FEDERAL COURT OF AUSTRALIA

Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd [2017] FCAFC 141

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| Appeal from: | *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004; (2015) 333 ALR 193 |
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| File numbers: | QUD 923 of 2015  QUD 924 of 2015  QUD 925 of 2015  QUD 1002 of 2015 |
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| Judges: | **DOWSETT, GREENWOOD AND WHITE JJ** |
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| Date of judgment: | 1 September 2017 |
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| Catchwords: | **EQUITY** – consideration of the principles deriving from the authorities and extensive academic writing, to be applied in determining whether in all the circumstances a person or entity owes fiduciary obligations to another – consideration of the coherent body of law developed by Equity in identifying “certain and distinct” obligations which define their own “fiduciary” for their own respective purposes – consideration of whether, upon analysis of the facts, a person or entity has assumed obligations to another or undertaken to act in the interests of another giving rise to fiduciary obligations owed to that other – consideration of the content of the duties owed in all the relevant circumstances – consideration of those matters in the context (among other contexts) of contended obligations owed by an employee of one company within a group of companies, to another asset owning company within the group, not the employer of the employee – consideration of whether a person or entity owing fiduciary obligations to another has a continuing obligation, beyond the termination of the relationship, to make disclosures required to be made to that other as an aspect of the content of the fiduciary obligations assumed by that person  **CORPORATIONS** – consideration of whether the knowledge of a particular senior employee of a company providing real estate agency services is to be regarded as knowledge of the company – consideration of whether the company had a duty of disclosure of the relevant matters falling within the knowledge of the employee – consideration of the employee’s duty of disclosure – consideration of the company’s duty of disclosure having regard to its state of knowledge imputed to it  **PRACTICE AND PROCEDURE** – consideration of the remedies arising out of contended breaches of fiduciary duty and other contended causes of action – consideration of the need to frame the relevant declarations so as to identify the relevant conduct with some precision – consideration of questions of remittal of particular matters to the primary Judge – consideration of matters to be decided by an appeal court in circumstances where that court has taken a different view on factual questions to that of the primary Judge – consideration of the observations of the High Court in *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679; 331 ALR 550 at [43]  **CONTRACTS** – consideration of the relationship between contractual obligations and circumstances giving rise to fiduciary obligations  **REAL PROPERTY** – consideration of the relationship between a real property asset owning entity within a group of companies carrying on property development projects and an entity appointed to provide real estate agency services to entities within the group – consideration of whether a senior representative of the real estate agent entity owed fiduciary obligations and a duty of disclosure to the asset owning entity – consideration of whether the knowledge of relevant matters held by a senior employee is to be knowledge imputed or attributed to the real estate agent entity – consideration of the duty of disclosure of the real estate agent entity – consideration of whether information disclosed to a particular employee of one entity within the group of companies carrying on property development was, in all the circumstances, a discharge of the fiduciary obligation of disclosure |
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| Legislation: | *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Property Agents and Motor Dealers Act 2000* (Qld) |
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| Cases cited: | *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 309 ALR 445  *Anying Group Pty Ltd v Wang* [2012] FCA 702  *Australian Securities Commission v AS Nominees Limited and Others* (1995) 62 FCR 504  *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35  *Barnes v* Addy (1874) LR 9 Ch App 244  *Beach Petroleum NL v Johnson* (1993) 43 FCR 1  *Blair v Martin* [1929] NZLR 225  *Bristol and West Building Society v Mothew [1998] Ch. 1*  *Carr v Finance Corporation of Australia Ltd* *(No 1)* (1981) 147 CLR 246  *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337  *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767  *Conway v Raitu* [2005] EWCA Civ 1302; [2006] 1 All ER 571  *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612  *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 306 ALR 25  *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296  *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41  *John Alexander’s Clubs v White City* (2010) 241 CLR 1  *Landsal Pty Ltd v REI Building Society* (1993) 41 FCR 421  *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 248  *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited* [2017] FCAFC 74  *Longstaff v Birtles* [2001] EWCA Civ 1219; [2002] 1 WLR 470  *Manildra Laboratories Pty Limited v Campbell* [2009] NSWSC 987  *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410  *NZI Securities Ltd v Poignard* (1994) 123 ALR 11  *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11  *Re Coomber* [1911] 1 Ch 723  *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679; 331 ALR 550  *Tag Pacific Pty Ltd v McSweeney* (1992) 34 FCR 438  *Tate v Williamson* (1866) 2 Ch. App. 55 (L.C.)  *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816  *Yong Internationals Pty Ltd v Gibbs* [2011] QCA 161 |
| Date of hearing: | 1, 2 and 3 March 2016 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Number of paragraphs: | 421 |
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| **In QUD 923 of 2015:** |  |
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| Counsel for the Appellant: | Mr A Collins and Mr J Trost |
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| Solicitor for the Appellant: | Carter Newell Lawyers |
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| Counsel for the First Respondent: | Mr D Murr SC and Ms M Painter QC |
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| Solicitor for the First Respondent: | Lander & Rogers Lawyers |
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| Counsel for the Second Respondent: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Second Respondent: | Warlow Scott Lawyers |
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| **In QUD 924 of 2015:** |  |
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| Counsel for the First and Second Appellants and First Cross‑Respondent: | Mr D Murr SC and Ms M Painter QC |
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| Solicitor for the First and Second Appellants and First Cross‑Respondent: | Lander & Rogers Lawyers |
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| Counsel for the First Respondent: | The First Respondent appeared in person |
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| Counsel for the Second Respondent and Cross‑Appellant: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Second Respondent and Cross‑Appellant: | Warlow Scott Lawyers |
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| Counsel for the Third Respondent and Second Cross‑Respondent: | Mr A Collins and Mr J Trost |
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| Solicitor for the Third Respondent and Second Cross‑Respondent: | Carter Newell Lawyers |
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| **In QUD 925 of 2015** |  |
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| Counsel for the First and Second Appellants: | Mr D Murr SC and Ms M Painter QC |
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| Solicitor for the First and Second Appellants: | Lander & Rogers Lawyers |
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| Counsel for the First Respondent: | The First Respondent appeared in person |
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| Counsel for the Second Respondent: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Second Respondent: | Warlow Scott Lawyers |
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| Counsel for the Third Respondent: | Mr A Collins and Mr J Trost |
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| Solicitor for the Third Respondent: | Carter Newell Lawyers |
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| **In QUD 1002 of 2015:** |  |
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| Counsel for the Appellant: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Appellant: | Warlow Scott Lawyers |
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| Counsel for the First and Second Respondents: | Mr A Collins and Mr J Trost |
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| Solicitor for the First and Second Respondents: | Carter Newell Lawyers |

ORDERS

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|  | | QUD 923 of 2015 |
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| BETWEEN: | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Appellant | |
| AND: | INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  First Respondent  ADAM KIMBERLY BARCLAY  Second Respondent | |

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|  | | QUD 924 of 2015 |
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| BETWEEN: | INVESTA PROPERTIES PTY LTD ACN 084 407 241  First Appellant | |
|  | INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  Second Appellant | |
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| AND: | ASHLEY COLIN NANKERVIS  First Respondent | |
|  | ADAM KIMBERLY BARCLAY  Second Respondent | |
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|  | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Third Respondent | |
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| AND BETWEEN: | ADAM KIMBERLY BARCLAY  Cross-Appellant | |
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| AND: | INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  First Cross‑Respondent | |
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|  | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Second Cross‑Respondent | |
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|  | | QUD 925 of 2015 |
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| BETWEEN: | INVESTA PROPERTIES PTY LTD ACN 084 407 241  First Appellant | |
|  | INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  Second Appellant | |
|  |  | |
| AND: | ASHLEY COLIN NANKERVIS  First Respondent | |
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|  | ADAM KIMBERLY BARCLAY  Second Respondent | |
|  | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Third Respondent | |
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|  | | QUD 1002 of 2015 |
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| BETWEEN: | ADAM KIMBERLY BARCLAY  Appellant | |
| AND: | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  First Respondent | |
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|  | VERO INSURANCE LIMITED ABN 48 005 297 807  Second Respondent | |
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| JUDGES: | DOWSETT, GREENWOOD AND WHITE JJ |
| DATE OF ORDER: | 1 september 2017 |

THE COURT ORDERS THAT:

1. Investa Properties Pty Ltd and Investa Residential Group Pty Ltd (the “Investa entities”) lodge with the Court and serve on Ashley Colin Nankervis (“Mr Nankervis”), Adam Kimberly Barclay (“Mr Barclay”), Oliver Hume South East Queensland Pty Ltd (“Oliver Hume”) and Vero Insurance Limited (“Vero”) within

two weeks proposed declarations and orders reflecting the principles described at [409] of the reasons for judgment published today and otherwise giving effect to the reasons.

2. Mr Nankervis, Mr Barclay, Oliver Hume and Vero within seven days thereafter, lodge with the Court and serve on the Investa entities their proposed declarations and orders.

3. The declarations and orders to be made by the Court be determined on the papers, subject to Order 4.

4. Should any party wish to be heard orally on any aspect of the declarations and orders to be made, the Court is to be so notified and the proceedings will be listed for further hearing on those matters.

5. The Investa entities file and serve within two weeks submissions as to the disposition of all issues in relation to the costs of and incidental to the appeal and any proposed costs of and incidental to the primary proceeding.

6. Mr Nankervis, Mr Barclay, Oliver Hume and Vero file and serve, within seven days thereafter, their submissions on the issue of costs referred to in Order 5.

7. Costs are reserved.

8. The parties have liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWSETT J:

# Introduction

1. In these reasons, I shall refer to the various parties as follows:

* Investa Properties Pty Ltd, “Investa Properties”;
* Investa Residential Group Pty Ltd, “Investa Residential”;
* Investa Properties and Investa Residential collectively, the “appellants”;
* Adam Kimberly Barclay, “Mr Barclay”;
* Ashley Colin Nankervis, “Mr Nankervis”;
* Oliver Hume South East Queensland Pty Ltd, “Oliver Hume”; and
* Vero Insurance Ltd, “Vero”.

1. These appeals arise out of the sale of two blocks of land near Ipswich in Queensland. The first, (Lot 170), was sold in June 2009 for $1,454,545. The second, (Lot 191), was sold in June 2010 for $290,000. In each case, the vendor was Investa Residential, a wholly owned subsidiary of Investa Properties. Investa Properties is, in turn, a wholly owned subsidiary of Investa Property Group Holdings Pty Ltd (“Holdings”). The appellants are members of a group of companies owned by Holdings and described in the pleadings as “Investa Property Group”. Within that group the appellants are members of a sub‑group known as “Investa Land”.
2. The proceedings at first instance concerned claims by the appellants that each of Lots 170 and 191 had been sold at less than its true value, and that such sales were the results of the conduct of Mr Barclay, Mr Nankervis and/or Oliver Hume. The appellants sought relief against Mr Nankervis a former employee of Investa Properties, Mr Barclay, a real estate agent and Oliver Hume, also a real estate agent. Mr Barclay was, at relevant times, an employee and director of Oliver Hume. The appellants had also sought relief against another party, Mr Long, a development manager formerly employed by Investa Properties. Proceedings against him were settled prior to trial. I need not say anything more about those proceedings.
3. The Investa Property Group was engaged in land development. Lots 170 and 191 formed part of a residential property development known as “Brentwood”. Lot 170 was sometimes referred to as the “Fossil Site” and sometimes, as “Brittains Rd”.
4. Until 26 May 2010, Mr Nankervis was employed by Investa Properties as its Senior Development Manager. Both Mr Barclay and Oliver Hume were licensed as real estate agents, under the now‑repealed *Property Agents and Motor Dealers Act 2000* (Qld) (the “PAMD Act”). Until 14 April 2011, Mr Barclay was an employee and director of Oliver Hume. Oliver Hume and Mr Barclay were involved in the sale of both lots.

# Lot 170

1. Lot 170 comprised 7.25 ha of mostly steep land. The appellants pleaded that, on 16 July 2008, Investa Residential offered commission to Oliver Hume for the in globo sale of Lot 170. Alternatively, they pleaded that on 27 November 2008 either or both of them offered a commission for the in globo sale of that lot. On 20 February 2009, Investa Residential entered into a deed of put and call (the “Lot 170 option”) in favour of Two Eight Two Nine Pty Ltd (“TETN”) for an exercise price of $1,454,545 plus goods and services tax (“GST”). The sole shareholder of TETN was Mr David Tonuri (“Mr Tonuri”). In June 2009 TETN exercised the Lot 170 option. On 25 June 2009 the parties executed a contract of sale. Settlement occurred on 30 July 2009. The appellants claimed that at the time, the true value of Lot 170 was $4 million. They claimed that at some time before 20 January 2009, Mr Nankervis and Mr Barclay had entered into an agreement with Mr Tonuri (the “Tonuri agreement”), pursuant to which they would participate in, and derive profits from, the sale of Lot 170 to him or his nominee, and from the subsequent development of the lot. The appellants claimed that a conflict of interest had thereby arisen, and that, as a result, the appellants were not informed of material matters affecting the grant of the Lot 170 option.

# lot 191

1. Lot 191 comprised 1,079 m2. On 16 July 2009, Investa Residential appointed Oliver Hume as its exclusive agent to sell a number of allotments in the Brentwood development, including Lot 191. The appointment complied with the requirements of the PAMD Act. On 23 December 2009, Investa Residential entered into a deed of put and call (the “Lot 191 option”). It entitled Queensland Property Centre Pty Ltd (“QPC”) or its nominee to purchase the lot at an exercise price of $195,000 plus GST. At that time, QPC was controlled by Mr Barclay’s wife (“Ms Barclay”). By a contract executed on 25 June 2010, Investa Residential sold Lot 191 to Spencer Projects Pty Ltd (“Spencer Projects”) for a contract price of $290,000. Settlement occurred on 28 July 2010. On settlement, Investa Residential retained $190,497.14 from the sale price and paid $95,000 to QPC. The appellants pleaded, and Mr Barclay and Oliver Hume admitted, that at the time of the contract, Ms Barclay was the sole shareholder and director of Spencer Projects. The trial Judge so found. However, on appeal, it appears to have been accepted by all sides that, at all material times, the sole shareholder and director was Ms Barclay’s daughter, Ms Jaide Spencer Crosbie (“Ms Crosbie”). I shall return to those matters.
2. The appellants alleged that, before November 2009, both Mr Nankervis and Mr Barclay had taken steps to subdivide Lot 191 without disclosing that fact to them, and that they had also failed to inform them of Ms Barclay’s interest in QPC and her alleged interest in Spencer Projects. The connection between the two grounds of complaint is obvious. In general, they seem to have been so treated. Although it seems that the Lot 191 option was extended from time to time, there is no direct evidence that the sale to Spencer Projects was the result of any exercise by QPC of its rights pursuant to that option. However, in the end, it may be that neither that issue, nor that concerning the ownership or control of Spencer Projects matters much for present purposes.

