Supreme Court

New South Wales

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| Case Name: | McMillan v Coolah Home Base Pty Ltd (No 4) |
| Medium Neutral Citation: | [2022] NSWSC 584 |
| Hearing Date(s): | 30, 31 August; 1, 2, 3, 8, 9, 10, 13, 14, 15, 16, September; 9, 10 November 2021 |
| Date of Orders: | 13 May 2022 |
| Decision Date: | 13 May 2022 |
| Jurisdiction: | Equity |
| Before: | Parker J |
| Decision: | See [656]-[664] |
| Catchwords: | REAL PROPERTY – caravan park with long-term cabin sites subject to company title – claim by purchasers of shares to equitable interests in cabin sites as well – whether purchase contracts included interests in land – specific performance – resulting trust – proprietary estoppel<br><br>CORPORATIONS – oppression – company owning caravan park with long-term cabin sites subject to company title – ownership company's finances and operations managed by separate company controlled by directors – ownership company placed in administration by directors following contested application by shareholders for access to company documents – land sold to another company controlled by directors following adoption of deed of company arrangement proposed by directors – whether oppressive conduct by directors – relief<br><br>CONSUMER PROTECTION – misleading or deceptive conduct – unconscionable conduct – undue harassment |

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| | or coercion – conduct "in trade or commerce" – contravention – loss and damage – purchase of company title shares in caravan park with long-term cabin sites – disappointment and distress<br><br>CORPORATIONS – voluntary administration – caravan park with long-term cabin sites subject to company title – claim by shareholders against administrators for compensation for loss arising out of sale of land pursuant to deed of company arrangement – whether administrators owed common law duty of care to shareholders – whether administrators negligent in discharge of their duties – causation – Insolvency Practice Schedule s 90-15 – whether unconscionable conduct by administrators – whether administrators "involved in" oppressive conduct by directors |
| Legislation Cited: | Australian Consumer Law, ss 18, 21, 50<br>Civil and Administrative Tribunal Act 2013, Sch 4, Cl 5(3)<br>Conveyancing Act 1919, s 66G<br>Corporations Act 2001 (Cth), ss 9, 179, 180, 181, 182, 183, 232, 233, 236, 237, 238, 239, 240, 241, 242, 247A, 293, 437A, 437B, 438A, 438D, 439C, 440D, 442C, 444E, 445D, 1314, 1324<br>Insolvency Practice Rules (Corporations) 2016 (Cth), rr 75-140, 75-225<br>Insolvency Practice Schedule (Corporations), s 90-15<br>Limitation Act 1969, s 15<br>Residential (Land Lease) Communities Act 2013<br>Retirement Villages Act 1999<br>Uniform Civil Procedure Rules 2005, Pt 54 |
| Cases Cited: | Australian Securities and Investment Commission v Kobelt (2019) 267 CLR 1<br>Baltic Shipping Co v Dillon (1993) 176 CLR 344<br>Cadwallader v Bajco Pty Ltd [2002] NSWCA 328<br>Campbell v BackOffice Investments Pty Ltd [2008] NSWCA 95<br>Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304<br>Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594<br>Correa v Whittingham (2013) 278 FLR 310 |

Eastlake v Eastlake [2015] NSWSC 1772
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McMillan v Coolah Home Base [2020] NSWSC 935
McMillan v Coolah Home Base (No 2) [2020] NSWSC 1243
McMillan v Coolah Home Base (No 3) [2020] NSWSC 1325
McMillan v Coolah Tourist Park Pty Ltd [2021] NSWCATAP 73
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(5th ed, 2015, LexisNexis Butterworths)

Category: Principal judgment

Parties: Geoffrey Ian McMillan (First Plaintiff)
David Arthur Darch (Second Plaintiff)
Helen Dawn Waugh (Third Plaintiff)
Margaret Joy Vale (Fourth Plaintiff)
Jill Cook (Fifth Plaintiff)
Lee Marilyn Tait (Sixth Plaintiff)
Jennifer Sue Axtell (Seventh Plaintiff)
Sietske Elisabeth Brown (Eighth Plaintiff)
James Terence James (Ninth Plaintiff)
Neville John Kelly (Tenth Plaintiff)
Susan Anne Kelly (Eleventh Plaintiff)
Christine Margaret McMillan (Twelfth Plaintiff)
Janne Marnie Robertson (Thirteenth Plaintiff)
John Daniel Sheahan (Fourteenth Plaintiff)
Richard Jim Squire (Fifteenth Plaintiff)
Susan Janet Squire (Sixteenth Plaintiff)
Leslie Townsend (Seventeenth Plaintiff)
Allana Mary Townsend (Eighteenth Plaintiff)

Coolah Home Base Pty Limited (First Defendant)
Coolah Tourist Park Pty Limited (Second Defendant)
Janet Marilyn Kelly (Third Defendant)
Graeme George Booker (Fourth Defendant)
Cameron Hamish Gray (Fifth Defendant)
Ronald Dean-Willcocks (Sixth Defendant)
Home Base Solutions Pty Limited (Seventh Defendant)

Representation: Counsel:
P E King (Plaintiffs)
A Macauley (First, Second, Third, Fourth and Seventh Defendants)
D Krochmalik (Fifth and Sixth Defendants: 30 August, 1, 2, 3 September 2021)
A Harding SC (Fifth and Sixth Defendants: 9, 10, 13, 14, 15, 16 September; 9, 10 November 2021)

Solicitors:
The Peoples' Solicitors (Plaintiffs)
Bridges Lawyers (First, Second, Third, Fourth and Seventh Defendants)
Brown Wright Stein Lawyers (Fifth and Sixth

Defendants)

File Number(s): 2020/44327

Publication Restriction: Nil

## JUDGMENT

1 The third defendant, Janet Marilyn Kelly, and the fourth defendant, Graeme George Booker, are former “grey nomads”. This term was used in the evidence to refer to people who are retired, or semi-retired, and live for all or most of their time out of a caravan or motorhome, travelling around the country.

2 Between them, Ms Kelly and Mr Booker, devised a plan to establish a grey nomad “home base”. Their vision was to offer grey nomads a permanent dwelling-place in or near a regional town, readily accessible by road, which would function as a home and to which they could return during breaks in their travels. The idea has unfortunately ended in recrimination and dispute, culminating in these proceedings.

3 Ms Kelly and Mr Booker set up their grey nomad home base at Coolah, in central western New South Wales, where there was an existing caravan park. They incorporated the first defendant, Coolah Home Base Pty Limited (“CHB”), and the seventh defendant, Home Base Solutions Pty Limited (“HBS”). CHB purchased and held the caravan park land (to which I will refer as the “Park”) and business. HBS (which was wholly owned by Ms Kelly and Mr Booker) was the operating company. The directors of both companies were Ms Kelly and Mr Booker.

4 The venture was set up as a “company title” arrangement. Residents who bought in would buy a share in CHB carrying the right to occupy a specified site in the Park. On some of the sites demountable cabins had already been erected. On others, incoming residents erected cabins for themselves. This began in 2012.

5 Ownership of a share carried with it an obligation to pay a site fee to contribute towards the cost of maintaining the Park. The existing caravan park business (referred to in the evidence as the “tourist business”) continued alongside the

company title arrangement, and allowed shareholders to rent out their sites to visitors. Ms Kelly and Mr Booker managed this through HBS.

6 In the end sixty shares, each corresponding with a site in the Park, were issued by CHB. The plaintiffs are grey nomads who, between them, bought sixteen of those shares. Through another company, Ms Kelly and Mr Booker own thirty-three of them. The remaining shares are owned by purchasers who are not involved in the proceedings.

7 By 2016, disputes had arisen between some of the plaintiffs, on the one hand, and Ms Kelly and Mr Booker, on the other, concerning management of the park and the affairs of CHB. The disputes resulted in proceedings being instituted in this Court against CHB in 2018. The plaintiffs in the proceedings, who were two of the present plaintiffs, sought access to documents of CHB pursuant to s 247A of the *Corporations Act 2001* (Cth) ("CA"). I will refer to these proceedings as the "s 247A proceedings".

8 In August 2019, while the s 247A proceedings were still pending, Ms Kelly and Mr Booker put CHB into voluntary administration. The administrators were Ronald John Dean-Willcocks and Cameron Hamish Gray. They are the sixth and fifth defendants in the proceedings. At the time both were principals of a firm of insolvency practitioners known as "DW Advisory" (in fact Mr Dean-Willcocks appears to have been the senior principal).

9 The statutory administration resulted in the approval by CHB's creditors of a deed of company arrangement prepared by Ms Kelly and Mr Booker ("Kelly-Booker DOCA"). The creditors consisted of Ms Kelly, Mr Booker and professional advisers to CHB. The Kelly-Booker DOCA provided for the sale of the Park to Coolah Tourist Park Pty Limited ("CTP"), another company belonging to Ms Kelly and Mr Booker. It is the second defendant in the proceedings.

10 As contemplated by the Kelly-Booker DOCA, control of CHB (now a shell) reverted to Ms Kelly and Mr Booker, as its directors, following the sale of the Park to CTP. The statutory administration ended but Mr Dean-Willcocks and Mr Gray continued their involvement with CHB as administrators of the DOCA.

11 CTP, as the new owner, is now operating the Park. The plaintiffs continue to occupy, or rent out, their cabins, but refuse to accept the validity of the transfer. Apart from these proceedings, the parties have been involved in ongoing litigation in the New South Wales Civil and Administrative Tribunal ("NCAT") under the *Retirement Villages Act 1999* and the *Residential (Land Lease) Communities Act 2013*.

12 The defendants fall into two groups, each group being commonly represented in the proceedings. One group consists of Ms Kelly, Mr Booker and the three companies I have mentioned, CHB, CTP, and HBS. I will refer to these parties collectively as the "Kelly-Booker parties". Where claims are made against Ms Kelly and Mr Booker in their capacity as directors of CHB, I refer to them as "the Directors". The other defendants, Mr Dean-Willcocks and Mr Gray, are referred to as the "Administrators".

**Claims for determination**

13 There are six claims, or groups of claims, pleaded by the plaintiffs in the proceedings and which require determination. They may be summarised as follows.

14 First, the plaintiffs claim equitable ownership interests in the sites which they occupy at the Park. They allege that when purchasing their shares in CHB, they were promised interests in the sites themselves. They contend that they are entitled to relief by way of specific performance or equitable (proprietary) estoppel, and that this relief is available against CTP (if they fail in their application to have the transfer of the Park to CTP rescinded, to which I will refer in a moment).

15 Secondly, the plaintiffs seek orders rescinding the transfer of the Park to CTP. They allege that they are entitled as shareholders of CHB to have the transfer set aside on the ground of wrongful conduct by the Directors. Thirdly, the plaintiffs seek declarations that, as against both CHB and CTP, their cabins are chattels rather than fixtures.

16 Fourthly, the plaintiffs allege that in conducting the affairs of CHB the Directors have breached their directors' duties and oppressed CHB's shareholders. The complaint includes the diversion of income and assets of CHB to HBS and the

placement of CHB in voluntary administration. Under CA s 233, the plaintiffs seek orders rescinding the transfer of the Park as between CHB and CTP (if they are unable to obtain that relief directly as shareholders), orders removing the Directors from control of CHB, and orders for compensation to undo the effect of the Directors' breaches.

17 Fifthly the plaintiffs make monetary claims for damages or compensation (at general law or under statute) on various bases against the Kelly-Booker parties. Some of these claims are made as an alternative to the claim for recognition of an equitable proprietary interest in the plaintiffs' sites. Others are made as an alternative to the plaintiffs' application for rescission orders and other relief against oppression. Some are independent. The heads of damage alleged by the plaintiffs include both financial losses and harm in the form of disappointment and distress.

18 Finally, the plaintiffs make monetary claims for damages or compensation against the Administrators. Again, some claims are made as an alternative to the plaintiffs' application for rescission orders and other relief against oppression, and other claims are independent.

19 CTP made a cross-claim against some of the plaintiffs for outstanding site fees. This cross-claim arose out of an undertaking which was given at an earlier stage of the proceedings. It is common ground that the cross-claim should be dismissed. The only outstanding question on the cross-claim is costs, which I will deal with when dealing with the costs of the principal proceedings. That will be after I have handed down this judgment and the parties have had an opportunity to consider it.

**Chronology of key facts**

20 Ms Kelly is a retired chartered accountant. In 1997, following her husband's death, she purchased a motorhome and began to travel around Australia. Around this time, she joined an organisation called the Campervan and Motorhome Club of Australia ("CMCA"). It was through this organisation that she later met Mr Booker. He is a retired businessman, having been the owner of various motels, service stations and truck stops during his working life.

21 Whilst a member of the CMCA, Ms Kelly met a number of travellers who had sold their homes and could not afford to buy new ones. In 2001, she began to develop the home base idea. In 2011, she started looking for a suitable property. Her relationship with Mr Booker apparently began at around the same time. They are both life partners and business partners.

22 In early 2012 Ms Kelly came across the Park, which was then known as the Cunningham, or Coolah, Caravan Park. Apparently, it had originally been developed in the 1960s or thereabouts. It was rather run down. Ms Kelly however liked its central location. She and Mr Booker decided to buy it and turn it into the home base.

23 The Park was laid out with sites available for rental to travellers and longer-term residents. Council approval was required for this purpose, and the approval distinguished between two different types of site which I will describe in a moment. The rest of the property (referred to in the evidence as the "common property") comprised: an office building which also contained residential accommodation for a manager (to which I will refer as the "management building"); a camp kitchen and other shared facilities; and surrounding parkland which contained some camping sites.

24 On the first type of rental site, occupation was only permitted for a continuous period of not more than twenty-eight days at a time. These sites were suitable for travellers in motorhomes or other recreational vehicles (RVs), or with caravans. The sites were essentially only a place to park, with a power supply. They were referred to in the evidence as "short-term" or "powered" sites.

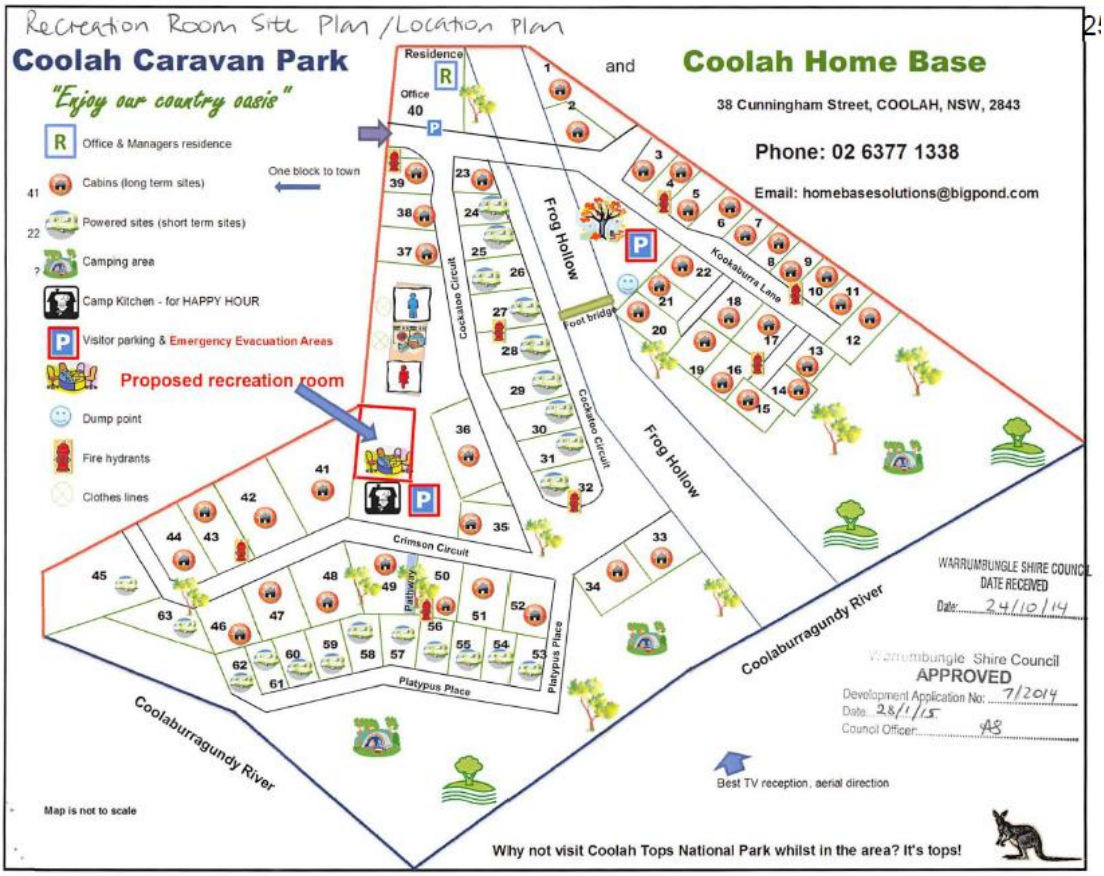
25 On the other type of site continuous occupation was permitted. These sites were thus suitable for the erection of cabins, and a number of cabins had already been erected. The sites were supplied not only with power but also with connections to other services. They were referred to in the evidence as "long-term" or "cabin" sites.

26 Under CHB's ownership, some refurbishment and development was undertaken on the common property. It appears from Ms Kelly's report at the CHB AGM in August 2013 (see below) that the approval at that time was for

forty-two sites. How many were long-term and how many short-term she did not say. The approval itself does not appear to be in evidence.

27 A revised approval was obtained in October 2014, which also covered the construction of a recreation room on the common property. Soon afterwards, an application was made in the name of CHB for a variation to the consent. This was approved in January 2015.

28 A plan of the property, showing the accommodation sites, the facilities and the rest of the common property, as attached to the approval, is reproduced below:




29 The approval specified forty-one long-term sites and twenty-one short-term sites (the key is incorrect in suggesting that there were twenty-two short-term sites). The site numbering on the plan identifies sixty-three sites in total for temporary or permanent accommodation; this is because it includes the management building (site 40) which was not let out.

30 A later permit from November 2015 records permission for letting out twenty short-term sites and forty-two long term sites. Although approval was obtained

for a total of sixty-two sites, two of them were never set up for accommodation purposes. It seems that these were both long-term sites. It is unclear which of the dwelling sites shown on the January 2015 site plan they were.

31 CHB was incorporated for the purpose of purchasing the Park on 22 February 2012. HBS was incorporated two days later. The copy of the contract between CHB and the vendors which is in evidence is undated, but the contract appears to have been executed sometime in March. The purchase price was $390,000, which was broken down into land ($80,000), plant and equipment ($210,000) and goodwill of the existing tourist business ($100,000).

32 The purchase was financed in part with a loan from the Commonwealth Bank of Australia ("CBA") in the amount of $225,000. Ms Kelly and Mr Booker contributed the remaining $165,000. The CBA loan was secured by a mortgage over the Park, supported by personal guarantees provided by Ms Kelly and Mr Booker and a mortgage over other property owned by them.

33 CHB's constitution established a company title land-holding arrangement. Ms Kelly and Mr Booker were the directors upon incorporation, and at all times thereafter. CHB settled on the purchase of the Park and became the registered proprietor on 27 April 2012.

34 I set out the terms of CHB's constitution in detail in a later section of this judgment. For present purposes they may be summarised as follows:

(1) There were two classes of share, ordinary and A class.

(2) There were two ordinary shares, held by Ms Kelly and Mr Booker.

(3) The ordinary shares gave the holders control of the management of CHB and of its unissued A class shares.

(4) The ordinary shares were to be redeemed when the CBA loan had been repaid.

(5) Each A class share gave the holder the exclusive right to one of the long-term or short-term sites.

(6) Holders of A class shares were obliged to pay a weekly site fee (indexed by reference to pension rates) towards the cost of operating the Park.

(7) There was to be a "managing agent" appointed by the directors (initially HBS) whose responsibilities included calculating and collecting the site fee.

(8) Residents were subject to by-laws set out in a schedule.

(9) Sale of the Park required the written consent of at least 80% of the shareholders.

35 Starting in March 2012, Ms Kelly and Mr Booker caused CHB to "sell off" the sites by issuing the corresponding A class shares in return for payment to CHB by the incoming purchasers. The parties used the language of sale and purchase for these transactions. For convenience I will do the same in this judgment, although in legal terms, they involved the "purchasers" subscribing for, rather than buying, shares in CHB. Unless otherwise specified, in the rest of this judgment I will for simplicity refer to A class shares in CHB as "shares". Shares carrying rights of occupation over short-term sites and long-term sites will be referred to as "STS shares" and "LTS shares" respectively.

36 Ms Kelly and Mr Booker promoted the sale of the shares in various ways. Starting in early 2012, before the completion of the purchase of the Park by CHB, they made presentations at rallies and other gatherings of CMCA members. These presentations were made using slides on an overhead projector, with questions taken orally afterwards. Ms Kelly and Mr Booker also had promotional flyers and brochures produced.

37 Some of the purchasers bought sites with existing cabins. Other long-term sites were vacant, and a kit home or other dwelling was later installed by, or for, the purchaser. The installation work was in some instances done by Mr Booker through HBS, and in others by external contractors.

38 Through HBS, Ms Kelly and Mr Booker bought some of the shares for themselves. Over time they bought several LTS shares. Also, in April 2014, Ms Kelly and Mr Booker caused CHB to sell to HBS nineteen of the twenty STS shares. The price per STS share was $550, which was well below the price being paid for other shares. This is one of the things which the plaintiffs complain about, and will be dealt with in more detail in a later section of the judgment.

39 Ms Kelly and Mr Booker later transferred the CHB shares they held through HBS to another company controlled by them, Residential Cluster Pty Limited ("RC"). RC is not a party to these proceedings.

40 Some of the CHB shares, once issued, were the subject of further transactions. The evidence refers to a number of what were described as “buy-backs” of shares originally issued to purchasers. I have not investigated the precise legal nature of these transactions. But it seems clear that the parties ignored the prohibition on a company buying its own shares otherwise than in accordance with the specific procedures laid down in CA Part 2J.1 (see Austin, R P and Ramsay I M, *Ford, Austin and Ramsay’s Principles of Corporations Law* (17th ed, 2018, LexisNexis Butterworths) at [24-370]).

41 There were also transactions in which, through HBS/RC, Ms Kelly and Mr Booker bought shares on the secondary market. There were some secondary market transactions in which they were not involved as buyer or seller, but even in those cases Ms Kelly and Mr Booker seem to have adopted a broker-type role. One of the plaintiffs’ purchases is an example of this: see [408] below.

42 One of the selling points used by Ms Kelly and Mr Booker was that shareholders would have a stake in the affairs of the Park as a whole. At least until the disputes between the parties arose, shareholders undertook volunteer work alongside Mr Booker and Ms Kelly on refurbishing and maintaining the common property in the Park.

43 Although shareholders would occasionally congregate in the camp kitchen, the common property was largely used for the tourist business. Ms Kelly and Mr Booker retained exclusive control over management of the tourist business (through HBS) and the issue of CHB shares as I have described.

44 I have already mentioned Ms Kelly’s background as a chartered accountant. She did the bookkeeping for CHB and HBS using bookkeeping software. An external accountant, Mr Randolf Rindfleish, who practised locally, used the records prepared by Ms Kelly to prepare CHB’s tax returns and financial statements.

45 As will be seen, the constitution of CHB contained no provision for annual accounts or annual general meetings. Nevertheless, Ms Kelly and Mr Booker had annual accounts prepared, and convened AGMs, from 2013 onwards. At these meetings an oral report, which included an explanation of the annual

accounts, would be presented to the shareholders by Ms Kelly. The first AGM was held in August 2013.

46 In September 2014, at the 2014 AGM of CHB, a Shareholders Advisory Group ("SAG") was formed. The stated purpose of this group was to act in the interests of the shareholders and resolve any disputes which arose between them and CHB. In practice it seems to have operated as a liaison group.

47 From around 2015 onwards, Ms Kelly and Mr Booker stopped doing the day-to-day management of the Park and handed that over to employed managers. This made no difference to the way in which the Park operated. HBS employed the managers and continued, under the direction of Ms Kelly and Mr Booker, as the management company. As directors of CHB, Ms Kelly and Mr Booker remained in full control of its affairs.

48 The plaintiffs between them hold sixteen shares, all of them LTS shares. In order of becoming shareholders, the plaintiffs' details are as follows:

(1) John Daniel Sheahan (14th plaintiff): site 5;

(2) Neville John Kelly (10th plaintiff) and Susan Anne Kelly (11th plaintiff) (no relation of Ms Janet Kelly): site 42;

(3) Margaret Joy Vale (4th plaintiff): site 21;

(4) Jennifer Sue Axtell (7th plaintiff): site 10;

(5) James Terence James (9th plaintiff): site 8;

(6) Lee Marilyn Tait (6th plaintiff): site 33 (originally purchased with her husband Barry John Tait who has since died);

(7) Helen Dawn Waugh (3rd plaintiff): site 14;

(8) Jill Cook (5th plaintiff): sites 38 and 50;

(9) Sietske Elisabeth Brown (8th plaintiff): site 39;

(10) Richard Jim Squire (15th plaintiff) and Susan Janet Squire (16th plaintiff): site 2;

(11) Janne Marnie Robertson (13th plaintiff): sites 46 and 47

(12) Geoffrey Ian McMillan (1st plaintiff) and Christine Margaret McMillan (12th plaintiff): site 52;

(13) David Arthur Darch (2nd plaintiff): site 37; and

(14) Leslie Townsend (17th plaintiff) and Alana Mary Townsend (18th plaintiff): site 13.

49 The plaintiffs' purchases took place between March 2012 and March 2017. Some, but not all, of the purchases followed attendance at presentations given by Ms Kelly and Mr Booker. The first fourteen purchases were directly from CHB; the last two (Mr Darch and Mr & Mrs Townsend) involved the transfer of shares from existing shareholders. I describe the purchases in more detail in a later section of this judgment.

50 As already noted, the nineteen STS shares issued in April 2014 are now held by Ms Kelly and Mr Booker through RC. RC also holds fourteen LTS shares (the sites for seven of which are undeveloped). Purchasers unconnected with either the plaintiffs or the Kelly-Booker parties hold the remaining shares.

51 The shareholder alignments may therefore be summarised as follows:

| | Long-term sites | Short-term sites | Total |
|---|---|---|---|
| RC | 14 | 19 | 33 |
| Plaintiffs | 16 | | 16 |
| Unaligned | 10 | 1 | 11 |
| **Total** | **40** | **20** | **60** |

52 By 2016, some of the shareholders had become dissatisfied with the way in which Ms Kelly and Mr Booker were operating the Park. Leading roles in this were played by Mr McMillan, the first plaintiff, and Mr Darch, the second plaintiff. Mr McMillan (along with his wife) had become a shareholder in July 2014 and he had become the secretary of the SAG a few months later. Mr Darch had bought his share in February 2015. He joined the SAG in March 2016 and became chairman shortly afterwards.

53 The initial concern focussed on the role of HBS, and in particular the potential for conflict of interest between it and CHB. Mr McMillan and Mr Darch established an unofficial group called the "Reform Group", which was independent of the SAG. Most, if not all, of the plaintiffs were, at one stage or

another, involved in the Reform Group, although there does not appear to have been any formal membership.

54 In late 2016, solicitors' correspondence began between Mr Andrew Boog, who had been retained by Mr McMillan and Mr Darch, and Mr Tom Flynn, acting on the instructions of Ms Kelly and Mr Booker, for CHB. The correspondence culminated in the institution of the s 247A proceedings in 2018 by Mr McMillan and Mr Darch against CHB. Mr Flynn was later replaced as the solicitor for CHB by Mr Aleco Vrisakis, whose firm is based at Rylstone and is known as Mid-West Law Practice.

55 The s 247A proceedings were heard by Black J in August 2019. A few days later, and before final submissions had taken place, Ms Kelly and Mr Booker appointed Mr Dean-Willcocks and Mr Gray as voluntary administrators of CHB.

56 The unsecured claims against CHB when it went into administration were nearly all for expenses associated with the s 247A proceedings (including for this purpose the prior dispute with shareholders). The main component was a claim by Ms Kelly and Mr Booker for reimbursement of legal and accounting expenses paid by them on CHB's behalf. They also claimed remuneration and expenses. There was also a claim by Mr Vrisakis for unpaid fees.

57 The Administrators largely accepted these claims. They accepted that CHB was insolvent as a result. The debt owed to the CBA was $60,000 but the bank relied on its rights as secured creditor and did not participate as a creditor in the administration process.

58 Initial and final meetings of unsecured creditors were convened by the Administrators in accordance with the statutory timetable. The final meeting was adjourned (as was permissible) to allow for further investigations by the Administrators and to permit Ms Kelly and Mr Booker to submit their deed of company arrangement (the plaintiffs were also afforded an opportunity to submit a deed of company arrangement but did not in the end do so).

59 The Kelly-Booker DOCA provided for CTP to purchase the Park from CHB for $430,000 (plus GST). The Administrators were to remain in control of CHB's affairs until the transaction was completed. The resulting funds would, in the

usual way, be used to pay off the CBA mortgage and meet the administration costs, with the balance being divided among CHB's creditors. To this end, Mr Dean-Willcocks and Mr Gray were to continue as administrators of the DOCA.

60 The Administrators recommended the Kelly-Booker DOCA in their report to the creditors and it was approved at the adjourned final meeting in late November. For the purposes of that meeting of creditors, the Administrators accepted claims by unsecured creditors totalling $272,000, including claims by Ms Kelly and Mr Booker for $230,300 and by Mr Vrisakis for $41,400. The approval resolution was unanimous, the claim by Mr Vrisakis being voted in favour of the resolution by Ms Kelly and Mr Booker as his proxy. Following the meeting, the DOCA and the contract for the sale of the Park to CTP were executed on CHB's behalf.

61 Between November and December, Ms Kelly and Mr Booker wrote a series of letters to the shareholders advising them that upon completion of the purchase of the Park by CTP, their existing right of occupation of their sites would cease. The shareholders were invited to enter into residential site agreements with CTP (carrying a site fee of $185 per week, compared with approximately $60 per week that the shareholders were then paying by way of site fee to CHB). Some of the unaligned shareholders appear to have accepted, but all of the plaintiffs eventually refused.

62 In December, Mr McMillan and Mr Darch consulted a new solicitor, Mr Peter Vogel. His office is at Penrith and his practice operates under the name "The People's Solicitors". The completion of the sale to CTP was due to take place on 17 December. On the morning of that day, Mr Vogel lodged caveats on behalf of Mr McMillan and Mr Darch over the Park. Their caveats claimed a proprietary interest in the sites occupied by them.

63 The lodgement of the caveats made it impossible to complete the registration of the transfer of the Park from CHB to CTP. Nevertheless, the rest of the transaction was settled (presumably CBA as the existing mortgagee permitted this to happen because it was financing the purchase by CTP). Mr Dean-Willcocks and Mr Gray as Deed Administrators received the balance due to CHB. They surrendered control of CHB back to Ms Kelly and Mr Booker.

64 Following the last-minute lodgement of the caveat and the settlement of the rest of the sale transaction, correspondence passed between Mr Vrisakis and Mr Vogel. Mr Vrisakis contended that the caveats were unsustainable. Mr Vogel maintained that they were justified. In mid-January Mr Vrisakis responded re-stating his position. This was the last exchange before legal proceedings were commenced.

65 Meanwhile, further caveats had been lodged by Ms Vale (the fourth plaintiff) and Ms Tait (the sixth plaintiff) on 23 December, followed by Ms Waugh (the third plaintiff) on 22 January. Ms Waugh's caveat was lodged on her behalf by Mr Vogel; Ms Vale's and Ms Tait's caveats were lodged by another lawyer. But following agreement between the parties in February, after these proceedings had begun, all the plaintiffs' caveats were withdrawn or permitted to lapse. This allowed the registration of CTP as owner of the Park to proceed.

**Procedural history**

66 These proceedings were commenced on 11 February 2020 in the names of the first six plaintiffs (Mr McMillan, Mr Darch, Ms Waugh, Ms Vale, Ms Cook and Ms Tait) against the first six defendants (CHB, CTP, Ms Kelly, Mr Booker and the Administrators). The proceedings were commenced by summons, which was accompanied by a notice of motion seeking urgent interlocutory relief which came before Emmett AJA, sitting at first instance, on the following day.

67 His Honour set a timetable for pleadings and evidence which provided for the final hearing to take place on 11 and 12 May. An interlocutory regime was established by the parties exchanging undertakings to the Court. The plaintiffs undertook to pay the occupation fees specified in the residential site agreements offered by CTP and to withdraw their caveats. CHB, CTP, Ms Kelly and Mr Booker undertook not to dispose of or otherwise deal with the Park, or to take any steps to evict the plaintiffs, without giving fourteen days prior written notice.

68 The timetabling directions resulted in the plaintiffs filing a statement of claim on 2 March. By this stage the remaining Kelly-Booker party, HBS, had been joined. Defences were filed for the Kelly-Booker parties and the Administrators, followed by replies to those defences.

69 On 2 April, Mr Vogel filed an application to join the remaining plaintiffs to the proceedings. An amended statement of claim was filed on 20 April. On 28 April Emmett AJA granted the necessary leave and excused the defendants from filing fresh defences, noting that their existing denials extended to any new allegations in the amended statement of claim. His Honour also vacated the May hearing dates and fixed a new timetable for the filing of the parties' evidence, to be followed by a further directions hearing in late June.

70 Disputes had also arisen about the payment of the occupation fees the subject of the 12 February undertaking, which had resulted in the filing of CTP's cross-claim. There were also disputes about other amounts claimed by way of arrears. Emmett AJA made a revised set of interlocutory orders on 28 April but the disputes continued and there were further modifications by Rein J on 1 July.

71 In the end, the filing of the affidavit evidence appears not to have been completed until December. In the interim, the proceedings were case-managed by Ward CJ in Eq (as her Honour then was). This process resulted in three interlocutory judgments.

72 The first interlocutory judgment dealt with an application by the Administrators to have the proceedings against them summarily dismissed or the statement of claim struck out. The Administrators' contention was that the plaintiffs had no tenable claims against them, or at least that the statement of claim did not disclose any tenable claims.

73 Her Honour delivered judgment on 23 July: *McMillan v Coolah Home Base* [2020] NSWSC 935. She concluded that the pleading of the plaintiffs' case against the Administrators was deficient and should be struck out. The plaintiffs should however have leave to re-plead, but not to advance certain claims which her Honour considered were untenable.

74 Before the revised pleading was finalised, another issue arose about the plaintiffs' claims against CHB. The plaintiffs, as members of CHB, were bound by the Kelly-Booker DOCA and could not bring proceedings against it without the leave of the Court: see CA s 444E(3). The plaintiffs applied for leave to pursue their claims in these proceedings and in the NCAT proceedings (see

below). In a judgment delivered on 14 September (*McMillan v Coolah Home Base (No 2)* [2020] NSWSC 1243 her Honour granted the necessary leave, on the condition that the plaintiffs would not seek to enforce any judgment obtained against CHB without further leave of the Court.

75 Meanwhile, the plaintiffs had propounded a new pleading of their claims against the Administrators, which they applied for leave to file. The Administrators opposed the grant of leave on the ground that the pleading was still inadequate. The Chief Judge dealt with the application on 30 September: *McMillan v Coolah Home Base (No 3)* [2020] NSWSC 1325. Her Honour granted the necessary leave, subject to some excisions and adjustments.

