Court of Appeal
Supreme Court

New South Wales

Case Name:	The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)
Medium Neutral Citation:	[2023] NSWCA 291
Hearing Date(s):	13 February 2023
Decision Date:	6 December 2023
Before:	White JA at [1]; Kirk JA at [124]; Griffiths AJA at [152]
Decision:	(1) The appeal be allowed in part. (2) Set aside the order dated 12 August 2022. (3) Subject to order (4), remit the proceedings to the primary judge for the purpose of considering making orders for judicial sale. (4) Within 14 days hereof, the parties are to seek to agree the form of a declaratory order which gives effect to these reasons, as well as seek to agree costs of the proceeding both below and on appeal. If they are unable to reach agreement, each should within that time provide a brief written outline of submissions, not exceeding four pages in length, in support of their respective positions. The remaining issues will then be finalised on the papers and without a further oral hearing.
Catchwords:	CONTRACTS – Rectification – Common intention – Proof of common intention – Proof by inference – Where appellant and respondent executed Sole Agency Agreement for marketing and sale of units in residential development – Where appellant as selling agent

entitled under Agreement to “Commission” upon sale of units – Where “Commission” as defined in Agreement limited to commission payable on certain units in development – Where appellant asserts common intention that “Commission” should have extended to commission accrued prior to execution of Agreement – Where directors and managers of respondent not called to give evidence on intention as at execution of Agreement – Whether uncontradicted evidence of sole director of appellant amounts to clear and convincing proof of common intention by inference – Relief in nature of rectification denied

REAL PROPERTY – Caveats – Caveatable interests – Grant of caveatable interest – Where appellant asserts caveatable interest in nature of equitable charge entitling it to judicial sale of units in development – Where Sole Agency Agreement confers right on appellant to compel sale of specified units at fixed price to itself or others and offset outstanding commission against purchase price – Where Agreement authorises appellant to lodge caveats in order to protect its entitlement to Commission – Whether grant of right to compel sale constitutes express grant of equitable charge – Whether grant of right to lodge caveats constitutes implied grant of equitable charge – Appellant held impliedly to have been granted equitable charge over units in development

AGENCY – Property, stock and business agents – Restrictions on real estate agent obtaining beneficial interest in property – Where appellant as real estate agent asserts rights as equitable chargee under Sole Agency Agreement – Where appellant had not obtained client’s consent in writing in form approved by Secretary prior to execution of Agreement – Where interpretation clause in Agreement purports to sever any term or provision of agreement repugnant or contrary to any law – Whether appellant obtained beneficial interest in property in contravention of Property and Stock Agents Act 2002 (NSW) s 49(1) – Whether interpretation clause accordingly severs clauses of Agreement that impliedly grant equitable charge to appellant – Held that

	clauses impliedly granting equitable charge to appellant not severed from Agreement
Legislation Cited:	Property and Stock Agents Act 2002 (NSW), ss 46, 47, 48, 49 Real Property Act 1900 (NSW), ss 74F, 74MA Trade Practices Act 1974 (Cth) s 52
Cases Cited:	Aged Care Services Pty Ltd v Kanning Services Pty Ltd (2013) 86 NSWLR 174; [2013] NSWCA 393 Australian Gypsum Ltd v Hume Steel Ltd (1930) 45 CLR 54; [1930] HCA 38 Bonhote v Henderson [1895] 1 Ch 742 Bonhote v Henderson [1895] 2 Ch 202 BP v State of New South Wales [2019] NSWCA 223 Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424; [2001] FCA 1833 Broken Hill Proprietary Co Ltd v Commissioner of Stamp Duties [1998] 1 Qd R 452 Bush v National Australia Bank Ltd (1992) 35 NSWLR 390 Coleman v Bone (1996) 9 BPR 16,235 Concept Television Productions Pty Ltd v Australian Broadcasting Corporation (1988) 12 IPR 129 Crane v Hegeman-Harris Co Inc [1939] 1 All ER 662 CSR Ltd v Adecco (Australia) Pty Ltd [2017] NSWCA 121 Depsun Pty Ltd v Tahore Holdings Pty Ltd (1990) 5 BPR 11,314 Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55 Fowler v Fowler (1859) 4 De G & J 250; 45 ER 97 Gan v Xie [2023] NSWCA 163 Johnson v Synnex Australia Pty Ltd [2017] SASCFC 165 Johnson Matthey Ltd v AC Rochester Overseas Corporation (1990) 23 NSWLR 190 Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8 Joscelyne v Nissen [1970] 2 QB 86 Kane’s Hire Pty Ltd v Anderson Aviation Australia Pty Ltd [2023] FCA 381 King Investment Solutions Pty Ltd v Hussain [2005] NSWSC 1076; (2005) 13 BPR 25,077 Kramer v Stone [2023] NSWCA 270

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11
Ling v Pang [2023] NSWCA 112
MacDonald v Shinko Australia Pty Ltd [1999] 2 Qd R 152
Mackay v Wilson (1947) 47 SR (NSW) 315
Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336; [1973] HCA 23
McNab v Director of Publication Prosecutions (NSW) (2021) 106 NSWLR 430; [2021] NSWCA 298
Morris Finance Ltd v Brown (2017) 252 FCR 557; [2017] FCAFC 97
Murphy v Wright (1992) 5 BPR 11,734
Newey v Westpac Banking Corporation [2014] NSWCA 319
Overlook v Foxtel [2002] NSWSC 17
Pukallus v Cameron (1982) 180 CLR 447; [1982] HCA 63
Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council [2004] NSWSC 880; (2004) 12 BPR 22,319
RHG Mortgage Corporation Ltd v Ianni [2016] NSWCA 270
Roberts v Investwell Pty Ltd (in liq) [2012] NSWCA 134; (2012) 88 ACSR 689
Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd [2008] NSWCA 39
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3
Ryledar Pty Ltd v Euphoric (2007) 69 NSWLR 603; [2007] NSWCA 65
Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd [2011] FCAFC 53
Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47
Swiss Bank Corporation v Lloyd's Bank Ltd [1982] AC 584
Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24; (2019) 19 BPR 39,153
Taleb v National Australia Bank Ltd (2011) 82 NSWLR 489; [2011] NSWSC 1562
Taylor v Johnson (1983) 151 CLR 422; [1983] HCA 5
The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd [2021] NSWSC 1175

	Troncone v Aliperti (1994) 6 BPR 13,291 Watson v Foxman (1995) 49 NSWLR 315 Zelden v Sewell Henamast Pty Ltd [2011] NSWCA 56
Texts Cited:	Perry Herzfeld and Thomas Prince, Interpretation (2nd ed, 2020, Thomson Reuters)
Category:	Principal judgment
Parties:	The Property Investors Alliance Pty Ltd (Appellant) C88 Project Pty Ltd (in liq) (Respondent)
Representation:	Counsel: S A Lawrance SC with J C Lee (Appellant) D Neggo (Respondent) Solicitors: Rutland's Law Firm (Appellant) Macpherson Kelley Lawyers (Respondent)
File Number(s):	2022/261766
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity Division
Citation:	[2022] NSWSC 1081
Date of Decision:	12 August 2022
Before:	Rees J
File Number(s):	2021/22126

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Pursuant to a Sole Agency Agreement ("**SAA**") executed on 20 April 2018, the appellant, The Property Investors Alliance Pty Ltd ("**PIA**"), undertook to market and promote the sale of specified units — designated as "Agency Lots" — in a residential development being constructed by the respondent, C88 Project Pty Ltd ("**C88**"). Under the SAA, it was agreed that where PIA, as selling agent, was the effective cause of sale of an Agency Lot, it would be entitled to "Commission" from C88, calculated at 5.5% of an Agency Lot's "Contract Price". So as to protect its right to payment of "Commission" or its "commission entitlement", cll 12.9, 12.10, and 12.11 of the SAA cumulatively conferred a right upon PIA to lodge a caveat or caveats over units in the development where C88 defaulted in punctual payment of its Commission. Similarly, cll 12.15 and 12.16 conferred a right upon PIA, in the same circumstances, to direct C88 to sell an Agency Lot to it or to its nominee or to a third party at a fixed price, which was to be capable of being offset against any accrued commission entitlement.

Prior to execution of the SAA, PIA and C88 had, with respect to the same development, entered into two Exclusive Agency Agreements, under which PIA came to be owed a significant amount of outstanding commission payments. As at the date upon which the SAA was executed, PIA had come to be owed even more, on a contingent basis, insofar as it had caused sales of units in the development not being Agency Lots. Notwithstanding the amounts owing to PIA for its prior work, however, cl 1.1(g) of the SAA limited the terms "Commission", "commission entitlement", and "agent commission" only to the sums payable to PIA for its sale of Agency Lots. One consequence of that limitation was that any amounts owing to PIA prior to the execution of the SAA fell beyond the ambit of the protections accorded to PIA by cll 12.9–12.11 and 12.15–12.16 thereof.

At trial, the sole director of PIA, Mr Justin Wang, gave evidence of conversations with a director of C88 which, PIA contended, showed that it had been the parties' common intention that the SAA should secure all amounts

then and thereafter owing by C88 to PIA. Mr Wang's evidence was uncontradicted by evidence from those involved in the management of C88 prior to its entry into liquidation, and was accepted by the primary judge as credible. Notwithstanding the primary judge's acceptance of Mr Wang's evidence, relief in the nature of rectification was denied on the basis that the appellant had not proffered clear and convincing proof that Mr Wang's understanding of the purview of cl 1.1(g) was common to that of the managers of C88.

The primary judge also rejected the claim that the appellant had been expressly granted an equitable charge by cll 12.15 and 12.16 or impliedly granted an equitable charge by cll 12.9, 12.10 and 12.11. A submission proffered by C88 that, even if the SAA did expressly or impliedly confer an equitable charge on PIA, any such charge would be excised from the agreement as being repugnant or contrary to s 49(1) of the *Property and Stock Agents Act 2002* (NSW) was rejected.

On appeal, the issues before the Court were:

(i) Whether the primary judge had erred in refusing to order rectification of cl 1.1(g) of the SAA, in circumstances where Mr Wang's evidence was unopposed by countervailing evidence adduced by C88 and where the liquidators of C88 had not called the company's former managers to give evidence as to their intentions regarding the scope of cl 1.1(g);

(ii) Whether the primary judge had erred in holding that cll 12.15 and 12.16 of the SAA did not expressly grant an equitable charge to PIA;

(iii) Whether the primary judge had erred in holding that, as a matter of construction, cll 12.9, 12.10, and 12.11 did not evince an intention to confer a proprietary interest in the units of the development on PIA as security for payment of its Commission, so as impliedly to grant a charge to it; and

(iv) Whether the primary judge had erred in holding that, in the event that the SAA did grant an equitable charge to PIA, a contravention by PIA of s 49(1) of the *Property and Stock Agents Act* was not such as to excise the clauses granting the charge from the SAA, as contemplated by cl 1.2(h) thereof.

The Court (per Kirk JA and Griffiths AJA, White JA dissenting in part), allowing the appeal in part and remitting the proceedings to the Equity Division, held:

As to issue (i) per Kirk JA:

(1) Rectification based upon mutual mistake requires clear and convincing proof of the parties' common intention. While the fact that a defendant to a suit seeking rectification has not gone into evidence does not necessarily foreclose the availability of rectification, the onus remains with the claimant to make the claim good. In the circumstances of this case, none of the conversations that Mr Wang deposed to having with the managers of C88 indicated agreement to the position, and an intention, that the SAA should safeguard all outstanding payments then and thereafter owing to PIA: [131]-[143].

(2) Inferential reasoning by recourse to *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 does not permit the bridging of gaps in evidence. In circumstances where there was no evidence that the managers of C88 had the same subjective intention and understanding as that of Mr Wang, there was no basis either to infer that their evidence would not have assisted the respondent's case or to draw an inference adverse to C88 with greater confidence: [144]-[149].

Kuhl v Zurich Financial Services Ltd (2011) 243 CLR 361; [2011] HCA 11, applied.

Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd [2011] FCAFC 53; *RHG Mortgage Corporation Ltd v Ianni* [2016] NSWCA 270; *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121; *Ling v Pang* [2023] NSWCA 112, followed.

As to issue (i) per Griffiths AJA:

(3) A party seeking rectification of a written document carries the onus of establishing both the substance and detail of a common intention between the parties and the document's departure therefrom in the clearest and most satisfactory manner, by reference not only to objective material but also to evidence of the parties' subjective states of mind: [157]-[165].

Fowler v Fowler (1859) 4 De G & J 250; *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54; [1930] HCA 38; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336; [1973] HCA 23; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; [2004] HCA 55; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603; [2007] NSWCA 65; *Newey v Westpac Banking Corporation* [2014] NSWCA 319; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47, cited.

(4) The primary judge did not err in holding that the appellant had not established a common intention departed from in the SAA to the standard required in a suit for rectification. Although Mr Wang's evidence was accepted by the primary judge, his recall of the discussions said to evidence the parties' common intention was admittedly imperfect notwithstanding their reduction to direct speech. Mr Wang's evidence, moreover, relayed equivocations as to whether the relevant representatives of C88 actually concurred in his proposal to encapsulate all moneys owing to PIA in the SAA, such equivocations occurring in ongoing and earnest commercial negotiations: [179]-[205].

Concept Television Productions Pty Ltd v Australian Broadcasting Corporation (1988) 12 IPR 129; *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17; *Watson v Foxman* (1995) 49 NSWLR 315; *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381, approved.

Gan v Xie [2023] NSWCA 163, cited.

(5) While the principle in *Jones v Dunkel* can apply in a rectification suit, and such a suit should not be successfully defended simply by the defendant not going into evidence, no such inference could be drawn in the circumstances of this case. The appellant's failure to discharge its onus of establishing the claimed common intention foreclosed any inference that the evidence capable of being given by C88's former managers would not have assisted C88: [207]-[215].

Ling v Pang [2023] NSWCA 112, followed.

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, cited.

As to issue (i) per White JA dissenting:

(6) Where a party intends to give effect to a document as worded, but also intends to enter into a transaction which has a different effect from that for which the document provides, then the availability of rectification depends upon the intention to achieve a legal effect being clearly predominant over the intention to give effect to the document as it is worded. In the circumstances of the present case, a fair inference was that the former managers of C88 shared an intention with Mr Wang that cl 1.1(g) would include, and thus the caveat provisions would protect, all moneys owing by C88 to PIA. In light of the long business relationship between the parties, it should not be lightly inferred that C88's former managers knew of Mr Wang's intention and kept silent knowing that he might be labouring under a mistake: [58]-[62].

Bush v National Australia Bank Ltd (1992) 35 NSWLR 390, cited.

(7) The inference that the parties shared a common intention of the kind asserted by PIA was strengthened by the fact that C88 had not called witnesses that it might otherwise be expected to have called. Accordingly, an inference adverse to C88 available from evidence led by PIA could more readily be drawn: [63]-[70].

RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11, applied.

As to issue (ii):

(8) The primary judge was correct to hold that cll 12.15 and 12.16 of the SAA did not amount to the express grant of an equitable charge to PIA. Although those clauses did confer a proprietary interest upon PIA as security for payment of accrued commission, that proprietary interest was in the nature of a call option rather than an equitable charge. The inability of PIA, under those clauses, to enforce its security by appointment of a receiver or by judicial sale was inconsistent with the supposed grant of a charge thereby to it: [71]-[77] (White JA); [126] (Kirk JA); [153] (Griffiths AJA).

Swiss Bank Corporation v Lloyd's Bank Ltd [1982] AC 584, followed.

Broken Hill Proprietary Co Ltd v Commissioner of Stamp Duties [1998] 1 Qd R 452; *King Investment Solutions Pty Ltd v Hussain* [2005] NSWSC 1076; (2005) 13 BPR 25,077; *Morris Finance Ltd v Brown* (2017) 252 FCR 557; [2017] FCAFC 97; *Johnson v Synnex Australia Pty Ltd* [2017] SASCFC 165, cited.

As to issue (iii):

(9) The contractual grant of authority to lodge a caveat in respect of the grantor's land does not necessarily imply the grant of a caveatable interest in the grantor's land, whether in the form of an equitable charge or otherwise. In each case, the question is one that calls for construction of the terms of the contract as a whole: [85]-[108] (White JA); [128] (Kirk JA); [153] (Griffiths AJA).