# The claims at trial

1. The appellants sought relief against the respondents on multiple bases.
2. In relation to both Lots 170 and 191, the appellants alleged that each of Mr Nankervis, Mr Barclay and Oliver Hume had breached fiduciary duties owed to them, and that Mr Nankervis had contravened each of ss 182 and 183 of the *Corporations Act 2001* (Cth) (the “Corporations Act”). Section 182 proscribes the use by an employee of a corporation, of his or her position in order to gain an advantage for him‑ or herself, or to cause detriment to the corporation. Section 183 proscribes the use by such an employee of information which he or she has acquired as an employee, to gain an advantage for him‑ or herself, or to cause detriment to the corporation. Although the appellants initially sought an account of profits made by each of Mr Nankervis, Mr Barclay and Oliver Hume by reason of the alleged breaches of fiduciary duty, during the trial, they abandoned those claims and instead sought equitable compensation. In respect of Mr Nankervis’s alleged contraventions of ss 182 and 183, the appellants sought compensation pursuant to s 1317H of the Corporations Act.
3. The appellants brought a third claim against Mr Nankervis, arising out of the relocation of a sales office (owned by Investa Residential) from the Brentwood site to a site owned by Mr Tonuri. The trial Judge dismissed that claim. It is not the subject of any appeal. I need not discuss it further.
4. Save that Oliver Hume did not cross‑claim against Mr Nankervis, each of the respondents made cross‑claims against the other respondents. Mr Barclay also sought an order that Vero Insurance Ltd (“Vero”) indemnify him pursuant to a policy of insurance taken out by Oliver Hume.

# The first instance DECISION

1. The trial Judge found, in relation to Lots 170 and 191, that Mr Nankervis:

* had breached fiduciary duties owed to Investa Properties as his employer; and
* as an employee had breached ss 182 and 183 of the Corporations Act in relation to Lot 170.

1. Her Honour dismissed Investa Residential’s claim that Mr Nankervis owed it fiduciary duties in relation to Lots 170 and 191.
2. The trial Judge also found that:

* both Mr Barclay and Oliver Hume had breached fiduciary duties owed to Investa Residential in relation to Lot 191;
* neither Mr Barclay nor Oliver Hume owed any fiduciary duty to Investa Properties in relation to either Lot 170 or 191; and
* neither Mr Barclay nor Oliver Hume owed any fiduciary duty to Investa Residential in relation to Lot 170.

1. The trial Judge further found that:

* Lot 170 had not been sold for less than its market value; and
* the market value of Lot 191, at the time at which Investa Residential entered into the Lot 191 option (23 December 2009), had been $290,000, $95,000 more than the option exercise price.

1. As to the various cross‑claims, her Honour:

* dismissed the claim by Mr Nankervis to equitable contribution from Mr Barclay and Oliver Hume in respect of the breaches of fiduciary duty found against him;
* dismissed the claim by Mr Barclay to equitable contribution from Mr Nankervis in respect of the breaches of fiduciary duty found against him;
* dismissed the claim by Mr Barclay to indemnity from Oliver Hume in respect of any liability found against him;
* dismissed the claim by Mr Barclay to indemnity from Vero under a policy of insurance; and
* upheld Oliver Hume’s claim against Mr Barclay to the effect that his conduct in relation to Lot 191 was in breach of duties owed to it.

1. The trial Judge made various declarations concerning the alleged breaches and dismissed all cross‑claims other than that by Oliver Hume against Mr Barclay. In respect of that claim, the trial Judge made an order that it “be upheld”. Her Honour then adjourned the matter for consideration of other remedies to which the appellants and Oliver Hume might be entitled. Following the lodgment of the present appeals and cross‑appeals, the trial Judge ordered that the determination of those matters be “stood over” pending their determination.

# The appeals AND APPLICATIONS

1. The appellants, Mr Barclay and Oliver Hume appeal or cross‑appeal (or seek leave to do so), from the first instance judgment. Mr Nankervis has not appealed against any of the declarations or orders which concern him. However he resists the making of any further orders against him. In the current proceedings:

* the appellants appeal against the finding that neither Oliver Hume nor Mr Barclay owed fiduciary duties to either of them in respect of Lot 170;
* Investa Residential appeals against the finding that Mr Nankervis did not owe fiduciary duties to it in relation to Lot 191;
* against Mr Nankervis, the appellants apply for an extension of time in which to apply for leave to appeal against the trial Judge’s finding that the value of Lot 170, as at 25 June 2009, did not exceed $1,454,545;
* each of Oliver Hume and Mr Barclay appeals against the finding that each breached fiduciary duties owed to Investa Residential in respect of Lot 191;
* Oliver Hume appeals against the finding that it is liable for Mr Barclay’s conduct;
* each of Oliver Hume and Mr Barclay appeals against the trial Judge’s finding that, as at 25 June 2010, the market value of Lot 191 was $290,000; and
* Mr Barclay applies for an extension of time in which to appeal against the dismissal of his claims to be indemnified by Oliver Hume and Vero, and the upholding of the claim by Oliver Hume against him.

1. At the commencement of the hearing of the appeal, the Court suggested that the judgment at first instance should be regarded as interlocutory, on the basis that it did not determine finally the rights of the parties in all respects: *Carr v Finance Corporation of Australia Ltd* *(No 1)* (1981) 147 CLR 246. If the judgment is interlocutory, then leave to appeal is required: *Federal Court of Australia Act 1976* (Cth) (the “Federal Court Act”) s 24(1A). The parties had taken the view that those parts of the trial Judge’s judgment and orders which had dismissed claims or cross‑claims, as the case may be, were final, whereas her Honour’s conclusions concerning the value of Lots 170 and 191 at the time of their sales were interlocutory, in that they related to the question of relief, which question her Honour has not finally determined.
2. The Court pointed out that there is authority to the effect that, when a judgment comprises some orders which are final in nature, and some which are interlocutory, all are interlocutory for the purposes of s 24(1A): *Anying Group Pty Ltd v Wang* [2012] FCA 702 at [8]. There is also a line of authorities, commencing with *Tag Pacific Pty Ltd v McSweeney* (1992) 34 FCR 438 in which it has been held that a judgment determining issues of liability in advance of issues of quantum is not interlocutory. The correctness of that approach has been doubted by two Full Courts: *Landsal Pty Ltd v REI Building Society* (1993) 41 FCR 421 at 431 and *NZI Securities Ltd v Poignard* (1994) 123 ALR 11 at [41]. It may also be that *Tag Pacific* is inconsistent with the decision of the High Court in *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767.
3. In these circumstances, the parties proposed that each of the notices of appeal be regarded as an application for leave to appeal, that, where necessary, the time for the filing of any application for leave to appeal be extended, that leave be granted, and that the hearing in each matter proceed by way of appeal. The Court made orders by consent, giving effect to that pragmatic approach, without considering further the character of the judgment at first instance for the purposes of s 24(1A).
4. As at trial, Mr Nankervis was unrepresented on the appeal. At the commencement of the appeal hearing, he informed the Court that he opposed the making of any orders which concerned him but did not wish to make any further submissions. He sought leave to be excused from further attendance at the hearing of the appeal. The Court granted that leave. Mr Nankervis took no further part in the hearing.

# The issues on appeal

1. As best I can tell, the issues for determination identified in the various notices of appeal are as follows:
2. whether the trial Judge was correct in finding that Oliver Hume and Mr Barclay did not owe fiduciary duties to either Investa Properties or Investa Residential in respect of Lot 170, on the basis that neither had been appointed as a real estate agent in respect of that lot in the manner required by the PAMD Act, and because the relationships were not otherwise fiduciary in nature, and whether her Honour’s reasons were sufficient (appellants: grounds 1 and 3);
3. whether the trial Judge should have found that Mr Nankervis owed fiduciary duties to Investa Residential in respect of Lots 170 and 191 and breached such duties, and whether her Honour’s reasons concerning this matter were sufficient (appellants: ground 3);
4. whether the trial Judge erred in finding that, as at 25 June 2010, Oliver Hume and Mr Barclay owed fiduciary duties to Investa Residential in respect of Lot 191 (Oliver Hume: grounds 1, 2 and 3; Mr Barclay: grounds 1, 2 and 3);
5. if the trial Judge was correct in finding that a fiduciary relationship existed between Oliver Hume and Investa Residential in respect of Lot 191, whether her Honour nevertheless erred by:
6. determining the content of the fiduciary obligation by reference to the PAMD Act (Oliver Hume: ground 4(a); Mr Barclay: ground 4(a));
7. failing to find that any such fiduciary obligation was limited to the disclosure of the interest which Mr Barclay’s wife held in QPC and Spencer Projects (Oliver Hume: ground 4(b); Mr Barclay: ground 4(b));
8. failing to find that the disclosure by Mr Barclay to Mr Nankervis of the interest held by Mr Barclay’s wife was a sufficient disclosure of such interest (Oliver Hume: ground 5; Mr Barclay: ground 5);
9. whether the trial Judge erred in concluding that Oliver Hume’s liability to Investa Residential was to be determined by reference to whether Mr Barclay had Oliver Hume’s actual or apparent authority in relation to the provision of real estate services to Investa Residential, and that Mr Barclay’s conduct was within the scope of his actual or apparent authority (Oliver Hume: grounds 6, 7 and 8);
10. whether the trial Judge should have found that, as Mr Barclay was not the controlling mind of Oliver Hume, it could not be vicariously liable for his actions (Oliver Hume: ground 8);
11. whether the trial Judge should have found that Mr Barclay’s conduct in relation to Lot 191 was fraudulent, and without knowledge on the part of Oliver Hume, with the consequence that Oliver Hume should not have been found liable for such conduct (Oliver Hume: ground 9);
12. whether the trial Judge should have found that Investa Residential did not, in any event, suffer a loss and, in particular, that the market value of Lot 191 was less than $290,000 (Oliver Hume: grounds 10 and 11; Mr Barclay: grounds 6 and 7);
13. whether the trial Judge erred in making an order that Oliver Hume’s claim to be indemnified by Mr Barclay “be upheld” (Mr Barclay: ground 3);
14. whether the trial Judge should have found that the market value of Lot 170 was more than $1,454,545 (appellants: grounds 1, 2 and 3);
15. whether the trial Judge erred in finding that Mr Barclay was not entitled to be indemnified by Oliver Hume (Mr Barclay: ground 1); and
16. whether the trial Judge erred in finding that Mr Barclay was not entitled to be indemnified by Vero (Mr Barclay: ground 2).
17. In the course of the hearing of the appeal, the parties appeared to refine some of these issues. The Court raised with the parties the competence of those parts of the appeal which challenged the trial Judge’s assessment of the values of Lots 170 and 191, pointing out that the right of appeal pursuant to s 24 of the Federal Court Act is against a “judgment, decree or order” and not against findings or reasons. No party has appealed, or sought leave to appeal, against an order to which such assessments related. Thus the appellate jurisdiction of the Court has not been invoked in respect of those matters. Counsel acknowledged that this was so. The difficulty may have been caused by the fact that during the conduct of the matter at first instance, there seems, from time to time, to have been a perception that the appellants’ case was based upon the alleged sale of each lot at an undervalue. However, as I understand the matter, such sales were the consequencesof impugned conduct. For that reason, questions of valuation relate only to the quantification of the claimed compensation, and not to proof of any breach of duty. In the end, I do not understand any party to argue that the applications for leave to appeal on these issues raised matters which this Court could presently hear and determine. However, questions of relief remain for determination. The Court should adjourn those aspects of the appeal to a date to be fixed, after the resolution by the trial Judge of all outstanding issues in the case, including any arising out of the current appeals.
18. Some of the parties’ submissions went to the issue of causation of loss for which the appellants seek equitable compensation. These are also matters directly connected to the question of remedies, which matters the trial Judge has adjourned. It would be premature for this Court to express any views about those matters. I do not propose to do so. For these reasons, I shall not address issues (h) and (j) above.
19. It is not entirely clear whether Investa Residential persists in its appeal against her Honour’s finding that Mr Nankervis did not owe it fiduciary duties in relation to Lot 191. Ground 3 of the notice of appeal suggests that it appeals concerning both Lots 170 and 191. However, in its written submissions, at para 1.2 it seems to suggest that Lot 191 was the subject of proceedings at first instance but that, on appeal, it is only the subject of the respondents’ appeals. At paras 2.3‑2.5, the appellants make submissions concerning Lot 170 but not concerning Lot 191. At paras 4.6‑4.8, there is reference to Lot 191, but apparently for the purpose of criticizing the trial Judge’s reasoning concerning Lot 170. In the written submissions, there is no further reference to Lot 191, as it concerns Mr Nankervis, until para 8, headed “Conclusion”, where the appellants seek relief against Mr Nankervis in connection with that lot. The matter was addressed to some extent in oral submissions. For reasons which appear below, I have, in any event, concluded that Mr Nankervis owed no fiduciary duties to Investa Residential.

# Further background circumstances

1. Within the Investa Property Group the functions of Investa Properties were:

* the employment of the staff of Investa Land in Queensland;
* the leasing of Investa Land’s offices;
* the provision of finance for the acquisition of land;
* the incorporation of subsidiaries to acquire and sell land;
* the implementation of policy decisions made by Holdings; and
* the making of managerial‑level decisions concerning the acquisition, development and sale of land.

