IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2015 000261

THE REALLY GOOD COMPANY PTY LTD (ACN 052 239 871) (as Trustee for The Monos Family Trust) — Plaintiff

v

MAE PACIFIC PTY LTD (ACN 107 155 902) (as Trustee for The MAE Pacific Unit Trust) (AND OTHERS ACCORDING TO THE SCHEDULE) — Defendants

---

JUDGE:	Kennedy J
WHERE HELD:	Melbourne
DATE OF HEARING:	8, 9, 10, 11, 12, 15, 16 and 18 August 2016
DATE OF JUDGMENT:	14 September 2016
CASE MAY BE CITED AS:	The Really Good Company Pty Ltd v MAE Pacific & Ors
MEDIUM NEUTRAL CITATION:	[2016] VSC 517

Trusts- Advance of $500,000 to first defendant together with execution of an application for units in a unit trust-whether advance induced by misleading and deceptive conduct to the effect that advance would be a "*short term loan*"- whether funds recoverable under trust deed in any event- *Trade Practices Act 1975* (Cth) s52, *Fair Trading Act 1999* (Vic) s9

Land Venture- advances of funds to second defendant pursuant to a land venture arrangement- whether a joint venture agreement- terms of agreement- whether plaintiff established that it was entitled to lost profits for breach of agreement/breach of fiduciary duty- alternatively whether funds invested recoverable pursuant to an "account stated"

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D F Hyde	Kliger Partners Lawyers
For the Defendants	Mr I R Jones QC	Sladen Legal

HER HONOUR:

1 Mr John Monos and his wife, Mrs Jeanette Monos, were formerly long standing friends with Mr Michael Elliott. Mr and Mrs Monos control the plaintiff company (**TRGC**) while Mr Elliott (the third defendant) controls the first and second corporate defendants (**MAE Pacific** and **MAE Properties** respectively). MAE Pacific was the trustee of the MAE Pacific Unit Trust.

2 This current proceeding arises because TRGC claims relief as a result of advancing sums of money in the following circumstances:

- First, on 19 November 2009, TRGC advanced the sum of $500,000 to MAE Pacific and also executed an application for units in the MAE Pacific Trust;
- Second, in 2010, TRGC paid various "deposit" amounts and settlement amounts on a number of blocks of land pursuant to an alleged joint venture with MAE Properties.

3 In relation to the first matter, the primary claim was against MAE Pacific and Mr Elliott, for misleading and deceptive conduct on the basis that they made certain "Payment Representations" to the effect that the advance would be a "short term loan" (not an investment as unit holder in a trust). A secondary claim was that the $500,000 should be recovered as against MAE Pacific on the basis of an alleged breach of the unit trust deed (or fiduciary breach), by reason of the failure to pay the $500,000 in redemption of the units. An earlier claim that the arrangement was "in truth" a loan on its true construction was abandoned in closing.

4 The defendants say that TRGC has no entitlement under the trust deed to a return of the $500,000. They also deny the making of the Payment Representations and submit that such a claim is statute barred.

5 In relation to the second matter, TRGC seeks damages for lost profits in an amount of $783,018 against MAE Properties in relation to the alleged joint venture agreement by reason of a failure to pay profit in breach of that agreement and/or breach of fiduciary duty.

Alternatively, it claims the (net) sum of $281,072 that it invested on an account stated.

6 However, the defendants say that no agreement is established and that there is no profit to return in any event. They further deny that an account stated is established and also allege it is statute barred.

7 The issues in relation to the first claim are, therefore, whether TRGC is entitled to $500,000 plus interest:

- based on the alleged "Payment Representations"?;
- or, alternatively, under the trust deed?

8 In relation to the second claim the issues are:

- what were the terms under which TRGC provided the monies?
- should damages for "lost profits" of $783,018, or some other amount, be ordered for breach of agreement/fiduciary duties?
- alternatively, should $281,072 be awarded on an account stated?

Background

Parties

9 Mr and Mrs Monos were the directors of TRGC.

10 Mr Monos, aged 57, failed HSC but went on to qualify as a mechanical engineer at the Footscray Institute of Technology.

11 From the 1970s, he operated service stations with family members and also bought and sold cars. From the 1990s, he commenced running a furniture shop with his wife. After setting up the furniture store, he arranged for two trusts to be set up: the Monos Trading Trust through which the furniture store operated; and the Monos Family Trust in which properties that he purchased with his wife were purchased. TRGC (incorporated in 1991) was the trustee of these trusts. Although Mr Monos claimed that the trusts were set up on advice from his

accountant, he also accepted that at various times he talked to his accountant about how different distributions would be made from those trusts.

12 During the period 1991-2007, the couple purchased some 24 properties through various structures, including through the trusts cited already as well as through a third trust, the Monos Unit Trust. These included premium rental properties in Nettanya Noosa and the Sebel, which were bought and sold through various financiers, using negative gearing. Mr Monos also purchased shares and a clothing business.

13 He described himself as generally very successful in his business activities, albeit with the odd loss.

14 Mrs Monos had successfully completed HSC and a short course at Stotts Business College. She then worked in a law firm as a typist/clerk for a short time when she was 19, before helping her husband run the service station business. From about 1991 she ran the furniture store with her husband (initially in partnership and later through the Trading Trust). She claimed that her husband had only a minor role in this business (doing deliveries), while she was responsible for managing the store including controlling accounts and providing documentation for lodging of tax returns.

15 Mr Elliott (aged 38) was the director of MAE Pacific and MAE Properties. He currently describes himself as a "development manager".

16 Although he qualified to enter a chemical engineering degree, Mr Elliott instead went on to work in a traineeship at the furniture store run by TRGC. He stayed on after completion to undertake some furniture delivery work, and also engaged in other miscellaneous work, including being an air traffic controller.

17 He became close to the Monos's, particularly Mr Monos, whom he described as a "mentor". They spent lots of time with one another, including cycling together. The two men would often talk about property and that maybe that they could do some sort of development together. The evidence of Mr Monos was that he was a bit bored with the furniture industry and wanted to look at doing something else.

18 In 2003, Mr Elliott set up the MAE Pacific Unit Trust for the development of some townhouses in O'Shanassy Street in Sunbury. The trustee of this trust was MAE Pacific (trading as MAE Pacific homes) which Mr Elliott described as, primarily, a construction company which obtained a builders licence in 2005. The evidence of Mr Elliott was that Mr Monos advanced the sum of $200,000 for the purchase and development of these townhouses – which was not denied by Mr Monos.

19 MAE Properties was not incorporated until later on 28 August 2009. The evidence of Mr Elliott was that it was set up for land transactions to hold land assets – and was not a construction company.

2009 discussions and execution of application for units

20 The evidence of Mr Elliott was that, by November 2009, MAE Pacific had significantly expanded into property construction and had struck a problem with home owner's insurance. Thus MAE Pacific needed to take out home owner warranty insurance (designed to protect the home owner in the event of defects if the builder cannot be found or is insolvent). Given the growth of MAE Pacific, the insurance cover it was holding was insufficient to cover the volume of building contracts it wanted to enter into.

21 During November 2009, discussions occurred between Mr Elliott and Mr Monos concerning this particular problem. Mr Elliott ultimately asked Mr Monos to advance funds to MAE Pacific so as to address this issue – which Mr Monos agreed to do. However, as will be seen below, evidence as to what was said is disputed.

22 Thus, the evidence of Mr Elliott was that he originally asked for a loan. However, after speaking to his insurance broker – who explained that loan funds would be inadequate in improving the balance sheet – he ultimately asked for capital.

23 The evidence of Mr Monos however, was that Mr Elliott always represented that the advance would be a "short term loan".

24 What is not in dispute though, is that on 19 November 2009 Mr Monos provided a $500,000 bank cheque to Mr Elliott. Further, that Mr Monos and Mrs Monos executed a document

entitled “Unit Application form” under the company seal of TRGC.

25 The form was completed by Mr Monos in his own handwriting, and includes:

- *TRGC* as the “name of applicant - company or trust”;
- Monos Family Trust (John & Jeanette Monos) - in response to the question “if the applicant is a trust, please advise name of its trustee”; and
- Details of the ABN number.

26 The signatures of both Mr and Mrs Monos together with the company seal further appear under the following statement:

> The above-named applicant(s) hereby:-
>
> 1. agree(s) to be bound by the terms and provisions of the Deed establishing the MAE Pacific Trust and by any amendments to the Deed and any supplemental Deed which may from time to time be duly made.
> 2. applies/apply for five hundred thousand (500,000) D Units in the MAE Pacific Trust (the "Units").
> 3. tender(s) application monies of five hundred thousand dollars ($500,000.00) in full payment of the Units.
> 4. agrees that in relation to the Units, the following terms and conditions shall apply:-
>
> Distribution of Income — At the rate of fifteen per cent (15%) per annum, payable monthly in arrears within five (5) business days of the end of each calendar month during the term and at the end of the term.
>
> Redemption amount — Equivalent to the sum of the amount invested for the Units (the "Investment Amount") payable upon the conclusion of the term providing all interest payments are up to date.
>
> Term — Six (6) months.

27 The cheque was banked on 19 November 2009. Further, on 20 November 2009, a Unit certificate was issued to TRGC for 500,000 D Class Units in the MAE Pacific Trust, such units held “subject to and with the benefit of the terms and conditions of the Deed establishing the said Unit trust”.

28 From 30 November 2009 until November 2011, interest payments to a total value of $146,394.43 were paid from MAE Pacific to TRGC.

29 The interest payments were accompanied at various times by both "Loan Transaction" statements and also remittance advices which referred to interest payments "from investment".