76 The plaintiffs' further amended statement of claim was eventually filed on 6 October. The Administrators filed a defence to the amended pleading on 28 October, followed by the Kelly-Booker parties on 29 October.

77 In December, with case management apparently complete, the proceedings were fixed for hearing for five days on 30 August 2021. The hearing was later allocated to me. There was a then further interlocutory flurry when Mr Vogel learned that Ms Kelly and Mr Booker were planning to sell an apartment they owned in Queensland. He made an application for freezing orders over both the Park and the proceeds of any sale. The application was resolved with consent undertakings given to Lindsay J at the end of January.

78 On 21 June last year I arranged for the proceedings to be listed before me for a pre-trial directions hearing. Coincidentally, at the end of April, Mr Vogel had filed an application for disclosure from both groups of defendants, covering various specified categories of documents (it seems that disclosure had not previously been required). That application was referred to me at the pre-trial directions hearing.

79 In preparing for the 21 June hearing, I thought that the prayers for relief in the plaintiffs' statement of claim did not make clear just exactly what proprietary interests the plaintiffs were claiming in the Park. Nor was it clear how, if granted, such proprietary interests were to be reconciled with the claimed relief against oppression, which sought to have the Park put back into the hands of CHB and the control by Ms Kelly and Mr Booker over CHB's affairs removed. I

was concerned that, even if the plaintiffs succeeded in the proceedings, they might in future find themselves in conflict with each other, or with CHB, about the operation of the Park. I also thought it unclear what monetary relief was sought against which of the defendants and how that fitted in with the other claims in the case.

80 I raised these questions with counsel for the plaintiffs, who had no immediate satisfactory answer. The upshot was that counsel undertook to reconsider the prayers for relief (at least) in the statement of claim. I held over dealing with the disputed categories of documents until that had happened.

81 The matter returned to Court on 30 June. Counsel for the plaintiffs produced a revised set of prayers for relief. Following further debate, the disclosure dispute was confined to the plaintiffs' application to have HBS produce all of its financial records going back to 2012. I declined to order disclosure in these terms because counsel was unable to satisfy me that disclosure of such width was justified by the specific pleaded claims made on the plaintiffs' behalf. I made orders for disclosure of the other agreed categories.

82 Counsel for the plaintiffs was, over the course of both hearings, very resistant to the idea that the plaintiffs' statement of claim might require any reconsideration or amendment. Counsel asserted more than once that the statement of claim in its then form had been "approved" by the judges who had previously been handling the matter.

83 Despite these assurances I remained sceptical, and said so. I emphasised that the proceedings would be conducted on the pleadings. Towards the end of the hearing I said to counsel for the plaintiffs:

> One thing that has to be clearly understood on your side is that this is not a Royal Commission into the sins or the alleged sins of the defendants; it is a claim or series of claims by your clients for specific legal relief, whether cumulatively or alternatively. It is incumbent on your clients, before we get near preparing this case for the hearing, to articulate exhaustively what those claims are and what the pleaded factual basis for those claims are.

84 The pre-trial directions which I gave on 30 June permitted the plaintiffs to make a further application to amend their statement of claim. Ultimately they did so. The revised pleading, styled "Third Amended Statement of Claim" ("TASOC"),

was filed on 20 July. The amendments (which only affected the Kelly-Booker parties) were not opposed and a further defence was later filed.

85 The trial began before me on 30 August as scheduled. From the outset, there were problems with understanding what actual relief the plaintiffs were seeking. In the course of the evidence of Ms Brown, who was the first witness, counsel for the plaintiffs observed, as if in passing, that questions of quantum would be determined at a later hearing. When I rose to the bait, counsel informed me that this was because I had already indicated at the pre-trial hearings this was to be the course followed. Counsel also asserted that the plaintiffs were already claiming orders in the nature of an account or accounts, which would, in accordance with the usual practice, be undertaken at a later stage.

86 In fact I had never actually indicated that there would be a separate hearing on quantum issues. All I had done was to say that I would consider such an application. But none had been made. In due course, counsel also conceded that no relief in the nature of an account was expressly sought in the plaintiffs' statement of claim.

87 On the following day (31 August), counsel for the plaintiffs obtained leave to file a notice of motion returnable instanter so as to seek an order for deferral of quantum issues. The motion also sought to add further claims for relief to the statement of claim, including an application to bring derivative proceedings under CA s 237 on behalf of CHB against other defendants and an application for an order to have the Kelly-Booker DOCA set aside.

88 The motion was opposed by both defendants' counsel. I thought that it had clearly come too late. Having regard to the pre-trial background which I have just described, the plaintiffs' legal representatives had been given ample opportunity and encouragement to reconsider the plaintiffs' claim and decide just exactly what it was that the Court was to be asked to do at the hearing. The evidence in support of the motion did not attempt to explain why it had not been made earlier. In fact, the absence of any application for s 237 relief had been noted by the Chief Judge during the previous year.

89 In refusing the motion, I also said that it raised too many unanswered questions. The motion sought an order providing baldly that "the questions of

relief and quantum of damages be determined at a separate inquiry". In a case where the plaintiffs were advancing numerous different monetary claims, sometimes cutting across each other, and where those claims included common law and statutory claims where damage was the gist of the cause of action, ordering a separate hearing on "damages" would have left it quite uncertain what was being determined in the "liability" hearing and what was being deferred. Adding in all questions of "relief" (including, presumably, equitable relief and relief against oppression) would have added further dimensions to the confusion. Making an order in the terms sought would have been out of the question.

90 Other practical problems rapidly emerged at the hearing. The trial had to take place by way of remote hearing because of the Covid-19 lockdown in Sydney. The audio/visual facilities left a lot to be desired. Indeed, on the afternoon of the very first day counsel for the plaintiffs went so far as to apply for the hearing to be vacated on the ground that it was not possible to have a fair trial. But, difficult and tiresome as the conditions were, they were the same for all the parties. Giving up and adjourning the hearing would have been unthinkable.

91 Even before this application was made and rejected, it had become apparent that the five day hearing estimate was hopelessly inadequate. Indeed it would have been hopelessly inadequate even for a perfectly prepared face-to-face hearing. There was no alternative but to sit extended hours and try to obtain further hearing dates.

92 Eventually I was able to allocate a further seven days of hearing through the month of September, making twelve hearing days in total for the evidence. I then found two further days in November and the parties' oral submissions were completed within those two days, although not without grumbling from counsel for the plaintiffs about lack of time.

93 It must be said that the hearing conditions continued to be adverse. Nor were they helped by the fact that the electronic bundle of documents was, contrary to the instructions in the protocol sent out before the hearing, split over numerous different separate documentary bundles. The plaintiffs' legal

representatives were also seemingly incapable of providing the court books to their witnesses in electronic form to facilitate cross-examination.

94 My rulings did not quell the disputes between the parties about the proper scope of the plaintiffs' case. Counsel for the plaintiffs manifested a determined refusal to limit the case to issues squarely raised by the pleadings. In particular, disputes recurred because counsel persisted in propounding the allegation that Ms Kelly and Mr Booker had imposed a "sham administration" on CHB. Counsel for the Kelly-Booker parties contended that this was not fairly within the terms of the plaintiffs' statement of claim, even as most recently amended.

95 The term "sham administration" was an unfortunate one. Obviously Ms Kelly and Mr Booker (and the Administrators, as the other parties to the supposed "sham") had intended there to be a real and effective administration in accordance with the requirements of the *Corporations Act*. What counsel for the plaintiffs appears to have meant by the term "sham transaction" was that the ground for administration, namely the insolvency or approaching insolvency of CHB, had been contrived by Ms Kelly and Mr Booker.

96 Another contentious issue which arose in the course of Ms Kelly's cross-examination was the production of CHB's accounting records. Some records had been discovered and some further accounting printouts were produced by Ms Kelly in the course of her cross-examination (which extended over several days). But it emerged that full electronic records did not exist for the first financial year or so of CHB's operations. There was a suggestion that further hard copy records might exist in storage in Queensland.

97 On the morning of Monday 13 September, which was day nine of the hearing, counsel for the plaintiffs made a further interlocutory application by way of notice of motion. The motion sought orders for discovery and production of further documents by the Kelly-Booker parties. It also sought a grant of leave for the plaintiffs to make further amendments to their statement of claim.

98 Counsel for the Kelly-Booker parties opposed both further discovery and further amendment. Counsel's position was that if the Court acceded to the application, then the hearing would need to be adjourned. Counsel for the

plaintiffs formally took the position that no adjournment was necessary, but did not oppose such an adjournment if (as he characterised it) the Kelly-Booker parties wanted it; indeed, counsel rather seemed to welcome the idea. But given the waste of time and costs which would ensue, it was unrealistic to deal with the application on that basis.

99 Evidence was led from the Kelly-Booker parties' solicitor about the discovery of financial records, and specifically the way in which computerised records had been made available. Mr Vogel was also cross-examined on this subject.

100 On the evidence, it became clear that the plaintiffs' legal representatives had had ample opportunity to obtain and review CHB's financial records in advance of the hearing. It appeared that the plaintiffs' legal representatives had only got to grips (or begun to get to grips) with understanding the accounting records in the course of Ms Kelly's cross-examination. I was not satisfied that there had been any failure to comply with orders of the Court, or anything inaccurate or misleading said by the solicitors for the Kelly-Booker parties, which would have justified an order for further discovery at that point. Accordingly, I rejected the application for further discovery.

101 The argument on the amendment aspect of the motion took an unusual course. The proposed amendments to the statement of claim spelt out the "sham administration" allegation, among others. But in the course of argument, when counsel for the Kelly-Booker parties objected that the amendments introduced new factual claims, counsel for the plaintiffs disclaimed any need to rely on them. He said that the relevant proposed paragraphs only drew together and spelt out in clear terms allegations that were already in the statement of claim.

102 I must admit that I had some difficulty in accepting this. But I considered that I really had no choice but to take counsel at his word. And if, as counsel claimed, the proposed amendments only reflected factual allegations already made, then they were not necessary. I therefore refused the amendment application as well.

103 The "sham administration" issue came to a head later that day, in the course of the ongoing cross-examination of Ms Kelly. Counsel for the Kelly-Booker parties objected to a question about the Directors' motivation for putting CHB

into administration. I heard argument at some length and ruled that an allegation that the appointment of the Administrators, or the apparent indebtedness of CHB at the time, was contrived, or a "sham", was not fairly within the terms of the plaintiffs' case as pleaded against the Kelly-Booker parties (although it was within the terms of the case pleaded against the Administrators).

104 The scope of the plaintiffs' pleaded case re-emerged as an issue in the course of final argument. Counsel for the Kelly-Booker parties contended that many of the submissions by counsel for the plaintiffs fell outside the pleadings.

105 On 10 November, which was day fourteen, the last day of the hearing, counsel for the plaintiffs produced yet a further revised version of the statement of claim. I was told that some, at least, of the amendments were not objected to. I indicated that it was far too late at that stage for a further contested amendment application, but that if there were amendments which were uncontentious I would receive them in the form of a further amended statement of claim in due course. But after I had reserved judgment I heard nothing further from the parties about this. I have therefore considered the parties' submissions by reference to the version of the plaintiffs' statement of claim filed in July.

**Summary and analysis of the evidence**

*Witnesses*

106 Fifteen of the eighteen plaintiffs were called as witnesses and were cross-examined. I refused belated applications for leave to lead evidence from Mr Neville Kelly (10th plaintiff) and Mr Townsend (17th plaintiff). Mrs Squire (16th plaintiff) was not called. All three were co-shareholders with their spouses who did give evidence.

107 The plaintiffs' oral evidence lasted for seven days. There was extensive cross-examination by counsel for the Kelly-Booker parties. The credibility of some of the plaintiffs was challenged in cross-examination. Counsel submitted that in general their evidence was unreliable at best. I will return to this when analysing the evidence on the share purchases in a later section of this judgment.

108 The witnesses for the Kelly-Booker parties were Ms Kelly and Mr Booker themselves. Ms Kelly was extensively cross-examined (over a period of five days) and Mr Booker was also cross-examined at some length. In closing submissions, counsel for the plaintiffs was highly critical of both of them as witnesses. Counsel submitted that their evidence on disputed questions of fact was not worthy of credit. The submissions went so far as to accuse Ms Kelly as having falsified some of the documents in evidence.

109 Counsel for the Kelly-Booker parties made a vigorous rebuttal of these submissions. Counsel complained that some at least of the more lurid allegations had not even been put in cross-examination. There was force in these submissions and I agree that counsel for the plaintiffs went too far in the allegations which he made.

110 Ms Kelly, as one would expect from a retired chartered accountant, presented as experienced and knowledgeable in matters of accounts and administration. She is clearly an astute person. I found certain aspects of her conduct commercially unsatisfactory but this did not necessarily make her evidence unreliable on a factual level. In the end it has not proved necessary to go into the allegations made against her by counsel for the plaintiffs in his closing submissions (if and to the extent that any of them was properly open). Nor has it been necessary to go into the allegations of threatening and overbearing conduct made against Mr Booker.

111 Mr Dean-Willcocks gave evidence in the Administrators' case. He was cross-examined at some length, but his credibility was not challenged on any factual issues. Mr Gray did not give evidence.

*Constitution of CHB*

112 The original version of CHB's constitution was presumably prepared before CHB was incorporated in February 2012. The version of CHB's constitution to which I was referred during the hearing is annotated as having been amended on 9 July 2014. The amendments are not marked up. I have assumed that those amendments, whatever they were, and any other amendments which may have been made beforehand, make no difference for the purpose of these proceedings.

113 For the purposes of the constitution, the "Land" was defined as the parcels of land which made up the Park. The constitution contained the following further definitions:

> **Building** means the improvements upon the Land.
>
> **Allotment** means a portion of land, including and [sic] buildings constructed thereon, and being one of the sites designated by numbers 1 to 60 inclusive in the plan set out in Schedule 4.
>
> **Common Property** means all areas of the Land and Buildings that are not Allotments or Buildings on Allotments.

114 Schedule 4 was a site plan in generally the same form as the site plan which was the subject of council approval in January 2015 (see [23] above). It is undated and seems to be an earlier version of that plan. It identifies only sixty-one shareholder sites (and the management building). Site 63 in the January 2015 site plan (a short-term site) does not appear. It seems likely that the plan in the version of the constitution to which I was referred post-dates the incorporation of CHB. But no point was taken about this.

115 Schedule 3 contains a list of the shareholder sites, showing both the shareholder site number and the share number for each Allotment. It also shows the area, in square metres, of each Allotment. It does not include the two sites which were not in the end developed as such.

116 Schedule 3 is described as CHB's "member register" as at 31 January 2017. It is not in fact a register of members since it contains no information about who the registered owner of the relevant share was on that date. On its face, it also post-dates the original constitution by almost five years. Again, no point was taken about this for the purposes of the hearing.

117 Clause 2 of the constitution dealt with the objects of CHB. Those objects included:

> 2.1 Without limiting the powers of the Company under the Corporations Act and this Constitution, the objects for which the Company is established and to carry on business are:
>
> > (a) To acquire all that piece of land being [the Park], the business operating on the property and all improvements erected thereon.
> >
> > …
> >
> > (c) To maintain decorate repair replace reconstruct enlarge develop alter demolish furnish supply services to and otherwise improve

> generally the whole or any part of the said improvements and the gardens and grounds of and the approaches to any land owned occupied or used by the Company and without limiting the generality of the foregoing to erect construct and provide premises in which the Share Holders of the Company or their respective tenants licensees or nominees may reside.

118 Clause 2.2 provided:

> 2.2 Notwithstanding any other provision in this Constitution, any proposal to sell, subdivide, mortgage, charge or otherwise encumber (including lodging of a caveat) the Land, the Building, or any part thereof, shall not be put into effect without with the prior written consent of 80% of Share Holders, provided that such written consent will not be valid unless it is also witnessed by another person who are not a Share Holder or Director of the Company.

119 Clause 3 dealt with share capital. It provided that CHB's share capital was $62. Sub-clause 3.1 dealt with shares. It gave the Directors power to issue shares and to allocate and confer or impose special rights or restrictions on those shares concerning voting, dividends and the like. The number of shareholders (counting joint shareholders as a single owner) could not exceed sixty-two.

120 Sub-clause 3.3 dealt with share classes. It provided for two classes of shares, ordinary and A class shares. The "terms of issue" of these classes of share was specified in schedule 2, to which I will refer in more detail below. Subclause 3.3(c) went on to provide:

> Notwithstanding anything contained in this Constitution, only the owner of shares pertaining to an Allotment shall be entitled to hold shares which grant any rights in respect of an Allotment.

121 Sub-clause 3.5 dealt with increasing or decreasing CHB's share capital. It gave the shareholders in general meeting the power to do so, and to attach rights or privileges to any group or groups of shares, with or without dividing them into classes. But this was subject to the proviso that eighty per cent approval of shareholders present and voting at the meeting was required. Sub-clause 3.7 dealt with variation of rights attaching to shares. Again, this required the consent of eighty per cent of shareholders.

122 Clauses 4 to 13 dealt, among other things, with general meetings, directors and executive officers, winding up, minutes and records, and indemnity and insurance. These provisions were generally conventional in form for a proprietary company. For the purposes of this judgment, it is only necessary to record the following:

(1) Clause 6 provided for general meetings to be convened either by the directors or the shareholders. There was no provision for annual general meetings.

(2) So far as directors' fees and expenses were concerned, clause 7.3 provided:

> (a) Each Director is entitled to the remuneration out of the funds of the Company as the Directors determine, but if the Company in general meeting has fixed a limit on the amount of remuneration payable to the Directors, the aggregate remuneration of Directors must not exceed that limit.
>
> (b) The remuneration of Directors:
>
> > (i) may be a stated salary or a fixed sum for attendance at each meeting of Directors or both; or
> >
> > (ii) may be a share of a fixed sum determined by the Company in general meeting to be the remuneration payable to all Directors which is to be divided between the Directors in the proportions agreed between them or, failing agreement, equally, and if it is a stated salary under rule 7.3(b)(i) or a share of a fixed sum under rule 7.3(b)(ii), is taken to accrue from day to day.
>
> (c) In addition to their remuneration under rule 7.3(a), the Directors are entitled to be paid all travelling and other expenses properly incurred by them in connection with the affairs of the Company, including attending and returning from general meetings of the Company or meetings of the Directors or of committees of the Directors.
>
> (d) Subject to any amount fixed in general meeting pursuant to rule 7.3(a), if a Director renders or is called on to perform extra services or to make any special exertions in connection with the affairs of the Company, the Directors may arrange for a special remuneration to be paid to that Directors, either in addition to or in substitution for that Directors' remuneration under rule 7.3(a).

(3) Clause 11.1, dealing with winding up, provided that the surplus on winding up should be distributed to the shareholders "in proportion to the square meterage attached to the shares held by them".

(4) Clause 12 dealt with minutes and records. Concerning records, sub-clause 12.4 relevantly provided:

> (a) Subject to the Corporations Act, the Directors may determine whether and to what extent, and at what time and places and under what conditions, the minute books, accounting records and other documents of the Company or any of them will be open to the inspection of Share Holders other than Directors.
>
> (b) A Share Holder other than a Director does not have the right to inspect any books, records or documents of the Company except as provided by law or authorised by the Directors.
>
> …
>
> (e) The Company must keep the financial records required by the Corporations Act.

123 Clause 14 provided for levies on shareholders. Sub-clause 14.1 gave the directors power, with the sanction of a "special resolution" of the shareholders, to impose an "Ordinary Levy" once per financial year and a "Special Levy" from time to time and at such times as the directors should see fit. Each shareholder was obliged to pay a proportion of the levies imposed, being the proportion which the "allotment entitlement" of the shareholder's Allotment bore to the "aggregate land" shown in the site plan. Presumably this was to be understood as the aggregate of allotments for which shares had been issued.

124 There was no definition of the term "Ordinary Levy" in the constitution. The definition for "Special Levy" was:

> **Special Levy** means a levy imposed to cover payments of a capital, irregular or major nature and shall include amounts sufficient to cover the liability of the Company for:
>
> (a) the cost of painting and re-painting any part of the Common Property of the Building;
>
> (b) the cost of acquisition of any personal property;
>
> (c) the cost to renew or replace any fixtures, fittings or personal property owned by the Company;
>
> (d) the cost of structural repairs to the Building;
>
> (e) any amounts that the Company is liable to pay forthwith but is unable to pay unless such a levy is raised; and
>
> (f) any amount payable by the Company that cannot be paid by current funds.

125 Clause 15 dealt with funds for operational purposes. It provided for three funds: a reserve fund; an ordinary fund; and a special fund. The ordinary and special funds were for the proceeds of Ordinary and Special Levies respectively.

126 Clause 16 provided for a Managing Agent:

> (a) A Managing Agent may be appointed by the Directors upon such terms as the Directors see fit.
>
> (b) The Managing Agent appointment is defined in Schedule 1.
>
> (c) The Managing Agent is responsible for calculating and charging a Site Fee for each Allotment.
>
> (d) The Site Fee levied is to cover costs as defined in Schedule 1.
>
> (e) The Managing Agent's appointment may be revoked subject to a special resolution of Share Holders decided by an 80% majority of votes cast any vacancy arising from the revocation.

127 Schedule 1 unhelpfully defined "Managing Agent" as follows:

> **Managing Agent** means a person or entity appointed in accordance with rule 16 of this Constitution. The Managing Agent appointed is [HBS].

128 The combination of clause 16(b) and the definition in Schedule 1 was effectively circular. As a result, there was no definition in the constitution of the authority or functions of the Managing Agent.

129 The wording of clause 16(e) seems to have gone wrong. The initial words seem to provide, somewhat clumsily, that the Managing Agent could be removed by the shareholders by an eighty per cent vote. The last six words referred to filling of a vacancy but were incomplete.

130 The Site Fee to be collected by the Managing Agent was defined in Schedule 1 as follows:

> **Site Fee** means a levy to cover the day to day administration, maintenance or repair of the property for the twelve month period following imposition of the levy and shall include amounts sufficient to cover the liability of the Company for:
>
> (a) council rates and all other amounts properly payable to municipal authorities;
>
> (b) water sewerage and drainage rates and all other amounts properly payable to water sewerage or drainage authorities;
>
> (c) amounts payable for Federal or State land taxes and any other charges and taxes imposed upon the Land by a properly constituted body;
>
> (d) insurance premiums for insurance of the Building in accordance with rules 13.4 and 13.6;
>
> (e) the cost of repairs and maintenance to the Buildings and the Common Property as are necessary to keep the Buildings in first class order and condition;
>
> (f) the cost of cleaning of the Common Property including all cleaning materials, implements and labour;
>
> (g) the cost of electricity to the Common Property;
>
> (h) the wages of any caretaker or other employee of the Management Company employed in the running, administration and maintenance of the Building;
>
> (i) any items of expenditure carried forward from the previous year;
>
> (j) any amount payable as Directors fees in accordance with this Constitution;
>
> (k) interest, bank charges and institutional of other ancillary charges payable upon any moneys borrowed of raised by the Company;
>
> (I) management, accounting, legal, secretarial and other professional charges including, without limiting the generality of the foregoing, any fees payable to the Managing Agent;

(m) maintenance and repair of fire prevention equipment including the fire extinguishers within the Home Units; and

(n) any other expenditure properly incurred by the Management Company in the day to day running, administration and maintenance of the property.

The Site Fee commencing April 2012 is $50 per week.

The Site Fee is reviewed six monthly and adjustments are based on 20% of the Single Aged Base Pension rate increase.

The Site Fee is payable weekly.

131 Clause 17 dealt with by-laws. It provided:

(a) Unless the Company otherwise resolves in general meeting, the ByLaws of the Company shall be those contained in Schedule 5 of this Constitution.

(b) The Directors may amend the By-Laws from time to time as the Directors see fit.

132 Clause 18 dealt with conversion to strata title. It relevantly provided:

The Company may, subject to property suitability, availability of finance and the approval by the unanimous resolution of the Share Holders, take all necessary steps to apply for and proceed to the conversion of the property to Strata Title.

133 I now come back to schedule 2, which defined the "terms of issue" of classes of shares. Clause 2 of the schedule dealt with the ordinary shares. It provided:

**Ordinary shares**

Two ordinary shares were issued when the Company was registered. They remain in existence whilst the initial loan from the Commonwealth Bank to purchase the property and business remains unpaid. When the debt is repaid in full and all shares are issued, these two ordinary shares are to be recalled.

134 Clause 2 went on to provide that ordinary shareholders were to have one vote each at general meetings of the Company. The shareholders were also to have power to "make management decisions for the Company" and to "control the issue of all unissued shares".

135 Clause 3 dealt with class A shares. Sub-clause 3.1 dealt with class entitlements. Such shares were to have one vote at general meetings of the Company. Further:

…

(b) in the event of a sale of the whole of the Land, Class A Share Holders:

(i) share equally in the square meterage of Common Property to calculate this portion of their share in the total sale proceeds, and

(ii) the square meterage allocated to the Class A Share in Column 4 of Schedule 3 is used to calculate their entitlement to their portion of the total sale proceeds.

(c) the exclusive right, subject to rule 3.3(c) of this Constitution, to use, enjoy and occupy the Allotment which appears opposite the Share Number of that Share Holder in Column 4 of Schedule 3, together with the right to use the Common Property in common with all others similarly entitled.

136 Subclause 3.2 set out rights and obligations of the class A shareholders. Relevantly, these included:

**3.2 Rights and obligations**

…

(b) the right to rent or lease to another person over [the Share Holder's Allotment]. The grant of any such rental or lease shall not affect the liability of the Share Holder to observe and perform the obligations arising under the Constitution:

(i) A lease or rental of any Allotment may be granted without prior approval of the Company and without any restriction to such person as shall in the opinion of the relevant Share Holder (or that person's agent), be a suitable and responsible licensee or lessee.

…

(e) Each Share Holder and any lessee, rental or invitee of that holder is entitled to use the Common Property subject to compliance with any ByLaws that may apply to the use of the Common Property.

…

137 Schedule 5 contained the by-laws. The schedule was drafted in the form of an agreement between the shareholder and the "ownership company" (CHB). It contained an acknowledgement by the parties that, upon signing of a share purchase agreement, they had entered into an agreement on the terms of the by-laws and the constitution. The author of the document appears to have been unaware that of its nature the constitution had contractual force (CA s 140(1)).

138 The schedule noted the provisions of clause 17 of the constitution which I have set out above. It recorded that the original by-laws had been dated 19 March 2012 (which post-dated the incorporation of CHB). The schedule represented the result of a "first amendment", done on 10 August 2013 "after review by the directors following the first annual general meeting". Again, it was not suggested that the earlier version or versions of the by-laws were relevant.

139 The by-laws also referred to the "management company" (HBS). It stated:

The shareholder/resident acknowledges that Coolah Home Base/Caravan Park is managed under an agreement between the ownership company [CHB] and the management company [HBS].

The shareholder/resident acknowledges that any reference in this agreement to the ownership company also refers to the authority of the management company under the management agreement.

140 The schedule set out an extensive set of rules for living at the Park. The following provisions were included:

**Site fees and other payments**

The shareholder/resident agrees:

1. to pay the site fees as nominated by the ownership company from time to time

…

3. to pay for electricity and gas supplied to the residential site

4. to pay for any reasonable expense incurred for maintenance on their behalf

...

**Shareholder site fee**

The shareholder agrees:

1. the shareholder site fee is payable for occupation of their purchased allotment only

2. the shareholder is to occupy their own allotment when at the park unless agreed verbally or in writing with the management company

3. if the shareholder occupies another site, normal caravan park site fees can be applied by the management company

4. the shareholder site fee does not cover frequent use of amenities, camp kitchen or other facilities provided for tourists. Additional charges may be made for frequent use of these facilities.

**Installation of moveable/transportable or fixed dwellings or buildings**

The shareholder/resident agrees:

1. only transportable buildings are permitted for residential dwellings

2. all building on the park is under the control and management of the management company

3. all building on the park is at the sole discretion of the management company unless the management company first agrees in writing

…

6. all construction in the park is carried out by the management company unless otherwise agreed in writing.

**Acknowledgement of shareholder/resident's property**

The shareholder/resident agrees:

1. any dwelling, associated structure, shed, retaining wall or any structure or fixture including but not limited to, any landscape [for example, paths, driveways and concrete slabs] or landscape on the shareholder/residential site are the property of the shareholder

2. any plumbing and/or gas fitting that connects the shareholder/residents dwelling or any of the shareholder/residents structures to the utility services provided by the ownership company are the property of the shareholder

3. any electrical wiring and/or fittings from any structure on the site to the point of connection to the meter board/s are the property of the shareholder.

**Personal occupancy**

The shareholder/resident agrees:

1. to personally occupy the shareholder/residential site

2. unless the shareholder/resident is a corporation and the site is occupied by a natural person/s nominated by the company

3. if the shareholder/resident is absent, not to permit any person to occupy the shareholder/residential site without first obtaining the management company's consent

4. Exception to this clause is when prior arrangements have been made with the management company to rent the residential site to tourists under a managed site arrangement.

**Right to sub-let**

The ownership company agrees:

1. that the shareholder/resident may sub-let the shareholder/residential site through an arrangement with the management company

2. the shareholder receives the nominated percentage of rent after paying rental expenses

**Occupants, guests and visitors**

The shareholder/resident agrees:

1. any other person who comes on to the park to visit the shareholder/resident is a visitor

2. any visitor who stays overnight is a guest

3. a guest may not stay longer than 7 consecutive days without the consent of the management company

4. the shareholder/resident may be required to pay the management company a guest fee for each night the guest stays on the shareholder/residential site.

141 I have already referred to several difficulties in the drafting of the constitution. It appears to have been based on a company title constitution for a home unit building (in particular, sub-paragraph (m) in definition of “Site Fee” refers to “Home Units”, a term which is not defined), with modifications (not fully thought

out) designed for the home base venture to be operated by CHB. I assume that those modifications were made by Ms Kelly, but there is no evidence about that.

142 Three particular difficulties should be mentioned at this stage. First, the body of the constitution seems to have contemplated that any buildings erected on the land would be built by CHB and would be fixtures on the land (see clause 2.1(c) ([117] above) and the definition of "Allotment" ([113] above). The by-laws, on the other hand, contemplated that any dwellings on the allotments would be moveable dwellings belonging to the shareholders, as would ancillary structures, even though as a matter of law such structures would usually be fixtures.

143 Second, there is slippage in the raising of funds for the payment of ordinary expenses. I suspect that the definition of "Site Fee" as it now appears was based on the definition for "Ordinary Levy", with an indexed capping mechanism then applied. There were however obvious difficulties with that mechanism.

144 First, the ordinary expenditure was necessarily variable from year to year (as was acknowledged by sub-paragraph (i) of the definition of Site Fee). Second, it might have been expected that the expenditure would increase more rapidly than the cap. The extent to which a special resolution of the shareholders might be used to override that cap is difficult to answer. On any view however, a shortfall could have been dealt with by means of Special Levy (see sub-paragraph (e) and (f) in the definition of that term).

145 A related problem was the question of unissued shares. Levies could only be imposed upon shareholders. So long as shares remained unissued, there was no one liable to pay the Site Fee for the relevant allotment or to contribute to Special Levies.

146 A third difficulty concerned the by-laws. In the first place, it is not easy to see how the Directors' power to vary the by-laws could operate consistently with the provision allowing the by-laws to be determined in general meeting. Furthermore, in certain respects the by-laws appear inconsistent with the provisions of the constitution itself. For example, the constitution gave class A

shareholders the right to let out their allotments without needing any consent to do so, but the by-laws purported to impose conditions, including conditions of consent. It is difficult to accept that the by-laws could prevail over shareholder rights entrenched in the constitution. It seems quite clear from clause 17 that they were to be regarded as subordinate provisions, and therefore would give way to the extent of any inconsistency.

*Share purchases by plaintiffs*

147 As already noted, it is common ground that each of the plaintiffs purchased (individually or jointly) at least one share in CHB carrying with it the right to exclusive use of the corresponding site. What is disputed is whether the plaintiffs' purchase contracts included the site itself, as a piece of land. In this section of the judgment, I deal with what the terms of the purchase contracts in fact were. I will, for convenience, refer to each of the purchases as a purchase of the relevant site. I will address the interpretation issues in a later part of the judgment.

148 Between the plaintiffs there were sixteen site purchases (two of the plaintiffs made more than one purchase). I will refer to them as purchases 1 to 16. In each case a share certificate corresponding with the subject site was issued to the purchaser.

149 **Terms of purchase contracts**: For fourteen of the purchases there is a signed written agreement in evidence. There are some differences in form.

150 Purchase 1 is recorded in a formal agreement between CHB and the purchaser styled "Share Sale Deed". The front-sheet bears the name of a firm of solicitors at Port Macquarie. Purchase 2 is documented in the same way, except that the Share Sale Deed does not have a front-sheet bearing the solicitors' name. Purchases 1 and 2 date from March and April 2012, and were completed before CHB had completed the purchase of the Park.

151 The later agreements, which all post-dated the completion of the purchase of the Park, are all printed on letterhead. They appear to have been prepared by Ms Kelly and Mr Booker without professional assistance. I will refer to them as the "letter agreements". They consist of two pages. I discuss their terms in

more detail below. All of the agreements are recognisably based on the same template but there are some changes over time.

152 There were ten letter agreements on the letterhead of CHB. These were for purchases 5 to 14, which covered the period from January 2013 to November 2014. In each case CHB was identified as the “vendor”.

153 The two remaining letter agreements were for purchases on the secondary market. That for purchase 15 (February 2015) was on the letterhead of RC (then called Cluster Park Pty Limited). RC was identified as the vendor. The letter agreement for purchase 16 (March 2017) was on the letterhead of HBS. The vendor was identified as Lorraine Faye Parsell. It seems that RC and Ms Parsell had previously “purchased” the relevant sites from CHB.

154 This leaves two purchases for which there is no written agreement in evidence. The purchase price for the first of these (purchase 3) was paid in October 2012. It appears that there was no written agreement and the transaction was purely oral. The remaining purchase is purchase 4. According to the evidence, the purchase took place in “late 2012”. Apparently, there was a written agreement, but it has been lost.