1. Investa Residential owned residential developments and, at the direction of Investa Properties, was responsible for contracting with real estate agents in relation to the sale and marketing of land, including Lots 170 and 191.
2. The operations of Investa Property Group were managed by a “Group Executive” who, at relevant times, was Mr Jenkins. He had delegated authority from Holdings to approve submissions made by responsible units for the acquisition, sale or development of land. In some cases, depending upon the amount of money involved, he may have had to refer matters to a superior (the Chief Executive Officer) for decision.
3. As already noted, Investa Properties employed Mr Nankervis as a Senior Development Manager. His responsibilities included the preparation of financial and feasibility reports and the making of recommendations relevant to land development and sales. He was a member of the group referred to as the “Project Control Group”, which group dealt with the development and sale of Lots 170 and 191.
4. Investa Properties made the decision to purchase the land comprising the Brentwood development. It arranged the provision of $48 million to Investa Residential for that purpose. On 31 October 2003, Investa Residential entered into a contract to purchase the land for $48 million. Completion of the purchase occurred on 4 May 2007. In mid‑2008, Investa Properties decided to sell Lot 170 as a single lot, rather than to develop and market it as individual lots. The circumstances in which it made that decision are not presently material. I do not understand any of these matters to have been in dispute at the trial. Subject to one qualification, I infer that Investa Residential had no employees and made no decisions, but rather acted in accordance with directions from Investa Properties. I base this inference upon the scope of Investa Properties’ duties, and various assertions by the appellants in the statement of claim to the effect that Investa Residential acted in transactions at the direction of Investa Properties. This conclusion is relevant to my consideration of the assertion that Mr Nankervis, an employee of Investa Properties, owed fiduciary duties to Investa Residential. The qualification is that in at least one place, Mr Mark Waters is described as the “State Manager Queensland” of “Clarendon Residential Group”, perhaps a shorthand reference to Investa Residential, which company was previously known as Clarendon Residential Group Pty Ltd. The relevant document is annexure “CH-5” to the affidavit of Cameron Richard Holt filed on 6 December 2013. However that document makes it clear that Mr Waters required approval from higher authority for the proposed sale of Lot 170. Further, in para 1A(c) of the statement of claim it is pleaded that all staff in the Investa Property Group were employed by Investa Properties.

# THE INCURRENCE OF FIDUCIARY OBLIGATIONS

1. Since the decision of the High Court in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, it has been accepted in this country that a fiduciary duty arises out of an undertaking, express or implied, by the person incurring such duty. At 68‑69, Gibbs CJ said:

The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another - e.g., partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.

In the present case McLelland J. said that there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is, in his opinion, analogous to a trust. Secondly, he said that the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power. The learned members of the Court of Appeal considered that the first of these statements needed a qualification which McLelland J. had intended to suggest, namely that the undertaking to act in the interests of another meant that the fiduciary undertook not to act in his own interests; they said that the principle is that "a fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interests of another and not in his own". They added that it is not inconsistent with this principle that a fiduciary may retain that character although he is entitled to have regard to his own interest in particular matters.

1. At 69, Gibbs CJ observed:

I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.

1. At 72, his Honour said:

The test suggested by the Court of Appeal in the present case seems to me not inappropriate in the circumstances, although it must be remembered that any test can only be stated in the most general terms and that all the facts and circumstances must be carefully examined to see whether a fiduciary relationship exists ... .

1. More frequently quoted is the statement by Mason J at 96‑97 as follows:

Because distributor-manufacturer is not an established fiduciary relationship, it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the concept, preferring instead to develop the law in a case by case approach, we have to distil the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide. In so doing we must recognize that the categories of fiduciary relationships are not closed ... .

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations ... trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed ... . Thus a mere sub‑contractor is not a fiduciary. Although his work may be described loosely as work which is to be carried out in the interests of the head contractor, the sub‑contractor cannot in any meaningful sense be said to exercise a power or discretion which places the head contractor in a position of vulnerability.

That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

1. Some few years after the *Hospital Products* decision, the late Justice BH McPherson, then of the Queensland Court of Appeal, published a speculative analysis of it. In his article “Fiduciaries: Who Are They?” (1988) 72 ALJ 288, the author observed that the *Hospital Products* decision established that it was the undertaking or agreement, “to act for or on behalf of another person in the exercise of a power of discretion which will affect the interests of that other person in a legal or practical sense”, which gave rise to a fiduciary duty. Concerning such undertaking, the author observed:

A difficulty with the concept of "undertaking" in this context is that it clearly includes an implied or inferred, as well as an express, undertaking. If the courts consider that someone ought to be treated as a fiduciary for the particular purpose in hand, they will say that he has "undertaken" or agreed to act in the interests of another person. Does the errand boy really "undertake" or agree to act in the interests of another? It would be more accurate to say that he is instructed to act in the interests of another (and, because he is an employee, he does what he is told). We should take care not to start talking of "constructive undertakings", which is a notorious form of judicial self-deception.

1. The reference to the “errand boy” is to a well‑known observation by Fletcher Moulton LJ in *Re Coomber* [1911] 1 Ch 723 at 728. Later in these reasons I set out the relevant passage.
2. In *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 540‑541 the Full Court applied the observations by Gibbs CJ and Mason J as to the need for an undertaking of the relevant nature, and then discussed other aspects of that case, concluding as follows:

In the end, an important question - if not the question - is whether, in the words of Professor Finn:

''the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement."

1. The expectation there identified presumably reciprocates the actual or implied undertaking referred to in *Hospital Products*.
2. In *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 at [271]‑[274], Jacobson J applied the decisions in *Hospital Products* and in *News Ltd*. At [272]‑[273] his Honour said:

272 Apart from the established categories, perhaps the most than can be said is that a fiduciary relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests but all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary ... .

273 Other factors that have been referred to in the authorities as pointing to the existence of a fiduciary relationship will also be important. But they will be so only to the extent that they disclose an expectation in one party that the other will act in his or her interests.

1. At [274], his Honour referred to the statement by Professor Finn which was cited in *News Ltd* and is cited above. However his Honour added further lines from the same statement as follows:

The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other’s affairs or so align him with the protection or advancement of that other’s interests that foundation exists for the ‘fiduciary expectation’.

1. In *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 309 ALR 445 at 666‑7, the Full Court identified the features of a fiduciary relationship as follows:

(1) The “critical feature is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person” ... .

(2) It is the element of undertaking (from the point of view of the fiduciary) or obligation (for and on behalf of the beneficiary) that has the consequence that equity insists that the principal must act in the “interests of” or “for the benefit of” the beneficiary rather than in the principal’s own interests ... .

(3) Whether a fiduciary relationship exists in a particular case, and if so, the scope of that fiduciary relationship, are matters which depend critically upon the particular circumstances of the case ... .

(4) The characteristics which define a fiduciary relationship cannot be exhaustively defined. It is inappropriate to treat the existence of a fiduciary obligation as being dependent upon whether the principal and beneficiary fall into a particular status relationship ... .

(5) Similarly, whether a fiduciary relationship has come into existence does not depend upon the motivation or desire of one party to establish a relationship of trust or confidence. What matters is whether there is a relationship involving the requisite undertaking, determined as a matter of objective characterisation, rather than by having regard to the subjective expectations of the parties ... .

1. I also note the Full Court’s reliance on Professor (now Justice) Edelman’s article “When Do Fiduciary Duties Arise?” (2010) 126 LQR 302. The author adopted the observations by Professor Finn (later Justice Finn) (in *Fiduciary Obligations* (Law Book Company 1977) at p 2) that a person is not subject to fiduciary obligations because he is a fiduciary. Rather he is a fiduciary because he is subject to such obligations. It is then argued that such duties inevitably arise, either expressly or impliedly, out of an undertaking to act. That proposition is inherent in the decision in *Hospital Products*. See, for example, 72‑73 per Gibbs CJ and 97‑98 per Mason J.
2. I should say something about the decision of Finn J in *Australian Securities Commission v AS Nominees Limited and Others* (1995) 62 FCR 504. The relevant aspect of that decision depends upon two earlier decisions. The first decision is that of the Court of Appeal in *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11. In that case agents who had been employed to procure an advance for their principal, retained, for that purpose, and with the consent of their principal, a sub‑agent. The agents and the sub‑agent were to share the commission. The sub‑agent was aware that the agents were acting for the principal. The sub‑agent procured the advance from a lender and, without the knowledge of the principal or the agents, received a commission from that lender. The trial Judge found that there was a contract of agency as between the principal and the sub‑agent but also found that the sub‑agent was in a fiduciary “position” in relation to the principal. On appeal, at 17‑18 Collins MR said:

The learned judge appears to have come to the conclusion that in fact there was privity of contract between Evan Jones & Co. and Cowperthwaite; but he also seems to have come to the conclusion that, whether there was such privity or not, Cowperthwaite was in a fiduciary position in relation to Evan Jones & Co.; that, inasmuch as he knew that the advance for which he was negotiating at the instance of Powell & Thomas was an advance which they had been employed by Evan Jones & Co. to procure for a commission which he was to share, he stood in a fiduciary relation to the latter, which debarred him from making a private profit for himself out of the transaction without their knowledge or consent. I think that the conclusion of the learned judge was quite right. If it were necessary to establish privity of contract between Evan Jones & Co. and Cowperthwaite, which, in my judgment, is not the case, there appears to me to have been abundant evidence to support the conclusion that Cowperthwaite did occupy the position of agent to Evan Jones & Co., when the negotiations were taking place through him with the Law Guarantee and Trust Society.

1. The second decision was that in *Blair v Martin* [1929] NZLR 225. In that case a firm of solicitors acted for Blair who had deposited money with the firm for investment. Martin was a law clerk, employed by the firm to do general conveyancing work and, on behalf of the firm, to take clients to “inspect mortgage securities”. Martin had been attending to Blair’s work for about 11 months. Previously, a partner had attended to that work. Blair, at the firm’s premises, asked Martin to find a suitable investment. At that time Martin held a second mortgage over certain property. Martin did not disclose his ownership of it but made representations as to its quality and sold it to Blair. He did not advise the relevant principal of the firm that Blair was buying his (Martin’s) property. The property was subsequently sold by the first mortgagee. The amount secured on the second mortgage was not paid. At 228‑229 Kennedy J said:

Upon these facts the plaintiff is entitled, in my opinion, to have the transaction set aside. He will be entitled to that relief whether in procuring a suitable investment Messrs. Bennett and Jacobsen were acting as solicitors for the plaintiff, or whether they were acting merely as agents and not as solicitors. The plaintiff, because of where he found the defendant, and because of his past associations with him as a clerk in the employ of Messrs. Bennett and Jacobsen, reposed confidence in him. In my opinion the defendant, when he proceeded to submit investments to the plaintiff, was in a fiduciary relationship to the plaintiff; and his relationship to the plaintiff was, under the circumstances, none the less fiduciary because he was a clerk in the service of Messrs. Bennett and Jacobsen. When the defendant was requested to find a suitable investment for the plaintiff he was in fact instructed as a member of the staff of Messrs. Bennett and Jacobsen; and when he sold his own mortgage without disclosing his interest he was guilty of a breach of duty, and none the less because he was a clerk and not a principal. If the defendant had been merely an agent to find an investment he could not, without breach of duty to his principal, have sold his own property without disclosing his interest. He could not be allowed to assume a position in which his duty to his principal and his own self-interest might conflict. In this case it appears that the defendant was desirous of realizing his second mortgage; and he had every motive of self-interest to represent this mortgage as a good and sound investment, although, in the events which have happened, there may be some doubt whether the investment really was a good and sound investment.

1. At 231 his Honour said:

The same considerations which apply to a purchase by a solicitor from his client apply also to a sale by a solicitor to his client. The obligations of a clerk in the service of a solicitor, to whom the solicitor has delegated a matter or to whom the solicitor's client goes direct, are no less in the matter upon which the clerk proceeds than the obligations of the solicitor ... . The solicitor's clerk will, in those circumstances, although there be no privity of contract between him and the client, stand in a fiduciary relation to the client ... , and therefore will be bound before selling his own property to the client to make full disclosure to him.

1. In *AS Nominees*, Finn J was concerned with a quite complex fact situation, involving trusts and companies with overlapping directorships. However one person, Windsor, appears to have controlled the overall operation. He and his wife were the ultimate recipients of any profits. Two companies “ASN” and “Ample” were the trustees of various trusts, ASN’s trusts being superannuation trusts, and Ample’s trusts being unit trusts. A third company, “Securities” managed ASN and Ample. It also managed the trusts on behalf of each trustee. The company boards were effectively of similar composition. Windsor controlled Securities and was a deemed director of ASN and Ample. ASN and Ample paid management fees to Securities. The affairs of ASN, Ample and the trusts were mismanaged. The Australian Securities and Investments Commission sought to wind up all three companies on the just and equitable ground. A question which arose in the course of the hearing was as to whether Securities owed fiduciary duties to the beneficiaries of the trusts. Finn J considered this question at 519‑521. In each of two of the unit trusts the relevant trust deed appointed Securities as manager and provided that the manager’s services were for the benefit of both the trustee and the unitholders. However his Honour chose not to base any findings as to fiduciary obligations upon these provisions. At 520 his Honour said:

It is the case that Securities has acted as a manager for both the SIPs and the Ample trusts. By manager I mean the party who sought out both investors in, and investments for, the trusts. As will be seen, Windsor was a pivotal figure in securing the commitment of the trusts to some number of the investments to be examined even if, as a matter of legal form, the investment decision itself may have been made by the board of the particular trust company concerned. Again as I have noted the benefit of all fees derived from the SIPs and the Ample trusts (less expenses) have been passed on to Securities.

1. At 521, his Honour continued:

Turning directly to the fiduciary question, my preferred approach is to resolve it by reference to what Securities in fact did for the trusts and to the context in which this occurred. The ASC has submitted that Securities, in any event, is in a fiduciary relationship with the investor-beneficiaries. That conclusion is one with which I agree for the following reasons.

Even if it is the case that Securities can properly be said as a matter of legal form to be the manager for, or the agent of, the trustees (that is, ASN and Ample) in performing services for the trusts, this by no means precludes a finding that it is, as well, in a direct fiduciary relationship with the beneficiaries of the trusts when providing those services ... .

When one has regard:

(a) to the functions actually performed for the trusts by Windsor who is Securities' alter ego ... ;

(b) to the level of responsibility for identifying and securing trust investments in fact conceded to Windsor by the boards of ASN and Ample;

(c) in the case of SIPI and SIP3, to the terms of the respective trust deeds and of the "Manager's" undertakings in them;

(d) to the appreciation Windsor must reasonably be taken to have had of the vulnerability of the trusts to Securities' actions; and

(e) to the awareness he must reasonably be taken to have had that the function Securities was performing was for the benefit of the trust beneficiaries,

the conclusion in my view is irresistible that Securities was in a fiduciary relationship with the beneficiaries of the respective trusts in rendering services to them.

The more prominent of the criteria which have been endorsed or relied upon in case law in this country for identifying fiduciary relationships - (a) undertaking ... (b) vulnerability to another's power or vulnerability necessitating reliance ... ; and (c) reasonable expectation ... - when applied to the factors I have identified above, confirm in my opinion the conclusion I have reached. Securities is so circumstanced vis-a-vis the beneficiaries of the various trusts of ASN and Ample that the beneficiaries of each individual trust are entitled to expect that Securities will act in the interests of those beneficiaries to the exclusion of its own or any third party's interests, in its dealings for or on behalf of that trust.