30 Mr Elliott's evidence was that the funds were used as working capital. In fact, by 31 December 2009, the funds in the MAE Pacific bank account had been reduced to $221,729.53.

"Land agreement"

31 As will be seen below, the precise discussions about the "land venture agreement" were vague, with both men having difficulty recollecting them.

32 It appeared that the "dream" of doing property development together crystallised when they met a demographer, Mr Colin Keane, who identified growth corridors including in the Northwest and North. The tenor of the evidence of both men was that they decided that undeveloped lots (pre-titling) should be purchased in such corridors on small "deposits" (or option fees) of around 10%. Further, that prior to construction (by MAE Pacific), third party purchasers would be found to enter separate land and housing contracts signed simultaneously.

33 The evidence of Mr Elliott was that purchasers could be obtained, particularly offshore, through accountants and financial planners, who were to be provided with a complete package (or a "turnkey product") including land and house, depreciation schedule, valuation and maybe a rental guarantee through a marketing group.

34 The venture relied on the delay in titling, which was meant to provide enough time to put together a package to marketing groups and for the price of land to rise.

35 In the result:

- On 12 February 2010, $103,250 was paid by TRGC for deposits on 18 blocks within the Brookfield development at Melton;
- On 26 February 2010, $138,950 was paid by TRGC for deposits on approximately 18

blocks within "Craigilands" in Craigieburn, "Cardinia" in Pakenham, and "Parkside" in Tarneit;

- On 29 March 2010, $61,900 was paid by TRGC for deposits on seven blocks within the Vantage Point development at Doreen.

36 A problem subsequently arose with two blocks: 809 and 845 in the Brookfield Estate. The evidence of Mr Elliott was that the purchasers who had signed contracts were unable to obtain their finance approval to settle before the time due for settlement of the head contract with the developer.

37 In the result, on 29 October 2010, TRGC paid $105,817 and $101,971 for settlement of the purchase of lots 809 and 845 in the Brookfield Estate.

38 The evidence of Mr Elliott was that other sales also fell through during the course of 2010 as purchasers failed to obtain finance approval which he believed was because of the rise in the market. He claimed that MAE Properties thereby had to settle lots themselves by raising finance from the ANZ and by using net proceeds of previous lots that did settle. He claimed this occurred with four or five of the first and second Brookfield lots, and also claimed there were rescissions with the Pakenham lots such that deposits were lost.

19 May 2010: Date for repayment under Unit Application Form

39 By May 2010, the six month period specified on the unit application form had expired. However, no demand was made. In fact, the evidence of Mr Monos was that he "probably wasn't even aware that the six months had come up".

40 However, the units register records that the units were "reinvested" in May and again six months later. The evidence of Mr Elliott was that he believes this was done by Mr Tom Della (his accountant), as corporate secretary, to reflect the fact that the money still remained within the entity.

Malaysian group deal

41 Meanwhile in late 2010-2011, Mr Elliott entered negotiations on behalf of MAE Pacific with

some Malaysian businessmen: Mr Yu, Mr Knok and Mr Leong (on behalf of TRC Synergy Group). He claimed that the essence of the "end result" struck was that MAE Pacific was to be rolled into a newer bigger entity called "MAE Synergy" with a one third interest, and with the Malaysian group injecting funds of (at least) $3,000,000.

42 From 3 May 2011, Mr Elliott became a Director/CEO of MAE Synergy. However, Mr Elliott claimed that, not only did the injection of funds fail to eventuate, but that MAE Synergy "wrongfully absorbed MAE Pacific funds" such that the amount they intended to repatriate to unit holders could not eventuate. Instead, the result was that MAE Pacific funds were "exhausted by October 2011" such that no further interest could be paid nor capital repatriated.

43 By July 2011, Mr Monos had become aware of the merger of MAE Pacific into MAE Synergy (as Mr Elliott had told him) and became more concerned about the fact there was "another element of risk". He therefore sent the following email on 9 July 2011 to Mr Elliot:

> I need to know three things of which I have approached you on numerous occasions for answers, so far to no avail.
>
> 1. When can I see monies back to me from the blocks I purchased?
> 2. What percentage profit will be paid to me?
> 3. I require a commitment from you for the date of the return of the lump sum of the $500,000 which I have loaned to you and I wish to know what that date will be.
>
> Regarding the two blocks of land which I paid for outright – the titles should have been put directly into my name.
> Some of the blocks of land that you now have to settle on probably should also go into my name.

44 By email of 12 July 2011, Mr Elliott refers to fact that a "forecast" would be completed by the end of the weekend in relation to the joint land arrangement. Further, that the original email was "50/50". In relation to the $500,000 he notes that, "as discussed", this was in a "moratorium" imposed by the Malaysian group (TRC) while it satisfied itself of the legitimacy of MAE Pacific transactions. In oral evidence, he stated that from May 2011 MAE Pacific was unable to make payments out of its bank account while issues were resolved with MAE Synergy.

45 In about October 2011, a meeting took place between the two men at the RACV Club where Mr Elliott invited Mr Monos to roll over his money into shares in the new business. Mr Monos rejected this proposal.

46 At about this time it also appears that Mr Monos was handed a spreadsheet (at CB 1750) in response to his requests for information about the land venture (**the 1750 spreadsheet**). In fact, Mr Monos could not actually say whether it was in late 2011 "*or a bit later*" that he was handed the 1750 spreadsheet, though TRGC now seeks to rely on this document to support its loss of profits claim.

7 March 2012 email

47 On 7 March 2012, Mr Monos wrote to Mr Elliott as follows:

> Hi Michael,
>
> After much thought I have decided to make my requests for return of invested funds clear.
>
> The monies which I invested to purchase blocks of land in Melton, Craigieburn & Doreen I would like repaid as soon as the blocks settle and clear funds have been paid into your account.
> This is not unreasonable.
>
> Regarding the $500,000 invested (with initial repayment schedule being 6 months) I require that it be paid back immediately with interest owed to date.
> If the outstanding interest is paid within the next 7 days and a clear commitment is made to pay the ongoing interest immediately when it is due, I will give consideration to extending the repayment of the $500,000 to the 3 year anniversary date – that is, the 19th of November 2012.
> This is also not unreasonable.
>
> Please email your response as soon as possible so that I can put an end to an extremely difficult and stressful period.

April 2012 - loss of documentation

48 In the meantime, the "merger" into MAE Synergy had completely soured. The (uncontested) evidence of Mr Elliott was that at a board meeting of MAE Synergy held on 23 April 2012 at Rowville, he was handed an envelope and given two weeks to resign. He was later terminated in May. During the meeting his phone and laptop were also taken and he left.

49 He subsequently went to his office at Sunbury (where the books for both defendants were maintained) and found that the office was "gutted", with electrical cables and desks and chairs scattered around. All books and records and anything of value had been removed; this included filing cabinets, archive boxes, and all books and records of MAE Pacific and MAE Properties.

50 Mr Elliott thereafter engaged in litigation with MAE Synergy, which was settled without receipt of any payment. Mr Elliott further claimed that, despite seeking books and records of both companies through discovery and subpoena processes, he has not received them. This included one occasion wherein he was provided access to discovery when he went through hundreds of boxes and identified a list of items which he was told would be sent but which were not.

Subsequent demands

51 On 20 August 2012, TRGC requested payment of the $500,000 which were "in reality" loan funds through Thomsons Lawyers. The 20 August letter also sought return of funds invested, as well as "profit share" on the land venture based on a 66% entitlement. There was also a further demand from Thomsons Lawyers of 15 October which states that, on 7 March 2012, TRGC had made demand for payment of the $500,000 plus interest "for redemption of the 500,000 units".

52 Then on 15 April, TRGC served a statutory demand on MAE Pacific. The affidavit of Mr Monos in support claimed a debt of $836,267.92, "relating to the Debtor company's failure to pay $500,000 plus interest following the Creditor's redemption of units in the MAE Unit Trust".

53 The evidence of Mr Elliott was that the land venture finalised in about 2014 in the sense that all the properties (not the subject of rescission) were sold.

54 He claimed that there were no funds which could have been the subject of a distribution and further, given the absence of documents, that he was unable to complete an accounting.

55 On 13 July 2015, this proceeding was filed. The Statement of Claim filed at that time sought

the $500,000 on the basis of the trust deed alone, with no claim based on any misrepresentation to the effect that the transaction was a loan.

56 Further, although subpoenas were later issued to MAE Synergy so as to obtain appropriate accounting documents in relation to the land venture, as will be seen below, only limited documents appear to have been obtained.

Witnesses

57 TRGC called Mr and Mrs Monos.

58 Mr Monos was not an impressive witness. Although some of this may be explicable by the effluxion of time (which was considerable) and by the challenges of the court environment, his evidence was marked by references to matters he "did not know" or "could not recall".

59 TRGC submitted that Mr Monos was not intelligent or sophisticated in business. However, although he sought to understate his business experience, as described already, he had a considerable depth of experience in business including involvement in the purchase and sale of 24 properties.

60 There were aspects of the critical "representations" case that I also did not find plausible. Thus, though there were many matters he could not recall, he was prepared to give detailed evidence as to what Mr Elliott allegedly said to him some seven years ago. His evidence that Mr Elliott told him that the unit trust application was a "receipt" was also inherently improbable and was not alleged in an earlier affidavit sworn on 22 July 2016.

61 Overall, I am unable to be confident that I can generally rely on the evidence of Mr Monos absent an objective foundation.

62 Mrs Monos presented as opinionated and argumentative and she was reluctant to give any concessions or qualifications. At one point she stated that "these questions are fairly tedious" and, later, that she did not "see the relevance".

