds on administration charges and Mr Moore claimed an entitlement to do so.

76 By May 2019 the parties could not agree on who should pay for the joint expert’s fees in the defect proceedings. This situation added to Mr Moore’s sense of unfairness that he had not received his distribution under the May 2017 agreement and was being asked to maintain 1A Eden’s solvency, when Mr Zaarour and Mr Sleiman had received all their distributions, had

subcontracted to Cubic, leading to building defects, and yet were doing nothing to maintain 1A Eden's solvency.

77 This became an impasse, potentially threatening 1A Eden's capacity to comply with the Court's orders in the defect proceedings. The details of the impasse and whether that actually was paralysing 1A Eden were matters considered by Rees J in her judgment in the winding up proceedings but are not of present relevance. Extensive correspondence contested the provision of adequate financial information about 1A Eden to the co-venturers and threatened the appointment of provisional liquidator.

78 Eventually, Mr Zaarour commenced the winding up proceedings in January 2020. But in the meantime, he lodged caveats over the 1A Eden lots earmarked for distribution to the Moore interests.

Commencing These Caveat Proceedings – 2019

79 In June 2019, Mr Zaarour lodged caveats over Lots 3, 5 and 6, to pre-empt Mr Moore transferring them unilaterally out of 1A Eden. He need not have worried. The Court accepts Mr Moore was of a different mindset. As his evidence in these proceedings made clear to the Court: he was not going to do anything to jeopardise 1A Eden's solvency and put at risk his own long-standing reliable commercial reputation. Mr Zaarour says he was motivated to put on the caveats to preserve the Trust's assets until an inquiry into its finances could be carried out. He can be taken at his word on this. That issue should have been uppermost in the minds of all these co-venturers.

80 On 31 July 2019, ING Bank offered Mr Moore an advance of $5.1 million to refinance an existing facility. The offered loan terms included guarantees from Mr Moore, MoDog, 1A Eden Street Pty Limited and Garawin and security by registered mortgage over Lots 5 and 6 in the name of 1A Eden. Mr Zaarour's caveats over these lots were an obstacle to the re-finance. Mr Moore continued to press his co-venturers to allow the mortgages to be put in place.

81 On 24 September 2019 Garawin returned fire. It lodged a caveat over Mr Sleiman's Lot 1. Despite this caveat, on 14 October 2019 Mr Sleiman contracted to sell Lot 1 for $675,000. On 22 October 2019, Mr Moore and Mr Zaarour attended a mediation but were unable to resolve their differences.

82 On 7 November 2019, Garawin commenced these proceedings by Statement of Claim in the Real Property List. Garawin principally sought removal of the caveats over Lots 3, 5 and 6 and declarations that the distribution agreement is binding notwithstanding the want of writing and 1A Eden holds Lots 3, 5 and 6 on trust for Garawin, and an order for specific performance that these titles be transferred forthwith to it.

83 In the alternative, Garawin sought a declaration that Zaarour Investments held Lots 27 and 36 on trust for Garawin, Zaarour Investments and Joesandra in the proportions 50:25:25 and a like declaration that Joesandra held Lots 1 and 2 on trust for Garawin, Zaarour Investments and Joesandra in the same proportions.

84 Garawin's Statement of Claim describes the agreements reached in May 2016 and May 2017 in respect of the distribution of profits. Thus, the Moore interests sought to have the profit distribution alleged to have been agreed by the parties in May 2016 and May 2017 implemented or, alternatively failing that, the lots transferred to the Zaarour and Sleiman interests held on trust for the co-venturers in the proportions initially agreed.

85 On 15 November 2019, Mr Sleiman served a lapsing notice in respect of the caveat lodged by Garawin over Lot 1. On 29 November 2019, Garawin filed a motion in these proceedings seeking to extend that caveat.

86 On 4 December 2019, Zaarour Investments, Joesandra and Mr Zaarour filed defences in these proceedings. Mr Zaarour denied the matters said to have been agreed at the meetings in May 2016 and May 2017. Further, the defences alleged Mr Moore made false or misleading representations as to the financial status of the project, the net income of the project and a proposed division of reported profits. Although, as will be seen this aspect of the defence was not propounded at the hearing of these proceedings. Although the amount for final distribution will need to be addressed after this judgment.

87 On 17 December 2019, Garawin filed an amended motion in the caveat proceedings, seeking an order extending the operation of the caveat it had lodged over Lot 1, or in the alternative, an order that Joesandra pay the net

proceeds of sale of $572,500 into Court on completion of settlement of the property.

88 On 28 February 2020, Darke J heard Garawin's motion in the caveat proceedings. His Honour concluded that there was a serious question to be tried as to whether Garawin had a beneficial interest in Lot 1. The balance of convenience also favoured preserving the status quo in relation to that property. As Lot 1 was the subject of a contract for sale to a third party, the matter was left on the basis that the sale of Lot 1 could complete if the proceeds of sale were paid into Court pending the outcome of these proceedings. The Court's records do not indicate that any sum has been paid into Court so it is assumed that Lot 1 has not been sold.

The Winding Up Proceedings – January 2020 to February 2021

89 The accounting and other disputes troubling these parties persisted. They have now been resolved in respect of accounts up to about November 2017, although after that they are still at issue for accounts after that. These reasons have already recounted the general nature of these disputes. They included, for example, who would pay for rectification work found by experts to be necessary, and whether invoices by the Moore interests had been inappropriately paid from 1A Eden's development funds. Mr Zaarour suggested that the improperly authorised payments totalled $156,000, perhaps not a large sum in the scheme of the amounts in issue in these and in the defect proceedings. But Mr Zaarour also said that, in agreeing to distribute the profits of the development, he relied on the figures presented by Mr Moore as being true and correct.

90 In January 2020 Mr Zaarour commenced the winding up proceedings on the just and equitable ground on the basis that 1A Eden was said to be deadlocked and the relationship between its directors had broken down by reason of these accounting disputes.

