Supreme Court

New South Wales

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| Case Name: | Fong v Douglas |
| Medium Neutral Citation: | [2023] NSWSC 1577 |
| Hearing Date(s): | 30 October; 1, 2 and 9 November 2023 |
| Date of Orders: | 14 December 2023 |
| Decision Date: | 14 December 2023 |
| Jurisdiction: | Equity - Expedition List |
| Before: | Parker J |
| Decision: | See [177]-[180] |
| Catchwords: | LAND LAW – conveyancing – options – call options – deed providing for mutual grant of put and call options – deed signed by grantor of call option only – whether bilateral execution required for effectiveness – whether signed deed delivered by grantor – whether contractual right of rescission established |
| Legislation Cited: | Nil |
| Cases Cited: | Comdox No 24 Pty Ltd v Robins [2009] NSWSC 367<br>Costin v Costin [1995] ANZ ConvR 289<br>Douglas v Belmore 88 Pty Ltd [2023] NSWSC 152<br>Pittmore Pty Ltd v Chan (2020) 104 NSWLR 62<br>Taouk v Ho [2019] NSWCA 156 |
| Texts Cited: | Seddon, N, Seddon on Deeds (2nd ed, 2022, Federation Press) [6.21]-[6.22], [6.25], [6.31] |
| Category: | Principal judgment |
| Parties: | Principal Claim<br>Sandra Fong (First Plaintiff)<br>Maurice Pakhoon Wong (Second Plaintiff)<br>Troy Pestano Douglas (First Defendant) |

Schofields 88 (No 1) Pty Limited (Second Defendant)
Shaurya Issa (Third Defendant)
SFMW Pty Limited (Fourth Defendant)
Dennis Raymond Bluth (Fifth Defendant)
Those persons who, together with the Fifth Defendant, traded as HWL Ebsworth Lawyers during the period 15 February 2020 to 15 October 2021 (Sixth Defendant)

Second Cross Claim
Troy Pestano Douglas (First Cross-claimant)
SFMW Pty Limited (Second Cross-claimant)
Schofields 88 (No 1) Pty Limited (First Cross-defendant)
Sandra Fong (Second Cross-defendant)
Maurice Pakhoon Wong (Third Cross-defendant)

Third Cross Claim
Dennis Raymond Bluth (First Cross-claimant)
Those persons who, together with the Fifth Defendant, traded as HWL Ebsworth Lawyers during the period 15 February 2020 to 15 October 2021 (Second Cross-claimant)
Troy Pestano Douglas (First Cross-defendant)
Craig Peter Arnold (Second Cross-defendant)

Fourth Cross Claim
Schofields 88 (No 1) Pty Limited (Cross-claimant)
Dennis Raymond Bluth (First Cross-defendant)
Those persons who, together with the Fifth Defendant, traded as HWL Ebsworth Lawyers during the period 15 February 2020 to 15 October 2021 (Second Cross-defendant)

Representation:

Counsel:
J Horowitz (Plaintiffs/Second and Third Cross-defendants on Second Cross-claim)
M Bennett (2 and 9 November 2023) (First and Fourth Defendants/First and Second Cross-defendants on Second Cross-claim/First Cross-defendant on Third Cross-claim)
P Afshar/J Pokoney (Second Defendant/First Cross-defendant on Second Cross-claim/Cross-claimant on Fourth Cross-claim)

M Newton (Fifth and Sixth Defendants/First and Second Cross-claimants on Third Cross-claim/First and Second Cross-defendants on Fourth Cross-claim)

Solicitors:
Yau & Wang Lawyers (Plaintiffs/Second and Third Cross-defendants on Second Cross-claim)
Uther Webster & Evans (First and Fourth Defendants/First and Second Cross-defendants on Second Cross-claim/First Cross-defendant on Third Cross-claim)
Baybridge Lawyers (Second Defendant/First Cross-defendant on Second Cross-claim/Cross-claimant on Fourth Cross-claim)
Gilchrist Connell (Fifth and Sixth Defendants/First and Second Cross-claimants on Third Cross-claim/First and Second Cross-defendants on Fourth Cross-claim)

File Number(s): 2021/226747

Publication Restriction: Nil

## JUDGMENT

1 This judgment is concerned with the ownership of a unit in a development at Schofields in western Sydney. The claim which is the subject of the judgment is to enforce a call option allegedly granted over the unit. The development was carried out in stages. The unit in question was part of the stage of the development known as “Frangipani”. It is known as unit D3.23.

2 The developer behind the project is Mr Andrew Hrsto. Mr Hrsto is an experienced builder and developer with several developments to his name. His building operations are carried out through a company, or corporate group, known as “Aland”. His practice is to hold the land used for his developments in special purpose companies. The company used for the development in question is Schofields 88 (No 1) Pty Limited (“S88”).

3 The practice adopted by Mr Hrsto for financing the subject development was to conduct off-the-plan “sales” of the units to investors, obtaining payment from the investors at the time of the “sales” which could be used to pay for construction work. The same practice appears to have been used by Mr Hrsto

in earlier development projects. I have used the term “sale” in inverted commas because the legal relationship between an investor on the one hand and S88 on the other was not based on a simple contract of sale. Rather, it involved both a loan agreement and a put and call option agreement.

4 Under the loan agreement, the investor would lend the “purchase price” (which was said to represent a substantial discount on the completed sale price of the unit) to S88. The loan would be repayable when the strata plan for the development had been registered. At the same time as entering into the loan agreement, the investor and S88 would enter into an option agreement giving the investor a call option (and S88 a put option) over the unit which could be exercised once the strata plan had been registered. If the option was exercised, the parties were to enter into a standard form contract for the sale of the unit by S88 to the investor, the purchase price being the principal amount of the loan.

5 The loan from the investor to S88 was described as being “secured” by the option agreement. It carried interest at the relatively modest rate of 3%. S88 could rescind the option agreement and terminate the arrangement by repaying the loan, but in that event was required to pay interest at the higher rate of 10%, to compensate for use of the investor’s money.

6 The central figure in the present dispute is Mr Troy Pestano Douglas. Mr Douglas was involved in bringing investors into earlier stages of the Schofields development, and had apparently been involved with at least one previous development of Mr Hrsto’s. He was involved with one or more companies, but also operated individually through a discretionary family trust named the “Douglas Family Trust”. There was reference in the evidence to Mr Douglas having previously obtained, or being close to obtaining, an Australian financial services licence, but it seems that he did not actually hold such a licence at the time of the transactions which are the subject of these proceedings.

7 The legal work for the transactions was undertaken by a Sydney solicitor, Mr Dennis Raymond Bluth, or by other solicitors at his firm, under his supervision. Mr Bluth was retained by Mr Douglas, who paid his bills (through the Douglas Family Trust). Mr Bluth apparently regarded Mr Douglas as his client; in the

course of the proceedings it has been alleged that he owed obligations as a solicitor to other parties as well.

8 Mr Bluth had extensive experience of property transactions. He had been admitted to practice in February 1977. At the relevant time, he was a partner of the national law firm HWL Ebsworth ("HWLE"). He retired from HWLE at the end of July 2022.

9 The plaintiffs in the proceedings are investors who were introduced to the Schofields development by Mr Douglas. The first plaintiff, Sandra Fong, is retired. The second plaintiff, Maurice Pakhoon Wong, is her son. He works as a website producer.

10 The plaintiffs had previously, through Mr Douglas, invested in another development undertaken by Mr Hrsto. In March 2020, as the result of an approach from Mr Douglas, they agreed to "buy" a unit in the Schofields development. The unit was in a stage known as "Bottlebrush" which was under construction. The "price" was about $400,000, which was said to represent a large discount on the selling price at completion.

11 Mr Bluth drew up a loan agreement and a put and call option agreement between the plaintiffs and S88, and obtained the plaintiffs' signatures on those agreements. Ms Fong drew a cheque for $401,000 which was deposited under her name into an HWLE trust account. It seems however that, unknown to the plaintiffs, the agreements were never signed on behalf of S88. Indeed, Mr Hrsto later denied all knowledge of them. For three months, the monies lay in an HWLE trust account.

12 Meanwhile, Mr Hrsto was trying to raise the finance to proceed with the "Frangipani" stage of the Schofields development, and entered into negotiations, through Mr Bluth, for Mr Douglas to help. Eventually, Mr Hrsto, on behalf of S88, and Mr Douglas entered into a formal agreement under which Mr Douglas was authorised to find investors for units in Frangipani. The agreement was referred to in evidence as the "Mandate Agreement" and was signed in early June 2020.

13 The Mandate Agreement was a form of commission arrangement. Mr Douglas was authorised to find up to $12 million in investments for Frangipani. In return, he would receive one unit for every $2 million invested. This would be effected by the grant of options, at nominal exercise prices, over units in Frangipani nominated by Mr Douglas.

14 The provisions of the Mandate Agreement concerning the grant of the options were not clearly drafted. As I explain below, the better interpretation of the language used is that Mr Douglas was entitled to require all six options to be granted to him upon entry into the Agreement, subject to later rescission if sufficient funds were not raised. But no immediate steps were taken by Mr Douglas to have the options issued, perhaps because the Agreement was not understood in that way.

15 Then, in mid-June, Mr Douglas appears to have decided to use the plaintiffs' Bottlebrush purchase money to "cash out" his entitlement, or prospective entitlement, to one of the units in Frangipani. He proposed to the plaintiffs that their "purchase" be switched to a unit in Frangipani from the unit they had agreed to take in Bottlebrush. As an inducement, he offered them the further sum of $20,000. The "purchase" of the unit would be effected by Mr Douglas nominating the plaintiffs to exercise his rights under a call option over the unit with S88. In correspondence with Mr Bluth, the plaintiffs accepted Mr Douglas' proposal, and identified unit D3.23 as the Frangipani unit which they wanted.

16 On Mr Douglas' behalf, Mr Bluth then wrote to Mr Hrsto advising of "purchases", or proposed "purchases", in Frangipani which exceeded, or purportedly exceeded, $2 million in aggregate value. Mr Bluth nominated unit D3.23 as the unit to be taken by Mr Douglas. Mr Hrsto replied with a confirmation, although what was actually confirmed, and whether the "purchases" satisfied the terms of the Mandate Agreement, are now in dispute.

17 Mr Bluth also drew up two further agreements to give effect to the arrangement between Mr Douglas and the plaintiffs. One was a standard form loan agreement for the "purchase price", but with Mr Douglas as the borrower rather than S88. The other was a "deed of inducement and nomination" under which

Mr Douglas agreed to nominate the plaintiffs to exercise his option over unit D3.23, and to pay the inducement sum of $20,000 on settlement.

18 On 26 June, Mr Bluth obtained the plaintiffs' agreement to these terms. But he did not ask them to execute full copies of the loan agreement and the deed of inducement and nomination. Instead, he obtained their authorisation to use the execution pages which had been signed back in March. Apparently, the plaintiffs understood that those pages would be affixed to the new agreements, but this does not appear to have been done (and the documents, it would seem, would not have matched anyway). Nor was Mr Douglas' signature obtained.