155 **Purchase details**: Details of the purchases are summarised in the following table. The table sets out, for each purchase, the purchaser, the date of the purchase contract, the site number and share number, and the date of issue of the share certificate (where I have found it in the evidence):

| **Purchase Number** | **Purchaser** | **Purchase date** | **Site Number** | **Share Number** | **Certificate Date** |
|---|---|---|---|---|---|
| 1 | Mr Sheahan | 26/03/12 | 5 | A5 | |
| 2 | Mr & | 22/04/ | 42 | A42 | 30/04/ |

| | | | | | |
|---|---|---|---|---|---|
| | Mrs Kelly | 12 | | | 12 |
| 3 | Ms Vale | 12/10/12 | 20 | A21 | 19/11/12 |
| 4 | Ms Axtell | Late 2012 | 10 | A10 | |
| 5 | Mr James | 03/01/13 | 8 | A8 | 15/03/13 |
| 6 | Ms Tait | 26/03/13 | 33 | A33 | |
| 7 | Ms Waugh | 11/07/13 | 14 | A14 | |
| 8 | Ms Cook | 05/08/13 | 38 | A38 | |
| 9 | Ms Brown | 24/08/13 | 39 | A39 | 05/09/13 |
| 10 | Mr & Mrs Squire | 07/11/13 | 2 | A2 | |
| 11 | Ms Robertson | 25/11/13 | 46 | A46 | 25/11/13 |
| 12 | Ms Robertson | 14/03/14 | 47 | A54 | |

| | | | | | |
|---|---|---|---|---|---|
| 13 | Mr & Mrs McMillan | 28/07/14 | 52 | A52 | 2807/14 |
| 14 | Ms Cook | 05/11/14 | 50 | A50 | |
| 15 | Mr Darch | 02/02/15 | 37 | A37 | 13/03/15 |
| 16 | Mr & Mrs Townsend | 13/03/17 | 13 | A13 | |

156 Four of the purchases (8, 9, 15 and 16) were of sites on which a cabin had already been built. Two more purchases (5 and 6) contemplated a further payment being made by the purchaser for construction of a cabin on the relevant site. The other purchases were for vacant sites.

157 Generally the price of the share was based, where the site was vacant, on the square meterage of the relevant site. As a general rule, for sales which occurred before the purchase of the Park was settled in April 2012, the price was $65 per square metre. This was later increased to $75 and then $85. For sites with cabins there appears to have been a “land” component which was calculated in the same way, and a “building” component for the cost of the cabin.

158 The contract terms for the plaintiffs’ purchases are summarised in the table below. Where the agreement does not contain a separate “land” and “cabin” component, the “land” component has been estimated, based on the then current rate per square metre, as best that can be determined:

| **Pur** | **Pur** | **Pur** | **S** | **A** | **Price** |
|---|---|---|---|---|---|

| chase Number | chaser | chase date | ite No. | rea | Site | Cabin | Total |
|---|---|---|---|---|---|---|---|
| 1 | Mr Sheahan | 26/03/12 | 5 | 173m² | $11,261 | $16,739 | $28,000 |
| 2 | Mr & Mrs Kelly | 22/04/12 | 42 | 220m² | $14,300 | | $14,300 |
| 3 | Ms Vale | 12/10/12, no written contract | 20 | 200m² | $13,000 | $35,500 | $48,500 |
| 4 | Ms Axtell | Late 2012, writ | 10 | 175m | $14,000 | $24,000 | $38,000 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | ten contract lost | | $m^2$ | | | |
| 5 | Mr James | 03/01/13 | 8 | 140 $m^2$ | $10,500 | $47,000 | $57,500 |
| 6 | Ms Tait | 26/03/13 | 33 | 272 $m^2$ | $23,120 | $76,880 | $100,000 |
| 7 | Ms Waugh | 11/06/13 | 14 | 150 $m^2$ | $12,750 | | $12,750 |
| 8 | Ms Cook | 05/08/13 | 38 | 168 $m^2$ | $10,920 | $70,080 | $81,000 |
| 9 | Ms Brown | 24/08/13 | 39 | 119 m | $8,983 | $49,017 | $58,000 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | $^2$ | | | |
| 10 | Mr & Mrs Squire | 07/11/13 | 2 | 252m$^2$ | $23,403 | | $23,403 |
| 11 | Ms Robertson | 25/11/13 | 46 | 192m$^2$ | $18,320 | $121,680 | $140,000 |
| 12 | Ms Robertson | 14/03/14 | 47 | 192m$^2$ | $18,320 | | $18,320 |
| 13 | Mr & Mrs Mc Millan | 28/07/14 | 52 | 204m$^2$ | $21,340 | | $21,340 |
| 14 | Ms Cook | 05/11/14 | 50 | 204m$^2$ | $25,000 | $145,000 | $170,000 |
| 15 | Mr Dar | 02/02/ | 3 | 18 | $12, | $112, | $125, |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | ch | 15 | 7 | 4 m$^2$ | 025 | 975 | 000 |
| 16 | Mr & Mrs Townsend | 13/03/17 | 13 | 182 m$^2$ | $11,830 | $68,170 | $80,000 |

159 **Share certificates**: At least two different forms of wording were used for the long-term and short-term site shares issued by CHB. The shorter form states:

> This Class A Share value [sic] represents exclusive use of Allotment XX, being XXX square metres of land.

160 A longer form also exists. It states:

> This Class A Share value [sic] represents exclusive use to the following:
>
> Allotment XX, being XXX square metres of land, and
>
> The building situated on Allotment XX, known as Cabin X.

*Promises and representations about purchases*

161 The plaintiffs' case was based on witness testimony. The plaintiffs claimed that they thought when they made their purchases of shares in CHB that they were buying an interest in the site itself, as land. They based this belief upon what they had understood from the purchase contracts, and also upon promotional materials in the form of slide presentations or brochures (but not in every case). They also said that was what they had been told orally by Ms Kelly or Mr Booker at the time of the purchase.

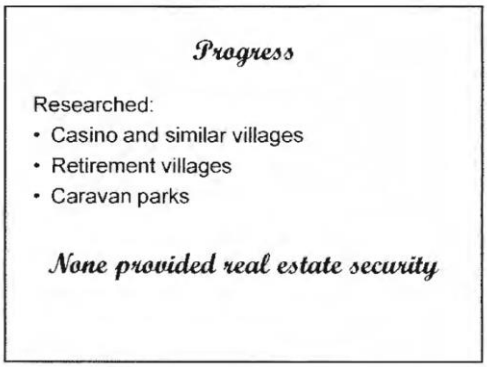
162 The plaintiffs' evidence on these matters was heavily contested in cross-examination. The reliability of all of the plaintiffs' evidence was questioned. In some cases the plaintiffs had been party to written communications, either before or after their purchases, which, it was suggested, contradicted their testimony.

163 None of the plaintiffs were able to produce any actual copies of the promotional materials which they saw at the time of the purchase. But copies of that promotional material are in evidence.

164 The earliest such evidence is a set of copies of slides used for the purpose of promotional presentation by Ms Kelly. The internal dating shows that they were prepared following the exchange of contracts in March 2012 but before 20 April. The slides describe the genesis of the home base idea and the steps taken by Ms Kelly to develop it. They went on to set out how the idea was to be put into effect.

165 The slides included the following:

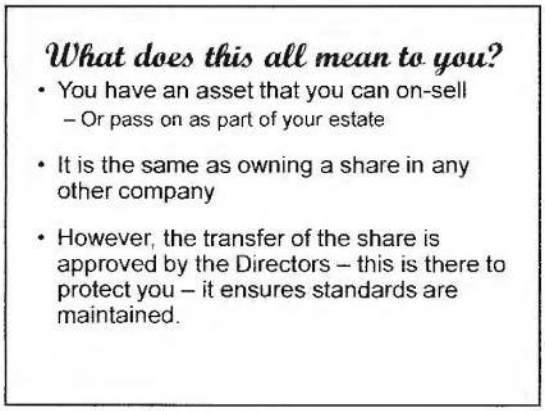
Slide 3



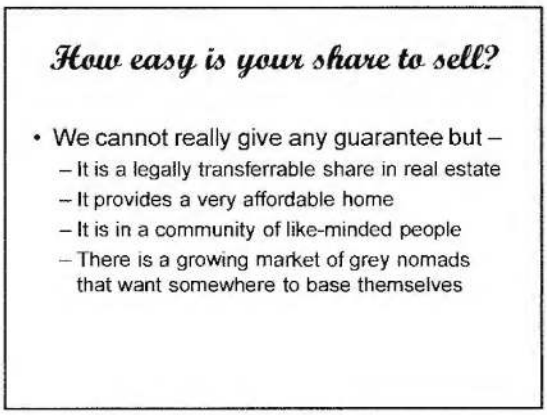

Slide 4


Slide 5

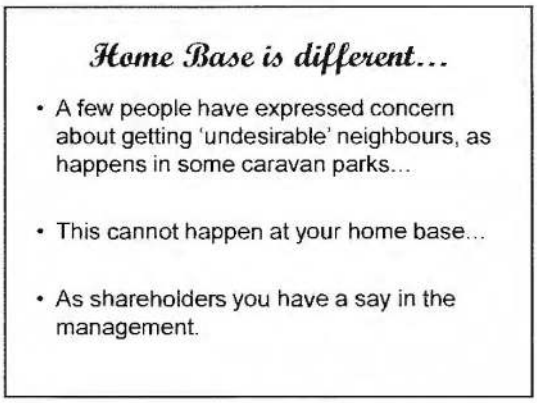

Slide 6




Slide 7

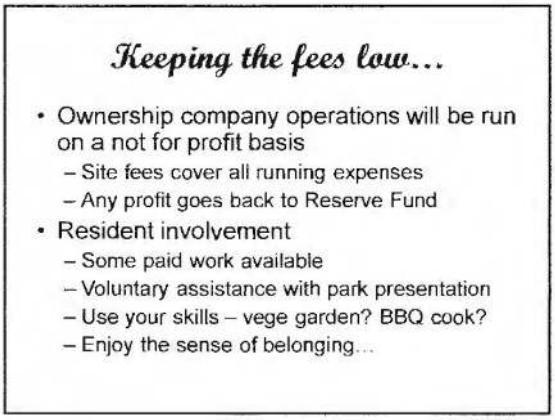



Slide 8

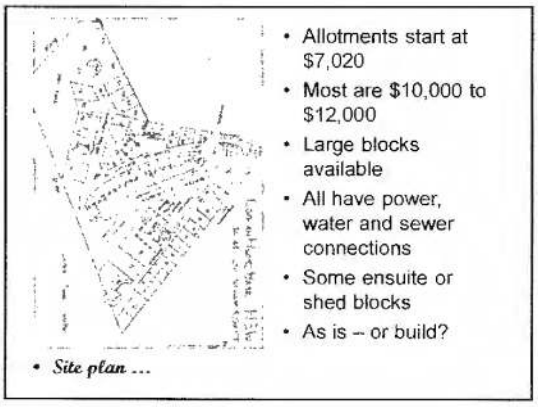



Slide 9


Slide 12



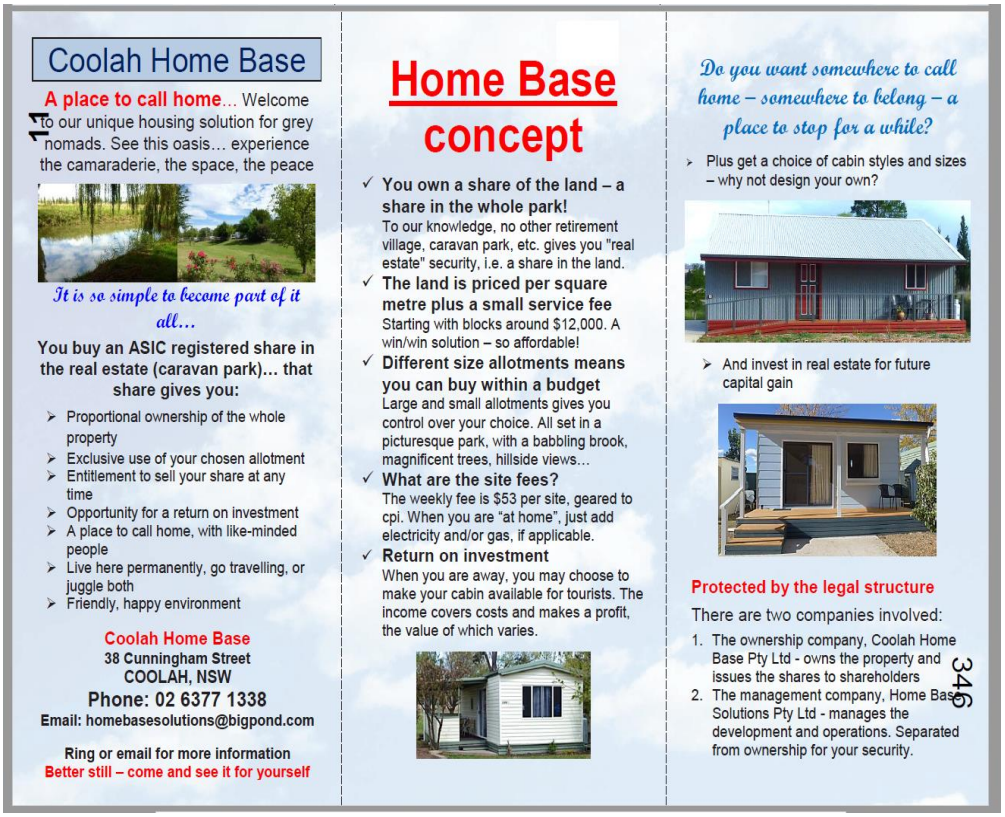

Slide 14




166 Next, there is a flyer which according to Ms Kelly was prepared in March or April 2013. There were six panels on the flyer which contained text interspersed with pictures:

Panel 1 Panel 2 Panel 3


Panel 4 Panel 5 Panel 6



## Coolah Home Base

**A place to call home**... Welcome to our unique housing solution for grey nomads. See this oasis… experience the camaraderie, the space, the peace



*It is so simple to become part of it all…*

**You buy an ASIC registered share in the real estate (caravan park)… that share gives you:**

- Proportional ownership of the whole property
- Exclusive use of your chosen allotment
- Entitlement to sell your share at any time
- Opportunity for a return on investment
- A place to call home, with like-minded people
- Live here permanently, go travelling, or juggle both
- Friendly, happy environment

**Coolah Home Base**
**38 Cunningham Street**
**COOLAH, NSW**
**Phone: 02 6377 1338**
**Email: homebasesolutions@bigpond.com**

**Ring or email for more information**
**Better still – come and see it for yourself**

## Home Base concept

- ✓ **You own a share of the land – a share in the whole park!**
  To our knowledge, no other retirement village, caravan park, etc. gives you "real estate" security, i.e. a share in the land.
- ✓ **The land is priced per square metre plus a small service fee**
  Starting with blocks around $12,000. A win/win solution – so affordable!
- ✓ **Different size allotments means you can buy within a budget**
  Large and small allotments gives you control over your choice. All set in a picturesque park, with a babbling brook, magnificent trees, hillside views…
- ✓ **What are the site fees?**
  The weekly fee is $53 per site, geared to cpi. When you are "at home", just add electricity and/or gas, if applicable.
- ✓ **Return on investment**
  When you are away, you may choose to make your cabin available for tourists. The income covers costs and makes a profit, the value of which varies.



*Do you want somewhere to call home – somewhere to belong – a place to stop for a while?*

- Plus get a choice of cabin styles and sizes – why not design your own?



- And invest in real estate for future capital gain



**Protected by the legal structure**

There are two companies involved:

1. The ownership company, Coolah Home Base Pty Ltd - owns the property and issues the shares to shareholders
2. The management company, Home Base Solutions Pty Ltd - manages the development and operations. Separated from ownership for your security.

346

167 Also in evidence is a later set of slides used by Ms Kelly for a promotion in late 2014 or early 2015. The slides are generally similar to the 2012 slides to which I have already referred, making necessary corrections for the fact that at the time they were prepared the venture was up and running.

168 The 2014-2015 slides included:

Slide 1

*Thank you for enquiring about*

*Coolah Home Base*

***with its affordable housing and RV style community living for grey nomads***

*"Affordable housing" is quite a claim!*

*But that is what you will see...*

Coolah Home Base has homes available from $45,000 to $155,000 INCLUDING real estate security PLUS it is just $60 per week site fees

*Coolah Home Base is unique*

Slide 3

## What is Coolah Home Base?

- It is a caravan park… and…
- It is a home base for grey nomads
- It is a place to call home
  - Even if only for a short stay in the caravan park
  - Or you may choose to be a shareholder

**Either way, it is a country oasis for RVers**

Slide 4

## The concept aims to…

- Base your home on land you cannot lose
- Build a community, a caring place to belong
- Provide somewhere you can call, and feel, at home
- Give you freedom to travel, without a worry
- And for it not to cost a fortune!

## • This has been achieved…

Janet and Graeme with our local member of Parliament who commended us on the concept.

Slide 5

## How it was achieved…

- We purchased a caravan park at Coolah. It is owned and registered as a company, with 62 shares, maximum. 20 are powered sites and 42 can have cabins on them for long term occupation.
- You purchase a share in that company

### You own a share in the entire property!

- That share entitles you to:
- Exclusive use of your chosen allotment – you can live there, visit it or simply leave it to come back to, at any time
- Proportional ownership of the real estate – your area of land is shown on your Share Certificate
- plus you get an equal share of the communal property
- voting rights – have a say in what happens to the property

Slide 6

## What does this m an to you?

- You have an asset that you can on-sell
  - You can sell it yourself or we can sell it for you
  - Or you can pass it on as part of your estate
  - There are a few conditions that are simply to comply with
- It means you own a share in a company that has financial stability in real estate. The property can only be sold if 80% of shareholders agree
- You are protected by:
  - The Company Constitution
  - ASIC registration
  - Australian company law
- The buildings on the allotment belong to you. By law, they are transportable and as you will see, they are homes with character.

Slide 7

*How is it managed?*

There are two companies involved:

- The ownership company is Coolah Home Base Pty Ltd, which owns the real estate (caravan park property). This company:
  - Is owned by the shareholders (you)
  - Does not trade (making it more secure)
- The management company, Home Base Solutions Pty Ltd
  - This is owned by Graeme and Janet
  - This company does all the trading
  - We have recently appointed a manager for the tourist side of the business, which will eventually be sold to new managers
  - Graeme and Janet will continue to manage the building side and administer Coolah Home Base Pty Ltd

That was a brief introduction to the concept. We are happy to discuss the finer details at any time.

169 These promotional materials had a dual evidentiary significance. To the extent that it could be inferred that they had been provided to the plaintiffs, they were direct evidence of representations made to them. They were also evidence of how Ms Kelly and Mr Booker were promoting the venture at the time, and thus indirect evidence of what they would likely have said orally.

170 Counsel for the Kelly-Booker parties pointed to other documentary evidence of the latter type. This was evidence recording the way in which Ms Kelly and Mr Booker had described the legal structure of the home base idea while some of the later sales to the plaintiffs were still going on.

171 The first was an email from Mr Booker to Mr James in December 2012. Mr James wished to take advantage of the government first home buyer's scheme in making his purchase. Mr Booker responded:

> You are buying a share in the company that owns the property which entitles you to ownership of your allotment. Because it is a share transaction it does not attract the rebate. Sorry, James, can't be done.

172 Ms Kelly's report to the 2013 AGM in August 2013 contained a description of the home base concept. This stated:

> OVERVIEW OF LEGAL STRUCTURE
>
> It is the legal structure that makes this venture work so well. To explain that briefly:
>
> There are two companies - we refer to them as the OWNERSHIP company and the MANAGEMENT company.
>
> The OWNERSHIP company is Coolah Home Base Pty Ltd and this company owns the property (the real estate). This is the company in which you have shares. The ownership company does not trade, that is, it has no income and all expenses are paid for by the management company. This is to protect your asset.

> The MANAGEMENT company is Home Base Solutions Pty Ltd and it has an agreement with the ownership company to manage the caravan park business as well as the home base development. Graeme and I are directors and owners of the management company. Whilst ever the ownership company owes any money, to the bank, the management company or us as individuals, the management of the ownership company remains with Home Base Solutions Pty Ltd, due to personal guarantees being in place.

173 Next, at the time Mr and Mrs Squire purchased their share in CHB in November 2013, Mr Squire wrote a long email to Ms Kelly setting out a list of questions about how CHB worked, to which Ms Kelly provided detailed responses. It is quite clear from the exchange that Ms Kelly (and Mr Squire) understood that the Squires were purchasing a share in a company which owned the Park, not a part of the Park itself.

174 In July 2014 Mr Booker wrote to Mr and Mrs McMillan in the course of the negotiations which led to their purchase. Mr Booker enclosed a redrafted version of the Letter Agreement and stated: “good to hear you are going to become a shareholder soon”.

175 There is further written evidence of this type which post-dates the last “sale” of shares by CHB to the plaintiffs. The most notable is a document called “The ‘CHB Dream’ Explained”. This document was prepared by Mr McMillan, apparently in late 2015 or thereabouts, with some input from Ms Kelly and Mr Booker, and then issued on the letterhead of CHB over Ms Kelly’s signature. It was later circulated to at least some of the other shareholders.

176 The document stated:

> **What is CHB?**
>
> This is best explained by way of some definitions:
>
> …
>
> Coolah Home Base Pty Ltd (**The Company**) is a duly registered, tightly held private company that owns all of The Park. Under the Commonwealth Corporations Act, The Company is treated as a "Real Estate Company" that subdivides specified Allotments or Sites in The Park to individual Shareholders by way of "Company Title". This is the company that we, the Shareholders, own - this company owns The Park.
>
> A **Shareholder** owns a share in The Company.
>
> > There are 62 shares, each of which is tied to an individual Powered Site or Dwelling Allotment, of which there are 62 - one share for each Site/Allotment.

> All shares in The Company are owned by people who own Sites or Allotments.
>
> A Shareholder is entitled to "exclusive use and enjoyment" of their Site/Allotment - they own it by virtue of Company Title.
>
> A Shareholder sells their Site/Allotment by selling their share in The Company.
>
> A Shareholder owns their Site/Allotment plus what's on it, plus their proportion of The Park "common property" (Amenities, Roads, Camp Sites, etc).
>
> Thus, the people who own the Sites/Allotments own the whole of The Park, there is no developer or investor behind the scenes seeking to maximise their return on investment.

**The Constitution** is the ·constitution of The Company. It contains special clauses that stipulate:

> The Company is a "Real Estate Company" with the prime purpose of subdividing The Park by way of "Company Title" (both as defined by ASIC as regulator of the Corporations Act).
>
> The Company is a not-for-profit operation. It does not pay dividends; any profits are invested back into The Park infrastructure.
>
> The Park can only be sold if agreed to by way of a Special Resolution at a General Meeting of the Company with an 80% majority.
>
> This "80% Rule" also applies to other constitutional changes which may affect the rights of Shareholders.

**Retail Tourist Activities**: The Park operates as a commercial caravan park offering Camp Sites, Powered Sites, Cabins and even Cottages/Houses to the travelling public. Whilst they are travelling, Shareholders may offer to make their Cabin/Cottage/House available for rental.

**Management Rights**: The Company owns The Park but does not itself operate the Retail Tourist Activities. The tourism side and the day-to-day management of The Park are subcontracted to a separate business which has a special Management Rights agreement with The Company.

177 The reference to CHB “subdividing” the Park to the shareholders is explained by one of the frequently-asked-questions:

> **What is Company Title?**
>
> Company Title is a two stage process whereby a company will own a parcel of real estate by way of Torrens Title; and the constitution and rules of the company establish how portions of the real estate are sub-divided between the company's shareholders. Strata Title was invented around 1970 to cater for the explosion of high-rise development in Sydney. Before Strata Title these developments were covered by Company Title, which still applies and is still in use today - Strata and Company Titles both have their advantages, it is a case of using the title system best suited to your needs.

178 According to Mr McMillan, it was he who picked up the term “company title” to describe how CHB operated. Ms Kelly learned of the term from him. Be that as

it may, the nature of the arrangement was clearly stated in the document. Statements to similar effect were also later made by Ms Kelly (and by some of the plaintiffs) to the Administrators.

179 In response to the plaintiffs' testimony, both Ms Kelly and Mr Booker gave evidence in their affidavits that in their own minds they had always understood that the land was held by way of company title (even if that was not a label they used until November 2015). They also denied saying anything different to the plaintiffs. They were cross-examined on this evidence but adhered to it.

180 Counsel for the Kelly-Booker parties devoted an extensive part of his closing submissions to the plaintiffs' evidence on this point. Counsel set out at length the witness evidence about the purchases and, where available, what the plaintiffs had said on other occasions. It was a withering analysis. Counsel submitted that none of the plaintiffs' evidence was reliable and some of them had been wholly discredited.

181 Counsel referred me to the well-known statement by McLelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319 about the difficulties of proof faced by plaintiffs seeking to establish that oral promises or representations were made to them in particular terms, when that is done through witness evidence given well after the event. In the present case, the plaintiffs gave evidence in 2021 about events which mainly took place between 2012 and 2014. Their claims rested on a fine distinction between ownership of land on the one hand, and ownership of shares in a company giving rights which had been assimilated in many respects to ownership of land, on the other. Counsel submitted that it was a case *par excellence* for the application of his Honour's comments.

182 The evidence of Ms Kelly and Mr Booker was self-serving, but that did not make it unbelievable. Counsel submitted that the evidence was inherently plausible, because it accurately reflected the legal position, and was consistent with what was recorded in the pre-litigation written evidence.

183 Counsel for the plaintiffs had no real reply to these submissions. I have already referred to his submissions attacking, in general terms, the credit of Ms Kelly and Mr Booker. But counsel did not come to grips with their evidence on this

particular issue. There was no reference in counsel's reply submissions to the earlier written evidence. Nor was there any written reply to the detailed written analysis of the plaintiffs' witness testimony from counsel for the Kelly-Booker parties, which had occupied forty-nine pages. Orally counsel for the plaintiffs did, when provoked, reply briefly to a handful of points made by counsel for the Kelly-Booker parties, but the reply was perfunctory and unconvincing.

184 **Conclusion**: The plaintiffs' statement of claim pleads that CHB (as well as Ms Kelly and Mr Booker personally) promised or represented "that the plaintiffs would receive an interest in the [Park] as well as a share in [CHB] by buying Allotments at Coolah Home Base". For convenience I will refer to this, in what follows, as the pleaded representation.

185 The form of the pleaded representation is important. That is for two reasons.

186 First, the representation allegedly related to the purchase transaction. It was a representation about the nature of the interest which would be conferred if the plaintiffs entered into the transaction.

187 Secondly, the representation allegedly was that the purchase would confer an interest in land "as well as" the corresponding share in CHB. Implicitly the plaintiffs accepted that they were promised shares in CHB corresponding to their sites. The question posed by their pleading is whether they were promised ownership of the sites themselves, as land, on top of those shares.

188 On my findings, the answer must be "no". For reasons I give below, I have concluded that no such representation was made in any of the purchase agreements. For reasons I will shortly explain, I am not satisfied that any such representation was made in the pre-contractual negotiations either.

189 I have earlier summarised the written promotional materials which were put into evidence by the plaintiffs. It is true that some of the brochures and slides contained statements which, on their own, suggested that the plaintiffs would be getting a share in the land itself. But (as the plaintiffs' formulation of the alleged representation implicitly accepts) the brochures and slides did clearly indicate that the plaintiffs were to receive shares in a company which owned

the Park. I think that, when read as a whole, that was all they were saying the plaintiffs would receive.

190 Nor am I satisfied that any further oral representations made to the plaintiffs would have gone further than the written promotional materials. I accept the submission from counsel for the Kelly-Booker parties that both the inherent probabilities and the contemporaneous evidence is against that having happened. I also accept counsel's submissions about the plaintiffs' testimonial evidence. I am not satisfied that the plaintiffs in fact believed that they would be receiving ownership of their sites as land. If any of them did hold any such belief, I am not satisfied that it was reasonably based on any promises or representations by Ms Kelly or Mr Booker.

*Management arrangements with HBS*

191 The arrangement between CHB and HBS was initially the subject of a written agreement dated 22 April 2012. The agreement appears to have been drafted by Ms Kelly. It was signed by her for CHB and by Mr Booker for HBS.

192 The agreement provided (I have inserted paragraph numbers for ease of reference):

> **It is agreed that**:
>
> [1] CHB remains a non trading entity.
>
> [2] All company management matters are handled by the Directors of CHB and those Directors are to abide by the Constitution of the company and all legal requirements.
>
> [3] All trading and financial matters are handled by HBS.
>
> [4] Expenses incurred by HBS on behalf of CHB, are paid for by CHB, including but not limited to, the capital development of the caravan park.
>
> [5] HBS becomes the exclusive owner of the management rights for CHB.
>
> [6] HBS has the rights to manage, sell, sub-let, lease or make any other arrangement regarding the management right to CHB.
>
> [7] This is an all encompassing agreement that is brief in words but the intention of complete management of CHB by HBS is clear.
>
> [8] This agreement may be cancelled by either party, giving three months notice, provided the Constitution [sic] of both companies are complied with.

193 Ms Kelly saw this agreement as having two consequences. One was that the "tourist business" and its associated income belonged exclusively to HBS. The other was that the site fee income was income of HBS. Likewise the

expenditure attributable to the operation of the “tourist business” or which was covered by the site fees was expenditure of HBS.

194 These assumptions were reflected in the accounts prepared by Ms Kelly for CHB and HBS. All income derived from, and all expenses incurred in, the operation of the Park went through the profit and loss account of HBS. Any overall profit or loss was retained by HBS. There were no income or expenditure figures in CHB’s accounts at all.

195 Ms Kelly did however undertake some analysis for HBS’ internal purposes of the various sources of income and expenditure associated with the Park. At least from 2014-2015 she maintained management accounts which allocated HBS’ income and expenditure between three profit centres. One centre was called “Building”. As its name suggests, it covered the supply and erection of cabins, and cabin maintenance work, for shareholders. The other two centres were called “HBS Trading” and “CHB Trading”.

196 HBS Trading was the name given to the tourist business as it applied both to cabins and powered sites. The rental income (less a cleaning fee in the case of a cabin rental) was split between the shareholder (as to sixty per cent) and HBS (as to forty per cent). According to Ms Kelly, however, it was only from 2014-2015 onwards that this arrangement was applied to the sites belonging to HBS/RC; prior to that, all of the income from those sites was used to subsidise the Park’s operations. It is not clear to me from the evidence whether any tourist rental income was derived from any of the sites before the relevant shares were issued, or, if so, who received the benefit of that income.

197 CHB Trading’s income consisted of the site fees payable under CHB’s constitution. The site fee was initially fixed at $50.00 per week, with increases limited to twenty per cent of the increase in the singles’ aged pension (see Sch 2, cl 2 of the constitution, quoted at [133] above). The result was that the fee increased by less than $2 per year. By November 2018 it was still only about $60. According to Ms Kelly, this was well below the market rate for a long-term cabin site, which at the time was between $150 to $200.

198 In her management accounts, Ms Kelly split HBS’ expenditure on the operation of the Park between CHB Trading and HBS Trading. Some of the expenses

covered by the Site Fee definition in CHB's constitution were allocated to CHB Trading. These included, for example, council and water rates; property insurance; and interest and bank fees on the CBA borrowing. So were shares of certain other expenses (for example, a 50% share of repairs and maintenance expenditure).

199 In addition, Ms Kelly debited CHB Trading for internal purposes with administration charges. The charges totalled sixty per cent of the site fee income, half of which was for "company administration" and the other half for "park administration" (these terms are discussed in more detail below). Costs referable to the tourist business, and the remaining general operating costs, were allocated to HBS Trading.

200 According to Ms Kelly, the site fees were always insufficient to meet the CHB Trading expenses (as calculated by her). The shortfall was covered by the profit from HBS Trading. Any surplus after covering the shortfall was, as already stated, retained by HBS. It bears repeating, however, that the allocation of expenses between profit centres was undertaken for internal management purposes of HBS. It formed no part of CHB's accounts, which, as I have said, contained no figures for profit and loss at all.

201 Although CHB had no profit and loss account, it did have a balance sheet. This included the historical cost of purchasing the Park assets, in the form of land, fixtures and fittings and goodwill. The balance sheet also contained an inter-company account between CHB and HBS. Initially this was in favour of HBS, representing a liability from CHB to HBS. Apparently this derived from the additional funds, beyond the advance from CBA, which had been needed to purchase the Park.

202 The fixtures and fittings were depreciable assets. In the ordinary course, the depreciation would have been debited to expenses in CHB's profit and loss account and claimed against income. Instead, it was debited to the HBS inter-company account, thereby reducing CHB's liability to HBS on that account.

203 This was an unusual arrangement. Perhaps it was done to allow a tax deduction to be claimed by HBS against its other income. Whatever the reason, it did operate in CHB's favour. The effect was that HBS bore the cost

of depreciation of the fixed assets used in the business. But HBS was of course receiving the benefit of the income derived from those assets. There was no equivalent arrangement for amortising, and passing on to HBS, the goodwill payment made by CHB for the tourist business when it originally acquired the Park.

204 The management agreement provided at [8] that the arrangements between CHB and HBS could be terminated by either party on three months' notice, but subject to compliance with the terms of CHB's constitution. As we have seen, the drafting of clause 16(e) of CHB's constitution, which dealt with the circumstances in which the managing agent could be changed, was unsatisfactory. But clearly Ms Kelly believed that it would not be open to CHB to terminate the agreement unless eighty per cent of shareholders supported the move. This can be seen, for instance, in slide 9 of her April 2012 presentation, quoted at [165] above.

205 The evidence also shows that Ms Kelly and Mr Booker saw the "management rights" conferred on HBS as valuable rights of theirs, which could potentially be sold to third parties for their benefit. It was not until several years had passed that there was any challenge to any of these assumptions about the management agreement. I describe that challenge in more detail in a later section of this judgment.

*April 2014 share issue*

206 Problems with the short-term sites arose fairly early on. At the first AGM, held in August 2013, Ms Kelly reported:

> We have … found powered sites are not financially viable for shareholders. We now realise that if any more powered sites are sold for the 60/40% income split, it will not be commercially viable for either the investor or management. This is due to fluctuations in site occupancy and the necessity to keep our tourist site fees as low as possible. I am also mindful that powered sites are not ideally suitable for full time occupation by a shareholder.
>
> Having powered sites for our tourist licence is essential. So we have a catch 22 situation that we have endeavoured to resolve. There are currently three powered sites owned by shareholders and we ensure those shareholders are suitably financially rewarded and they remain a viable investment. My purpose in explaining this situation is to advise current shareholders that no more powered sites will be sold to future shareholders.

207 It will be recalled that from January 2015 CHB's permit provided for twenty-one short term sites, and this was reduced to twenty short term sites from November 2015. The shares for nineteen of those twenty sites were the subject of the April 2014 share issue. The remaining one had earlier been sold to an external purchaser, a Mr Chilmaid. What happened to the other two external shareholders who were referred to by Ms Kelly as having purchased short term sites before August 2013 does not appear from the evidence to which I was referred. It is possible that their sites converted to cabin sites or their shares were reallocated to cabin site shares at some later date. Nor is there any evidence of the arrangements Ms Kelly described for keeping the three external shareholders "suitably financially rewarded".

208 The only written record of the April 2014 share issue in evidence is the ASIC form which was lodged to record the transaction. There does not appear to have been any formally minuted directors' meeting. There was also apparently no written agreement such as there was for the purchases by the plaintiffs.

209 The ASIC form was lodged on 12 April 2014, which was also the date given in the form for the transaction itself. According to the form, the amount paid by HBS was $550.74 per share. This totalled $10,464 and equated to about $4 per square metre. According to Ms Kelly, the payment was made by book entry as a credit against the amount then owing on the loan account between CHB and HBS. This was contested by counsel for the plaintiffs who suggested that the accounting records were unclear and potentially showed the opposite, namely that CHB paid HBS for the shares. Counsel for the Kelly-Booker parties responded that this had never been put to Ms Kelly. In the end it is unnecessary to decide the question (if it is open).

210 Ms Kelly was asked in cross-examination where the price of $550.74 per share had come from. She said that she calculated it by reference to the value per square metre of the unimproved capital value of the Park as a whole, as determined for rating and land tax purposes by the Valuer General.