91 The allegations in the winding up proceedings somewhat foreshadowed the arguments in these proceedings. Mr Moore denied that there was a deadlock and denied Mr Zaarour had been treated unfairly and said that he had been given 1A Eden's accounts whenever requested.

92 Mr Moore said that a dispute about paying legal fees had led to Mr Zaarour placing caveats on Mr Moore's units, which was what had led to any corporate paralysis that had prevented it from distributing the remainder of the trust income and acting against ZS Queenscliff in relation to the losses arising out of the defect proceedings. Mr Moore said that 1A Eden still had functions to perform as trustee, including distributing the trust property and taking legal action in relation to the defect proceedings.

93 In February 2021 Rees J declined to appoint a liquidator to 1A Eden and dismissed the proceedings with costs. Her Honour's decision has been substantially vindicated by the fact that 1A Eden has continued to operate and has been capitalised, albeit under directions from this Court, to continue to defend the defect proceedings.

The Hearing of the Caveat Proceedings – May to June 2021

94 The parties remained divided on the main issues during the hearing of these proceedings. But they resolved some issues and create some working arrangements for the future conduct of the defect proceedings.

95 On 10 May 2021 the Zaarour interests and the Sleiman interests conceded that there was no further issue between them as to the correctness of the accounts of the Trust for the period prior to the agreed distribution from the Trust in November 2017 and that final relief could be granted based on that concession. This removed a very substantial part of the accounting issues among the parties.

96 The payment of Piper Alderman's fees in the defect proceedings had become a major source of contention between these parties. Facing a history of non-payment of its fees in May 2020 Piper Alderman threatened to cease to act. Garawin paid the fees on behalf of 1A Eden and had been meeting them ever since. Following dialogue with the Court on this issue, the parties agreed on 3 June 2021 to a regime in which the Moore interests, the Zaarour interests and the Sleiman interests would, within 3 days of Piper Alderman issuing to 1A Eden a memorandum of fees in respect of its defence costs in the defect proceedings that they would pay the fees in their respective unitholder's proportions. This arrangement appears to have been satisfactory.

The Holding Redlich Letter – 13 May 2021

97 The Owners Corporation appear not have been aware of the hearing in May and June 2021. On 12 May 2021 the Court formally noted that to assist in the moulding of relief in the proceedings it would like to have a reasonably accurate figure, if available, as to the present monetary claim made by the Owners Corporation in the defect proceedings. The Court directed that a copy of that note be provided to the parties to the defect proceedings.

98 On 13 May 2021 Holding Redlich, the solicitors for the Owners Corporation in the defect proceedings wrote to the solicitors for the parties in response to the Court's notation, indicating that they had only learned of the hearing of the proceedings "in the last 48 hours" and that Garawin's solicitor had been instructed previously not to send to Holding Redlich the pleadings in the matter. Whether that is right or wrong the Court does not have to determine.

99 Holding Redlich's 13 May letter indicated the following in summary. A building defect rectification process had been agreed between the parties and noted by the Court but had run its course unsuccessfully and the defect proceedings were continuing. 1A Eden may be liable under the *Home Building Act* for the whole of the Owners Corporation's damages claim. Based on the defects known as at 13 May the Owners Corporation's estimated claim was $1.6 million. The rectification process had commenced in March 2018 but simultaneously more major defects had emerged, including "serious fire safety defects and waterproofing defects"; the former being the subject of a fire safety order from the Council. The Owners Corporation allege that all defendants in the defect proceedings have ignored the seriousness of the defects, have not committed to serious rectification work, and that some rectification work did not comply with the Building Code of Australia. The Owners Corporation is in the course of amending the Summons to add counts under the *Design and Building Practitioners Act 2020* ("the *DBP Act*"). The Owners Corporation's aim is to have an indicative bottom figure available "in the next three months" which would have been sometime in September 2021.

100 The 13 May letter further stated that the Owners Corporation is concerned that any judgment in these proceedings would impact upon the Owners

Corporation's recovery against 1A Eden in the defect proceedings. And it stated that should it be necessary, the Court should consider the Owners Corporation's monetary claim to be $1.6 million, based only upon defects known at the commencement of the defect proceedings in November 2017, based upon a report of a quantity surveyor Mr Scott Smith. The clear inference of the letter is that this figure may increase when the full extent of building defects and the degree rectification work successfully undertaken were better understood.

The Current Allegations in the Defect Proceedings

101 The current form of the Amended Technology and Construction List Statement that the Owners Corporation relies upon in the defect proceedings alleges that 1A Eden developed the building, ZS Eden contracted with 1A Eden to construct the building, Cubic Interiors NSW Pty Ltd trading as Cubic Interiors contracted with ZS Constructions Eden to construct the building and that a combination of Cubic Contracting NSW Pty Ltd and Cubic Interiors NSW Pty Ltd trading as Cubic Interiors performed work in the construction of the building which contained latent defects, occasioning loss and damage to the Owners Corporation.

102 The Owners Corporation alleges that all the defendants owed it a duty of care and some of them owed statutory warranties under the *Home Building Act 1989*, s 18B and that 1A Eden owed duties to the Owners Corporation under the the *DBP Act*. The Owners Corporation alleges that all these duties have been breached by the various defendants owing them. The Amended Technology and Construction List Statement does not quantify the alleged amount due, but in such proceedings the range of contestable claims can be large. A more detailed analysis of the issues in those proceedings is not necessary here.

103 These findings allow the Court to analyse and determine the claims for relief.

Analysis of the Relief Claimed

The Relief Claimed and the Issues

Garawin's Claims for Relief

104 In its Statement of Claim filed in November 2019 Garawin seeks a range of relief upon some of which it seeks present adjudication. It seeks a declaration that 1A Eden holds Lots 3, 5, and 6 in trust for Garawin and an order that 1A Eden transfer title to the said properties to Garawin (prayers 1 and 2). Alternatively it seeks a declaration the 1A Eden and the other defendants representing the Sleiman interests and the Zaarour interest are estopped from denying the validity of the distribution of Lots 3, 5 and 6 to Garawin (prayer 4) and in the alternative, specific performance (prayer 5).