1. In *Powell*, the fiduciary relationship arose out of the undertaking by the sub‑agent to procure the advance and related only to that transaction. In *Blair v Martin*, Kennedy J appears to have proceeded on the basis that the fiduciary duty had arisen at a point in time prior to the transaction in question, at the point, “when [Martin] proceeded to submit investments to [Blair]”. There seems to have been an identifiable point at which a principal of the firm transferred to Martin the responsibility for advising Blair. In *AS Nominees*, Finn J proceeded upon the basis that the “more prominent” criteria for identifying fiduciary relationships were:

* the undertaking;
* vulnerability of the beneficiaries to Securities’ power or vulnerability necessitating reliance on Securities; and
* reasonable expectation, on the part of the beneficiaries that Securities would act in their interests to the exclusion of its own or any third party’s interest.

1. Securities obviously gave the relevant undertakings when it agreed to manage both the trustees and the trusts. As appears from the reasons of Mason J in *Hospital Products* at 96‑97, the vulnerability is that which arises out of the opportunity given to the fiduciary to exercise a power or discretion to the detriment of the person to whom the duty is owed. Any reasonable expectations presumably must arise out of the undertakings.
2. The relationship of principal and agent generally comprises at least some fiduciary duties. It is helpful to consider the question of such duties in that context. In *Bowstead & Reynolds on Agency* (20th ed, Sweet & Maxwell 2014) the authors say at 1-019:

**Incomplete agency: internal relationship only‑the "canvassing" or "introducing" agent.** Article 1(4) seeks to achieve completeness by taking in a well-established type of intermediary who makes no contracts and disposes of no property, but is simply hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves. In effecting such introductions he is remunerated by commission, which he may sometimes take from both parties. Such a person is a common figure in most western legal systems and may well be referred to as an agent. The most obvious example of such an intermediary in the English cases is the estate agent, who introduces purchasers to vendors and tenants to lessors of houses, and vice versa. Such persons are sometimes also referred to as brokers, and indeed in some English‑speaking countries the estate agent is referred to as a "real estate broker": but this may be misleading since the current practice, at any rate in England, is to use the term "broker" for persons who go beyond introductions and certainly do make contracts for their principals, e.g. commodity brokers, insurance brokers and stockbrokers. Canvassing agents are on the fringe of the central agency principles used by the common law, since their powers to alter their principals' legal relations are at best extremely limited. They often, however, have authority to receive and communicate information on their principals' behalf, and in so doing have the capacity to alter their principals' legal position. They also usually act in a capacity which may involve the repose of trust and confidence, and hence may be subject in some respects to the fiduciary duties of agents towards their principals. They are also subject of typical rules, largely developed in estate agent cases, as to entitlement to commission, which are normally regarded as part of agency law and are relied on also by agents who have greater powers to bind their principals. They may sometimes hold money (e.g. deposits) for their principals. The rules applicable to the internal relationship between principal and agent will therefore apply as appropriate, and for this reason such persons should certainly be treated in a work on agency even though they lack the external powers of the agent. It is an advantage of the formulation of basic agency principle in Article 1, which selects the internal relationship between principal and agent as a distinguishing feature of agency, that it can be taken to cover such persons. Canvassing agents are persons to whom the internal parts of agency law may apply, but who, because of the limited nature of their external powers to affect their principals' legal positions, are not agents in the full sense of the word. They may therefore be said to provide an example of "incomplete agency".

(Footnotes omitted.)

1. The authors then refer to the following passage from the reasons of Fletcher Moulton LJ in *Re Coomber* [1911] 1 Ch 723 at 728‑729:

It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the court with regard to them. In my opinion there was absolutely nothing in the fiduciary relations of the mother and the son with regard to this house which in any way affected this transaction.

1. The authors then continue:

It is certainly true that fiduciary relationships arise in situations other than those of agency. Nevertheless, it is submitted that the fact that an agent in the strictest sense of the word has a power to alter his principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship. To do so will not mislead so long as two things are borne in mind. The first is that the word "agent" can be used in varying senses, and not all persons to whom the word is applied are agents in the full (or sometimes, any) legal sense. A canvassing, or introducing agent, for instance, may do no more than bring two parties together and thus may in many situations do little involving the incidence of fiduciary responsibilities at all; though equally he can, as has been stated above, in some circumstances become liable for breach of such duties, as when he conceals from his principal the existence of further offers. Further, even canvassing agents usually have authority to make and receive communications on behalf of their principals, and can be expected to act loyally in exercising those powers. A distributor or franchisee, though sometimes called an agent, is in most respects in a position commercially adverse, rather than fiduciary, to the person whose goods he distributes: he buys and resells. But again it is conceivable that circumstances might give him knowledge of and power over his principal's affairs which could justify the imposition of some fiduciary duties; and this is quite apart from the possibility that he may also in some circumstances exercise true agency functions, for example as regards complaints concerning the goods, and be subject to fiduciary duties in that respect.

The second matter which should be borne in mind is that the extent of an agent's equitable duties (a phrase that embraces more than the strictly fiduciary duties to avoid conflicts of interest and not to profit) and also common law duties may vary from situation to situation. For example, a person who is certainly an agent in general, but who is authorised on a particular occasion to carry out an exactly specified act, may on the occasion act in no more than a ministerial capacity, even though he affects his principal's legal position. Nevertheless, even a messenger may have to decide what to do if the person to whom he is sent is not there. To take another example, a person otherwise at arm's length with a claimant with whom he is proposing to contract may have a limited authority to act for the claimant, for example in filling out the blanks in the document recording the contract. In so doing he may be required both to adhere to the mandate given and to exercise it in good faith. In many situations the duty may be, by virtue of the circumstances, limited; or restricted or even excluded by contract. "The precise scope of [the obligation] must be moulded according to the nature of the relationship."

(Footnotes omitted.)

1. I cite this passage at length for two reasons. First, it seems to be quite uncontroversial in the way in which it deals with the incurrence and incidents of a fiduciary relationship. Second, the discussion seems appropriate for application to an agency for sale, which relationship may or may not be contractual in nature. I have in mind the arrangement by which a real estate agent undertakes to find a buyer. Obviously, the passage is of more relevance to the case concerning Oliver Hume and Mr Barclay than to that concerning Mr Nankervis.
2. As I understand it, the appellants’ case is that any relationship, fiduciary or otherwise, between Mr Nankervis and either Investa Properties or Investa Residential must have arisen primarily out of duties to be performed by him as an employee of the former. I understand that the alleged fiduciary relationship, in each case, depends upon the same circumstances and relates to both Lot 170 and Lot 191. The situation as between Oliver Hume, Mr Barclay and each appellant is more complicated. Oliver Hume accepts that it was in a fiduciary relationship with Investa Residential in relation to Lot 191, but not necessarily at relevant times. It seems that Oliver Hume’s retainer was withdrawn with effect from 8 February 2010. The contract of sale to Spencer Projects was executed on 25 June 2010. It denies that it was in any such relationship with Investa Residential in relation to Lot 170. It denies that it was in a fiduciary relationship with Investa Properties at any time, and in relation to either lot. Mr Barclay denies that he was in a fiduciary relationship with either company in relation to Lot 170. Although it is not entirely clear, it seems that he now accepts that in relation to Lot 191, he owed a fiduciary duty to Investa Residential, which duty arose out of his employment with Oliver Hume and/or his position as a director. As with Oliver Hume, Mr Barclay does not accept that he had such obligations at relevant times, given the termination of Oliver Hume’s retainer on 8 February 2010. The case against Oliver Hume is largely based upon its liability for Mr Barclay’s conduct. It is convenient that I deal with the case against each of Mr Nankervis, Oliver Hume and Mr Barclay separately.

# WAS THERE A RELEVANT FIDUCIARY RELATIONSHIP BETWEEN MR NANKERVIS AND INVESTA RESIDENTIAL IN RELATION TO LOT 170 OR LOT 191?

1. The trial Judge found that Mr Nankervis owed fiduciary duties to Investa Properties, and that he acted in breach of those duties. However her Honour declared that there was no relevant fiduciary relationship between him and Investa Residential. Her Honour gave no reasons for this decision, save for an observation that the fact that a fiduciary duty was owed to a parent company did not necessarily lead to the conclusion that a similar duty was owed to a subsidiary.
2. Mr Nankervis was employed by Investa Properties, not Investa Residential. Hence one must look elsewhere for circumstances which may have created a fiduciary relationship between them. The appellants’ case seems to be that a fiduciary relationship emerged from the matters pleaded at paras 1A, 1B, 2, 3, 5, 16, 17, 18 and 19 of the statement of claim. Paragraphs 1A, 1B, 2, 3 and 5 are as follows:

1A. At all material times:

(a) Investa Properties was part of a group of companies known as the Investa Property Group, the holding company of which was [Holdings].

(b) Investa Properties acted as the land development division of the Investa Property Group (in which capacity it was also known and referred to as "Investa Land").

(c) For the purpose of carrying out land development, Investa Properties:

(i) employed all staff of the Investa Property Group;

(ii) maintained offices and equipment;

(iii) engaged architects, planners, engineers, other professional consultants, builders and contractors;

(iv) provided or arranged finance for the purpose of acquiring and developing land;

(v) incorporated or acquired subsidiaries for the purposes of acquiring land at its direction, holding the legal title to land on its behalf, selling land at its direction, and remitting the proceeds of sale at its direction; and

(vi) through its directors, officers and employees, implemented the policy decisions of [Holdings] and made all managerial‑level decisions relating to the acquisition, development and sale of land.

1B. At all material times, Investa Properties was engaged in the development of a site at Cardena Drive (off Augusta Parkway), Augustine Heights, Ipswich, Queensland (the Brentwood Site).

2. [Investa Residential] (formerly known as Clarendon Residential Group Pty. Ltd.):

(a) is, and was at all material times, part of the Investa Property Group;

(b) is, and was at all material times, a wholly owned subsidiary of Investa Properties; and

(c) was at all material times:

(i) the registered proprietor of the land the subject of these proceedings, holding that land at Investa Properties direction; and as such,

(ii) the entity that, at the direction of Investa Properties, contracted with real estate agents in connection with the sales and marketing of the land the subject of these proceedings; and

(iii) the vendor, at the direction of Investa Properties, in the contracts of sale of the land the subject of these proceedings.

3. Investa Properties employed the first respondent, Ashley Colin Nankervis:

(a) initially in the position of Development Manager and then in the position of Senior Development Manager, reporting to the Queensland General Manager; and

(b) pursuant to a contract of employment signed by Nankervis on 8 March 2006.

5. Nankervis's duties included:

(a) preparing financial and feasibility reports and reporting to internal management, including making recommendations on relevant matters;

(b) project management including managing project negotiations and ensuring all contracts were accurately prepared and delivered in accordance with Investa Properties' obligations;

(c) managing all projects to ensure compliance with all relevant regulatory, legislative and corporate policy requirements and obligations;

(d) managing land sales including tracking of land sales on a weekly basis;

(e) managing project negotiations and ensuring the accurate preparation of contracts and liaising with and appointing contractors and planners on behalf of Investa Properties; and

(f) approving and/or recommending sales prices for lots within the Brentwood site.

Particulars

Position Description - Senior Development Manager Investa Land - Qld Residential.

1. At para 16 of the statement of claim the appellants plead:

By reason of the positions of Development Manager and Senior Development Manager held by Nankervis, and the responsibilities that he discharged, and the relationship between Investa Properties and Investa Residential Group as alleged in paragraphs 1A and 2 above, at all material times during his employment, Nankervis:

(a) had fiduciary obligations to Investa Properties and [Investa Residential] to:

(i) act in good faith and with fidelity;

(ii) avoid and disclose to Investa Properties or to [Investa Residential] all actual or perceived conflicts of interest;

(iii) act in the best interests of Investa Properties and [Investa Residential]; and

(iv) give Investa Properties and [Investa Residential] the full benefit of his knowledge and skill, and in particular, pass on to Investa Properties or to [Investa Residential] all information that he had about the marketing and sale of the properties that were the subject of his employment, that might be relevant to the marketing and sale;

(v) not profit from his position, other than by receiving remuneration in the course of his employment with Investa Properties, without full disclosure to and the informed consent of Investa Properties and [Investa Residential]; and

(vi) not assist

* any person with whom he was associated; or
* any entity in which he had an interest; or
* any person or entity from whom or from which he could expect a benefit,

to purchase any of the properties he was engaged in the marketing and sale of, without full disclosure to and the informed consent of Investa Properties and [Investa Residential]; ...

1. At para 18, the appellants plead that Mr Nankervis answered to the Queensland General Manager, presumably of Investa Properties. Paragraph 19 is as follows:

Nankervis:

(a) was responsible for the overall management of the Brentwood Site; and

(b) was responsible for signing off on all relevant stage releases in the Brentwood site.

1. Neither the term, “overall management of the Brentwood Site”, nor the term, “signing off on all relevant stage releases”, has any precise meaning. In effect the question must be whether, in entering into employment with Investa Properties, or perhaps at some time thereafter, Mr Nankervis expressly or impliedly undertook fiduciary obligations to Investa Residential, the owner of Lots 170 and 191. Investa Residential was a company with no employees. It permitted Investa Properties to manage its business. Such management included decision‑making concerning the acquisition and sale of properties. In effect Investa Residential made no decisions.
2. The effect of the pleading seems to be that the fiduciary relationship emerged from:

* the fact that Investa Properties and Investa Residential were part of a group of companies in which Investa Properties performed most, if not all group functions; and
* the nature of Mr Nankervis’s duties as an employee of Investa Properties.

1. There is no suggestion that Investa Properties was in a fiduciary relationship with Investa Residential. Nor is there, in para 5 of the statement claim, any suggestion that Mr Nankervis had any particular duties concerning Investa Residential. Rather, I infer from paras 1A(c) and 5 that Mr Nankervis would, from time to time, perform functions as an employee of Investa Properties, but relevant to the affairs of Investa Residential. Paragraph 16 of the statement of claim is problematic, particularly if one keeps in mind Professor Finn’s statement that the incurrence of fiduciary duties is the basis for finding the existence of a fiduciary relationship. The pleader seems rather to assert that the relationship gave rise to the duties. Paragraphs 1A and 2 (relied upon in para 16) concern the relationship between Investa Properties and Investa Residential, without going so far as to allege that Investa Properties owed fiduciary duties to Investa Residential. Paragraph 16 otherwise relies upon Mr Nankervis’s position as an employee of Investa Properties and the duties owed by him to Investa Properties. If the question is whether Mr Nankervis owed fiduciary duties to Investa Residential, it might be said that para 16 begs that question. If it had been asserted that Investa Properties had fiduciary duties towards Investa Residential, that Mr Nankervis’s duties were to attend to the affairs of the latter company and that he had undertaken so to do, it may well have followed that he had undertaken fiduciary duties towards it. However, as far as I can see, he undertook to perform functions for his employer, some of which functions concerned the affairs of Investa Residential.