19 Nevertheless, on 29 June, Mr Bluth arranged for the $401,000 held under Ms Fong's name in an HWLE trust account to be transferred into the name of Mr Douglas. This allowed Mr Douglas to draw on the monies, and he quickly did so. By 29 July, there was only $7 left in the account. Among the withdrawals were payments totalling $29,000 for outstanding bills rendered by HWLE.

20 At the same time as he drew up the agreements between the plaintiffs and Mr Douglas, or shortly afterwards, Mr Bluth drew up a standard form put and call option deed to reflect Mr Douglas' entitlement, or claimed entitlement, to receive unit D3.23 by way of commission from S88. The document provided for the grant of put and call options over unit D3.23 between S88 and Mr Douglas for the nominal price of $1. It also provided that Mr Douglas could appoint a nominee to exercise his rights under it. On 1 July, Mr Bluth obtained Mr Hrsto's signature on the document on S88's behalf. There is a dispute about whether the document was binding on S88 as a deed, but for convenience I will refer to it as the "Option Deed". The contract annexed to the Deed will be referred to as the "Option Contract".

21 Ten months then went by, during which no further investors appear to have been introduced by Mr Douglas. Nevertheless, the construction of Frangipani was begun, presumably with finance obtained from other sources.

22 In May 2021, Mr Wong wrote on behalf of himself and his mother to Mr Bluth. Mr Wong requested the documentation for their "purchase". He also sought information about when Frangipani would be complete. Despite reminders from

Mr Wong, Mr Bluth failed to give him a substantive response. This went on for more than two months. Meanwhile, on 23 July, the strata plan was registered, allowing S88 to proceed with the sale of the Frangipani units.

23 By late July, Mr Wong was still seeking information from Mr Bluth, and suggested that the plaintiffs might wish to "get out of [the] deal". Mr Bluth had made some internal enquiries and drafted the documents required for Mr Douglas to nominate the plaintiffs and exercise the option (whose expiry date was less than two weeks away), but had not taken any steps to have Mr Douglas sign those documents.

24 Eventually, on 2 August, Mr Bluth wrote to Mr Wong with a substantive (but partial) response. He stated that the plaintiffs were "purchasing" from Mr Douglas who in turn was "purchasing" from S88 under a "call option deed". Mr Douglas would need to nominate the plaintiffs as purchasers under that deed. HWLE no longer acted for Mr Douglas, and it was up to the plaintiffs to pursue the transaction, including any question of pulling out, with him.

25 On the following day, following a meeting with Mr Bluth, the plaintiffs appointed an independent solicitor to act for them. On 5 August, the solicitor, having provided Mr Douglas with the documents drafted by HWLE, called upon him to nominate the plaintiffs and exercise the option in their favour, in accordance with his obligations.

26 On 6 August, Mr Douglas responded through his own independent solicitor. At first, he raised a question as to the validity of the Option Deed. Then, on 9 August, he changed tack. Through his solicitor he wrote to S88 purporting to nominate the "purchaser" under the Option Deed. But rather than naming the plaintiffs as his nominee, Mr Douglas named a company owned by him, SFMW Pty Limited ("SFMW"). At the same time, he purported, as the sole director of SFMW, to exercise the option in its favour.

**Claims for determination**

27 The proceedings were commenced by the plaintiffs on 9 August 2021. In September of that year, an interlocutory regime was established which prevented S88 from dealing with the unit. This regime included two separate restraints which reflected the two separate proprietary claims made at that

stage concerning the property, one by the plaintiffs and one by Mr Douglas (and SFMW, but I will not refer to that company separately in the rest of this judgment unless it is necessary to do so). S88 gave an undertaking (based on a cross-undertaking as to damages) to the plaintiffs not to deal with the unit and the Court ordered the extension of a caveat previously lodged by Mr Douglas over the unit.

28 In fact, S88 had in December 2020 contracted to sell unit D3.23 to another investor. But that contract went off and in the end no question of third-party rights arose for decision in the proceedings.

29 Expedition of the proceedings was sought and granted. In March this year, the hearing date was fixed to begin at the end of October. By the time the proceedings came on for hearing, they involved the following parties and claims.

30 First, there was the plaintiffs' claim in the principal proceedings. In those proceedings, Mr Douglas was the first defendant and SFMW was the fourth defendant. S88 was the second defendant. Mr Bluth was the fifth defendant. The remaining partners of HWLE, collectively, were named as the sixth defendant. The third-named defendant has played no part in the hearing and does not need to be mentioned.

31 The plaintiffs' primary claim was to enforce Mr Douglas' rights against S88 under the option, but for the plaintiffs' own benefit. The plaintiffs sought an order declaring the unit to be held by SFMW on constructive trust for them, and an order that S88 transfer the unit directly to them. If proprietary relief was not possible, the plaintiffs fell back on a claim against Mr Douglas by way of debt or restitution. They also claimed damages from Mr Bluth and HWLE for any loss they would suffer in the event that they did not obtain the unit.

32 The next claim was described as the second cross-claim, although, in fact, there was no first cross-claim. It was a cross-claim by Mr Douglas and SFMW for specific performance of the Option Contract against S88. Alternatively, damages were claimed in lieu of specific performance. There was also a claim for common law damages for breach of contract.

33 The third cross-claim was by Mr Bluth and HWLE. The cross-defendants were Mr Douglas and Craig Peter Arnold. Mr Arnold was, at the time, the trustee of the Douglas Family Trust. Mr Arnold has not participated in these proceedings, and it seems that Mr Douglas has now replaced him as trustee. Mr Bluth and HWLE sought damages for any loss they might suffer from being made liable to the plaintiffs. This claim was based on allegedly misleading and deceptive conduct by Mr Douglas (both in his own capacity and on behalf of the Trust) in giving the instructions to Mr Bluth which resulted in the plaintiffs' unit entitlement being switched from Bottlebrush to Frangipani.

34 Finally, there was a fourth cross-claim. The cross-claimant was S88 and the cross-defendants were Mr Bluth and the other partners of HWLE. The claim was contingent on S88 being required to hand over the unit. The claim for damages was based on allegations of professional negligence, on the footing that Mr Bluth had been acting for S88 in the transaction as well as for Mr Douglas (and the plaintiffs).

35 The position taken by S88 in its defences was as follows. S88 had no direct obligations to the plaintiffs at all, and the plaintiffs needed to have recourse to Mr Douglas, or perhaps to Mr Bluth and the other partners of HWLE, for the loss of their investment. Nor did S88 have any obligation to Mr Douglas or SFMW to proceed with the transfer of the unit in accordance with the terms of the Option Deed. Among the reasons for this was that Mr Douglas had not raised the $2 million required for him to be entitled to the unit. In August last year, formal notice was given on behalf of S88 purporting to rescind the arrangement with Mr Douglas.

36 Another ground raised in S88's defences was that the Option Deed was not binding on S88 because it had never been formally delivered. An affidavit from Mr Hrsto was filed for S88 in which Mr Hrsto stated, among other things, that he had specifically agreed with Mr Bluth that the Option Deed signed by him would be held "in escrow" until $2 million in funding had actually been provided, and that this had never happened.

37 In their defences, Mr Bluth and HWLE accepted that they had acted for Mr Douglas, but did not admit that they had acted for the plaintiffs or for S88. They

also denied any negligence or other breach of professional obligation on their part. An affidavit from Mr Bluth was filed for them, but the affidavit was filed before Mr Hrsto's and did not address the alleged escrow arrangement.

38 Mr Douglas had previously been represented in the proceedings by solicitors, who had filed the cross-claim on behalf of Mr Douglas and SFMW, and defences on their behalf which denied the claims against them. But the solicitors withdrew in November last year. Thereafter Mr Douglas conducted his own case. He may have appeared at some of the directions hearings, but did not file or serve any evidence in support of his defences to the claims against him or in support of his cross-claim.

39 The hearing had been fixed for four days, beginning on Monday 30 October. On that day, I was informed by counsel that a settlement in principle had been reached between the plaintiffs, S88, Mr Bluth and HWLE. This would leave for determination only the claim by the plaintiffs against Mr Douglas and SFMW, and the cross-claim by Mr Douglas and SFMW against S88. Counsel jointly requested that the proceedings be adjourned for two days (until Wednesday 1 November) to allow the settlement to be documented and the remaining claims then to proceed.

40 Mr Douglas appeared at the hearing on 30 October alongside the counsel for the other parties. He also purported to appear for SFMW, but I pointed out to him that, as a non-lawyer, he would need leave to represent the company. Mr Douglas consented to the adjournment until 1 November on the basis proposed by the other parties. I indicated that, if he wished to proceed with SFMW's claim on that occasion, he would need to obtain legal representation for the company or make a formal application for leave to represent it himself.

41 When the matter returned to court on 1 November, it emerged that the settlement had not yet been finally documented and signed. A solicitor, Ms Vivian Evans, sought to appear on behalf of Mr Douglas and SFMW to argue for an adjournment. But this was not possible, as she only held instructions to appear on the adjournment application, not the hearing of the substantive proceedings if they went ahead, and she was not prepared to enter an

unconditional appearance. I allowed Ms Evans to participate in the hearing as a Mackenzie friend to Mr Douglas (only).

42 In the end, it was not necessary to rule on the adjournment application on that day. I adjourned the proceedings to the following day, Thursday 2 November, to see whether the settlement could be finally documented, and final orders made disposing of the proceedings, between the parties who had agreed to settle. I left it open to Mr Douglas to renew his adjournment application, but ordered Mr Bluth to be present so that he could be called as a witness in Mr Douglas' cross-claim in the event that an adjournment was refused.

43 By the time the hearing began on 2 November, Ms Evans had entered an unconditional appearance for Mr Douglas and SFMW, and had briefed counsel to represent them. I am indebted to Ms Evans and counsel for taking on the matter at short notice. From this point forward, Mr Douglas and SFMW were commonly represented, and I will for convenience refer only to Mr Douglas unless express reference to SFMW is necessary.

44 Eventually, after the hearing had begun, I was told that a settlement agreement had been signed between the plaintiffs, S88, Mr Bluth and HWLE. I was invited to, and did, make orders dismissing the proceedings as between the plaintiffs, S88, Mr Bluth and HWLE. S88's cross-claim against Mr Bluth and HWLE (the third cross-claimant) was also dismissed by consent. The undertaking over the unit in favour of the plaintiffs was discharged.

45 The settlement resulted in the contingency which had been the subject of the third cross-claim, by Mr Bluth and HWLE against Mr Douglas, not being fulfilled. The cross-claim therefore would have to be discontinued or dismissed. But counsel for Mr Bluth and HWLE wished to argue that any discontinuance or dismissal should be on the basis that there be no order as to costs. This was not agreed. As the question was not urgent, I indicated that it could be dealt with at some later point.