105 Although the hearing did not press the relief in prayer 6, by that prayer Garawin sought in the alternative to prayers 1 to 5 a declaration that Zaarour investments holds Lots 27 and 36 in Trust for Garawin, Zaarour and Joesandra in the proportions 50:25:25 and that Joesandra held Lots 1 and 2 in Trust for the other parties in the same proportions.

106 Finally, Garawin's Statement of Claim sought orders under *Real Property Act 1900* ("the *RPA*"), s 74MA(2) that Mr Zaarour remove the caveats placed over Lots 3, 5 and 6 and consequential orders under the *RPA* , s 74MA(3) lapsing the caveats and restraining any further lodgement of caveats and compensation under the *RPA*, s 74P.

107 Garawin's Summons also seeks such further or other declaration or order as the Court seeks fit (prayer 11).

108 None of the defendants filed a cross-claim in the proceedings. Nor did they actively propound an agreement different in its essentials from that which Garawin was propounding.

Applicable Legal Principles

109 The issues in these proceedings engage several general legal principles, which are briefly stated below. Other specific principles are dealt with in the course of the Court's analysis of the issues.

110 *Equity is Equality*. The balancing of the interests of the parties in these proceedings calls for the application of the principle that equity is equality. In the absence of a rationale for following a different approach, equity operates on that principle, which can be traced as far back as the emergence of equity as a separate discipline: PW Young, C Croft, ML Smith, *On Equity* (2009, Thomson Reuters) ("*On Equity*") [3.220]. The maxim is an expression of the general object of both law and equity, which is to distribute property and losses in proportion to the several claims or liabilities of the relevant parties. The maxim is not applied literally and does not mean mathematical or absolute equality: *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 318. Rather, depending on the circumstances it may mean proportionate quality: *Steel v Dixon* (1881) 17 Ch. D 825 at 830 and *Re Unit 2 Windows Ltd* [1985] 1 WLR 1383. The principal is readily applied in the absence of any other basis for distributing property among competing claimants: *Jones v Maynard* [1951] Ch 572 at 575. The principle applies in the administration of estates and other property, the document contribution, marshalling, in company administration, in tracing and in many other applications: *On Equity* at [3.220]. The principle can be used as a fallback formula, to be applied if upon examination of relevant circumstances, no other conclusive method of distribution is possible: *Stack v Dowden* [2007] 2 AC 432 at 469 and *Gissing v Gissing* [1971] AC 886.

111 *The Duty of Impartiality*. The trustee owes a duty of loyalty to all the beneficiaries of the trust, both present and future. A trustee breaches that duty if the trustee favours the interests of some beneficiaries at the expense of the interests of others. As Herring CJ observed of trustees in *Tanti v Carlson* [1948] VLR 401 at 405:

> "And it is also their [trustees]'s duty to be impartial in the execution of their trust and not to exercise their power so as to confer advantage upon one beneficiary at the expense of all others."

112 An agreement which a trustee promises to prefer one beneficiary over another will not be enforced: *Clark v Dillon SC Napier* (1925) 26 GLR 201; [1925] NZGazLawRp 27. The rules requiring trustees to keep property, capital and income accounts are a manifestation of the requirement for impartiality: HAJ Ford and WA Lee, *Principles of the Law of Trusts*, (1990, 2nd edition, Law Book Co) ("*Ford and Lee*") at [929].

113 A trustee is under a duty to keep and render to beneficiaries a full and candid record of the trustee's stewardship including all appropriate financial accounts *Spingett v Dashwood* (1860) 66 ER 218; 2 Giff 521; 3 LT 542 and *Trustee Act 1925*, s 102. In a unit trust such as in the present case, the trustee is not under an obligation to keep the investment of each unitholder separate, as that would be contrary to the purpose of the trust, which is to require the investment advantage of a large fund and lower the administrative costs per unitholder: *Ford and Lee* at [929]. But the accounts must show all receipts as well as all payments, and payments must be supported by vouchers, although oral evidence of disbursements may be allowed in the absence of vouchers: *White v Lady Lincoln* (1803) 8 Ves 363 at 369; 32 ER 395 at 397 per Lord Eldon and *Christensen v Christensen* [1954] QWN 37 and *Ford and Lee* at [929]. Further it is the duty of the trustee to render accounts to the beneficiaries and to have the trustees accounts ready: *Re Craig* (1952) 52 SR (NSW) 265 at 267. The duty entails allowing the beneficiaries or their legal representatives to inspect the accounts, vouchers and other associated financial documents relating to the trust. *Ottley v Gilby* (1845) 50 ER 237; 8 Beav 602, *Re Cowin* (1886) 33 Ch. D 179 and Ford and Lee at [932].

114 *Creditors Rights Against a Trustee*. A very full discussion of the principles applicable to the possible insolvency of trustees is set out in a paper given to the 20th Australian Legal Convention in 1979: RP Meagher, "*Insolvency of Trustees*" (1979) 53 ALJ 648. Some relevant principles are summarised here. In equity a trustee has a general right of indemnity out of trust assets for all liabilities properly incurred. This involves a right of reimbursement for liabilities already discharged and a right of exoneration for liabilities incurred but not yet discharged.

115 The creditors of a trustee are subrogated to the trustee's rights of indemnity or lien (from beneficiaries or out of trust property), whatever those rights may happen to be, and if the trustee has no right of indemnity then the creditors cannot have any higher right: *Re Johnson* (1880) 15 Ch. D 548 and *Re Oxley* [1914] 1 Ch 604. A trustee's right of indemnity is not necessarily terminated once it is established that a trustee acted beyond power but it can still ensure against the shares in the assets of any *cestui que trust*, who assented to or

acquiesced in the unauthorised transaction in question: *Vacuum Oil Co. Ltd v Wiltshire* (1945) 72 CLR 319; [1945] HCA 37. The trustee’s rights to indemnity and lien extend only to acts which the trustee was authorised to do and if trustee acts beyond power, neither right arises: *Labouchere v Tupper* (1857) 14 ER 670; 11 Moo PC 198.