Murphy v Wright (1992) 5 BPR 11,734; *Coleman v Bone* (1996) 9 BPR 16,235; *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489; [2011] NSWSC 1562; *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174; [2013] NSWCA 393, considered.

Troncone v Aliperti (1994) 6 BPR 13,291, explained.

Depsun Pty Ltd v Tahore Holdings Pty Ltd (1990) 5 BPR 11,314; *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* [2004] NSWSC 880; (2004) 12 BPR 22,319; *Ta Lee Investment Pty Ltd v Antonios* [2019] NSWCA 24; (2019) 19 BPR 39,153, cited.

(10) The primary judge erred in holding that cll 12.9, 12.10, and 12.11 did not impliedly grant an equitable charge to PIA to protect its entitlement to Commission from C88. In circumstances where C88 was a special purpose vehicle whose ability to satisfy PIA's Commission depended upon the sale of units in the development, the parties must have intended that PIA was to have more than a mere right to restrain completion of contracted sales of unit by caveat: [110]-[112] (White JA); [128] (Kirk JA); [153] (Griffiths AJA).

As to issue (iv):

(11) Even assuming that the implied conferral of an equitable charge upon PIA contravened s 49(1) of the *Property and Stock Agents Act*, that would not of itself necessitate the severance of cll 12.9, 12.10, or 12.11 from the SAA. The primary judge was correct to conclude that any such contravention would

not void the SAA and that, accordingly, the excisive effect of cl 1.2(h) of the SAA was not enlivened: [114]-[122] (White JA); [125] (Kirk JA); [153] (Griffiths AJA).

JUDGMENT

1 **WHITE JA:** This is an appeal from orders of the Equity Division (Rees J) dismissing claims by the appellant that it is entitled to an equitable charge over certain units in a development known as "The Somerset" to secure moneys owing to it pursuant to an agency agreement called a "Sole Agency Agreement" under which the appellant acted as agent for the respondent to sell units in the development. The appellant also sought rectification of a provision in the Sole Agency Agreement relating to the definition of "Commission" and "commission entitlement" to which the provisions in the Sole Agency Agreement said to have given rise to the equitable charge referred (*The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)* [2022] NSWSC 1081).

2 The appellant carries on business as a real estate agent. Between 2015 and 2019, it entered into a number of agency agreements with the respondent for the sale of apartments in the Somerset situated at Carlingford. The primary judge recorded that the appellant had sold 317 apartments in the development and had received some $10 million in commission but remained owed some $18 million (at [1]). The respondent was a special purpose vehicle incorporated by Dyldam Developments Pty Ltd ("Dyldam") for the purpose of developing the Somerset. It is now in liquidation.

3 On 13 September 2021, summary judgment was given for the appellant for the amount of outstanding commission in the sum of $18,055,076.20 plus interest (*The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd* [2021] NSWSC 1175). The respondent was placed into external administration on 14 April 2022 and, on 31 May 2022, a meeting of creditors resolved that it be wound up.

4 The appellant claims that it is entitled to an equitable charge over 27 specified lots in the development to secure its claimed entitlement to commission. It

relies upon the following clauses of the Sole Agency Agreement that it entered into with the respondent on 20 April 2018:

> "**12 COMMISSION**
>
> …
>
> 12.9 The Owner agrees that the Agent may lodge and maintain caveat or caveats on any units in the Development, the title of which has not been transferred to a third party, where the Owner is in default of its obligations to make payment of Commission to the Agent.
>
> 12.10 The Owner acknowledges that the caveat provision gives an absolute right to the Agent to protect the Agent's interest to commission entitlement or compensation or damages as the case may be.
>
> 12.11 Where the right of the Agent to lodge and maintain caveat or caveats arise, the Owner is taken to have and is deemed to have duly given consent to the Agent to the lodgment or lodgments and maintaining of caveats and the Agent is only obligated to remove the caveat or caveats on full receipt of its Commission entitlements and this clause shall provide a full and complete defense to any action of the Owner to seek removal of the caveat or caveats.
>
> …
>
> Further Right of the Agent In Respect of Accumulated or Accrued Commission Entitlement
>
> 12.15 The Agent has the right from time to time, to:
>
> (a) direct the Owner to pay accrued commission which is due and payable to the Agent, in whole or in part to any third party as the Agent may direct; or
>
> (b) Nominate any party, including itself or any person to acquire any Agency Lot, which is not subject of exchanged contracts, as stock for re-sell in the future. Such nomination may be on more than one occasion, and where the Agent makes such nomination the Owner must sell to the nominated party (including the Agent itself) and the price of the Agency Lot concerned shall be the MSP for the Agency Lot concerned.
>
> 12.16 For the contracts on the sale of any Agency Lot to the Agent or the party nominated by the Agent, the Owner agrees:
>
> (a) the sale price (inclusive of GST) is the MSP for the Agency Lot concerned;
>
> (b) notwithstanding any other provision in this Agreement, no deposit is payable and the Agent shall be absolutely entitled to apply set off against the Commission due and payable by the Owner to the Agent towards the deposit and balance payable at completion of contracts for the or each Agency Lot concerned;
>
> (c) completion to be not longer than 6 weeks from the date of exchange; and
>
> (d) the Owner at the Owner's own cost must do all things and sign all documents to transfer unencumbered title to the Agency Lot concerned to the Agent or its nominee as the case may be."

5 The appellant put its case for the existence of an equitable charge on two bases. The first, was that cll 12.15 and 12.16 contained an express equitable charge. Alternatively, it submitted that cll 12.9, 12.10 and 12.11 created a charge in its favour by implication.

6 Whatever the proper characterisation of those provisions, they protect the Agent's right to "Commission" or its "commission entitlement". Clause 1.1(g) includes the following definitions:

> "1.1 **Definitions**
>
> …
>
> (g) '**Commission**' or '**commission entitlement**' or '**agent commission**' means the commission plus interest for any late payment of the commission in accordance with this Agreement, which the Owner has agreed to pay to the Agent for the sale of each Agency Lot."

7 "Agency Lots" is defined as follows:

> "(d) '**Agency Lots**' mean only the residential units (whether described as *apartments, units or lots*) listed in the Agency Lot Schedule."

8 The schedule to the Sole Agency Agreement contained a list of 34 Agency Lots and the respective MSPs (Minimum Selling Prices) for each Agency Lot. By a later agreement, additional apartments in the development were added to the definition of Agency Lots.

9 The effect of the definition of Commission was that even if cll 12.9 - 12.11, 12.15 and 12.16 conferred on the appellant the rights of an equitable chargee, the only debt secured by the charge would be for any commission earned from the sale of the listed Agency Lots.

10 At the time the Sole Agency Agreement was entered into, the appellant was owed $3,203,862 in outstanding commissions in relation to the sale of other apartments in the Somerset development, which had settled. It also had a contingent entitlement to substantial further commissions that would be payable on completion of the sale of apartments where contracts had been exchanged but not yet settled. As at 20 April 2018 the appellant had effected the unconditional exchange of 295 lots within the Development.

11 The Sole Agency Agreement of 20 April 2018 was the third written agreement entered into between the parties in relation to the development. In 2015, the

parties entered into an “Exclusive Agency Agreement” for a term of four months. That agreement was replaced by a further “Exclusive Agency Agreement” on 21 May 2015. The terms of those agreements are not directly relevant to this appeal. They are summarised in the reasons of the primary judge at [17]-[26].

12 The sole director of the appellant is Mr Yue (Justin) Wang. The primary judge accepted his evidence. He deposed that, in or around the end of March or early April 2018, the respondent wanted the appellant to sell unsold units in the Somerset, including some unsold units the subject of the second Exclusive Agency Agreement, under a new Sole Agency Agreement. (We were informed that the difference between the two forms of agreements is that, under an exclusive agency agreement, an agent has the right to sell a property even to the exclusion of the vendor. Thus, the agent would be entitled to commission even if the vendor, and not the agent, were the effective cause of the sale. Under a Sole Agency Agreement, the agent would not be so entitled to commission if the vendor were the effective cause of the sale.)

13 The earlier Exclusive Agency Agreement of 21 May 2015 had not included provisions to the same effect as cll 12.9, 12.10, and 12.11. It did include provisions to the same effect as cll 12.15 and 12.16.

14 Mr Wang’s evidence, referred to below, was to the effect that cll 12.9, 12.10, and 12.11 were introduced because of his concern about the delay in payment of outstanding commission for several developments including, but not limited to, units in the Somerset. Mr Wang gave evidence that it was his intention that he needed a right to caveat to protect the appellant’s whole commission for the whole project. It was not until he received legal advice that he learnt that the definition of Commission was confined to the commission to be derived from the sale of each Agency Lot, being the lots specified in the Agency Lot Schedule attached to the Sole Agency Agreement (as subsequently amended when additional lots were added). The primary judge recorded (at [46]) that, as drafted, the caveat provisions applied to protect the Agent’s Commission on the 34 apartments only (being Commission of some $641,000), rather than all

unpaid commission. The appellant sought an order for rectification of the definition of "Commission" so that the definition reads as follows:

> "1A Order that definition of Commission in the Sole Agency Agreement be rectified as to read:
>
> *'commission' or 'commission entitlement' or 'agent commission' means the commission that is agreed between the Owner and the Agent for the sale of each Agency Lot, and for any lot in the Development which the Agent has already caused the sale of for the benefit of the Owner prior to the date of this Sole Agency Agreement*."

15 The primary judge correctly observed that, before construing the Sole Agency Agreement to determine whether it gave rise to an equitable charge, it was necessary to identify the true terms of the agreement to be construed. Hence, the primary judge dealt with the appellant's claim for rectification first (at [70]).

Rectification

16 The appellant relied upon the evidence of Mr Wang. He deposed to discussions that he had primarily with Mr Sam Fayad, whom he understood to be one of the owners of Dyldam. Mr Fayad was a director of the respondent. The other directors of the respondent were a Mr Joseph Khattar and his wife, Ms Chahida Khattar.

17 By 20 April 2018, the appellant had introduced purchasers who had exchanged unconditional contracts for the purchase off-the-plan of 295 lots. Around March 2018, when the South, East and West buildings of the Somerset were nearly ready for settlement, Mr Fayad called Mr Wang. Mr Wang deposed that they had a conversation to the following effect:

> "Sam: Brother, I need your help, at settlement our funder only allowed you to deduct 3.3% of contract price from the deposit you hold. The balance is required to be provided at settlement for payment to our funder.
>
> Justin: No, I can't agree with this. This is only opportunity for PIA [the appellant] to get our full commission for the sale.
>
> Sam: Brother, we have problem with our cash flow. If you do not agree with this the settlement will not happen. Then you, we and your buyers will all be in trouble.
>
> Justin: How will PIA commission be protected?
>
> Sam: North building will be settled next year. You can keep all deposit for North building for outstanding commission when North building starts settle.
>
> Justin: If the deposits are not enough to pay all balance of commission I need put caveat on your remaining units.

> Sam: It is ok, but please make sure your caveat will not affect our sale and settlement."

18 He deposed that Chahida Khattar called him around the same time and they had a conversation to a similar effect of the conversation to which he deposed he had with Mr Fayad.

19 Mr Wang agreed to Mr Fayad's request and received only 3.3% of the contract price towards payment of its commission on sales of units in the East, West and South buildings. The respondent admitted the appellant's allegation that, at the date of the entry into the Sole Agency Agreement, the amount of commission unpaid that was owing under the former Exclusive Agency Agreement amounted to $3,203,862.[1]

20 Mr Wang deposed to having had further conversations with Mr Fayad concerning delays in payment of commission in several developments to the following effect:

> "Justin: Please help with payments. Payments are outstanding in Viewpoint, Vivo and Northgate. Dyldam has also delayed in making payments for the Somerset sales. PIA has to honour the payment to its sales consultants even PIA has not received payment Please follow up and make some payments to help with my cash flow.
>
> Sam: If you can settle sold units and sell few more units, we will pay you all outstanding commission, otherwise PIA, we and your clients are all in trouble. You will be fully paid when North building settles."

21 He deposed that he and Mr Fayad agreed to change the commission rate to 5.5% for further sales on the sole agency basis and there was a further discussion with Mr Fayad as follows:

> "Justin: Can you and Joe provide personal guarantee to pay all unpaid commission and interest on late payments?
>
> Sam: No, you know I do not like to provide personal guarantee. I do not think Joe would be agreeable to providing personal guarantee as well. At least you hold 10% deposit, it is enough for your commission and penalty interest.
>
> Justin: I need some security for the significant amounts owing to PIA in Somerset.
>
> Sam: What security do you want?
>
> Justin: I need add caveat clause in our agency agreement. I will send you the agency agreement on terms like the replacement exclusive agency agreement

[1] The respondent did not plead to the allegation and is therefore taken to have admitted it: Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd [2008] NSWCA 39 at [62]-[63]; Zelden v Sewell Henamast Pty Ltd [2011] NSWCA 56 at [8].

> of 2015, but changing to sole agency agreement, commission rate at 5% plus GST and caveat provisions to protect PIA.
>
> Sam: OK. My office will send you the list of the further units. Put them in your sole agency agreement and send to me. We can discuss further afterwards."

22 The primary judge found that it was not clear whether Mr Fayad's quoted "OK" expressed agreement to Mr Wang's request or simply acknowledged the changes which Mr Wang wished to make to the agency agreement. Her Honour favoured the latter characterisation on the basis that Mr Wang and Mr Fayad continued to negotiate about the inclusion of the caveat clauses when they next spoke (at [32]).

23 Nonetheless, Mr Fayad had already expressed agreement to the appellant's having "protection" for its outstanding commission on units it had already sold, either by recourse to the deposits it held as stakeholder, or by the use of caveats.

24 At some point, and the evidence did not reveal precisely when, the respondent sent to the appellant a schedule of the Agency Lots that were to be the subject of the Sole Agency Agreement. Mr Wang or his staff prepared a Sole Agency Agreement that incorporated the caveat clauses 12.9, 12.10, and 12.11 quoted above. Mr Wang deposed that he had a further discussion with Mr Fayad in around early April 2018 to the following effect:

> "Justin: It is changed to sole agency and not exclusive. The interest provision remains the same. There is no personal guarantee, and the added part is the security provisions in clauses 12.9, 12.10 and 12.11 to safeguard the commission and interest which C88 has failed to pay for the sales and further sales and the extension of the agency period and payment of the first instalment of the commission.
>
> Sam: Can you leave out the caveat part?
>
> Justin: No, the caveat part is necessary and important. If PIA is not paid upon completion of contracts of the sold agency lots since 2015 or any further sales PIA will lodge.
>
> Sam: Okay, but can you agree not to lodge caveats until the remaining stages have completed and the strata plans registered, and PIA has still not received payment for settlement of the sold lots?
>
> Justin: Okay."

25 After this conversation, Mr Wang and Mr Fayad signed the Sole Agency Agreement for their respective companies. It was signed on or about 20 April 2018.

26 The appellant's claim to rectify the definition of "Commission" or "commission entitlements" was based upon its claim that it was the parties' common intention that the provisions which it contended gave rise to an equitable charge would secure its entitlement to past commissions and not merely the commissions to be earned from the sale of the Agency Lots specified in the Schedule. No claim was advanced for the rectification of the instrument on the ground of the appellant's unilateral mistake, that is, on the basis that the respondent had deliberately set out to ensure that the appellant did not become aware of the existence of the mistake (*Taylor v Johnson* (1983) 151 CLR 422 at 432-3; [1983] HCA 5).

27 Mr Fayad did not give evidence. The appellant submitted at trial and on appeal that an inference should be drawn favourable to the appellant on the principles in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 arising from his failure to do so.

28 The primary judge rejected this submission on the basis that, by the time of the trial, the respondent was in liquidation and Mr Fayad could not be described as "in the camp" of the respondent that was then being administered by the liquidator merely by reason of his having been a director of the company (at [6]).

29 There was evidence from the solicitors retained by the liquidator as to their unavailing attempts to try to contact Mr Fayad to ascertain whether he would be willing to give evidence (at [8]).

30 The primary judge's reasoning is challenged by ground 3 of the Notice of Appeal which contends that the primary judge erred in declining to draw an inference that any evidence given by Mr Fayad or Ms Chahida Khattar, who also did not give evidence, would not have assisted the respondent.