63 I am also unable to rely on her evidence absent other objective evidence.

64 Mr Elliott generally presented as a careful, considered witness who was ready to make appropriate concessions. There certainly were gaps in his recollection and his evidence about accounting matters was not completely satisfactory. However, he was not a qualified accountant and his memory lapses were generally explicable by the extensive effluxion of time involved with this case.

65 The plaintiff made a substantial attack on the credit of Mr Elliott. Much of this attack was on the basis of matters extraneous to the pivotal Payment Representations case.

66 For example, it was put to Mr Elliott that he procured the property schedule of the Monos's so he could go to HIA and pretend that Mr Monos was his business partner. Further, that he procured it without telling the Monos's what it was for.

67 Mr Elliott denied the suggestion, stating that they had explored being partners but the matter did not proceed. He also denied any suggestion that he had not discussed the matter with the Monos's, highlighting that he would not have obtained the information from them otherwise. I had no reason to reject this explanation and accept it.

68 Some of the other attacks were about the conduct of the land venture. There were aspects about this venture which might give rise to concern, for example, as to precisely what happened with MAE Synergy. However, many of the matters raised were matters which could not be fully investigated given the absence of proper documentation and/or given the allegations were not the subject of any pleaded case.

69 In terms of the Payment Representations case, particular complaints will be dealt with further below. However, as will also be highlighted below, I generally found the account of Mr Elliott to be cohesive, plausible and consistent with the objective documentation, to the extent there is any.

70 Although not a perfect witness then, I have generally preferred the account of Mr Elliott over that of Mr and Mrs Monos, particularly as to the events leading up to the execution of the unit trust application.

First Claim

Whether TRGC is entitled to $500,000 as damages based on the alleged "Payment Representations"?

Alleged representations

71 The alleged representations made were that if Mr and Mrs Monos provided the sum of $500,000 to MAE Pacific, that sum:

- would be "held in a separate bank account";
- would be "protected";
- would "not be used in MAE Pacific's business";
- would be "a short term loan";
- was only required to show sufficient equity or capital in MAE Pacific to allow it to obtain further building insurance;
- was a loan;
- would attract interest until repaid.[1]

72 The primary way the case was put in closing was that the material representation was that the arrangement was a "short term loan" or "loan", with the other aspects forming part of this central representation.

73 Counsel for TRGC claimed relief under the former *Trade Practices Act 1974* (**TPA**) and *Fair Trading Act 1999*.[2] This appears to be appropriate although nothing appears to turn on the distinction.[3]

74 The first element requiring satisfaction is that the impugned conduct was actually engaged in.

---

1 Plaintiff's Fourth Further Amended Statement of Claim, dated 9 August 2016, [18B] (**Plaintiff's FFASOC**).

2 Plaintiff's Closing Submissions, dated 17 August 2016, [46] (**Plaintiff's Closing Submissions**).

3 Thus the TPA was amended by the *Trade Practice Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) but with effect that the TPA continued to apply after 1 January 2011 in relation to acts or omissions that occurred before that commencement. Given the alleged representations were made in late 2009 it follows that the TPA applies: *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) s 6; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640, 644-5.

Given this includes oral statements, the remarks of McLelland CJ in *Watson v Foxman* are applicable:[4]

> 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.

75 The consequences of those considerations are that a party relying on spoken words as the foundation of a misleading or deceptive case might face serious difficulties "in the absence of some reliable contemporaneous record or other satisfactory corroboration".[5]

Mr Monos

Examination

76 In about October-November 2009, Mr Monos claimed that Mr Elliott told him that he had a "massive problem" in that, although he wanted to grow his business quickly, he was restricted to how many houses he could build because of his insurance cover.

77 Mr Elliott then said "my business needs more equity, can I borrow some money off you?" Mr Monos maintained that "equity" was a word he used.

78 Mr Elliott further told him that he needed $500,000 and that he just needed to show "equity" in his company so he could show this to the insurance company to give him more cover. Further, that the money would be in the bank account and that it was "not going to be touched". He claimed that Mr Elliott said the $500,000:

---

4 *Watson v Foxman* (1995*)* 49 NSWLR 315, 318-319 as approved in *Sunland Waterfront (BVI) Ltd v Prdeuntia Investments Pty Ltd* [2013] VSCA 237, [159].

5 *Watson v Foxman* (1995) 49 NSWLR 315, 319 (McClelland CJ in Equity).

> was just going to be for a short term, he didn't specify a time during those discussions, but he said it was going to be for a short term, and that really, it was just going to be there in a bank account that's not going to be touched. And, it wasn't a really lengthy conversation, and it wasn't something that went on for hours, it was basically as simple as I've just told you now.

79 Mr Monos said he thought this would be all right but needed to check with Mrs Monos. At the time the couple were looking to put units on a property in Gisborne, but he did not expect to need funds for this project until about 12 months' time.

80 Mr Elliott then offered to come to talk to Mrs Monos at the shop – which he did. This was about two days prior to the drawing of the cheque (on about 17 November).

81 Mr Monos did not "recall the conversation exactly" that took place at the shop. However, Mrs Monos raised concerns that she was not happy Mr Elliott was growing his business too quickly. Mr Elliott, however, said "basically" the same thing as he had told Mr Monos – ie that the money would be in a separate bank account and it would be a short term loan. He didn't know if Mrs Monos agreed to the loan there and then. He also did not know when interest was discussed but believed Mr Elliott came up with the figure of 15% to cover his interest payments to the bank (given he had had to draw down on his Westpac loan to raise these funds).

82 On the morning of Thursday 19 November, he then got a bank cheque for $500,000. He rang Mr Elliott and told him that he had a bank cheque that he could come and collect.

83 Mr Elliott then came to his office in the afternoon and asked him to fill in the unit application form "just as a receipt". He filled it in and stamped it and asked Mrs Monos to sign too. It included the ABN number.

84 He "did not actually know" what was said in this meeting, but accepted that he and his wife signed the document. He noticed the term of six months, which sounded short term, and saw that it had the $500,000 and 15%. He did not read the document but filled it in at Mr Elliott's request.

85 He also handed over the cheque before the application form was given to him.

86 He denied receiving the application form prior to 19 November and said he did not see the

trust deed until after the litigation started. He denied that there were any discussions about a unit trust on or before 19 November.

Cross-examination

87 Mr Monos conceded that the particular problem Mr Elliott referred to was about having enough equity or capital in his business to support a particular level of insurance cover.

88 He denied that the conversations changed after Mr Elliott spoke to his broker, whereupon he told Mr Monos that the advance could not be by way of debt (which would make the balance sheet worse) but had to be working capital.

89 He maintained that he was told the monies would be “protected" and would not be used in the MAE Pacific business.

90 He admitted that he had been to see Mr Elliott’s accountant, Mr Della, with Mr Elliott at Sunbury, but did not recall what he went there for. He then claimed he was merely “introduced” to Mr Della but was not involved in any meetings concerning Mr Elliott’s business affairs.

91 He “can’t recall” what was said at the meeting with Mrs Monos but accepted he (Mr Monos) did most of the talking. He also can’t recall whether anything was said about the terms of the arrangement.

92 He said that Mr Elliott told him the application form was a “receipt” and this was all he remembered about the execution meeting. He accepted that he had never in his experience as a business person filled out a form under company seal applying for a receipt, and also said he “didn’t know what [he] was thinking”. However under re-examination he claimed that he thought he was getting “an agreement in writing for some monies that [he] had loaned…”

Mrs Monos

93 Mrs Monos claimed that the meeting at the furniture shop took place a day or two before 19 November. Mr Elliott and Mr Monos were present but Mr Monos did most of the talking. Her evidence was:

> Well, I can't recollect who said exactly - or what words were exactly said; I only know that what was said was that Michael *wanted to borrow money*, Michael *wanted to put it into an account* so that *he could get more equity* in his business so that he could have enough to show the insurance that he could get more insurance to build a greater quantity of houses than he was already building.

94 She also said at some point that she thought Mr Elliott "should grow his business slowly in the same way that we did". However, she claimed that Mr Elliott said "it would be protected"; it was for a short period of time*;* and it would be sitting "outside of his trading account".

95 The next morning, Mr Monos got the bank cheque and sometime later Mr Elliott came to pick it up. She claimed that:

> John gave him the bank cheque, and then Michael gave John, and then myself, a document to sign. John filled in the information, and Michael specifically said to us, "This will protect you if anything happens to my company."

96 She signed the document and Mr Monos stamped it. The meeting took 10 minutes maximum.

97 Under cross-examination, she maintained that the word "loan" was used. However she also stated that Elliott explained that he could only get the increased insurance cover if he had enough "equity" in his company. She agreed that equity was an amount of something "owned" in a business. She could not recall if interest was mentioned and said that a specific period of time was not discussed apart from it being "short term".

98 She further maintained that in the short meeting the next day Mr Elliott said "it would protect us if anything happened to his company". There was no conversation about the content of the form. She could not recall when the company seal was affixed and she did not read the document.

Mr Elliott

99 Mr Elliott's evidence was that MAE Pacific needed to take out home owner's warranty insurance. In practice, this put a "glass ceiling" on business revenue. For example, if you had five contracts at $200,000 each, this was $1,000,000 worth of work. However, if insurance cover was only $800,000, then you could not enter the last contract.

100 In 2009, MAE Pacific was growing and ran into difficulty as it had contracts to a value higher

than covered by his insurance. He therefore wanted to increase the insurance. However, in order to do this it appeared that an injection of funds was required.

101 He discussed the matter with Mr Monos (as his mentor) and then later directly asked if Mr Monos could advance the money.

102 His evidence described the following events (placed in chronological order hereunder):

(1) The initial discussion was in early November 2009 and was premised on the basis of a loan with a term of 6 months. He believes this was when there was talk of a separate bank account. The discussions about the term and interest rate developed "as it progressed".