116 A trustee is personally liable to its creditors for all the debts it incurs. The debts are its debts and not those of the trust: *Labouchere v Tupper*. The question of whether the creditor may indirectly resort to trust assets only arises where the trustee's personal assets are inadequate to pay the creditor: Meagher “*Insolvency of Trustees*”, at p 653.

117 A trustee’s general right of indemnity out of trust assets for all liabilities properly incurred, comprises a right of reimbursement in respect of liabilities already personally discharged, and a right of exoneration in respect of trust liabilities incurred but not yet discharged: Meagher “*Insolvency of Trustees*”, at p 653.

118 *Real Property Act, s 74MA(2).* The parties contested the width of the Court’s power to make orders under *RPA*, s 74MA(2) in the proceedings. But the Court accepts as accurate the following statement of relevant legal principles (PJ Butt, *Land Law* (7th ed 2017, Thomson Reuters) at [12.1100]) [excluding footnoted case references]:

> “[12.1100] When making an order under s 74K(2) of the *Real Property Act 1900* (NSW) extending a caveat, the court may make any ancillary orders it thinks fit: s 74K(5). Likewise, when ordering withdrawal of a caveat under s 74MA(2), the court “may make such other or further orders as it thinks fit”. These provisions authorise the court to make any order that is proper in the circumstances to resolve the dispute over the caveat. This includes, for example, an order that the caveat be withdrawn to allow a dealing to be registered and that a substitute caveat then be lodged; or an order imposing conditions on the caveat remaining; or an order that the caveat be withdrawn but not until a future time, so as to give the caveator time to negotiate with a prior mortgagee for a portion of the sale proceeds of the property.
>
> These same statutory provisions probably include the power to amend the caveat to overcome a deficiency in form, in particular by curtailing the caveat's “prohibitory” terms so that it is not expressed any wider than necessary to protect the caveator's interest.
>
> Whether the provisions include the power to correct the description of the caveator's interest is problematical. Some decisions hold that they do; others hold that they do not; and others suggest there is power to correct the ambit of the protection claimed, but not the estate or interest claimed. (Perhaps complete consistency is not to be expected on this point, at least between

> decisions from different jurisdictions, because much turns on the wording of the particular statutes.) In New South Wales, given the statutory direction in s 74L to disregard the caveator's failure to comply "strictly" with the formal requirements for caveats, perhaps the ideal position lies mid-way between these two views. That is, where the caveat on its face recites facts that disclose a caveatable interest, but that interest is misdescribed, the court may amend the caveat to accurately disclose the caveator's interest; but where the caveat on its face discloses no caveatable interest, the court may not amend the caveat by inserting a caveatable interest – even one that the caveator in fact has. However, the authorities to date do not seem to support such a mid-view"

119 *Specific performance.* The parties do not contest the making of the distribution agreement. Notwithstanding that it is not in writing, both parties accept that the distribution agreement has been made and has been acted upon. One of Garawin's alternative prayers for relief (prayer 5) seeks specific performance of the distribution agreement.

120 If it grants a degree of specific performance, from that time both the contract and its performance are under the control of the Court: *On Equity* [16.1030]. Supplemental orders can always be made after a decree of specific performance: *On Equity* [16.1030]. When considering whether such an order should be made does not matter that the relevant facts arose after the decree: *Australian Hardboards Ltd v Hudson Investment Group Ltd* (2007) 70 NSWLR 201; [2007] NSWCA 104 at [125] ("*Australian Hardboards")*. A decree of specific performance gives rights to both parties under the contract, and both are at liberty to apply to the court for clarification about their rights under the contract and the working out of the specific performance order: *Australian Hardboards,* at [77].

121 *The Doctrine of Part Performance.* Although the defendants do not deploy a defence that Garawin cannot enforce the agreement because it is not in writing, Garawin is nevertheless drawing upon equitable principles of part performance to seek relief where it would be unconscionable for the defendants to assert that there is no contract. The basis for the doctrine appears from *Maddison v Alderson* [1883] 8 App Cas 647 at 745: in a suit founded on the part performance of a parol contract concerning land, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not upon the contract itself: see also *McBride v*

Sandland [1918] 25 CLR 69 ("*McBride*") at 77. In *McBride* (at p 78) Isaacs and Rich JJ offered the same caution:

> "if the terms of the oral bargain are first ascertained and then the alleged acts of part performance are judged or merely by their consistency with and applicability of that bargain, grievous error may result"

122 Acts that may be relied upon by plaintiff as part performance must be done under the terms and by force of the contract in question and must be unequivocally and in their nature referrable to some contract to the general nature of that alleged: *Walton's Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 432. The doctrine must be carefully applied, as was explained in *Thwaites v Ryan* (1984) VR 65 at 77:

> "it is wrong first to postulate the contract pleaded and then to ask if the alleged acts were a part performance *of it*, or of a contract *of its* general nature…One must first seek to find such a performance as much imply a contract, and then proceed to ascertain the general nature of such contract as the performance implies, and then to compare *that result*, if one gets to it, with the general nature of the contract is pleaded". [emphasis added in original]

123 The acts of part performance must be the acts of the plaintiff, because the essence of the equity is that the defendants' conscience is affected by the fact that the plaintiff has been induced to act to the plaintiff's prejudice: *On Equity* (at [16.970]) but the acts of the plaintiffs agents and even independent contractors will be considered to be the acts of the plaintiff for that purpose: *Hollier v Braston* [1920] 2 Ch 420 and *On Equity* at [16.970].

The Parties' Submissions

124 *The Plaintiff's Principal Submissions.* Garawin seeks primary relief of the removal of caveats over Lots 3, 5 and 6. It submits that the caveats fail to identify the nature of the interest claimed in Lots 3, 5 and 6. Garawin submits it is fundamental that the interest protected is proprietary: *Martin v Official Trustee in Bankruptcy* [1990] Tas SR 65, Green CJ ("*Martin*"). And *Martin* identifies some characteristics of a caveatable interest: only a person with a legal or equitable interest, partaking of the character of an estate in it can lodge a caveat; a claimed interest based upon an assertion of a purely personal right is insufficient; and the interest asserted must be in existence at the time of caveat lodgment. Garawin further submits that where there is no registered instrument, it is an interest in the land itself, in respect of which equity will grant

specific relief: *Composite Buyers v Soong* (1995) 48 NSWLR 286, Hodgson J (as his Honour then was), at 288.