46 Other terms of the settlement, including whether any payment was to be made either by S88 or by Mr Bluth or HWLE to the plaintiffs, were not revealed. Counsel for Mr Douglas foreshadowed an application to issue a Notice to

Produce in this regard. But in the way the argument developed, it was not necessary to reach a final decision on this.

47 As already noted, the consent orders left Mr Douglas' cross-claim against S88 for decision. The caveat lodged by Mr Douglas over the unit was also left in place. Counsel for S88, having earlier foreshadowed this course, urged me to proceed with the hearing of Mr Douglas' cross-claim forthwith.

48 Nor, as already noted, had the plaintiffs had not given up their claim against Mr Douglas. While they no longer pursued a direct proprietary claim for the unit against S88, counsel made it clear that, should Mr Douglas' cross-claim succeed, the plaintiffs would then seek to take advantage of that success and seek orders requiring Mr Douglas to transfer the property on to them. Counsel proposed that the plaintiffs' remaining claims against Mr Douglas stand over until after his cross-claim against S88 had been decided.

49 In response, counsel for Mr Douglas accepted that he was prima facie liable in debt to the plaintiffs. If his claim to the property succeeded, counsel accepted that the plaintiffs would be entitled to the property in discharge of his debt obligations. But counsel did not accept that if the proprietary claim failed, the plaintiffs would necessarily obtain judgment for the full amount of the loan and interest. The suggestion was that, if the settlement provided for the plaintiffs to receive a sum of money, that would be credited against any liability Mr Douglas would otherwise have had.

50 Counsel for Mr Douglas re-applied for an adjournment of the remaining proceedings. The orders proposed by counsel involved the matter being stood over to 14 December, for directions before the Registrar in Equity. They also contemplated the issue of a notice to produce concerning the terms of settlement and the possibility of amendments to Mr Douglas' pleadings to make a cross-claim against Mr Bluth and HWLE.

51 Another function of the proposed adjournment was that it would allow counsel to propound Mr Douglas' case properly. In particular, late affidavits from Mr Bluth and one of his employed solicitors had been served on behalf of HWLE which responded to Mr Hrsto's evidence about the Option Deed being handed over in escrow. But counsel for S88 had foreshadowed an objection on the

basis that the affidavits raised new matters which could not be addressed if the hearing were to proceed forthwith, and there was an obvious risk that this objection would succeed. An adjournment would, in all probability, allow this evidence (and any reply from Mr Hrsto) to come in and be dealt with on its merits.

52 Counsel for Mr Douglas pointed out that the settlement between the other parties had been reached without Mr Douglas' involvement (at least so far as the evidence was concerned) and had left him in a somewhat exposed position. Counsel suggested that Mr Douglas should at least be entitled to a sufficient adjournment to investigate, by Notice to Produce, what the terms of the settlement were and their ramifications for his position in the litigation. But in my view, the terms of the settlement were only potentially relevant, if at all, to the claims by the plaintiffs against Mr Douglas. They could not affect the merits or otherwise of his cross-claim against S88.

53 There was also some debate between the parties about what was to have been dealt with at the hearing. Before the hearing date had been fixed, I had suggested that I would not hear monetary claims for relief, but would instead leave those for determination at some later point in a non-expedited way. But the order fixing the proceedings for hearing, when actually made, did not provide for monetary claims for relief to be hived off. It was also somewhat unclear from the order whether the third and fourth cross-claims were to be determined. But I did not consider that this was relevant to whether Mr Douglas' cross-claim should be adjourned. As it happened, as a result of the settlement, neither the third nor the fourth cross-claims needed to proceed to hearing anyway. The precise scope of the order fixing the proceedings for hearing therefore did not need to be determined.

54 No criticism could be made of counsel for wishing to have further time. But the merits of the application depended upon Mr Douglas' conduct of his defence, and no special treatment could be afforded to him on the ground that he had not been represented in the lead-up to the trial. It should have been clear to Mr Douglas that his cross-claim had been fixed for hearing and he would need to

be ready to run it, whether or not the plaintiffs pursued their direct proprietary claim against S88.

55 Furthermore, the application was made on the basis that Mr Douglas wished to maintain his caveat, thereby continuing the effective prohibition on S88 dealing with the unit, until his cross-claim had been determined. No fixed date was suggested for the resumed hearing and there could be no certainty that a judge would be available when Mr Douglas was ready to proceed.

56 In these circumstances, I considered I had no alternative but to dismiss the application for an adjournment. This will not necessarily prevent Mr Douglas from bringing a claim against Mr Bluth or HWLE, whether in separate proceedings, or perhaps by later cross-claim in these proceedings. That question can be considered in due course.

57 Following my ruling, the hearing continued for the rest of the day on 2 November. The evidence was not completed, but I found it possible to allocate a further day the following Thursday, 9 November. The evidence and parties' submissions were completed on that occasion.

58 It was agreed that following determination of Mr Douglas' cross-claim, counsel for the plaintiffs would return and any further debate about the plaintiffs' claim against Mr Douglas would take place in the context of my decision on the cross-claim. Accordingly, this judgment deals only with the claims made in the cross-claim.

**Summary and analysis of evidence**

59 Although the affidavit evidence and the cross-examination ranged wider than this, the factual issues on the cross-claim were limited to the circumstances in which the Option Deed was signed. In this part of the judgment, I will first summarise the documentary evidence before turning to the witness testimony and setting out my conclusions.

*Documentary evidence*

60 The background to the relevant negotiations included an earlier development in which Mr Hrsto and Mr Douglas had both been involved. That development was one at Belmore in western Sydney. The vehicle for it was a company

named Belmore 88 Pty Limited ("B88"). Coincidentally, the development is the subject of other pending proceedings in the Court: see the judgment of Slattery J in *Douglas v Belmore 88 Pty Ltd* [2023] NSWSC 152.

61 In his judgment, Slattery J gave a summary of the Belmore development which appears not to have been in dispute for present purposes. The shares in B88 were, on incorporation in 2011, held equally by Mr Hrsto and Mr Douglas. B88 held the Belmore property as trustee under a unit trust, the units in which also appear to have been held equally by Mr Hrsto and Mr Douglas. Mr Douglas was a director and secretary of B88 from December 2011 onwards. Then, in July 2018, he agreed to resign (to be replaced by Mr Bluth) and to transfer his shares in B88 to Mr Hrsto. In return, he was to receive a share of the profits from the project, with advances on his eventual entitlement to be made in the meantime. He also seems to have retained his units in the unit trust.

62 This arrangement left Mr Hrsto in effective control of B88. By 2020, the development was still incomplete, and Mr Hrsto was concerned about the costs of completing it. Mr Douglas, it seems, continued to be involved in dealings with investors he had introduced into the development. Mr Bluth also appears to have been involved in dealings with investors, presumably on behalf of B88.

63 The negotiations which resulted in the execution of the Mandate Agreement began at the end of April 2020. Those negotiations led to a meeting on 27 May. Following the meeting, Mr Bluth sent an email to Mr Hrsto, copied to Mr Douglas, which summarised the outcome in these terms:

> 1. Belmore
>
> Troy is to discuss with Belmore Investors releasing units and taking units in Frangipani, subject to discount 30% and tax advice.
>
> 2. Wattle/ Bottlebrush
>
> Troy is to discuss with 4 investor loans where HWLE holds $1,400,000 approx to swap to Frangipani.
>
> 3. Frangipani
>
> Troy to raise on investor loans $10-$12 million on 27.5-30% discount (higher discount for 2 or more units).
>
> For every $2m raised Troy entitled to a unit.
>
> 4. Troy to investigate using AFL Licence to raise money for Aland on the debt market.

64 The formal Mandate Agreement, which was dated 5 June 2020, took the form of a letter from Mr Douglas to Mr Hrsto on behalf of S88. It was drafted by David Clarke, another partner at HWLE. Counterpart copies are in evidence, one signed by Mr Hrsto and one by Mr Douglas. The copies each bear handwritten amendments, and there is one discrepancy between them, but the discrepancy is not material for the purposes of this judgment.

65 I will set out the relevant clauses later, when considering matters of construction. But broadly speaking, Mr Douglas was granted six call options over units in the Frangipani development. For each $2 million raised by Mr Douglas, he would be entitled to retain an entitlement to one unit. At the end of the development, S88 would transfer the units to Mr Douglas or his nominee. S88 was also to loan $125,000 to Mr Douglas, repayable with interest within 24 months. If the loan was not repaid by the end of the development, Mr Douglas was to lose one of his unit entitlements.

66 Following entry into the Mandate Agreement, negotiations took place between Mr Douglas, the plaintiffs and Mr Bluth about the swap arrangement. Joanna Parry, an employee of a company of Mr Douglas' named "Shoebill Capital", with the position of Executive Assistant, was also copied in some correspondence. The following emails record the negotiations which took place between 17 and 25 June:

> **Bluth to Fong and Wong (Cc Douglas, Parry), 17 June 12:42**
>
> As discussed with Troy, the developer wishes to now move the investors onto the next stage being Frangipani.
>
> Building will be commencing in 3 months and be completed hopefully by December 2021.
>
> I have enclosed floor plan for an apartment as close in size and layout as you had chosen in Bottlebrush. Unit D4.22.
>
> The market price is $581,250 and 30% discount = $406,875.
>
> Please confirm that you will swap over to D4.22.
>
> Any queries please let me know**.**
>
> **Bluth to Fong (Cc Parry), 23 June, 11:23**
>
> Here are 2 floor plans on level 3 instead of D4.22 on level 4.
>
> Unit 3.22 and 3.33 overlooking the courtyard.
>
> Both are priced at $576,000

Please let me know which one you prefer.

**Fong to Bluth, 23 June, 13:54**

Thank you for your email. Troy Douglas spoke with me yesterday and explained the situation. Troy has offered to pay us $20,000 at the end of the project as compensation for the change and hence considerable delay. Therefore, Maurice and I confirm the swap from Unit B3.08 Bottlebrush to Unit D3.23 Frangipani.

Can you please confirm if the following figures are correct:

Initial apartment cost: $576,000

Discount: 30%

Discounted apartment cost: $403,200

Additional payment required from us: $1,950 (please advise date required)

End of construction rebate: $20,000

Please go ahead with drawing up the relevant documents including the one with Troy. Will there be additional legal fees to this, considering the first agreement did not go ahead?

**Bluth to Fong, 24 June, 15:57 (attaching Deed of Inducement and Nomination)**

Here is the Deed with Troy to nominate you and Maurice to be the purchasers of D3.23 and to pay you $20,250 on settlement of the unit.

Please review and confirm.

No need to worry about the extra funds.