(2) He then had a discussion with his broker, Mr Luu, who said that a loan would not be satisfactory. Mr Luu explained that the insurance cover was a multiple of the net asset position on the balance sheet so a loan would reduce the net asset position whereas equity would increase it.

(3) In November 2009, he and Mr Monos then both attended the office of his accountant, Mr Della, and structuring was discussed. By that stage the discussion was around "equity" given the advice of the broker. Mr Della suggested using the existing structure of MAE Pacific and issuing units in the unit trust. They discussed the $500,000 as D Class Units in the trust, as well as the term of six months which worked for both of them (six months gave him time to repatriate the capital for Mr Monos' proposed project given the homes he was constructing took about four months to build).

(4) He and Mr Monos then met at Suzanne's Coffee Shop (he remembers this because they had not met at this café regularly so it "stands out"). He had the first form of the unit application form at that time which he had received from Mr Della (without handwriting). They discussed the terms at points 1-4 of that document though the detail had already been discussed at Mr Della's. They agreed between themselves but discussed the need to present the matter to Mrs

Monos.

(5) A meeting then occurred on 17 or 18 November with Mrs Monos at the store. Only 5-10 minutes was spent on this transaction, with Mr Monos doing most of talking. He recalled Mr Monos highlighting $500,000, 15%, six months, and that he said "I think it will be all right". Mrs Monos said something to the effect that he should grow the business slowly. He rejected that there was discussion about the advance being a loan and did not believe they discussed the form the advance would take. He did not recall anything said about monies being in a separate bank account; nor about monies being protected; nor that monies would not be used in the MAE Pacific business. No formal resolution was reached (apart from Mr Monos saying he thought it would be all right).

Mr Monos then rang (later that day or the next day) and asked him to come to the office. He said he had the bank cheque.

(6) A meeting then took place on 19 November of 5-10 minutes. He got the cheque and gave Mr Monos the form (though he could not remember the actual order). The documents were executed and nothing was said about the transaction itself.

Cross-examination

103 Mr Elliott conceded that they were initially discussing a loan, and that early on he said the funds would be in a separate bank account and short term though he was not sure if he said the money would be protected.

104 He disagreed with the proposition that he never said anything to Mr Monos about the "fundamental change" after seeing Mr Luu, and he rejected that the only matter discussed was a loan. In response to a question as to what would have alerted Mr Monos to the rights of a D Class Unit holder, he believed that the meetings with Mr Della and at Suzanne's Coffee Shop were "very relevant".

105 He disagreed that the meeting with Mr Della was only a short "meet and greet" and had

nothing to do with an explanation about unit trusts. He said that Mr Della had explained that investment was required in a trust. He did not recall if there was a follow up letter, but the follow up was the production of the first unit application form which Mr Della got from Castle (who was a provider of trusts and deeds). He also maintained that he took the unit application form to Suzanne's Coffee Shop.

106 He agrees it would have been appropriate to give Mr Monos the trust deed given what he knows now. He accepts that he did not understand the mechanism to redeem and had a relatively simply understanding about the rights of different class holders.

107 In terms of the meeting with Mrs Monos, he did not recall Mr Monos saying it would be a short term loan, nor discussion about an interest rate. He disagreed that Mr Monos said it would be in a separate account. He also did not recall Mr Monos saying the money would be protected.

108 He also later says: "You're specifying short-term, you're specifying these items *that I don't believe were said, that's why I don't recall them being said.*"

Findings

109 Apart from the attack on Mr Elliott's credit, TRGC submitted that the court should accept the account of Mr and Mrs Monos to the effect that the arrangement was always represented to be a loan and never changed.

110 This was said to be the case on a number of bases including:

- the absence of any overt objective evidence which supported the "change" to a trust arrangement, in particular, the absence of any trust deed or correspondence from Mr Della;
- that the court should draw an adverse inference as to the failure of the defendants to call Mr Della;
- that Mr Monos had given evidence that he did not want to invest with the defendants;

- that subsequent "loan statements" were significant.

111 In terms of objective evidence, there is little contemporaneous objective evidence in this case, including any correspondence from Mr Della. However, there is a critical piece of objective evidence in existence, namely, the unit trust application which was executed by both husband and wife. It appears highly unlikely that people with the business experience of Mr and Mrs Monos would execute an application for units if the arrangement was always intended to be a (completely inconsistent) loan transaction as they claim.

112 Mr Monos must also have taken the time to consider how to complete the form – not just to sign it. It is highly unlikely that he would go to the trouble of completing the document in the way he did (without challenge) if the representations had been made as he now alleges. This included taking the trouble to insert the name of the Monos Family Trust rather than the other Trading Trust which ran the furniture store. I also did not find his evidence that he chose the Monos Family Trust on the unit application form because this was the "only trust I'd known" to be credible, given he accepted that they actually held three trusts.

113 The unit trust application must also have been sourced from somewhere which is consistent with the account of Mr Elliott that he had made earlier contact with his accountant to obtain it.

114 It is true that there was no explanation offered as to why Mr Della was not called. However, I do not consider that it is appropriate to draw any adverse inference in the circumstances of this case. Mr Monos did not challenge the fact that he went to meet Mr Della, rather he challenged the contents of the conversation that ensued there. In circumstances where the events took place so long ago it could not be expected that Mr Della, as a professional accountant, would have any detailed recollection of events such as would assist the court absent any contemporaneous note.

115 It is true that Mr Monos had given oral evidence that he did not want to "invest" with Mr Elliott's building business. However, as will be seen below, he was clearly prepared to "invest" substantial sums of money in a land venture with Mr Elliott on the basis of an oral arrangement only.

116 In terms of the loan statements, the evidence of Mr Elliott was that the reason for this title was because Mr Della had suggested that a "simple" software package be used which tracked the monthly payments as distributions of income. Although this was not a completely satisfactory explanation, such a subsequent recording does not serve to re-characterise the transaction entered into freely and voluntarily in December 2009; nor to make it more likely that Mr Elliott said the things alleged. In any event, there were other subsequent communications which weighed against the making of the representations: for example, the remittances (which refer to the funds being an "investment"); the statutory demand; and the October 2012 letter from Thomsons Lawyers.

117 Overall, I am unable to be satisfied that the alleged representations were made. In particular, I am unable to be satisfied that Mr Elliott (consistently) made the pivotal operative representation that the advance was a "short term loan".

118 I say this firstly because I did not find the plaintiff witnesses to be impressive or reliable for the reasons given already.

119 As the authority already cited makes clear, such reservations are amplified in the present case where there is no objective evidence at all to support their version of events, and in circumstances where much of the evidence was vague and imprecise. The plaintiff's claim is also utterly inconsistent with the terms of the unit application document which was freely executed and completed.

120 There were further aspects of the testimony of Mr and Mrs Monos which also makes their account unlikely:

- as they themselves highlight, the term "equity" was utilised. In such a situation it would be improbable for Mr Elliott to be asking for an inconsistent transaction (a loan) as is now alleged;
- That the evidence of Mr Monos was contradictory as to what actually occurred at the meeting with Mrs Monos: at one stage giving evidence about what Elliott said, but later saying he could not recall whether anything was said about the

arrangement. Although this might be understandable given the passage of time it does not assist TRGC;

- That his evidence about the unit application form itself was particularly unsatisfactory. Thus I did not find his evidence that it was a "receipt" to be believable and I do not accept that Mr Elliott told him this;
- That there was no reason for him to visit Mr Elliott's accountant for a "meet and greet" alone as Mr Monos alleges;
- Although some divergence could be expected, the account of Mrs Monos varied in quite significant matters, particularly as to the meeting on 19 November. Thus while she maintained that there was no conversation about the content of the form, he said he was told it was a receipt. Her suggestion that they were told "this will protect you if anything happens to my company" was also not the subject of evidence from Mr Monos.

121 I am therefore not satisfied that I can rely on the evidence of the plaintiff witnesses such that I am not satisfied that the representations as alleged were actually made.

122 In terms of whether Mr Elliott's account should be accepted, there was a variety of attacks made on his version of events which included that:

- Mr Elliott was prepared to characterise monies in whatever way suited his purposes;
- some criticism should be made of Mr Elliott's evidence that the purpose of the meeting with Mr Della was for Mr Della to explain the change of arrangement because Mr Elliott himself was "unable to explain";
- he fabricated evidence that Mr Della reinvested the funds.

123 There did appear to be some sloppiness in the way transactions were characterised. However, this did not make it more likely that Mr Elliott made the Payment Representations alleged.

124 I also saw no issue with his evidence that he was personally "unable to explain" the transaction such that he took Mr Monos to see his accountant. Nor with his evidence about the reissue of the units. Instead, it seems highly probable that the idea for the trust structure and the subsequent recording did originate with a professional rather than Mr Elliott (who had only a limited understanding of the trust deed and only a limited legal/financial background).

125 The account of Elliott was generally cohesive and credible and fitted with what little objective evidence there was. In particular, it made sense that a loan would not improve a balance sheet for the purposes of securing insurance. It further made sense that Mr Elliott would seek an accountant's advice and obtain the application form as he alleges.

126 I therefore accept Mr Elliott's account. More particularly that, although there may have been some earlier reference to a loan, the structure was altered following discussion with the broker to a unit trust arrangement. Further, that Mr Monos was advised of this at a meeting with Mr Della and at a subsequent meeting at Suzanne's Coffee Shop.