211 Counsel for the plaintiffs submitted that the Court should not accept this explanation. Counsel pointed out that Mr Chilmaid paid $10,465 for his share. Counsel noted that this was only $1 different from the amount recorded in the

ASIC form for HBS' purchase. The suggestion was that Ms Kelly and Mr Booker selected the same figure as had been paid by Mr Chilmaid, but included nineteen shares in the purchase rather than one. Again, counsel for the Kelly-Booker parties protested that this had not been put to Ms Kelly, and again it is not necessary in the end to determine how the reported purchase price was calculated (if that question is open).

*Reporting to shareholders*

212 As already mentioned, from August 2013 onwards, AGMs were held for the CHB shareholders at which Ms Kelly made an oral report and at which financial statements for CHB were displayed. The text of some of Ms Kelly's reports, which appear to have been prepared in advance and read out, are in evidence.

213 Also in evidence are CHB's financial statements for all of the relevant years. They consisted of a formal directors' report, profit and loss statement, and balance sheet, all of which were apparently prepared by Mr Rindfleish. But the information they contained was limited.

214 Reflecting on Ms Kelly's assumptions about the management agreement between CHB and HBS, nothing was shown in the profit and loss account. The balance sheet also lacked detail. Apart from a trivial amount of cash at bank (representing an account with a few hundred dollars in it, which was later closed) the assets consisted of the land, the fixed assets (gradually reducing due to depreciation) and goodwill. Amounts owing to creditors were recorded in a single line as "financial liabilities".

215 In her reports, Ms Kelly explained to shareholders that there was no profit and loss account for CHB because all of the Park income and expenses went through HBS, which was a separate company belonging to her and Mr Booker. She explained that this would ensure that there was no risk of insolvency to CHB.

216 Although the formal financial statements contained no profit and loss account for CHB, Ms Kelly did at the 2015 AGM provide a budget showing a breakdown of site fee expenditure. At the 2016 AGM she provided CHB Trading figures for the year extracted from the accounts of HBS.

217 Ms Kelly reported at the AGMs that the funds raised for CHB from the sales were used for two purposes. One was to fund the development and refurbishment works at the Park. The other was to reduce the debt from the initial purchase. This was consistent with the figures in the balance sheets, which showed increasing issued capital from the “sale” of shares and a decreasing figure for financial liabilities.

218 In her report for the 2013 AGM, Ms Kelly explained that the financial liabilities were made up of the loan from CBA and the debt to HBS on the inter-company account. She reported that in June 2013, $120,000 had been paid off the loan from the CBA. A further $100,000 had been paid off after the balance date, in July 2013, leaving the amount outstanding as only $5,000.

219 In her report for the 2014 AGM Ms Kelly noted that, out of a total figure of $133,000 for financial liabilities, the CBA debt had increased again, back up to $60,000. She explained this by saying that, during the year, she and Mr Booker had wanted to draw down on the HBS loan account so as to fund the purchase of a share in CHB which they were buying. Accordingly, $55,000 had been borrowed from CBA and the liability to HBS reduced by the same amount. Ms Kelly pointed out that there were further shares still to be issued, which could be used for repaying debt, and there was no cause for concern.

220 In her report for the 2015 AGM, presented in September 2015, Ms Kelly reported that the CBA loan (then still drawn to $60,000) was due for renewal in January 2016 and the plan was to sell the three remaining lots to repay the loan. For reasons which are not clear from the evidence, that did not happen and there were no share sales issued in the 2015-2016 financial year. The CBA loan was renewed, apparently with the maximum loan balance reduced to $60,000.

221 The following table sets out the balance sheet figures for 30 June 2012 to 2016. They show an apparently prosperous company with substantial assets and declining debt. The table also sets out the breakdown of the “financial liabilities” between the loan from CBA and the intercompany loan from HBS. As at 30 June 2016 the CBA loan balance remained at $60,000 but the intercompany debt to HBS had reduced to $14,000.

| | **30/6/12 ($,000)** | **30/6/13 ($,000)** | **30/06/2014 ($,000)** | **30/06/2015 ($,000)** | **30/06/2016 ($,000)** |
|---|---|---|---|---|---|
| **Balance sheet** | | | | | |
| Issued capital | (341.2) | (678.8) | (726.2) | (780.9) | (780.9) |
| Property, plant and equipment | 664.4 | 838.9 | 858.8 | 857.3 | 845.7 |
| Other assets | 1.7 | 180.2 | 0.3 | 9.1 | 9.3 |
| Payables | | (112.4) | | | |
| Financial liabilities | (324.9) | (129.9) | (132.9) | (85.5) | (74.0) |
| **Breakdown of financial liabilities** | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| CBA | (225.0) | (105.0) | (60.0) | (60.0) | (60.0) |
| HBS | (99.9) | (24.9) | (72.9) | (25.5) | (14.0) |

222 Ms Kelly and Mr Booker had planned the purchase on the basis that it would take about three years to establish the home base. During that period they would undertake the management, following which it would be contracted out. At the 2013 AGM, Ms Kelly reported that good progress had been made. She then turned to the future:

> As shareholders, no doubt you are wondering what the situation is when we eventually retire or if anything happened to us in the meanwhile. If you are not wondering that, well you should be!
>
> This venture was planned to go into perpetuity and not be dependent on Graeme or myself, so let me explain how the plan and legal structure enables that to happen.
>
> Home Base Solutions Pty Ltd currently has the management rights for the caravan park and home base. That cannot be changed whilst ever we are guarantors for loans to the ownership company or it owes us money, but we plan to have all debt cleared by the end of the original three year period. After that Home Base Solutions has the right to retain the management rights (with 80% of shareholder's approval), or sell the management rights to a buyer approved by 80% of the shareholders of Coolah Home Base Pty Ltd. The management rights need to be sold as there is a lot of money tied up in cabin contents, equipment and goodwill. There is the option for the shareholders to buy the management rights but that is not something I would recommend. My recommendation for the self-management of the park is for shareholders to approve, appoint and control the management team of their choice. This is a situation that could go in into perpetuity without impacting on the camaraderie of the shareholder community, which should be preserved and not come into conflict with management objectives.
>
> In the (hopefully) unlikely event that something should happen to either Graeme or me whilst a debt is in place, then the beneficiaries of our wills will work with the remaining partner to achieve the goals already in place. Should anything happen to both of us, the beneficiaries of our wills will look after our own assets and shareholders can implement the transition to self-management by shareholders, as described above.

223 In her report for the 2015 AGM, Ms Kelly explained that CHB had been through a “transitional” period. An employed manager had been in place for almost twelve months. CHB was in a position to “begin the stand-alone process”. The

first step would be the sale of the tourist business from HBS to a third party. She continued:

> … over the next couple of years, your home base will be operating independently. That is the future.

Ms Kelly concluded by reporting that CHB was "in a very sound financial position".

*Shareholder disputes*

224 As already mentioned, rebellion by some of the shareholders against Ms Kelly's and Mr Booker's control of the Park only came out into the open in 2016. But it may have been anticipated by Ms Kelly at an earlier time. Her report to the AGM in August 2013 had struck the following cautionary note:

> There is not a family or community of people on this earth that is total joy 24/7. I accept that. Building this community has been the hardest part of creating Coolah Home Base and I want to say there is one thing I will not tolerate here and that is "undermining". By undermining I mean speaking badly about people, trying to change things by lobbying other shareholders, creating undercurrents -.you get the gist of what I am saying I am sure. Well, that sort of approach is not tolerated. Graeme and I are not perfect, we have, and will, make mistakes, but we do have good people skills and try to do our very best.

225 In her report to the following year's AGM, in September 2014, Ms Kelly stated:

> To the minority group of shareholders who are hell bent on targeting management and denigrating the home base, all we are going to say is WE HAVE HAD ENOUGH and we will do everything in our power to stop the rot. Consider where you would all be if we step out of the picture at this point in time. Maybe it is time for this minority to consider their options.
>
> This week John Sheahan [the fourteenth plaintiff] told a prospective purchaser about "problems" here. It was fortunate that other shareholders set this prospect straight. This undermining will not be tolerated, especially if it happens at a rally, where we are actively promoting sales.
>
> The majority of shareholders who support the home base are being severely affected by the gossip, lies and undermining. The effect is not only on the community atmosphere but on your property values as well.
>
> In the past couple of weeks, we have taken legal action on a couple of matters, so be warned. As I said, we have had enough. We do not think this minority realise just how much blood, sweat, tears and money Graeme and I have put into the development of the park and the community.

226 When open dissention emerged in 2016, it seems to have had a number of sources. Until the Reform Group was formed later in the year, there appears to have been no co-ordination between dissatisfied shareholders.

227 For the purposes of this judgment, it is sufficient to start with a document headed “Skulduggery” prepared by Mr McMillan and Mr Darch early in November 2016, evidently for circulation to other shareholders. It recorded that Mr Darch and Mr McMillan had met with Mr Boog and established a $20,000 fighting fund. The document appears to have been prepared to solicit support from other shareholders.

228 The focus of concern in the document was with the arrangement between CHB and HBS. Mr McMillan and Mr Darch explained that in combination with their position of directors of CHB, the arrangement gave Ms Kelly and Mr Booker complete control over the operations of the Park. This was a concern because of the possibility of conflict of duty and interest.

229 Mr McMillan and Mr Darch outlined a plan of action which they had agreed among themselves and with Mr Boog. Mr Boog would write to Ms Kelly and Mr Booker making an initial inquiry for information. If this was rebuffed, proceedings would be brought. The objective was to secure a board of directors for CHB which was independent of, or at least not controlled by, Ms Kelly and Mr Booker. Voting rights in CHB should be attached only to long-term sites. Any agreements between HBS and CHB would be put before the new board for possible renegotiation. Mr McMillan and Mr Darch emphasised that they had no desire for “blood on the floor” or to remove Ms Kelly and Mr Booker entirely from the Park.

230 Mr McMillan and Mr Booker did not refer to the financial consequences their action might have for CHB. Perhaps they did not perceive that there would be any. They noted that the current balance of the CBA loan was $60,000 and that the loan should be paid out from the next sites to be sold (of which at the time there were at least three).

231 Meanwhile, Ms Kelly and Mr Booker had developed their own tentative proposal to deal with issues raised by some of the shareholders at the AGM. This was the subject of a discussion between Ms Kelly and Mr Tait (the then chairman of the SAG) on 16 November. On 19 November Mr Darch, who had replaced Mr Tait as chairman of SAG and had evidently learned from him of

the proposal, wrote to Ms Kelly to confirm it. Ms Kelly replied with some qualifications and corrections, and emphasising its tentative nature.

232 The proposal had a number of elements. One was for CHB to "buy back" the twenty short-term site shares which were then on issue. The price for the nineteen shares which had been issued to HBS in April 2014 and had since been acquired from HBS by RC was to be $6,000 each (a total of $114,000). The price for the other share, which had been bought by Mr Chilmaid, was to be $12,000. At the same time the CBA loan (current balance $60,000) was to be paid off and the mortgage discharged. CHB would raise by way of loan the $176,000 which would be needed.

233 The proposal also envisaged that Ms Kelly and Mr Booker would "lease" the tourist business out to a third-party operator. CHB would get a share of the "rent" from the tourist business, reflecting CHB's ownership of the short-term sites (following the "buy-back"), the camping sites, the camp kitchen and the other amenities on the common property.

234 In cross-examination Ms Kelly insisted that the proposal for CHB to buy back the short-term site shares, or at least the buy-back figure of $6,000 per share, came from Mr Tait. Counsel for the plaintiffs pressed her about the proposal. Counsel was later to submit that her evidence spoke volumes about her attitude towards the other shareholders of CHB.

235 The particular passage upon which counsel relied was:

> COUNSEL FOR PLAINTIFFS
>
> Q. You didn't say $6,000 was too much, did you?
>
> A. No, of course not, no.
>
> …
>
> HIS HONOUR
>
> Q. Why "of course not"?
>
> A. We're businesspeople, your Honour. You know, if you're going to offer $6,000.
>
> Q. He wasn't offering $6,000.
>
> A. Yes, he did.
>
> Q. Hang on, no, wasn't the proposal that the buy-back would be buy the company?

A. Yes, that's true, but he put the figure of $6,000 on each block.

Q. It was going to be the company's money that was going to be spent.

A. Correct.

I will return to this evidence below.

236 The proposal by Ms Kelly and Mr Booker did not go anywhere and Mr McMillan and Mr Darch proceeded with their plan. Mr Boog's letter was sent, addressed to CHB, Ms Kelly and Mr Booker, on 1 December 2016.

237 Mr Boog stated that he was acting for seven of the shareholders (all of them plaintiffs in these proceedings). His request was, as had been planned, as non-threatening as possible. He simply said that he needed to advise his clients and sought documents in order to do so. He referred, in a non-specific way, to "matters at issue" and "queries" which his clients had. The documents he sought were: the current version of CHB's constitution; CHB's accounts and tax returns for the last three years; details of "related party transactions" for the last three years; and copies of any related party contracts.

238 Despite follow-up requests, a response took more than two months. On 8 February 2017 the solicitor retained by Ms Kelly and Mr Booker, Mr Flynn, responded. He enclosed a copy of the constitution but referred to cl 12.4(b) (quoted at [122] above) which provided that shareholders had no right to inspect books or records. He took the position that before the request would be considered, it was incumbent on Mr Boog's clients to show that they were acting in good faith and for a proper purpose. To this end, he asked for full particulars of the "matters in issue" and the "queries" referred to by Mr Boog.

239 Mr Boog responded on 15 February. He stated his clients' objectives were to ensure appropriate governance of CHB, and that transactions involving CHB had been properly undertaken and complied with the law. When there was no reply from Mr Flynn, Mr Boog sent a further letter on 1 March stating that if no reply was received within fourteen days his clients would have no alternative but to commence proceedings.

240 On the following day, Mr McMillan and Mr Darch issued a newsletter from the Reform Group. The newsletter stated that it was issued to all shareholders, including Ms Kelly and Mr Booker, in the interest of transparency.

241 The newsletter stated that HBS was operating the Park on CHB's behalf but the shareholders had no information about the nature of any licence and agreement between CHB and HBS. They had also been denied financial information on the grounds that they were not shareholders of HBS. HBS' role as management company might have been alluded to in, but was not established by, the constitution. The arrangement created a conflict and was open to manipulation, abuse and possible fraud.

242 In evidence is a board minute of CHB dated 4 March 2017. The resolution referred to Mr Boog's letter of 1 March 2017. It stated:

> It was resolved that the company would defend any proceedings and if funds were required to do that, the company authorises loans, as determined by the Directors, from Graeme Booker, Janet Kelly, Home Base Solutions Pty Ltd and/or Commonwealth Bank of Australia. The loan funds are to be recorded in the books of account of Coolah Home Base Pty Ltd and payable by Coolah Home Base Pty Ltd.

243 Meanwhile Mr Flynn maintained the position that inadequate particulars had been provided for Ms Kelly and Mr Booker, as directors of CHB, to decide whether the application for documents had been made in good faith and for a proper purpose. Eventually on 21 June, Mr Boog lodged a request with ASIC under CA s 293 for CHB to prepare audited accounts for 2016 and 2017. Accounts audited by Mr Rindfleish were eventually produced but took matters no further. They were simply in the same form as the earlier financial statements which had been provided, and contained no entries for income and expenditure.

244 Meanwhile, on 3 July Mr Boog raised a new issue, which concerned the payment of site fees. At the 2016 AGM, Ms Kelly had given a figure for the site fees collected during the 2015-2016 year. Working from their copy of the constitution, Mr McMillan and Mr Darch compared this figure with what should have been levied on a square metre basis and found a large disparity. In his letter Mr Boog asked for an explanation.

245 On 21 July, Mr Flynn responded. He stated (apparently for the first time, so far as the shareholders of CHB were concerned) that site fees had not been levied on properties owned by Ms Kelly and Mr Booker through HBS/RC. Mr Flynn argued that this made no difference as there would still have been a shortfall.

246 On 28 July, the 2017 AGM was held. It was chaired by Mr Vrisakis. Ms Kelly explained that the "company solicitor", Mr Flynn, would ordinarily have chaired the meeting, but felt he could not because of his involvement in dealing with Mr Boog. Ms Kelly then introduced Mr Vrisakis as a family friend of Mr Flynn's.

247 It appears that some of the shareholders had tried to put resolutions on the agenda dealing with the management of CHB's affairs. In particular, the Directors' power to appoint a "company solicitor" without reference to the shareholders was questioned. Mr Vrisakis ruled these agenda items out of order, on the ground that under the constitution of CHB (as is usual), the Directors had general power to manage the company's business to the exclusion of the shareholders in general meeting.

248 Mr Vrisakis added that under the constitution the shareholders' rights were limited to: the exclusive right of possession of the allotments specified in their shares, together with the use of the common property; the right to attend and vote at meetings; and the right to a share of the proceeds of sale in the event of sale of the property. The minutes then record a series of questions from Mr Vrisakis and answers from Ms Kelly:

> A. Do all shareholders have the exclusive use of their allotment? The answer was yes.
>
> B. Have shareholders ever had to pay the Company any more money other than the site fees provided in the Constitution? The answer was no.
>
> C. Have the site fees been calculated according to the Constitution? The answer was yes but a $4 reduction occurred in the early days.

249 Mr McMillan raised the failure to charge site fees to RC. In response Mr Vrisakis read from Mr Boog's letter of 3 July and Mr Flynn's response. The costs of defending "the action" by Mr McMillan and Mr Darch (which presumably meant the dealing with Mr Boog's correspondence and defending any future legal action) were discussed. The minutes record that the shareholders were advised (presumably by Ms Kelly or Mr Booker) that the costs would be paid by CHB but the Directors were seeking legal advice on obtaining reimbursement of the costs from Mr McMillan and Mr Darch.

250 Mr McMillan complained about the audit accounts, stating that they were simply "rubber stamped". He asked for the meeting to be adjourned until the

auditor (Mr Rindfleish) could attend and answer questions. This was ruled out by Mr Vrisakis. Mr McMillan asked if he could speak to the auditor directly, but Ms Kelly indicated he could only do so if he paid Mr Rindfleish's fees for attending.

251 The meeting ended with a discussion of the need to identify issues for mediation. Mr Vrisakis stated that he believed the Directors had acted properly and in the best interests of the shareholders. He ended the discussion by suggesting that Mr McMillan should put together a list of issues and suggestions to be submitted to the Directors for consideration.

252 After the AGM, the correspondence between Mr Boog and Mr Flynn continued. On 16 August Mr Boog wrote a somewhat plaintive letter in which he asserted again that his clients were entitled to review the relevant documents. Mr Flynn continued to stonewall. After that the evidence peters out.

253 On 25 October the Reform Group issued what was referred to in the evidence as a "discussion paper" in order to avoid litigation. The paper stated that the Reform Group members agreed with the "dream" for the home base "as it has been sold to us". The paper proposed, without apportioning blame, a mediation resulting in a restructure of CHB, and set out the Reform Group's objectives in that regard.

254 The main objective was that CHB should have "a new constitution and board, no longer managed by HBS". The CBA debt was to be re-financed by CHB and the ordinary shares surrendered. CHB would have an independent board elected by the shareholders holding long-term sites. Each shareholder would have one vote irrespective of the number of shares owned. Ms Kelly and Mr Booker were not to hold office for a period of three years. CHB would be responsible for development and maintenance (which might be subcontracted to HBS). The new board would "err on the side of openness and disclosure". HBS (under the continuing management of Ms Kelly and Mr Booker) would continue to operate the tourist business under a lease which could in due course be sold.

255 The paper added that the status of the short-term sites should be "re-thought" because it was agreed that they lacked economic viability. Perhaps there

should be a separate class of shares for the short-term sites, having reduced fees and voting rights. Or the shares could be "recalled" and the sites treated as part of the common property so they could be used for the tourist business.

256 On 2 November, Ms Kelly responded to the discussion paper in an email to shareholders. She described it as "outlandish". CHB shareholders had "absolutely no rights" (Ms Kelly's emphasis) to the records of HBS and RC. Already more than $30,000 had been spent unnecessarily on legal issues and it would be necessary for CHB to draw down on the CBA loan to meet further costs. She insisted the constitution had to be defended and could not be altered by a "minority". She called on other shareholders to "stop the nonsense".

257 On the same day, Mr Booker responded directly to Mr McMillan and Mr Darch. He stated:

> It seems, from your discussion paper, and your verbal comments, that you want to seriously alter the configuration of the structure Janet and I have established for the Home Base at Coolah. I make it very clear to you both that we will not be changing the structure. Also, be very clear, we will not be relinquishing control over our substantial investment in Coolah.
>
> The simplest way for you two to achieve your desired structure and the control you yearn, is to sell your shares at Coolah and start your own home base. I know you have both been very successful in business and capital accumulation. Start your own because we will not be changing ours.

258 Mr Booker continued:

> I note in the 'discussion' paper, that you are "about to go to the NSW Supreme Court". I am also aware that on a number of previous occasions you have, through your solicitor threatened similar action. My concern is the costs of court action and the implications this will have on the shareholders in your group. The legal costs, at this stage paid by CHB, are considerable and they will continue to grow to possibly hundreds of thousands of dollars. I think you need to give this serious consideration and at least advise your members of their possible financial implications. Shareholders not involved in your group will be protected by the company. The action you have instigated could cost your members everything they own and that makes me sad, particularly when I know some of them are unaware of the implications of their involvement. They may even hold you two responsible.

259 There is little information in the evidence about what happened between November 2017 and the commencement of the s 247A proceedings in October the following year. The 2018 AGM took place on 30 August. There appears to have been much less debate than there was at the 2017 AGM. Mr McMillan did

raise concerns about the accounts, complaining that the note which stated the basis on which the accounts had been prepared was incorrect. With assistance from advice from Mr Flynn (who attended the meeting as the company solicitor) it was explained that the Directors were satisfied with the accuracy of the accounts. A request by Mr McMillan to speak was declined. Instead he was asked to put his concerns in writing so that the Directors could take it up themselves with Mr Rindfleish "without the potential of miscommunication".

260 The initiating application for the s 247A proceedings is not, it seems, in evidence. But Ms Kelly's affidavit for the proceedings is, and gives some indication of the issues.

261 From that affidavit, it appears that Mr McMillan and Mr Darch raised issues about: the arrangement with HBS, including whether it was authorised by CHB's constitution; the involvement by Ms Kelly and Mr Booker in the sale and repurchase of shares in CHB, including the April 2014 share issue; and the failure of HBS to collect site fees for the sites owned by HBS/RC.

262 On 22 October 2018, the Directors formally resolved, following discussions with Mr Flynn, that "for the benefit of all shareholders" CHB "must" defend the proceedings. They also authorised Mr Flynn to retain the services of Mr Vrisakis as a specialist consultant.

263 The initiation of the proceedings evidently resulted in a review of the arrangements between HBS and CHB. In her affidavit for the s 247A proceedings (dated 20 November 2018) Ms Kelly stated that in the course of preparing her affidavit "it was realised" that the April 2012 agreement had not reflected the Directors' intentions, or the practice they had followed. A CHB board minute also dated 20 November 2018 records:

> The agreement between Coolah Home Base Pty Ltd and Home Base Solutions Pty Ltd be amended to make it clearer that any shortfall of funds from Coolah Home Base Pty Ltd shareholder site fees, paid to Home Base Solutions Pty Ltd, are paid from tourist income received by Home Base Solutions Pty Ltd.

264 The formal variation agreement between CHB and HBS, also dated 20 November, provided:

> **Terms of Agreement**:

> 1. This agreement amends the agreement made between Coolah Home Base Pty Ltd and Home Base Solutions Pty Ltd, dated 22nd April 2012 (Principal Agreement).
>
> 2. The fourth sentence in the Principal Agreement, commencing "Expenses", is deleted and the following sentence is substituted:
>
> > The costs, expenses and liabilities to be covered by the Site Fee, set out in the definition of Site Fee in Schedule 1 of the Constitution of Coolah Home Base Pty Ltd must be paid by Home Base Solutions Pty Ltd out of its CHB Trading account, being the Site Fees charged by it and, to the extent the Site Fees are not sufficient to cover those costs, expenses and liabilities, the shortfall must be paid by Home Base Solutions Pty Ltd out of its HBS Trading account, being the tourist income received by Home Base Solutions Pty Ltd.
>
> 3. The parties acknowledge that the foregoing amendment gives formal effect to the actual practice of Home Base Solutions Pty Ltd since the Principal Agreement was made.

265 Ms Kelly also referred in her affidavit to the failure to charge site fees to HBS/RC. She repeated Mr Flynn's argument that it made no practical difference, because there would still have been a shortfall and that shortfall was covered by HBS anyway. Nevertheless, she indicated that "from the last quarter of the 2018 financial year" the practice had been changed and site fees were being charged to all shareholders.

266 Again, there was little evidence of what happened during the period after the affidavits were filed in the s 247A application and while the application was awaiting hearing. The hearing eventually took place on 13 and 14 August 2019. The evidence was completed but Black J adjourned for final submissions on 4 September.

267 At the end of the hearing on 14 August his Honour made observations for the parties' benefit which included:

> I did want to raise with the parties for your consideration that as matters stand, it is of course possible that the Court would find that there are difficulties with the structure of this arrangement and in particular, the allocation of management rights does not dispose of or constitute an assignment or other disposal of income which ought to have been received by Coolah Home Base.
>
> It is possible that the Court would find that there are difficulties with the preparation of the company's accounts, including whether they present a true and fair view of the company's financial position, in particular, so far as the accounts treat the company as receiving no income and any failure to dispose of the economic property in site fees would have the consequence that they do not present a true and fair view of the company's accounts. It is possible that the Court will find that there is an issue as to the solvency of Coolah Home

> Base or at least that it is wholly dependent on financial support from Home Base Solutions from time to time.
>
> It is also possible that it will find that the plaintiff's application for access to documents will fail in its entirety because of the documents sought will not cast the slightest light upon the issues as to the structure of the arrangement which has been exposed by these proceedings. I raise those matters because they are possible findings and because it may be that once the Court reaches these findings and a judgment is published to that effect, and it may or may not be referred to the regulator in those circumstances, the arrangement and possibly the caravan park will not survive the result that you have brought upon yourselves.

268 At some point early in 2019 Ms Robertson (the thirteenth plaintiff in these proceedings) had initiated District Court action against CHB and HBS. The original statement of claim does not appear to be in evidence, but the proceedings must have been initiated by 13 February, when a minute of the Directors recorded a resolution to defend the proceedings and to split the costs equally between CHB and HBS. An amended version of the statement of claim is in evidence. As against both defendants, Ms Robertson claimed damages. The allegation was that the building work done by HBS on Ms Robertson's cabin was defective. CHB was sued on the basis that HBS was allegedly its agent. Directions for the preparation of evidence by the parties were given by the District Court on 29 July.

269 Although the Directors had resolved in March 2017 to borrow money on CHB's behalf to meet any expenses associated with the legal action taken by Mr McMillan and Mr Darch, no such borrowing was recorded in CHB's 2017 accounts. Instead the accounts recorded the sale of further shares for $13,450, which was applied to the CBA loan balance, reducing it to $46,500.

270 The 2018 financial accounts for CHB did however show a draw-down of $13,000 on the CBA loan to meet legal costs. Rather than that expenditure being treated as an expense, it was debited to a receivable account called "Advance – Legal Fees". By this stage no proceedings had been commenced and there is no apparent way in which CHB could recover the costs of dealing with the queries raised by Mr McMillan and Mr Darch from them. It is therefore difficult to see how the accounting treatment could have been justified, but this point was not taken by counsel for the plaintiffs.

271 Also in the 2018 financial year, the debiting to HBS of the depreciation on CHB's plant and equipment exhausted the remainder of CHB's inter-company debt to HBS, and resulted in a liability of HBS to CHB in the amount of $6,900. This was not paid, and was shown in the balance sheet as a non-current asset.

272 Relevant balance sheet figures, and the breakdown of the "financial liabilities" (not disclosed in the accounts) for 30 June 2016, 2017 and 2018 are set out in the table below:

| | **30/6/16 ($,000)** | **30/6/17 ($,000)** | **30/06/18 ($,000)** |
|---|---|---|---|
| **Balance sheet** | | | |
| Issued capital | (780.9) | (794.4) | (794.4) |
| Property, plant and equipment | 845.7 | 835.0 | 825.1 |
| Loans to other companies | | | 6.9 |
| Advance – legal fees | | | 13.0 |
| Other assets | 9.3 | 9.3 | 8.9 |
| Financial liabilities | (74.0) | (49.8) | (59.5) |
| **Breakdown of financial liabilities** | | | |
| CBA | (60.0) | (46.5) | (59.5) |
| HBS | 14.0 | 3.3 | |

273 The accounts for the 2018-2019 year were prepared in draft, but never formally completed, because the administration intervened. According to internal CHB evidence, the balance of the CBA loan was drawn down by $500 to take it back to its $60,000 limit, and the $500 proceeds lent to CHB. For some reason not

explained in the evidence, the practice of debiting the depreciation to CHB ceased. Thus at the end of the 2018-2019 year, CHB's internal accounts showed HBS as a debtor for $7,400.

274 As I have mentioned, a total of $13,000 was drawn down in 2017-2018 to pay for legal expenses. It seems that this did not cover all of the legal and accounting fees associated with the dispute which had been incurred in 2016-2017 and 2017-2018. The balance appears to have been paid by HBS or the Directors personally and kept off CHB's balance sheet. According to the Administrators' later report, the total amount incurred for additional legal and accounting fees up to the date of their appointment was $160,700.

*Appointment of statutory administrators*

275 Prior to the Administrators' appointment, there was some discussion between Mr Dean-Willcocks and Ms Kelly, Mr Booker, and their legal advisors. The Administrators' report to creditors identified each occasion on which discussions took place. In his affidavit, Mr Dean-Willcocks fleshed out the detail, based on his file notes. There was no objection to his evidence and no challenge was made to it by any party.

276 In the Administrators' report they stated that the administration had been referred to them by James Duncan, the barrister retained by Ms Kelly and Mr Booker to represent CHB in the s 247A proceedings. It seems that Mr Dean-Willcocks was an acquaintance of Mr Duncan, although he had not previously been referred any work by him.

277 The initial contact came in a call from Ms Kelly to Mr Dean-Willcocks on 15 August, the day after the second day of the hearing before Black J in the s 247A proceedings. Ms Kelly told Mr Dean-Willcocks that CHB was involved in litigation and Mr Duncan had recommended him. Mr Dean-Willcocks subsequently spoke to Mr Duncan. Later, he spoke to Mr Vrisakis. There were also some further conversations with Ms Kelly.

278 According to Mr Dean-Willcocks, Ms Kelly explained the administration by saying that she and Mr Booker had spent $200,000 to $300,000 of their own money and had "had enough". Mr Dean-Willcocks asked why, if all the application asked for was documents, it had been so vigorously and

expensively defended. Ms Kelly replied that their solicitor had advised them that the application by Mr McMillan and Mr Darch for documents was only the first step to getting control of CHB. She and Mr Booker had agreed.

279 Mr Dean-Willcocks stated that Ms Kelly asked him at one point about the eighty per cent consent requirement in the constitution for the sale of the property whether it would apply. Mr Dean-Willcocks replied that he thought it probably would not. Mr Vrisakis was later to write to the Administrators confirming that view. Mr Dean-Willcocks stated that Ms Kelly did not at that stage mention buying the Park back out of CHB. All she said was that she and Mr Booker had sites of their own in the Park and wanted to make sure that "the right buyer" could be found.

280 The formal resolution putting CHB into statutory administration was passed by Ms Kelly and Mr Booker on 21 August. It recited that in the Directors' opinion CHB "is insolvent, or is likely to become insolvent at some future time". On the same date, the Directors executed an instrument formally appointing Mr Dean-Willcocks and Mr Gray as statutory administrators.

*Course of statutory administration*

281 Upon their appointment, the Administrators continued the existing management arrangements with Ms Kelly and Mr Booker through HBS. They continued to collect site fees from the shareholders and to pay the ongoing costs of operating the Park. The managers employed by them continued in place. This had in fact been organised by the Administrators for their appointment.

282 A few days after the Administrators' appointment, Ms Kelly completed and submitted the Directors' report on company activities and property (ROCAP). She identified trade creditors of $79,100. They included Mr Vrisakis ($24,100) and Mr Rindfleish ($300).

283 As well as the trade creditors, Ms Kelly identified related party creditors of $267,500. The largest claim was the Directors' claim on their loan account. This totalled $179,900 and included: $159,200 for legal fees; $1,500 for audit fees; $12,900 for reimbursement of food, travel and accommodation expenses associated with the proceedings; and interest of $6,300. Next, the Directors claimed additional fees under CHB's constitution for time spent on the s 247A

proceedings. This was calculated at $150 per hour and totalled $87,600 ($64,400 for Ms Kelly and $23,300 for Mr Booker). Finally, HBS claimed $4,700. This was made up of $12,100 in site fees which had allegedly not been paid by shareholders, less the $7,400 owing by HBS on the intercompany loan account.

284 The Administrators issued an initial circular to creditors on 22 August, the day after their appointment. They called for the creditors to submit proofs of debt. Of the trade creditors listed in the ROCAP, only Mr Vrisakis and Mr Rindfleish submitted claims. All of the related party creditors (Ms Kelly, Mr Booker and HBS) did. CBA did not play any part in the administration; the bank simply relied on its entitlements as a secured creditor.

285 On the day the Administrators were appointed, Mr Clarke, Ms Robertson's solicitor, had contacted them to advise them of her claim against CHB in the District Court. Mr Clarke advised Ms Robertson would be seeking about $300,000 in damages. None of the other plaintiffs appear to have notified any claim against CHB as creditors during the course of the statutory administration.

286 The first meeting of creditors took place on 2 September. The meeting was attended by Ms Kelly and Mr Booker, representing their own interests and as proxies for Mr Vrisakis and Mr Rindfleish. No proposal was put forward for the appointment of a committee of inspection, or for the appointment of a replacement administrator.

287 Meanwhile, the Administrators had commissioned a valuation from a real estate firm, Heron Todd White ("HTW"). HTW had previously conducted a mortgagee valuation for CBA in January 2017. That valuation had valued the property for mortgage purposes at $430,000.

288 The Administrators instructed HTW that the valuation was to be conducted on the following basis:

> Caravan Park (including camp kitchen, amenities block and other fixed infrastructure owned by Coolah Home Base Pty Ltd) on a vacant possession basis excluding business, plant and equipment, shareholders rights to occupy the property (and their movable dwellings) and management agreement between Coolah Home Base Pty Ltd and 'Home Base Solutions'.

289 In advance of the second meeting, the Administrators issued their report to creditors on 16 September. The report was an interim one because the Administrators stated that their investigations were not complete. The report indicated, subject to verification of the expenses, a disposition to accept the Directors' loan account claim. It raised some questions about the quantum of the Directors' remuneration claim. HBS' claim to $12,100 in unpaid site fees was rejected on the ground that there was no mechanism in the management agreement for HBS to charge unpaid site fees to CHB. This left HBS owing CHB $7,400.

290 On the same day, the Administrators received HTW's valuation. The figure was $330,000. The Administrators withheld disclosure of the figure to CHB's creditors (including Ms Kelly and Mr Booker) on the basis that it was commercially confidential.