**Fong to Bluth (Cc Wong), 25 June, 10:27**

Maurice and I have a few questions to ask;

1. Does this ONE document replace the 3 documents Maurice and I previously signed for the apartment in Building A? Or do we still sign a separate Loan Agreement and a Put and Call Option Deed? If it is the former, what's the reason why?

2. A slight difference in amounts between your email ($20,250) and the Deed ($20,062.50). Which is the correct amount?

3. Please add Maurice Wong's email address at clause 3.3(b) Email address is: [address]

4. Do we come in to sign the document(s) and have our signatures witnessed in your office? Is there a deadline when the contracts need to be finalised?

Please email or call me to discuss further. Please include Maurice into your future correspondence.

**Bluth to Fong and Wong (Cc Douglas and Parry), 25 June 13:37 (attaching revised Deed of Inducement and Nomination)**

Please see updated Agreement.

I have made the inducement amount $20,250.

This is different to the earlier one as Troy has a mandate over some units in Schofields and he is nominating you as the buyers. So the loan is made to Troy.

Please ring to discuss.

**Bluth to Fong and Wong (Cc Douglas), 25 June, 15:10pm (attaching Loan Agreement)**

As mentioned earlier the Loan is now with Troy who has a mandate from Andrew/ Schofields 88 and he will in turn appoint you as the purchasers under the Put and Call Deed for apartment D3.23 Frangipani.

**Fong to Bluth (Cc Wong and Douglas) 26 June 2020 at 11:37am**

Thank you for clarifying this information.

As per our phone conversion, we are happy to proceed using the signed contract documents from the previous Schofield agreement.

67 There appears to have been a discussion by telephone between Ms Fong and Mr Bluth, as suggested in the second-last of these emails. The following morning, Ms Fong wrote to confirm:

> **Fong to Bluth (Cc Wong and Douglas) 26 June 2020 at 11:37am**
>
> Thank you for clarifying this information.
>
> As per our phone conversion, we are happy to proceed using the signed contract documents from the previous Schofield agreement.

68 On 26 June (a Friday), the following emails were exchanged between Mr Bluth and Mr Hrsto under the heading “schofields raise”:

> **Bluth to Hrsto and Douglas (Cc Parry), 26 June, 9:52:**
>
> ANDREW,
>
> Thus far the following
>
> Belmore to Schofields
>
> 1. lot 82 apartment 123 to Schofields D3.19 Sale price $586,500-30% = $410,550
>
> 2. lot 62 apartment 118 to Schofields D3.23 and D4.22 Sale price $1,157,250 - 30% = $810,075
>
> Total = $1,220,625
>
> Schofields Raise
>
> 1. C2.17 sale price $550,000-30% $385,000
>
> 2. DG24 and D2.24 sale price $1,141,00-30% $798,700
>
> Total = $1,183,700
>
> Troy's unit
>
> D3.23

Units from Belmore investors returned

1. lot 97 apartment 407

2.Lot 51 apartment 312

3. lot 65 apartment 216

More to come.

**Bluth to Hrsto, 26 June, 12:46**

Correction

Lot 62 apartment 118 (Sam Seng) to Schofields D2.23 $570,750 and D4.22 581,250 = 1,152,000 -30%= $806400

So total is now $1,216,950

**Hrsto to Bluth (Cc Douglas and Parry), 26 June, 13:21**

Confirmed.

69 The following Monday (29 June), Mr Bluth caused the monies held in an HWLE trust account, under the client name of Ms Fong, to be transferred into a trust account ledger in the name of the Douglas Family Trust.

70 The affidavit evidence discussed below establishes that on 1 July, Mr Hrsto attended HWLE's offices for a meeting with Mr Bluth. Also present was Mr Paul Tran, an employed solicitor at HWLE, who was assisting Mr Bluth on Mr Douglas' matters. Mr Hrsto signed, on behalf of S88, the Option Deed and a version of the Option Contract which was expressed to be an attachment to it, and left those documents with Mr Bluth and Mr Tran.

71 One thing which I think does appear relatively clearly is that the Option Deed and Option Contract would have derived from a standard form used by Mr Bluth for investors introduced by Mr Douglas to Mr Hrsto's projects (see [3] above). But there was no specific evidence about the process of preparation of the documents in advance of the meeting on 1 July 2020.

72 There are several copies of the Option Deed and the Option Contract in evidence and there are some divergences between them. As I will describe below, when the question of exercise of the option arose in late July 2021, Mr Bluth and Mr Tran retrieved and provided copies of the documents, or parts of them, or supplementary pages, to other parties. Some of the divergences can be explained by inference, but there was no direct evidence which identified,

precisely and exhaustively, what precise form the documents took when Mr Hrsto signed them on 1 July 2020.

73 In what follows, I try to describe what can be gleaned from the evidence as it stands. I also set out the relevant terms of the Option Deed (which are not in doubt).

74 The parties to the Option Deed were identified as S88 (the Grantor) and Mr Douglas (the Grantee). After the cover page and a table of contents, there was a statement under s 66ZH of the Conveyancing Act 1919 which set out Mr Douglas' cooling-off rights as Grantee. The body of the Deed then consisted of 15 pages which contained an identification of the parties, a recital, and eleven numbered clauses, followed by three schedules (Notice of Exercise of Call Option; Notice of Exercise of Put Option; Nomination Form), and a "signing page".

75 The recital stated:

> This deed witnesses that in consideration of, among other things, the mutual promises contained in this deed the parties agree as follows:

76 Clause 3 was headed "Call Option". By clause 3.1, S88 granted Mr Douglas an option to buy the unit on the terms in the contract annexed to the Deed. By clause 3.2, headed "Payment of Call Option Fee", S88 acknowledged having received the "Call Option Fee" (defined as $1) from Mr Douglas, on the making of the Deed. Clause 3.3 obliged S88, after lodging the plan of subdivision, to provide, within a reasonable time, notice of lodgement to Mr Douglas.

77 Clause 3.4, headed "How to exercise", made provision for the exercise of the call option, by the delivery of specified documents, to the Grantor's Solicitors. Delivery had to be made during the "Call Option Period". The "Call Option Period" was defined as commencing from the date 43 days after "the date of this deed" and ending thirty business days after the giving of the lodgement notice.

78 Clause 3.6 made provision for the consequences of the call option being exercised. The contract was to bind the parties, and any guarantor, from the time that S88 received the documents listed in clause 3.4.

79 Clause 4 was headed “Put Option”. Broadly speaking it mirrored clause 3. By clause 4.1, Mr Douglas granted to S88 an option for S88 to sell the unit to him on the terms in the annexed contract. Clause 4.3 provided that the put option, like the call option, was to be exercised by the delivery of certain documents in a specified way, during a specified period. The “Put Option Period” was defined as commencing on the expiry of the Call Option Period and ending twenty business days afterwards.

80 Clause 5 was headed “Nomination”. Clause 5.1 provided that Mr Douglas could appoint a nominee to exercise the call option, by issuing a nomination notice to S88, which needed to be given to S88 or its solicitors on or before the exercise of the call option. By clause 5.3, the nominee was to have the full benefit of all rights given by S88 under the Deed, and to be bound by all of Mr Douglas’ obligations under the Deed.

81 The execution page began by stating “executed as a deed”. Signature blocks then appeared for both S88 and the Grantee. For S88, the signature block provided: “executed … in accordance with section 127 of the *Corporations Act 2001*” with space for signature by the “Director/Company Secretary”. For the Grantee, the signature block provided: “signed sealed and delivered by the Grantee”. But there was space provided for two signatures, described as “the Grantee Sandra Fong” and “the Grantee Maurice Pakhoon” (Mr Wong’s surname was omitted).

82 The copies of the Option Deed in evidence are signed by Mr Hrsto, on behalf of S88, on the signing page. There is no signature for the Grantee. The other pages of the Deed are not signed or initialled by Mr Hrsto. On some copies of the Deed, the names of the plaintiffs, as grantees, have been crossed out on the signing page. On others they have not. I infer that this was done at some point after Mr Hrsto originally signed the Deed. The copies bear the date of 1 July 2020 in handwriting. I refer to the witness evidence about the date below.

83 The Option Contract began with a disclosure statement concerning off-the-plan contracts. There was then a standard form contract for the sale of land (2019 edition). A page headed “Execution Page” had been inserted after the second page of the contract. A cooling-off certificate, privacy statement and foreign

resident capital gains withholding certificate were also inserted a couple of pages later. The withholding certificate and subsequent pages of the standard terms do not appear in all copies in evidence.

84 The Contract also contained special conditions. There were 52 clauses, numbered 30 through to 81, as well as six schedules (the sixth being an index of attachments), and then several attachments. There is variable coverage of the conditions, schedules and attachments across the copies of the Contract in evidence (some do not include them at all). One of the attachments was a floor plan of the unit (the covering page notes that this was "to be inserted"). One copy of the contract in evidence (attached to correspondence on 5 August 2021, see below) contained a floor plan for a different unit. Mr Douglas' solicitor stated ([104] below) that the special conditions in the copy of the Contract sent to her contained references to "unrelated parties", but I was not taken to these references by counsel, and I have not come across them in my review of the evidence.

85 The execution by vendor section of the execution page in the copies in evidence bear the signature of Mr Hrsto on behalf of S88. The other pages have not however been signed or initialled. It is therefore impossible to say precisely what the form of the Contract (and in particular its attachments and annexures) was when it was signed by Mr Hrsto on 1 July 2020.

86 On 9 July, on behalf of Mr Douglas, HWLE transferred the sum of $1.010 million to S88. This was $174,000 less than was due for the Frangipani units the subject of introductions by Mr Douglas. The discrepancy was queried by someone in Mr Hrsto's organisation at the end of the month. By this point, Mr Bluth was being assisted on Mr Douglas' matters by Paul Tran, an employed solicitor at HWLE. Mr Tran explained, in an email sent on 30 July, that $99,000 represented monies still owing by the investor. The other $75,000 had been borrowed "in accordance with" the Mandate Agreement (out of a borrowing entitlement of $125,000). Mr Tran attached a copy of the Agreement "for your records".

87 So far as the evidence goes, the monies transferred on 9 July were the only fresh monies from investors raised by Mr Douglas for units in Frangipani. Nor

did the transfers of investors from the Belmore development, which were referred to in Mr Bluth's email of 26 June, eventuate.