31 The hearing of the trial commenced on 23 June 2022. Administrators had been appointed to the respondent on 14 April 2022.

32 Mr Wang's affidavit, parts of which have been quoted above, was filed on 12 October 2021. The primary judge recorded that the respondent had first been ordered to put on its evidence by 25 February 2022 and recorded the

liquidator's submission that that order had been varied to require its evidence to be served by 28 March 2022 (at [5]).

33 That submission was not an accurate description of the relevant orders. On 9 December 2021, Ball J ordered that the appellant file and serve any further evidence in chief on which it intended to rely in respect of the "equitable charge and judicial sale relief" by 28 January 2022 and that the respondent file and serve any evidence in reply by 25 February 2022.

34 On 24 January 2022, the appellant's solicitors advised the respondent they had served their evidence, save for valuation evidence, which was outstanding. This, they said, was partly due to the Christmas and New Year holiday period and also because the respondent was yet to provide keys for access to certain units. On 31 January 2022, Hammerschlag J made the following orders:

> "…
>
> 2. The plaintiff to file and serve valuation evidence in which it intends to rely in respect of the equitable charge and judicial sale relief by 28 February 2022.
>
> 3. The defendants to file and serve any evidence in response by 28 March 2022."

35 Any evidence Mr Fayad could have given was due to have been served by 25 February 2022.

36 The respondent's then-solicitors filed a notice of ceasing to act on 25 March 2022.

37 The primary judge's reasons for not drawing a *Jones v Dunkel* inference from the respondent's failure to serve an affidavit by Mr Fayad after the appointment of administrators did not address its failure to have served an affidavit from Mr Fayad prior to 25 February 2022. That failure was unexplained.

38 The primary judge drew an inference "generally adversely to the agent" arising from its failure to adduce documentary evidence which might have been expected to be brought forward to support its case for rectification (at [11]). The primary judge recorded that the liquidator submitted that an adverse inference should be drawn from the agent's failure to adduce any corroborative documents of anything that was said, in particular, "the email or cover letter by which the agent sent the Sole Agency Agreement to C88" (at [9], [11]).

39 It would have been open to either party to tender any email or covering letter accompanying the draft of the Sole Agency Agreement, assuming that there was such an email or letter and, after a lapse of three years or more, it was still preserved. It was not suggested to Mr Wang in his cross-examination that he had made a file note of his conversations with Mr Fayad.

40 The primary judge referred (at [11]) to the absence of any drafts or notes created in the course of preparing the agreement and observed that this was a little surprising in light of the quantity of apartments to be sold and the quantum of the appellant's anticipated commission.

41 The Sole Agency Agreement was not prepared by the appellant's solicitor, a Mr Cheung. From about 2009 or the end of 2010, Mr Cheung provided templates of a form of agency agreement or agreements for the appellant's use. He prepared the caveat provisions, cll 12.9,12.10, and 12.11, in one of those templates in, he believed, 2011 or 2012 or thereabouts. Mr Wang or one of his staff used a template document that had earlier been provided by Mr Cheung in preparing the Sole Agency Agreement.

42 The primary judge referred to the relevant legal principles concerning rectification of written instruments, noting in particular the requirement of clear and convincing proof that the parties had a common intention concerning their agreement which is not reflected in the written instrument (*Fowler v Fowler* (1859) 4 De G & J 250 at 265; 45 ER 97 at 103; *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54; [1930] HCA 38; *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662 at 664-5; *Joscelyne v Nissen* [1970] 2 QB 86 at 98; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 349; [1973] HCA 23; *Pukallus v Cameron* (1982) 180 CLR 447 at 452; [1982] HCA 63; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [41]) .

43 The primary judge accepted Mr Wang's evidence as to the terms of the conversations he had with Mr Fayad (at [78]). Her Honour accepted Mr Wang's evidence as to his intention and understanding at the time (at [88]), which was that he understood that the provisions providing for the entitlement of the appellant to lodge caveats on the properties in the development would include

protection for the appellant in relation to commissions which were then owing to it by the respondent, and for commissions in relation to properties in that development which had already been sold by the appellant. The primary judge was not satisfied that that was also Mr Fayad's intention. In relation to the conversation quoted at [17] above her Honour said that it was not entirely clear whether Mr Fayad's agreement at the time to the lodgement of caveats depended upon its becoming clear that the deposits for stage 4 would not be enough to pay unpaid commission from stages 1, 2 and 3 and, in any event, his consent to the lodgement of caveats was qualified by his request to "…please make sure your caveat will not affect our sale and settlement" (at [79]).

44 These reservations did not address the issue whether recourse to the deposits, or the protection envisaged by the lodgement of caveats, would apply to arrears of commission.

45 In relation to the conversation deposed to by Mr Wang in paragraph 18 of his affidavit, quoted at [20] above, the primary judge observed that it was unclear whether Mr Fayad had in mind that the agent would be paid all outstanding commissions in respect of the Somerset when the North building was sold, or whether this means of payment would extend to commissions owing to the agent in respect of other developments (at [80]). That is true, but the conversation at least established that Mr Fayad was promising to pay all outstanding commissions in respect of the Somerset development. It was in that context that the discussions about caveats, which were the subject of the next conversation to which Mr Wang deposed, took place. That conversation is quoted at [21] above and, as noted at [22] above, the primary judge found in respect of it (at [32]) that Mr Fayad's "OK" should be understood as merely acknowledging Mr Wang's request for the addition of a caveat clause in the agency agreement to provide security for significant amounts owing to the appellant in Somerset rather than voicing agreement with it.

46 Mr Fayad ultimately did accede to the inclusion of cll 12.9, 12.10 and 12.11 in the Sole Agency Agreement and could not have been in doubt that those

clauses were requested by Mr Wang so as to provide security for arrears of commission.

47 The primary judge observed (at [84]) that, if the caveat clauses were taken straight from Mr Cheung's template without amendment, then it is unsurprising that they did not address the problem of arrears in commission. Her Honour observed that, as unpaid commissions then exceeded $3 million, it might have been a matter on which Mr Cheung's assistance would have been sought. Mr Cheung's unchallenged evidence was that his assistance was not sought. Her Honour said:

> "As the Court has neither the template nor any notes or drafts, it is not possible to say precisely what happened, save that no attempt appears to have been made to draft such a clause. I infer that such documents, which may be expected to be in the possession of the agent in respect of the preparation of the Sole Agency Agreement would not have supported its claim."

48 With respect, this reasoning is difficult to follow given her Honour's finding that it was Mr Wang's intention and understanding that the caveats would secure arrears of commission. If there were any such notes or drafts, and there was no evidence that there were, they would only have been adverse to the appellant's claim if an amendment to the definition of Commission had been drafted but then rejected. But that would have been inconsistent with Mr Wang's intention. The primary judge accepted Mr Wang's evidence of his intention. The existence of such notes or drafts could not be relevant to the respondent's intention.

49 In rejecting the rectification claim, the primary judge also had regard to evidence of a conversation to which Mr Wang deposed that he had with Mr Fayad in August 2019. Mr Wang deposed:

> "Around August 2019, the North building were ready to settle. Sam informed me that I cannot keep full deposit but can keep 3.3% of contract price from holding deposit. I had a few conversations with Sam separately –
>
> Justin: Hi Sam, you agreed that I can hold all deposit for North building for commissions including for paying part of outstanding commission east, south and west building.
>
> Sam: Brother, I am sorry for this. We have not enough money to pay funder, GST etc. You can keep 3.3% of contract prices, please release the balance. Please agree with this for some settlement and enable us to pay some cost. Then you can keep 5.5%.

> Justin: I have concern that you keep breaking your promise. With normal practice your funder should allow you keep amount for paying commissions and GSTs.
>
> Sam: Brother, the problem is we never tell our funder how much we owe PIA.
>
> Justin: Same question, what is the security for PIA?
>
> Sam: As what I said before, after paying off our funders we have a lot of profit left. I have some units without any mortgagee.
>
> Justin: Can I put caveat on those unit.
>
> Sam: Yes You can, not now, please don't disturb our funders and affect settlement."

50 The primary judge said that if there were a common intention that a caveat lodged under the Sole Agency Agreement secured commissions payable prior to entry into that agreement, it would not have been necessary for Mr Wang to ask the question "what is the security for PIA?" (at [89]).

51 But Mr Wang's questions were only relevant to his understanding as to whether the caveat provisions applied to arrears of commission. They were not relevant to Mr Fayad's understanding. The primary judge accepted that Mr Wang's intention and understanding was that the caveats did secure commission in respect of arrears of commission (at [88]). The respondent's notice of contention does not challenge that finding. Mr Fayad's acknowledgement that the appellant could place a caveat on the units, but his request not to do so at that time, in the context of the conversation which related to recovery of arrears, was confirmatory of Mr Fayad's intention that arrears of commission would be secured by the caveat provisions.

52 The appellant has not sought rectification of cll 12.9, 12.10, or 12.11, so Mr Fayad's intentions as to what those provisions were intended to achieve is not relevant. But if cll 12.9, 12.10, and 12.11 do imply the grant of an equitable charge to secure the payment of commission, Mr Fayad's statement as recounted by Mr Wang is confirmatory of Mr Fayad having the intention that arrears of commission would be secured by those provisions.

53 The Sole Agency Agreement included an "Whole Agreement" clause in the following terms:

> "**22 WHOLE AGREEMENT**

> 22.1 The contents of this Agreement together with the Price List record the entire agreement between the parties. All representations, communications and prior agreements in relation to the subject matter of this Agreement are merged in and superseded by this Agreement.
>
> …
>
> 22.3 All understandings, agreements, warranties or representations (whether express or implied) are excluded other than those which are set out in this Agreement."

54 This clause does not preclude the availability of rectification (*MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152 at 155-6). But it is relevant to whether Mr Wang's or Mr Fayad's dominant intention was to be bound by the document as worded.

55 Mr Wang's evidence was that he probably did not read the clause, which was part of the template which he believed was there to protect him, and had "no impression [that] I particularly paid attention for this clause when I prepared the Sole Agency Agreement…I [am] confident that this, this is all good for us" (at [83]). The primary judge accepted Mr Wang as a witness of credit.

56 The primary judge found:

> "[88] Whilst I accept Mr Wang's evidence as to his intention and understanding at the time, the more difficult question is whether that intention was shared by Mr Fayad as, effectively, the intention of C88. Where C88's clear preference was that there be no caveat clauses at all, it is at least equally likely that C88 had no intention to enter into an agreement other than in the terms of the document proffered by the agent. Where the clauses of the Sole Agency Agreement were tolerably clear, the act of Mr Fayad signing the written document is consistent with a conclusion that he did not intend agree to anything further."

57 The reasoning that the terms of the document were tolerably clear must be a reference to a reading of the caveat clauses which were the subject of the negotiations with their reference to the defined term "Commission".

58 In *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390, Hodgson J (as his Honour then was) dealt with the position where a party both intends to give effect to the document as worded, but also intends to enter into a transaction which has a different effect from that for which the document provides. His Honour said at 407 that, in those circumstances, rectification will be available if the intention to achieve a legal effect, which is not the true legal effect of the

words used, is clearly predominant over the intention to give the effect of the document as it is worded.

59 A fair inference is that Mr Fayad had the same intention as Mr Wang that the caveat provisions would provide “protection” not only in respect of commissions to be earned from the sale of the Agency Lots listed in the Schedule, but for arrears of commission. That had been the subject of their negotiations.

60 A second possibility is that Mr Fayad had that intention but also intended to give effect to the document as worded.

61 A third possibility is that Mr Fayad either read the terms of the document, or was advised on the terms of the document, and either believed, or was advised, that the effect of the document, as worded, was that the caveat provisions would only give “protection” for commissions to be derived from the sale of the Agency Lots listed in the Schedule and not for arrears of commission.

62 Mr Wang and Mr Fayad had done business together since 2009, when the appellant was first engaged to market and sell a development conducted by a special purpose vehicle of Dyldam’s in Castle Hill. From about 2014, the appellant was Dyldam’s principal external selling agent. It should not lightly be inferred that Mr Fayad, knowing Mr Wang’s purpose in including the new caveat provisions in the Sole Agency Agreement, would have signed the agreement knowing that the agreement as worded did not provide protection in respect of arrears of commission and kept silent. If Mr Fayad had given evidence to that effect, it might have been anticipated that the appellant would have submitted that it was entitled to rectification on the ground of its own mistake known to the respondent, who had deliberately set out to ensure that it did not become aware of the existence of the mistake.

63 The respondent submitted that no adverse *Jones v Dunkel* inference should be drawn against it because Mr Wang had not given evidence concerning the respondent’s intention other than what could be gleaned from the conversations. As those conversations were not disputed, there was nothing which the respondent was required to explain or contradict.

64 I do not accept that submission. A consequence of not calling a witness who might be expected to be called is not only that it can be inferred that the witness would not have advanced the case of the party who might be expected to have called him or her, which will often not take the matter further. It is also that an inference available from the evidence that has been led by the opposite party, adverse to the party who might be expected to call the witness, may more readily be drawn (*Jones v Dunkel* at 308, 312, 320; *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3 at [26]; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11 at [63]).

65 There is no reason that that principle should not apply to rectification suits where the plaintiff has the burden of establishing the opposite party's intention by clear and satisfactory evidence, or convincing proof. It should not be thought that a party facing a claim for rectification, where an inference as to that party's intention as to the legal effect of the document is available on the evidence adduced by the plaintiff, can successfully defeat the claim by not going into evidence itself, but by propounding alternative inferences by argument, unsupported by evidence, and submitting that the proof proffered by the plaintiff is not convincing because the alternatives have not been rebutted. It may be a question of degree. But in this case, the primary judge erred in concluding that the appellant had not established that it was the parties' common intention that arrears of commission be "secured" or "protected" by the caveat provisions.

66 The primary judge accepted Mr Wang's evidence as to his intention and the conversations to which he deposed were not disputed. The fair inference that Mr Fayad had the same intention as Mr Wang should be drawn in the absence of evidence from Mr Fayad to the contrary.

67 The respondent submitted that, even if a common intention were established, the appellant's proposed amendment to rectify the Sole Agency Agreement would be inconsistent with that common intention. The primary judge had observed that the caveat provisions as drafted did not include qualifications requested by Mr Fayad that caveats not be lodged until the remaining stages had been completed, the strata plans had been registered, and the appellant

had not received payment for settlement of the sold lots. Mr Wang agreed. That was not a matter relevant to whether the "protection" to be provided by the caveat provisions would extend to arrears of commission. It is not relevant to the claim for rectification of the definition of "Commission" and "commission entitlement".

68 Mr Wang adhered to his agreement with Mr Fayad not to lodge the caveats until those events had passed.

69 The respondent's submissions did not otherwise identify why, if the common intention of the parties were established, the proposed rectification of the definition of "Commission" and "commission entitlements" did not give effect to that intention. The respondent did not submit that rectification of the definition should be confined to the use of the defined term "Commission" in cll 12.9, 12.10, and 12.11.

70 For these reasons, the definition of "Commission" or "commission entitlement" in the Sole Agency Agreement should be rectified as sought in paragraph 1A of the Amended Summons.

Express charge

71 What would be secured by an equitable charge is relevant to the construction of cll 12.9, 12.10, and 12.11 in that it informs the construction of the infinitive "to protect" in cl 12.10 (see below at [111]).

72 The appellant's primary submission on appeal was that cll 12.15 and 12.16 conferred on it the right to compel a sale of the Agency Lots and set off outstanding Commission against the purchase price. The appellants submitted that this was "a charge by another name" because the Agency Lots had been expressly made liable for the discharge of the Commission owed by the respondent to the appellant. It submitted that it enjoyed a right of immediate recourse to identifiable property, exercisable upon its demand for the satisfaction of that debt.