291 In their report the Administrators expressed the view that CHB was insolvent. Ordinarily, this would have led to a recommendation that it be wound up but the Administrators noted that Ms Kelly and Mr Booker had foreshadowed a Deed of Company Arrangement. The Administrators recommended that the meeting be adjourned for a period within the statutory maximum of 45 days to allow the Kelly-Booker DOCA to come forward.

292 The second meeting was convened on 25 September (within the twenty business days allowed from the date of the Administrators' appointment). Again, Ms Kelly and Mr Booker attended to represent their own interests as creditors and as proxies for Mr Vrisakis and Mr Rindfleish. The meeting was also attended by Mr Darch and Ms Robertson. Ms Robertson advanced a claim to be a creditor for $300,000 but this was not accepted by the Administrators who allowed her to vote for only $1. The meeting accepted the Administrators' recommendation and voted to adjourn.

293 Before issuing their report on 16 September, the Administrators had raised with Ms Kelly the failure by the Directors to collect site fees from HBS/RC. This resulted in Ms Kelly producing a revised calculation of the income and expenditure for the CHB Trading profit centre for the four years from 2015-2016 to 2018-2019. Ms Kelly sent this to Mr Gray on 17 September.

294 In her revised figures, Ms Kelly credited CHB Trading with the site fees which should have been paid on the HBS/RC sites. But she also adjusted the internal allocations of expenses between CHB Trading and the other HBS profit centres. For instance, she allocated 100% of repairs & maintenance expenditure to CHB rather than 50%. The increased notional site fee income also increased the amounts debited to CHB Trading for "company administration" and "park administration". Taking the expenses, as adjusted, into account, CHB Trading showed profits in 2015-2016 and 2016-2017 but losses in 2017-2018 and 2018-2019. The combined figure over the four years was a loss of $73,000.

295 The most important contributors to this result were the internal administration charges. In notes which accompanied her revised figures, Ms Kelly sought to justify these charges as follows:

> Company administration includes the management of site fees, expenses, reconciliations, monthly accounts to shareholders, fortnightly electricity accounts, gas accounts, daily communications with managers on site, dealing with SH problems and queries, communications with authorities, preparation for and running of meetings with shareholders and AGM, preparation of financials and communication with accountant, finding managers and much more.
>
> Park administration represents approximately 50% of the labour to do park tasks such as mowing, cleaning common areas, mail collection, gardens, road maintenance, security, safety and much more.

296 In calculating her revised figures, Ms Kelly also charged interest to CHB on the outstanding balance of the intercompany account in favour of HBS. At some point after 17 September, Ms Kelly undertook further revisions which covered the whole of the period from 2012 to 2019.

297 As well as consulting with the Directors and their solicitor Mr Vrisakis, the Administrators consulted with the shareholders of CHB. An informal meeting was held on 11 September, before the second creditors' meeting. The meeting was chaired by Mr Dean-Willcocks. Ms Kelly, Mr Booker and Mr Vrisakis attended. So did a number of the current plaintiffs, including Mr McMillan and Mr Darch, and Mr Boog.

298 At the meeting both Mr Squire (fifteenth plaintiff) and Mrs Susan Kelly (eleventh plaintiff) stated that some of the cabins on the long-term sites were removable. The transcript records:

> Mr Squire: Just I imagine a lot of people that are creditors are aware that the…we have exclusive right… or were given exclusive right with our share to use the land and therefore we have built homes on it… or many of us have built homes on it.
>
> Mr Dean-Willcocks: Yes.
>
> Mr Squire: The… I imagine that all of the creditors will be advised of that so that when they make a decision they are aware that peoples' homes are going to go.
>
> Mr Dean-Willcocks: No… no… I wouldn't think so. The… certainly in circumstances where the administration ends up in a liquidation in any sale process the contract for sale will make reference to the fact that there are homes owned by shareholders built on lots, but we really haven't formed a view as to what the form of a contract would take, and in the event that there is a sale, other than a sale under a deed of company arrangement if that is put and if that is recommended then we will certainly be communicating significantly in advance with all owners of the dwellings.
>
> Mr Squire: Just for your information not all homes built are relocatable. Most of the early home are all… they were built on site, they weren't relocatables.
>
> Mr Dean-Willcocks: Thank you and that is clearly a problem
>
> **...**
>
> Mrs Susan Kelly: We came here and we paid for our land to put our house on and the majority of the homes are ones that cannot be moved, they were built on site. It is only the last few years there's probably about 4 or 5 that are transportable and the average age of us here is probably around 72 year olds, most people here might have up to $10,000 besides what they've got for their pension. They cannot afford to spend money to move their house even if they could and for us where our house is built on site, it is not removable, for us to get it ripped apart and cut and tied to take away and then fix up all the damage it would probably cost nearly as must as what the house is anyway… and you know we haven't got that kind of money to fix it, so what do we do, do we just walk away and leave our house and have nothing?
>
> …
>
> Mr Dean-Willcocks: Yes, well look I might say though Janet before you do comment, obviously as the administrators, you know, we are bound by the law and the shareholders became shareholders and erected their dwellings, or acquired their dwellings consistent with the provisions of the constitution, so what Susan Kelly has raised is a real problem and I don't have an easy answer for that. You have exclusive use, but if the land is sold than that contract exists with the company. So that… that Susan that is a problem that I don't have an answer for but Janet if you have any comment…. I'd… please.
>
> …
>
> Mr Vrisakis: Some issues have been raised as to whether buildings on allotments aren't movable or not, these are issues that obviously require very

careful consideration and I think any answer that is given to Susan or any comment that is made can only be of a preliminary kind until the issues raised have been properly determined.

No Name: Exactly.

Mr Dean-Willcocks: Janet Kelly were you going to make any comment.

Ms Janet Kelly: I was because I do understand where the shareholders are at and Graham and I may look at the possibility of revitalising part of the original concept under a different structure. We proposed to talk to our advisers and the administrators at 12 noon today regarding a deed of company arrangement, that's it. If we can do anything we will.

Mrs Susan Kelly: Thank you for that Janet, because you know most of us will just have to walk away otherwise and just leave what we've got behind and just live in our caravan or motor home so… we cannot afford to do anything different if our house isn't movable.

299 Following the meeting, further representations were made by Mr Darch and Mr McMillan by email to the Administrators (copied to Mr Boog). These representations included complaints about the Directors' conduct which had been canvassed in the s 247A proceedings. Mr Dean-Willcocks encouraged Mr Darch and Mr McMillan, if they were not satisfied with the proposal from Ms Kelly and Mr Booker to submit their own Deed of Company Arrangement.

300 For the purpose of the administration, the Administrators retained as their solicitor Mr Peter Wright of Brown Wright Stein ("BWS"). On 30 October, Mr Wright wrote to Mr Vrisakis about the Administrators' upcoming report to creditors. Mr Wright stated that the Administrators proposed to make potentially adverse comments in the report about various matters and invited Mr Vrisakis to make any representations he wished to make on those matters.

301 Among the matters raised in the letters was the defence of the s 247A proceedings on CHB's behalf. Mr Wright stated that the Administrators' initial view was that the quantum of costs incurred "seemed prima facie unreasonable", given that all that was being sought was authority to inspect books of the Company. The Administrators were concerned about a breach of Directors' duties. Mr Wright also raised the non-payment of site fees by HBS/RC.

302 Mr Vrisakis responded on 5 November. Mr Vrisakis vigorously rejected the suggestion of breach of duty. He stated that Mr McMillan and Mr Darch had not acted in good faith or for a proper purpose in bringing their s 247A application,

but rather “as part of a campaign conducted by them to attack and vilify the Directors and gain control of the Coolah Caravan Park owned by the Company”. This was said to be evident from the discussion paper circulated by Mr McMillan and Mr Darch in October 2017.

303 Mr Vrisakis also rebuffed the point about the payment of site fees by HBS/RC. Consistently with the position previously taken by the Directors, he pointed to the management agreement and stated that the site fee shortfall had been covered by HBS in any event. He also observed that the accounts for 2016 and 2017 had been audited, and asserted that the auditor had endorsed the correctness of this approach, which the Directors were entitled to rely upon.

304 On 6 November, Mr McMillan emailed to Mr Dean-Willcocks a document entitled “Report Outlining Proposed Inclusions in a Deed of Company arrangement (DOCA) for Coolah Home Base Pty Limited (in administration)”. The document was in the form of a position paper and was issued over the names of Mr McMillan and Mr Darch. It was stated to be submitted to the Administrators on behalf of “Shareholders” (unidentified) in CHB.

305 Mr McMillan in his covering email explained that “we” had intended to produce a deed of company arrangement for Mr Dean-Willcocks to consider, with a view to its being presented to creditors. But the information which would have been needed to do so (and which would have been available through the now adjourned s 247A proceedings) was not available. Instead, the Report identified “proposed inclusions” in a deed of company arrangement and “some items that we need to resolve”.

306 The Report in its preamble stated:

> The problems with CHB are primarily related to two related companies and the way they are inter-twined together. There are two companies:
>
> a. CHB: Which owns the park real estate and effectively sub-divides this to shareholders via Company Title, and
>
> b. Home Base Solutions HBS: Owned exclusively by Janet and Graeme to, as it turns out, manage the park and run tourist operations.
>
> Both companies are managed by the same directors which results in a Conflict of Interest and the inability of the Directors to look after the interests of the Shareholders of CHB.

307 The preamble continued by stating that the Shareholders did not accept that CHB was "genuinely insolvent". The Report stated that the position was unclear, referring to the non-payment of site fees. The Report also complained that the legal fees for the s 247A proceedings which had resulted in the appointment of the Administrators were a product of the Directors intransigence.

308 The preamble continued:

> Liquidation will not yield a good return to creditors other than [the Directors]. It will likely be expensive, protracted and messy if:
>
> a. It involves dislodging the pensioner shareholder from their homes, or
>
> b. We challenge the right of [the Directors] to be considered as creditors of CHB, or
>
> c. We are successful in unwinding the transaction where [the Directors] issued themselves the 19 sites and $550.74 each, or
>
> d. There is an argument that it was the directors decision not to supply the information initially request by McMillan and Darch that has led to CHB being placed in Administration. This implies that the directors decision to defend the action was an Uncommercial Transaction that was to the detriment of the company, designed to benefit the directors personally, or
>
> e. We pursue the action in the Supreme Court and prove that [the Directors] have abuse a conflict of interests for their own benefit.

309 The Report went on to consider CHB's creditors. It promised to pay trade creditors within twelve months and sought details of the trade creditors, the CBA loan and the claims by related parties. The revenue was to come from the sale of the two remaining shares; site fees, including for the Directors' holdings; a share of the tourist income, or fees paid by a third party operator of the tourist business; and special purpose levies if "agreed to and voted on" by CHB's shareholders.

310 Under the heading "Company Structure" the Report proposed a new board of three directors by excluding Ms Kelly and Mr Booker, to hold office for two years. Shareholder voting would be one vote per person rather than one vote per share. The intention was to retain "Company Title" but to "tweak" CHB's constitution so that the *Residential Communities Act* would apply. Management agreements with HBS would be cancelled but this would not preclude future agreements being negotiated between CHB and HBS.

311 The summary contained the following:

> The proposals in this report are consistent with the concepts outlined in the 2014 document titled "Janet's Dream" [sic; the reference was to the "Dream Explained" document from late 2015 or thereabouts: see [175] above] which was produced in cooperation with the current Directors. This document largely represents the concept that shareholders thought they were buying into.

312 Mr Dean-Willcocks discussed the Report with Mr McMillan, Mr Darch and Mr Boog in a teleconference on 11 November. But it never resulted in a formal Deed of Company Arrangement. And, for reasons which are referred to in more detail below, Mr Dean-Willcocks did not think that the proposal in the Report was workable anyway. In the end the Administrators took no further action on it.

313 The "Kelly-Booker DOCA" was drafted by BWS following discussions between the Administrators and Ms Kelly and Mr Vrisakis. It was prepared at the same time as the proposed contract for the sale of the Park to CTP, which I assume was also prepared by BWS.

314 The contract provided for the purchase by CTP of the Park for the sum of $430,000 plus GST. It solely covered the Park as land and did not apply to the tourist business. Moreover, clause 51.3 provided:

> The purchaser acknowledges that each Shareholder has constructed or holds parks or places improvements on their Allotment. The vendor has no interest in the Shareholder improvements (*Shareholder Improvements*) and the Shareholder Improvements are expressly excluded from the sale of the *property*.

315 The contract was prepared on the assumption that following the purchase by CTP the operation of the Park would be governed by the *Residential Communities Act 2013*. This Act regulates contracts under which residents live in caravan parks, which are referred to as Residential Site Agreements ("RSAs"). The contract provided in clauses 52.1 and 52.2:

> 52.1 The purchaser acknowledges and agrees that the sale of Land is subject to the rights of Shareholders to occupy, let and or use part of the Land including Common Property and that the purchaser is not entitled to nor will the purchaser obtain vacant possession on the Date for Completion.
>
> 52.2 The purchaser agrees that on or before the Date for Completion the purchaser will enter into a Residential Site Agreement including the conditions disclosed in the form attached hereto with each Shareholder of an Allotment (Lease) who irrevocably and unconditionally agrees to enter into the Lease.

316 The parties to the Kelly-Booker DOCA were CHB; the Administrators; Ms Kelly; Mr Booker; and HBS. CTP was not a party to the Kelly-Booker DOCA but Ms Kelly and Mr Booker undertook to procure that CTP would comply with its obligations under the sale contract (clause 14.5).

317 The Kelly-Booker DOCA provided in the usual way for the creditors' claims to be adjudicated upon by the Deed Administrators (clause 5; CBA as a secured creditor was not bound by the Deed: cl 6). The monies received under the sale contract were to be held as a fund to be administered by the Administrators as Deed Administrators (clause 7). After payment of the Administrators' fees and disbursements, the balance of the fund was to be distributed among the creditors (clause 8). Any further claims by creditors were barred (clause 11).

318 Clause 12 provided:

> 12.1 The Deed Administrators, and not the Directors, shall have control and stewardship of the Company from the Deed Date until the settlement of the sale of the Land (*DA Control Period*).
>
> 12.2 The control and stewardship revert to the Directors at the end of the DA Control Period.

319 Despite clause 12.1, the Directors were to be entitled to continue the defence of the s 247A proceedings, but the costs of doing so were not to come out of the fund (clause 14.6). The Administrators were provided with releases of liability and indemnities in their favour (clause 16) but the Deed did not otherwise restrict future claims by CHB against officers or third parties.

320 On 14 November, the Administrators sent a notice to shareholders. The Administrators advised the shareholders that they had received a final form of the Kelly-Booker DOCA proposal and would be recommending it to creditors. If accepted (as seemed likely) the Park would be sold and it would be necessary for shareholders to make arrangements with CTP if they wished to continue to occupy their sites. The Administrators enclosed copies of CTP's proposed RSA and a circular from CTP to CHB's shareholders proposing the terms on which occupation would continue (see below).

321 The Administrators also stated that the proceeds of the sale of the Park would be insufficient to meet all of the administration expenses and the claims of the creditors and therefore there would be nothing for shareholders. Upon

execution of the Kelly-Booker DOCA control of CHB would revert to Ms Kelly and Mr Booker as the directors.

322 On 18 November, the Administrators issued their supplementary report to creditors in advance of the adjourned meeting. In these circumstances, the Administrators recommended that the creditors vote to enter into the Kelly-Booker DOCA. Their investigations and reasoning were as follows.

323 Under the heading “Books and Records” the Administrators considered the propriety of the practice adopted by Ms Kelly whereby all of the income and expenses associated with the Park were put through the accounts of HBS so that CHB had no profit and loss. The Administrators stated that on any view the expenses listed in the constitution as being covered by the Site Fee were expenses of CHB. They should have been recognised as such in CHB’s accounts.

324 The Administrators considered, based on the terms of the constitution, the by-laws and the management agreement, that it was “not without doubt” as to whether it was CHB or HBS who was entitled to the site fees. The Administrators preferred the view that it was HBS. Even so, site fee income from HBS should have been taken up in the accounts of CHB so as to be set off against the expenses incurred by CHB. The surplus or deficiency should have been recognised on an inter-company account between CHB and HBS and recorded in the balance sheet. The Administrators therefore concluded that the Directors had failed to ensure that CHB kept proper records.

325 The Administrators remained of the view that CHB had been insolvent when they were appointed. They considered, however, that no question of insolvent trading appeared to arise. This was because, in their view, CHB would not have become insolvent until the Directors decided to stop funding the litigation, which had only happened shortly before their appointment.

326 The Administrators next addressed the related party creditor claims. The Administrators accepted the whole of the Directors’ loan account claim of $179,900. They recorded that the Directors had verified substantially all of the expenditure claimed for legal and accounting fees. The food, travel and accommodation expenditure did “not appear unreasonable”. Interest on the

loan account was not provided for in the constitution but "would ordinarily appear admissible".

327 The Administrators also accepted the fee claims by the Directors (which totalled $87,600), but not in full. The Administrators considered that the Directors were entitled to fees under subparagraphs 7.3(a) and (d) of the CHB constitution. But the rate of charge ($150 per hour) was too high. The claim had however been reduced in the Kelly-Booker DOCA to $50,400 which was "not unreasonable".

328 The Administrators then reported on six "other transactions". In doing so they stated that they had taken into account issues raised by Mr McMillan and Mr Darch.

329 The first matter was the management agreement between CHB and HBS, and specifically the failure to charge site fees to HBS/RC. The Administrators described the internal division of expenses between the three "businesses" operated by HBS, including the deduction in "CHB Trading" for 60% of site fees to cover "company administration" and "park administration". This had resulted in a shortfall in CHB Trading between 2012 and 2019 of $180,000. Following the revision by Ms Kelly, to which the Administrators made some adjustments which were not quantified in the report, the shortfall over the period was still $80,000. Implicitly, the Administrators accepted the Directors' contention that the failure to charge site fees had made no practical difference.

330 Secondly, the Administrators considered the transactions in which HBS or RC had purchased shares from existing shareholders and later on-sold them. The Administrators quoted a written explanation provided by Ms Kelly. This showed that some of the purchases had been at discounts to the price paid by the initial purchaser. These discounts totalled $17,800. Of the shares purchased, there had been three re-sales, one of which had resulted in a profit to HBS of $1,800. The Administrators noted that the discounts and the profit could be attributable to market forces, but "subject to establishing the facts" the Directors might have breached their duties by making use of company information for their own benefit.

331 One of the other two shares which were on-sold was the share purchased by Mr Darch in February 2015. Although RC made no profit on that portion of the price attributable to the share, there was a profit on the cabin component of the price. RC bought the cabin in an unfurnished state, then furnished and rented it out for a period of 7 months before selling it in its furnished state to Mr Darch. After allowing for $5,000 on the cost of the furnishings, RC made a profit of $25,000. The Administrators made no comment about this in their report.

332 The third matter discussed by the Administrators was the conferral of all management rights for CHB on HBS under the management agreement. The Administrators stated that the agreement contained a provision which allowed it to be cancelled by either party on three months' notice, as a result, they did not consider that the management rights had any significant commercial value.

333 Fourthly, the Administrators referred to an issue about "unsold sites". According to Mr Darch, there were three. According to Ms Kelly, there were two. While it is not entirely clear, it seems that the point raised by Mr Darch was that the shares could have been sold and used to pay off the CBA loan, thus resulting in the redemption of the ordinary shares which gave the Directors control of CHB. The Administrators noted that the Directors controlled thirty-three out of the possible sixty-two shares, and thus held a majority in any event. Furthermore, the ordinary shares gave no rights in a winding up. The Administrators concluded that there were no relevant breaches or recovery actions available.

334 Fifthly, the Administrators considered the April 2014 share issue. They noted Ms Kelly's argument that the sites were not valuable. The Administrators were unable to determine what the true value of the sites was and the cost of a valuation was not justified. The equal ranking with long-term site shares in a liquidation in theory raised the possibility of a voidable transaction or breach of director's duty claim. But as there was unlikely to be any surplus for shareholders on the winding up of CHB no action would apparently be available to a liquidator.

335 The final matter considered by the Administrators was the defence of the s 247A proceedings. The Administrators quoted from the letter from Mr Vrisakis

justifying the defence, and from advice provided to the Administrators by BWS. That advice stated that Mr McMillan and Mr Darch had borne the onus of proving that they were making the application in good faith and for a proper purpose. The advice went on to discuss in general terms the test of good faith and proper purpose.

336 The Administrators noted that, while the dealings between CHB and HBS were "not straight forward", on the information available to them there had been a deficit between the site fee income and the expenses of CHB, which had been borne by HBS to CHB's benefit. Final argument in the s 247A proceedings had not taken place. In the circumstances, they were unable to form a view on whether the application had been made in good faith and for a proper purpose, or on whether there had been a breach of duty in defending the proceedings.

337 The Administrators' report then dealt with recovery claims. No voidable transactions had been identified. Insolvent trading was unlikely. Of the six "other transactions", a claim concerning the purchase and re-sale of shares would not be justified on a stand-alone basis (being worth only $19,600) and the information on a claim concerning the defence of the s 247A proceedings was inconclusive. Furthermore, it would be necessary to conduct examinations (at a cost of at least $100,000) before bringing proceedings, and any proceedings would be vigorously defended, with recoveries uncertain. The conclusion was that the expenditure would be disproportionate. If appointed as liquidators, the Administrators would recommend against any recovery proceedings.

338 The adjourned meeting of creditors took place on 27 November. For the purposes of the vote, and consistently with the views expressed in their report, the Administrators allowed the Directors' claims in the sum of $230,304. The only external creditors were Mr Vrisakis ($41,393) and Mr Rindfleish ($303) both of whom were represented by proxy by Ms Kelly. Ms Robertson's claim was allowed at a nominal amount of $1 but she did not attend the meeting. The vote in favour of executing the Kelly-Booker DOCA was unanimous.

339 On 2 December, the Administrators issued a further notice to shareholders advising them that the Kelly-Booker DOCA had been approved and executed.

The notice repeated the statement made in the earlier circular that it was up to individual shareholders to make arrangements with CTP for continued occupation of the long-term sites. The Administrators again recommended that shareholders contact Ms Kelly or Mr Booker to make arrangements for occupation following completion and noted control of the Company would revert to them at that point.

340 On the following day, the Administrators lodged their report to ASIC under CA s 438D concerning possible breaches and offences in the conduct of CHB's affairs. The report reflected the conclusions reached by the Administrators in their report to creditors. They stated that the books and records of the Company had not been kept adequately. The cause of failure of the Company was the legal fees and other costs incurred in defending the shareholder proceedings. There were possible breaches of duty and contraventions of the obligation to keep proper financial records. There was no insolvent trading. The Administrators stated that they considered that no enquiry was warranted by ASIC.

341 On 19 December the Administrators sent a final notice to shareholders. It reported that the contract had been completed on 17 December and (incorrectly) that the Park had been transferred to CTP. The Administrators repeated their earlier advice that shareholders should make arrangements with CTP to ensure their future occupation.

342 As I have mentioned, in his affidavit Mr Dean-Willcocks recounted his discussions with Ms Kelly and Mr Booker and with their legal representatives, prior to accepting the appointment. He stated that he did not think that the Directors were attempting to use the administration process to defraud CHB's shareholders. In cross-examination it was briefly put to him that he knew the administration was a charade, which he denied. Counsel took the issue no further and I accept Mr Dean-Willcocks' evidence.

343 Mr Dean-Willcocks also stated in his affidavit that (as stated in the Administrators' reports) he believed that CHB was insolvent. This evidence was not challenged in cross-examination and again I accept it.

344 In his affidavit, Mr Dean-Willcocks described his dealings with the other shareholders, including Mr McMillan, Mr Darch and Mr Boog. He referred in particular to the meeting on 11 September and the position paper from Mr McMillan and Mr Darch of 6 November.

345 Mr Dean-Willcocks noted that the position paper did not result in a formal proposal for a Deed of Company Arrangement. He also identified a number of "issues" with the proposal in the position paper. It did not involve a sale of the Park or otherwise provide funds to meet the claims of creditors (noting that Mr Dean-Willcocks stated that he believed that the claims by Ms Kelly and Mr Booker were genuine, and the "limited financial resources" of the majority of the shareholders). The proposal for the future management of CHB also involved a complex restructure and further costs. Mr Dean-Willcocks also noted, with considerable understatement, the "likely lack of support" from "known creditors".

346 Mr Dean-Wilcocks stated that in his view a liquidation was inevitable to meet the Company's liabilities, including the costs of the administration. A liquidation would inevitably result in the sale of the Park, potentially with lower proceeds and without any assurance as to the possibility of continued occupation by the Shareholders. Consistently with what was said in the Administrators' Report Mr Dean-Willcocks stated that in his opinion the Kelly-Booker DOCA proposal was preferrable to a liquidation and in the interests of creditors.

347 None of this evidence was challenged in cross-examination. Again I accept it.

348 Mr Dean-Willcocks stated in his affidavit that it was always his belief that the shareholders owned shares in CHB which gave them rights under CHB's constitution to use and occupy "their" Allotments. The contrary had never (so far as he recalled) been suggested in his dealings with the shareholders, or Mr Boog.

349 In cross-examination, counsel for the plaintiffs referred Mr Dean-Willcocks to that part of the transcript of what Mrs Susan Kelly said on 11 September about having "paid for our land". Mr Dean-Willcocks accepted counsel's suggestion that it was a "matter of serious concern" that he had been told by Mrs Kelly that she had "bought an allotment of land that [the Administrators] were proposing

to sell". Later in the cross-examination Mr Dean-Willcocks accepted counsel's suggested that he had "made no enquiry to see whether the claim by Mrs Kelly, that she had bought land, was true".

350 Counsel submitted in the light of this evidence that Mr Dean-Willcocks was on notice of the plaintiffs' proprietary claims to ownership of their Allotments. There is an irony in counsel's reliance on what was said by Mrs Kelly. As will be seen below, out of all the purchase agreements hers was one of the two which were most clearly agreements for the purchase shares. Nevertheless, I will address the merits of counsel's submission.

351 There was more to Mr Dean-Willcocks' oral evidence than the passages on which counsel relied. When Mrs Kelly's statement was first raised, Mr Dean-Willcocks pointed to his statement that the shareholders had become shareholders and had erected or acquired their cabins in accordance with CHB's constitution. Mr Dean-Willcocks also rejected counsel's suggestion that he paid no regard to shareholder concerns raised at the meeting. Mr Dean-Willcocks referred, as he had in his affidavit, to the extensive further dealings with Mr McMillan, Mr Darch and Mr Boog.

352 I found this part of the cross-examination somewhat disjointed. It was also confused by counsel's references to a letter from Mr Vogel, which did assert in quite clear terms that the shareholders had interests in the Park, but which came after the purchase monies had been paid and control of CHB had reverted to the Directors. It was also complicated by the fact that in the passage of transcript upon which counsel for the plaintiffs relied, Mrs Kelly raised a quite separate point, namely that at least some of the cabins were fixtures. This was undoubtedly a problem for the Shareholders, albeit not something which Mr Dean-Willcocks could do very much about.

353 In the end, I do not think Mrs Kelly's passing reference, in this context, to having bought "our land" can fairly be seen as some sort of notice to Mr Dean-Willcocks of a claim to a proprietary entitlement. Counsel did not cross-examine on the express statements in Mr Dean-Willcocks' affidavit to the effect that he was unaware of any such claim. Nor did counsel address the later

statements by Mr McMillan and Mr Darch to the Administrators which clearly acknowledged that the Shareholders held Company Title.

354 In his affidavit, Mr Dean-Willcocks purported to give evidence both on behalf of himself and Mr Gray. This was unsatisfactory as a matter of form, but no objection appeared to be taken. Counsel for the plaintiffs nevertheless drew attention to the absence of evidence from Mr Gray. Counsel submitted that a *Jones v Dunkel* inference should be drawn against the Administrators as a result.

355 But in order to ground a *Jones v Dunkel* inference, it is not enough simply to point to the absence of a person involved in a transaction. It is necessary to identify specifically the issue on which it is suggested that the witness could have been expected to give evidence and from which an adverse inference should be drawn.

356 It is true that Mr Gray was the partner who actually visited the site, and he had numerous conversations with the parties involved. But the submissions by counsel for the plaintiffs never identified any specific disputed finding to which Mr Gray's evidence might have been relevant. In truth, there was little, if any, dispute about the basic facts so far as the plaintiffs' claim against the Administrators were concerned. It was a question of the appropriate conclusions to be drawn from those facts, and the legal consequences of those conclusions. I reject the *Jones v Dunkel* submission.

*Sale of the Park to CTP and later events*

357 As already noted, on 14 November 2019 the Administrators wrote to the shareholders of CHB advising that they would be recommending the Kelly-Booker DOCA to CHB's creditors, and it was likely to be approved. On the same day, Ms Kelly and Mr Booker sent an email to the shareholders of CHB on the letterhead of HBS. The letter began by stating the shareholders were "already aware" that CHB was in administration as a direct result of conduct of the 2018 proceedings, which had been brought by Mr McMillan and Mr Darch. It went on to say that Ms Kelly and Mr Booker were buying the Park out of the administration through CTP.

358 Ms Kelly and Mr Booker stated that upon the transfer to CTP the Park would operate as a "standard caravan park" and accordingly the *Residential (Land Lease) Communities Act 2013* would apply. They foreshadowed that a disclosure statement and an RSA would be sent to CHB shareholders for them to sign. The rent was expected to be about $190 per week. The letter emphasised that no RSA would be entered into until arrears of rent were paid.

359 This email was followed up on 2 December by a letter on CTP letterhead under the names of Mr Booker and Ms Kelly. The letter stated that CHB shareholders' rights would be terminating and offered an RSA with CTP instead. The rent would be $185 per week. The letter stated that shareholders had two choices: sign, or leave the Park. It also stated that arrears must be paid.

360 The letter went on to say that the "regrettable situation" was the result of the court action by Mr McMillan and Mr Darch. If there had been no court case, there would have been no administration. The letter quoted what Black J had said about possible insolvency and also about the possibility that the claim by Mr McMillan and Mr Darch would fail in its entirety. It did not quote the other observations which his Honour made.

361 On 11 December, Mr Vrisakis wrote to Ms Kelly and Mr Booker advising them on the status of the cabins as fixtures. As we have seen, the constitution had made it clear that the cabins were chattels which belonged to the shareholders. So had the purchase contracts which had referred to cabins. The constitution also purported to make associated works chattels. But Mr Vrisakis gave advice that the situation had changed, or at least would change. He stated:

> Section 42(6) of the Residential (Land Lease) Communities Act 2013 (NSW) (the Act) provides:
>
> > 42(6) A home located on a residential site is not, for any purpose, to be regarded as a fixture, regardless to the manner in which it is attached to the land. This subsection does not apply to a home that is owned by the owner of the community.'
>
> Having regard to the foregoing, the dwellings that have been erected on the allotments of shareholders in CHB are taken to be fixtures and, as such, will be acquired by CTP on completion of its purchase of Coolah Caravan Park from CHB.
>
> However, once a person enters into a site agreement with CTP, the dwelling on the site ceases to be a fixture by force of section 42(6) of the Act and is owned by that person.

362 On the same day, Ms Kelly sent an email on the letterhead of HBS to the shareholders of CHB attaching Mr Vrisakis' advice. She stated that she had been asked "who owns my cabin". She referred to the advice, and stated that it was important that the shareholders should "understand your legal position".

363 The email also stated that CTP intended to sell the Park on to another purchaser. The sale would be on the basis that that purchaser would take on any RSAs into which CTP had entered. If therefore the shareholders had not signed an RSA, they might have no rights.

364 It was also alleged in the statement of claim that Mr Booker was guilty of physical harassment. The evidence in support of this allegation came from Mrs Susan Kelly. She recounted a confrontation with Mr Booker in which he pinned her behind a glass door. She placed this as having occurred on 17 December.

365 Mr Booker denied any wrongdoing. In fact the incident seems to have occurred on 18 November, because on that date Ms Kelly wrote to Mr Dean-Willcocks to tell him of a confrontation in the office between Mr Booker and Mrs Susan Kelly. On Ms Kelly's account, Mrs Susan Kelly was the aggressor, as she was in another incident involving one of the employed managers a day or so later. It is not necessary to resolve the factual dispute as the allegation was not pressed in the closing submissions by counsel for the plaintiffs.

366 Following the completion of the sale and the correspondence about the caveats, on 27 December Mr Vogel wrote to Mr Vrisakis a formal letter before action **[3/70]**. The letter argued that the shareholders had entered into contracts to purchase their sites as land. Mr Vogel also stated that it was a term of their contracts that the shareholders should have ongoing possession and quiet enjoyment. Further, the Park could only be sold with the approval of eighty per cent of shareholders (the last two points evidently relied on provisions of CHB's constitution).

367 The letter continued by stating that the contract was capable of specific performance and the Park was therefore held in trust. It asserted that Ms Kelly and Mr Booker were in breach of their fiduciary duties to CHB and its shareholders. They were also guilty of oppression. The letter proposed a mediation rather than court action.

368 On 13 January, Mr Vogel followed up with a further letter to Mr Vrisakis. The letter made the additional point (perhaps implicit in the letter of 27 December anyway) that the shareholders had contractual rights against CHB flowing from the constitution, as well as their alleged equitable ownership of their sites.

369 Mr Vrisakis responded to Mr Vogel on the following day**.** He was dismissive of Mr Vogel's claims. Mr Vrisakis stated that it was clear CHB had operated under a company title arrangement. Mr Vrisakis in fact quoted passages in Mr Boog's affidavit in the s 247A proceedings back to Mr Vogel which said that very thing. He also referred to similar statements by Mr Darch and Mr McMillan in their affidavits in those proceedings. The transfer to CTP was valid. The current situation was entirely a consequence of actions taken by Mr McMillan and Mr Darch.

370 Mr Vrisakis stated that the best outcome for the shareholders was to take advantage of the protection which would be provided to them under the *Residential Communities Act*. He rejected the idea of mediation, noting that no specific issue had been identified for mediation. He stated that if proceedings were commenced then they would be an abuse of process.

371 On behalf of his clients, Mr Vogel rejected the application of the *Residential Communities Act*. His contention was that the Park was governed by the *Retirement Villages Act 1999*. That Act proceeds on the basis that the relationship between a resident in a retirement village and an owner and operator of the village is governed by what is called a "Village Contract". Mr Vogel's contention was that the purchase agreement, which, as will be recalled, picked up the terms of the constitution, (through the constitution which was picked up through that contract) gave residents a right of occupation. The property had been marketed to "grey nomads" who were retired. Therefore, Mr Vogel contended that the constitution was in effect a village contract and the *Retirement Villages Act* applied. One of the statutory consequences was the original terms of the "village contract" would continue to bind CTP as purchaser.

372 There are some similarities between the *Residential Communities Act* and the *Retirement Villages Act*. Both apparently provide that a VA/RSA, once entered

into with one owner/operator, continues to bind subsequent owner/operators. NCAT also has a power to vary both types of agreements. It would seem however that there are sufficient differences between the two statutory regimes to make it worth arguing about.