127 In terms of the meeting with Mrs Monos, according to all 3 present, Mrs Monos suggested that Mr Elliot should grow his business slowly. Given this, it appears probable that something was said about the need for his business to have more "equity" so that he could obtain more insurance and build more houses. I also accept that Mr Monos did most of the talking and said something to the effect that the advance of the money would be "all right". Beyond that, I am unable to be satisfied that there was any discussion about the form of the transaction on that day, or on the day of execution. More particularly, I am unable, on the state of the evidence, to be satisfied that Mr Elliott said anything to the effect of the alleged representations.

128 Given I accept Mr Elliott's evidence that he apprised Mr Monos of the change in structure, and further, that he did not make the alleged representations to Mrs Monos, it is unnecessary to say more. However, to the extent that anything at all had previously been said to the effect that the sum advanced was to be loan, it also needed to be considered in the context of what all of the witnesses said occurred in the meeting of 19 November. Thus, at that time, Mr

Elliott handed over a document entitled (in capital letters) “UNIT APPLICATION FORM”, which both Mr and Mrs Monos were given opportunity to read. In such circumstances, I consider that it was clearly represented that the advance was now to be by way of investment of units in the unit trust, and that any earlier representation to the effect that the transaction would be a loan was effectively rendered inoperative.

129 Given TRGC has not established that the alleged representations were made, it follows that the claim must fail.

130 In the light of this finding, it is unnecessary to consider the other elements of the misleading/deceptive claim. More particularly, it is unnecessary to consider whether, if the alleged representations were in truth future representations, there were reasonable grounds for making them. TRGC maintained it was not such a case in any event.[6]

131 I will, however, express summary views on two other aspects of the claim for the sake of completeness: namely, reliance and causation, and the limitations defence.

Reliance and causation

132 It is true that Mr Monos gave oral evidence to the effect that he advanced the funds based on the assurances of Mr Elliott. Further, that he would not have gone into the arrangement if he had known it was a trust arrangement. Mrs Monos also claimed that they thought “for the reasons that he’s advised us, that we could help him to succeed”.

133 However, for reasons given already, I am unable to be satisfied that I can generally rely on their evidence. This is particularly the case given the self-serving nature of this sort of evidence. It is also important to consider the totality of the evidence in considering the question of reliance, including whether an overall inference as to reliance should be drawn or not.[7]

134 I am mindful that the representation need only play some part in inducing entry into the relevant transaction and need not be the sole inducement. However, a representation to the

---

6 Plaintiff's Closing Submissions, [61].

7 *Lord Buddha Pty Ltd v Harpur* (2013) 41 VR 159, 197 [159].

effect that the advance would be a short term loan and/or loan is objectively unlikely to induce a person to actually advance funds pursuant to a (totally inconsistent) unit trust arrangement. This is particularly so in this case where the title of the document is prominent and capitalised as a "UNIT APPLICATION FORM" and where Mr Monos has actually taken the trouble to fill in details on that form.

135 Moreover, even if an inference of inducement arises, the actions of the Monos's make it plain that they did not rely on any representation to the effect that the transaction took any particular form at all. Thus, Mr Monos was prepared to advise Mr Elliott that he could come and get the cheque before even signing the unit application form. His evidence was also that he provided the cheque before the application form was even handed to him. The fact that both then proceeded to execute the form freely and voluntarily without question also tends to suggest that the form of the transaction was immaterial. This is particularly so given neither took the trouble to even read the document.

136 Although such a result appears to be uncommercial, this fits with the tenor of the totality of the evidence and actions of the witnesses. As Mr Monos said, he felt the payment was backed up "by trust" though he took no mortgage or other security. Instead, when asked why he paid it over, his immediate response was: "I wasn't a highly intelligent person, but I trusted Mr Elliot, and it was something that I didn't find difficult to do." The evidence of Mrs Monos was also to the effect that she thought they could "trust him".

137 If then, contrary to the above, some representation was made to the effect that the advance would be a "short term loan", I would not be satisfied that it actually induced TRGC to advance the funds and apply for units in the unit trust.

138 There would also be a further difficulty. Thus, TRGC would need to demonstrate that any loss was suffered by reason of the misleading conduct. This then raises an objective question of causation.[8]

139 The loss identified in this case was not the advance of the funds. Rather, it was the "failure of MAE Pacific to repay the sum of $500,000",[9] which is not said to arise until, at the earliest,

---

[8] Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis Butterworths, 4th ed, 2015) 397.

July 2011 (when the first "request for payment" is not satisfied).

140 However, any such "failure to pay" arises by reason of the terms of the trust deed; It has nothing to do with any statement to the effect that the transaction "would be a short term loan". Put another way, as a matter of common sense,[10] a statement that a transaction would be "X" (a loan) does not cause a person to enter into a completely different transaction "Y" (a unit trust deed) in circumstances where such a transaction is entered into voluntarily and absent any special disability.

141 If then, contrary to the above, a representation was made that the transaction would be a short term loan, I am unable to be satisfied that it was relied upon. Nor am I able to be satisfied that any failure to redeem the funds under the trust deed was causally connected to some representation that the advance was to be a loan.

Whether statute barred?

142 If TRGC was otherwise successful it would also be necessary to consider the defendant's defence that the claim was statute barred.

143 Pursuant to s82(2) of the TPA an action for damages may be commenced at any time within six years after the day on which the cause of action accrued. Such accrual occurs when the plaintiff first suffers loss.[11]

144 In this case, the defendants submitted that the cause of action first accrued when the agreed term of six months in the unit application form expired and the "loan" was not repaid. However, I do not consider that any loss was actually suffered at this time given no funds were actually called for. Instead, I consider that the first demand for payment was actually made in the letter of 7 March 2012 (within six years of when the representation case was first pleaded).[12] More particularly, that the correspondence of 9 July 2011 was only a request for a "commitment as to the date of return" and not a demand.

---

9 Plaintiff's FFASOC, [18L].

10 *March v E & MH Stramare Pty Ltd (*1991) 171 CLR 506.

11 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

12 Plaintiff's Third Further Amended Statement of Claim, dated 29 July 2016, Part A2.

145 If it were necessary to consider I would therefore not be satisfied that the claim was statute barred, though it is unnecessary to consider this further given the findings already made above.

Summary

146 I am not satisfied that the alleged Payment Representations were made.

147 If, contrary to the above, a representation was made to the effect that the advance would be a short term loan, I am also unable to be satisfied that it was relied upon. Nor am I able to be satisfied that any failure to redeem the funds under the trust deed was causally connected to some representation that the transaction was to be a loan.

148 TRGC has thereby failed to establish its claim for relief based on the making of the alleged Payment Representations.

Whether TRGC is entitled to a return of the $500,000 under the trust deed?

149 It will be recalled that, pursuant to clause 1 of the unit application form, TRGC agreed to be bound by the terms of the trust deed establishing the MAE Pacific Trust. TRGC alleged that, if its preferred misrepresentation case failed, it was "still open" to it to succeed on the basis of a breach of the trust deed. In this respect, it alleged that MAE Pacific, wrongfully and in breach of the "Monos Unit Agreement" and/or Unit Trust Deed, failed to pay $500,000 in redemption of the Monos units and interest, citing in particular clause 17.2.[13] It was also alleged that the wrongful retention of funds contrary to the deed was a breach of the equitable and fiduciary duties of MAE Pacific,[14] (though it was conceded that such a claim did not take the matter any further).

150 The defendants, in return, allege that the redemption of units is governed by clause 28.1. Further, that there were no "Trust Fund" sufficient to repatriate the $500,000.[15]

151 In order to consider these positions it is therefore necessary to consider the terms of the Trust

13 Plaintiff's FFASOC, [12], [14].
14 Ibid [17].
15 Defendants' Third Further Amended Defence to the Third Further Amended Statement of Claim, dated 11 August 2016, 3 [12], [14] **(Defendants' TFAD).**

Deed, particularly clauses 17.2 and 28, according to appropriate principles.

General principles

152 The principles governing the interpretation of contracts apply equally to the interpretation of deeds including trust deeds.[16]

153 In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean.[17]

154 This objective approach requires reference to the text, context and purpose.[18]

155 In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd,*[19] the High Court considered, without unanimously deciding, the circumstances in which recourse might be had to matters external to the text, context and purpose of a contract as revealed by the contract itself; in particular as to whether ambiguity in the relevant contractual provision must be shown. French CJ, Nettle and Gordon JJ stated that:[20]

> [o]rdinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

Relevant clauses

156 The MAE Pacific trust deed is made between the "First Unit Holders" (MAE Pacific, as trustee for the O'Shanassy trust, and Mr Elliott) and the Trustee, MAE Pacific, and is established on 25 November 2003.

157 Clause 1 provides that the trustee is to stand possessed of the Trust Fund and income thereof for the "Unit Holders" and the "Beneficiaries" upon the trusts thereafter set out.

158 "Beneficiaries" include all Unit Holders (clause 3.5). However, pursuant to the definitions in

---

16 See *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93, 3 [12] (Kyrou, Ferguson and McLeish JJA).

17 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656 [35].

18 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46]; *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95, [45].

19 (2015) 256 CLR 104.

20 Ibid [48] (French CJ, Nettle and Gordon JJ).

clause 3.3, "Units" are divided into various classes with only the "A Class Unit" holders entitled to vote (but with no right to receive income or capital).

159 By way of contrast, B Class Unit holders are only entitled to receive income (not capital) (3.3.3) while C Class Unit holders are entitled to a distribution of capital (not income) in direct proportion to the number of Units held (3.3.4).

160 Pursuant to clause 3.3.5, D Class Units conferred the right to receive both income and/or capital at the rate or rates agreed as a term of the issue of the Unit.