73 The primary judge dealt with this submission as follows:

> "[129] The agent's reliance on clauses 12.15 and 12.16 was not pleaded. However, as the liquidator addressed the matter in submissions in the event that I was minded to hear the argument, and as the issue turns on the terms of

> the Sole Agency Agreement, I will deal with it; it does not require any additional evidence and the liquidator has been able to consider the matter. I note, however, that these clauses were not referred to by Mr Wang when he spoke to Mr Fayad after having circulated the proposed Sole Agency Agreement and described the "security provisions": see [36]. Nor were these clauses cited in the caveat when describing the equitable charge: see [61]. More importantly, the same provisions were included in the second agency agreement (see [24]-[25]), executed before there was any discussion about "security". If the agent's submission is correct, then the agent had an equitable charge all along and did not know it.
>
> [130] Consideration of these sub-clauses requires application of the principles summarised in *Roberts v Investwell* [*Pty Ltd (in liq)* [2012] NSWCA 134; (2012) 88 ACSR 689], as described at [92]-[96]. Sub-clauses 12.15 and 12.16 do not appropriate property of C88 to the agent for payment of a debt, nor give the agent a present right to have the property made available for the payment of its debt. The first option given in sub-clause 12.15(a) is that the agent can direct C88 to pay accrued commission to the agent's nominee. The second option given in sub-clause 12.15(b) is that the agent may nominate an apartment to be transferred to the agent at the MSP. At most, the sub-clauses are an agreement to create a charge in favour of the agent *on request*, which does not create an equitable charge as no immediate proprietary interest or right to recourse to a particular asset is conferred on the creditor: *Roberts v Investwell* at [30]. The sub-clauses do not refer to a charge, or mortgage or anything other than the ability, on request, to require C88 to sell an apartment to the agent at a set price, which price could be off-set against the commissions owing. Whilst I do not agree with the liquidator that the agent was entitled to exercise this option in the absence of being owed commission, nor do I consider that these sub-clauses evince an intention to confer a proprietary interest as security for a present or future debt. There was no equitable charge. It follows that the agent is not entitled to orders for judicial sale."

74 The appellant submitted that the primary judge conflated the concept of creating an equitable charge on request with the exercise of the mechanism to enforce that equitable charge on request.

75 There is a more fundamental difficulty with the appellant's submission. In *Swiss Bank Corporation v Lloyd's Bank Ltd* [1982] AC 584, Buckley LJ said (at 595):

> "An equitable charge which is not an equitable mortgage is said to be created when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realisation by judicial process, that is to say, by the appointment of a receiver or an order for sale…"

76 That passage has been cited with approval in a number of decisions of intermediate appellate courts in this country (see, eg, *Broken Hill Proprietary Co Ltd v Commissioner of Stamp Duties* [1998] 1 Qd R 452 at 458; *Morris Finance Ltd v Brown* (2017) 252 FCR 557; [2017] FCAFC 97 at [38]; *Johnson v Synnex Australia Pty Ltd* [2017] SASCFC 165 at [56]).

77 I accept that cll 12.15 and 12.16 do confer a proprietary interest on the appellant as security for the payment of accrued commission. But the security provided is in the form of a call option, exercisable by the agent with the right of set-off of the accrued commission against the purchase price payable on the exercise of that option. The mechanism agreed by the parties for the enforcement of the security is not a judicial process for the appointment of a receiver or for judicial sale, which are the remedies granted to an equitable chargee in the event of default in the payment of the secured debt (*King Investment Solutions Pty Ltd v Hussain* [2005] NSWSC 1076; (2005) 13 BPR 25,077 at [50]-[51], [81] (Campbell J)). Exercise of the call option with a right of set-off is the only remedy the parties contemplated. It excludes recourse to the Court for the appointment of a receiver or for an order for judicial sale.

78 The appellant has not sought to exercise that option. The appellant submitted that this Court should make a declaration as to its entitlement to exercise the option as an alternative declaration as to the proper construction of cl 12.15(b). It sought leave to amend its notice of appeal accordingly. But that was not an issue in the proceedings below. The respondent is in liquidation. Counsel for the respondent submitted that defences might be available to the liquidator if the appellant now sought to exercise the option, including that the appellant's right to commission has merged in the judgment (at [3] above). No issues relevant to the alternative relief sought were ventilated below. It would be inappropriate to make any declaration or order. I would refuse leave to amend. It suffices to say that cll 12.15 and 12.16 do not confer on the appellant the rights of an equitable chargee.

Implied Charge

79 Clauses 12.9 – 12.11, 12.15 and 12.16 are quoted at [4] above. By cl 12.9, the respondent agreed that the appellant may lodge and maintain a caveat or caveats on any "units in the Development". "Development" was defined in cl 1.1(l) as follows:

> "'**Development**' means the development on the Land of new multi storey residential apartments to be under strata title, with such s96 EPA modifications as may be approved by Council."

80 The “Land” meant land known as 7-13 Jenkins Road and 2-14 Thallon Street, Carlingford, being the site of the Somerset development.

81 “Unit” or “Units” was defined in cl 1.1(z) as a reference to the “respective Agency Lot in the Development, or as a general reference to the residential apartment(s), unit(s) [sic] in the Development, as the context may require”.

82 Clause 12.9 uses the word “units” in lower case and not the defined term “Units”. The right to lodge and maintain caveats conferred by cl 12.9 was therefore a right that related to all units in the Somerset development which had not been transferred to purchasers, in contradistinction to the call options conferred by cl 12.15 which related only to the specified Agency Lots. This would follow even if “units” were to be read as “Units” in the defined sense. This is because the context, in particular the express reference in cll 12.15 and 12.16 to Agency Lots, would suggest that even a reference to Units would be to all units in the Development.

83 Clause 22.1 (the Whole Agreement clause referred to at [53] above) precludes recourse to the negotiations between Mr Fayad and Mr Wang in construing cll 12.9 – 12.11, even in so far as those negotiations reveal matters of objective fact (*Johnson Matthey Ltd v AC Rochester Overseas Corporation* (1990) 23 NSWLR 190 at 196; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833 at [440]). But that clause does not preclude regard being had to the objective facts that must have been known to both parties at the time the Sole Agency Agreement was entered into, namely, that the appellant was owed millions of dollars in outstanding commission with more commission becoming payable as the settlement of exchanged contracts proceeded.

84 At all material times, s 74F of the *Real Property Act 1900* (NSW) has provided that a person who claims to be entitled to a legal or equitable estate or interest in land under the provisions of that Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled.

85 The call options provided for by cl 12.15 undoubtedly conferred on the appellant a caveatable interest in respect of the Agency Lots (see, eg, *Mackay*

v Wilson (1947) 47 SR (NSW) 315 at 325). But because the right granted by cl 12.9 extends to the lodgement of caveats on units in the development other than the Agency Lots specified in the schedule to the Sole Agency Agreement, cll 12.9 – 12.11 are not to be read down by reference to cl 12.15.

86 In *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489; [2011] NSWSC 1562, Bryson AJ observed that:

> "[60] In my view the meaning conveyed by a contractual document, including what is conveyed by implication, must be understood by addressing the terms and the whole terms of the document in question, and there is no principle or true principle establishing what implication must be drawn in all cases from authority to lodge a caveat in connection with an obligation to pay money."

87 That observation has been approved by this Court in *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174; [2013] NSWCA 393 at [82] – [83] (Gleeson JA, with whose reasons Meagher and Leeming JJA agreed) and *Ta Lee Investment Pty Ltd v Antonios* [2019] NSWCA 24; (2019) 19 BPR 39,153 at [98] (Bathurst CJ, Beazley P and Macfarlan JA)).

88 Nonetheless, consideration of cases in which it has been held that a right to lodge a caveat does or does not impliedly confer the grant of an interest in land by way of equitable charge may be instructive.

89 In *Murphy v Wright* (1992) 5 BPR 11,734, a deed of guarantee provided that, in the event of default by the principal borrower in payment of moneys due under the "Security Documents" (being a deed of loan between the lender and borrower and a registered mortgage given by the borrower over its land), the lender would be entitled

> "…to attach the debt due to any of the assets of the Guarantor…whether such assets be real or personal and further the parties hereto agree that in the event of such default the Lender may register a caveat against any property registered in the name of [the Guarantor] until the Moneys Secured are repaid"

(The Moneys Secured were the principal debts secured by the guarantee).

90 On an application for an order extending the operation of a caveat lodged by the lender in respect of property of which the guarantor was the registered proprietor, there was an order for the separate determination of the question whether, by that clause, the guarantor agreed to grant any security interest in any asset to the lender.

91 By majority (Priestley and Handley JJA, Sheller JA dissenting), that question was answered in the affirmative.

92 Handley JA held that the clause conferred on the lender an option which, when exercised, created an equitable charge over the subject property. He construed the clause as a conditional contract by the guarantor authorising the lender to attach the debt to her property in respect of her property other than her Torrens title land. As to such other property, the option failed because the manner of its exercise had not been specified. But in relation to the Torrens title land, the manner of exercise of the option was specified by the lender having the right to "register" [sic] a caveat. Handley JA held that attaching a debt to a property involved charging the property with the debt (at 11,739). He reasoned that, unless this construction were adopted, the clause would be meaningless. Priestley JA held that only the construction favoured by Handley JA gave the clause some effect (at 11,735).

93 The reasons of Handley JA and Priestly JA focused on the right of the lender to attach the debt due to any assets of the Guarantor. The right to lodge a caveat was consequential on the meaning attributed to those words.

94 In *Troncone v Aliperti* (1994) 6 BPR 13,291, the loan agreement did not in terms provide for any security for repayment of the loan, but included a clause which provided:

> "The Debtor authorises the Creditors to lodge a Caveat on any property owned by the Debtors (sic) to protect his interest."

95 Mahoney JA held (at 13,292):

> "It is a fundamental principle of construction that 'Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect'…
>
> A caveat cannot be entered against land unless the caveator has the relevant proprietary interest in the land: see Real Property Act 1900 s 74F(1) ("a legal or equitable estate or interest in land"). Therefore, unless there be evident an intention to the contrary, the grant to the creditors of an authority to lodge a caveat on the relevant property carried with it by implication such an estate or interest in land as was necessary to enable the authority to be exercised. There was, in the present case, no intention to the contrary…
>
> In order to determine the present appeal, it is not necessary to determine what is the precise nature of the interest in the land which, by this implied grant, was passed to the creditors. It is, in my opinion, sufficient to conclude that it was an

> interest which, within the Real Property Act 1900, would support the lodgment of the caveat."

96 Mahoney JA concluded that the caveator's sufficient interest to support the lodgement of the caveat was the registered proprietor's covenant that he would not sell or deal with the land until the loan was repaid and that a right to restrain a dealing with the land was an interest in the land "within this branch of the law" (at 13,293).

97 However, this was not the *ratio decidendi* of the Court of Appeal's decision in *Troncone v Aliperti*.

98 Priestley JA agreed with Mahoney JA's construction of cl 5 of the loan agreements and with his conclusion. He did not agree with his reasoning. Priestley JA regarded the case as being indistinguishable from *Murphy v Wright*, where the majority concluded that the caveat was supportable by the charge created, in that case, by the clause providing for the attachment of the debt to the property (at 13,293).

99 Meagher JA initially stated that he agreed with Mahoney JA's reasons and his proposed orders, but his Honour went on to say that the interest which the debtor intended to grant to each of his lenders could only be an equitable charge because, unless the clause were construed as granting a charge, it would be meaningless (at 13,293).

100 In *Coleman v Bone* (1996) 9 BPR 16,235, the *de facto* husband of the plaintiff lent the plaintiff's daughter and her *de facto* partner $50,000 to assist them to purchase a home unit from the plaintiff and her *de facto* husband. A document was prepared without legal assistance which provided for the terms of the loan of $50,000. The terms included:

> "About the $50,000 I shall want to put caveat on the property.
>
> If you wish to sell you repay me $50,000 plus one third share of capital gain…
>
> As the caveat will safe guard my investment, and you are over borrowing, I will not remove it unless you can (when you wish to sell) repay the $50,000 plus my share of capital gain…".

101 In holding that the lender was entitled to an equitable charge to secure repayment of the loan of $50,000 plus any capital gain, McLelland CJ in Eq said (at 16,239):

> "So far as the "caveat'' is concerned, it has been held by the Court of Appeal (in *Troncone v Aliperti* (1994) 6 BPR 13,291 ; NSW ConvR 55-703) that if in a contract between A and B, A grants B authority to lodge a caveat in respect of property of A, that grant carries with it by implication such estate or interest in the property as is necessary to enable that authority to be exercised. Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B, and there is no sufficient indication to the contrary, the implication is that the estate or interest granted is an equitable charge to secure payment to B of that money (*Troncone* at BPR 13,293–4; ConvR 60,020 per Meagher JA). In the present case the terms of the loan document support such an implication, and in my view the result of the transaction was that the plaintiff became entitled to an equitable charge over the Lane Cove property to secure to her the payment of the $50,000 and any share of capital gain to which she might become entitled calculated in accordance with the loan document."

102 In *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* [2004] NSWSC 880; (2004) 12 BPR 22,319, I referred (at [21]) to other first instance decisions in which *Troncone v Aliperti* had been characterised as a case of an implied charge.

103 In *Taleb v National Australia Bank Ltd*, Bryson AJ did not agree with the observations of McLelland CJ in Eq in *Coleman v Bone* (at [60]) but they were cited with apparent approval by Gleeson JA in *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (at [83]). In *Taleb*, a lender advanced money to a company that carried on the business of pawning motor cars. The deed acknowledging the loan included a term that the company agreed to the following term:

> "1.3 the Debtor will grant to the Creditor the right to register a Caveat over the Debtor's interest in property located at [address] ('the secured property')".

104 Bryson AJ held that this provision did not impliedly grant an equitable charge. His Honour said:

> "[61] The circumstances that there was a debt and that there is to be a caveat, together with the nature of the caveat, certainly direct attention to whether it was intended that the debt should be protected by a charge or some other interest. It is quite likely that there was some such intention in the mind of one party or of both, but if that intention is not found expressed or by implication in their document there is no equitable interest. Authorisation to lodge a caveat does not create by necessary implication the conclusion that there must have been an intention to create an equitable interest, and that there must have been the further intention that that interest should be a charge over the property.
>
> …

> [63] My experience with commercial documents has shown that the advantages sought by provisions such as these is not always the advantage of owning an equitable interest such as a charge; there are real advantages in having a caveat on the register and impeding the registered proprietor's dealings in that way, whether or not one owns an interest in the land; once a caveat is lodged it is a complicating factor and an impediment for the registered proprietor's dealings, and getting rid of the caveat involves a certain amount of difficulty. The conclusion that contractual authorisation to lodge a caveat means what it says and no more is not irrational at all. Registered proprietors may agree to put up with an inconvenience as a term of their dealings, and in my experience from time to time they do.
>
> …
>
> [65] In the Deed of Acknowledgement there is no reference to a charge, or to any steps which the creditor might take against the property in the event of non-payment of the debt, or in any event it all. The operative provisions of clause 1.3 come earlier; the reference to the property comes after the operative provisions have concluded. There is no other reference to the property, except as the address of the Debtor. In clause 1.3 the property is referred to parenthetically as ("the secured property") but there is no other use of that expression anywhere in the deed. This is not an operative provision, all it does is restate the reference to the address as a defined expression, yet that defined expression is not used. To refer to the property as "secured" is not to say that the creditor has security over it: the word "secured" does not indicate that in any way. If there were a mortgage or charge the creditor would be secured, not the property. In my opinion clause 1.3 shows an intention of the debtor, as it says in plain language, to grant to the creditor the right to register a caveat over the debtor's interest; it does not express or convey in any way an intention to give the creditor any interest, whether a charge or any other interest, in or over the debtor's property. The grant is to happen in the future, but no event or condition is stated in which it is to happen. All this is too insubstantial matter out of which to spin a filament of implication."

105 In *Aged Care Services Pty Ltd v Kanning Services Pty Ltd*, Gleeson JA said:

> "[82] Whether it is possible to discern from the authorisation to lodge a caveat (given by a registered proprietor), an intention to create a charge which would support a caveat is the subject of conflicting views in the authorities. The conflict relates to whether there is a principle establishing what implication must be drawn in all cases from the authority to lodge a caveat in connection with an obligation to pay money, or whether each case is to be addressed by reference to the terms of the contractual document to discover what it means, by expression and by implication: *Taleb v National Australia Bank Ltd* [2011] NSWSC 1562; 82 NSWLR 489 at [60] per Bryson AJ.
>
> [83] In my view, Bryson AJ was correct to observe in *Taleb* that the statements of Mahoney JA and Meagher JA in Troncone v Aliperti (1994) 6 BPR 13,291 are not to be taken as such a principle. Rather, they are to be taken as a proposition to be derived from the facts in Troncone."