125 Garawin submits there is nothing in the Caveats or the evidence that supports any claim for an interest in the land and that the claimed interest must fail and the caveat must be withdrawn.

126 Garawin's primary submission was supplemented in various ways as the argument developed. One of those oral submissions is mentioned immediately below. But Garawin's other submissions are dealt with during the Court's later analysis.

The Defendant's Principal Submissions and Admissions

127 Much is not in issue in these proceedings. The Zaarour and Sleiman parties oppose the orders sought. But they accept most of Garawin's fundamental contentions about the contractual arrangements between the parties.

128 The defendants accept that the intended and mutually agreed process was for the project to be completed, for the profits to be realized and for assets and capital to be distributed after all project expenses had been paid in proportion to the parties' respective unit holdings defined the March 2013 deed. They do not dispute that the shareholders agreed in 2016 and 2017 on a process of taking their entitlements in specie, supplemented in cash to equalize profit distributions.

129 The defendants do not contest the following matters most but not all of which have already been found as facts earlier in the narrative in these reasons.

(1) As to the Zaarour interests, Lots 27 and 36 and cash in the amount of $156,555.15 were to be distributed to the Zaarour interests as their profit share. Lot 36 was transferred into the name of Zaarour Investments. Lot 27 has not yet been transferred and remains registered in the name of 1A Eden. The Zaarour interests have not received any cash distribution.

(2) As to the Sleiman interests, the agreed distribution was to be cash in the sum of $500,000.00, Lots 1 and 2 and further cash in the amount of $136,555.16. The Sleiman interests received the $500,000 cash and on 18 April 2018, Lots 1 and 2 were transferred into the name of Joesandra. Joesandra sold Lot 2. Lot 1 remains in Joesandra's name but subject to Garawin's caveat. The Sleiman interests have not received payment of their $136,555.00 cash.

(3) As to the Moore interests, of the agreed distribution was to be of Lots 3, 4, 5 and 6. Lot 4 was sold. Each of units 3, 5, and 6 remain registered in 1A Eden's name but are now mortgaged the benefit of the Moore interests.

130 The defendants do not dispute that at the meeting in May 2016 the distribution and transfer of Lots in specie was agreed in principle but no precise figures were agreed. But distribution could not occur then because all the remaining Lots held by 1A Eden had been mortgaged for the sole benefit of Moore interests. The defendants contend that the distribution could not then be implemented for that reason.

131 The Owners Corporation commenced the defect proceedings on 30 November 2017. The following day the Owners Corporation sought and obtained ex-parte freezing orders over the assets of 1A Eden. But Mr Moore requested Piper Alderman and his fellow co-venturers to lift the freezing orders over Lots 3, 5 and 6 as the securities over those lots supported day-to-day finance facility to the Moore interests. Within the next week Piper Alderman gave the co-venturers sound advice that their ordinary profit distribution arrangements were being mis-characterized in the defect proceedings as an attempt to avoid financial responsibility, and that provided they showed the Owners Corporation and the Court in the defect proceedings that 1A Eden could sustain the financial burden of rectifying defects, the freezing orders would probably be dissolved. Piper Alderman suggested that one way through was for the parties to put up bank guarantees of 1A Eden's obligations to secure the release of the eight properties from the freezing orders.

132 Mr Zaarour, Mr Sleiman and Mr Moore discussed the problem and agreed to accede to Mr Moore's request. Lot 27 which was then unencumbered and agreed to be transferred to Mr Zaarour was offered as security to release Mr Moore's three lots from the freezing order. Unit 27 remains subject to an undertaking to the Court in the defect proceedings.

133 The defendants submit that Garawin's claim for relief if granted would transfer out of 1A Eden to the Moore interests Lots 3, 5 and 6, leaving only Mr Zaarour's Lot 27. Meanwhile 1A Eden continues to incur debts in relation to the

defect proceedings, exposing Lot 27 to greater and disproportionate individual liability, if Lots 3, 5 and 6 are so transferred.

134 The defendants point to Lot 27 having to meet other contingent liabilities of 1A Eden, including any amounts ordered by the Court in the defect proceedings, any adverse costs orders, builder's retention for Cubic, and any rectification costs resulting from design flaws rather than poor building practices.

135 The defendants say that the removal of lots to Garawin will place the whole burden of 1A Eden's liabilities on the Zaarour interests and that the defendants will also be deprived of the balance of the cash funds due to them both from 1A Eden as a component part of the distribution agreement. At the same time the Moore interests will secure the whole distribution without any reduction.

136 The defendants still have residual concerns as to the accuracy of the accounts from the date of the distribution agreement. They submitted to the extent that a final accounting shows that the Moore interests will have to reimburse the defendants that may further magnify the imbalance among the parties created by transferring lots to Garawin at this time prior to the completion of the rectification proceedings.

137 The defendants also take issue with Garawin's alternative claims for a declaration of a 50% interest in Zaarour Investments' Lots 27 and 36 and Joesandra's Lots 1 and 2. But the defendants accept that if the Court does make such of the declaration that an equivalent declaration should apply to Lots 3, 5 and 6. The defendant's submissions approach their defence on the basis that there should be stability until appropriate financial accounting adjustments are made to enable final distribution in accordance with the March 2013 deed and that that financial accounting will involve the bringing to account of distribution is already made it to the co-venturers.

138 Both parties sharpened their competing proposals on the last hearing day as follows.

139 *A Proposal by the Zaarour and Sleiman Interests*. The defendants recognise that if the Moore interest properties, units 3, 5 and 6 are left in Trust, that the units distributed to the Zaarour interests and the Sleiman's interests will have

to be charged in favour of the Trust. They recognise that a party seeking equity must do equity. Mr Davis of counsel on behalf of the defendants did not resile from accepting that the defendants needed to do equity in this way to the extent that they were seeking equitable relief. Mr Sleiman said in evidence that he was willing to contribute to the capital of the trust and conveyed the idea that he was keen to put up his share of security if required.