373 In January, Mr Vogel filed an initiating application with NCAT to pursue his contention that it was the *Retirement Villages Act* which applied. The application was filed on an urgent basis in the name of Ms Tait. It sought, among other things, determinations that the Park was a retirement village for the purposes of the *Retirement Villages Act* and the village contracts between the shareholders and CHB continued in effect.

374 Shortly afterwards Mr Vogel commenced these proceedings in the names of the first six plaintiffs. The initiating summons sought, among other things, a declaration that the relationship between the parties was, and continued to be, governed by the *Retirement Villages Act*. This was in substance part of the relief sought by Ms Tait in her NCAT proceedings. On 25 February, Mr Vrisakis applied by way of notice of motion to Emmett AJA for an order staying the application to NCAT on the ground of multiplicity of proceedings.

375 The application came before Emmett AJA on 20 February. His Honour considered that an application for a stay of the NCAT application should be made to NCAT (perhaps because NCAT arguably had exclusive jurisdiction). He therefore dismissed Mr Vrisakis' motion.

376 On the following day Mr Vrisakis wrote to NCAT with a copy to Mr Vogel. He stated that Emmett AJA had "held" that a stay application should be made to NCAT. In effect, he asked NCAT to treat the letter as an application for a stay.

377 Meanwhile, disputes had arisen between Ms Kelly and some of the former CHB shareholders about the payment of rent. One of the shareholders in arrears was Mr Rex Roberts, an elderly resident whose daughter, Ms Sharon Knight, acted as his attorney.

378 On 28 February, Ms Kelly sent an email on the letterhead of CTP to Mr Roberts and Ms Knight. Ms Kelly referred to the undertaking which had been given by the plaintiffs. Mr Roberts was not, and is not, a plaintiff in the proceedings. She

stated that the undertaking did not in terms apply to Mr Roberts but the "principle" that shareholders should pay the amount due under the new RSA had been "accepted by the court". The letter asked Mr Roberts and Ms Knight to arrange payment accordingly. If the plaintiffs were successful in obtaining a refund as a result of the proceedings, Mr Roberts would likewise receive a refund.

379 Ms Knight seems to have seen this letter as a form of harassment of her father. She told Mr Vogel about it. On 29 February Mr Vogel wrote to Mr Vrisakis. He accused Mr Vrisakis of having made "untrue" statements and committed a contempt of court. The alleged untrue statements were the statement in the letter of 21 February that the court had held that an application for a stay of the NCAT application should be made to NCAT, and the statement in the letter of 28 February that the "principle" of shareholders paying the amount due under CTP's RSA had been "accepted by the court". Mr Vogel asked Mr Vrisakis to issue correcting emails. He stated that otherwise he would bring the matter to the attention of the Court and NCAT.

380 No response to this letter from Mr Vrisakis appears to be in evidence. Nor does it seem that the issue was taken up with this Court or NCAT. Nor it seems is there any evidence about whether Mr Roberts complied with Ms Kelly's request.

381 The Kelly-Booker DOCA provided that, upon completion of the statutory administration, the Directors were entitled to defend the s 247A proceedings and Ms Robertson's District Court claim. But Ms Kelly and Mr Booker showed no appetite for reinstating the s 247A proceedings. On 17 March 2020 Mr Vrisakis wrote to Mr Vogel proposing that the proceedings be dismissed with no order as to costs. Mr Vogel responded that CHB should pay his clients' costs on an indemnity basis. But in the end he did not pursue this and the proceedings were dismissed by consent, with no order as to costs, in April 2020. The Robertson proceedings also apparently were not pursued.

382 As I have mentioned, Ms Tait was initially the only applicant in the proceedings which were commenced in NCAT in January 2015. Later, fourteen other applicants, who are also plaintiffs in these proceedings, were joined. Three of

the plaintiffs in these proceedings have not joined as applicants in Ms Tait's proceedings. These are Ms Axtell and Mr and Mrs Townsend.

383 Ms Tait's application was dismissed in May 2020. But an appeal was allowed in July and the proceedings were relisted before NCAT. They eventually came on for hearing last year (see below).

384 Meanwhile, Mr and Mrs McMillan had made a separate application to NCAT. This application concerned the RSA which had been provided by CTP for the McMillans to sign. The McMillans had not in fact signed the RSA; in fact they, through their participation in Ms Tait's proceedings, were contending that it was the *Retirement Villages Act*, rather than the *Residential Communities Act*, which applied. Nevertheless they made an application to NCAT complaining, among other things, that the proposed RSA contained a non-disparagement clause which was too broad.

385 At first instance in NCAT, this part of the McMillans' application was successful. The Tribunal Member made an order purporting to require CTP to enter into an RSA with the McMillans which did not contain the offending provision.

386 CTP appealed. The Tribunal's Appeal Panel handed down its decision in March 2021: [2021] NSWCATAP 73. One of the issues raised in the application of the *Residential Communities Act* was whether the cabin was or was not a fixture. At [61]-[67] the Panel found that: there was no evidence that the McMillans' cabin was in fact a fixture; even if the cabin was at law a fixture, it might, based on the terms of the McMillans' purchase agreement, be a chattel in equity; the McMillans had purchased, and owned, the cabin before the purchase of the Park to CTP; and the purchase contract did not convey ownership of the cabin to CTP. The Appeal Panel concluded that the CHB constitution, as picked up by the McMillans' purchase agreement, was an RSA binding on CHB. By statute it was therefore binding on CTP.

387 This however did not necessarily mean that the first instance decision concerning the proposed new RSA was correct. The Tribunal had power to vary an RSA but only where an RSA had actually been entered into and it had contractual effect. As a result, the orders made at first instance were set aside for want of jurisdiction.

388 The decision following the first instance re-hearing of the Tait proceedings was handed down in July 2021. The Tribunal Member was satisfied that the *Retirement Villages Act* applied to those parts of the Park occupied by applicants who held company title shares in CHB. The constitution and by-laws were a "village contract". The village contract was enforceable against HBS. The Member also adopted as correct the earlier statement from the Appeal Panel about the status of the cabins as easements. The Member directed CTP/HBS as owner/operator to perform their obligations under that RSA.

389 CTP and HBS have appealed. The appeal has not yet been decided.

**Equitable proprietary interests in sites**

390 The plaintiffs propound their proprietary claims in three ways. First, they contend that under their purchase contracts they bought the sites themselves as well as the shares in CHB relating to those sites. They seek specific performance. The second and third claims are equitable. These are claims to have the Court recognise that the plaintiffs have equitable ownership of the sites by way of resulting trust (purchases 1 and 2 only) or proprietary estoppel.

391 The proprietary claims are framed in the first instance against CHB, the owner of the Park at the time of the plaintiffs' purchases. The plaintiffs contend that, if their claims are established against CHB, this gave them an equitable interest in the sites which can be enforced against CTP as purchaser of the Park.

*Specific performance*

392 As already mentioned, the written agreements for purchases 1 and 2 were formal deeds, in each case styled "share sale agreement". Clearly, they did not involve purchase of the relevant Allotments, considered as pieces of land. As I understood him, counsel for the plaintiffs accepted this.

393 But counsel contended that the wording of the other agreements was such as to make them contracts for the sale of the relevant shares in CHB and the associated sites as well. The strength of this contention varies according to the particular form of the agreement in question.

394 **CHB letter agreements**: From the plaintiffs' point of view the most favourable form of CHB letter agreement was that used for purchases 6, 7 and 8. I will

consider that form of agreement first, by reference to the written agreement for purchase 6.

395 The agreement was described as an agreement between Mr and Mrs Tait as "Purchaser" and CHB as "Vendor". The relevant provisions were (emphasis added; I have also added paragraph numbers for ease of reference):

> **It is hereby agreed that**:
>
> [1] ***The Purchaser will purchase, and the Vendor will sell, Allotment 33*** Cockatoo Circuit, at Coolah Home Base, 38 Cunningham Street, Coolah NSW 2843.
>
> [2] Allotment 33 has a total size of approximately 272 square metres. (17 x 16 metres)
>
> [3] The purchase price is twenty three thousand one hundred and twenty dollars ($23,120.00)
>
> [4] Deposit ten thousand dollars ($10,000.00) on the signing of this agreement. ***The balance of the land*** thirteen thousand one hundred and twenty dollars ($13,120.00) is to be paid on or about the 5th April 2013.
>
> [5] Home Base Solutions Pty Ltd is to construct a cabin known as "The Banksee" on allotment 33. Final plans are to be approved by the purchasers. It is planned the construction will commence on or about the last week in May 2013.
>
> [6] The purchase price of the cabin is not to exceed seventy-six thousand eight hundred and eighty dollars ($76,880.00) without the written approval of the Purchasers.
>
> …
>
> [8] The purchase price includes:- split system air conditioner (1.5hp); Rheem gas hot water system; shower; toilet; standard bathroom vanity; cupboard over vanity; bamboo batten type flooring in bedrooms, lounge, kitchen; tiled bathroom; laundry tub; washing machine plumbing; kitchen cupboards; single sink and cooking hood exhaust.
>
> [9] The purchase price does not include any variations made by the purchaser to the original plan or inclusions. The purchase price does not include gas oven/stove; electrical appliances e.g. refrigerators, dishwashers; furnishings; driveways or gardens.
>
> …
>
> [12] ***The purchase price includes one A Class Share, Number A.33, in Coolah Home Base Pty Ltd, for Allotment 33***. A separate share certificate will be issued within 14 days of final payment.
>
> [13] ***The Constitution and the By-Laws of Coolah Home Base Pty Ltd apply to the on-going possession of Allotment 33***.

396 Counsel for the plaintiffs emphasised that the subject matter of the purchase was identified in [1] as the "Allotment". That term was defined in the

constitution of CHB as meaning the land itself; the reference to the "balance of the land" in [4] was consistent with this. Counsel accepted that the purchase price was said in [12] to "include" the share in CHB corresponding with the Allotment but argued that this was quite consistent with the purchase covering land as well.

397 There are however countervailing considerations, as counsel for the Kelly-Booker interests pointed out. Counsel identified three in particular.

398 First, the agreement did not specify the precise location and dimensions of the Allotment. Nor did it contain any provisions for completing the conveyance or requiring the delivery of instruments of transfer and documents of title. Such provisions are basic elements for any contract for the sale of land in this State.

399 Counsel's second point was that the Allotment represented a small plot of land which was isolated and landlocked within the Park. There was no provision for the Purchaser to have any right of access from outside the Park to the plot being "purchased", or between that plot and the common areas of the Park. Counsel submitted that a proprietary interest in the plot would have been so lacking in usefulness that an intention to provide for the creation of such an interest should not be attributed to the parties.

400 A related point was that subdivision so as to create separate titles for the Allotments would have been impossible from a planning point of view. Counsel for the plaintiffs conceded as much. Realistically, the only way for the arrangement to work was as a company title one (or if the whole property were converted to strata title, a possibility expressly recognised in the original version of CHB's constitution).

401 The third, and most important, point was that at [13] the agreement specifically provided that the constitution of CHB and the by-laws were to apply to ownership of the "Allotment". This was not consistent with absolute ownership. For example, the constitution permitted the Park, including all the Allotments, to be sold to a third party with the consent of 80% of the shareholders.

402 Counsel for the Kelly-Booker parties also relied on the Court of Appeal decision in *National Australia Bank Ltd v Clowes* [2013] NSWCA 179. In that case

borrowers granted a purported first registered mortgage over a company title flat. The Court held that this was legally nonsensical and the grant should be read as a grant of security over the borrowers' shares in the company which held the legal title: see per Leeming JA, speaking for the Court, at [34]-[39].

403 Counsel for the plaintiffs had no real answer to these arguments. His reply submissions said only that a contract for sale of both the share in a company title arrangement and the land itself would be permissible even if "unusual". But counsel was unable to point to any precedent for such an arrangement at all. That is not surprising. It would be legally incoherent.

404 The letter agreement for purchase 9 was treated by the plaintiffs as being in the same category as the agreements for purchases 6, 7 and 8. But that agreement contained the following instead of [2]-[4] in the version I have just discussed (emphasis added):

> Allotment 39 has a total size of approximately 119 square metres and has a cabin on it, known as Cabin One [1]. The purchase price is Fifty Eight Thousand Dollars ($58,000.00).
>
> ***The Allotment is sold as a share in [CHB]***. The allotment is sold as is but does not include, linen, crockery, utensils and other items used for tourist tenants. The purchase includes the installation of a new split system air-conditioner and gravel driveway on the southern side.

405 This version expressly stated that the Allotment was sold "as a share in" CHB. This made explicit what I have already concluded was implicit in the letter agreements for purchases 6, 7 and 8.

406 The same conclusion extends *a fortiori* to purchases 10, 11, 12, 13 and 14, where the subject matter of the purchase was identified as "the share for Allotment [X]". The conclusion also extends to purchase 5. In that case the subject matter was identified as a kit home, and there was no reference to the purchase of the Allotment at all.

407 **Purchases involving already-issued shares**: These are purchases 15 (by Mr Darch) and 16 (by Mr & Mrs Townsend).

408 The written agreement for purchase 16 was described as an agreement between Mr and Mrs Townsend as "Purchasers"; HBS; and Lorraine Faye

Parsell (the existing owner of the share) as "Vendor". It provided (emphasis added):

> ***The Purchasers have agreed to purchase [Allotment 13] from the Vendor. The purchase includes the buildings on the Allotment, existing furniture and fittings and the share (A.13) in [CHB].*** Allotment 13 has a size of 14 x 13 metres equalling 182 square metres.
>
> ***The Vendor has agreed to sell the share*** for the sum of [$80,000.00]. The share transfer will be completed within 28 days of the Vendor notifying the Directors of CHB, in writing, that she has received cleared funds, for the total sale value, to her bank account. …
>
> The Purchasers acknowledge that the CHB site fee is currently [$56.00] per week and is payable fortnightly in advance by direct deposit to [HBS]. The site fee is subject to increases as per the CHB's Constitution and is payable from the date of this agreement.
>
> The Purchaser acknowledges that the allotment and/or building can only be sublet in an exclusive arrangement with management.
>
> The Purchaser acknowledges that they are buying in an "as is" condition and that no warranty exists.
>
> The Purchaser agrees to complete certain repairs and maintenance to the building within 12 months of the date of this agreement or in a time frame agreed between the Purchaser and HBS. …
>
> …
>
> The Purchasers acknowledge that any stamp duty payable to the NSW Government now or the future is the responsibility of the Purchasers.
>
> The Purchasers acknowledge that the Constitution of CHB, Section 5.2, confers on its Directors the absolute discretion to accept or decline to register any transfer of shares. The Directors will accept the Purchaser as a shareholder upon the signing of this agreement.
>
> ***The Purchasers acknowledges that the Constitution and the By-laws of CHB apply to the on-going possession of Allotment 13.*** Copies of the Constitution and By-laws have been emailed to the Purchasers.

409 CHB was not named as a party. The agreement nevertheless stated that CHB's directors would accept the Purchaser as a shareholder. CHB however undertook no obligations to the Purchaser in connection with the Allotment.

410 In his reply submissions, counsel for the plaintiffs relied on the Townsends' evidence of alleged representations by Ms Kelly to the effect that they were purchasing land. I will address those representations below. But the point for present purposes is that any liability of those statements would not be a contractual one.

411 In my view the agreement, on its proper interpretation, was relevantly nothing more than an agreement by the Townsends to buy a share in CHB from Ms Parsell, the existing owner of that share. Although the subject matter of the agreement is an "Allotment", in the context that can only mean the share associated with the site in question. Ms Parsell as vendor was not the owner of the Park or any part of it. The conclusion that I have reached for the other agreements, namely that they did not involve any obligation to convey the relevant allotments as land, applies to purchase 16 *a fortiori*.

412 The written agreement for purchase 15 was on the letterhead of RC. The parties to the agreement were RC (the existing shareholder) as Vendor and Mr Darch as Purchaser. CHB was not named as a party. The same conclusion applies as for purchase 16. Purchase 15 did not include any entitlement to the relevant Allotment as a piece of land.

413 **Purchases where there is no written agreement in evidence**: These are purchases 4 (by Ms Axtell) and 3 (by Ms Vale).

414 On Ms Axtell's evidence, a written agreement was signed for her purchase but has been lost. There was no evidence of its terms. But there is no reason to think that they were any more favourable to Ms Axtell for present purposes than the written agreements which are in evidence, and she bears the onus of demonstrating what the terms of the contract were.

415 Counsel for the plaintiffs relied on evidence from Ms Axtell about representations allegedly made by Ms Kelly. But this misses the point. That evidence from Ms Axtell was not evidence of the terms of the written agreement itself.

416 On Ms Vale's evidence, her contract may have been entirely oral. Again the evidence of pre-contractual negotiations does not establish what the terms of that contract were. Ms Vale has failed to prove to my satisfaction that those terms provided for the sale of her Allotment.

417 **Specific performance**: I have already referred to the impossibility, from a planning point of view, of subdividing the Allotments into separate pieces of land. Counsel for the Kelly-Booker parties submitted that, as a result, even if

there had been a contractual obligation to transfer the Allotments to the plaintiffs, specific performance could not have been obtained. Counsel for the plaintiffs made no reply to this submission and I accept it.

*Resulting trust*

418 Resulting trust claims were made only for purchases 1 and 2, which took place before settlement of the sale of the Park to CHB. The argument by counsel for the plaintiffs was that the money from the purchases (or at least from purchase 1, the only one mentioned in the plaintiffs' reply submissions) was used to pay for the land, giving rise to a resulting trust.

419 The fundamental difficulty with this contention is that it is inconsistent with the terms of the purchase agreements. Clause 3 provided that the amount paid was for the purchase of a share in CHB (which the purchaser in due course received). Clause 3.1 provided:

> The purchaser acknowledges that funds paid for the Shares may be used at completion as funds toward the purchase price of the Caravan Park and will be paid into the Trust Account of the Vendors Solicitor (the details of which form schedule 2) until settlement of the purchase of the Caravan Park when they may be used for that said purpose.

420 The clear purpose of this clause was to empower CHB to use the money it received to buy the land without that giving rise to any proprietary obligation. In the face of this express provision there is no room for the implication, or assumption, that the legal interest in the land was to be held for the benefit of the parties who provided the money. The resulting trust claims fail.

*Proprietary estoppel*

421 **Alleged promises and detrimental reliance**: It is common ground that the plaintiffs cannot succeed in establishing a proprietary estoppel without proving that:

(1) there were promises or representations by CHB to the plaintiffs that they would receive a proprietary interest in the Allotments; and

(2) induced by those promises or representations, the plaintiffs acted to their detriment by way of expenditure of money on the Allotments or otherwise.

I have already concluded that neither of these elements has been established on the evidence: see [188] and [190] above.

422 **Relief**: I have already pointed out that the subdivision of the Allotments out of the rest of the property is not feasible. I am not sure that in the end counsel for the plaintiffs disputed this.

423 But where an entitlement of interest to land by way of proprietary estoppel has been established, difficulty in defining the interest promised will not necessarily defeat the claim. The Court may, in a proper case, make an order which gives effect to the substance of the promise: Heydon, J D, Leeming, M J and Turner, P G, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies* (5th ed, 2015, LexisNexis Butterworths) at [17-110].

424 In the present case counsel for the plaintiffs suggested that this could be done by decreeing what he described as a proportional joint ownership of the Park in favour of the plaintiffs. If a particular plaintiff's Allotment represented three per cent of the area of the Park as a whole, the decree would confer on that plaintiff joint ownership of the Park as to three per cent.

425 An obvious difficulty with this would be that joint tenancy, even in a minority percentage, would give each plaintiff rights over the Park as a whole. Those rights would extend to all of the other Allotments, and also to the common property, although not so as to exclude other co-owners. It would be a recipe for argument and dissension. I also think that it would not in substance be anything like the same interest as the ownership of the Allotment which was allegedly promised. But there would be other difficulties, as counsel for the Kelly-Booker interests pointed out.

426 One practical problem would be that giving the plaintiffs joint tenancies would allow any of them to apply to have the Park sold using the trustee for sale procedure under the *Conveyancing Act 1919*, s 66G. A co-owner is usually entitled to such an order virtually as of right: *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [36]-[38]. This would, on the face of it, allow an individual plaintiff to force the sale of the whole Park effectively at will.

427 Even more fundamentally, counsel pointed out that there are owners of other shares in CHB who are not plaintiffs and have not been joined as parties to these proceedings. Counsel submitted that they would be affected by the relief sought. As they have not been joined, it was not open to the Court to grant

such relief: *John Alexander's Clubs Pty Ltd v White City Tennis Club* (2010) 241 CLR 1 at [131]-[133].

428 Counsel for the plaintiffs did not accept that there were any real difficulties with the proposal. Counsel pointed out that by the terms of the CHB constitution (and the written purchase agreements, in the case of fourteen of the purchases), members of the company were given exclusive use of their Allotments. Counsel also pointed to the provision in the constitution requiring consent by eighty per cent of the shareholders for any sale of the property as an answer to the apparent s 66G problem.

429 These are curious arguments coming from plaintiffs who are at pains to contend that they were promised ownership of land, not merely shares in a company owning land. Be that as it may, I do not think that they do solve the problems identified by counsel for the Kelly-Booker interests.

430 In the first place, even if the rights of the non-party members of CHB over their Allotments were protected by the constitution of CHB, this would not stop the plaintiffs, if successful, exercising joint ownership rights over the common property. More fundamentally, as the facts of this case themselves illustrate, CHB's constitution does not bind an administrator (or a liquidator). The constitution could also be changed by resolution passed by a suitable majority.

431 Furthermore, I think that the grant of the relief sought by the plaintiffs would clearly, in a practical sense, affect the rights and interests of the non-plaintiff shareholders of CHB. If the plaintiffs were to obtain the relief they seek, then it would create an unfair situation where they had legal interests in the non-plaintiffs' Allotments but the non-plaintiff members had no corresponding interests in the plaintiffs' Allotments.

432 The practical problem with subdividing the Park so as to decree the transfer of the Allotments to the plaintiffs was raised before the trial. Only after that did counsel for the plaintiffs articulate the claim for a joint tenancy. In my view by then it was far too late. The non-plaintiff members of CHB have been given no opportunity to respond to the relief now claimed, or to seek equivalent relief in their own interests.

433 For these reasons, even if I had found in favour of the plaintiffs on proprietary estoppel, relief would have been limited to equitable compensation. In the light of the other conclusions I have reached, there is no need for me to go on to consider whether the plaintiffs have established any relevant loss, and how it would be quantified.

*Enforcement against CTP*

434 The steps in the plaintiffs' claim against CTP were as follows. First, the plaintiffs were entitled to be recognised in equity as the owners of the Allotments as against CHB. Second, that made CHB a trustee, or in effect a trustee, for the plaintiffs. Third, CTP, through Ms Kelly and Mr Booker, was aware of the plaintiffs' entitlements, and was liable as a recipient of trust property on that basis.

435 In his submissions, counsel for the Kelly-Booker parties submitted that even if the purchase contracts gave the plaintiffs rights over the Allotments against CHB, those rights could not now be enforced against CTP as the new registered proprietor. This contention was disputed by counsel for the plaintiffs in reply.

436 I have rejected the first step in the plaintiffs' argument. The claim against CTP therefore cannot succeed. It is unnecessary to consider the question of indefeasibility.

**Rescission of transfer of Park to CTP**

437 In their statement of claim, the plaintiffs alleged that "by causing the transfer of all the assets and undertaking" of CHB to CTP, the Directors breached their duties as directors of CHB. Claims were made both under statute and in equity. The allegation was that the transfer was part of a wider plan designed to move the assets out of CHB and into CTP, as a vehicle to be controlled by the Directors.

438 In his written submissions, counsel for the plaintiffs acknowledged that the Directors' duties would usually be owed exclusively to CHB (I deal with the directors' duties to CHB under oppression, below). But counsel contended that in the present case the Directors' conduct was a breach of fiduciary duties owed directly to the plaintiffs as shareholders of CHB.

439 In response, counsel for the Kelly-Booker parties submitted that the claim was misconceived. The Administrators, not the Directors, signed the contract with CTP on CHB's behalf. Even if the transfer of the Park to CTP could be said to have resulted indirectly from actions of Ms Kelly and Mr Booker, they could not be made liable for breach of duty for things they did not themselves do.

440 Furthermore, the transfer agreement was entered into pursuant to the terms of the Kelly-Booker DOCA. It could therefore not be rescinded unless the Kelly-Booker DOCA itself was first set aside. Again, the plaintiffs had not sought this.

441 Finally, counsel pointed out that CTP had paid $430,000 plus GST under the agreement for the purchase of the Park. Rescission would not be available unless CHB was prepared to do equity by returning the purchase money. Clearly CHB was not in a financial position to do so, and the plaintiffs had not offered to put the money up themselves.

442 Counsel also pointed out that a direct fiduciary duty between the Directors and the plaintiffs as CHB shareholders had never been pleaded. It was therefore not available to the plaintiffs.

443 There was no reply of substance to these submissions. I accept them. I would add that the cases in which directors have been found to owe fiduciary duties to shareholders have involved transactions by the shareholders such as the sale of their shares. That is not this case, where the conduct complained of is the sale by the company of an asset belonging to it. This claim by the plaintiffs fails.

**Status of cabins as chattels**

444 The plaintiffs seek a declaration that:

> The shareholders' homes situated on the [Park] are not for any purpose to be regarded as a [sic] fixture, regardless of the manner in which it [sic] is attached to the land.

445 Counsel for the plaintiffs submitted that the declaration should be made because it reflected the "contractual and legal position". In this regard, counsel relied on:

(1) the provisions in the CHB constitution that any dwellings etc on a residential site were the property of the shareholder (see [140] above); and

(2) clause 51.3 of the contract for the purchase of the Park by CTP, which excluded "shareholder improvements" (see [314] above).

446 It is not in dispute that, as between the plaintiffs and CHB, the plaintiffs were the owners of the cabins erected on their sites (and other associated improvements). Nor is it in dispute that CTP's purchase contract excluded shareholder improvements. Counsel for the Kelly-Booker parties expressly stated that none of the defendants claim any interest in any building or structure erected on any of the sites occupied by the plaintiffs.

447 Counsel for the Kelly-Booker parties submitted that in these circumstances there was no occasion for the grant of a declaration. Furthermore, counsel submitted that the status of the improvements as chattels had been, subject to appeal, determined by NCAT. This Court therefore had no jurisdiction: *Civil and Administrative Tribunal Act 2013*, Sch 4, Cl 5(3).

448 I am not sure about this latter point. It may well be correct that the question of the application of the *Retirement Villages Act* to the Park, and whether as a result CTP is bound by the terms of the CHB constitution as a "village contract", which was determined by the Tribunal in July last year in the *Tait* proceedings, is, at least so far as the fifteen plaintiffs to those proceedings are concerned, exclusively a matter for NCAT. But the observations made by the Tribunal Member (adopting the earlier analysis of the Appeal Panel in the NCAT proceedings brought by Mr McMillan), does not seem to me to fall within that area. I do not think that the determination at general law of the status of the cabins as fixtures or chattels, or the determination of the legal and equitable rights the parties may have in those cabins, is within NCAT's exclusive jurisdiction.

449 But that does not mean the declaration sought on the plaintiffs' behalf should be made. The form of the declaration is that the shareholders' "homes" are not "for any purpose" fixtures. As between the parties, the plaintiffs may be the owners of the cabins and associated works. This may entitle the plaintiffs to treat the cabins and associated works as chattels and to remove them. But that

is not at all the same thing as saying that they are, at law, chattels. So long as they are (or may be) attached to the land, they may so far as third parties are concerned still be fixtures.

450 In deciding whether the cabins and associated structures are indeed fixtures at law, the critical questions are the degree of their attachment to the land and the intention with which they were placed on, or attached to, it. There is no evidence focusing on these questions. Furthermore, the declaration sought is that the improvements are “not to be regarded as fixtures” irrespective of the degree of annexation to the land. The Court should not declare that they should not be “regarded as” fixtures even if they are in fact fixtures.

451 In my view, there is insufficient evidence to determine the status of the cabins, or associated structures, as fixtures or chattels at law. Nor is there any demonstrated utility in doing so. The claim for a declaration must be refused.

**Shareholder oppression**

452 There was a great deal of debate between the parties about the proper scope of the plaintiffs’ pleaded case of oppression. In closing submissions, counsel for the Kelly-Booker parties identified no less than thirteen allegations of oppressive conduct made by counsel for the plaintiffs which, it was said, did not fall within the pleadings. For the moment I propose to defer any discussion of the pleadings and address the broad thrust of the plaintiffs’ case as presented by counsel.

453 CA s 232 provides:

> **Grounds for Court order**
>
> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or
>
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
>
> is either:
>
> (d) contrary to the interests of the members as a whole; or
>
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

> For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

454 Subparagraph (a) speaks of "the conduct of" the company's affairs being oppressive. It refers to a state of affairs continuing over a period of time. It is also apt to cover a case where a conjunction of factors, not necessarily being oppressive in themselves, creates an oppressive effect. Subparagraph (b), on the other hand, is directed to specific acts or omissions (actual or threatened) that themselves are, or would be, oppressive.

455 The same dichotomy can be seen in the orders which the Court is empowered to make under s 233. Some of those orders allow the Court to alter the way in which the company is controlled or managed. Others are, or may be, directed to a single act or omission, or transaction, which is oppressive in nature.

456 What follows reflects the dichotomy. I will first consider the general questions: whether the conduct of CHB's affairs is, or was at relevant times, oppressive, and the relief affecting the control or management of CHB which might flow from such a finding. I will then consider complaints about specific transactions to determine whether any of them, standing on its own, was or is oppressive, and the availability of any relief sought by the plaintiffs which is directed specifically to that transaction.

457 The specific matters fall under eight headings:

(1) the management arrangements with HBS;

(2) the proceeds of the "sale" of CHB shares;

(3) profits by the Directors on the purchase and re-sale of shares;

(4) the April 2014 share issue;

(5) the denial of the plaintiffs' requests for documents;

(6) the appointment of statutory administrators to CHB;

(7) the sale of the Park to CTP; and

(8) the management right conferred by CHB's ordinary shares.

458 Examples of orders addressed to a single oppressive transaction are orders under s 233(1)(f) and (g) for the company, or a member of the company in its name and on its behalf, to bring specified proceedings. The power to make orders of this type in cases of oppression pre-dates the statutory derivative

action regime (CA ss 236-242), and must now be exercised with an eye to the restrictions on the court's power to authorise such derivative actions: *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 at [199] per Basten JA. But orders for the bringing of proceedings by or on behalf of the company can still be made in proper cases. Also, if satisfied that a party to the proceedings is liable to the company, the court can make a direct order for an account or compensation in the company's favour: *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97 at [138], [527]-[528], [698]; *LPD Holdings (Aust) Pty Ltd v Phillips* (2013) 281 FLR 227 at [44]-[53].

459 In the present case, no order was sought for the bringing of proceedings by or on behalf of CHB against the Directors or their associated companies. But counsel for the plaintiffs did seek direct orders for relief in CHB's favour, which I consider under each heading below.

*Conduct of CHB's affairs generally*

460 As we have seen, right up until the end of the statutory administration, the Directors continued to hold the ordinary shares which gave them control over the operations of CHB and its unissued share capital. They also held a voting majority as a result of the April 2014 share issue. Each of these on its own was sufficient to give the Directors effective control over CHB's affairs. Furthermore, the effect of the management agreement with HBS (or at least the way in which it was interpreted by the Directors) meant that all of CHB's income and expenditure transactions were controlled by HBS.

461 As I have described, CHB's financial statements contained no details of income or expenditure, and only the broadest summary figures in the balance sheet. Some breakdowns of the balance sheet figures were provided in Ms Kelly's AGM reports. At the 2015 and 2016 AGMs, Ms Kelly also provided some details of site fees received and expenditure. But overall the information was limited.

462 The revelation that HBS/RC were not paying site fees illustrates the effect of the Directors' control over the flow of information. It had apparently never been disclosed to the shareholders. Mr McMillan and Mr Darch had to work it out, incidentally, from information provided at the 2016 AGM.

463 In the end, the Directors provided only such information as they wished to provide. In 2017 and 2018, by which point the Directors were in open dispute with the Reform Group, the modest level of financial information provided seems to have been further reduced.

464 It is true that the 2017 AGM was chaired by Mr Vrisakis. But although he was presented as being independent, he evidently did not see it as his role to help the other shareholders hold Ms Kelly and Mr Booker to account. In hindsight, his "Dorothy Dix" questions to Ms Kelly and his gratuitous statement that the Directors appeared to be acting in the best interests of CHB wear an unfortunate appearance. It is very regrettable that he lent himself to being used by Ms Kelly and Mr Booker in this way.

465 I discuss below whether the arrangements which gave the Directors this control over CHB's affairs were legitimate. But even if they were, control which is lawful may still be exercised oppressively. That is one of the reasons why the remedy exists.

466 In my view the evidence shows that the Directors were determined to maintain their control and to monopolise decision making concerning the affairs of CHB. From the first AGM the Directors warned "troublemakers" that they would not be tolerated. Their attitude was summed up by Mr Booker's response to the October 2017 discussion paper about the future of CHB as a home base: "start your own because we will not be changing ours".

467 The Directors' response to the requests for information about CHB's finances tells the same story. The Directors did not just resist the disclosure of any details of CHB's income and expenditure. They would not even disclose the terms of the management agreement with HBS. Again, the Directors' attitude was summed up by Ms Kelly's response to the October 2017 discussion paper, in which she insisted in absolute terms that shareholders had no right to any of this information.

468 I agree with counsel for the plaintiffs that Ms Kelly's evidence about the proposal to buy back the shares issued to HBS in April 2014 for $6,000 each is revealing. When Ms Kelly said that she and Mr Booker were "business people" she was acknowledging that they judged the proposal by reference to how it

would further their own financial interests. They did not ask whether the price was justified from CHB's point of view. Seemingly, from what Ms Kelly said, that question had still not even occurred to her by the time the trial took place.

469 The Directors presented their defence of the s 247A proceedings as resistance to an attempt by the dissident shareholders to seize control of CHB. This was a misrepresentation of the objectives of the Reform Group. A fair reading of the March 2017 newsletter and the October 2017 discussion paper was that the Reform Group was seeking to remove the Directors' absolute control over CHB. The Directors should not have seen this as threatening or unreasonable when they themselves had indicated that their plan was to step back once the home base was up and running and no longer needed their financial support.

470 Also revealing is the decision by the Directors to charge fees for time spent on the s 247A proceedings, and for incidental expenses. Under CHB's constitution, the payment of directors' fees was subject to limits imposed by the shareholders in general meeting: see clause 7.3(a), quoted at [122] above. But the shareholders never had an opportunity to try to impose any such limits. The fees were imposed retrospectively in August 2019, never having been foreshadowed at any earlier AGM.

471 Similar observations apply to the charging of interest on the legal fees associated with the s 247A proceedings and on the balance of the HBS loan account. These charges were applied retrospectively and without any consultation with, or prior notice to, the shareholders.

472 The way in which the Directors ultimately decided to put CHB into voluntary administration was also telling. In his response to the October 2017 discussion paper, Mr Booker had specifically said that CHB (implicitly, the Directors) would protect the interests of the non-dissident shareholders from the financial effects of the proceedings foreshadowed by the Reform Group. But no notice was given of the Directors' decision to cease funding the proceedings in August 2019, nor did the Directors make any attempt to raise money from the shareholders to continue the defence which was supposedly so vital to their interests. Instead CHB was placed in administration without any warning at all.