106 What emerges from this review of the authorities is that the principle that where A grants B authority to lodge a caveat in respect of the property of A, the grant carries with it by implication such estate or interest in the property as is

necessary to enable the authority to be exercised, is to be qualified by the fact that the agreement to lodge the caveat does not necessarily imply a grant of an interest in the land (s 74F(1)). This is because the existence of a contract authorising the lodgement of caveat may be a good discretionary reason for refusing an application under s 74MA of the *Real Property Act* for an order that the caveat be withdrawn (*Depsun Pty Ltd v Tahore Holdings Pty Ltd* (1990) 5 BPR 11,314 at 11,318-9). In *Troncone v Aliperti*, where the clause provided that the right to lodge the caveat was "to protect" the lender's interest, the Court of Appeal did not consider this alternative.

107 After referring to the authorities, the primary judge reasoned as follows:

> "[125] Clause 12.10 provided that the caveat provision entitled the agent '*to protect*' its interest to commission, compensation or damages. It was not suggested that the agent had any proprietary interest to secure any entitlement to compensation or damages which, by the very nature of such claims, are ordinarily unsecured. This may suggest that nor was a proprietary interest intended 'to protect' the agent's right to recover unpaid commission. Also noteworthy, notwithstanding the conversation between Mr Wang and Mr Fayad (described at [31] and [36]), the word 'security' was not used in clause 12.10. Rather, the use of the words 'to protect' in clause 12.10 is similar to the clause in *Troncone v Aliperti*, which only one member of the Court of Appeal found created an equitable charge (cf *Redglove Projects v Ngunnawal Local Aboriginal Council* [2004] NSWSC 880 at [20] per White J).
>
> [126] Clause 12.11 dealt with the circumstances in which the caveat might be removed, being on the agent's 'full receipt of its Commission …' Clause 12.11 provided a contractual bar to an application to remove the caveats, which would be unnecessary if the sub-clauses were intended to create a charge.
>
> [127] As such, by clause 12.9 to 12.11, the agent was entitled to lodge a caveat and was not obliged to remove the caveat until 'full receipt of its Commission entitlements'. The sub-clauses said nothing about the agent's ability to require the sale of the caveated property. Nor was this mentioned in the conversations between Mr Wang and Mr Fayad. Rather, a recurring theme throughout negotiations was that the agent's entitlement to commission or to lodge caveats was subject to the exigencies of C88's financier. This brings to mind Bryson AJ's observation in *Taleb* that contractual authorisation to lodge a caveat without creation of an equitable charge may nonetheless serve a commercial purpose and is neither irrational nor uncommon. At [63]:
>
> > … the advantage sought by provisions such as these is not always the advantage of owning an equitable interest such as a charge; there are real advantages in having a caveat on the register and impeding the registered proprietor's dealing in this way, whether or not one owns an interest in the land; once a caveat is lodged it is a complicating factor and an impediment for the registered proprietor's dealing, and getting rid of the caveat involved a certain amount of difficulty. … Registered proprietors may agree to put up with an inconvenience as a term of their dealings, and in my experience from time to time they do.

> [128] What is not clear from these sub-clauses is an objective, contractual intention to confer a *proprietary interest* on the agent as security for unpaid commission, nor any present right to have the caveated property made available for the payment of that commission. The implication of an equitable charge does not 'appear clearly' from the document. Mr Wang's use of the word 'security' in two conversations with Mr Fayad before execution of the *instrument* does not change this when the factual background is viewed *in toto*. Rather, the caveat provisions gave the agent the ability to interrupt or prevent the sale of an apartment until unpaid commission had been paid, but no entitlement to bring about the sale of the apartment itself and use the proceeds of sale to pay the debt owed. The caveat clauses did not grant an implied equitable charge."

108 I do not agree that only one judge in *Troncone v Aliperti* found that the use of the words "to protect" created an equitable charge. I adhere to the opinion I expressed in *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* (at [20]) that the *ratio decidendi* of *Troncone v Aliperti* was that the proper construction of the clause in question in that case was that debtor impliedly granted an equitable charge to the creditors.

109 But the construction of the clause in *Troncone v Aliperti* is not determinative of the proper construction of cll 12.9 – 12.11 in this case.

110 I do not accept that the negotiations between Mr Wang and Mr Fayad can be used to construe those clauses. It may be accepted that the caveat provisions gave the agent the ability to interrupt or prevent a sale of an apartment until unpaid commission had been paid. It is true that cll 12.9 - 12.11 did not provide that the agent could bring about the sale of the apartment itself and use the proceeds of sale to pay the debt owed, but any such clause would go beyond the grant of an equitable charge and amount to the grant of an equitable mortgage. It does not negate the implication of an equitable charge.

111 Clause 12.10 contained an acknowledgement that the caveat provision gave the agent an "absolute right" to protect its interest to commission entitlement. Its commission entitlement ran into the millions of dollars. It is not plausible, considered objectively, that such protection would be provided merely by a right to restrain the completion of contracted sales of units in the Development. Although such a right might give the agent an advantage in negotiating its position, such an advantage would be illusory where the Owner was a special purpose company incorporated for the purposes of the development so that its

ability to pay the commission depended upon its being able to complete the sale of units.

112 For these reasons I consider that cll 12.9 – 12.11 impliedly conferred on the appellant the right of an equitable chargee to protect its interest to its commission entitlement by way of an equitable charge.

Notice of Contention

113 By Notice of Contention, the respondent submitted that "the Court would not find an implied term creating a charge where the charge would be in contravention of s 49(1) of the *Property and Stock Agents Act*".

114 Section 49 of the *Property and Stock Agents Act 2002* (NSW) is in Division 4 of Part 3 of that Act, entitled "Conflicts of interest". Section 46 provides that regulations may be made requiring a real estate agent who provides financial or investment advice to a person in connection with the sale or purchase of land to provide the person with specified information or warnings. Section 47 requires a buyer's or seller's agent acting on the sale or purchase of the land to disclose information to a prospective buyer of the land of any relationship the agent has with his client. Section 48 provides that a real estate agent may not act for both the buyer and seller of land.

115 Section 49 relevantly provides:

> "**49 Restrictions on licensee obtaining beneficial interest in property**
>
> (1) A real estate agent who is retained by a person (***the client***) as an agent for the sale of property must not obtain or be in any way concerned in obtaining a beneficial interest in the property.
>
> Maximum penalty—200 penalty units or imprisonment for 2 years, or both.
>
> ...
>
> (3) A person does not contravene this section by obtaining a beneficial interest in property if—
>
> (a) before the person obtains the interest, the client consents in writing in a form approved by the Secretary to the person obtaining the interest, and
>
> (b) the person acts fairly and reasonably in relation to the obtaining of the interest, and
>
> (c) no commission or other reward is payable to the person in relation to the transaction by which the interest is obtained, unless the

client consents in writing in a form approved by the Secretary to the commission or other reward being paid.

(4) Without limiting this section, a person is considered to obtain a beneficial interest in property if—

(a) the person or a close relative of the person obtains a beneficial interest in the property, or

(b) a corporation having not less than 100 members and of which the person or a close relative of the person is a member, or a subsidiary of such a corporation, obtains a beneficial interest in the property, or

(c) a corporation of which the person or a close relative of the person is an executive officer obtains a beneficial interest in the property, or

(d) the trustee of a discretionary trust of which the person or a close relative of the person is a beneficiary obtains a beneficial interest in the property, or

(e) a member of a firm or partnership of which the person or a close relative of the person is also a member obtains a beneficial interest in the property, or

(f) the person or a close relative of the person has, directly or indirectly, a right to participate in the income or profits of a business carried on for profit or gain and another person carrying on that business obtains a beneficial interest in the property.

(5) Without limiting this section, each of the following is considered to constitute the obtaining of a beneficial interest in property—

(a) purchasing property,

(b) obtaining an option to purchase property,

(c) being granted a general power of appointment in respect of property.

Note –

…

property includes an interest in property."

116 The primary judge held (at [144] – [145]) that if cll 12.9 – 12.11 or 12.15 – 12.16 created an equitable charge, then the appellant contravened s 49 by obtaining a beneficial interest in the respondent's property. The appellant did not challenge that finding.

117 The primary judge held that nonetheless, if the appellant were entitled to the benefit of an equitable charge, s 49 did not render that charge unenforceable (at [150] – [152]). The respondent did not challenge that finding.

118 But the respondent relied upon the finding that the grant of an implied equitable charge to secure outstanding commission would contravene s 49 as a reason

for denying the implication. It also relied on cl 1.2(h) of the Sole Agency Agreement which provided:

> "**1.2 Interpretation**
>
> …The following rules apply unless the context requires otherwise:
>
> …
>
> (h) Where any term or provision in this Agreement is at any time repugnant or contrary to any law, it shall where possible be read, interpreted and construed beneficially to and for the benefit of the Agent so as not to be repugnant or contrary to law and where this is not possible, the term or provision shall be deemed to be excised and not form part of the Agreement and not to cause the Agreement or any part to be invalid."

119 The respondent submitted that by cl 1.2(h) the parties expressly catered for any inadvertent contravention of the law by excising the contravening clauses.

120 In the absence of a ground of appeal or any submissions on the issue, I proceed on the basis that because, in s 49, the definition of "property" includes an interest in property, the grant of an equitable charge to a real estate agent to secure outstanding commission would contravene the section. I am not to be taken as necessarily accepting that proposition. The reference in s 49 to a "beneficial" interest rather than an equitable interest, the examples in s 49(5) which suggest Parliament's focus was on beneficial interests which relate to the ownership of property, and the fact that *prima facie* a registered mortgage which secured the payment of outstanding commission would not be within the scope of the section, suggest that a contrary construction would be arguable. Any such argument must await another day.

121 Under cl 1.2(h) a term which is contrary to law is only to be read down as not to be contrary to law where this is for the benefit of the Agent. The provision is clearly intended to be for the benefit of the Agent. The respondent relies on the second part of cl 1.2(h). Construing that part of the clause beneficially for the Agent its intended scope is that the offending provisions are to be excised from the Agreement where otherwise the whole Agreement or any particular provisions of it would be invalid. So construing the clause it does not negate the implication of an equitable charge arising from cll 12.9 – 12.11.

122 The respondent does not challenge the primary judge's finding that s 49 does not render the agency agreement or the equitable charge contained in it

(assuming it arises) unenforceable. Clauses 12.9 – 12.11 are not “invalid” even on the necessary assumption that they are contrary to law.

123 For these reasons, I propose the following orders:

(1) Refuse the appellant leave to amend its notice of appeal.

(2) Appeal allowed.

(3) Set aside the order in the Court below of 12 August 2022.

(4) In lieu thereof make the following declaration and orders:

(a) Declare that the appellant has an equitable charge over the lots in the Development contained within the schedule of lots which is Annexure “A” to the notice of appeal to secure all moneys owing to it pursuant to the Sole Agency Agreement, as supplemented by the Fourth Supplementary Agency Agreement dated August 2019.

(b) Order that the Sole Agency Agreement be rectified by correcting the definition of Commission so as to read:

"Commission" or "commission entitlement" or "agent commission" means the commission that is agreed between the Owner and the Agent for the sale of each Agency Lot, and for any lot in the Development which the Agent has already caused the sale of for the benefit of the Owner prior to the date of this Sole Agency Agreement".

(c) Order that the defendant pay the plaintiff's costs.

(5) Remit the proceedings to the primary judge for the purpose of making orders for judicial sale in relation to each of the apartments contained within the said schedule.

(6) The respondent pay the appellant's costs of the appeal.

124 **KIRK JA:** Three broad issues arise in this appeal: rectification; the existence of an equitable charge; and whether or not the appellant can rely on cll 12.9-12.11 of the Sole Agency Agreement (**SAA**) in light of the possible breach of the *Property and Stock Agents Act 2002* (NSW). The context in which these issues arise, and the relevant facts, are set out in the judgment of White JA.

125 Taking those issues in reverse order, I agree that the notice of contention, raising the third issue, should be rejected for the reasons given by White JA.

126 As regards the charge issue, I agree with White JA that no express charge is made out. I also agree that the appellant should not be permitted belatedly to raise a claim that cl 12.15 of the SAA conferred a call option. In the proposed amended notice of appeal that issue was only sought to be raised in the alternative to the claim for an equitable charge. It therefore would not have been necessary to address the point in any event in light of the recognition of an implied charge.

127 In relation to that issue, the primary judge, having reviewed relevant case law, correctly summarised the legal position as follows:

> [119] As the authorities make plain, in determining whether a party has an equitable charge, the focus remains on the objectively ascertained contractual intention of the parties to confer a proprietary interest as security for a present or future debt, accompanied by a present right to have the property made available for payment of that debt. The right to lodge a caveat over the debtor's property may or may not give rise to the implication of an equitable charge depending on the terms of the contract, construed as a whole, and having regard to the particular facts of the case.

128 I agree with the reasons given by White JA for concluding that, in the circumstances of this case, cll 12.9-12.11 of the SAA do impliedly create an equitable charge, save that I do not consider it necessary to address the point raised by his Honour at [106] as to whether the existence of a contract authorising the lodgement of caveat may be a good discretionary reason for refusing an application under s 74MA of the *Real Property Act 1900* (NSW) for an order that the caveat be withdrawn, nor whether any such conclusion has relevance to recognising an implied equitable charge. Part of the reasoning of White JA relates to the amount owing at the time the SAA, which takes account of his Honour's conclusion in favour of rectification. I reach a different view on that issue. However, significant amounts would foreseeably come to be owed in any event, thus I do not consider that difference leads to any change in the conclusion.

129 As for the rectification claim for mutual mistake raised by appeal grounds 2-5, those grounds overlap. Ground 2 in effect raises the ultimate issue, to which the conclusions on grounds 3-5 – relating to the drawing of inferences – are relevant. Nevertheless, it is convenient to address them in order.

Ground 2 – the claimed common intention

130 The principles relating to a claim in rectification for mutual mistake were not in dispute. They are summarised by Griffiths AJA at [157]-[166] below. Consistently with that summary, it was necessary for the appellant to discharge the onus of making out its claim, doing so by reference to clear and convincing proof of the parties' common intention. The standard required is onerous for good reason. Where parties have committed themselves to a written contract, the courts will not readily engage in a process of rewriting it.

131 As White JA indicates at [65] above, the fact that a defendant does not go into evidence does not necessarily defeat such a claim. That party's intention may be revealed directly by statements they have made or in documentary evidence, or may be inferred more indirectly from a range of sources. But the onus remains on the claimant to make the claim good. The fact that the defendant has not gone into evidence may give rise to a *Jones v Dunkel* inference of one kind or another but, as addressed further below, is not of itself enough to fill an evidentiary gap relating to intention and understanding.

132 Here, the primary judge found that when signing the SAA, Mr Wang, on behalf of the appellant, "understood and intended that the agent's entitlement under the Sole Agency Agreement to lodge caveats would include protection for the agent in relation to commissions which were then owing by C88 for properties which had already been sold by the agent" (at [87]). There has been no challenge to that finding. The issue is whether or not Mr Fayad, on behalf of the respondent, had the same intention and understanding such that the SAA did not accurately record their agreement.

133 Mr Fayad did not give evidence. Whether or not he had the requisite intent depends upon what can be drawn from the evidence, directly or by inference. There are no relevant documents in evidence going to this issue, leaving aside the SAA itself.

134 The highpoint of the appellant's case for rectification is Mr Wang's recitation of two conversations with Mr Fayad – the first in March or April 2018 (as quoted by White JA above at [21]), and the second around early April 2018 (as quoted above at [24]). Like Griffiths AJA, and without doubting the primary judge's

acceptance of the evidence of Mr Wang, I have some reservations about placing great reliance on the exactitude of his recollection. As was said in the rectification suit in *Bonhote v Henderson* [1895] 1 Ch 742 at 748-749 (a decision upheld on appeal in *Bonhote v Henderson* [1895] 2 Ch 202):

> If there are documents, such as written instructions, evidencing the intention of the parties, the course may be clear; but if that intention rests on statements of settlors made, perhaps, long after the date of the deed, when haply precise memory is wanting and circumstances have changed, it behoves the Court to act warily.

135 Nevertheless, for the purposes of my analysis it suffices to assume in his favour the accuracy of Mr Wang's recollection.