## Lot 170

1. The conduct in connection with Lot 170, said to be in breach of Mr Nankervis’s fiduciary (and other) obligations, is set out at para 194 of the statement of claim as follows:

* entering into the Tonuri agreement, pursuant to which Mr Barclay and Mr Nankervis would participate in, and derive profits from the sale of Lot 170 to Mr Tonuri or his nominee, and subsequent development of the site;
* making incorrect statements concerning the nature of Lot 170 in the course of recommending its sale at $1,454,545;
* recommending such sale without taking into account, or telling the appellants about, a valuation report showing a higher value and design plans and an amended application for roadworks approval than the previously mentioned incorrect statements;
* providing services to Mr Tonuri and TETN as particularized in para 186; and
* relocating and decommissioning of the sales office.

1. As already noted, the last matter is no longer relevant.
2. The appellants allege that Mr Nankervis:

(1) ... did not act in good faith and with fidelity towards [Investa Properties] and [Investa Residential] at all times during his employment with Investa Properties because of the facts alleged in paragraphs 174A-177, 186, 187, 188, 192.

(2) ... did not avoid and disclose to Investa Properties or to [Investa Residential] actual or perceived conflicts of interest because of the facts alleged in paragraphs 174A, 186, 187, 188, 192.

(3) ... did not at all times act in the best interests of Investa Properties and [Investa Residential] because of the facts alleged in paragraphs 174A-177, 178,186, 187,188, 192.

(4) ... did not pass on to Investa Properties or to [Investa Residential] all information he had about the marketing and sale of the properties that were the subject of his employment and that might be relevant to the marketing because of the facts alleged in paragraphs 174A-177, 186, 187, 188, 192.

(5) ... profited from his position, or stood to profit from his position, other than by receiving remuneration in the course of his employment with Investa Properties and did not disclose that fact to Investa Properties and [Investa Residential] because of the facts alleged in paragraph 174A. … .

(6) ... gave assistance to persons with whom he was associated, or to persons or entities from whom or from which he could expect a benefit to purchase the properties which he was engaged in the marketing and sale of without full disclosure to Investa Properties or to [Investa Residential] because of the facts alleged in paragraphs 174A, 186, 187 and 192.

1. The pleading seems to allege that the same conduct breached duties owed to both companies. The basis for finding that the relevant duties were owed to Investa Properties is plain. However in the end it seems that the basis upon which the appellants seek to attribute to Mr Nankervis, duties owed to Investa Residential, they rely upon the fact that in performing the duties owed to the former company, it dealt with matters concerning the affairs of the latter company. Further, one might infer that it was for Investa Properties, and not its employees, to protect the interests of Investa Residential. Mr Nankervis’s principal responsibility must have been to Investa Properties, to which company he had undertaken obligations. Further, if Investa Residential was vulnerable, it was to the effects of decisions made by Investa Properties, particularly in its application of group policies.
2. Her Honour summarized the appellants’ case concerning Lot 170 at [177] as follows:

In relation to Lot 170 the case of the applicants against Mr Nankervis for breach of fiduciary duties is primarily found in paragraphs 165-184 of the amended statement of claim. In summary, the applicants submit as follows:

* On or about 5 November 2008, CB Richard Ellis prepared a valuation report for ANZ Banking Group Ltd in respect of Lot 170. Mr Barclay received the report, and on 19 December 2008 he emailed a copy to Mr Nankervis and Mr Waters. This report valued Lot 170 at $4 million, plus GST, as at 5 November 2008.
* A copy of this report was also emailed to Mr Tonuri on 2 December 2008, copied to Mr Nankervis.
* The CB Richard Ellis report included a statement describing Lot 170 as:

Moderately sloping site subject to a difficult topography Overlay with approximately 14% of the site sloping between 20% and 25% along the northern boundary.

Requirement for substantial retaining wall works.

Majority of lots on the eastern side of the site will require benching and a split level house design.

* On 26 November 2008, Citimark sent an email to Mr Barclay with a letter attached, offering to purchase Lot 170 for $3.7 million including GST, subject to a thirty day due diligence period. The offer was signed by Mr McWilliam, the Director – Residential Land of Citimark, although allegedly withdrawn over the telephone on 27 November 2008. Mr Nankervis conceded that Mr Barclay told him of this offer. There is no evidence that Mr Nankervis told his superiors (in particular Mr Stubbs) at Investa about the Citimark offer.
* On or about 16 December 2008, Mr Nankervis received engineering advice from Mr Walker, director of Projex North Ltd, in relation to Lot 170. That advice included the following comment:

Assessment of the existing design with Mr Ashley Nankervis revealed that a design which provided significantly flatter allotments could be achieved by adjusting the levels of Road 2 and Road 3.

* Mr Nankervis emailed this advice to Mr Barclay and Mr Tonuri, but did not disclose it to the applicants.
* From about December 2008, Mr Nankervis was involved in submitting an amended Operational Roads Works Approval to the Ipswich City Council which sought levelling and retaining of Lot 170 to create flat Lots.
* On or before 20 January 2009, Mr Nankervis and Mr Barclay entered into an agreement with Mr Tonuri, pursuant to which Mr Nankervis and Mr Barclay would participate in and derive profits from the sale to Mr Tonuri or his nominee and subsequent development of Lot 170.
* On 19 January 2009, Mr Barclay sent an email to Mr Stubbs and Mr Nankervis reporting on a meeting with another possible purchaser, Mr Lance Washington. Notwithstanding that Mr Washington expressed concern over the sloping nature of Lot 170, Mr Nankervis did not forward him the advices concerning the flattening of the site.
* In a memorandum dated 2 February 2009 and in a subsequent Delegated Authority Approval prepared on or about 6 February 2009, Mr Nankervis recommended the sale price for Lot 170 in the amount of $1,454,545 exclusive of GST to Two Eight Two Nine. This price was referable to a valuation of obtained on 12 June 2008 from valuer Jones Lang LaSalle dated 12 June 2008, valuing Lot 170 in the range of $2.1 million-$2.3 million at that date, and the view at that time in Investa that Lot 170 could be sold for a price in the range of $1.8 million.
* In his approval submission, Mr Nankervis wrote:

The site is irregular in shape and heavily vegetated with steep topography, rising from the southeast to the northwest and is unattractive to our target market as only speciality custom build housing can be built on the site. The housing product needs to accommodate steep slope of 10% to 15%. No slab on ground product will be achieved and this is compounded by the tree retention Council require and also approval limitations in association with the degree of earthworks allowed on the site, there is no ability to level the site.

These statements were incorrect in light of the design amendment proposal and the application for amended Operational Road Works Approval.

* Mr Nankervis did not seek instructions to investigate the possibility of sale of Lot 170 at a higher price and did not recommend that the sale price of Lot 170 be reconsidered, notwithstanding that:

o he had seen a more recent report valuing Lot 170 at $4 million;

o he knew of the Citimark offer of $3.7 million; and

o he had seen advices indicating that levelling the site was feasible.

* Mr Nankervis’ submission was approved and Lot 170 sold for $1,454,545. This price did not reflect the potential market value of Lot 170.

1. In reality, the nub of the claimed breach of duty against Mr Nankervis was his entry into the Tonuri agreement and subsequent conduct pursuant to it.
2. After a detailed consideration of the evidence, her Honour concluded, at [273], that Mr Nankervis had breached fiduciary duties owed to Investa Properties by:

* on or before 20 January 2009, entering into [the Tonuri agreement] to develop Lot 170 and to divide the profits;
* recommending that TETN’s offer for Lot 170 be accepted; and
* not disclosing to Investa Properties his arrangements with Mr Tonuri and Mr Barclay.

## Lot 191

1. The pleaded circumstances concerning the sale of Lot 191 were as follows:

* on or about 1 October 2008 Investa Residential, at the direction of Investa Properties, entered into an agreement in the form required by the PAMD Act, by which Oliver Hume agreed to provide real estate agent services for the sale and marketing of the Brentwood site;
* on or about 16 July 2009 Oliver Hume entered into a further agreement to provide such services;
* such appointments were terminated on 8 February 2010;
* Mr Barclay, with Oliver Hume’s authority, provided such services to Investa Residential;
* from about 19 October 2009, Mr Nankervis and Mr Barclay were, together, seeking to subdivide Lot 191 into two lots;
* at some stage thereafter, Mr Nankervis recommended to Investa Properties that Lot 191 be sold for $210,000 (after rebate);
* that price did not reflect the “potential value” of Lot 191, taking into account the fact that Mr Nankervis and Mr Barclay were “involved in taking steps to subdivide” it;
* on or about 18 December 2009, Mr Nankervis “approved”, “the sale price for Lot 191 of $195,000”, $15,000 less than the previously fixed price;
* on 23 December 2009, Investa Properties caused Investa Residential to enter into the Lot 191 option with QPC at the price of $195,000;
* thereafter Mr Nankervis and Mr Barclay took further steps to effect the subdivision;
* Ms Barclay was, between 21 October 2009 and 10 November 2010, the sole director and shareholder of QPC;
* Mr Nankervis did not disclose that QPC was owned and controlled by Ms Barclay;
* Mr Nankervis subsequently “approved” an extension of the expiry date for the Lot 191 option;
* on 18 June 2010, Mr Nankervis “approved” sale to Spencer Projects as trustee for the Spencer Trust for $290,000;
* on 25 June 2010, Investa Properties caused Investa Residential to enter into a contract to sell to Spencer Projects for $290,000;
* between 10 June and 10 November 2010, Ms Barclay was the sole director and sole shareholder of Spencer Projects; and
* Mr Nankervis did not disclose to Investa Properties or Investa Residential that he and Mr Barclay were engaged in seeking to subdivide Lot 191 or that QPC and Spencer Projects were owned and controlled by Ms Barclay.

1. I should say that the “approvals” allegedly given by Mr Nankervis appear, in at least some cases, to have been recommendations to persons who were authorized to grant such approvals. As I have previously observed, it seems that in the end, there was no evidence as to Ms Barclay’s ownership or control of Spencer Projects.
2. The appellants’ case at trial was that Mr Nankervis’s position, as a senior employee of Investa Properties, led to his owing fiduciary duties to both appellants in respect of Lots 170 and 191. However the trial Judge considered that the mere fact of an employment relationship did not necessarily lead to a fiduciary relationship. Her Honour accepted, however, that the seniority of an employee and/or the greater responsibilities accepted by that employee may give rise to fiduciary obligations co‑existing with those arising from the employment relationship.
3. At [73] and [75] her Honour identified a number of matters which superficially, might have indicated that Mr Nankervis owed fiduciary duties to Investa Residential. These matters were that:

* the corporate veil between Investa Properties and its subsidiary Investa Residential was, for employees in the position of Mr Nankervis, “blurred”: at [73];
* although Mr Nankervis was formally employed by Investa Properties, he had actual authority to take steps in respect of land (including Lots 170 and 191) which was owned by Investa Residential: at [73];
* from late 2008, the structure of the Investa Property Group had been such that the management and leadership of the commercial and industrial development business, and the residential development business (in which Mr Nankervis worked) had been combined: at [73]; and
* in his role as Senior Development Manager, Mr Nankervis had played a key role in acquiring knowledge of the land under his management, including Lots 170 and 191 and in making informed recommendations to senior management with respect to the development or other use of the land: at [75].

1. The reference to the “corporate veil” being “blurred” seems to be little more than a generalized statement, reflecting the effects of the following points which her Honour identified. The point concerning his authority is apt to mislead. As far as I can see, Mr Nankervis did not decide whether to sell, or the price at which to sell. He made recommendations. No doubt, he carried out research and formed views. It may be that once there was a decision to dispose of land, he dealt with the relevant agent. He might have advised on whether or not to accept a particular offer, but decisions were made elsewhere in the offices of Investa Properties, or at even higher levels within the Investa Property Group.
2. Further, his advisory functions were directed towards decision‑making by Investa Properties, not Investa Residential. Once the nature of his duties is fully understood, it appears that his actions were generally unlikely to affect the interests of Investa Residential. It was rather the decisions by Investa Properties, perhaps informed by his research and advice, and the application of group policies which would affect such interests.
3. As to combined leadership of the commercial and industrial development business and the residential development business, again, the terminology seems to have little meaning. The combination of categories of business has nothing to do with the present case. The relevant fact is that there were two discrete legal entities, to which duties may or may not have been owed. The question is whether the fact of being employed by one entity to give advice which may have led to decisions affecting the other entity was a basis for inferring the existence of fiduciary duties to the latter, where the former was not shown to have owed such duties.
4. I also see nothing of real relevance in the final point. Again, it means little to say that Mr Nankervis had played a key role in acquiring knowledge and making recommendations if, in fact, he did so pursuant to his employment with Investa Properties.
5. The trial Judge noted that Mr Nankervis’s research and advisory roles included the preparation of Board papers containing submissions concerning Lots 170 and 191. In particular, Mr Nankervis had prepared a “Delegated Authority Approval” submission for the Investa Land Board on 6 February 2009 in relation to Lot 170 in which he had said:

The site is irregular in shape and heavily vegetated with steep topography, rising from the south east to the north west, and is unattractive to our target market as only specialty custom built housing can be built on the site. The housing product needs to accommodate steep slope of 10 to 15 degrees, no slab on ground product will be achieved, and this is compounded by the tree retention that council require, and also approval limitations in association with the degree of earthworks allowed on the site. There is no ability to level the site …

The table above shows that the sale is at the lower end of the range, however the subject property is considered to be inferior to the other sides due to the steep topography and heavy vegetation. Essentially, the site is discounted to account for the additional house building costs.