161 Pursuant to clause 15.1, "Prior to the Termination Day" no Unit Holder is entitled to require the Trustee to pay to him any part of the Trust Fund nor to transfer to him any of the assets or property of the Trust Fund nor to deal with any part of the Trust Fund "otherwise than as provided for in this Deed".[21]

162 Clause 17 concerns distributions of the Trust Fund prior to the Termination Day (with clause 18 dealing with distributions as from the Termination Day). Clause 17 reads:

> **TRUST FUND PRIOR TO THE TERMINATION DAY**
>
> 17.1 The Trustee may, from time to time, at the direction of those Unit Holders entitled to vote, determine that all or any part of the Trust Fund be thereupon or at any time distributed, transferred or paid to:
>
> 17.1.1 the C Class Unit Holders in direct proportion to the number of C Class Units held by them at the date of any such determination, or
>
> 17.1.2 all or any of the Beneficiaries living or in existence at the time of the direction to the exclusion of the other Beneficiaries and in such shares and proportions and in such a manner as those Unit Holders entitled to vote have directed.
>
> 17.2 A distribution of the Trust Fund shall be made to the holder or holders of D Class Units at such time or times and at such rate or rates as were provided for in the terms of the issue of each D Class Unit.

163 Clause 28 then deals with redemption of units, the material part of which reads as follows:

---

[21] The "Termination Day" is defined in clause 3.7 as the first to occur of (3.7.1) the day specified in the Schedule [the 80th anniversary of the Deed] or (3.7.2) such date being earlier than the day so specified as the Trustee may in his discretion determine, "with the consent of the Unit Holders." Further, pursuant to clause 3.8 "the consent of the Unit Holders" or "a direction of the Unit Holders" means a consent or direction of a simple majority of Unit Holders who hold a simple majority of units which confer an entitlement to vote.

REDEMPTION AND CANCELLATION OF UNITS

28.1. The Trustee may, with the consent of those Unit Holders entitled to vote redeem and cancel any Unit at the request of the holder thereof and in consideration pay by cash or by transfer of assets to such Unit Holder either the amount or equivalent to the allotment price which would be determined if any allotment was made on that date pursuant to Clause 24 hereof or the amount to which the Unit Holder is entitled under the terms of issue of the Unit to be redeemed.

Resolution

164 TRGC submitted that, given the unit application form required redemption of the D Class Units six months after execution, clause 17.2 required the Trustee to make a final distribution on 19 May 2010.

165 However, the subject matter of clause 17 is concerned with the distribution of the Trust Fund to a unit holder, prior to Termination Day, on the basis of, and with reference to, the units actually held. It has nothing to say about the circumstances in which units themselves might be redeemed and cancelled.

166 Clause 17.2, in particular, makes no provision for payment of a "redemption amount". Rather it makes provision for the "distribution" of the Trust Fund at specified times and at a specified "rate or rates" as provided for in the terms of issue of each D Class Unit.

167 This is to be compared with clause 28, which directly deals with the circumstances in which units themselves are "redeemed" and "cancelled". Unlike clauses 17 and 18, Clause 28 is also not concerned with circumstances relating to the termination of the trust; rather it is concerned with the "redemption" or surrender of the units themselves.

168 Turning then to the terms of issue in this case, the Unit application form makes no provision for a distribution of the Trust Fund at a particular "rate" pursuant to clause 17.[22] Rather, consistent with clause 28, there is provision for payment of a "Redemption Amount" being "equivalent to the sum of the amount invested for the Units" (which is the total sum invested of $500,000).

169 A reasonable businessperson would therefore consider that the circumstances in which a

---

[22] There is provision for a distribution of interest income but this would be governed by clause 16.3.

"Redemption Amount" may be paid are governed by clause 28 and not clause 17.

170 However, this does not assist TRGC. Thus, pursuant to clause 28, the Trustee may only redeem and cancel units under that clause "with the consent of those Unit Holders entitled to vote". Given there was no evidence that any such consent had been obtained, the result is that TRGC is not entitled to the sum of $500,000 as a "redemption amount" pursuant to the terms of the trust deed.

171 It is unnecessary in such circumstances to consider the defendants' further submission that there was never any "Trust Fund" in existence as at May 2010, or subsequently, sufficient to pay $500,000 having regard to the monies in the relevant ANZ bank account.

172 However, the submission appears to be without merit given the concept of the "Trust Fund" in the deed extended well beyond the value of any funds remaining in a bank account.[23] Given the balance sheets for the MAE Pacific Trust as at 30 June 2010 showed the net assets of the trust to be $1,106,918 there appeared to be a sufficient "Trust Fund" to give rise to the obligation, if such an obligation had actually arisen.

173 However, for reasons given already, there is no entitlement to the $500,000 under the Deed in any event.

Summary

174 I am not satisfied that the alleged Payment Representations were made.

175 I am also not satisfied that any such representations were relied upon. Nor am I able to be satisfied that any loss (constituted by failure to redeem the funds under the trust deed) was causally connected to some representation that the advance would be a loan.

176 TRGC has thereby failed to establish its claim for relief based on the making of the alleged

---

[23] Pursuant to clause 3.2, "Trust Fund" included the moneys investments and property paid or transferred as well as moneys investments and property representing the said moneys or into which the same may be converted. Pursuant to clause 3.11 "Property" also included "real or personal property of any kind or tenure, any debt, any chose in action and any estate, right or interest at law or in equity in or over property".

Payment Representations.

177 I am also not satisfied that TRGC has any entitlement to the $500,000 under the Deed for redemption of the Monos units.

178 It follows that the first group of claims fail and the proceeding must be dismissed as against MAE Pacific and Mr Elliott.

Second Claim

179 At various times TRGC made complaint about a number of aspects as to the way the joint venture was conducted. Whether or not these complaints are justified, the pleaded case was restricted to three claims as follows:

- An alleged breach of a joint venture agreement in that MAE Properties "failed to pay the profit" and "failed to account to TRGC with respect to all sales, costs, fees and profits";[24]
- An alleged breach of fiduciary duties in that it "obtained an unauthorised benefit" and "placed itself in a position of conflict";[25]
- A claim for $281,072 as an "account stated".[26]

180 It is these matters only that will be considered, below.

Alleged breach of JV agreement

Terms of agreement

181 The case pleaded on behalf of TRGC was that it entered into a joint venture agreement with MAE Properties which had the following terms:

- TRGC would provide the deposit such that MAE Properties and TRGC could jointly purchase blocks of land;

24 Plaintiff's FFASOC, [32].
25 Ibid [35].
26 Ibid [42].

- MAE Properties would arrange the further sale of the JV Land to third parties either as vacant land or as house and land packages;

- TRGC and MAE Properties would share the administrative costs of such further sales to third parties and would share equally the profit attributable to the increased value of the land component of such sales;

- TRGC would be entitled to repayment of the deposit paid on each block;

- MAE Properties would be entitled to a 3% fee with respect to managing and arranging the sale of each block of land sold, either as vacant land or as a house and land package.[27]

182 The defendants denied the existence of the joint venture agreement pleaded by TRGC but alleged that there was a "Land Agreement" in existence which had substantially similar terms (and which was evidenced in writing by an email sent from Mr Jordan Screen, a lawyer, of 16 February 2010).[28] However, there were two additional material terms alleged as follows:[29]

> - after the deduction from the sale proceeds of these reasonable costs of contract administration and a 3% administration fee to MAE Properties, and refund of the deposit to TRGC paid for the purchase of the said block, the net proceeds of the sale of each block of land or land and house package would be split and paid as to 50% each to MAE Properties and to TRGC.
>
> - TRGC would not be entitled to the return of any monies paid by it as deposits or otherwise in respect of the Land Agreement in the event that on an overall accounting for the blocks, the subject of the Land Agreement, there was no net profit to be split between TRGC and MAE Properties.

183 As the defendants highlighted, there was one piece of objective evidence in relation to the alleged agreement which was an email from Mr Screen, of 16 February 2010, to Mr Elliott which purported to provide a "summary of agreement with John Monos" in bullet points as follows:

> - JM will pay an amount directly into your bank account equal to the deposits for certain Lots (to be identified);
> - JM will assist with identification of specific Lots;

---

27 Ibid [20].

28 Defendant's TFAD, [20A].

29 Ibid [20A(k)]-[20A(l)].

- MAE will buy / contract to purchase the Lots, in MAE's name, and inform JM of the Lots purchased; MAE will market / sell the Lots to 3rd parties, and is responsible for all contract administration / conveyancing etc;
- JM will underwrite the purchase of any Lots that do not sell to 3rd parties (if he does not choose to lose deposit rather than purchase);
- JM will invoice MAE for his consultancy fee (50% of profit share), being for his assistance with identifying each Lot.

184 The evidence of Mr Monos was that there were no meeting where Mr Screen was present at discussions about the land venture (although he also said at another point that he might have been present at one or two conversations). However, he accepted that he and Mr Elliott discussed a profit splitting arrangement on the blocks of land; that he was to pay the deposits; that he was to assist with identification of lots; that MAE Properties was to buy the property in its name; and that there would be an overall accounting and split of net profits which he accepted should be on a 50% basis (though this was not discussed).

185 Given the apparent optimism of both, they never discussed what would happen to the deposit if a sale failed, nor "underwriting" of the deposit.

186 The evidence of Mr Elliott was that he and Mr Monos met Mr Screen at the Green Leaf café and discussed the agreement with him. They derived the "high level points" as itemised in the email of 16 February and intended to come back to fully document the entire agreement (though this was not done).

187 He described the agreement as being that Mr Monos was to contribute the time to identify the specific lots and the provision of seed capital. Mr Elliott was to contribute the expertise and relationships around the marketing channels that would allow the uplift in the land value.