88 From mid-May of the following year, Mr Wong followed up Mr Bluth about his and Ms Fong's investment, and the state of the development. The following emails were exchanged. Jo Campbell, personal assistant to Mr Bluth and Mr Tran, were also included in some of these. The correspondence was as follows:

> **Wong to Bluth, Campbell and Fong, 13 May, 15:07**
>
> How's the progress of the apartments coming along?
>
> I seem to have misplaced my documentation for the D3.23 schofield apartment. Would you be able to send me a copy of the following documentation?
>
> Loan agreement
>
> Inducement documentation
>
> Trust receipt
>
> and any other documents I may have missed out on relating to this property.
>
> **Bluth to Fong and Wong, 18 May, 12:17**
>
> I understand that the development is looking at completion around July.
>
> I will keep you informed.
>
> I will look for the documents.
>
> **Wong to Bluth (Cc Campbell and Fong), 10 June, 9:05**
>
> Hope you are well.
>
> Has there been update on this request?
>
> **Bluth to Wong, 10 June, 9:42**
>
> I am ascertaining when the development will be completed.
>
> Will let you know.
>
> **Wong to Bluth (Cc Campbell, Fong and Tran), 16 July, 18:05**
>
> Hope you are doing well.
>
> It's been like 2 months since our initial request for the documentation of the D3.23 frangipani schofield apartment.
>
> Could we find out what is happening with this?!
>
> From our understanding the development is near completion.
>
> **Bluth to Wong (Cc Campbell, Fong and Tran), 19 July, 15:17**
>
> I am not aware as to when the development is to be completed. And now with the delay on construction sites more uncertainty.

> When you and your mother came into sign, did you not take away the documents?
>
> Can you please check.

89 There is no documentary evidence of any searches by Mr Bluth for the documentation until 27 July, when he emailed Mr Tran:

> **Mr Bluth to Mr Tran 27 July 12:34pm**
>
> Can you please send me The documents this [sic]
>
> 1. Deed / Agreement between the 2 entities
>
> 2. Put and Call Option Deed

90 Later that day Mr Tran responded to Mr Bluth with copies of the Mandate Agreement and the Option Deed. His email stated that these were the only documents he had.

91 Having received these documents, Mr Bluth, on 28 July, instructed Mr Tran to draft a Notice of Nomination under the Option Deed nominating the plaintiffs as Mr Douglas' nominee for the purchase, together with a Notice of Exercise of the option. He advised Mr Tran, "You can be the nominated lawyer". Mr Tran sent drafts that evening, for Mr Bluth's review and approval. The draft nomination form, in evidence, listed Mr Tran as the solicitor for the plaintiffs.

92 Later that evening (a Thursday), Mr Bluth received a further email from Mr Wong:

> **Wong to Bluth (Cc Campbell, Fong and Tran), 29 July 20:47**
>
> We've had a look and only have documentation for the old unit that was offered. Could we please get the documentation for the new unit?
>
> What are the new estimated completion dates? and when could we expect the transfer of the unit?
>
> We are considering withdrawal from the deal. Would you be able to tell us what's involved in withdrawing and getting our money back.

93 Mr Bluth replied to Mr Wong (copying Mr Tran) on the following Monday, 2 August, and attached copies of the nomination and notice of option exercise forms:

> Regarding this unit, you are purchasing from Mr Troy Douglas who in turn is purchasing from Schofields 88 Pty Limited under a Call option Deed.
>
> It is necessary for Mr Douglas to nominate you and your mother.

> We no longer act for Mr Douglas and if you are in contact with him please ask him to sign or have his lawyers contact me. Once he has signed you and your mother should also sign and return to us.
>
> If you want to "get out of this deal" you can raise that directly with Mr Douglas.

94 Mr Wong replied that evening, copying Mr Tran and Ms Fong:

> Can we give you a call tomorrow to discuss what's going on? as I am confused with the whole situation.
>
> Also has there been any success finding the signed documentation for the apartment? as we were never sent the finalised documentation.

95 It is not clear from the documentary evidence whether Mr Wong in fact called Mr Bluth on 3 August, the next day. But Mr Bluth has given evidence that a call did take place with the plaintiffs on that day. According to Mr Bluth, he told the plaintiffs that he could not act for Mr Douglas. This seems strange when Mr Bluth had already said he had ceased to act for Mr Douglas, but it was not taken any further in Mr Bluth's oral evidence. What does appear clear is that Mr Bluth did not agree to act (and may not even have been asked to act) for the plaintiffs.

96 The evidence does not reveal when or why HWLE stopped acting for Mr Douglas. And at the same time, communications between HWLE and Mr Douglas continued (or resumed). On 3 August, Mr Tran emailed copies of the Mandate Agreement, the Call Option Deed and the strata plan to Mr Douglas. Mr Tran's email did not contain any request for Mr Douglas to take any action and the purpose for sending the documents is not revealed by the evidence.

97 Late on the evening of 3 August, Mr Bluth received an email from Mr Albert Yau, the plaintiffs' newly-appointed solicitor, with the subject, "Fong and Wong investment into Schofield 88 (No 1) Pty Ltd". The letter relevantly stated:

> We understand that until recently, you acted for [S88] and an intermediary, Mr Troy Douglas.
>
> Unfortunately our client is not able to locate any signed documents in relation to their investment. We understand that there was a loan agreement, put and call option agreement, and an inducement agreement prepared by your firm. We understand that our client's investment was first paid into your firm's trust account. We further understand that at the time of the transaction, our client was not separately represented.
>
> In order for us to properly advise our client, we would be grateful if you could forward to us copies of all transaction documents signed by our client. If you are not possession of such, we would be grateful if you could forward any

> unsigned versions of the transaction documents. Please also provide copies of your [(the remainder of the email is not in evidence)].

98 Mr Bluth replied the following day, 4 August (at 13:58), as follows:

> I refer to your email and will send through emails and copies of the transaction documents which sets things out. Plus copy of the trust account statement.
>
> Mr Douglas has been advised of registration details.
>
> As you understand correctly, Mr Douglas has an option to purchase an apartment at Schofields and has agreed to nominate Sandra Fong and Maurice Wong.

99 Shortly afterwards, Mr Tran sent the following email to Mr Douglas (at 14:10):

> Please see below the DocDrop link which contains the following documents:
>
> 1. Agreement with Schofields 88 and Troy Douglas;
>
> 2. Put and Call Option deed with Troy Douglas;
>
> 3. Strata Plan 101165; and
>
> 4. Floor plan D3.23.
>
> [link]
>
> Please note that Unit D3.23 is lot 113 in the registered strata plan SP101165 (see page 16 of the attached strata plan).

100 Mr Bluth then forwarded Mr Tran's email to Mr Yau (at 15:10), adding:

> As discussed
>
> Email for Mr Douglas is [email address]
>
> We can discuss tomorrow.

101 A later email refers to a telephone conversation between Mr Yau and Mr Douglas on the evening of 4 August. Evidently in that conversation, Mr Yau called upon Mr Douglas to exercise his rights under his deed of option with S88 in favour of the plaintiffs to allow them to proceed with the purchase of unit D3.23, but Mr Douglas said that he was not in possession of the "signed deed". On the face of it, Mr Tran had sent Mr Douglas a copy of the Option Deed, as signed by Mr Hrsto, earlier that day. But, to be fair to Mr Douglas, he may have been referring to the fact that the Option Deed had not been signed by him, or that the Option Contract contained errors, or both.

102 On the following day, 5 August, Mr Yau emailed Mr Douglas indicating that his firm had been able to obtain a copy of the "signed deed" from HWLE, and attaching a copy for Mr Douglas' reference. He continued:

> In view of the Call Option Period expiring 30 business days after the Lodgement Notice, and the strata plan having been registered on 23 July 2021, we would be grateful if you could, as a matter of urgency, proceed with exercising the call option and nominate our clients as purchasers, pursuant to the Deed of Inducement. We attach Notice of Exercise of Option and the Nomination Form signed by our client.
>
> We look forward to receiving your confirmation that you have exercised the Call Option and that our clients have been nominated.

103 The "signed deed" was the Option Deed as signed by Mr Hrsto and the nomination form was the one drafted by HWLE (see above). On that form, the reference to Mr Tran as the nominee's solicitor had been crossed out, with Mr Yau's details inserted instead. The form had been signed, by way of execution, by the plaintiffs.

104 On 6 August, the following emails were exchanged between Ms Cerena Fu, a solicitor retained by Mr Douglas, and Mr Tran:

> **Fu to Bluth and Tran (Cc Douglas), 6 August, 11:54**
>
> We act for Mr Troy Douglas in the above matter and have been provided with the DocDrop link included in [Mr Tran's email of 4 August (above)].
>
> On review of the documents, we note that the Put and Call Option deed with our client does not appear to be the final executed version as it includes the wrong floor plan and clauses in the special conditions referring to unrelated parties. As your firm was acting for our client at the time, our client requests that you transfer all his files relating to this matter including the original of the Put and Call Option deed executed by our client.
>
> **Tran to Fu (Cc Douglas and Bluth), 6 August, 12:14**
>
> You have all the documents to enable your client to exercise the option to nominate Maurice Wong and Sandra Fong as your client agreed to do pursuant to the loan agreement with Maurice Wong and Sandra Fong
>
> We note your comments regarding the draft contract annexed to the option and advise the following:
>
> 1. The floor plan is able to be substituted and that is why we have included a new floor plan for D3.23 in our previous email.
>
> 2. The additional provisions are irrelevant and can be deleted. This has been accepted by Aland in relation to other options which have been exercised on behalf of other clients.
>
> **Fu to Tran (Cc Douglas and Bluth), 6 August, 12:28**
>
> We are instructed that, subsequent to your email, Denise [sc Mr Bluth] has agreed with our client to provide us with the original Put and Call deed.
>
> We look forward to receiving the original deed.
>
> **Tran to Fu (Cc Douglas and Bluth), 6 August, 12:32**

> We are arranging to send to you the pro forma contract to enable your client to exercise the option.
>
> **Tran to Fu (Cc Douglas and Bluth), 6 August, 13:27**
>
> Further to our email below, please see attached the original contract (off the plan contract) that is annexed to the put and call option deed signed by [S88].
>
> Would you please now exercise the option and nominate, in accordance with the instructions of Mr Douglas, as the matter is urgent.

105 Meanwhile, at 12:07pm on 6 August, Mr Yau sent the following text message to Mr Douglas:

> As requested, the nominee names are Sandra Fong and Maurice Pakhoon Wong. As discussed, I have sent you the nomination form signed by my clients. My clients needs you to exercise the option and nominate them as purchasers by 1pm today, or we are going to Court.

106 On 11 August, after the proceedings had begun, Mr Yau sent a further email to Mr Bluth (copying Ms Campbell and Mr Tran). After referring to Mr Bluth's 4 August email (above), he wrote:

> From our brief telephone discussions around that time, I was under the impression that you had in your possession a fully signed Put and Call Option Deed. However, the document that I was able to extract from the provided link was only signed by the Developer and not by Mr Douglas.
>
> Can you please confirm whether you have a Put and Call Option Deed and the Deed of Inducement and Nomination that was signed by Mr Douglas?

There was no evidence of any response to this email. On one level, a lack of response would not be surprising, because it seems clear that Mr Bluth never had a copy of the Option Deed signed by Mr Douglas. But Mr Bluth does not appear to have contested Mr Yau's assertion that Mr Bluth told him on 4 August or thereabouts that there was a "fully signed" version of the Deed in HWLE's possession.