1. This is, perhaps, an example of the way in which Mr Nankervis might have influenced a decision made by Investa Properties, but it says nothing about any duty undertaken towards Investa Residential.
2. There is no challenge to her Honour’s conclusion regarding Mr Nankervis’s fiduciary relationship with Investa Properties. In considering that relationship one inevitably starts with the contract of employment. However there is no such starting point in considering the relationship with Investa Residential. It is true that it held the title to the Brentwood land, and that Mr Nankervis’s duties concerned Lots 170 and 191, and no doubt many other lots. However the statement of claim demonstrates that Investa Residential was really only the nominal owner, at least from the point of view of Investa Properties and other group companies, and Mr Nankervis’s duties were advisory, not decisive. On the face of the statement of claim, Investa Residential took no step with regard to its land holdings other than at the direction of Investa Properties, including steps concerning:

* the acquisition of the Brentwood site;
* the proposed sale of the Brentwood site;
* the sale of the Brentwood site at the price recommended by Mr Nankervis;
* the retention of Oliver Hume in connection with Lot 191;
* entering into the Lot 191 option with QPC;
* approval of the extension of time in which to exercise the Lot 191 option;
* agreement to the sale to Spencer Projects;
* execution of the contract with Spencer Projects;
* approval of the sale of Lot 170 at a particular price; and
* entering into the Lot 170 option with TETN.

1. The trial Judge observed that a person who owes fiduciary duties to a parent company need not necessarily owe such duties to a subsidiary. I consider that observation to be of considerable importance. In my view, the appellants’ case is really that because of the corporate association, Mr Nankervis was necessarily in a fiduciary relationship with Investa Residential. Within such a group, it may not be unusual for employees of one company to perform functions which concern the affairs of another company. The question is whether Mr Nankervis undertook to act in the interests of Investa Residential, and perhaps, to it alone. If a fiduciary obligation is incurred by an express or implied undertaking, there must be a point at which such undertaking is given. The earliest point at which Mr Nankervis could have incurred fiduciary obligations to either Investa Properties or Investa Residential must have been the date of his employment by the former. There is no evidence that he was, at that time, even aware of the existence of Investa Residential. His contract of employment identified no company, other than Investa Properties as his employer, or as a party to which he owed obligations. Hence one must ask whether he undertook such duties at a later stage and, if so, when. One might also have to ask whether, if he incurred any such obligations, those obligations were of a general nature, regulating his conduct in connection with all of that company’s affairs, or whether obligations arose on a case by case basis.
2. Investa Properties was not uninterested in the affairs of Investa Residential, its wholly owned subsidiary. However Investa Properties owed duties to other companies in the Investa Property Group. If one focusses on the more general question of the circumstances in which an employee of one company should be held to have fiduciary duties to another in the same group, it becomes apparent that there may be good policy reasons for not imposing such duties upon him or her. It is surely not desirable that an employee should have to decide whether to perform a direction by his or her employer, dependent upon the effect of such conduct on the financial or other interests of an associated company. These concerns arise in this case simply because it is so clear that Investa Residential was, for all practical purposes, the creature of Investa Properties.
3. In this case, the appellants had no interest in seeking to establish that Investa Properties owed a fiduciary duty to Investa Residential, and they did not seek to do so. However it would, in my view, be curious if Mr Nankervis had such duties whilst his employer did not. In this case, I consider that Investa Properties had no such duty, simply because of the arrangements concerning the subsidiaries of Holdings within the Investa Property Group. In the end, those arrangements were effectively inconsistent with the existence of fiduciary duties owed by either Investa Properties or Mr Nankervis to Investa Residential. In the context of this case, that outcome may seem odd, primarily because of Mr Nankervis’s misconduct. However he is liable to Investa Properties for his breach of the fiduciary duty which he owed to it. Proceedings for that breach should provide an adequate remedy for those ultimately affected by such conduct, assuming that any loss suffered by Investa Residential is reflected in the value of Investa Properties’ shares in that company. Further, it must be kept in mind that the existence of a fiduciary duty is not to be inferred from the conduct said to be in breach of such duty. Finally, it seems most unlikely that Investa Residential would, itself, have understood that Mr Nankervis owed it fiduciary duties, as opposed to owing such duties to Investa Properties.
4. Given that Investa Properties owed no fiduciary duty to Investa Residential, the “working hypothesis” referred to by Finn J in *Fiduciary Obligations* at para 469 (and cited by the trial Judge at [132]) has no present relevance.
5. Finally, I acknowledge that the duties undertaken by Mr Nankervis, concerning the affairs of Investa Residential might, in other circumstances, have led to the inference that he owed fiduciary duties to that company. However the circumstances in which he took such actions lead me to conclude, in this case, that he owed no such duties.

# MR BARCLAY AND OLIVER HUME – FIDUCIARY DUTIES OWED TO INVESTA PROPERTIES AND/OR INVESTA RESIDENTIAL

1. The trial Judge found that neither Mr Barclay nor Oliver Hume owed a fiduciary duty to either Investa Properties or Investa Residential in respect of Lot 170. Her Honour found that both Mr Barclay and Oliver Hume breached fiduciary duties owed to Investa Residential in respect of Lot 191, but found that neither owed any fiduciary duty to Investa Properties in respect of that lot. Investa Properties and Investa Residential appeal against the findings concerning Lot 170. Mr Barclay and Oliver Hume appeal against the decision concerning Lot 191. Oliver Hume accepts that it owed a fiduciary obligation to Investa Residential but denies breaching such duty, at least to the extent that it is said that it failed to disclose any relevant interest in the sale to Spencer Projects. As I have previously observed, Oliver Hume’s retainer ceased on 8 February 2010. The contract of sale to Spencer Projects was executed on 25 June 2010. Further, whilst it was pleaded, and her Honour found that Ms Barclay had an interest in Spencer Projects, it now seems that such interest had not been proven. The evidence demonstrated that Ms Crosbie, not Ms Barclay, was the sole director and shareholder, and Investa Residential did not plead any such case.
2. As to Mr Barclay, the trial Judge indicated in her reasons that at trial, he denied any fiduciary duty with respect to Lot 191, or alternatively, that any such duty expired on 8 February 2010. In Mr Barclay’s notice of cross‑appeal, he claims that the trial Judge erred in finding that he had any fiduciary duty to Investa Residential at the time of the contract between that company and Spencer Projects, and that QPC did not acquire Lot 191. In his outline of submissions on appeal, Mr Barclay submits that as at the time of the sale to Spencer Projects, he owed no fiduciary duty to Investa Residential and that, in any event, disclosure of the relevant matters to Mr Nankervis constituted sufficient disclosure to Investa Residential. In oral submissions at ts 118, ll 4‑17, counsel made it clear that Mr Barclay adopted Oliver Hume’s submissions concerning Lot 191, save for two matters. First, Mr Barclay submitted that his own knowledge of his wife’s interest in QPC should not have been imputed to Oliver Hume. Second, counsel submitted that there was no finding of fraud as against Mr Barclay.

## Lot 191

1. Although the sale of Lot 170 preceded that of Lot 191, it is convenient to deal firstly with Lot 191, largely because there are statutory considerations in connection with the sale of both lots, which considerations are more easily explained in connection with Lot 191 than in connection with Lot 170.
2. The trial Judge found that on 16 July 2009, Investa Residential appointed Oliver Hume as real estate agent to sell Lot 191. The appointment was in accordance with the PAMD Act. It was terminated on 8 February 2010. There had, apparently, been an earlier appointment dated 1 October 2008, also by Investa Residential. The relevance of that appointment is unclear. It seems that as at that date another employee of Investa Properties had identified, as the appropriate sale price for Lot 191, the figure of $225,000, less a rebate of $15,000, resulting in a sale price of $210,000. The appellants’ claim against Oliver Hume is based upon the appointment dated 16 July 2009. In paras 102G‑102J of the statement of claim, the appellants pleaded the duties allegedly undertaken by Oliver Hume. It is not necessary that I set out those paragraphs. As against Mr Barclay, the case was pleaded at paras 29, 30, 102K and 102L of the statement of claim. As I have said, both Oliver Hume and Mr Barclay accept that from 16 July 2009, until 8 February 2010, they had fiduciary obligations to Investa Residential in connection with the proposed sale of Lot 191.
3. Issues arising in connection with Mr Barclay’s grounds of appeal are:

* the existence of any fiduciary obligations owed by Oliver Hume and him to Investa Residential at the time of entering into the contract of sale to Spencer Projects;
* the interest of Ms Barclay in Spencer Projects;
* the termination of Oliver Hume’s retainer;
* the terms of any retainer;
* disclosure of Ms Barclay’s interest to Mr Nankervis; and
* the absence of any loss suffered by Investa Residential.

1. Although it is difficult to tell, I suspect that only the last three points really remain in issue between the parties.
2. Oliver Hume’s grounds of appeal address the following issues:

* the connection between Oliver Hume and the ultimate sale of Lot 191 to Spencer Projects, having regard to:
* the absence of any connection between the Lot 191 option and the eventual sale;
* the identity of the eventual purchaser; and
* the termination of Oliver Hume’s appointment on or before 8 February 2010.
* that Oliver Hume should not be held liable for the actions of Mr Barclay, the relevant conduct being beyond his actual and apparent authority;
* the relevance of the “fraud exception”;
* the fact that Mr Barclay had disclosed Ms Barclay’s interest in QPC to Mr Nankervis; and
* the valuation of Lot 191.

1. Again, although it is difficult to tell, I suspect that the first point is no longer in issue between the parties. Further, as I have said, the valuation questions should not be addressed in these proceedings.
2. Although the fiduciary obligations owed by both Oliver Hume and Mr Barclay arose, at least to a significant degree, out of the appointment of Oliver Hume pursuant to the PAMD Act, the alleged breaches by both parties arose substantially out of Mr Barclay’s conduct.
3. Concerning the Lot 191 case the trial Judge said at [291]‑[297]:

291 It is not in dispute that the acquisition of Lot 191 involved companies controlled by Mr Barclay's wife. This is so both in respect of the company which entered into the [Lot 191 option] [QPC] and the company which eventually acquired Lot 191 at the nomination of [QPC] (Spencer Projects).

292 The evidence supports a finding that Mr Barclay was exploring the possibility of subdividing Lot 191 prior to the approval of the sale of the property. Such evidence includes:

* An email dated 20 October 2009 from town planning consultant, Mr Marcus Brooks on behalf of his client, Mr Barclay, to land surveyor WD Surveys in respect of subdivision of Lot 191.
* A fee proposal from consulting engineers Bellas & Reitano, dated 23 October 2009, in respect of required engineering support for a proposed development application to subdivide Lot 191, and additional engineering design and documentation.

293 It is appropriate to consider this evidence in circumstances where Oliver Hume SEQ was appointed real estate agent in respect of Lot 191 on 16 July 2009; a delegated authority approval submission in relation to Lot 191 was prepared on 21 October 2009 recommending that Lot 191 be sold for $210,000; and on 23 December 2009, Investa Residential entered a deed of put and call giving call rights to Queensland Property Centre with an exercise price of $195,000.

294 Mr Barclay was not only a senior executive with Oliver Hume SEQ at the time, he was also the sales consultant involved in marketing lots including Lot 191. A real estate agent, who is in a fiduciary relationship with the principal, must give full and frank disclosure in circumstances where he or she seeks to purchase the real property from the principal, being the person to whom the fiduciary obligation is owed. This obligation of disclosure by the real estate agent is equally the case where it is the spouse of the real estate agent who seeks to purchase the property: see comments of the Court of Appeal of Western Australia in *Real Estate and Business Agents Supervisory Board v Landa* [2009] WASCA 191.

295 In this case it would not have been apparent to the casual observer that either Queensland Property Centre or Spencer Projects were connected with Mr Barclay. Mr Barclay's direct contact with Investa was Mr Nankervis. I am satisfied at material times that Mr Nankervis was aware of the relationship between Mr Barclay and Queensland Property Centre and Spencer Projects. However the disclosure of this information to Mr Nankervis did not constitute full disclosure required of a fiduciary assisting his spouse to purchase a property from a principal. Mr Nankervis was not the decision-maker who was empowered to sell Lot 191. Mr Nankervis was not "the principal" in the fiduciary relationship to which Mr Barclay was a party.

296 Further, notwithstanding that Mr Nankervis was an employee of the first applicant, no justification for imputing his knowledge of Mr Barclay's relationship with Queensland Property Centre and Spencer Projects to either of the applicants exists where Mr Barclay knew that Mr Nankervis would not disclose that information to the applicants: re *Fitzroy Bessemer Steel etc Co Ltd* (1884) 50 LT 144 at 147; *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at [616]; Dal Pont GE, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014) at [22.56]. In circumstances where it appears that Mr Nankervis had a separate business relationship with Mr Barclay in relation to Lot 170 at this time, I consider it proper to conclude that Mr Barclay knew that Mr Nankervis would not disclose Mr Barclay's relationship to either of the two companies involved in the acquisition of Lot 191.

297 Accordingly I find that Mr Barclay did breach his fiduciary obligation to the second applicant in relation to Lot 191, in failing to make full and frank disclosure to them concerning the acquisition of Lot 191 by corporate entities controlled by Mrs Barclay, and further that any knowledge or acquiescence by Mr Nankervis in relation to Mr Barclay's arrangements concerning Lot 191 did not relieve Mr Barclay from that breach of fiduciary duty.