140 The defendants therefore proposed as follows. The Zaarour interests have the equivalent of approximately $1 million in the Trust, by committing Lot 27 under the freezing orders. The defendants distanced themselves from any proposal that: Mr Sleiman should return $1 million to the trust or commit it by way of security; and that Mr Moore put in $2 million, resulting in a total restoration of $4 million to the Trust. That was said to be excessive. Mr Davis of counsel made this as an open offer on behalf of the defendants.

141 Mr Davis proposed that Mr Sleiman in effect would take over, in a private arrangement with Mr Zaarour, the security over Lot 27, worth approximately $1 million, and that unit 27 should remain committed on the side of the defendants. Matched against that would need to be $1 million committed by the Moore interests, representing their 50% interest in the Trust.

142 This would provide $2 million in capital back to the Trust. But whether that is enough or not is an open question to which the answer is presently unclear, because the internal administrative liabilities of the Trust together with the liabilities associated with building defects proceedings are unknown. It is nevertheless a good starting point.

143 *A Proposal from the Moore Interests*. Late in submissions on 13 May 2021 the Moore interests proposed by open offer an alternative solution which would return the Trust to the way it was in April 2017, removing the mortgages over Lots 3, 5 and 6 and replenishing the Trust to the full extent possible and reversing the decisions which had been made to distribute cash and properties. This was strictly in the alternative to the principal relief Garawin sought. This became an attractive proposal to consider, in part because it has the virtue of taking account of the need to treat the unitholders equally.

144 In summary the proposal is as follows. The Sleiman interests have received two apartments and $500,000 in cash (and have had the benefit of the stamp duty and GST associated with those transactions) and are in credit by about $2 million. The Zaarour interests are in credit by about $1 million, subject to the freezing order. The Moore interests have sold one of the apartments and received $750,000. In summary the Moore interests say they have a 50% interest in the joint venture but have only received $750,000, whereas the other 50% unitholders have received $3 million. This is said to be a disproportionate and unfair outcome.

145 So, the proposal put was the Sleiman interests return either in cash or to the extent possible an apartment to the trust and if the apartment has been sold then the Sleiman interests can replenish the trust with cash. Mr Sleiman would return the $500,000 he has received to the trust, with undertakings not to sell any of the other units. The Zaarour interests would return the other apartment or undertake not to sell it. Mr Moore would return $750,000 to the trust. He would then clear the mortgages on the three units. The Trust would then be back to what it was as at April 2017 just before the distribution agreement. Thereby the trust would be replenished to the full extent now reasonably possible.

146 In summary, if this proposal were accepted it would not matter much whether there is a freezing order over Lot 27, because provided the defendants do the same thing and recapitalise the Trust and everyone is treated equally by returning all the fruits that have been distributed to them, after a complete accounting and the conclusion of the defect proceedings, the Trust can redistribute the remaining assets.

Consideration

147 *Overview.* The current situation faced by these parties is accidental and inequitable. It is accidental because the parties commenced but did not complete the distribution of properties from 1A Eden before they had notice of the full nature and quantum of 1A Eden's potential liability to the Owners Corporation through the defect proceedings. And it is inequitable because the present capital contributions of the Moore interests, the Zaarour interests and

the Sleiman interests to 1A Eden reflect neither their beneficial interests in the Trust nor their corresponding obligations under the March 2013 deed to maintain the capital of the Trust: clause 8.3.

148 This situation has been cemented by the parties' progressive distribution of property and their *ad hoc* use of the caveat power under the *Real Property Act*. The rigid structure that has developed means that 1A Eden cannot respond flexibly in the face of the uncertain external liabilities it faces, particularly those from the Owners Corporation. But addressing the relief Garawin seeks leads to a solution.

149 *Garawin's Claim to Relief.* Garawin seeks removal of Mr Zaarour's two caveats over Lots 3, 5 and 6 under *Real Property Act* s74A(2)(a). Mr Zaarour filed two caveats. Each of these caveats is incompetent and embarrassing in form for failing to disclose a caveatable interest. The Court will remove them both.

150 Mr Zaarour filed Caveat AP310370 on 7 June 2019, claiming an estate or interest, described "as director of the company entitled to protect the assets of the company". This caveat is incompetent. It does not identify or describe any maintainable equitable interest in the land and must be removed from the register. Mr Zaarour's position as a director of 1A Eden does not give him any equitable interest in whatever assets it holds, legally or beneficially. Moreover, the caveat wholly ignores the fact that 1A Eden is a trustee and does not hold beneficially the land subject to the caveat.

151 Caveat AP 315248 that Mr Zaarour filed on 12 June 2019 fares little better. It claims an estate or interest described, "as director claiming charge over property of the registered proprietor". The estate or interest claimed is that of a "lien" said to be by virtue of an "agreement" between Mr Zaarour and 1A Eden. This caveat does not identify the nature of the lien, whether it is legal or equitable, whether it is a vendor's, purchaser's or some other lien, or the date of the lien. At no stage did either defendant seek to articulate in this proceeding a case that a director of 1A Eden was himself entitled to assert the benefit such a lien over Lots 3, 5 or 6. This caveat will also be struck out as incompetent.

152 It is possible for the Court to permit amendment of the caveat. But the Court will not take that course. Given the range of possible rights and remedies

between these parties, discussed below in these reasons, the better course is for the Court to impose a single injunctive regime binding on all parties which can being recorded in uniform terms against all the relevant titles, and binding all the parties. The nature of the restraints on each of the titles here should not depend upon the vagaries of drafting of individual caveats and should be informed by the Court's reasoning as it applies to all the titles and all the parties.