136 It is clear from the first key conversation that Mr Wang communicated to Mr Fayad that he wanted security for the significant amounts then owing to the appellant. Mr Fayad obviously understood that, and requested that Mr Wang send him a draft SAA. He did not indicate that he agreed to Mr Wang's request about security; he wanted to consider the written proposal, and "[w]e can discuss further afterwards".

137 A draft SAA was then drawn up at Mr Wang's direction – although he did not recall by whom – and sent in some way to the respondent so as to come to the attention of Mr Fayad. That occurred prior to the second key conversation. Mr Wang did not recall how the draft had been sent across. Importantly, Mr Wang accepted in cross-examination that it was possible that Mr Fayad had had the assistance of a solicitor in considering the SAA (as had occurred previously), and that it was possible the draft SAA had actually been sent on the appellant's behalf to the respondent's solicitor. Mr Wang also accepted in cross-examination that the SAA departed from the then current agreement in more than the three ways that had been outlined by Mr Wang in the first key conversation. He said: "Yeah, a lot of changes, yeah, of course. The changes were submitted to the vendor to review it. Yeah, I think my staff take this opportunity to amend it."

138 It thus is entirely plausible that Mr Fayad had received legal advice on the content of the SAA. He had certainly wanted the opportunity to consider it before discussing the matter further.

139 In Mr Wang's recount of the second key conversation he does not explain the context of what he says was said. The first thing Mr Wang records that he said was an explanation of some of the changes made to the SAA compared to the current agreement. His recitation does not include all of the changes made. Mr Wang does not state that Mr Fayad asked for an explanation of how the SAA differed from the then current agreement. On Mr Wang's version it is equally possible that he volunteered what he saw as the main differences.

140 Mr Fayad is then said to have stated: "Can you leave out the caveat part?" Mr Wang had not used the word "caveat" in what he had said prior to this query. Rather, what he had relevantly said was: "… and the added part is the security provisions in clauses 12.9, 12.10 and 12.11 to safeguard the commission and interest which C88 has failed to pay for the sales and further sales …". Based on Mr Wang's recount, Mr Fayad must have had some understanding that cll 12.9-12.11 of the SAA provided for caveats. That implies he had read it himself and/or received some advice about it from someone.

141 Mr Wang's response to the request to leave the caveat part out was to say no and explain why. Mr Fayad then responded: "Okay, but can you agree not to lodge caveats until the remaining stages have completed and the strata plans registered, and PIA has still not received payment for settlement of the sold lots?" The "okay" in this response denoted agreement by Mr Fayad that the "caveat part" would not be left out of the SAA; that is, he acceded to Mr Wang's rejection of his request. It did not signify assent to anything else. Taking account of his acceptance of that rejection, he went on to seek a further softening of what was proposed.

142 A rectification case based upon mutual mistake requires clear and convincing proof of the parties' common intention. Here, there is nothing in either of the two key conversations which indicate that Mr Fayad agreed and intended that the SAA would safeguard the commission and interest which the respondent had failed to pay for past sales. That point is reinforced by the conclusion that there is a real possibility that Mr Fayad had received legal advice about the content of the SAA. The primary judge was correct to conclude that "it is at

least equally likely that C88 had no intention to enter into an agreement other than in the terms of the document proffered by the agent" (at [88]).

143 The appellant also relied on the fact that it had subsequently placed caveats on 74 properties, consistently with Mr Wang's understanding of the SAA, and the respondent did not assert in response that doing so was not consistent with the contract. As the primary judge discussed at [61]-[64], the respondent did request the removal of the caveats to allow the apartments to be sold, and Mr Wang agreed to do so for 46 of the apartments, insisting in return only on payment of the appellant's commission on the relevant apartment, without requiring payment of amounts owing from apartments previously sold. This course of events throws little light on whether or not the respondent intended that the caveat clauses in the SAA extend to create an interest relating to past sales.

Grounds 3 and 4 – the drawing of a Jones v Dunkel inference

144 Ground 3 claimed that the primary judge erred in declining to draw an inference "that any evidence given by Mr Sam Fayad and/or Mrs Chahida Khattar would not have assisted the respondent in relation to the issue of whether the appellant and respondent had the common intention in Ground 2". Ground 4 asserted that her Honour erred in finding that the respondent had adduced evidence of a sufficient explanation as to why Mr Fayad had not been called to give evidence.

145 Let it be assumed, without deciding, that the inference sought by the appellant should have been drawn. The rule in *Jones v Dunkel* "permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party": *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11 at [64]. The rule does not permit the bridging of gaps in evidence. As Ward JA said in *RHG Mortgage Corporation Ltd v Ianni* [2016] NSWCA 270 at [161] (Meagher JA agreeing at [29]; citation omitted):

> a *Jones v Dunkel* inference, if one does arise, can do no more than permit the court to infer that the uncalled evidence or missing material would not have assisted the relevant party's case; it does not permit the court to infer that the uncalled evidence would have been positively damaging to that case. Thus, it allows for the more ready acceptance of evidence which might have been

> contradicted but which was not. What a *Jones v Dunkel* inference does not permit is a choice between two guesses or conjectures, nor does it supply missing gaps in evidence.

146 Similarly, Besanko, Perram and Katzmann JJ said the following in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [79] (citations omitted):

> But the fact that one can infer that a party was afraid to call some particular witness or tender some particular document can take a trier of fact only so far. It is accepted that where a party fails, without explanation, to call a witness who that party might have been expected to call and whose evidence might have elucidated the matter in dispute, then the inference may be drawn that the evidence of the absent witness would not have assisted the party that failed to call that witness. By itself that inference is frequently somewhat barren, for knowing that the evidence of a witness would not have assisted tells one nothing about what the witness's evidence affirmatively would have been. Often more directly useful is the allied principle that in such a case the trier of fact may more confidently draw any inference unfavourable to the party that failed to call that witness if that witness appears to be in a position to cast light on whether the inference should be drawn. Neither inference is mandatory and, generally speaking, these inferences only become material where the balance of the evidentiary record is equivocal.

147 I agree; see also *Ling v Pang* [2023] NSWCA 112 at [25] and [27]. The latter observation – that generally speaking the inferences only become material where the balance of the evidentiary record is equivocal – has previously been endorsed in this Court: *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 at [144].

148 Here, as explained, there is no evidence that Mr Fayad had the same subjective intention and understanding as Mr Wang. The inference that Mr Fayad's or Mrs Khattar's evidence would not have assisted the respondent does not make up for that absence of evidence.

149 The appellant did not seek that the second type of *Jones v Dunkel* inference be drawn, namely that the Court should draw, with greater confidence, any inference unfavourable to the party. But even if it had, that argument would fail for the same reason. Based upon the evidence, in my view there is insufficient basis to found any inference that Mr Fayad, on behalf of the respondent, had the requisite understanding and intention. The claim that he did is speculative.

Ground 5 – the drawing of an inference against the appellant about documents

150 The appellant's ground 5 is that the primary judge erred in drawing an inference against the appellant with respect to its failure to adduce documentary evidence relating to the drafting and provision of the SAA. As explained, I have reached the conclusion that the appellant's rectification case fails regardless of whether or not such an inference should be drawn against the appellant. In that context it is not necessary to address ground 5. In any event, senior counsel for the appellant indicated in his reply submissions that "it seemed to us to be common ground between the parties that [this issue] did not affect the outcome of the case". The ground thus seemed to have fallen away in any event.

Conclusion

151 I would thus dismiss the appeal insofar as it relates to the rectification claim. In my view the primary judge was correct to reject that claim. I agree with the orders proposed by Griffiths AJA.

152 **GRIFFITHS AJA:** I have had the advantage of reading in draft the reasons for judgment of White JA. I gratefully adopt his Honour's description of the background facts.

153 I respectfully agree with White JA's reasons for upholding ground 1 of the amended notice of appeal (which relates to whether or not the Sole Agency Agreement (**SAA**) created an equitable charge) and for rejecting the notice of contention.

154 I respectfully disagree, however, with his Honour's conclusion that grounds 2-5 (which relate to the issue of rectification and/or the principle in ***Jones v Dunkel*** (1959) 101 CLR 298; [1959] HCA 8) should be upheld. In brief, this is because I am not persuaded that the appellant has discharged its heavy onus of establishing by clear and convincing evidence the existence of the asserted common intention.

155 This means that I would grant a declaration in narrower terms to that proposed by White JA relating to the scope of the equitable charge. Rather than extending to the schedule of lots which is Annexure "A" to the amended notice of appeal, I consider that the charge should be limited to the debt relating to

outstanding commission concerning the lots as listed in the Agency Lot Schedule which is an annexure to the Supplementary Agency Agreement dated 12 August 2019.

156 I shall now explain why grounds 2-5 should be rejected.

Relevant legal principles concerning rectification summarised

157 First, it is well settled that a written document which is being executed by the parties is presumed to be the true record of their agreement subject to a defence of non est factum or rectification (see *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; [2004] HCA 55 at [33] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

158 Secondly, where rectification is sought, the party seeking rectification carries the onus, which Gleeson JA has aptly described as "a heavy one" in ***Newey*** *v Westpac Banking Corporation* [2014] NSWCA 319 at [170].

159 Thirdly, and relating to the content of that heavy onus, as noted by Perry Herzfeld and Thomas Prince in *Interpretation* (2nd ed, 2020, Thomson Reuters) at [28.120], it is well settled that the relevant common intention must be proved in the "clearest and most satisfactory manner", an expression used by Lord Chelmsford LC in *Fowler v Fowler* (1859) 4 De G & J 250 at 265, as approved for example in *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54 at 64; [1930] HCA 38 and *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 349; [1973] HCA 23 and see also *Newey* at [170] per Gleeson JA.

160 Fourthly, the following obiter observations by Tobias JA (with whom Mason P and Campbell JA agreed) in ***Ryledar*** *Pty Ltd v Euphoric* (2007) 69 NSWLR 603; [2007] NSWCA 65 at [182], [185]-[186] provide helpful guidance on the kind of evidence that might constitute "clear and convincing proof" of the parties' common intention which includes not only objective material but also evidence of the parties' subjective states of mind:

> It follows from the foregoing that first, the common intention which must be established by clear and convincing proof to justify rectification must be the actual or true common intention of the parties. Second, evidence of that intention may be ascertained not only from the external or outward

> expressions of the parties manifested by their objective words or conduct but also from evidence of their subjective states of mind.
>
> …
>
> Fifth, it follows that where the correspondence and/or conduct positively establishes the necessary common intention, then assertions by the party opposing rectification of his or her subjective state of mind which is inconsistent with that party's outward manifestation of his or her intention, being unexpressed and uncommunicated, is unlikely to trump his or her expressed intention. But this is because that party is unlikely to be believed.
>
> Sixth, where as in the present case, the outward expression of the parties' common intention is at best inconclusive, then establishing that the subjective states of mind of the parties evinces the relevant common intention becomes critical if the necessary standard of proof to support an order for rectification is to be achieved.

161 One of the prominent features of this appeal is that because Mr Fayad did not give evidence (a matter to which I will return), Mr Wang gave evidence of the terms of various conversations he had with Mr Fayad, which evidence was accepted by the primary judge. This evidence went not only to Mr Wang's subjective state of mind but also to what the plaintiff claimed to be the outward expression of the parties' common intention.

162 Fifthly, the prerequisite of establishing a common intention for the purposes of rectification is directed to the subjective or actual intention of the parties. The following paragraphs from Gleeson JA's reasons for judgment in *Newey* at [175] and [176] are apposite:

> The "intention" that is relevant to rectification of the contract is the subjective intention of the parties, sometimes called the actual intention: *Ryledar* at [267]. Before rectification of the contract is granted, the actual intention needs to exist in circumstances where it can be seen that there is a *common* intention of all those entering into the contract: *Ryledar* at [279]. Campbell JA explained at [281] in *Ryledar* the importance of concentrating on what is needed before any intention of the parties to a negotiation counts as a *common* intention. When that intention relates to the terms upon which the parties will contract with each other, his Honour noted that it is still necessary for them to know enough of each other's intentions for it to be said that there is a *common* intention. How might the parties come to know each other's intentions? His Honour explained that this could occur where those intentions are directly stated, or through the various other means by which one person's intentions can become known to another person. His Honour noted that those means sometimes involve a process of conscious and deliberate inference and could also involve simply perceiving a *gestalt* in a series of events. (The word "Gestalt" is of German origin and is defined in the Online Oxford English Dictionary as "a 'shape', 'configuration' or 'structure' which as an object of perception forms a specific whole or unity incapable of expression simply in terms of its parts.")

> At [282]-[293] in *Ryledar,* Campbell JA reviewed the authorities which emphasised the consensual nature of the common intention. The "common intention which must be established as a basis for rectification must be one that has been manifested in the words or conduct of the parties and not merely one which remain undisclosed the course of negotiations": *Bishopgate* at 431 (Yeldham J) applying the principle expressed by Street J in *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* [1972] 2 NSWLR 467 at 473.

163 In *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [104], Gageler, Nettle and Gordon JJ said (citations omitted):

> The issue may be approached by asking – what was the actual or true common intention of the parties? There is no requirement for communication of that common intention by express statement, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party.

164 Sixthly, as Herzfeld and Prince also point out at [28.120] (footnotes omitted):

> …
>
> The party seeking rectification must show clearly that the document does not reflect the common intention but also what the common intention was in "clear and precise terms". Where words are to be added, the exact form of additional words need not be agreed provided there is precise agreement about the substance and detail.

165 Seventhly, as Campbell JA observed in *Ryledar,* the requirement that the requisite common intention be in some manner disclosed is consistent with the underlying rationale for rectification, which is "the avoidance of unconscientious taking advantage of the common mistake". Thus, Campbell JA said at [315]:

> …the rationale for granting rectification is to avoid unconscientious departure from the common intention, assists in deciding what is required for there to be a "common intention". If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical, but that intention was disclosed by neither of them, and they later entered a document that did not accord with that intention, what would be the injustice or unconscientiousness in either of them enforcing the document according to its terms?

166 Finally, it was not suggested that the primary judge's summary of the relevant legal principles at PJ[72]-[75], which largely reflect my summary above, is erroneous.

The primary judge's reasons for refusing rectification summarised

167 As White JA has observed, rectification was not sought of the terms of cll 12.9, 12.10 or 12.11. In the plaintiff's amended summons filed on 26 October 2021,

the order seeking rectification was directed only to the definition of "Commission" (and related definitions) in the SAA. The primary judge noted at PJ[71] that the plaintiff sought rectification to amend the definition of "Commission" as follows (the tracking reflects amendments by the plaintiff):

> "Commission" or "commission entitlement" or "agent commission" means the commission plus interest for any late payment of the commission in accordance with this Agreement, which the Owner has agreed to pay to that is agreed between the Owner and the Agent for the sale of each Agency Lot, and for any lot in the Development which the Agent has already caused the sale of for the benefit of the Owner prior to the date of this Sole Agency Agreement.

168 In the notice of appeal filed on 31 August 2022, the appellant sought an order that the SAA be rectified by correcting the definition of "Commission" so as to read the same as that sought below (that formulation was also retained in the amended notice of appeal).

169 The primary judge was not persuaded that the plaintiff had discharged the heavy onus of establishing by "clear and convincing proof" that the parties had a common intention that the caveat protection afforded by cll 12.9, 12.10 and 12.11 of the SAA extended to commissions payable to the plaintiff prior to 20 April 2018 (being the date of execution of the SAA). Her Honour rejected the plaintiff's contention that the requisite common intention was established by the four conversations between Mr Wang and Mr Fayad. In brief, the primary judge made the following primary findings regarding the insufficiency of evidence to establish common intention.

170 First, while these conversations between Mr Wang and Mr Fayad indicated each party's individual intention, none of those conversations established a common intention in the relevant sense.

171 Secondly, it is reasonable to think Mr Fayad would have wanted to see a final draft of the SAA and, in particular, the precise detail of the security sought by the plaintiff before considering whether that form of security was acceptable to the defendant.

172 Thirdly, whether the clauses dealing with security were sufficient to protect the plaintiff's interests was hardly a matter on which the defendant would have been expected to comment.