1. Some aspects of the Lot 191 option require further explanation. It was originally entered into on 23 December 2009 and was for a period of 90 days, suggesting that it would have expired on 23 March 2010. The appellants pleaded, at para 122 of the statement of claim, that on 20 April 2010, it was extended until 24 May 2010. I do not understand that matter to be in dispute. The contract with Spencer Projects was executed on 25 June 2010, suggesting that the extended Lot 191 option had previously expired. However, in the course of the hearing of the appeal, we were informed that there had been a further extension until 31 July 2010. There is no express pleading that the contract (between Investa Residential and Spencer Projects) was entered into as the result of a nomination by QPC pursuant to the Lot 191 option. Nor is there any pleading of a further extension of that option.
2. A more serious complication is that although the appellants pleaded, and Oliver Hume and Mr Barclay admitted that as at 23 June 2010, Ms Barclay was the sole director and shareholder of Spencer Projects, and her Honour so found, the evidence apparently established that the sole shareholder and director was Ms Barclay’s daughter, Ms Crosbie. Although the appellants pleaded non‑disclosure by Mr Barclay and Oliver Hume of Ms Barclay’s assumed interest, there is no pleaded case based on non‑disclosure of Ms Crosbie's interest.
3. I do not understand that Investa Residential seeks to maintain the finding that Ms Barclay was the sole shareholder and director of Spencer Projects. Rather, it made a very general submission to the effect that Ms Crosbie, “was not some third party, dealing at arms’ length with [QPC] ... . She was [Ms Barclay’s] daughter.” However, as I have said, no such case was pleaded, and there has been no application to amend so as to raise such a claim. Nonetheless it seems that Investa Residential will submit, in any subsequent proceedings in connection with relief, that any loss incurred as a result of the sale to Spencer Projects is recoverable by virtue of the non‑disclosure of Ms Barclay’s interest in QPC and the associated steps concerning subdivision. Oliver Hume and Mr Barclay seemed to submit that Investa Residential had not pleaded that such loss was attributable to the non‑disclosure of Ms Barclay’s interest in QPC. In my view that approach is unduly narrow, having regard to paras 137, 232 and 233 of the statement of claim as against Mr Barclay, and paras 139, 236 and 237 as against Oliver Hume.
4. As I have said, Mr Barclay’s appeal seems now to be limited to the points raised by Oliver Hume, together with the question of the attribution of his knowledge to Oliver Hume and the question of any finding of fraud against him. As to the imputation to Oliver Hume, of Mr Barclay’s knowledge of Ms Barclay’s interest in QPC, Oliver Hume asserts that Mr Barclay’s non‑disclosure cannot be imputed to it because he was not its “directing mind and will”. Investa Residential nonetheless asserts that Mr Barclay was Oliver Hume’s agent and was acting on its behalf, so that his knowledge of Mr Barclay’s interest is to be imputed to it, unless he was acting entirely in his own interest or, to put it another way, not in any respect in Oliver Hume’s interest. Mr Barclay submits that his knowledge should not be imputed to Oliver Hume, and that therefore, Oliver Hume did not breach its duty to Investa Residential. Oliver Hume submits that the question of imputation does not arise because Mr Barclay cannot have been acting within his authority when he participated in effecting the grant of the Lot 191 option. Mr Barclay’s concerns regarding any possible finding of fraud are closely related to this question of imputation.
5. I do not understand the appellants, Mr Nankervis or Oliver Hume to have alleged fraud, in the technical sense, against Mr Barclay, although the term appears in para 9 of Oliver Hume’s notice of appeal. Below, I explain my understanding of the context in which that allegation is made. In its defence to Mr Barclay’s cross‑claim against it, Vero sought to rely on the, “Dishonest, Fraudulent or Criminal Acts” exclusion in the policy. Vero alleged that Mr Barclay’s conduct was, “dishonest and fraudulent within the meaning of those terms as used in the policy”. The matter is also addressed in paras 5 and 6 of the defence. It is clear, however, that the trial Judge made no such finding.
6. In the trial Judge’s reasons, the word “fraud” is mentioned at [299] in connection with the extent to which Mr Barclay’s knowledge, primarily of his wife’s interest in QPC, should be imputed to Oliver Hume. At [299] her Honour said:

In relation to this issue the applicants submit, in summary:

* Mr Barclay was an employee and agent of Oliver Hume SEQ, acting in the ordinary way as a real estate agent, and plainly acting within the scope of his actual or ostensible authority.
* Mr Barclay’s knowledge of the transactions in which he was involved as agent was the knowledge of Oliver Hume SEQ. This includes his knowledge of the identity of the purchasing parties.
* The imputation of the knowledge of an agent to his or her principal is subject to the fraud exception: knowledge of an agent’s own fraud committed against his or her principal will not be imputed to the principal. This principle extends beyond fraud to breach of fiduciary obligations.
* The scope of the fraud exception is not unlimited, and was recently considered by the Court in *Grimaldi*.
* Mr Barclay’s activities were directed against Investa, not Oliver Hume SEQ, which suffered no loss from the transaction involving Lot 191. In fact, Oliver Hume SEQ benefitted by earning commission on the sale.
* It follows that the fraud exception does not apply, and Mr Barclay’s knowledge of the purchaser of Lot 191 was the knowledge of Oliver Hume SEQ.

1. Her Honour, was, in that passage, summarizing the appellants’ submissions. At [300] her Honour referred to Oliver Hume’s submissions concerning the matter. It is clear that her Honour was using the expression as a shorthand way of referring to the application of a more general principle concerning the imputation of the knowledge of an agent to his or her principal, and not suggesting that Mr Barclay had been fraudulent. Her Honour’s approach reflected that adopted by the Full Court in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [282]‑[286]. At [283] and [284], the Full Court said:

283 This “fraud exception”, as it has been called, has been controversial in a number of common law countries: see Watts, “Imputed Knowledge in Agency Law - Excising the Fraud Exception” (2001) 117 LQR 300; 3 Am Jur 2d “Agency” 280; Dal Pont, *The Law of Agency* [22.57]-[22.59], 2d (2008); *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 at [99]‑[108]; and see *In re Parmalat Securities Litigation* 659 F Supp 2d 504 (SDNY 2009) at 519 for the view taken in some number of US States jurisdictions:

“ … the principal suffers imputation as long as the agent in some respect served the principal or, stated another way, unless the agent totally abandoned the principal's interests. The rule of imputation absent total abandonment, moreover, is not simply a matter of mechanics or rhetoric. It embodies a determination that it would be undesirable to permit principals to avoid responsibility for an agent's actions or knowledge whenever an agent could be said to have acted even in part for the agent's own interest notwithstanding that the agent simultaneously served the interests of the principal.”

See also *Restatement of Agency* 3rd §504.

284 The fraud exception to imputation has not only been accepted in first instance decisions in this country: *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 esp at 22.14-22.35; it also has been extended beyond knowledge of fraud to that of breach of fiduciary duty “at least where the fiduciary's conduct is morally reprehensible”: *Aequitas v AEFC* (2001) 19 ACLC 1,006 at 1,062; see also *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544 at 587. Nonetheless, the exception itself has been qualified in a fashion which resonates with that suggested in the *Parmalat* quotation above. As von Doussa J observed in *Beach Petroleum* (at 22.34), while a director's knowledge will not be imputed to a company where the director's activities are directed against the interests of the company, it will be otherwise if his or her conduct is not totally in fraud of the company if, “by design or result the fraud partly benefits the company”: see also *Canadian Dredge & Dock Co Ltd v The Queen* (1985) 19 DLR (4th) 314 at 351 which von Doussa J considered provided “compelling guidance”.

1. In *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 31‑32 von Doussa J said:

These authorities indicate that if a company is to be imputed with the conduct and knowledge of a director, the director must be acting within the scope of his or her authority, that is, within the scope of his or her actual or apparent authority. The scope of the authority of a director may vary widely from company to company and according to the circumstances of the case. In many instances a director might not be formally appointed by resolution of the board to act on the company's behalf for a particular purpose, but may assume that role without dissent from those who customarily run the company, perhaps even assume the role of managing director: *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480. Provided that the director is acting within the scope of his or her authority, in civil proceedings the state of mind of a director ordinarily will be attributed to the company where there is a duty on that director to communicate his or her knowledge to the company. The exception to this rule is where the director is acting totally in fraud of the company, that is, where all the director's activities are directed against the interests of the company, and not partly for the benefit of the company. If the director is guilty of fraudulent conduct which is not totally in fraud of the corporation, and by design or result the fraud partly benefits the company, the knowledge of the director in the transaction will be attributed to the company.

1. Hence it seems that where the trial Judge referred to fraud, her Honour was, in the context of this case, referring to breach of fiduciary duty, and only in connection with the imputation of Mr Barclay’s knowledge to Oliver Hume. I infer that, in para 9 of its notice of appeal, Oliver Hume uses the word “fraud” in the same sense. Nothing in the notice of appeal or Oliver Hume’s submissions suggests otherwise.
2. The cases against both Mr Barclay and Oliver Hume depended upon the former’s conduct in not disclosing the steps taken to subdivide Lot 191, or that his wife had an interest in QPC. Since Mr Barclay now accepts that prior to 8 February 2010, he owed a fiduciary duty to Investa Residential in connection with the proposed sale of Lot 191, there can be no basis upon which he can avoid a finding of breach of duty based upon his non‑disclosure of his wife’s interest in QPC. The evidence suggested that such conduct was a cardinal breach of a real estate agent’s duty. There was a clear conflict of interest.
3. Whether one proceeds under the code of conduct prescribed by the PAMD Act, or under the general law, Oliver Hume undertook to act in the best interests of Investa Residential and not to act, or continue acting, if to do so would place its interests in conflict with those of Investa Residential. It follows that Oliver Hume was obliged to inform Investa Residential that the proposed grantee of the Lot 191 option was Mr Barclay’s wife, and that the lot had subdivisional potential assuming its awareness of those matters. One might well have expected Investa Property Group to have been as likely as Oliver Hume or Mr Barclay to identify such potential, but the case was not conducted on that basis.
4. The only remaining question is whether Oliver Hume had such knowledge. There can be no doubt that in failing to disclose his wife’s interest in QPC and the steps taken to effect subdivision, Mr Barclay breached a fiduciary duty owed to Investa Residential, and that such failure occurred in the course of his conduct as Oliver Hume’s agent in seeking a buyer for Lot 191. Oliver Hume submits that Mr Barclay’s involvement in the grant of the Lot 191 option, without disclosure of his knowledge, was necessarily outside of the scope of his authority from Oliver Hume. However I do not understand the relevant question, as against Oliver Hume, to focus on his conduct. It is Oliver Hume’s conduct which is relevant. At para 139 of the statement of claim, the appellants pleaded that Oliver Hume did not disclose either the steps taken to effect the subdivision or Ms Barclay’s interest in QPC. The relevant question is whether Mr Barclay’s knowledge is to be imputed to Oliver Hume, so that it was obliged to disclose the matters in question. The decisions in *Beach* and *Grimaldi* demonstrate that Mr Barclay’s knowledge should be imputed to Oliver Hume, so that it breached its duty to Investa Residential by not disclosing that information, unless Mr Barclay was acting solely in his own interest, or not at all in the interest of Oliver Hume. In my view it is clear that he was acting in Oliver Hume’s interest in that he was performing the duties which it had undertaken to perform for Investa Residential.
5. I have, in effect, dealt with most of the points made by Oliver Hume and Mr Barclay in their submissions. However a number of other matters deserve mention. First, Oliver Hume seems to put great store upon the fact that Mr Barclay was not its, “directing mind and will”, but its agent, asserting that misconduct could not have been within his authority. I have explained that it is Mr Barclay’s knowledge, as imputed to Oliver Hume, and its failure to disclose such knowledge which lie at the base of the claim against it.
6. Secondly, the case against Oliver Hume seems to have been put in a number of ways other than that dealt with above. One case seems to have been based on Oliver Hume’s alleged vicarious liability for Mr Barclay’s conduct. There is reason to doubt the applicability of the concept of vicarious liability to the incurrence of accessorial liability for breach of equitable duties. See the decision of Besanko J in *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 248. On appeal ([2017] FCAFC 74), the Full Court found, at [123], that it was unnecessary to consider, “this important question of principle”. As I understand it, the problem is that to apply the doctrine of vicarious liability in order to impose upon an employer, liability for a breach of trust (or fiduciary duty) by an employee, without more, would go beyond the ambit of accessorial liability as identified in *Barnes v Addy* (1874) LR 9 Ch App 244 and subsequent cases. In the present case, it is unnecessary that I consider the matter, as the case can be appropriately dealt with on the basis of Oliver Hume’s imputed knowledge. It may be that Investa Residential advances a third case, asserting breach of duty by Oliver Hume, independent of any conduct by Mr Barclay, or Oliver Hume’s imputed knowledge. However the nature of that case is unclear. Again, it is not necessary that I take the matter further.
7. I should say something about ground 4 of Oliver Hume’s notice of appeal. I see no justification for the assertion that in connection with Lot 191, the trial Judge determined the nature and extent of any fiduciary duty by reference only to the provisions of the PAMD Act. Clearly, her Honour had regard to the terms of that Act and the general law. Indeed, there is no suggestion in the notice of appeal that her Honour imposed any inappropriate duty upon Oliver Hume, having regard to her findings. In any event, I do not understand that her Honour found any duty other than that of disclosure concerning Ms Barclay’s interest in QPC, and the associated question concerning subdivision of Lot 191.
8. There is a question as to whether Mr Nankervis’s knowledge of these matters constituted sufficient disclosure to Investa Residential. For the reasons given by the trial Judge at [296], I do not consider that Mr Nankervis’s knowledge constituted such disclosure. The matters identified in para 5 of Oliver Hume’s notice of appeal take the case nowhere.
9. Finally, there is a question as to the declarations made concerning Lot 191. Whilst fiduciary obligations may have survived the termination of the agency relationship, Investa Residential did not plead such continuing duties as against Mr Barclay or Oliver Hume. The duties are pleaded at paras 102J and 102L. In each case, the duties are said to have existed “while [Oliver Hume or Barclay was] providing real estate agent services in relation to Lot 191 ...”. If Investa Residential wished to assert ongoing duties, it should have expressly so pleaded.
10. One difficulty with the declarations concerning Lot 191, Oliver Hume and Mr Barclay (declarations 3 and 4) is that they do not identify the relevant conduct or the timeframe in which it occurred. The problem is compounded by the confusion which has emerged on appeal concerning the extension of the Lot 191 option, the circumstances in which the sale to Spencer Projects was made and the error concerning Ms Barclay’s involvement with that company.
11. It is not clear to me that any ongoing non-disclosure had consequences for Investa Residential. As I understand its case, it is that it derived less than the true value of Lot 191 as the result of its entering into the Lot 191 option on 23 December 2009. The ultimate sale to Spencer Projects may offer some evidence as to Investa Residential’s loss as the result of non-disclosures prior to its entering into the Lot 191 option. However it cannot be said that it suffered loss as the result of the ultimate sale which was, apparently, pursuant to extensions of the option. It might be said that had Investa Residential become aware of the undisclosed matters after 10 February 2010, it could have terminated the Lot 191 option, or refused to extend it. However the case seems not to have been conducted on that basis. Further, it would not have added anything to the claim based upon the grant of the option in December 2009. The loss is either a consequence of entering into the Lot 191 option or it is not.
12. Given Investa Residential’s failure to plead any ongoing duty after 10 February 2010, and the apparent lack of utility attaching to any declaration relating to conduct after that date, I would limit the declaratory relief as against Oliver Hume and Mr Barclay, concerning Lot 191, to the period expiring on 10 February 2010.
13. Declarations 3 and 4 made by her Honour should be amended to reflect the fact that, in each case, the proven breach of duty related only to conduct prior to 8 February 2010.

## Lot 170

1. On 16 July 2008, Mr Nankervis, on behalf of Investa Residential (then Clarendon Residential Group Pty Ltd), wrote to Mr Barclay at Oliver Hume as follows:

...