188 His evidence was that the bullet points in the email from Mr Screen "reflects" the agreement. However, the contribution of Mr Monos in identifying lots was to be part of the 50% overall accounting (rather than as a separate consultancy fee).

189 Despite the pleaded case and evidence of Mr Elliott, Counsel for the defendants invited the Court to reject the existence of an agreement in closing, citing, in particular, uncertainty as to whether profit was to be calculated based on any increase in land values alone; the percentage of profit agreed; whether marketing fees were to be included as a cost item; and what was to

occur as to deposits.[30]

190 However, consistently within the pleadings, the position of both men was that profit was only to be calculated on any uplift in the land value, and further, that it was to be on a 50% basis. Although Mr Monos rejected the subtraction of marketing fees, the intention of both appeared to be that any attributable costs should be deducted from the gross revenue. To the extent necessary I also accept the evidence of Mr Elliott that there was a separate marketing cost attributable to the land component. Mr Elliott also accepted that the deposit would be paid back to Mr Monos (but only) if there was a profit.

191 I therefore accept that there was an agreement as follows:

a) that TRGC would provide the "deposit" or other funds (the "deposits") as it determined were appropriate to secure the purchase of certain blocks of land;

b) that Mr Monos would provide assistance with identification of the Lots;

c) that MAE Properties would purchase the lots in its name and inform Mr Monos of the lots purchased;

d) that MAE Properties would market/sell the lots to third parties and would be responsible for all contract administration/conveyancing;

e) that MAE Properties would be entitled to a 3% fee with respect to managing and arranging for sale;

f) that the parties would be entitled to a 50% profit share on a final accounting based on any uplift in the sales proceeds of the land component (only) after deduction of costs;

g) TRGC would only be entitled to the return of any monies paid by it as deposits or otherwise in the event that there was some net profit to be split.

192 The first four matters were reflected in the email of Mr Screen and appeared to be generally

---

30 Defendants' Closing Trial Submissions, dated 17 August 2016, [112] **(Defendants' Closing Submissions)**.

agreed to by the witnesses. However, insofar as (a) was concerned, the agreement as developed appeared to envisage that TRGC might provide seed capital beyond the deposit as occurred with Lots 809 and 845 in the Brookfield estate.[31]

193 In relation to (e), Mr Monos accepted that MAE Properties would be entitled to a 3% fee with respect to administrative work.

194 In relation to (f), as indicated already, both men accepted that it was a 50% profit share arrangement which was based on any uplift in the land component only. Given this position, if any accounting was able to be finalised, it would be appropriate for this to include any properly incurred costs.

195 In relation to (g), the evidence of Mr Monos was that there was no discussion about the return of deposits. Mr Elliott ultimately accepted that the deposits should be accounted for but only in the event that there was a profit. This was consistent with the evidence of both men (as well as the pleaded case) that this was a "profit share" arrangement rather than a loan of the monies advanced by TRGC. It was also consistent with the calculations performed by Mr Monos contained in exhibit B, referred to below.

196 TRGC, however, sought a finding that the agreement was a "joint venture" and, further, that fiduciary relationships arose.

197 In the decision in *United Dominions Corporation Limited* v *Brian Pty Limited*,[32] the High Court stated:

> The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing, money, property or skill.

198 The agreement found would appear to come within such a formulation. Thus, TRGC and MAE Properties constituted an association of persons for the purposes of purchasing and selling blocks of land for mutual profit. TRGC was to identify the land and provide seed

---

31 These blocks were originally pleaded as being purchased pursuant to a separate joint venture but they were included as part of the same JV agreement in the Plaintiff's FFASOC at [26].

32 (1985) 157 CLR 1, 10 (Mason, Brennan and Deane JJ).

capital, while MAE Properties was to contribute skill and knowledge in order to develop and market the lots and maximise the profits achieved.

199 In terms of whether the relationship was one of fiduciaries, engagement in a joint venture is not itself determinative of whether parties are in a fiduciary relationship.[33] However, Dawson J in *United Dominion* observed that a relationship may be fiduciary if the necessary confidence is reposed by the participants in each other.[34]

200 Given MAE Properties appeared to control the management of the project, including the purchase and sales of the properties, the necessary confidence would arise in this case such that it is appropriate to characterise the relationship as one of fiduciaries.

201 However, it remains to consider whether MAE Properties has actually breached the JV agreement as found (**JV agreement**) and/or the equitable and fiduciary duties in the ways that have been pleaded.

Alleged breach of JV agreement/ loss

202 TRGC alleges that wrongfully and in breach of the JV agreement, MAE Properties "failed to pay the profit" attributable to the sales and "failed to account to TRGC with respect to all sales, costs, fees and profits".[35] Further, that "as a result" of this breach TRGC suffered loss and damage which was said to be "lost profits" of $783,018. A fall back position was the sum of $281,072 (which was also the subject of the account stated claim).[36]

203 The relevant term breached was apparently the term pleaded (in paragraph 20(c)) to the effect that TRGC and MAE Properties were to share equally in the overall profit.

204 One other matter also warrants brief mention. Thus, there appeared to be a complaint in closing about a more general failure "to account". It was not always clear what was meant by this complaint but in written closing submissions it was submitted that MAE Properties "failed to account" which "can include explanation as to why payments of moneys are

---

33 Ibid 10-11.
34 Ibid 16.
35 Plaintiff's FFASOC, [32].
36 Ibid [33].

delayed or cannot be made or will require further steps of the joint venturers".[37]

205 No term of the JV agreement is pleaded to the effect that MAE Properties was obliged to "explain as to why payments of money are delayed" nor was the matter addressed. It follows that the matter is outside the matters to be determined by this Court. TRGC also failed to establish (or even address) precisely what remedy should flow even if such a breach was established. It could certainly not be said, for example, that TRGC should be entitled to all of its alleged "lost profits" (as alleged) simply because of any failure to provide information.

206 Returning then to the pleaded case, TRGC needed to demonstrate that there was some profit which MAE Properties "failed to pay". The issue therefore became whether the asserted figure of $783,018 was established; alternatively, whether the evidence established some other "lost profits" amount (including the figure of $281,072).

Evidence of Mr Monos

207 The figure of $783,018 was derived from a handwritten document prepared by Mr Monos and produced for the first time on the second day of the trial. It was adduced into evidence as exhibit B.

208 The methodology adopted by Mr Monos was to take figures from the 1750 spreadsheet document.[38] For each development he took the gross margin, subtracted the "total costs" figure and 3% sales commission figures, and then derived a net profits figure which he divided by two.[39] He then added back the deposit figure provided to give a total owing to TRGC. He also included amounts in respect of "deposits to be refunded" and for "deposits not used" and subtracted amounts received on an ad hoc basis during the course of the joint venture (a total of $230,816).

209 As indicated already, Mr Monos could not clarify precisely when he received the 1750 spreadsheet – the source of his calculations – nor the other spreadsheets adduced into evidence (for example, at 1749 and 1751).

---

37 Plaintiff's Closing Submissions, [145].

38 Though he also had regard to two sale prices from settlement statements.

39 Although this did not appear to be the case with Mr Monos' calculations for lots 809 and 845, despite the plaintiff's concession in closing submissions that there was no entitlement to 100% of the profits on these lots.

210 Under cross-examination, Mr Monos accepted that 1750 was incomplete and at one stage referred to it as a "dogs breakfast" but stated that "it's all we've got".

211 The evidence of Mr Monos was also that at some point some two years ago an accountant, Mr Simon Edwards, was engaged at a fee of $35,000 "to try to see some sense" with spreadsheet 1750. Mr Edwards produced "an accounting document" which was "very complicated" and which would need explanation from Mr Edwards to understand.

212 However, when Mr Monos was asked about Mr Edwards he stated:

> Well, why don't you call Edwards?---Well, will you pay for them? It's like, how far do I go? I don't know – I would have expected - this is what I expected, and I don't know if it I'm living in Fairyland, but I almost expected Michael to have come up with something a little bit more detailed than this by this stage, and so that I don't have to miss out on my lunch and then just keep on adding figures up and going through figures.

213 The matter was further complicated given the defendants had also foreshadowed that they objected to documentation produced by Mr Edwards (which was said to be produced in the course of "without prejudice negotiations"), although the matter was never the subject of submission from either party.

214 The end result was that neither Mr Edwards nor his accounting document was produced. Instead, the Court was left with the 1750 spreadsheet together with the imperfect memory of two men and some limited source documentation.

215 In terms of the documentation required for an accounting, the evidence of Mr Elliott was that three levels of documents were continually produced: source documents; statements of where the land was at a particular time; and an Excel spreadsheet "forecast" document.

216 He further claimed that in order to undertake a final accounting you would need a range of source documentation as detailed in the list of documents set out in a subpoena to MAE Synergy dated 15 July 2016.[40] This included relevant contracts, receipts, adjustment statements, and statements pertaining to costs including stamp duty and penalty interest.

217 He believed that spreadsheet 1750 was actually produced by Mr Edwards and emphasized it

---

[40] Which was prepared pursuant to an order of Elliott J made on 12 July 2016.

was only a "working document" or "budget or forecast" of the land venture at a particular point in time. He emphasized a number of times that it was not intended to be a final account.

218 Specific issues he identified with spreadsheet 1750 included that:

- all transactions were incomplete except for the first 18 which would still need to be reconciled with source documents;
- it was wrong to exclude costs like marketing fees and penalty interest;
- it made no allowance for the fact that they had needed to settle some sales themselves which involved using net profits from other sales and also setting up a line of credit with the ANZ.

Resolution

219 TRGC maintained reliance on exhibit B, and hence spreadsheet 1750. In closing it was also submitted that because there had been an (unpleaded) breach of the joint venture in relation to the Doreen properties (in proceeding to build rather than to forfeit the deposits), this meant that the Court should be more satisfied that an amount was owing as suggested in 1750.