173 Fourthly, it was not clear whether the relevant clauses in the SAA were extracted from an earlier "template" prepared by the plaintiff's lawyer (Mr Cheung) or whether the template had been amended. The primary judge reasoned that, if these clauses were extracted from the template, they would not have been drafted to address the subject of arrears in commissions (because that problem had only recently emerged). Accordingly, if it was intended that the clauses cover that territory, it would have been obvious that the template required revision. The primary judge then noted at PJ[84] that, because the Court had neither the template nor any notes or drafts retained by the plaintiff, it was "not possible to say precisely what happened, save that no attempt appears to have been made to draft such a clause" (see further at [177] below).

174 Fifthly, at PJ[88], her Honour reasoned as follows:

> Whilst I accept Mr Wang's evidence as to his intention and understanding at the time, the more difficult question is whether that intention was shared by Mr Fayad as, effectively, the intention of C88. Where C88's clear preference was that there be no caveat clauses at all, it is at least equally likely that C88 had no intention to enter into an agreement other than in the terms of the document proffered by the agent. Where the clauses of the Sole Agency Agreement were tolerably clear, the act of Mr Fayad signing the written document is consistent with a conclusion that he did not intend agree to anything further.

175 Sixthly, the primary judge referred at PJ[89] to a later conversation in August 2019 between Mr Wang and Mr Fayad, in which Mr Wang "continued to hark back to the initial deal in March 2018" and that, notwithstanding that the caveat clauses had been added to the SAA in the interim, Mr Wang was still asserting "Same question, what is the security for PIA?". Her Honour reasoned that if there was a common intention as at 20 April 2018 that a caveat lodged under the SAA secured commissions payable prior to entry into that agreement, it would not have been necessary for Mr Wang to ask that question of Mr Fayad the following year.

176 Finally, after noting that Mr Wang's evidence was unchallenged and that he was a credible witness, the primary judge declined to apply the principle in *Jones v Dunkel* so as to infer that Mr Fayad's evidence, if given, would not have assisted the defendant. Her Honour's reasons for rejecting the plaintiff's reliance on *Jones v Dunkel* are set out at PJ[5]-[8]. In brief, her Honour

concluded that Mr Fayad was not "in the camp" of the defendant company (which was then in liquidation) merely because of his directorship. In addition, after noting that the principle in *Jones v Dunkel* may be applied where there is an unexplained failure by a party to call the witness, her Honour concluded that the liquidator's failure to call Mr Fayad was explained by the liquidator's solicitors. Their evidence was to the effect that when they tried to contact Mr Fayad through his solicitor shortly before the hearing commenced, they learned that Mr Fayad was in the United States, could not provide an affidavit and would only return to Sydney during the first day of the hearing. When the liquidator's solicitor followed up with Mr Fayad's solicitor on the first day of the hearing, he was told that Mr Fayad was unwell, had been advised to do a COVID test and was unavailable on that day.

177 Although the primary judge declined to apply the *Jones v Dunkel* principle to the failure of Mr Fayad to give evidence, as noted at [173] above, her Honour considered whether the principle applied against the plaintiff by reason of its failure to provide any drafts or notes which were created in the course of preparing the draft SAA. Her Honour referred to authority at PJ[10] in support of the proposition that the principle can equally apply to missing documents as well as to missing witnesses. Her Honour then stated at PJ[11] (emphasis added):

> Aside from the agency agreements, there were few contemporaneous documents in evidence. Mr Wang may have left the preparation of documents to his staff, whose "English is better than me". Given the number of apartments which the agent was engaged to sell, and the potentially large amounts of commission, the absence of contemporaneous correspondence is a little surprising. Whether this is reflective of the longstanding business relationship between the agent and the developer, or the business practices of either or both, is unclear. The agency agreement was prepared from a template to which amendments were made to reflect the particular agreement reached between the agent and vendor. **Where rectification of the agreement is now sought on the basis of a common mistake, the absence of any drafts or notes created in the course of preparing the agreement is also a little surprising. As such, I have drawn this inference, generally adversely to the agent, where documents which may have been expected to be brought forward to support its case were not adduced.**

178 As noted above, at PJ[84], the primary judge said that it was not possible to say precisely what had happened and whether cll 12.9-12.11 were taken straight from Mr Cheung's template or whether the template was amended. In

circumstances where the plaintiff had not put into evidence either the template nor any notes or drafts relating to those clauses, her Honour stated that she inferred that such documents as might be expected to be in the plaintiff's possession regarding the preparation of the SAA "would not have supported its claim". White JA describes this reasoning as "difficult to follow". I shall explain below why I consider that her Honour's reasoning does not present a material error.

Common intention of the parties

179 For the following reasons, I consider that the appellant has failed to establish any appellable error in the primary judge's conclusion that it did not discharge its heavy onus of establishing the requisite common intention so as to justify rectification.

180 At the risk of some repetition with White JA's reasons, having regard to the central significance of Mr Wang's evidence concerning the terms of the four conversations he had with Mr Fayad, it is desirable to set out the entirety of [16]-[22] of Mr Wang's affidavit sworn on 12 October 2021:

> 16. Around March 2018, the South, East and West buildings of Somerset were nearly ready for settlement, Sam called me and we had conversation to the following effect – and Chad call me to ask for help.
>
> Sam: Brother, I need your help, at settlement our funder only allowed you to deduct 3.3% of contract price from the deposit you hold. The balance is required to be provided at settlement for payment to our funder.
>
> Justin: No, I can't agree with this. This is only opportunity for PIA to get our full commission for the sale.
>
> Sam: Brother, we have problem with our cash flow. If you do not agree with this the settlement will not happen. Then you, we and your buyers will all be in trouble.
>
> Justin: How will PIA commission be protected?
>
> Sam: North building will be settled next year. You can keep all deposit for North building for outstanding commission when North building starts settle.
>
> Justin: If the deposits are not enough to pay all balance of commission I need put caveat on your remaining units.
>
> Sam: It is ok, but please make sure your caveat will not affect our sale and settlement.
>
> 17. Chad (Chahida) the wife of Joe Khattar also called me around the time of the call from Sam Fayad, and the conversation was similar to the conversation which I reported above of Sam Fayad's request concerning the deposit and Dyldam's funder. Considering the bigger picture, continuing relationship with

Dyldam, I agreed with their 3.3% proposal. PIA successfully settled sold units in the East, West and South buildings and only received 3.3% of contract price towards part payment of PIA's commission from the sales.

18. In or around end of March 2018 or early April 2018, the defendant wanted PIA to sell unsold units in the Somerset including some unsold units in the 2nd EAA with new sole agency agreement. Prior to this time, I had conversations with Sam Fayad on more than one occasion concerning the delays in payment of PIA's commission in several developments, including conversation to the following effect:

Justin: Please help with payments. Payments are outstanding in Viewpoint, Vivo and Northgate. Dyldam has also delayed in making payments for the Somerset sales. PIA has to honour the payment to its sale consultants even PIA has not received payment. Please follow up and make some payments to help with my cash flow.

Sam: If you can settle sold units and sell few more units, we will pay you all outstanding commission, otherwise PIA, we and your clients are all in trouble. You will be fully paid when North building settles.

19. After some discussion Sam Fayad and I agreed to change the commission rate to 5.5% for further sales on sole agency basis and not exclusive agency basis. I had also raised my concern for security because of late payments, and I had the following discussion with Sam Fayad –

Justin: Can you and Joe provide personal guarantee to pay all unpaid commission and interest on late payments?

Sam: No, you know I do not like to provide personal guarantee. I do not think Joe would be agreeable to providing personal guarantee as well. At least you hold 10% deposit, it is enough for your commission and penalty interest.

Justin: I need some security for the significant amounts owing to PIA in Somerset.

Sam: What security do you want?

Justin: I need add caveat clause in our agency agreement. I will send you the agency agreement on terms like the replacement exclusive agency agreement of 2015, but changing to sole agency agreement, commission rate at 5% plus GST and caveat provisions to protect PIA.

Sam: OK. My office will send you the list of the further units. Put them in your sole agency agreement and send to me. We can discuss further afterwards.

20. After receipt of the further list and discussion including on the sale prices, I arranged to send to Sam Fayad a Sole Agency Agreement incorporating the list of 34 additional units, the caveat provisions at paragraphs [12.9] [12.10] and [12.11], PIA's commission entitlement to 5.5% of the Contract Price (inclusive of GST); extension of agency period to 90th business day from the defendant's providing the registered strata plan and occupation certificate; increase 1st stage payment to $7,700 within ten business days after exchange of contract (contract date).

21. Sam Fayad and I had further discussion in or around early April 2018 to the following effect –

Justin: It is changed to sole agency and not exclusive. The interest provision remains the same. There is no personal guarantee, and the added part is the

> *security provisions in clauses 12.9, 12.10 and 12.11 to safeguard the commission and interest which C88 has failed to pay for the sales and further sales and the extension of the agency period and payment of the first Instalment of the commission.*
>
> *Sam: Can you leave out the caveat part?*
>
> *Justin: No, the caveat part is necessary and important. If PIA is not paid upon completion of contracts of the sold agency lots since 2015 or any further sales PIA will lodge.*
>
> *Sam: Okay, but can you agree not to lodge caveats until the remaining stages have completed and the strata plans registered, and PIA has still not received payment for settlement of the sold lots.*
>
> *Justin: Okay.*
>
> 22. Sam Fayad and I then signed respectively for the defendant and PIA the Sole Agency Agreement on or about 20 April 2018 (**"the SAA**") but the SAA contains only the year 2018.

181 As noted above, the primary judge accepted Mr Wang's evidence as to the terms of the conversations, but ultimately concluded that the evidence was insufficient to establish the asserted common intention. Before explaining why I agree with that conclusion, it is apt to say four things about Mr Wang's evidence (some of the points overlap).

182 The first point relates to the significance of the fact that Mr Wang frankly said at [7] of his affidavit that, in describing the conversations with Mr Fayad, "I have set out the **effect** of the words used" (emphasis added). He said that he may not recall the exact dates and times of the meetings and telephone calls but that he did "recall the discussions during those meetings and telephone calls". It is notable that Mr Wang then set out in his affidavit his recollection of the various conversations in direct speech.

183 This brings to mind the recent observations of Jackman J in *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 at [121]-[129] (which were referred to approvingly by White JA (Simpson AJA and Basten AJA agreeing) in *Gan v Xie* [2023] NSWCA 163 at [119]) regarding the use of direct speech in affidavits. In particular, Jackman J said the following at [127]-[129]:

> The practice of witnesses and lawyers working up a version of a conversation in direct speech (whether or not prefaced by the phrase "in words to the following effect") from the witness's actual memory merely of the substance or gist of what was said is logically, ethically and grammatically wrong. It is logically wrong because it reverses the logical process of deriving the meaning or substance of what was said from the actual words which were spoken; one cannot derive (as distinct from guess at) the actual words spoken simply from

their gist. It is ethically wrong because the evidence given as a result of that process conceals the true nature and quality of the witness's memory, and conveys a false impression of that memory. It is grammatically wrong because the use of quotation marks indicates as a matter of conventional usage that the relevant expression is a quotation of the exact words which were spoken. It could not be said that this practice is allied to an iron sense of principle.

The form in which evidence of conversations is given should reflect the difference between verbatim memory and gist memory. While in general terms gist memory tends to be more stable and durable over time than verbatim memory, possibly because it has engaged with higher reasoning processes which interpret and give meaning to what has been heard superficially, it will often be the case that certain words or phrases can actually be remembered verbatim. It would appear that verbatim memory and gist memory of conversations are not merely different in degree, but are also different in kind: see C J Brainerd and V F Reyna, "Fuzzy-Trace Theory and False Memory", (2002) 11(5) *Current Directions in Psychological Science*, pp 164-169.

Applying that reasoning, the following general principles apply to the form of evidence of conversations:

> (1) The form of the evidence should correspond to the nature of the actual memory the witness has of the conversation: *Wright* at 19; *Noble* at [4] and [20]; *LMI Australasia* at [8]; *Hamilton-Smith* at [83]. There is no reason in the abstract to think that evidence in direct speech is more reliable or credible than evidence in indirect speech, or vice versa.
>
> (2) If the witness remembers only the gist or substance of what was said, and not the precise words, then the evidence should be given in indirect speech (also known as reported speech), in terms which reflect the witness's actual memory: *Wright* at 19; *Noble* at [4], [20]; *LMI Australasia* at [8]; *Hamilton-Smith* at [83].
>
> (3) If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks to indicate that they are verbatim quotations, even if the evidence is otherwise given in indirect speech: see *Wright* at 19; *LMI Australasia* at [10].
>
> (4) If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech; that is, quoting the words as actually spoken: *LMI Australasia* at [8]; *Hamilton-Smith* at [83]. Apart from rare cases of photographic memory, this may well be the case where the witness has made a detailed contemporaneous note of the conversation, and has refreshed his or her memory from the note (in which case this should be expressly stated along with the tender of the note).
>
> (5) Evidence given in direct speech should not be prefaced by the phrase that the conversation occurred "in words to the following effect". That expression blurs the important distinction between verbatim memory and gist memory, and leaves the Court unable to ascertain which kind of recollection is being claimed by the witness. This is a different point from the one considered by Bromwich J in *Director of Public Prosecutions (Cth) v Country Care Group Pty Ltd (Ruling No 1)* [2020] FCA 1670 at [11], where the only argument against admissibility was the erroneous contention that evidence of

> conversations can only be given in direct speech of what was actually said.
>
> (6) Evidence of a witness who claims to remember the exact words of a conversation, but who is found after cross-examination to have exaggerated the nature and quality of his or her memory, may well suffer an adverse effect on his or her credibility (the weight of which will depend on all the circumstances). However, the inability to cross-examine in that manner a witness who gives evidence in indirect speech is not unfairly prejudicial within the meaning of s 135 of the *Evidence Act 1995* (Cth): *LMI Australasia* at [9].

184 I respectfully agree with the thrust of those observations. In particular, they highlight the need for caution in drawing inferences from, for example, the use of a term such as "OK", as attributed to Mr Fayad by Mr Wang in their third conversation and as accepted by the primary judge. This may explain why the primary judge said at PJ[32] that it was not entirely clear whether the term voiced agreement with Mr Wang's requests or simply acknowledged the changes which Mr Wang wished to make. I respectfully agree with her Honour's observations.

185 Similar ambiguity relates to the significance of the term "okay" in the conversation which occurred in early April 2018 as set out in [21] of Mr Wang's affidavit.

186 The second point relates to the heavy onus carried by Mr Wang and the necessity for the evidence supporting a common intention to be clear and convincing. The following observations of McLelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319 are apposite to the circumstances here, notwithstanding that they are directed to alleged misleading conduct arising from oral statements:

> Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually

> remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

187 The essential point may be expressed as follows. Merely because the primary judge accepted Mr Wang's evidence regarding the terms which were used in the four relevant conversations does not mean that those terms, assessed in the context of all relevant surrounding circumstances, constituted clear and convincing proof of the alleged common intention.

188 The third point (which overlaps with the second) concerns the weight to be given to the fact that the statements which Mr Wang attributes to Mr Fayad are statements which were made in the course of robust and protracted commercial negotiations. Justice Gummow made the following observations about the approach to be taken to such statements in the context of a claim for breach of s 52 of the *Trade Practices Act 1974* (Cth) in *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129 at 135L; [1988] FCA 419, observations which also resonate here:

> Further, statements made in the course of complex negotiations must be assessed in their overall context…Here, the overall context is one of little certainty and much fluidity.

189 To similar effect, the following observations of Barrett J in *Overlook v Foxtel* [2002] NSWSC 17 at [114] ring true in the present case:

> A statement made by one party in the course of commercial negotiation between sophisticated corporate parties that it understands or appreciates a position stated by the other will most often be no more than what it appears to be, namely, a statement of awareness of the other's position. It is commonplace in such situations for one party to say that it cannot accept a particular position or can do so only if some concession is made. That is part and parcel of the negotiating process. But one party's representations about what is vital or important to it and the other's response that it understands or appreciates the first's position are most commonly steps in the formulation of a complete bargain where the party who holds the particular aspect to be vital or important effectively bears the onus of putting that matter squarely on the table and obtaining an explicit promise that the other party will honour or respect it. Furthermore, a statement that it is appreciated or understood that a matter is considered vital cannot, of itself and without more, amount to a representation that the matter will be accepted or respected or not departed from. It might be different where the parties are dealing on unequal terms or one is entitled to place some reliance upon the other. But here the parties were sophisticated corporations represented by experienced businessmen and assisted by lawyers.