*Witness evidence*

107 Mr Bluth's affidavit in response to the claims made against him and HWLE was made on 26 April this year. The affidavit did not contain any reference to the circumstances in which the Option Deed was prepared.

108 Mr Hrsto's affidavit followed on 5 May. Concerning the Option Deed, he stated:

> … I recall I had a telephone discussion with Mr Bluth in or about May or June 2020 to the following effect:
>
> *Bluth: "Troy wants to pick his unit now. He wants us to prepare an agreement that nominates the unit"*

*Hrsto: I can sign a document now to give Troy surety that he would get the unit he wants but that agreement will need to be held by you in escrow until he meets the conditions of the Mandate Agreement.*

*Bluth: Okay".*

109 On 27 October, the Friday before the trial was due to begin, Mr Bluth and Mr Tran both made affidavits responding to Mr Hrsto. These affidavits were prepared well outside the period allowed under the timetable. In accordance with my usual practice, I took the position that leave was required to the extent that any of the evidence in them was to be relied upon.

110 When the hearing of the cross-claim began on Thursday 2 November, counsel for Mr Douglas indicated that he wished to read the new affidavits in Mr Douglas' case in chief. Counsel did not object to paragraph 3 of Mr Bluth's affidavit which read:

> On 1 July 2020, I attended a meeting with Andrew Hrsto at HWLE's Sydney offices for him to sign various transaction documents relating to the Schofields Development. One of those documents was the Put and Call Option Deed I have mentioned. In that meeting, Mr Hrsto also signed two Loan Agreements with an investor, Narelle Simpson. Copies of those Loan Agreements, also dated 1 July 2020, are annexed hereto and marked 'A'. In so far as Mr Hrsto also signed those Agreements in his personal capacity as guarantor, I witnessed his signature.

111 Nor did counsel object to Mr Tran's affidavit. Mr Tran's evidence was that he witnessed Mr Hrsto's signature on the Option Deed on 1 July 2020. Mr Tran stated that on that occasion he did not hear Mr Hrsto say anything about holding the deed in escrow.

112 Mr Bluth's affidavit contained a specific response to Mr Hrsto's evidence that Mr Bluth had agreed, in a telephone conversation, to hold the Option Deed in escrow. Mr Bluth's evidence was set out in [5] and [7]-[8] of his affidavit:

> [5] … Mr Hrsto states that in May or June 2020, he had a telephone conversation with me in which he asked me to hold in escrow an agreement giving Troy Douglas a unit in the Schofields Development until Mr Douglas had met the conditions of the Mandate Agreement. I did not have any conversation to that effect with Mr Hrsto at any time, including on 1 July 2020 when Mr Hrsto signed the Put and Call Option Deed.
>
> …
>
> [7] My usual practice, when asked by a counterparty to hold a document in escrow, was to seek my client's instructions in relation to the request and, if that was acceptable, to cause an escrow agreement to be prepared setting out the terms of the escrow, including the condition or conditions to be satisfied for

> the lifting of the escrow. It was my usual practice to seek my client's instructions because my understanding of the legal effect of delivery of a Deed or holding of an agreement in escrow is that the document is inoperative until the escrow is lifted. Given my understanding, I regarded it as necessary to obtain my client's agreement to a document being held by me escrow. These are the practices I would have followed had Mr Hrsto asked me to hold the Put and Call Option Deed, or any document, executed by Schofietds 88 in escrow. I never sought instructions from Mr Douglas to hold any such document in escrow, and no escrow agreement was prepared in relation to the Put and Call Option Deed, because Mr Hrsto made no request to me of the kind asserted in paragraph 48 of his affidavit.
>
> [8] Had Mr Hrsto asked me to hold in escrow a deed or agreement giving Mr Douglas a unit in the Schofields Development, I would have advised Mr Douglas it was inoperative, and that he could not promise that unit to a third party, until the escrow was lifted. If a deed or agreement giving Mr Douglas a unit in the Schofields Development was, or was to be, held by me in escrow until the satisfaction of some condition, I would not have informed the plaintiffs that Mr Douglas had a right to a unit and would have put any arrangement between Mr Douglas and the plaintiffs on hold.

113 Counsel for S88 stated that he did not object to the denial in [5] but objected to the explanation in [7] and [8]. Counsel submitted that it would be impossible to test Mr Bluth's assertion about his practice as a solicitor so far as escrow documents were concerned. I was concerned, if possible, to allow the evidence to be led if that could be done fairly, and there followed a debate about what documents would need to be produced, by way of Notice to Produce or Subpoena, to allow the allegation by Mr Bluth about his practice with respect to escrow documents to be properly tested. But the debate proved inconclusive and, in the end, counsel submitted that I should rule on the objection.

114 For reasons I have already given, there was a strong discretionary case against granting the leave necessary to rely on the evidence. The debate which had taken place about Subpoenas and Notices to Produce left me convinced that it would not be reasonable to expect counsel to proceed to cross-examine Mr Bluth without having had the opportunity to obtain relevant documents, and such documents could not be quickly obtained.

115 Although counsel for S88 had not objected to the bare denial in [5], I was troubled about permitting that paragraph, on its own, to be allowed in. As the issue involved witness credit, I did not think it would be fair to Mr Bluth to allow the denial without allowing the explanation for it. On the other hand, it would clearly have been unfair to S88 to allow the explanation in circumstances

where counsel had not had a fair opportunity to counter it. When I put this to the parties, counsel for S88 changed their position and indicated that the denial in [5] was also objected to. In these circumstances, I thought that I had no alternative but to reject [5]-[8] as a whole.

116 Mr Hrsto was cross-examined about the entry into the Option Deed. He recalled attending HWLE's offices to sign it. Mr Hrsto was asked if he had written "1 July 2020" on the Option Deed, but he could not recall. He suggested it could have been written by Mr Bluth. He added, "I don't even say it looks like my handwriting". Mr Hrsto agreed with counsel that either he or Mr Bluth wrote the date, but he could not recall which of them had written it. When I asked Mr Hrsto if it was his handwriting, he responded:

> I don't think so. I don't think so. I'm not sure. Like, I - it's, yeah, I don't know.

117 Mr Hrsto agreed that he signed the Deed when at HWLE's offices, with Mr Bluth. The cross-examination continued:

> Q: When you'd signed it did you take the original away or did Mr Bluth take the original with him?
>
> A. I believe he kept the original.
>
> Q. But he gave you a copy - is that correct - for your records?
>
> A. I can't recall if he gave me one for my record.
>
> Q. You've put a copy of this deed into evidence. Do you know how you came across that document to put into evidence?
>
> A. He probably sent it to me then, yeah. I'm saying I can't recall whether he gave it to me on the day or I got it later.
>
> Q. Just looking at that page, so if you could scroll down a little bit, that page in its entirety, is that how the document looked when you--
>
> A. I can't recall that.
>
> Q. Can't recall that?
>
> A. No. Absolutely not. Can't recall it. I came and signed a document, like, I typically do, and I don't look at the bottom of the page because that's my lawyer's job, yeah.

118 Mr Hrsto was also asked about the redaction of the grantees' name on the copy of the Deed which he had annexed to his affidavit. Mr Hrsto could not recall if he had made the redaction, nor how it had got there. He maintained his evidence that he did not understand, at any time, that the plaintiffs had any

interest or involvement in unit D3.23, including having not seen their names on the Option Deed document.

119 Mr Hrsto maintained his evidence that he could not remember if he took a copy of the Option Deed on the day he signed it, or if it was sent to him later. Counsel put to him that he was not particularly concerned about which occurred, as long as he received the document at some point. Mr Hrsto answered, “yeah, typically, yeah”.

120 Mr Hrsto was also cross-examined about his evidence of having had a conversation in May or June of 2020 (quoted above) where he indicated that the option deed would be held in escrow. Despite being repeatedly challenged on this, Mr Hrsto maintained his position.

121 After the completion of Mr Hrsto’s oral evidence, counsel for Mr Douglas made a renewed application to lead Mr Bluth’s affidavit evidence on the alleged escrow conversation, this time by way of reply. Counsel referred specifically to the denial by Mr Bluth in [5]. Counsel repeated an earlier submission that I had been wrong in rejecting that paragraph, given that counsel for S88 had not initially objected to it.

122 My reasons have already been set out for thinking that allowing [5] but disallowing [7] and [8] would be unworkable and unfair. I remained of that view. Had the supplementary affidavit been canvassed in Mr Bluth’s cross-examination, there might have been an argument that, as a matter of fairness, the affidavit should be allowed in by way of response, although this would usually have led to an application to read the affidavit in re-examination, rather than in reply. But the affidavit was not canvassed in Mr Bluth’s cross-examination either. Counsel simply left the issue alone. Nor was the supplementary affidavit canvassed by Mr Hrsto in his oral evidence. He simply stuck to his guns and repeated his earlier evidence.

123 I referred earlier to the potential unfairness of Mr Bluth being challenged on his credit on the escrow issue without an opportunity to put forward all of his evidence on that issue. A wider argument might perhaps have been developed that if Mr Bluth’s credit was impugned on any issue, his whole evidence on every issue to which his credit was relevant should have been before the

Court, to allow his credit to be assessed as a whole. Counsel for S88 did in fact seek to justify some of his cross-examination of Mr Bluth on the ground that the questioning went to credit. But no argument of the type which I have mentioned was advanced by counsel for Mr Douglas, and, in the end, I did not need to make any finding on Mr Bluth's credit on any issue. It is therefore unnecessary to consider this possible argument any further.

*Conclusions*

124 According to Mr Douglas' case on the cross-claim, the Deed was delivered by Mr Hrsto, on behalf of S88, to Mr Bluth or Mr Tran, acting on behalf of Mr Douglas, at the meeting at HWLE's offices on 1 July 2020. While the question of delivery is an objective legal one, the onus in establishing the facts giving rise to delivery lies on Mr Douglas.

125 Mr Bluth and Mr Tran both gave evidence that Mr Hrsto signed the Option Deed on 1 July 2020. This was not disputed. It may be accepted that the Deed was left by Mr Hrsto and was collected up by Mr Tran and placed somewhere on one of the HWLE files. But beyond that, there is striking lack of evidence, and documentary evidence in particular, about what happened.

126 No file note of the meeting was in evidence. Time records and document metadata might have provided some context, by indicating when the Option Deed was prepared. Time records might have shown when telephone conversations between Mr Hrsto and Mr Bluth or Mr Tran took place in advance of the meeting. But no such records were tendered.

127 There was a similar gap in the witness evidence. Neither Mr Bluth nor Mr Tran gave any account of what was said at the meeting or during the telephone conversations which presumably preceded it. The Deed bears the handwritten date of 1 July 2020. But there is no evidence which would allow the Court to make any finding about when that date was written, or by whom.