473 No doubt the Directors had taken financial risks in establishing CHB. But other shareholders had invested substantial sums, and performed volunteer work, as well. Although the Directors emerged with a majority of the shares, more than half of the issued share capital appears to have been contributed by others. Even if it had been otherwise, that would not have justified the effective disenfranchisement of the other shareholders.

474 In my view it is relevant that CHB was not, or at least was not primarily, a trading venture. Its main function (its sole function, according to the Directors) was to manage the Park on a company title, non-profit, basis. The attitude of the Directors was not consistent with that sort of co-operative venture. The other shareholders were left without the ability to exercise any practical influence on CHB's affairs. There were no mechanisms to protect their interests when those interests clashed with those of the Directors.

475 In these circumstances, I am satisfied that the conduct of the affairs of CHB under the management of the Directors, at least from the time when serious issues about governance were raised in late 2016, was oppressive within the meaning of 232.

476 Counsel for the Kelly-Booker parties submitted that, even if so, the Administrators' appointment altered the position. The control that Ms Kelly and Mr Booker had was removed. The very fact that the Receivers investigated the Directors' dealings between HBS and CHB demonstrated that fact. Once CHB was placed in administration, in counsel's submission, the oppression ceased. The Park had also since been sold. Counsel submitted that even if (as I have found) there was past oppressive conduct by the Directors, no relief was now available.

477 Historically, the statutory remedy of oppression emerged as an alternative to liquidation. As Powell J said in *Re Dernacourt Investments Pty Ltd* (1990 20 NSWLR 588 at 619-620), its purpose was to provide a remedy for unfair conduct in the management of companies where liquidation might prove to be a cure worse than the original disease. Against this background, there has been debate in the authorities about the extent of the court's power to grant

relief where the oppressive conduct has ceased by the time the proceedings are commenced, or by the time the court comes to make orders.

478 The issue reached the High Court in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304. The case concerned a company ("Healthy Water") which had previously been wholly owned by the defendant, Mr Campbell. A half share in Healthy Water was bought by a Mr Weeks, through his company Backoffice. The parties rapidly fell out and Mr Campbell excluded Mr Weeks from involvement in Healthy Water's affairs.

479 Mr Weeks, through Backoffice, brought proceedings for winding up and other relief against oppression. After the proceedings had been brought, Healthy Water's financial position declined. Both parties agreed to the appointment of a provisional liquidator who thereupon sold the business. The proceeds went towards paying Healthy Water's creditors and the liquidator's fees, leaving it a shell.

480 It was found at first instance that Mr Campbell had behaved oppressively. An order was made requiring him to buy Backoffice's share at the value it had when Backoffice acquired it. But the order was set aside by the High Court. Arguably the fact that oppressive conduct had ceased did not necessarily deprive the court of power to make an order to relieve against ongoing consequences of earlier oppression. This did not however need to be decided, because:

> Given that there was no continuing oppression, and given that Healthy Water had no business and no assets, and was but an empty shell, no order for compulsory purchase of Backoffice's share should have been made.

481 Counsel for the Kelly-Booker parties argued that this case was the same. I accept that the Directors' oppression ceased with the appointment of the Administrators on 21 August 2019. But that does not necessarily mean that the effect of prior oppressive conduct also ceased. Nor has the sale of the Park left CHB as a completely empty shell.

482 For reasons given below, the Directors' claims as creditors were, at least in part, open to question. It is not clear whether these claims are still open to question or what the practical effect of a successful challenge would be. But on any view it is still open for claims to be brought on behalf of CHB against the

Directors for any breach of duty they might have committed, or to vindicate any other rights of the company (such as rescission of the share issue). As will be seen below, there are real questions (not necessarily fully explored in these proceedings) about the Directors' conduct.

483 The Directors' control over CHB resumed on 17 December 2019 with the completion of the sale of the Park. They continue to hold a majority of the shares in CHB (and, it seems, the ordinary shares). Clearly there is no prospect, under their management, of potential claims by CHB being considered or pursued.

484 In my view the resumption of the Directors' control over CHB on 17 December 2019 means that the oppressive conduct of its affairs has resumed. There is also the potential for relief to be granted to redress the ongoing effect of oppression prior to 21 August 2019. I reject the submission that no relief is available at all.

485 It might have been open to the plaintiffs to contend that, by reason of the oppressive conduct of the Directors, the Directors or their associates should be required to buy out the plaintiffs' shares in CHB at some price representing pre-administration fair value. That would have raised a question about whether the case was sufficiently distinguishable on its facts from *Campbell v Backoffice* for that remedy to be available. But that question does not have to be decided. No such relief was sought.

486 What the plaintiffs did seek was orders removing Ms Kelly and Mr Booker as directors of the Company and restraining them from acting as directors of CHB in future. Orders were also sought for the appointment of three other persons (presumably shareholders) as directors of CHB.

487 I doubt that the Court would have power to make an order of the type sought against Ms Kelly and Mr Booker. Such an order would I think go beyond curing the ongoing oppression of the other shareholders. It would be virtually punitive. In any event, even if I were to make such an order, that would not affect RC's voting control of CHB. RC could use that control to remove any directors nominated by the other shareholders and to appoint nominees of Ms Kelly and Mr Booker, even if they themselves could not be appointed.

488 This might not be a practical difficulty for the plaintiffs if the issue of the nineteen STS shares held by RC could be set aside. But as will be seen, because of the failure to join RC, it cannot.

489 Counsel for the plaintiffs, adopting an earlier argument made by Mr Darch to the Administrators, submitted that there had been a fundamental problem with the structure of CHB in the first place. It was wrong that STS shares should carry the same voting rights as LTS shares when they were worth so much less. But no order was sought to remove or limit the voting rights of the LTS shareholders (noting that one share is held by somebody independent of the Kelly-Booker parties). In any event, RC would be directly affected by any such order and has not been joined.

490 This leaves the possibility of an order that CHB be wound up. That order was not sought either. But on the face of it, there seems a case for liquidation. That would allow potential claims against the Kelly-Booker parties to be independently investigated and, if justified, pursued (if funding can be obtained).

491 As I have found that oppression has taken place and is continuing, I think I should give the plaintiffs an opportunity to ask for a winding up order if they see utility in it at this stage. If any such application comes forward, I will of course hear any submissions the Kelly-Booker parties may make in opposition to that order. I will allow a short period after handing down my judgment to give the parties an opportunity to consider this point.

*Management arrangements with HBS*

492 Counsel for the plaintiffs submitted that the effect of the management arrangements between CHB and HBS was that HBS appropriated to itself all of the site fee income which rightfully belonged to CHB under CHB's constitution. According to counsel's calculation, this amounted to $895,000 from 2012 to 2019. In addition there was the foregone income from site fees not collected from HBS/RC. This amounted to $215,000 over the period from 2015-2016 to 2018-2019.

493 Counsel acknowledged that some expenditure could legitimately be counted against this income. But counsel contended that the allocation of expenses

adopted by HBS (as adjusted by Ms Kelly for the Administrators), involving as it did a deduction of sixty per cent of the site fees, involved gross overcharging. Counsel submitted that a proper administration charge would have been ten per cent "at most". The sixty per cent totalled $410,000 over the period from 2015-2016 to 2018-2019, and accordingly counsel estimated the loss for that period at $370,000.

494 Counsel also propounded a wider argument. This was that the whole management structure was contrary to the constitution. It had been CHB, not HBS, which had paid for the fixed assets and goodwill associated with the tourist business. The effect of the management arrangements adopted by the Directors was to hand these assets of CHB over to HBS for nothing (apart from the depreciation on the fixed assets up to 2017-2018: see [294] above). It was CHB, not HBS, which should have received the profit from the tourist business (which counsel calculated at $171,000 from 2015 to 2019).

495 Counsel for the Kelly-Booker parties submitted that the fact that CHB was a "non-trading entity" had been disclosed to the plaintiffs from the outset, and repeatedly referred to, in particular from the first (August 2013) AGM onwards. Counsel submitted that it was no longer open to the plaintiffs to raise the point. The plaintiffs had acquiesced in the arrangement.

496 Counsel also submitted that the wider argument about the tourist income was not open anyway. Counsel pointed out that the formulation of the argument by counsel for the plaintiffs had come from my formulation of a possible argument for the plaintiffs, which I had expressly said needed to be pleaded. It had not been.

497 **Site fee income and related expenditure**: Under the terms of CHB's constitution the site fee was payable to CHB; it was only to be "collected" by HBS. And the definition of "site fees" clearly recognised that expenditure to be covered by the site fee was expenditure of CHB. Necessarily that was so, for example, in the case of directors' fees payable to CHB (sub-paragraph (j) of the definition), quoted at [130] above. Similarly, rates and other expenses flowing from ownership of the Land, and borrowing expenses (sub-paragraphs (a)-(c) and (k)) could only have been liabilities of CHB.

498 It follows that the treatment of CHB as a “non-trading entity” and the presentation of accounts on that basis was incorrect. It is true that the plaintiffs failed to complain about this approach up until 2016. I am not sure that was acquiescence in the relevant sense. But if it was, it only affects the relief which might be obtained for conduct during that period. It cannot be an answer to a complaint about continuation of that conduct once the issue had been raised.

499 The failure to provide any details of income and expenditure in the accounts contributed to the effective disenfranchisement of the shareholders other than the Directors. When it was raised the Directors wrongly stuck to their guns. In my view this was oppressive conduct on the part of the Directors as well as being contrary to the terms of CHB’s constitution.

500 As I understood counsel for the Kelly-Booker interests, he did not contest the proposition that the site fees should have been charged to HBS/RC. Clearly there had been no acquiescence to this by the shareholders: they had not been aware of it prior to 2017, and as soon as it was revealed, Mr McMillan and Mr Darch raised it. The question is whether Ms Kelly was correct in claiming that it made no practical difference.

501 This makes it necessary to say something about Ms Kelly’s allocation of expenses between CHB and HBS. I repeat that it must be borne in mind that the allocation was one which was devised by Ms Kelly. Counsel for the Kelly-Booker parties noted that the Administrators had apparently been prepared to go along with that allocation (with some adjustments), but that was for the limited purpose of preparing their report and cannot be regarded as definitive.

502 What should have happened was an arms’-length negotiation between CHB and HBS as to how common expenses were to be shared, and failing agreement, an independent determination. There never was an arms’-length agreement and neither party treated the hearing before me as a suitable venue for an independent determination. The allocation issues therefore stand unresolved.

503 Having said that, it seems to me that there is force in the criticism made by counsel for the plaintiffs of the internal administration charges imposed on CHB by Ms Kelly. Clearly there was some justification for taking into account the

general costs of managing the Park, as the managers would have undertaken tasks for the benefit of CHB shareholders as well as tourists. The thirty per cent of site fee income for "park administration" was said to be roughly equivalent to fifty per cent of the management and employment costs. Whether a fifty/fifty split between CHB and HBS for the management expenses was appropriate cannot be determined now. But even if it was, the imposition of the additional thirty per cent charge for "company administration", raises different questions.

504 It must be borne in mind that all of the expenses which were specific to CHB (including specified shares of the general costs) had already been charged to CHB. The "company administration" charge was levied on top of those direct expenses. It was fixed by reference to the site fees and not by reference to actual expenditure of HBS. There is no reason to think it bore any relation to the expenses actually incurred by HBS (taking into account, of course, HBS' recoveries from CHB for some of the general costs).

505 Clearly an order for compensation in favour of HBS is impossible. A proper conclusion on what CHB should have been charged would depend upon a formal account being taken, at which it would be possible to consider Ms Kelly's allocation of the direct expenditure and the quantum of the administration fees. Counsel for the Kelly-Booker parties was quite correct in saying that there was no evidentiary justification for the ten per cent "at most" figure asserted by counsel for the plaintiffs. It would also be necessary to consider the effect of the six year limitation period imposed by s 15 of the *Limitation Act 1969*. I touched on some of the limitation issues in my judgment in *Mao v Bao* [2021] NSWSC 1096.

506 Counsel for the plaintiffs submitted that the onus lay on CHB to justify its claimed expenditures as deductions. That is correct: *Eastlake v Eastlake* [2015] NSWSC 1772 at [49]. But it is still necessary for that to happen within the context of a formal accounting process.

507 Counsel for the Kelly-Booker parties pointed out, again correctly, that the prayers for relief in the plaintiffs' statement of claim did not include an account in favour of CHB for the site fees received, or which should have been received, by HBS. In any event CHB currently remains under the control of the

Directors. As long as that remains the case proceedings for an account from HBS in favour of CHB would be unworkable. The only thing I can do is to leave the issue to the liquidator, if one is appointed.

508 **Tourist income**: On the face of it, there seems to be force in the complaint that the tourist income should have enured to the benefit of CHB. The April 2012 agreement between CHB and HBS said quite clearly at [4] that any expenditure incurred by HBS was incurred on behalf of CHB. Although Ms Kelly was later to claim that this was a mistake, it was entirely consistent with HBS' role under CHB's constitution as "managing agent": see [126] above.

509 But counsel for the Kelly-Booker parties was I think right to say that this issue was not pleaded. Even if it had been, an order for compensation in favour of CHB would not have been possible. An account would have been required, in the course of which HBS would have been entitled to an allowance reflecting the fair value of its services in managing the business. As with an account for the site fees, it would not have been appropriate to make such an order, even if pleaded, now. On any view, the issue must be left to the liquidator, if one is appointed.

*Proceeds of issue of shares*

510 The plaintiffs' closing submissions asserted that between 2012 and 2017 the sum of $1,117,000 was paid for shares in CHB, but the latest ASIC filing shows CHB's share capital as $742,000. The submissions also asserted that certain specified sums of money had been paid for shares but never deposited into CHB's bank account. The suggestion was that the Directors had stolen large sums of CHB's money for themselves.

511 Counsel for the Kelly-Booker parties submitted that the early ASIC filings had incorrectly included the amounts paid by purchasers for cabins. The plaintiffs' figure of $1,117,000 came from aggregating those earlier findings without taking account of later corrections and adjustments. The $742,000 figure in the latest ASIC filing was therefore correct, and reflected all of the monies received for the purchase of shares. It was also consistent with the issued capital figure in CHB's balance sheet.

512 Counsel objected to the further allegations about misappropriation. Allegations about specific missing share receipts had never been pleaded. Nor had they been put to Ms Kelly in cross-examination.

513 There was no reply to these submissions from counsel for the plaintiffs. I accept them. On any view, the evidence would not permit the making of an order for compensation, or an account, in CHB's favour. At most there could be issues worth investigating. Any such investigation, and any consequent proceedings, should, like any proceedings for an account from HBS of site fees or income from the tourist business, be undertaken, if at all, by a liquidator if one is appointed.

*Profits on purchase and re-sale of shares by Directors*

514 Under this heading counsel for the plaintiffs raised a claim about the $25,000 profit made by RC on the sale of Mr Darch's cabin to him. Counsel submitted that the opportunity to make this profit was one which came to Ms Kelly and Mr Booker as directors of CHB. Counsel criticised Ms Kelly's argument to the Administrators that the opportunity came to the Directors in their capacities as directors and officers of HBS, and her suggestion that it was not part of HBS' business to make a profit but rather to provide the home base for the shareholders. The implication was that the profit should have inured to the benefit of CHB.

515 Counsel for the Kelly-Booker parties submitted that this allegation had not been pleaded. In my view, that is clearly correct. But there is a further difficulty with it in any event.

516 In the debate between Ms Kelly and counsel for the plaintiffs about this transaction, both appear to have proceeded on the assumption that once a share had been sold to an initial purchaser, there was an opportunity to "buy back" the share available to CHB. This seems to have reflected the practice in fact adopted by the Directors in "selling" the shares of CHB to incoming purchasers.

517 If the assumption were correct, there would be much to say for the arguments by counsel for the plaintiffs. But once a company has issued a share it is not lawful for the company to buy it back and hold it as an asset, so no question of

making a profit on a further sale can arise. Statutory prohibitions on insider trading provisions aside, there can thus be no objection to a director of a company buying the share on the secondary market. In my view the claim made for the plaintiffs under this heading is misconceived.

*April 2014 share issue*

518 There is no dispute that the effect of the issue of the nineteen STS shares in April 2014 was to give Ms Kelly and Mr Booker, when combined with the fourteen LTS shares they held, voting control over CHB in general meeting. Counsel for the plaintiffs submitted that the share issue had been made for that purpose and was therefore improper. Counsel submitted that it ought to be reversed.

519 Counsel for the Kelly-Booker parties submitted that impropriety had not been established. Ms Kelly's evidence that the STS allotments generated very little revenue was not disputed. Clearly, they were not worth as much as the LTS allotments. There was no evidence of any higher market value. Moreover, counsel pointed out that Ms Kelly had later been happy to sell the shares back. Counsel suggested that she would hardly have had that attitude if the shares had been issued for the purpose of cementing control over CHB.

520 These submissions have some force but they cannot be pressed too far. If Ms Kelly is correct in saying that the sites on average generated $3 to $4 per day, that is still over $1,000 a year, roughly double what CHB paid to acquire the shares. And even if one ignores the revenue from the shares, buying nineteen of them for only $10,000 was a very cheap way of obtaining about a third of CHB's share capital.

521 It is true that at the time of the issue, the directors already had effective control of its business and of the unissued shares. But that did not necessarily ensure continued control of CHB's board. Furthermore, the Directors would have been contemplating the sale of the remaining shares and the repayment of the CBA loan, which would result in the redemption of their ordinary shares, in the not-too-distant future. And while it is true that the Directors later contemplated selling the shares back to HBS, that was part of a wider proposal which might well have made continued control of CHB unnecessary.

522 Only eight months before the share issue, Ms Kelly had advised the shareholders of CHB that no further STS shares were to be issued. She and Mr Booker did not give any explanation for why they changed their minds. CHB did not apparently have any particular need for the money. Nor is there any evidence that the Directors offered the opportunity to buy the shares to any of the other shareholders.

523 No other reason for the share issue was suggested. It was clear from her evidence in the witness box that Ms Kelly was a shrewd and businesslike person. I think I am entitled to draw the obvious inference that the Directors issued the shares so as to cement their control of CHB. In any event I am satisfied that the Directors gave no consideration to the interests of the other shareholders. Whether or not the transaction involved the improper use of the Directors' powers, I am satisfied that it was, considered on its own, oppressive.

524 But, as counsel for the Kelly-Booker parties pointed out, there is a difficulty with now obtaining an order to have the transfer set aside in these proceedings. The shares have passed to RC and it is not a party. An order depriving RC of those shares would plainly affect its interests. The rule in *John Alexander's Clubs* (above at [427]) meant that such an order could not be made against it in the absence of its joinder.

525 In reply, counsel for the plaintiffs asserted that this limitation did not apply because, so he claimed, RC would have acquired the shares with notice of the circumstances in which they had originally be issued. But that assertion cannot deprive RC of its right to be heard. It is no answer to the application of the *John Alexander* principle for the plaintiff to claim that the absent defendant would have been unlikely to succeed if it had participated in the proceedings.

526 A further obstacle to rescission would be the need for CHB to do equity. This would involve refunding the $10,000 paid by HBS for the shares (and, presumably, HBS refunding in turn any payment received from RC). Any site fees paid on the shares would have to be repaid (and any unpaid fees excluded from any account sought from HBS). Clearly CHB would not be able to fund these repayments itself, and there was no offer from the plaintiffs to do so.

527 Although I have discussed all of this in the context of relief against oppression, that may be an over-complication. Counsel for the Kelly-Booker parties pointed out that the plaintiffs (or at least those plaintiffs who held their shares at the time of the April 2014 share issue) would have standing in equity to set aside the share issue if it was made for an improper purpose, in their capacity as shareholders: *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 447; *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 31-32 per Williams J. But framing the claim in that way would not have affected the practical difficulties with joinder and doing equity to which I have referred.

528 None of this would not prevent me from making an order that the Directors, who are parties, compensate CHB for any loss it has suffered. But in my view the evidence before me does not properly establish what the loss, if any, was. There was no expert evidence on the question of value. I do not think it would be safe to rely on an inference derived from the price paid by Mr Chilmaid two years before, especially when problems with the economic viability of the short-term sites, which appear to be accepted on both sides, arose in the meantime. Again there is nothing else to do but to leave the issue (including the possibility of joining both HBS and RC to a rescission suit) to the liquidator if one is appointed.

*Denial of access to documents*

529 Counsel for the plaintiffs submitted that the evidence disclosed a pattern of behaviour on the part of Ms Kelly and Mr Booker whereby from 2016 onwards they resisted all attempts by the other shareholders to find out information about the affairs of the Company. This forced Mr McMillan and Mr Darch to bring the s 247A proceedings. Counsel submitted that the defence of the proceedings was unreasonable and represented nothing more than a continuation of the stonewalling tactics which Ms Kelly and Mr Booker had applied to that point. The proceedings should never have been defended and the expenditure on it was unjustified.

530 Counsel for the Kelly-Booker parties said little to justify the position which Ms Kelly and Mr Booker took towards the production of documents. Counsel simply observed that the documents in question had now been obtained in the

course of these proceedings. But counsel did complain about the submission that the defence of the s 247A proceedings had been a breach of duty.

531 Counsel suggested that this issue was not raised on the pleadings and, when attempts had been made to ventilate the issue in the course of the hearing, I had rebuffed them. Counsel stated that had the issue been properly raised, his clients would have wished to put evidence before the Court to show that they had been justified in not capitulating to the demands made in the 2018 proceedings. In particular it was suggested that the scope of the request for documents was far too broad.

532 It is no answer to the allegation of oppression to say that the plaintiffs were later able to obtain the documents through these proceedings. To my mind, that only underlines the problem. I think it is clear that the situation created by the refusal of documents was oppressive.

533 But I think that the submissions by counsel for the plaintiffs go too far in saying that the whole defence of the proceedings was wrongful. Counsel for the Kelly-Booker interests was right to say that it was not fairly open on the pleadings, especially given the rulings which I made in the course of the hearing. The plaintiffs had ample opportunity before the hearing or at the beginning of the hearing to propound this claim properly and they did not do so.

534 The proceedings may well have been defended more vigorously and at greater expense than was necessary. I do not think it is open to me on the pleadings to find that it was a breach of duty for the Directors to defend them at all. Again it will be open to pursue this issue properly through a liquidator, if one is appointed.

*Appointment of statutory administrators*

535 Counsel for the plaintiffs submitted that the administration was an abuse of process. HBS was not truly insolvent. The Directors' real purpose was, once they learned that the requirement for eighty per cent shareholder consent would not apply in an administration, to use CTP to acquire the Park out of CHB and leave the shareholders with the corporate wreckage. Counsel noted that CTP was actually incorporated in June 2019, before the hearing of the s 247A proceedings even took place.

536 Counsel for the Kelly-Booker parties did not accept these allegations on a factual level. But counsel submitted that, in any event, they were outside the pleadings.

537 The first question posed by the argument from counsel for the plaintiffs was whether CHB was in fact insolvent. I will briefly address this question before returning to the pleading objection.

538 One component of CHB's alleged indebtedness was its claimed liability to the Directors for fees for time spent by them on the s 247A proceedings. It will be recalled that Ms Kelly sought to justify the fees under both subparagraphs (a) and (d) of clause 7.3 of CHB's constitution (quoted at [] above). In my view the fees claimed were clearly not covered by subclause (a). But they did apparently fall within the terms of subparagraph (d).

539 I have however already observed that the fees were claimed retrospectively. No provision was made for them in the resolutions passed by the Directors in February 2017 and October 2018 about defending the proceedings. The same observations apply to the claims for reimbursement of the Directors' expenses for travel etc associated with the litigation, and for interest on legal fees paid by the Directors. Indeed it seems likely that the relevant invoices were only prepared shortly before they were presented to the Administrators on 25 August 2019.

540 These circumstances might have raised questions about the extent of the Directors' powers to impose such liabilities retrospectively. In particular, there might have been a question as to whether fees could be imposed under subparagraph 7.3(d) after the end of the relevant financial year. Indeed a more fundamental issue might have been raised about whether the Directors in fact resolved to impose the fees in question before the Administrators were appointed on 21 August: there appears to be no minute of any such resolution in evidence.

541 The timing also raised a potential question about whether, even if the Directors had power to impose these liabilities on CHB, they exercised that power for a proper purpose. There must be a suspicion that the imposition of these liabilities was an afterthought, which was prompted only by a desire to make

the level of indebtedness from CHB to the Directors as high as possible, so as to ensure that as much as possible of the proceeds of the sale of the Park which was left over after payment of the Administrators' fees would be clawed back by the Directors.

542 But none of these potential points was specifically taken by counsel for the plaintiffs. Furthermore, the fees, reimbursements and interest collectively represented only a minor part of the claims by creditors which resulted in HBS being treated as insolvent and placed into administration. The major part of the claims represented out of pocket expenditure by the Directors or HBS on legal and accounting fees. These liabilities were undoubtedly liabilities of CHB. The real complaint about them is that it had been irresponsible and oppressive for the Directors to incur them in the first place. As we have seen, that was not part of the plaintiffs' pleaded claim.

543 Accordingly, this is not a case of a company being put into administration on account of apparent debts which did not actually exist. But there does remain a question whether, even if the liabilities attributed to CHB by the Directors were valid ones, CHB was insolvent.

544 Counsel for the plaintiffs submitted that CHB was not insolvent because it was owed money by HBS. Counsel relied on the alleged misappropriations of CHB's share capital and the alleged diversion of its property. The amounts due, on counsel's calculations, exceeded any liability of CHB to the Directors and external creditors. But whatever claims CHB may have had against HBS, they were unquantified ones which would have been contested. It could not be said at the time the Administrators were appointed that HBS was indebted to CHB in any particular amount on account of those claims.

545 As I have explained, the structure adopted by Ms Kelly under which all of the income associated with the Park was treated as income of HBS, so that CHB had no income, was arguably incorrect. But even if incorrect, that was the way in which CHB's affairs were being run and solvency is a practical test.

546 In theory however there were some other questions which might have been raised about whether CHB was truly insolvent. I will refer to three in particular.

547 First, there might have been a question about whether the Directors were entitled to require the legal fees they had paid to be reimbursed by CHB on demand. Nothing was said about this in the resolution of February 2017. On the Directors' approach, CHB had no income of its own to meet the fees. If the Directors had created a situation in which they were entitled at any time to require immediate reimbursement by CHB, they had placed CHB in an extraordinarily vulnerable situation, perhaps amounting to insolvent trading. Arguably it should be inferred that they could not have intended to behave in such an irresponsible fashion, and should be taken to have agreed that CHB would not have to repay the fees until the end of the proceedings, or at least not until the company had had a reasonable opportunity to raise the necessary funds.

548 The second point concerns the management agreement with HBS. The legal fees associated with the s 247A proceedings (and the previous dispute with Mr Boog) were expressly covered by the definition of site fee expenses in CHB's constitution (sub-paragraph (l), quoted at [130] above). So too were directors' fees (sub-paragraph (j)). In any event they were covered by the general catch-all provision in subparagraph (n). It would seem to follow that, to the extent that there was a shortfall between the ongoing legal fees and the site fee income, HBS was obliged to meet the shortfall.

549 Third, even if HBS lacked the funds to meet the expenditure, that did not exhaust the sources of funds apparently available to CHB. As I have stated, it is unclear whether a resolution of the shareholders could have been used to overcome the cap on the site fees, so as to increase them to a level sufficient to cover the costs of the defence of the s 247A proceedings. But on any view special levies could have been used.

550 No doubt this would have been unpopular. It might well have led to recriminations about the Directors' decision to defend the proceedings in the first place. But responsible directors considering the future of CHB should have considered, if it was truly insolvent, all available means of satisfying its liabilities.

551 None of these points however were pleaded or put to Ms Kelly in cross-examination. None of them were articulated by counsel for the plaintiffs in final submissions.

552 Even putting these points to one side, CHB was put into administration in highly suspicious circumstances. While the expense of conducting the litigation had been heavy, the case was almost finished. Ms Kelly claimed that she was expecting for CHB to receive a costs order in its favour when it succeeded in the proceedings. It seems very hard to explain why the Directors would have abandoned CHB's defence when they did, unless they had concluded that they were better served by seeing CHB collapse and purchasing the Park out of the wreckage.

553 But I remain of the view which I expressed in the course of the hearing about the scope of the pleadings. The case which counsel for the plaintiffs sought to propound under this head was one of breach of duty, or other improper conduct, of the Directors, giving rise to an entitlement to relief on the part of CHB against them and CTP. If such a claim was to be put forward in support of an oppression case it should have been pleaded with just as much specificity as if the claim had been brought in conventional proceedings by CHB against the Directors and CTP. That was not done. I uphold the submission by counsel for the Kelly-Booker parties that such a case is beyond the scope of the plaintiffs' pleadings.

554 The possibility remains that a "sham administration" claim could still be made against the Directors in future, if made on a properly pleaded basis, for losses suffered by CHB as a result of the administration. But again any such claim will have to be pursued on CHB's behalf by a liquidator if one is appointed.

*Sale of Park to CTP*

555 Counsel for the plaintiffs submitted that the sale of the Park itself had an oppressive effect on the plaintiffs. The eighty per cent approval requirement in CHB's constitution was overridden. As a consequence, the plaintiffs lost the rights of occupation deriving from their shareholdings. Counsel also alleged that the valuation was flawed because it did not include the tourist business and the sale price was less than the Park was actually worth. Counsel sought

orders setting aside the transfer and providing for the return of the Park to CHB.

556 It is not necessary for present purposes to go into these submissions in detail. There are two fundamental difficulties for the plaintiffs.

557 The first is that, once CHB had been placed in liquidation, the Administrators were clearly correct in proceeding on the basis that the restrictions on the sale of the Park imposed by the constitution no longer applied. This is well established by authority (see *Re Smith* [2006] NSWSC 780 at [13]); it is simply a reflection of the basic principle that creditor's rights to payment prevail over the rights of shareholders.

558 Furthermore, entry into the sale was mandated by the Deed of Company Arrangement. For the purpose of granting other relief it might have been possible to regard the sale of the Park to CTP as part of the ongoing effect of prior breaches of duty, or oppressive conduct, on the part of the Directors. But it is not open to the Court to treat the sale as itself having been oppressive.

559 None of this would necessarily prevent a claim being made on behalf of CHB against the Directors on the ground that the sale was the consequence of prior breaches of duty by them. It would be theoretically possible to seek rescission of the transfer of the Park to CTP on this ground (but this would be subject to setting the Kelly-Booker DOCA aside and doing equity by paying back the purchase price, otherwise only equitable compensation could be recovered). But for reasons already given, any such claims must be left to a liquidator of CHB, if one is appointed.

*Retention of ordinary shares in CHB*

560 It seems that the Directors still retain the ordinary shares in CHB which entitle them to control its activities. No complaint was made about this for the period up until the appointment of the Administrators in August 2019. Although the impression given to the shareholders in 2014 may have been that the CBA debt would be fully discharged, and the shares surrendered, in the not-too-distant future, that did not happen. In effect, further monies raised from the sale of shares went to reduce the loan to HBS. No point was taken about this and

there seems nothing unreasonable about the Directors ensuring that all debts properly owed to HBS were discharged before the CBA debt was paid off.

561 But the CBA mortgage was discharged in December 2019. The relevant term in CHB's constitution provided for cancellation of the ordinary shares to follow automatically once the mortgage was discharged. Yet it appears that has not happened.

562 Counsel for the Kelly-Booker parties submitted that the ordinary shares were no longer of any significance. For the reasons which I have already given, I cannot agree. There is still potential recovery action available to CHB and the failure to release the ordinary shares still gives the Directors fall-back control over the company's management. This will of course be of little or no practical significance if a liquidator is appointed. However, if the plaintiffs wish to have an order requiring the ordinary shares to be cancelled then I am inclined to make such an order. For the reasons I have given such an order should not however be necessary and the Directors should cancel the shares immediately.

**Monetary claims against Kelly-Booker parties**

563 The plaintiffs plead the following monetary claims against the Kelly-Booker parties:

(1) damages in tort for inducing breach of contract, namely CHB's alleged obligation, under the plaintiffs' share purchase agreements, to confer upon them ownership of their sites (no claim was made for damages from CHB for breach of contract, as an alternative to specific performance);

(2) damages arising out of the plaintiffs' purchases of their shares in CHB;

(3) compensation for losses arising out of the sale of the Park to CTP;

(4) damages arising out of alleged harassment and other conduct of the Kelly-Booker parties in connection with, and subsequent to, the sale.

564 I have concluded that the plaintiffs had, and have, no contractual entitlement to ownership of their sites. It is therefore unnecessary to consider the claim based on breach of contract. I deal with the other monetary claims below.

*CHB share purchases*

565 The plaintiffs' claims were based on the alleged contravention of the Australian Consumer Law ("ACL"). In particular they alleged contravention of the prohibitions on misleading or deceptive conduct (ACL s 18) and unconscionable conduct (ACL s 21).

566 **Misleading or deceptive conduct**: In their statement of claim, the plaintiffs identified CHB's misleading or deceptive conduct as arising from the same representations on which it relied for its proprietary estoppel claim, namely representations that the plaintiffs would receive interests in land as well as shares in CHB.

567 In submissions, counsel for the plaintiffs laid heavy emphasis on the evidence that Ms Kelly and Mr Booker were promoting the sale of the Allotments on the basis that it would give purchasers "real estate security" and that the interests they acquired would be overseen by the Australian Securities and Investments Commission. Counsel also submitted that many of the plaintiffs were unsophisticated, and believed that they were acquiring some novel form of interest in land.

568 The case for the plaintiffs might have been put on the basis that they were told, and believed, that the purchases would give them rights over their sites which were equivalent to "real estate security". But it was not pleaded in this way. I have already explained why I consider that the pleaded representations that the plaintiffs would receive an interest in land along with a shareholding did not arise from the purchase agreements or the promotional materials. The plaintiffs' pleaded case of misleading and deceptive conduct fails.

569 **Unconscionable conduct**: The plaintiffs' pleaded case of contravention by engaging in unconscionable conduct relevantly referred back to, and relied upon, the representations which were relied upon as misleading and deceptive conduct. While the making of misleading or deceptive representations, or promises that are relied upon and are not fulfilled, can in some circumstances amount to unconscionable conduct, the focus of the unconscionability prohibition is different. It is on exploitative commercial transactions: see,

generally, *Australian Securities and Investment Commission v Kobelt* (2019) 267 CLR 1.

570 In the present case, it was not alleged that there were any features of the representations, apart from the allegation that they involved promises or representations that the plaintiffs would receive a plot of land as well as a share in CHB, to establish such exploitation. It was not, for instance, alleged that the prices the plaintiffs were asked to pay for the shares were not commensurate with the company title interest that they obtained. The unconscionable conduct allegation therefore does not add in any substantial way to the allegation of misleading and deceptive conduct and fails for the same reason as that claim fails.

571 **Reliance and causation**: I have already concluded that, even if the representations made by Ms Kelly and Mr Booker had conveyed that the plaintiffs would receive a plot of land as well as a share in CHB, I would not have been satisfied that the plaintiffs relied on those representations to proceed with the purchase. Accordingly, the plaintiffs have failed to establish that the alleged contraventions caused them to act differently.