190 The four relevant conversations here occurred in the context of ongoing and robust negotiations over several weeks or months regarding Mr Wang's concern that the plaintiff be paid outstanding commission. His own strongly stated position was that he needed to have the capacity to lodge caveats on the remaining units. He made this clear in the first and third of their conversations. It is equally plain that Mr Fayad's strong personal position was that the plaintiff's commission was adequately protected because he was willing for it to keep all the deposit for the sale of units in the North building of the development (which the primary judge found was a reference to Stage 4 of the development and the strata plan for that stage was ultimately registered on 12 July 2019), to be applied to any outstanding commission at that time. In their first conversation, Mr Wang responded by saying that if the deposits were not enough to cover the balance of commission, he needed to "put caveat on your remaining units". Mr Fayad is said to have responded by saying "it is ok, but please make sure your caveat will not affect our sale and settlement".

191 Viewed in isolation, Mr Fayad's response on this occasion might provide some support in establishing the common intention but, significantly and as a matter of context, the negotiations did not end there. In the second conversation, which according to Mr Wang took place towards the end of March 2018 (i.e., approximately three weeks before the SAA was executed), Mr Wang again raised the need for outstanding commissions to be paid. Mr Fayad simply repeated that the plaintiff would be fully paid when the North building settled. Notably, Mr Wang did not suggest that either he or Mr Fayad raised in this particular conversation the issue of caveats protecting the plaintiff's past commission. This issue was simply not part of the negotiations which occurred at that time. This assumes that this particular conversation occurred earlier than the third conversation, to which I now turn.

192 In the third conversation (noting that it is unclear whether it formed part of the second conversation in late March 2018 or early April 2018 or some other time but possibly within that period), it is plain that the parties were still in robust negotiations. Apparently for the first time Mr Wang raised whether Mr Fayad and his business partner could provide personal guarantees to pay all unpaid commission and interest on late payments. Mr Fayad rejected that suggestion.

Again, he sought to reassure Mr Wang that his commission and penalty interest were sufficiently protected by the fact that the plaintiff as agent held 10 per cent of the deposit. When Mr Wang insisted that he needed some security, Mr Fayad asked what security he wanted. This led Mr Wang to say that he needed to add a "caveat clause in our agency agreement". Mr Fayad is recorded as saying "OK" and that his office will send Mr Wang a list of the further units to be included in a sole agency agreement and that they can "discuss further afterwards". Plainly, therefore, Mr Fayad kept open the prospect of further negotiations. I respectfully agree with the primary judge's finding that Mr Fayad's use of the term "OK" on this occasion should not be viewed as an express agreement to Mr Wang's request, but rather amounted to an acknowledgment of the changes which Mr Wang wished to make in the proposed sole agency agreement so as to protect the plaintiff regarding outstanding commission.

193 The fourth point (which is weaker than the earlier points) relates to Mr Wang's command of English. I mean no disrespect to him when I say he clearly had difficulties with the English language, it being his second language. As the primary judge noted at PJ[11], Mr Wang said that he left the preparation of documents to his staff whose "English is better than me". This evidence was given in the context of the following exchange during Mr Wang's cross-examination:

> Q. Carla doesn't sound like a person who would have any particular capability to do a legal drafting document. Do you accept that?
>
> A. Maybe not in a legal sense but the - grow here, the English is better than me.

194 Under cross-examination, Mr Wang freely acknowledged that his English was not good as is evident from the following exchange:

> Q. I am talking about amendments to the template document, not using the template document to create agency agreements for each project. Do you understand that?
>
> A. Sorry, I bit confused. Most – sorry, my English, yeah?

195 If further evidence of Mr Wang's difficulties with the English language is required, reference can be made to the following extracts from his cross-examination:

> Q. Are you saying here the template document was held in the office of PIA at Sydney Olympic Park?
>
> A. Yeah.
>
> Q. And are you also saying that the sole agency agreement document was prepared in the office of PIA at Sydney Olympic Park?
>
> A. The drafter over what is prepared by solicitor before for the previous project.
>
> Q. The template?
>
> A. Yeah, the template but there may be like some modification for particular case is by my staff, for my memory, yeah.

196 Mr Wang did not give evidence with the assistance of an interpreter. I am not suggesting that because of his difficulties with English as his second language his evidence deserved no weight. That would be inconsistent with the primary judge's acceptance of his evidence regarding the terms of the four conversations. Rather, the point I am making is that considerable caution needs to be exercised in attaching significance to, or drawing strong inferences from, Mr Wang's account of his recollections of particular words used by Mr Fayad. Mr Wang's difficulties with the English language is relevant to the weight to be given to matters upon which linguistic skills depend. Naturally, these reservations do not apply to any reasonable inferences drawn from conduct, as opposed to words.

197 With those four points in mind, I will now explain why I consider that the primary judge was correct in concluding that the plaintiff failed to discharge its heavy onus regarding common intention.

198 In his reasons for judgment at [23], after referring to the primary judge's interpretation of Mr Fayad using the word "OK" in the third conversation, White JA states that, nonetheless, Mr Fayad "had already expressed agreement to the appellant's having 'protection' for its outstanding commission on units it had already sold, either by recourse to the deposits it held as stakeholder, or by the use of caveats". His Honour may be referring to what was said at the conclusion of the first conversation with Mr Wang, when Mr Fayad said: "It is ok, but please make sure your caveat will not affect our sale and settlement".

199 With respect, I do not agree. As I have emphasised, Mr Wang and Mr Fayad were engaged both then and subsequently in ongoing and earnest

negotiations. This is evident not only from the terms of the relevant conversations, but Mr Wang himself frankly acknowledged during his cross-examination that he too was still in the course of negotiating when he forwarded a copy of the draft SAA for Mr Fayad's review. The following exchange occurred concerning this matter:

> Q. PIA was taking an opportunity to submit the document to C88 via Sam Fayad to see whether they would agree to it?
>
> A. Yes.
>
> Q. You were using this as an opportunity to negotiate new clauses--
>
> A. Yeah.
>
> Q. --being clauses that, from your point of view, were improvements to the document?
>
> A. From our side, yeah.
>
> Q. From your side. They were better for you?
>
> A. That's right.
>
> Q. And what you were doing by providing that document to Mr Fayad is saying to him, "This is the deal I want to do."
>
> A. Sorry, say that – what's the deal like--
>
> Q. "This document--"
>
> A. Yeah.
>
> Q. "--contains the deal I want to do with you."
>
> A. With Sam Fayad, yeah, that's right.

200 No doubt each negotiator was seeking to advance and secure his own commercial position throughout the course of the negotiations. The fact that Mr Fayad is recorded as saying at the end of the first conversation after the issue of caveats was raised by Mr Wang that: "it is ok…", does not mean that he had expressed final agreement to Mr Wang's proposal regarding caveats.

201 The fourth conversation (which is set out at [21] of Mr Wang's affidavit) occurred in early April 2018, which was several weeks before the SAA was executed. It may be inferred that Mr Wang had sent Mr Fayad a copy of the proposed SAA before the fourth conversation occurred. The draft included the caveat provisions at cll 12.9, 12.10 and 12.11, as well as the definition of "commission" as set out at [6] of White JA's reasons for judgment. Mr Wang explained to Mr Fayad that there was no personal guarantee but that the added

part of the proposed SAA was "the security provisions in clauses 12.9, 12.10 and 12.11 to safeguard the commission and interest which C88 has failed to pay for the sales and further sales and the extension of the agency period and payment of the first instalment of the commission". Consistently with his earlier position, Mr Fayad asked whether the caveat part could be left out. Plainly, he was still negotiating. Mr Wang refused to delete the caveat provisions, describing them as "necessary and important" and that caveats would be lodged if the plaintiff was not paid upon completion of contracts for lots sold since 2015 or any further sales. That led to Mr Fayad then saying what is attributed to him at the end of the fourth conversation, including the significance of his use of the term "okay". But then he immediately asked whether Mr Wang would agree not to lodge caveats unless certain things occurred. Mr Wang recalls he then said "okay".

202 Thus, it is evident from Mr Wang's account of the fourth conversation that both he and Mr Fayad continued to negotiate right up to the end of that conversation notwithstanding that, by this time, Mr Fayad had been provided with a copy of the proposed SAA.

203 Finally, as noted above, the primary judge also attached some significance to the terms of a conversation which Mr Wang and Mr Fayad had in August 2019 (i.e., well after the SAA was executed), around the time when the North building was ready to settle. The terms of that conversation are set out at [49] of White JA's reasons for judgment.

204 The primary judge attached significance to the fact that Mr Wang again raised with Mr Fayad the question of the plaintiff's security. Her Honour reasoned that if there was a common intention that a caveat lodged under the caveat clauses of the SAA secured commissions payable prior to 20 April 2018, it would not have been necessary for Mr Wang to ask that question.

205 I respectfully agree with that reasoning. Moreover, Mr Fayad sought to assuage Mr Wang's concerns by saying that the defendant would have "a lot of profit left" and that there were some units (presumably in the North building) without any mortgagee. It was in that context that Mr Wang asked him whether he could put a caveat on those particular units, to which Mr Fayad responded

affirmatively but asked that no such lodgement occur which would disturb the funders and affect settlement. I do not regard this exchange as indicating an acceptance on Mr Fayad's part that caveats could cover arrears of commission. Viewed in the wider context, the statements are equivocal and open to more than one interpretation. In my respectful view, they are insufficient to discharge the appellant's heavy onus.

206 For these reasons, I reject ground 2 of the notice of appeal.

Jones v Dunkel

207 Grounds 3, 4 and 5 of the amended notice of appeal all relate to the principle in *Jones v Dunkel*. I have summarised her Honour's reasons on this matter at [176] above.

208 I agree with White JA that the principle can apply in a rectification suit. In particular, I agree with his Honour's observation that such a suit should not be successfully defended simply by the other party not going to evidence itself. Ultimately, the issue whether or not the principle applies depends on the particular circumstances and, as his Honour correctly points out, may involve a question of degree.

209 The *Jones v Dunkel* principle was recently considered by Kirk JA (Leeming and Mitchelmore JJA agreeing) in ***Ling*** *v Pang* [2023] NSWCA 112 at [20]-[28]. As Kirk JA observed at [21], after referring to *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11 at [63], there are two types of inferences which may be drawn where the principle applies (citations omitted):

> The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. ... The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

210 I respectfully agree with Kirk JA's statement at [27] as to the rationale underlying the principle:

> What underlies the principle in *Jones v Dunkel* is that the failure to call the witness "serves to indicate, as the most natural inference, that the party fears

> to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party": *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8; at 320-1 at 320-321 per Windeyer J; see also *Fabre v Arenales* (1992) 27 NSWLR 437 at 449 per Mahoney JA. The circumstances in which such a fear may be inferred are various.

211 Having regard to the wording of ground 3 of the amended notice of appeal and the appellant's outline of submissions at [64], it appears that the appellant relied upon the first type of inference described by Kirk JA in *Ling*. The appellant's claim was that any evidence given by Mr Fayad and/or Mrs Khattar "would not have assisted the respondent in relation to the issue of whether the appellant and the respondent had the common intention in Ground 2".

212 In circumstances where Mr Wang deposed at [17] of his affidavit that the conversation he had with Mrs Khattar was similar to that which he had with Mr Fayad, it is sufficient to focus upon this ground as it relates to Mr Fayad. Although the appellant pointed out that Mrs Khattar's absence was entirely unexplained, I do not consider that this puts her in a different position from Mr Fayad. As I shall shortly explain, the *Jones v Dunkel* principle did not apply because of the plaintiff's failure below to discharge its onus of establishing the claimed common intention. This failure applies equally to Mr Fayad and Mrs Khattar.

213 Although no affidavit was filed by Mr Fayad prior to 25 February 2022 as required by the orders dated 9 December 2021 (subsequent orders dated 31 January 2022 relate only to the filing of valuation evidence), no significance or adverse inference should attach to this omission. For the reasons given above, I agree with the primary judge's assessment that, objectively assessed, Mr Wang's oral and affidavit evidence (together with the matters of conduct relied upon by the plaintiff) did not provide a sufficient foundation for any inference to be drawn concerning the alleged common intention. Thus there was no requirement for the defendant to go into evidence on this point given that the plaintiff carried the burden. In these circumstances, there was no scope for an unfavourable inference to be drawn against the defendant because of Mr Fayad's failure to provide an affidavit. To put the matter another way, given the equivocal nature of the plaintiff's evidence on the issue of common intention, no natural inference should be drawn that the defendant feared that if Mr

Fayad had provided evidence this would have exposed facts which were unfavourable to it.

214 In addition, insofar as Mr Fayad's failure to give evidence at the hearing itself was concerned, an adequate and acceptable explanation was provided as summarised at [176] above.

215 For these reasons, I reject grounds 3 and 4.

216 Ground 5 relates to the primary judge's observations at PJ[11] and [84] concerning the plaintiff's failure to adduce any notes or drafts pertaining to the preparation and finalisation of the SAA. As noted at [178], the primary judge's reasoning on this matter was criticised by White JA as "difficult to follow" and appears to form part of the basis for his Honour's opinion that ground 5 should succeed. For the following reasons, I respectfully disagree.

217 First, even if it be assumed that the reasoning is difficult to follow, that of itself would not assure the appellant success. It is well settled that appeals lie from orders, not reasons (see, e.g., *BP v State of New South Wales* [2019] NSWCA 223 at [11]-[12]; *McNab v Director of Publication Prosecutions (NSW)* (2021) 106 NSWLR 430; [2021] NSWCA 298 at [25]; and *Kramer v Stone* [2023] NSWCA 270 at [259]).

218 Secondly, I do not have any difficulty with the primary judge's reasoning at PJ[11] and [84]. The critical steps in that reasoning may be summarised as follows:

(a) it was unclear whether the caveat clauses were taken straight from a template or whether the template was amended;

(b) if there was an intention for caveats to be lodged in respect of arrears in commission, amendments were plainly required to the template;

(c) if Mr Wang did not draft the SAA himself, given the importance to him of the caveats applying to past commission, one would think that he would have instructed his staff on this subject (or sought Mr Cheung's assistance) in preparing the SAA;

(d) in these circumstances, without the template or any notes or drafts, it was not possible to say precisely what occurred, save that no attempt appears to have been made to draft such a clause; and

(e) thus an inference arose that any documents which may have been within the plaintiff's possession in respect of drafting the SAA would not have supported "its claim".

219 Fairly read, I understand her Honour's reference at PJ[84] to "its claim" to be a reference to the plaintiff's claim below that there was a common intention that the SAA would permit caveats to be lodged in respect of arrears in commission.

220 I do not read the primary judge's reasoning as involving any inconsistency between her Honour's acceptance of Mr Wang's intention and the inference her Honour may have drawn from the plaintiff's failure to adduce documents regarding the drafting of the SAA. I understand her Honour to be saying that if in fact there was a common intention which accorded with Mr Wang's subjective intention, it would be reasonable to expect that this would be recorded in the notes or drafts of the SAA. But since no such documents had been adduced, an inference could be drawn that any documents which may have existed would not have supported the plaintiff's case concerning the asserted common intention.

221 Thirdly, and in any event, as the appellant's counsel explained in his reply submissions, it was common ground between the parties on the appeal that the primary judge's observations at PJ[84] concerning the *Jones v Dunkel* principle applying to any notes or drafts, did not affect the outcome of the case. I see no reason why the Court should depart from the common position of the parties on this issue.

Conclusion

222 For these reasons, I propose that the appeal be allowed in part. As I have indicated above, I consider that the declaration regarding the equitable charge needs to be narrower so as to reflect the appellant's failure to obtain rectification. The parties should have an opportunity to agree the terms of a declaratory order, as well as orders as to costs of both the proceeding and the appeal.

223 Accordingly, I propose the following orders:

(1) The appeal be allowed in part.

(2) Set aside the order dated 12 August 2022.

(3) Subject to order (4), remit the proceedings to the primary judge for the purpose of considering making orders for judicial sale.

(4) Within 14 days hereof, the parties are to seek to agree the form of a declaratory order which gives effect to these reasons, as well as seek to agree costs of the proceeding both below and on appeal. If they are unable to reach agreement, each should within that time provide a brief written outline of submissions, not exceeding four pages in length, in support of their respective positions. The remaining issues will then be finalised on the papers and without a further oral hearing.

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