220 Some unpleaded breach that was not fully investigated[41] does not provide any foundation for a claim that profit was owing under the JV agreement.

221 Moreover, even a cursory examination of spreadsheet 1750 suggests that it cannot be relied upon for any final accounting.

222 First, I cannot even be sure as to the date to which it relates so as to be confident as to whether it represents a final account; as indicated already, the spreadsheet itself is not dated and Mr Monos' evidence did not clarify the precise date it was provided.

223 Second, it is clear on its face that it is an incomplete "working document" as Mr Elliott described. Thus, there are obvious omissions on the face of the document with blank fields, references to "TBA", and also references to "#REF!" suggesting calculation errors that were

[41] The matter was not even the subject of evidence by Mr Monos.

not explained. The variance with other amounts said to be "owing" in other documents in evidence also confirms that the document was a "forecast" document only.[42]

224 Third, there was an absence of source documentation necessary to support the calculations contained therein (to the extent relevant calculations are even included). Instead, what the court was provided with was a "mish mash" of selected source documents in no particular order (many of which were "doubled up") without any explanation. This primarily consisted of some settlement statements (for Brookfield and Vantage Point). However:

- many other settlement statements were simply missing;
- the settlement statements adduced were sometimes illegible or were incomplete;
- there was a complete absence of many other source documents which would be needed for any final accounting (which were identified in the subpoena).

225 The factors above of themselves mean that I am unable to rely on spreadsheet 1750 to deriver any final accounting figure. However, there were other issues which were also not explained. For example, there appeared to be inconsistencies in the use of source documents to derive the "contract price" as compared with the "referral price."[43] There also appears to be no attempt to properly account or explain relevant costs such as the costs of the ANZ facility. Further, although the spreadsheet at 1749 includes a column for penalty interest, there is no such column on spreadsheet 1750.

226 It follows that I am unable to be satisfied that TRGC is entitled to the damages of $783,018 sought based on spreadsheet 1750.

227 I have further given consideration to whether some other figure could be identified. However, given the state of the evidence before me, I am simply unable to derive any appropriate "net" figure as profit or otherwise.

---

42 Cf amounts in Court Book 1749 and 1751.

43 Court Book 1639-40 shows the 'Retail Price' of the Vantage Point, Tarneit, Craigilands and Packenham lots. For Craigilands lots 29, 30 and 31 this price has been recorded in 1750 as the 'Referral' price, however for lots 32 and 34 it has been recorded as both 'Referral' and 'Contract' price. For Packenham lot 44 the 'Retail' price is recorded as the 'Referral Price' in 1750 while for Tarneit lots 56, 60 and 63 it is recorded as the 'Contract' price.

228 Insofar as the figure of $281,072 is relied upon, TRGC cites a document which contains the notation "Presented to John 17/10/11" (at CB 556). It contains various columns with entries for the "investment dates and amounts" paid by TRGC (a total of $511,888), as well as columns for the "amounts repaid" and "payment dates" (a total of $230,816). The final column is entitled "Balance of loan" and includes a figure of $281,072 as "Total Owing."

229 The figure represented therefore constitutes the difference between the amounts paid (the deposits or "seed capital") and amounts received. However, it would only be payable in the event that TRGC was to be entitled to a guaranteed return of its (net) investment. Given the evidence of Mr Monos was that there was no discussion about return of deposits and given my findings as to the terms of the JV agreement above, TRGC is not entitled to a return of its invested funds in this way. Instead, consistent with the terms above, the amounts advanced were only to be returned in the event that a profit was obtained.

230 It follows that TRGC is not entitled to the sum of $281,072.

231 I am therefore not satisfied, on the state of the evidence, that MAE Properties has breached the agreement by failing to pay profits in circumstances where TRGC did not establish whether any profit at all was derived.

232 It follows that TRGC has not established any right to damages for lost profits.

233 In closing submissions, TRGC submitted that, "upon a finding that profit was made and is due", a referral for the taking of accounts was sought as a last preference.[44] This was confirmed in oral submissions, that is, Counsel submitted that such a remedy was appropriate if the court was satisfied that there was "money owing". Counsel also conceded that where the documentation was so bad such that it would be futile to make such an order, then there would be "nothing to send out".

234 For reasons given already I am unable to find that any profit is due. Given the state of the evidence, there would be no utility whatsoever in referring this matter for any taking of accounts.

---

44 Plaintiff's Closing Submissions, [189(e)].

235 I am therefore unable to be satisfied that TRGC is entitled to any remedy for an alleged breach of the JV agreement.

Alleged breach of fiduciary duties

236 TRGC alleged that MAE Pacific owed equitable and fiduciary duties not to obtain any "unauthorised benefit" and "not to place itself into a position of conflict." [45]

237 It was further alleged that, by reason of the conduct already pleaded in Part B (in respect of the breach of agreement claim), MAE Pacific had breached such duties in that it had "obtained an unauthorised benefit" and "placed itself in a position of conflict".[46] The Particulars provided then (again) refer to all the allegations concerning the breach of agreement claim and state that "MAE Pacific has, without authorisation retained funds to which TRGC is entitled as a joint venturer".

238 As a result of MAE Properties' breach of these equitable and fiduciary obligations, TRGC alleges loss and damage which was the same "lost profits" of $783,018 or $281,072 as for the breach of contract claim.[47]

239 In closing TRGC again attempted to expand the case beyond the pleadings. Thus, it invited the Court "to examine the whole of the conduct in the light of the learning about fiduciary duties in a wide sense".[48]

240 There is no warrant to examine claims that MAE Properties breached fiduciary duties which were not properly pleaded. Rather, the only two breaches pleaded were that MAE Properties "obtained an unauthorised benefit" and "placed itself in a position of conflict".

241 The pleading does not identify any "position of conflict" which MAE Properties placed itself in; nor was the allegation developed or established in submissions.

242 For reasons given already, I am also not satisfied on the evidence that TRGC can show that MAE Properties "obtained an unauthorised benefit".

---

45 Ibid [34].
46 Ibid [35].
47 Ibid [36].
48 Ibid [147].

243 This claim must also then fail.

Account stated

244 TRGC relied upon an account stated in the "first form" which is where there is an "admission of a debt" citing the following passage from *Bank of New South Wales v Brown*:[49]

> An account stated may take either of two forms (per Jordan C.J. in *Commonwealth Dairy Produce Equalisation Committee Ltd. v. McCabe*). The two forms are explained by Viscount Cave in *Camillo Tank Steamship Co. Ltd. v. Alexandria Engineering Works*:
>
> > "The expression 'account stated', as Mr. Jowitt pointed out in his able argument, has more than one meaning. It sometimes means a claim to payment made by one party and admitted by the other to be correct. An account stated in this sense is no more than *an admission of a debt* out of court; and while it is no doubt cogent evidence against the admitting party, and throws upon him the burden of proving that the debt is not due, it may, like any other admission, be shown to have been made in error. This is the plain result of the authorities, such as *Perry v. Attwood* and *Laycock v. Pickles*.
>
> ...
>
> Although the former kind of account stated, being an acknowledgment of a debt, infers a promise to pay (per Viscount Haldane in the *Camillo Case*, the existence of the debt can be rebutted (*Siqueira v. Noronha*).

245 The evidence relied upon was the document at 556 as "supported by the Financial Statements" in exhibit 12.

246 The document at 556 is dated 17 October 2011 and has been summarised above. The MAE Pacific Properties Balance Sheet as at June 2014 (exhibit 12) also records four "Loans" to TRGC to a total of $281,072.00 which correspond to the "balances of loan" amounts in document 556.

247 The figure therefore effectively represents the appropriate amount owing if the total (net) payments made are to be effectively reimbursed.

248 As a preliminary matter, if there is a debt owed on the basis of this document, it could only arise in October 2011 (not 2010 as alleged by the defendants) given the repayments which go to constitute this amount were not made until that year. In such circumstances the claim would not appear to be statute barred.[50]

---

[49] (1983) 151 CLR 514, 535-6 (emphasis added).

[50] Given the first time the case for an account stated was in the Further Amended Statement of Claim dated 15 July 2016 being within 6 years of when the cause of action accrued under s 5(2) of the *Limitation of Actions Act 1958*

249 However, as established already, the terms of the JV agreement reached did not include any entitlement to the return of monies based on a debt owing. Instead, the parties agreed to a profit sharing arrangement (where no amount of return was guaranteed at all). The effect of any mis-description in a handwritten document and/or financial record is thereby rebutted by evidence as to the true nature of the transaction.

250 The concept of an "account stated" therefore has no application to this case wherein the evidence (and pleaded case) is not based on any debt, but rather an agreement to share profits.

251 It follows that the claim based on an account stated must also fail.

Summary

252 TRGC has failed to establish any entitlement to lost profits on the basis of a breach of the JV agreement and/or breach of fiduciary duties as pleaded.

253 It has also failed to establish an entitlement to relief based on an account stated.

254 The claims of TRGC as against MAE Properties must also fail.

Conclusion

255 The plaintiff's claim should be dismissed.

256 I will hear from the parties on the question of costs.

(Vic).

SCHEDULE OF PARTIES

THE REALLY GOOD COMPANY PTY LTD (ACN 052 239 871) (as Trustee for The Monos Family Trust)	Plaintiff
MAE PACIFIC PTY LTD (ACN 107 155 902) (as Trustee for The MAE Pacific Unit Trust)	First Defendant
MAE PACIFIC PROPERTIES PTY LTD (ACN 139 150 057)	Second Defendant
Michael Cameron Elliott	Third Defendant