128 One would like to think that a solicitor in the position of Mr Bluth, who intended, on his client's behalf, to conclude a contract at a meeting with an unrepresented counter-party would have ensured that some formality took place so as to bring home to that counter-party that contractual obligations were being created. But there is no evidence of that here. There cannot have

been any ceremony of exchange, because there was no version of the Deed signed by Mr Douglas to be handed over by Mr Bluth. All the Court has is the bare fact that Mr Hrsto left the Option Deed and the Option Contract which he had signed behind when he left.

129 It was of course unnecessary for S88 to sign the Option Contract separately. Prior execution of the Deed would have been sufficient, upon exercise of the option, to oblige S88 to execute the Option Contract annexed to the Deed. But it is not even clear precisely what the contents of the Option Contract were on 1 July 2020. Again, this bespeaks a level of informality about the process.

130 One would also like to think that a solicitor in Mr Bluth's position would have reported to his client that the contract had been concluded, and would have handed the contractual instrument over to the client, or at least made arrangements to hold on to it for safekeeping on the client's behalf. There is no evidence that this happened either. There is no correspondence from Mr Bluth or Mr Tran to Mr Douglas reporting on execution of the Option Deed. Mr Douglas never seems to have been asked to sign the Deed himself. The Deed apparently just sat on Mr Tran's file until Mr Bluth asked for it in July 2021. Even after it turned up, the original seems not to have been handed over to Mr Douglas, even though, on Mr Bluth's account, Mr Douglas was the client and HWLE had ceased to act for him by that point.

131 According to counsel for Mr Douglas, this was not necessarily fatal to Mr Douglas' case. Counsel submitted that I could infer that, as a very experienced and senior property lawyer, Mr Bluth would have taken the necessary steps to obtain formal delivery of the Deed on Mr Douglas' behalf part so as to make it legally effective.

132 I think the first difficulty faced by this submission is that, on the evidence, Mr Bluth did little to ensure that other steps in the transaction were properly documented. He appears never to have obtained documents signed by S88 when the plaintiffs' initial investment was made in March. Nor did he obtain any documents signed by S88 to protect the plaintiffs' position before handing over their $400,000 to Mr Douglas in June. Instead, he put them in the perilous position of having merely indirect rights against S88 through reliance on the

option in favour of Mr Douglas. Even then, there were no signed agreements to record the rights that the plaintiffs were supposed to have against Mr Douglas, and the plaintiffs' money was on any view handed over to Mr Douglas before the Option Deed was signed.

133 I acknowledge that the question directly at issue is how well Mr Bluth served Mr Douglas' interests, rather than those of the plaintiffs (and Mr Bluth did not admit that the plaintiffs were his clients). But it would be unrealistic to make too much of this distinction. The conduct I have described would, I think, raise questions about Mr Bluth's professionalism even if he was not acting for the plaintiffs and only owed them obligations as unrepresented contractual counterparties of his client, Mr Douglas.

134 Counsel's submission faces a second difficulty in the context of the correspondence between Mr Bluth and Mr Wong in the following year, in which Mr Wong repeatedly sought copies of the documents to underpin the deal to buy unit D3.23, and Mr Bluth repeatedly failed to produce those documents (see [88]-[106] above). Even if Mr Bluth's excuses are taken at face value, they are rather surprising. If he believed that he had, in the Option Deed, a document binding on S88 which could be enforced for the benefit of the plaintiffs, why did he not send them that document, and emphasise that he had Mr Hrsto on the hook, as soon as Mr Wong asked him about the matter?

135 Mr Bluth has had no opportunity to put his side of the story, and I am making no findings against him. But I must deal with counsel's submission on the evidence before me. I must say, on that evidence, that Mr Bluth appears to have been more of an independent actor in an evolving commercial environment than a solicitor single-mindedly seeking to implement transactions devised by someone else. I am not prepared to draw the inference that counsel seeks.

136 Nor can I leave out of account the evidence of Mr Hrsto that it was expressly agreed that the Option Deed was being handed over in some form of escrow. It is unfortunate that Mr Douglas was unable to present a full evidentiary case by way of response to Mr Hrsto. But for reasons I have explained, Mr Douglas cannot complain about that. And although Mr Hrsto was briefly cross-examined

on having annexed a copy of the Deed to his affidavit (see [117] above), it was not put to him that this was inconsistent with his evidence regarding escrow.

137 In the end, it is not necessary for me to make any affirmative finding about escrow. It is sufficient to say that I see no compelling reason, on the evidence, to reject what Mr Hrsto said.

**Specific Performance of Option Contract**

138 Counsel for Mr Douglas emphasised that he was seeking specific enforcement of an obligation to complete the Option Contract in accordance with the Option Deed. No wider case was presented for enforcement of the obligation to grant call options in the Mandate Agreement. In effect, Mr Douglas was seeking to enforce the Option Deed as a stand-alone source of contractual obligations.

139 Counsel for S88 contended, on multiple grounds, that Mr Douglas was not entitled to any such specific relief. There were five grounds in total. Three of them involved the contention that S88 had no obligation at law to complete the Option Contract pursuant to the Option Deed. The fourth ground involved the contention that even if such an obligation had earlier come into existence at law, S88 was entitled to rescind. The final ground was that specific performance was not available.

*Bilateral option requirement*

140 The first contention by counsel for S88 was that the Option Deed had never had any contractual force because it had never been executed by Mr Douglas. Counsel submitted that the Option Deed provided for the imposition of obligations on both parties. Without Mr Douglas' execution of the agreement, it was incomplete and ineffective.

141 The relevant principles were not in dispute. The question is whether, on the true construction of the Option Deed, the grant of the call option was effective once the Deed was executed by S88, independently of whether it was executed by Mr Douglas. The question is an objective one, depending upon the construction of the Deed, in the light of relevant surrounding circumstances.

142 The starting point is the wording of the Deed. I have set the relevant terms out at [74]-[80] above. The Deed was structured as the mutual and simultaneous

grant of a call option by S88 and a put option by Mr Douglas. The recital expressly referred to "mutual promises contained in" the Deed. I see nothing in it which suggests it was contemplated that the Deed would be executed by one party alone.

143 Indeed, I think the reference to the "date of this deed" in the definition of "Call Option Period" is to the contrary. If, following execution by Mr Hrsto on 1 July, the Deed had then been executed by Mr Douglas a week later, then, for the purposes of calculating when the Call Option Period began, the "date of this Deed" would surely have been 7 August, not 31 July.

144 It must be accepted that the put option in favour of S88 against Mr Douglas was of no commercial substance. S88 was never going to exercise a right to require Mr Douglas to buy the unit for $1. But the case mounted on Mr Douglas' behalf does not involve the specific enforcement of the Mandate Agreement, which contained the wider commercial agreement between the parties. Mr Douglas is seeking to enforce the put option on a stand-alone basis, on the ground that it is recorded in a formal deed which did not require valuable consideration to be effective. In such circumstances, I think that the formal structure and drafting of the Deed should prevail over commercial considerations.

145 The matter is perhaps one of first impression. But in my view, Mr Douglas' failure to sign the Deed meant it never came into effect. S88's defence succeeds on this point.

*Delivery of Option Deed*

146 The second defence advanced by counsel for S88 was that Mr Douglas had not proved that the Option Deed had been validly delivered. I did not understand the relevant principles to be in dispute. They were summarised by Leeming JA (Bell P and Brereton JA agreeing) in *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 at [65]-[76]. Physical delivery is neither necessary nor sufficient. It is a question of the executing party's intention, which is to be objectively ascertained (see the passage from *Taouk v Ho* [2019] NSWCA 156 at [47] (Gleeson JA, Emmett AJA agreeing), quoted by Leeming JA in *Pittmore* at [75]).

147 I have set out above my findings on the primary facts so far as they concern this issue. Taking all of those findings into account, I am not satisfied that formal steps were taken between Mr Bluth and Mr Hrsto, on 1 July 2020, sufficient to manifest an intention on the part of Mr Hrsto to adopt the Option Deed as binding on S88.

148 As I noted above, my conclusion does not depend upon an affirmative finding of a prior escrow agreement, but the failure to rebut Mr Hrsto's evidence on this point is relevant. Counsel for Mr Douglas did contend that the possibility of an oral escrow arrangement was excluded by an entire agreement clause in the Deed. But I do not agree. The entire agreement clause was directed to the terms of the parties' bargain, and not the external question of delivery.

149 Delivery has therefore not been established. S88's defence on this point also succeeds.

150 Counsel for Mr Douglas submitted that even if the Option Deed was not effective as a deed, the parties had, by their conduct, manifested an agreement to be bound by its terms. That agreement could take effect as a simple contract. But the conduct specified by counsel did not seem to me to amount to a contract in the terms alleged, or at all. In any event, I do not think this contention was properly raised on the pleadings.

*Exercise of option*

151 The third defence advanced by counsel for S88 was that Mr Douglas had not, in any event, validly exercised any call option. Counsel submitted that there were two deficiencies. First, there was no evidence, beyond the assertion in the Option Deed itself, that the call option fee of $1 had ever been paid by Mr Douglas to S88. Second, there was no evidence, beyond the notice of call option exercise letter, that the requisite documents had been delivered to S88 in accordance with the terms of the Deed (see *Comdox No 24 Pty Ltd v Robins* [2009] NSWSC 367).

152 In view of the other conclusions I have reached, I do not propose to rule on this defence. The second point taken by counsel, in particular, appears to involve matters of construction at a level of detail not adverted to in argument.

*Entitlement to rescind*

153 This defence is based on the Mandate Agreement. The Agreement contained the following preamble:

> Troy Douglas, through his nominee details of which are to be advised (Mr Douglas), is pleased to submit a non-exclusive mandate (Mandate) to [S88] (Company) to raise up to $12 million (Capital) through loans to the Company (Loans) made by third parties (Investors) who will have a right to require repayment of the Loans or a right to acquire ownership of residential units (Units) to be developed by the Company at [Frangipani] (Development) at a discounted price to the market value of the Units determined by Aland as at the date of this Mandate. The Company will use the raised Capital to complete the Development.

154 S88's right of rescission appeared in clause 5. Counsel relied separately on subparagraphs (a) and (b):

> Consideration
>
> In consideration for Mr Douglas and/or his nominee performing its role under this Mandate, the Company will agree to:
>
> (a) Grant simultaneously with the Mandate call options for six bedroom Units in the completed Development Bottlebrush or Wattle Frangipani to Mr Douglas or his nominee for every $2,000,000 received by the Company from the Investor(s) through the Debt Raising. The Units to be transferred to Mr Douglas will be determined by Mr Douglas. Should Mr Douglas not be entitled to 6 or less Units then the company can rescind the call options to the number of units he is entitled to based on the money raised[.] The ownership of the relevant Units is to be transferred by the Company to Mr Douglas or his nominee upon completion of the Development; and
>
> (b) make a loan to Mr Douglas, within 14 days of this Mandate, in the sum of $125,000, such loan to accrue interest at the rate that Aland is paying on funds borrowed and to be repayable no later than that date which is 24 months of the date of this Mandate. If this loan is not repaid by the due date, interest will accrue at the rate aforesaid plus 4% per annum until repaid in full and, if not repaid by the date of completion of the Development, Mr Douglas and/or his nominee will forgo the entitlement to one unit under clause 5(a).