572 **Damages and limitation**: In the written submissions by counsel for the plaintiffs, counsel asserted a claim for loss on two bases, economic loss and loss in the form of disappointment and distress.

573 As to economic loss, the obvious basis for a claim would be if the price paid by the plaintiffs for their shares exceeded the true value of the shares at the time of purchase. The plaintiffs presented no evidence, however, that that was the case. Nor did the plaintiffs present any evidence that the occupation and service fees paid by them exceeded the market value of those services.

574 Nor was there any evidence of financial loss consequential upon termination of the plaintiffs' right of occupation. As a result of the NCAT decision, the plaintiffs currently have the protection of the *Retirement Villages Act*. It is unclear what will happen if the decision is reversed. In any event the plaintiffs presented no evidence that they will suffer any financial loss if required to vacate.

575 As to the claim for disappointment, distress and anxiety, counsel for the plaintiffs emphasised the promotional materials issued by Ms Kelly and Mr Booker which spoke of the happy lifestyle the plaintiffs would lead if they signed on to the home base "dream". Counsel also referred to the description of the Park (and implicitly, its future operation) as being "peaceful" and "oasis". In counsel's submission, the "dream" became a "nightmare" as a result of the conduct of Mr Booker and Ms Kelly. Counsel also emphasised evidence from the plaintiffs of anxiety at the possibility of being evicted from their homes.

576 For present purposes, I am concerned with an enquiry into the damage flowing from the plaintiffs' acquisition of shares in CHB, and the consequential right of occupation which they obtained. The enquiry is probably therefore, strictly speaking, limited to the period up to the point when the Park was sold to CTP and the occupation rights in CHB's constitution became unenforceable.

577 Obviously, counsel's submissions about the "dream" becoming a "nightmare" involved overstatement, just as the initial promises of a halcyon existence involved a degree of puffery. The plaintiffs may find the conditions under which they are living at the Park unpleasant but many of them are apparently still living there.

578 It should be noted that the plaintiffs make no claim for damages for personal injury as a consequence of the alleged misleading and deceptive conduct. There was no evidence that any of the plaintiffs suffer from any recognised medical condition, nor did the plaintiffs give evidence that their disappointment and distress has resulted in any substantial impairment of their ability to live a normal life. Their claim was for disappointment and distress of a type recognised as being compensable in the restricted category of cases identified by the High Court in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

579 The present case is much more complicated factually than the cases where damages have been awarded to plaintiffs for disappointment or distress as a result of a ruined holiday (*Jarvis v Swan Tours Ltd* [1973] 1 All ER 71; *Baltic Shipping v Dillon*) or having received a notification of having won a prize in a lottery which turns out to be incorrect (*NSW Lotteries Corporation Pty Ltd v Kuzmanovski* (2011) 195 FCR 234). The state of disappointment and anxiety in

which the plaintiffs found themselves at the time the Park was sold to CTP was the product of a long period of disputation. During that period the personal relationships between the plaintiffs on the one hand and Ms Kelly and Mr Booker on the other became mutually unhappy and in some cases poisonous, which would have made the situation worse. The plaintiffs' current state of disappointment and anxiety (and that is what they gave evidence of) has no doubt also been influenced by subsequent events including the stress of the litigation itself.

580 Can all of this be blamed on the initial purchase by the plaintiffs? If it cannot, can the extent to which it can be blamed on the initial purchase be somehow segregated and quantified?

581 It must be remembered that the pleaded allegation is that the plaintiffs would receive an interest in land *as well* as the shares they were buying in CHB. The problem for the plaintiffs is that there is no obvious link between the state of affairs which has resulted in the disappointment, distress and anxiety which they complain about on the one hand, and any falsity in that particular representation on the other. If the plaintiffs had obtained ownership of their allotments as well as ownership of the shares, they would still have been dependent upon CHB, as the owner of the Park, providing them access to their lots and the services required to live there. In these circumstances, had I concluded that there had been misleading and deceptive conduct by Ms Kelly and Mr Booker on behalf of CHB, I would still have rejected the plaintiffs' claim for damages as too remote.

582 Counsel for the Kelly-Booker parties went further. He submitted that the principles in *Baltic Shipping v Dillon* did not apply at all because the plaintiffs' purchase arrangements did not, in themselves, involve any promise to provide comfort, convenience and relaxation to the plaintiffs. He also submitted that if any damages were awarded under this head the amount would be minimal. The claim for $200,000 by each of the plaintiffs was preposterous. In view of the other conclusions that I have reached, I do not need to reach any conclusion on these points, or on the limitation defences.

*Transfer of Park to CTP*

583 I have already concluded that, as shareholders, the plaintiffs have no claim for rescission of the transfer of the park to CTP on the ground of breach of duty by the Directors. Any such claim is that of CHB and must be pursued by a liquidator, if one is appointed. The same applies to the alternative claim for monetary compensation.

584 The plaintiffs' closing submissions made a separate claim for monetary compensation against the Directors based on unconscionable conduct. The conduct was in substance the same as, or a subset of, the conduct upon which the plaintiffs relied for their oppression claim.

585 But breach of duty by the directors of a company, or other oppressive corporate conduct, cannot simply be equated with unconscionable conduct for the purposes of the ACL. In particular, for conduct to contravene the ACL, it must have a trading or commercial character: see *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603-604. I do not think the present complaints satisfy that requirement. They concern the exercise of corporate powers of CHB, rather than commercial dealings between CHB and its shareholders.

586 Even if I had been satisfied that a claim was available, there is no satisfactory evidence that the price paid by CTP was less than the Park was in fact worth. Even if there had been, there would have been a question as to how, if at all, this translated into recoverable individual losses for the plaintiffs. But in the circumstances that question does not arise.

*Post-sale conduct*

587 As pleaded, the plaintiffs' claim was based on responses emanating from Ms Kelly and Mr Booker, or Mr Vrisakis on their behalf, between November 2019 and February 2020. The plaintiffs complained about the letters written by Ms Kelly and Mr Booker on 14 November, 2 December and 11 December in which they asserted that following completion of the purchase, residents of the Park would need to enter into residential site agreements with CTP to be entitled to stay (see [361] above). They also complained about Mr Vrisakis' letter to Mr

Vogel of 14 January (see [369] above) rejecting the claims made by him on the plaintiffs' behalf.

588 Next, the plaintiffs relied on Mr Vrisakis' letter to NCAT of 21 February 2020. The complaint apparently was that Mr Vrisakis misstated something said by Emmett AJA about the stay of the NCAT proceedings (see [379] above).

589 Finally, in similar vein, the plaintiffs relied on a letter from Ms Kelly and Mr Booker to Ms Knight and Mr Roberts of 28 February 2020 (see [378] above). Apparently, the complaint here was that Ms Kelly misrepresented the terms or effect of the undertaking which had been given concerning the ongoing payment of rent (see [379] above).

590 The plaintiffs' statement of claim relied on three different alleged contraventions of the ACL. One was undue harassment or coercion (ACL s 50). The second was misleading or deceptive conduct (ACL 18). The third was unconscionable conduct (ACL s 21).

591 Counsel for the Kelly-Booker parties submitted that the correspondence was nothing more than a statement of the legal position being taken by Ms Kelly and Mr Booker. It could not be said to amount to harassment. Nor did counsel accept that it was misleading or deceptive or unconscionable. In any event, none of this mattered. There was no evidence that any of the plaintiffs had taken any action of any kind (for instance, by entering into an RSA with CTP) in reliance on any of the conduct. There was accordingly no damage.

592 Once again, there was no reply of substance to these submissions and I accept them. I would add that, where the relevant conduct involves asserting a legal conclusion, that conduct does not become misleading or deceptive (or become a form of harassment or unconscionable) just because the conclusion is ultimately rejected by the court: compare *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [35]-[43]. The assertions made by Ms Kelly and Mr Booker were made in an adversarial context. It was not alleged that Ms Kelly and Mr Booker lacked a bona fide belief that they were entitled to make the assertions.

593 In this regard the claims based on the letters written by Mr Vrisakis are particularly problematical. It is questionable whether those letters, and particularly the letter to NCAT, were even conduct "in trade or commerce": *Little v Law Institute of Victoria* [1990] VR 257 at 273.

594 Counsel for the Kelly-Booker parties did not address in his submissions under this head the pleaded claim of harassment and coercion arising out of the altercation between Mr Booker and Mrs Susan Kelly. But it is not necessary to go into that allegation for the purposes of this judgment. As with the claims based on the correspondence, there was no allegation that Mrs Kelly or any of the other plaintiffs took any relevant action as a result of the incident.

**Monetary claims against Administrators**

595 The plaintiffs' monetary claims against the Administrators are pleaded on nine bases. They are:

(1) damages for breach of a common law duty of care;

(2) accessorial liability for damages for contravention by the Directors of the statutory prohibition against unconscionable conduct;

(3) accessorial liability for damages for breach by the Directors of their statutory duties as officers of CHB;

(4) compensation in equity for knowing assistance in breach of the fiduciary duties owed by the Directors to CHB;

(5) compensation in equity for knowing assistance in a breach of trust by CHB, namely, the sale of the Park including the allotments in which the plaintiffs allegedly had an equitable proprietary interest;

(6) damages for breach of CA s 442C (which prohibits, except in some circumstances, sale by an administrator of property not belonging to the company in administration);

(7) an order for compensation under the *Insolvency Practice Schedule* (IPS) s 90-15 for breach of duty by the Administrators;

(8) an order for compensation under CA s 1324(10) (the Court's power to award damages in addition to or in the alternative to an injunction against a breach of the *Corporations Act*);

(9) an order for compensation under CA s 233 by way of relief against oppression.

596 For reasons given above the Directors cannot have breached their statutory or equitable duties in exercising powers as directors of CHB during the administration because they had no such powers. In particular, the sale of the

Park was entered into on CHB's behalf by the Administrators pursuant to an obligation created by the Kelly-Booker DOCA following its approval by CHB's creditors. The Administrators cannot have any accessorial liability for breaches of duty which occurred before their appointment. Therefore claims (3) and (4) must fail.

597 I have concluded also that the directors have no equitable proprietary interest in the Allotments which they occupied. Claims (5) and (6) fail for that reason alone.

598 It is therefore unnecessary to consider the other points raised by counsel for the Administrators against claims (3), (4), (5) and (6). Nor is it necessary to address the remaining claims to the extent that they are based on the same complaints as underpin those claims (for instance the alleged common law duty of care, to the extent based on a failure to take action to protect the plaintiffs' alleged equitable proprietary interests). I will now consider what is left.

*Common law duty of care*

599 **Existence of duty**: All common law duties of care require the defendant to take reasonable steps to avoid damage of a particular type or types. In the present case, the pleaded scope of the duty was that the Administrators were required to take reasonable steps to avoid:

(1) loss of the plaintiffs' "residence rights" (presumably a reference to their rights as shareholders in CHB);

(2) loss of the plaintiffs' dwellings;

(3) loss in value in the plaintiffs' shares in CHB;

(4) the costs of the plaintiffs "protecting themselves";

(5) physical and mental injury; and

(6) distress and disappointment.

600 On any view, even if a duty of care existed, this would not be one of the rare cases in which it would extend to avoiding distress or disappointment (see [578] above: *Baltic Shipping v Dillon*). Nor did any of the plaintiffs establish that they had suffered any recognised psychiatric injury going beyond distress and disappointment. No physical injury was identified for which the Administrators

could be responsible. Effectively the duty of care for which the plaintiffs contended involved economic loss.

601 As pleaded, there were two bases for the recognition of a duty of care. The first was that the plaintiffs were in a generally "proximate relationship" with the Administrators. I understood that to mean that by virtue of their acting as statutory administrators, the Administrators owed a duty of care to all of the shareholders of CHB, or at least all those shareholders who owned shares giving them rights of occupation over long-term sites. I will deal with this first.

602 Where the relationship between the plaintiff and the defendant occupy has been created, or is governed, by statute, any common law duty of care which is to be recognised between must be coherent with the statutory context. Often where a duty of care is recognised, it can be seen as being virtually implicit in the statutory provisions. It follows that the terms of the statute are critical: see, for example, *New South Wales v Fahy* (2007) 232 CLR 486 at [18]f, [26].

603 This makes it necessary to consider the nature of the obligations imposed on the administrator by the *Corporations Act*. The principal ones are:

(1) upon appointment the administrator assumes control of the company's affairs to the exclusion of the directors: CA, s 437A;

(2) the administrator must investigate the affairs of the company for the purpose of forming an opinion on whether the interests of the creditors would be best served by the company being returned to the control of its directors, or by the execution of a Deed of Company Arrangement, or by the company proceeding to liquidation: s 438A;

(3) the administrator must provide a report in support of the opinions reached: *Insolvency Practice Rules (Corporations) 2016* (Cth) ("IPR") r 75-225(3);

(4) the administrator must convene a meeting of creditors to decide which of the three options is to be followed: s 439C.

604 In summary, therefore, the administrator's role is mainly to advise the creditors. The focus is on the future of the company, rather than on the process by which the administrator has been appointed.

605 This does not mean that the background to the appointment, or the nature of the creditor's claims, are irrelevant. The administrator is required, in deciding to accept proofs of debt, to be sufficiently satisfied of the creditors' claims to admit

them to vote at the meeting. The administrator is probably also, for practical purposes, obliged to form a view on whether, at the time the company was placed in administration, it was insolvent, or nearly insolvent, if for no other reason that this issue will usually be critical to the recommendation the administrator makes to creditors.

606 In evaluating the statutory relationships, it is also relevant that the Act requires that the administrator's tasks be undertaken within strict time limits. The meeting of creditors which will make the decision must be held within no more than twenty-five business days of the administrator's appointment. The meeting can be adjourned but for no more than 45 business days (now dealt with by IPR r 75-140). The administrator's report to the creditors for the purpose of the meeting must be completed five business days before it takes place.

607 Another important contextual factor is that the administrator owes duties to the company. An administrator is an officer (CA, s 9) and therefore subject to statutory duties of reasonable care, honesty, etc: CA, ss 180(1), 181(1), 182(1) and 183(1). These overlie a common law duty of care and equitable fiduciary duties (see CA s 179). Furthermore, all of the actions by the administrator are deemed to be actions as agent for the company (s 437B), and this is another source of fiduciary obligation: see *Correa v Whittingham* (2013) 278 FLR 310 at [144], [148].

608 In considering the imposition of common law duty of care, it is of particular significance that the Act itself imposes, in express terms, statutory duties of proper conduct. It has always been recognised that these duties are owed to the company. The Act also recognises and confirms the continuing existence of duties of care and equitable fiduciary duties again owed to the company.

609 In support of the plaintiffs' contention that a duty of care arose from a "proximate relationship", counsel submitted that harm of the type suffered by the plaintiff was reasonably foreseeable. As will be seen below, this proposition may to some extent be debatable: it is far from clear what it is the Administrators could have done to avoid the outcome. But it is not necessary to go into that any further at this point. Even if foreseeability is established, it is

only a necessary condition for the recognition of a duty. It is not sufficient. Something more is required.

610 There are a number of difficulties with the plaintiffs' "proximate relationship" contention. Four in particular stand out.

611 The first and fundamental difficulty is that the statutory procedure itself gives the creditors of a company in administration control over the company's future, and relegates the shareholders. There is nothing that the administrator can do about this; the administrator's tasks are confined to advising the creditors on what decision they make, and keeping the company going until the decision is made. Any duty of care imposed on the administrator cannot operate outside this statutory straightjacket.

612 Once a company has been placed in administration, there may be a conflict between the interests of the shareholders and the creditors. For instance, it may be in the creditors' interests to secure a quick sale of the company's assets whereas the shareholders will desire to hold out for a longer period so the assets can be sold in an orderly way for a higher value. But in an administration where the company is insolvent the statute has laid down that the creditors' wishes are to prevail. It would be pointless for the common law to oblige the administrator, when preparing a report for the creditors on what they should do, to investigate and advise on conflicting shareholder interests: compare *Sullivan v Moody* (2001) 207 CLR 562 at [55]-[60].

613 It may be acknowledged that not everything an administrator does will necessarily involve conflict between the shareholders' and the creditors' interests. But even in situations where these is no direct conflict, the second point is that to impose on the administrator a duty to protect the financial interests of the shareholders would be incoherent with the established duties (firmly anchored, as I have pointed out, in the words of the statute itself) owed by the administrator to the company. In a case where the company had insufficient assets to meet its liabilities, that would effectively elevate shareholders' interests above those of creditors. It would also cut across the basic principle that the proper means for redressing losses suffered by the

company is through a derivative action brought in the company's name from which all creditors and shareholders may benefit.

614 Third, where (as here) the shareholders may have other means of redress. The Court of Appeal decision in *Cadwallader v Bajco Pty Ltd* [2002] NSWCA 328 shows that a shareholder has standing to invoke the equitable power to set aside the improper placement of the company in administration (and the statutory power under CA s 445D to terminate any resulting Deed of Company Arrangement). The shareholders may also present their own Deed of Company Arrangement. They may also pursue the liquidation of the company, or, if it continues under the directors' management, apply for leave to bring a derivative action against the directors or third parties.

615 It would be going too far to say that the shareholders' interests are always irrelevant in an administration. Where a company is insolvent or near insolvent, the officers' duties to the company are, for practical purposes, equated with those of the creditors. As I have said, that is the approach expressly adopted in the *Corporations Act*. But in the rare case of a company in administration which is actually solvent, then the interests of the company will certainly involve taking account of, and may for some purposes be equated with, those of the shareholders.

616 This does not affect any of the points that I have made. It is only an illustration of the way in which the duties which the law already imposes in favour of a company require that creditors' or shareholders' interests, according to the circumstances, be considered when identifying the company's overall interests.

617 I therefore conclude that the Administrators owed no duty of care to the plaintiffs based on a "proximate relationship". This conclusion is consistent with authority. In *Macks v Viscariello* (2017) 130 SASR 1, the South Australian Full Court held that an administrator held no duty of care to creditors: see at [192], [202], [208]. There was no challenge (nor could there have been at trial level) to that decision. The conclusion in the present case that the Administrators owed no duty of care to the plaintiffs as shareholders follows *a fortiori*.

618 The second pleaded basis for the duty for which the plaintiffs contended was alleged foreseeability of harm to them as a result of matters learned by the

Administrators in the course of the administration. These matters fall into two groups.

619 First, it was alleged that the Administrators knew, or ought to have known, that the plaintiffs were vulnerable elderly people. Their cabins were not transportable. If the Park was sold to a third party purchaser they stood to lose their homes.

620 Secondly, the Administrators were alleged to have been on notice of what was characterised as "dishonest and fraudulent conduct" by the Directors. Specially, that conduct was:

(1) the April 2014 share issue (it being alleged that the Administrators should have appreciated that the market value of the short-term sites was $7,000, rather than $550 per share, resulting in a loss to CHB of $120,000);

(2) the failure to pay site fees for the sites held by the Directors through HBS/RC (allegedly amounting to $180,000);

(3) the presentation of accounts for CHB which contained no figures for profit and loss, the appointment of the Administrators just before the Court was to hear final submissions and give judgment in the s 247A application, and the circumstance that the only creditors were the Directors and their associates.

621 This conduct, it was alleged, should have led the Administrators to the conclusion that the shareholders' "suspicions were well-founded" and the Directors planned to use the administration to buy the Park out of CHB and thereby defeat the plaintiffs' rights.

622 As to the first group of factors, the Administrators knew the plaintiffs were retired and that some of them may have been unsophisticated. The allegation that they knew that the plaintiffs stood to lose their homes through the sale of CTP is however overstated.

623 What rights the shareholders had to remove their cabins, and the practical impact if they could not, were, as was acknowledged at the Administrators' initial meeting with the shareholders, complex questions, the answers to which might vary between individual shareholders. Certainly the answers were important to shareholders who did not wish to take up the offer of an RSA from CTP. Even so, the additional cost of taking up the offer was about $120 per

week. This may have been a significant sum for some of the plaintiffs but it would not on the face of it necessarily have been beyond their financial capacity.

624 There was also no reason for the Administrators to think that it was their responsibility to advise the plaintiffs on these questions. Mr McMillan and Mr Darch (and their associated shareholders) were not taking the Directors' conduct lying down. They had legal representation from Mr Boog. In their position paper of 6 November 2019, Mr McMillan and Mr Darch expressly foreshadowed taking their own legal action over the Directors' conduct.

625 As to the honesty of the Directors, I have accepted Mr Dean-Willcocks' evidence that he did not think the Directors were using the administration to achieve a fraudulent takeover of CHB. In investigating and reporting on the Directors' conduct the Administrators acted in good faith. There may be room to argue about whether they should have reached conclusions which were more unfavourable to the Directors. That would be relevant to establishing breach of duty, if one exists. It provides no reason for imposing a duty in the first place, and still less for imposing a duty in favour of the plaintiffs alongside the established duty to CHB.

626 For these reasons, the pleaded matters added nothing to general proximity considerations. No duty of care has been established and the plaintiffs' claim fails for that reason alone.

627 **Negligence and causation**: As we have seen, the Administrators had a specific statutory task to perform and a limited time in which to perform it. The plaintiffs' case was long on denunciation of the Administrators for the deplorable outcome of the administration for the shareholders, but short on practicalities. Even if the Administrators should have been (or in fact were) suspicious of the Directors' motives, "no conclusion of negligence can be arrived at until the mind conceives affirmatively what ought to have been done" (Isaacs ACJ in *Metropolitan Gas Co v City of Melbourne* (1924) 35 CLR 189 at 194, quoted by Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [192]).

628 As I have explained, the creditors' claims by the Directors were to some extent questionable. There were also questions which might have been asked about whether CHB was insolvent. But Mr Dean-Willcocks genuinely believed that CHB was insolvent and counsel for the plaintiffs did not contend that he should have reached the contrary conclusion.

629 Still less was it suggested that the Administrators should themselves have taken some sort of action to set aside the administration or terminate the Kelly-Booker DOCA. That is not surprising because such action could have been taken by the plaintiffs had they wished.

630 The statement of claim alleged that, but for the Administrators' failure to take reasonable care, the Directors could not have sold the Park without eighty per cent approval from the shareholders. But as we have seen, unless the administration had been set aside or terminated, the eighty per cent restriction was not applicable. The Administrators would have had no power to take it into account. In any event, approval of the Kelly-Booker DOCA was a matter for the creditors not the Administrators.

631 The plaintiffs alleged that the Administrators were negligent in recommending the Kelly-Booker DOCA to the creditors. The critical conclusions in the report were that: (1) overall, HBS had underwritten CHB's expenses; and (2) there was insufficient evidence to decide whether the Directors had been justified in defending the s 247A proceedings.

632 As we have seen, conclusion (1) was contestable. There were arguments available that under CHB's constitution the profit from the "tourist business" belonged to CHB not HBS. There were also arguments available that Ms Kelly's division internal allocation of expenses and administration costs between the tourist business and "CHB Trading" was too favourable to HBS. But these arguments were not put to Mr Dean-Willcocks in cross-examination or articulated against the Administrators in final submissions.

633 For reasons I have given, there is room for suspicion about the Directors' motives for defending the s 247A proceedings (and later placing CHB in administration). But it would be another thing entirely to say that the Administrators should have rejected Mr Vrisakis' representations on behalf of

the Directors. Ultimately the legitimacy of the Directors' conduct turned on the facts. In any event, counsel for the plaintiffs did not mount any real challenge to the Administrators' conclusion that they could not decide the question one way or another.

634 As we have seen, the plaintiffs' real complaint was (or at least should have been) that the Directors by their conduct drove the company into administration. This of course was not something for which the Administrators were directly responsible. For reasons which I have given, once the administration had actually begun a failure by the Administrators to blame the Directors for CHB's predicament made no practical difference.

635 And even if the report were open to criticism for being too uncritical and accepting the Directors' denials of breach of duty, all the Administrators could have done would have been to recommend that CHB proceed to liquidation so that recovery action might be pursued. It is hardly likely that this would have made the slightest difference to the decision by Ms Kelly and Mr Booker, as creditors, to approve their own DOCA. The creditors' claims may have been to some extent overstated, but there was no opposition from any other creditor, so the overstatement would not have made any difference. It was not alleged that the Administrators had been negligent in admitting the Directors as creditors for the amounts claimed.

636 It is also alleged in the statement of claim that but for the Administrators' failure to take reasonable care the s 247A proceedings would not have been stayed (under CA 440D) and the plaintiffs would have "pursued remedies and protected their interests" as shareholders. But what "remedies" the plaintiffs would have obtained was not identified. The s 247A proceedings did not include any claim for relief in the nature of oppression.

637 In any event the bar on legal action by the plaintiffs against CHB was not absolute. The bar would not necessarily have prevented the plaintiffs from challenging the administration itself, or from challenging the Kelly-Booker DOCA; and it would always have been open to the plaintiffs to seek the court's leave to proceed anyway. Most fundamentally, the Administrators were not to

blame for the existence of CA s 440D, nor was there anything they could do about it.

638 Finally, although the plaintiffs alleged that the Park was sold to CTP at an undervalue, there was no evidence to support this. The plaintiffs asserted that the valuation obtained by the Administrators was "flawed". It is not necessary to go into whether that assertion was correct. It is true that the Park had a significantly higher carrying value in CHB's accounts. But proof of an entitlement to damages required proper evidence that, in the hands of the Administrators, the Park was worth more than the $430,000 offered by the Directors. There was simply no such evidence.

639 For these reasons, I think that the plaintiffs' common law claim fails on breach and causation grounds also. But even if I were wrong in this view, any entitlement to damages would be an entitlement of CHB's, not the plaintiffs'. The common law cause of action fails.

*Unconscionable conduct*

640 The allegations of unconscionability are relevantly pleaded two ways.

(1) The Administrators recommended entry in to the Kelly-Booker DOCA, thereby stripping CHB of assets without adequate compensation, to the advantage of the Directors and to the disadvantage of CHB and the shareholders.

(2) The Administrators were involved in the sale of the Park at an undervalue, due to having given erroneous instructions to the valuer.

641 Neither of these allegations fits comfortably within the concept of statutory unconscionability. In each case, the Administrators were at best negligent in the discharge of their obligations to CHB in a way which indirectly affected the plaintiffs. The Administrators' conduct was not conduct directed towards, nor did it impinge in any commercial way, on the plaintiffs. Indeed, it was not conduct "in trade or commerce" because it did not have the requisite trading or commercial character: *Macks* [233]-[234]. Furthermore damage is the gist of the action and, for reasons already given, no damage has been established.

*CA, s 1324(10)*

642 CA, s 1324(10) provides:

> Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

643 Counsel for the Administrators submitted, by reference to authority, that the section only applies where an injunction has actually been, or is actually being, sought. No injunction is sought here against the Administrators, nor could one have been sought. The proceedings were not instituted until after the statutory administration had been completed.

644 There was no reply to this submission and I accept it. The claim for compensation under s 1314(10) fails.

*Insolvency Practice Schedule s 90-15*

645 IPS s 90-15 relevantly provides:

> **90-15 Court may make orders in relation to external administration**
>
> *Court may make orders*
>
> (1) The Court may make such orders as it thinks fit in relation to the external administration of a company.
>
> *Orders on own initiative or on application*
>
> (2) The Court may exercise the power under subsection (1):
>
> (a) on its own initiative, during proceedings before the Court; or
>
> (b) on application under section 90-20.
>
> *Examples of orders that may be made*
>
> (3) Without limiting subsection (1), those orders may include any one or more of the following:
>
> (a) an order determining any question arising in the external administration of the company;
>
> (b) an order that a person cease to be the external administrator of the company;
>
> (c) an order that another registered liquidator be appointed as the external administrator of the company;
>
> (d) an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company;
>
> (e) an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator;
>
> (f) an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company,

remuneration paid to the person as external administrator of the company.

*Matters that may be taken into account*

(4) Without limiting the matters which the Court may take into account when making orders, the Court may take into account:

(a) whether the liquidator has faithfully performed, or is faithfully performing, the liquidator's duties; and

(b) whether an action or failure to act by the liquidator is in compliance with this Act and the Insolvency Practice Rules; and

(c) whether an action or failure to act by the liquidator is in compliance with an order of the Court; and

(d) whether the company or any other person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the liquidator; and

(e) the seriousness of the consequences of any action or failure to act by the liquidator, including the effect of that action or failure to act on public confidence in registered liquidators as a group.

646 The plaintiffs claimed an order for compensation for the losses suffered by them under s 90-15(3)(e). The breaches of duty were identified, apparently, as the breaches of common law, equitable and statutory duties elsewhere alleged against the Administrators.

647 The apparent intent of IPS s 90, of which this provision forms part, is to give the Court a wide power of supervision over the external administration of companies, comparable to the power of supervision which this Court has over the administration of trusts under Part 54 of the *Uniform Civil Procedure Rules 2005*. In particular, the power given by s 90-15(3)(e) parallels the Court's power in trust administration proceedings to order a trustee whose breaches of trust have diminished the trust estate to pay compensation which will restore the trust estate. But it is important to recognise that the supervisory jurisdiction over trusts, while allowing for relief to be granted against trustees and third parties associated with trustees, reflects substantive rights and obligations. It does not give the Court power to make any order it pleases. I would interpret s 90-15(3)(e) in the same way.

648 Counsel for the Administrators submitted that the plaintiffs have no standing. Section 90-20 limits standing for members to cases of members' voluntary winding up, which is not the present case. Counsel acknowledged a possible exception in the case of Mr Neville Kelly and Mrs Susan Kelly. They have

lodged a proof of debt which has not yet been ruled upon by the Administrators. I am not however sure that that proof is relevant, as it is a proof of debt in the deed administration, not the statutory administration. In any event, I have found that the Kellys have no claim against CHB.

649 The pleaded claim by the plaintiffs is a claim for an order for payment of compensation, directly for them, for their loss. That is not within s 90-15(3)(e) and I have found that no such entitlement exists.

650 In closing submissions, counsel for the plaintiffs sought an order for payment of compensation for loss suffered by CHB. Counsel appeared to acknowledge that this would require an enquiry into the damages suffered, given the lack of evidence about the loss actually suffered by the plaintiffs. Even if I were satisfied that a claim had been established, I would be disinclined to order this now in the light of the procedural history to which I have referred.

651 In any event, I do not consider that any such claims have been established. At most there may be some available criticisms of the way in which the Administrators conducted the administration. If there are viable claims against the Administrators, entitling CHB to substantial damages or compensation, then those claims may be pursued by a liquidator or by way of derivative action. I am not satisfied that any actionable breach has been established which would at this stage warrant ordering an enquiry into damages or compensation.

*Compensation by way of relief against oppression*

652 Initially, the plaintiffs' pleaded case included a claim that the Administrators' conduct itself constituted a form of oppression. That allegation was abandoned in the course of the hearing, but during final submissions counsel for the plaintiffs still sought to obtain relief against the Administrators on the footing that they were "involved in" the Directors' oppression.

653 I do not accept that this is a valid position to take. The court's powers under s 233 are directed towards eliminating oppressive conduct, or the effect of it. Such orders can of course be made against the parties' who engaged in, or are engaging in, the oppressive conduct. They can also be made against parties who are the beneficiaries of it. But there is no concept of "involvement in"

oppressive conduct as there is for contraventions of the *Corporations Act*. CA ss 232 and 233 simply provide that if oppressive conduct takes place the court may make orders to redress the oppressive effect of that conduct. Engaging in oppressive conduct is not in itself a contravention of the Act.

654 In the present case, it might have been argued that, although the Directors' control of the Company ceased with the appointment of the Administrators, and therefore direct oppressive conduct by the Directors ceased, the incurring of the Administrators' fees and the sale of the land by the Administrators were a continuing consequence of the Directors' previous oppressive conduct and therefore could be the subject of orders against the Directors and possibly also CTP. As I have already pointed out, this claim was not pleaded. But in any event it would not have given rise to a claim against the Administrators personally.

655 As counsel implicitly accepted by abandoning the allegation of oppressive conduct by the Administrators, their actions were taken in the course of performing their statutory obligations. Even if those actions were open to criticism on the grounds of negligence, they were not oppressive in the relevant sense.

**Conclusions and orders**

656 I have concluded that:

(1) the plaintiffs' claims to equitable proprietary interests in their sites fail;

(2) so too do the plaintiffs' claims as shareholders to have the transfer of the Park to CTP rescinded;

(3) there is no utility in the declaration sought that the plaintiffs' cabins are not "for any purpose" fixtures;

(4) some actions by the Directors were oppressive and the conduct of CHB's affairs has generally also been oppressive, but none of the relief against oppression expressly claimed in the statement of claim is appropriate;

(5) the plaintiffs' monetary claims against the Kelly-Booker parties fail;

(6) the plaintiffs' monetary claims against the Administrators fail.

657 As a consequence of conclusion (4) I will, as foreshadowed, give the plaintiffs an opportunity to seek an order for the winding up of CHB. It seems to me that

otherwise the claims against the Kelly-Booker parties should be dismissed. The plaintiffs' claims against the Administrators should also be dismissed.

658 I assume that the cross-undertakings given by the plaintiffs and the Kelly-Booker parties should be released and the freezing orders against the Kelly-Booker parties should be discharged. I will give the parties an opportunity to bring in a minute of order giving effect to my judgment and dealing with costs. If agreement cannot be reached I will hear further argument.

659 As I have described, the hearing was disjointed and difficult. The parties' submissions were also lengthy and canvassed many issues which I have not found it necessary to address. As I will be deferring the making of any formal orders at this point, I invite the parties to raise with me any errors and omissions in my judgment which could suitably be corrected before the making of final orders.

660 The result is a disappointment for the plaintiffs. The conduct of Ms Kelly and Mr Booker in marketing the shares and in the subsequent operation of CHB is, to say the least, open to criticism. But the result must reflect the way in which the plaintiffs' case was pleaded and presented to the Court.

661 With the benefit of hindsight, the decision to pursue the s 247A proceedings proved unfortunate from the plaintiffs' point of view. The costs of defending the proceedings necessarily fell on CHB because it was joined as the sole defendant. That was what later allowed the Directors to put CHB into administration.

662 This is not necessarily to accept the criticisms levelled by the Directors against Mr McMillan and Mr Darch for bringing the s 247A proceedings. It may yet be found that the Directors breached their duties in defending the proceedings unreasonably or expending excessive amounts on the defence. It may also be found that the Directors abused their powers in putting CHB into administration. But on any view, once the s 247A proceedings had been launched, it would have been necessary for CHB to incur some costs, which would, directly or indirectly, have had to be borne by the shareholders.

663 In oppression proceedings, it is common to join the subject company as a defendant, and it is necessary to do so if relief is sought which may affect the company's corporate interests (for example, a winding up order). But in a case involving a proprietary company it is often possible to ensure that the oppressors themselves are the main defendants and that they bear the costs of defending their conduct. Had the s 247A proceedings (which involved many of the same complaints as were later raised in these proceedings) been constituted as oppression proceedings, the whole outcome could well have been quite different.

664 The orders of the Court are:

(1) Adjourn the proceedings to 9:30 am on 1 June 2022 or such other time as may be arranged with my Associate.

(2) Direct that the parties confer on the form of orders to be made to give effect to this judgment and to deal with costs, and, no later than 24 hours before the adjourned hearing, submit proposed orders for this purpose.

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