153 The Court's findings in these reasons provide the framework for that injunctive regime based upon a set of equitable principles that is wider than any described as the basis for of any party's individual caveat. The Court will direct that a copy of its orders be served upon the Land Titles Office for imposition on each of the titles. This reasoning has implications for the Moore interests' caveats over Lots 27 and 36 and Lots 1 and 2. No immediate application sought to remove those caveats. But the effect of the orders made here may mean the parties will find it more satisfactory to replace those caveats with a notification of the present injunctive relief. That can be dealt with in a subsequent directions hearing.

154 Garawin has asked the Court to exercise its power under *Real Property Act* s74MA(2)(a). The Court has done so. This enlivens the Court's jurisdiction to grant ancillary relief under s74MA(2)(b). As the authorities discussed earlier in these reasons show, this is a broad jurisdiction, "not subject to any express constraints" and giving the Court "the widest powers in the making of orders": *Hanson Construction Materials Pty Ltd v Roberts* [2016] NSWCA 240; (2016) 93 NSWLR 1 at [60].

155 Mr Weinberger submitted that the Court may not have the power to make wide-ranging orders of the type proposed in his own client's open offer. That submission is not persuasive. Mr Moore's open offer has the virtue of neutralising the inequitable and accidental nature of the present situation. But giving effect to it by way of the orders made in these reasons is not beyond power. Without the making of additional orders the removal of the caveats would provide the opportunity for the Moore interests to transfer Lots 3, 5 and 6 out of 1A Eden, in a manner which could be inequitable to the defendants. Not

to make additional orders invites chaotic land transfers of Lots 3, 5 and 6 out of 1A Eden and more competitive applications against the defendants. The Court's power to grant ancillary relief under *Real Property Act* s74MA(2)(b) must be wide enough to allow Court to stabilise the position left by the removal of the caveats. The analysis that follows provides the basis for the ancillary relief granted to create that stability.

156 *Analysis.* The parties did not closely analyse the equitable basis of their rights against one another. But there seemed to be at least three forms of equitable interest that each party here holds in real estate either within the trust and earmarked for one party or already distributed from the trust.

157 The only exceptions are Lot 2 sold by the Sleiman interests and Lot 4 sold by the Moore interests. The proceeds of Lots 2 and 4 would be traceable in the hands of the Sleiman interests and the Moore interests respectively and supplementary relief can be granted in respect of those proceeds as required. But the most convenient course of the Court will order bank guarantees or substitute property to be secured in place of the lots that are sold.

158 The parties have rights in two main areas giving them equitable interests in the properties in question. These equitable interests are caveatable interests at the suit of each party. It is sufficient to take the distributions to the Sleiman interests, Lots 1 and 2 as an example.

159 First, those lots were distributed to and received by the Sleiman interests in breach of trust and the Sleiman interests were aware of the breach of trust when the properties were distributed to them. All Trust unitholders are beneficially entitled to the Trust Fund in proportion to the units registered in their name: Clause 4.3. Any distribution of trust property which does not conform with clause 4.3 is a breach of trust. Each beneficiary and the trustee may seek remedies for recovery of property distributed in breach of trust under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244; 43 LJ Ch 513 . The property is held by the Sleiman interests such rights by the other parties to the March 2013 deed. The temporary arrangement to accommodate the Moore interests and the freezing orders over Lot 27 do not change this as the parties

fundamental long-term agreement was to distribute equitably in accordance with the unit proportions and the March 2013 deed.

160 Second, the other main area of relief is in contract. The agreement to distribute is specifically performable at the suit of each party. And each party has an equitable interest in the property dealt with by each party requiring each property to be dealt with in accordance with the distribution agreement. Put another way each party may be seen as having both an equitable purchaser's and vendor's liens against the others in respect of the incomplete performance of the contract to distribute the lots: *Hewitt v Court* (1983) 46 ALR 87 at 105-7. And the various lots are (or in the case of Lots 2 and 4, their proceeds of sale are) subject to such equitable interest in that sense. If any party wants an order for specific performance the Court, then the party should formulate the precise order required in accordance with the authorities discussed above the Court will continue to administer the contract under those orders.

161 Each of these interests also found injunctive relief against all these properties by each party. The Court will restrain dealings with all the properties. The injunction should continue for at least until the conclusion of the defect proceedings. But the Court needs to make orders to address the current situation with the Trust facing uncertain external liabilities to the Owners Corporation. This can readily be done through s 74MA(2)(b).

162 *Moulding s 74MA(2)(b) Relief.* 1A Eden still has an important role to play. Rees J's decision at the urging of the Moore interests not to wind the company up, points to an appropriate vehicle for the parties to continue to perform the various agreements they have made. 1A Eden provides a forum for the parties to implement a regime of Court directions to ensure that the Trust remains appropriately capitalised strictly in accordance with the terms of the March 2013 deed, whilst the parties continue to perform their several agreements.

163 The Court will direct the parties to convene a meeting of 1A Eden under the March 2013 deed clause 36 to decide as to what provision should be made under the March 2013 deed clause 8.3 to set aside appropriate "reserves for the future and contingent liabilities as the Trustee shall consider necessary". Once that provision is fixed the parties can attempt to work at a regime for the

equitable and partial distribution of the property. This will need to be done in accordance with the principles of impartiality and equity is equality discussed above. The Court in the meantime will not disturb the existing mortgages over Lots 3, 5 and 6, or the orders over Lot 27. The parties should prepare a regime to restore or provide security over the proceeds of sale of the properties they have sold. This will be discussed at the next directions hearing.

164 But Mr Moore's open offer still has relevance. If nothing else can be agreed through the reactivation of the machinery of 1A Eden, all parties should understand that that offer should be the default position. The Court will also make that order in exercise of its power under *Real Property Act* s 74MA(2)(b). Implementation of such an order is authorised under s 74MA(2)(b) because if the Court directed solution of using 1A Eden to reach an appropriate level of capitalisation fails, the parties will be left in their current inequitable situation and with proper provision for 1A Eden's external liabilities unresolved. Without some ancillary orders, the prospect of further chaotic misuse of caveats arises, so the use of the Court's s 74MA(2)(b) ancillary powers is apt.