155 The wording of subparagraph (a) is clumsy, but I think the subparagraph must be understood as meaning that Mr Douglas' entitlement was to a maximum of six call options, equating to a total Debt Raising of $12 million or more. It was faintly suggested by counsel that the obligation to grant the call options over each unit only arose once the corresponding $2 million tranche had been raised. But this is inconsistent with the reference to the grant being "simultaneously with the Mandate" (which I think must mean the grant of the Mandate), and the express reference to rescission of call options if the specified monies were not raised.

156 Strictly speaking, therefore, on the wording of the Mandate Agreement, Mr Douglas was entitled to six call options from the outset. But equally clearly, he was not entitled to maintain even one option unless he eventually raised at least $2 million through the Debt Raising. Counsel pointed out that S88 only ever received $1.01 million in actual cash as a result of Mr Douglas' efforts. Therefore, counsel submitted, S88 was entitled to rescind the one option which was granted.

157 Counsel also submitted that subparagraph (b) was engaged. Mr Douglas had borrowed $75,000 from the funds raised. That loan had not been repaid. Thus, Mr Douglas had forgone an entitlement to one unit which, on the most generous view possible, was the only entitlement he had.

158 These contentions require consideration of the relationship between the Option Deed (which is what Mr Douglas was trying to enforce and which, on its face, said nothing about rescission or forfeiture of entitlements) and the Mandate Agreement. Counsel submitted that the two should be "read together". But I think that more precision is required in the analysis.

159 One way in which the two instruments can be reconciled would be by way of implication of rights to rescind, in the terms set out in the Mandate Agreement, into the terms of the Option Deed. As counsel pointed out, the Deed does refer to the Agreement. Clause 2 of the Deed was headed "Mandate Agreement". It provided:

> 2.1 **Mandate Agreement**
>
> The Parties have entered into a Mandate Agreement for the investment in Frangipani.
>
> 2.2 [(Blank)]
>
> The parties hereby agree that if the Grantee or Nominee exercises the Call Option, then the Purchase Price on the Contract is $1.

160 Clause 2, taken as a whole, appears unfinished. Clause 2.1 is especially curious. It does not on its face have any operative effect. But it might be argued that the purpose of referring to the Mandate Agreement was to convey, even if elliptically, that the terms of the option granted under the Option Deed were subject to the terms of the Mandate Agreement.

161 If this is not available, then there is an alternative way of reconciling the two instruments. The Mandate Agreement came first. It was an "umbrella" agreement under which options were to be granted but they could also be rescinded. As such, it could be used as a means, outside the Option Deed, to require Mr Douglas to surrender his rights under the Deed, effectively by way of specific performance.

162 In the end, I think one or other of these analyses must be correct. It is not necessary for me to determine which of them is the preferable one. I do not think the Option Deed can be understood as having been completely independent of the Mandate Agreement. I am not sure, in the end, that counsel for Mr Douglas so contended.

163 No point was taken by counsel for Mr Douglas about the fact that the purported rescission only came after the nomination of SFMW and the purported exercise of the option by that company. Counsel did however submit that S88 had not demonstrated any entitlement to rescind Mr Douglas' option under the terms of the Mandate Agreement.

164 The exchange of emails between Mr Bluth and Mr Hrsto on 26 June 2020 ([68] above) was central to counsel's submission. As already noted, the Belmore investor transfers to which Mr Bluth referred never actually happened. But counsel argued that it had been sufficient to "offer" the monies in the email. If S88 did not take up the "offer", that was its choice. Furthermore, counsel characterised Mr Hrsto's one-word response, "confirmed", as an agreement that Mr Douglas was entitled to unit D3.23 which deprived subparagraph (a) of any ongoing effect.

165 There are multiple difficulties with this submission. If what was required was only offers of loan monies, rather than the making of an actual loans, they would surely would have had to have been formal offers capable of acceptance by S88. There was no evidence that any such offers were made.

166 In fact, the Mandate Agreement appears to have contemplated a Debt Raising made up of fresh monies. This interpretation is supported, in particular, by the definition of "loan" in the Agreement. That definition required such a loan to have a repayment date of "two years". On the face of it that would be two years

after the Debt Raising, which presumably would have been beyond the repayment dates of the existing Belmore loans. But there is no need to go into this question any further because there was simply nothing in the evidence to evaluate against the requirements of the Agreement.

167 Nor do I accept that Mr Hrsto's use of the word "confirmed" gave Mr Douglas some sort of indefeasible entitlement to unit D3.23. The word, in its context, was ambiguous. Moreover, whatever Mr Hrsto may have thought, the nomination by Mr Douglas of a particular unit as the subject of a call option in his favour was, on the proper construction of subparagraph (a), perfectly consistent with the later rescission of that option if the relevant fundraising conditions were not ultimately satisfied.

168 Nor was there any substantial ground put forward in opposition to the claim for rescission based on subclause (b). Counsel pointed out that the subparagraph contemplated that the loan would be made within 14 days of the Agreement (which was 19 June), and that $125,000 would be borrowed. But on the face of Mr Tran's email of 30 July ([86] above), it had been Mr Douglas' decision to borrow $75,000 when he did, and to rely on his entitlement under subparagraph (b) to justify his appropriation of S88's money. It would be an absurd construction of subparagraph (b) for S88's right of rescission to be defeated by Mr Douglas borrowing at a later date, or borrowing a lesser amount.

169 Counsel faintly suggested that there was no direct evidence that Mr Douglas had actually borrowed the money. But Mr Tran was acting (and on the face of the evidence, acted at all times with complete propriety) as Mr Douglas' solicitor. His email was tendered, without objection, under the business records provisions of the *Evidence Act*. Mr Douglas has not put forward any evidence on the topic. I am satisfied that he did in fact borrow the money, and it is common ground that he failed to make the repayment. Even if the case for rescission under subclause (a) were not established, the case for rescission under subclause (b) would be.

170 The rescission defence also succeeds.

*Entitlement to specific performance*

171 The final defence advanced by counsel for S88 fastened on the option fee for the call option under the Option Deed, which, as I have stated, was nominal ($1.00). Nominal consideration might make a contract actionable at law, but in equity, so counsel submitted, a person who had provided only nominal consideration was regarded as a volunteer who was not entitled to assistance. Therefore, only a plaintiff who had given valuable consideration could obtain specific performance.

172 In support of this contention, counsel cited the decision of Santow J in *Costin v Costin* [1995] ANZ ConvR 289. Counsel quoted the following parts of the report:

> …
>
> Nonetheless while nominal consideration may support a contract, in the sense of making it binding, the availability of specific performance is typically if not inevitably, negated by the consideration being merely nominal. Thus nominal consideration may go to the proper exercise of the Court's discretion in ordering specific performance, though sometimes subsumed under hardship or unfairness, as I explain below. The language in the cases and the texts tend to confuse whether there is a contract at law with the availability of specific performance and then its unavailability per se with unavailability as a matter of discretion. There is similarly elision between inadequacy of consideration (see for example *Jefferys v Jefferys* (1841) Cr and Ph 138, 41 ER 443) and purely nominal consideration…
>
> His Honour concluded:
>
> I conclude that the distinction to be drawn is that between nominal consideration and merely inadequate consideration, the latter being no absolute bar to specific performance. So in Ready Construction Pty Ltd (at 192): "It is well settled that inadequacy or excess of consideration, IF IT STANDS ALONE, is not a ground for the Court to refuse specific performance of a contract, because that is a matter which the parties are supposed prima facie to be able to determine for themselves," (my EMPHASIS).
>
> However in the case of purely nominal consideration, Equity will look to substance over form. In so doing, it would characterise such a transaction as one of gift, though there may be a contract, when it comes to determining whether specific performance should be allowed. Thus in *Corin v Patton* (*supra* at 577) Deane J said "In determining whether a party to a transaction has given valuable consideration, equity looks to the substance not mere form."
>
> In that case itself, there was consideration. But it was what the court treated as "not valuable consideration" thus implying it was nominal consideration, at best. That was the reciprocal agreement on the part of the intended trustee to act as such and hold the property purportedly assigned to the trustee on trust for the purported assignor. There is thus, I conclude, likewise no necessity to

> find some other disqualifying factor to deny specific performance, where there is merely nominal consideration or, as the High Court put it, no valuable consideration. Specific performance will be denied in any event.

173 His Honour's judgment was overturned on appeal, but this part of the reasoning was not challenged.

174 Dr Seddon (*Seddon on Deeds*, 2nd ed, 2022, Federation Press) argues that equity's attitude to specific performance is not so niggardly. He accepts, it seems, that the rule that a deed imports consideration at law but not in equity is too deep-rooted to be overthrown (at [6.22]). But he argues that equity should accept a nominal consideration as sufficient consideration to support an ordinary contract, and on that basis should be prepared to decree specific performance (at [6.21] and [6.25]). On any view, equity has never enquired as to the sufficiency of consideration, so long as it has some value. Dr Seddon takes this further and argues that the parties, by adopting a nominal consideration, have agreed that sufficient consideration has been given, and equity should not refuse relief (at [6.31]).

175 In the end, I am not sure that counsel for Mr Douglas went so far as to depart from the reasoning of Santow J and embrace Dr Seddon's thesis. Having regard to the other conclusions I have reached, it is not necessary to pursue this issue any further.

**Damages**

176 In view of my conclusion that the Option Deed was not enforceable (or is not now enforceable) at law, no question of damages arises. Nor can there be any question of damages in lieu of specific performance. Mr Douglas' claim fails in its entirety.

**Conclusions and orders**

177 I have concluded that:

(1) Mr Douglas' claim to specific enforcement of the Option Contract fails;

(2) so too does his alternative claim to damages.

178 On the face of it, I see no reason why the costs of the cross-claim should not follow the event. But I propose to deal with the costs of the cross-claim at the same time as dealing with all of the other outstanding costs issues in the

proceedings. This will include the costs issues arising on the discontinued cross-claim by HWLE against Mr Douglas.

179 As earlier noted, the next step in the proceedings is to deal with the remaining claims by the plaintiffs against Mr Douglas. I will stand the proceedings over for directions before me to make arrangements for any further hearing which may be necessary. At that time, or at some later convenient time, I will deal with any outstanding costs issues.

180 The orders of the Court are:

(1) Order the second cross-claim be dismissed.

(2) Reserve the costs of the second cross-claim.

(3) Adjourn the proceedings to 15 December 2023 in the Expedition List, or such other time or date as may be arranged with my Associate.

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