165 But merely returning all the properties or their cash equivalent to 1A Eden will not be enough on its own. The parties clearly wish to continue to the extent possible to perform their mutual agreements, consistently with meeting 1A Eden's external liabilities. But if they fail to agree through 1A Eden, then appropriate provision for 1A Eden's external liabilities will need to be made in accordance with the March 2013 deed, clause 8.3. This can be achieved by the appointment of a referee under Uniform Civil Procedure Rule ("*UCPR*") r 20 Division 3, or a court expert under *UCPR* r 31 Division 5. The referee or court expert can decide upon a requisite level of provision for external liabilities, no doubt informed by the Owners Corporation's then current demands. If the stay upon the Moore proposal is lifted because 1A Eden does not work, the Court will hear submissions about such an appointment. The same court expert or referee may also decide upon the remaining accounting disputes between the parties. That option should be discussed and the Court will make further directions if that cannot be agreed.

166 And I will retain management of these proceedings, so the parties have a judge to approach with prior knowledge of the intricacies of the case.

167 If agreement is reached and 1A Eden makes decisions in accordance with the Court's directions, 1A Eden may need to engage in property transactions. If the parties cannot agree upon appropriate legal representatives to make its side of the required property transactions happen, it is perhaps possible for 1A Eden to engage Piper Alderman, because of that firm's familiarity with 1A Eden's position in the defect proceedings. Another possibility would be for all parties to agree for one of the solicitors engaged in these proceedings to carry out those functions and yet another is for an independent solicitor to do so. If the parties cannot agree upon matters such as this, they will be covered by the liberty to apply granted in the orders below.

Conclusions and Orders

168 In the result therefore, the Court makes the following orders and directions:

(1) For the purposes of these orders the following expressions shall have the following meanings

(a) "Garawin" means the plaintiff;

(b) "1A Eden" means the first defendant;

(c) "Zaarour Investments" and "Mr Zaarour" mean the second and fourth defendants respectively;

(d) "Joesandra" means the third defendant;

(e) "the defect proceedings" means proceedings 2017/362562 in the Technology and Construction List of this Court;

(f) "the Owners Corporation" means the plaintiff in the defect proceedings;

(g) "Lot" followed by a number is a reference to a lot in Strata Plan 92226;

(h) "the accounting issues" means the accounting issues among the parties to these proceedings that are identified under the heading "the remaining issues" in the reasons published by the Court today with these orders;

(2) Order each of 1A Eden, Garawin, Zaarour Investments, Joesandra and Mr Zaarour to take by Monday, 18 April 2022 all necessary steps on his or its part (including making all reasonable endeavours to obtain the consent of third parties that may be necessary to the taking of such steps) to,

(a) remove all encumbrances from the certificates of title for Lots 3, 5 and 6 registered in the name of 1A Eden imposed thereon at the request of Garawin or any related party of Garawin since 30 November 2017;

(b) transfer Lots 36 from Zaarour Investments to 1A Eden; and

(c) transfer Lots 1 from Joesandra to 1A Eden;

(d) order that Joesandra restore the proceeds of sale of Lot 2 to 1A Eden;

(e) order that Garawin restore the proceeds of sale of Lot 4 to 1A Eden;

(3) Each of the parties subject to order (2) may apply to the Court to vary order (2) provided any such application for variation to the order adheres to the principle that any recapitalisation of 1A Eden,

(a) will strictly require the provision of funds by Garawin, Zaarour Investments, and Joesandra in the ratio 50:25:25,

(b) will not permit 1A Eden to be left at risk of not meeting its liabilities to the Owners Corporation or any other party in the defect proceedings or any statutory authority with functions under the Home Building Act (1989) or the Design and Building Practioneris Act Act (2020),

(c) may be achieved by

(i) the substitution for Lots 1, 2, 6, 27 or 36 of other real property or liquid funds of equivalent value;

(ii) the charging or further charging of Lots 1, 2, 6, 27 or 36 in favour of 1A Eden, and

(d) will be approved by the Court;

(4) Each of Garawin, Zaarour Investments, and Joesandra by their servants and agents is restrained, until further order, other than in the ordinary course of 1A Eden's business from diminishing the capital of 1A Eden until the conclusion of the defect proceedings.

(5) Each of 1A Eden, Garawin, Zaarour Investments, and Joesandra by their servants and agents is restrained, from dealing with Lots 1, 3,4, 5 and 6 until the conclusion of the defect proceedings.

(6) Order the parties to convene within 28 days a meeting of the directors of 1A Eden under the March 2013 deed to make provision for the external liabilities of 1A Eden in accordance with clause 8.3 of the March 2013 deed.

(7) Order that the caveats lodged by Mr Zaarour, the fourth defendant, over Lots 3, 5 and 6 be removed.

(8) Stay order (2) until further ordered.

(9) if the parties cannot agree among themselves for 1A Eden to engage legal representatives for that party to give effect to order (2) of these orders, then the parties are directed to take advantage of the liberty to apply granted in these orders, to relist the matter for the Court to make such directions.

(10) Direct the parties to bring in by Monday 11 April 2022, agreed short minutes of order, or if agreement is not possible by that date a set of short minutes of order marked up to show the differences between the parties, providing for the determination within a reasonable time of all the accounting issues by means of the appointment of a referee under *Uniform Civil Procedure Rule* ("*UCPR*"), r 20 Division 3, or a Court Expert under *UCPR*, r 31 Division 5.

(11) Direct Garawin to provide by 5.00 pm today to the solicitors for all parties in the defect proceedings a copy of these orders together with the reasons published by the Court today.

(12) Any party is at liberty forthwith to provide a copy of these orders to the Land Titles Office for notification on in respect of any of the lots subject of these proceedings registered in the name of any party.

(13) List these proceedings for argument about costs or any other matters on 19 April 2022, or on such other convenient date as the parties may arrange with the Associate to Slattery J.

(14) The parties are at liberty to file submissions on any issue proposed to be raised on 19 April 2022 by Friday, 15 April 2022.

(15) Reserve costs.

(16) Grant liberty to apply.

(17) Orders may be taken out forthwith.

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