Re: Engagement of Sales Agent - Brentwood Fossil Site

Clarendon Residential Group is pleased to offer Oliver Hume the Commission for the Englobo Sale our Brentwood Fossil Site. The site is located in the suburb of Bellbird Park, adjacent to the Redbank Plains existing neighbourhood at Ipswich.

We confirm the Sales Commission with regard to this Englobo Sale will be 1% of final contract price.

Can you please supply a Marketing Proposal and the relevant REIQ Commission details.

The property is described as follows:

Site Address: Brittains Road, Bellbird Park

Property Description: Lot 170 on RP 904872

Zoning: Low Density Residential

Site Area: 7.2ha

The current status of application details, the Development Permit Approval was issued by Ipswich City Council on the 21st December 2007 (copy attached) for reconfiguring of a Lot (1 Lot into 77 Lots) and preliminary approval for building works.

Also attached is a Town Planning Summary Report prepared by Conics with regard to current approval status and application details.

We also attach the current Cost Estimate prepared by Hyder Consulting for the development of the total site and the environmental report and free assessment from Yurrah Pty Ltd.

The following details will be required as soon as possible:

* a marketing and sales program to be completed to achieve an Englobo Sale over a 4 week period
* an indication of the estimated gross realisation for the sale
* we confirm a settlement in respect of this sale will be required by no later than 1st December 2008
* we will provide a Contract of Sale prepared by our Solicitor Freehills by Friday, 25 July 2008.

Any further details that you require with regard to this appointment, please contact me on (07) 5477 2500.

Please note this transaction should be initiated under the utmost of confidentiality. Any breach of confidentiality will result in the immediate termination of this engagement

...

1. On 22 July 2008, the Ipswich City Council approved a proposed development of Lot 170, subject to conditions. On 11 August 2008, Investa Residential entered into a contract of sale of Lot 170 to Brittains Road Developments Pty Ltd as trustee for the Brittains Road Unit Trust. The purchase price was $1,775,000. No real estate agent was named in the contract. The contract had three special conditions:

1. This contract is subject to and conditional upon obtaining a satisfactory valuation to the purchaser within 45 days of the date of contract.

2. This contract is subject to and conditional upon 60 days from the date of contract due diligence to the satisfaction of the purchaser.

3. Vendor to support purchasers application for operational works approval, pursuant to clause 2.32 of the Sale Contract.

1. The contract was also subject to finance in an amount “sufficient to complete purchase”. The “finance date” was 30 days after purchase. The settlement date was 15 December 2008. On 11 August 2008, Mark Waters, apparently the State Manager of Investa Residential, recommended sale of Lot 170 “under a wholesale sell off” for $1.75 million. A sale had previously been approved at $1.8 million. Mr Waters’ recommendation was for the purpose of obtaining approval for sale at the lower price. Mr Waters noted that Mr Nankervis had, “indicated the timing for the contract would be suitable in achieving the forecast Qld Residential Developments business plan for 2008”. The recommendation was approved on 11 August 2008.
2. On 19 August 2008, CB Richard Ellis Pty Ltd (“CBRE”), a valuation company, confirmed instructions from “Adam Barclay, Brittains Road Developments Pty Ltd” for the valuation of Lot 170. The valuation was said to be for mortgage purposes. On 5 November 2008, CBRE provided a report, apparently prepared for ANZ Banking Group Ltd. The property was inspected on 5 November 2008, the date of the valuation. The land value “as is” was said to be $4 million. The gross realization, if the property were subdivided, presumably pursuant to the Council’s conditional approval, was, with GST $15,805,000 and less GST, $14,731,818.
3. On 26 November 2008, by letter to Mr Barclay, Geoff McWilliam of Citimark Properties Pty Ltd (“Citimark”) made an offer to purchase Lot 170. The letter of offer was as follows:

...

RE: OFFER TO PURCHASE - BRITTAINS ROAD SITE BELLBIRD PARK

Thank you for your time to discuss the above property.

I confirm we wish to purchase the project having completed a preliminary review of the issues associated with the development.

Our offer is set out below and can be incorporated into a contract of sale to be provided by you when appropriate.

Purchase Price: $3,700,000 (including GST based on using the margin scheme).

Deposit: $100,000 payable upon signing of a contract; refundable if Citimark does not proceed following a due diligence.

Due Diligence: 30 days from written advice of acceptance of offer. We could be unconditional by 31 December 2008 if this offer is accepted within a few days.

Settlement: 15 April 2009

Special Conditions: Land Payment Schedule:

- $100,000 deposit payable on signing of the contract

- $1,750,000 on settlement

- Balance $1,850,000 payable 12 months after settlement.

The balance payment secured by the vendor having a 2nd mortgage over the land with Citimark borrowings against the title to be limited to 60% of land valuation until commencement of development, 80% of land valuation once developing and unlimited for development costs.

The vendor make available all investigations, studies, reports and schedules prepared to date on the property within one week of agreement to this offer and give access to the consultants who have prepared them.

The vendor to provide Citimark with a copy of the current valuation prepared by CBRE so Citimark can use for mortgage purposes.

Thanks Adam. I look forward to working up a contract with you and can be contacted on (07)3002-6200 or (0418) 876-141.

...

1. On the same day Mr Nankervis sent an email to Mr McWilliam as follows:

...

Feaso as Discussed

...

1. The “feaso” was presumably a feasibility study. The document appears to have been prepared for the purposes of Investa Property Group.
2. On 27 November 2008, Mr Nankervis sent an email to Mr Barclay at Oliver Hume, copying it to Mr Stubbs who was senior to Mr Nankervis in the Investa Property Group hierarchy. It read as follows:

...

Re: Brentwood – Fossil Site – Back Up Sale Contract

...

Discussions were had today at our project review meeting for Brentwood, regarding the ongoing Sale of the Fossil Site. Our recent dealings with the potential purchaser of the site do not provide us with any confidence that they will be in a position to perform as required under the Contract. As a result we have reached a decision at the project level to have Oliver Hume procure a back up Sale Contract.

As discussed earlier this evening, the following details are provided:

1. Current Purchase Contract Details:-

Price $1,775,000 incl GST

Dep $10k

Balance Dep to 10%

Finance 30 days

Valuation 45 days

DD 60 Days

Settlement 15 Dec 2008

The Sale was Off Market procured by Mark Waters, we have not met the purchaser, the DD is now due 31 Jan 2008, with Settlement 14 days after.

2. Investa Board Approval

“The Fossil site disposal is to be reflective of market conditions and valuation. (Minimum Sale price to exceed $1.75M), 8 August 2008.”

We are seeking a Sale Price above the Current Sale Contract and in line with valuation by JLL $1.8M under the margin scheme, dated June 2008.

2. Property Details:-

Seller: Clarendon Residential Group Pty Ltd

Address: Lot 170 Brittains Road, Bellbird Park

Property Description: Lot 170 RP904872

County: Stanley

Parish: Bundamba

Title Ref: 50196414

Area: 7.25Ha

Ipswich City Council

3. Approved Plans – 22 July 2008

4. Development Approval – Negotiated Decision Notice 22 July 2008

5. Lot Calculation Plan – 3 July 2008

5. Engineering Cost Estimate – Dated 14 November 2008

6. Slope Analysis

7. Recent Sales Advice – Brentwood Rise

8. Sales Commission

We are willing to pay Oliver Hume 1% sales commission for an englobo sale, but if you feel that you have a better opportunity in seeking your sales commission at the purchaser end feel free to pursue. We will not formalise your engagement to act on our behalf at this stage until you advise.

9. Deal Structure

We would like an unconditional contract, asap, therefore we would like to reduce some of the time frames as noted in the previous contract, as follows:

Initial Deposit $50K

Balance Deposit to 10%

Finance 21 Days

Due Diligence 30 Days

Cash Settlement

Contract subject to the initial contract not completing on or before 31 January 2009

(If we can achieve a clean unconditional contract as described, we would negotiate settlement date)

10. Sale Strategy

We would like you to promote this offer through the Oliver Hume network Off Market. I suggest with your recent discussions re: Brentwood North and your recent retail involvement in the corridor on Brentwood, Springfield Lakes and the Australand Sale you would have a pretty good handle on potential prospects.

As you are aware the site is constrained by slope and the potential built form, please consider a strategy for the slope and appropriate built form solutions at your earliest.

If you have any questions please give me a call.

Gavin and I would like weekly updates and ultimately we need a Contract/purchaser that will perform, we can not afford any further delays.

Thanks

...

1. It is worth noting that the terms of Citimark’s offer would not have satisfied the terms proposed by Mr Nankervis.
2. Mr Barclay replied on 28 November 2008 as follows:

...

Re: Brentwood – Fossil Site – Back Up Sale Contract

...

Thank you for the opportunity to assist Investa with the sale of the Fossil site and to strengthen the relationship with Gavin and yourself further.

I will commence making contact with potential purchasers of the site immediately upon reviewing the documentation provided. It is my expectation that no contract will be entered into prior to Christmas, however I am confident that I can have a buyer signed contract that in large part meets your requirements prior to the completion of DD on 31 January 2009. There will need to be a short DD period beyond the execution date and we may need to provide some flexibility around settlement. This is of course contingent upon an unconditional contract.

“Unknown” developers will not have the capacity to complete in this market and it appears you have been dealing with someone without the necessary credentials. I will only put forward offers from parties that have a demonstrated ability to perform.

I will report back to you each Monday to advise current status.

Would you please confirm the process for preparation of a draft contract and advise access arrangements to your current consultants for the purpose of DD.

...

1. Mr Nankervis replied on 28 November 2008, copying the reply to Mr Stubbs as follows:

...

Re: Brentwood – Fossil Site – Back Up Sale Contract

...

The Contract can be prepared by Oliver Hume (consistent with what you are doing with the retail Sales). Consultants will be made available once you have a preferred purchaser under Contract etc. I presume some time in jan 2009 from your note below.

Weekly updates can be via email, once you get to a point of exchange we would like to either meet the potential purchaser or at lease [sic] understand the pre‑qualifications you have had with them.

...

1. There was no appointment pursuant to the PAMD Act.
2. A number of points should be made concerning this correspondence. First, Lot 170 was already under contract. Notwithstanding the obviously serious doubts entertained by Mr Nankervis as to the likelihood of completion, Investa Residential was, for all practical purposes, not in a position to sell to any potential purchaser identified by Oliver Hume. Under the existing contract the “Due Diligence” date was 31 January 2009, with settlement 14 days thereafter. The reference to 31 January 2008 is an obvious error. Any new contract was to be “reflective of market conditions and valuation” with a minimum sale price of $1.75 million. Mr Nankervis also asserted that Investa Residential was looking for a sale price in line with an existing valuation of $1.8 million.
3. Investa Residential was anxious to compress the time between the making of any new contract and settlement, presumably to ensure speedy payment of the purchase price. Paragraphs 4‑8 of the letter suggest that Investa Residential was providing to Oliver Hume a substantial amount of information concerning its proposed development, which information would no doubt be of value to any potential purchaser.
4. Investa Residential had indicated that Oliver Hume might prefer to negotiate a commission payable by a purchaser, in lieu of the 1% offered by Investa Residential. Such an arrangement would presumably assume a price at or about $1.75‑$1.80 million. If Oliver Hume looked to Investa Residential for its commission, it would receive 1% of the purchase price, reducing the amount received by the latter company accordingly. If Oliver Hume negotiated a higher commission to be paid by the purchaser, Investa Residential would receive the extra 1%, but the commission to be paid to Oliver Hume would presumably be an amount which the purchaser would otherwise have paid in the form of a higher purchase price. Paragraph 8 demonstrates a clear intention not to “formalize” any engagement of Oliver Hume, “until you advise”, presumably when a buyer had been found, and a decision made as to the commission.
5. It seems, however, that there was another dimension to the question of commission. Oliver Hume may have had it in mind that it would not charge any commission to either the vendor or purchaser on the sale. Its intention may rather have been to reach an agreement with the purchaser to act as agent in the eventual sale of subdivided allotments.
6. Investa Residential wanted a contract, conditional only upon the existing contract not being settled on or before 31 January 2009. It also wanted a sale “off market”, presumably to a person already known to Oliver Hume as a likely buyer. The previously identified topographical problems were mentioned. Mr Nankervis sought weekly updates and stressed that Investa Residential needed a “Contract/purchaser that will perform. We can not afford any further delays”.
7. Mr Barclay’s response was optimistic. On 2 December 2008 he identified two possible buyers, including Mr Tonuri who was to be the eventual purchaser. On the same day, Mr Barclay provided to Mr Tonuri an Investa report concerning an adjoining site. The report seems to have contained quite detailed information.
8. In further emails, Mr Barclay reported to Mr Nankervis and Mr Stubbs. By mid‑January, Mr Tonuri had emerged as the most likely buyer. On 27 January, he offered $1.6 million including GST, with settlement on 31 July 2009. On 28 January, Mr Nankervis recommended sale at $1.6 million, with the commission to be paid by the purchaser. On 2 February 2009, he recommended sale at $1,454,545 excluding GST. The difference in the amount seems to have been the amount of GST. Approval was given on 19 February 2009. The Lot 170 option was executed on 20 February 2009, the optionee being TETN. The call option period was to expire at 5.00 pm on 22 June 2009. On 25 June 2009, a contract of sale was entered into between Investa Residential and TETN. The purchase price was $1,454,545. No agent was identified. The sale was completed on 31 July 2009.
9. At paras 162A and 162B of the statement of claim, the appellants pleaded that by the letter of 16 July 2008 and/or the email of 27 November 2008, they offered Oliver Hume a commission for the “englobo” sale of Lot 170. At para 162C, they pleaded that Oliver Hume thereafter performed services for them, particularizing those services. At para 162D, the appellants pleaded that, “further and alternatively”, Oliver Hume and Mr Barclay were in a position of confidence in relation to both appellants in connection with the sale and marketing of Lot 170 because:

(a) [Investa Residential] engaged [Oliver Hume], and thereby [Mr Barclay], to provide services to [Investa Residential] in connection with the sales and marketing of other lots in the Brentwood site;

(b) pursuant to that engagement, [Oliver Hume], by [Mr Barclay], provided services to Investa Properties and [Investa Residential] in connection with the sales and marketing of other lots in the Brentwood site;

(c) while acting in the course of that engagement and otherwise because of it, [Mr Barclay] and [Oliver Hume] acquired knowledge of the Fossil Site, including plans, approvals, reports and valuations relating to it and proposals affecting it;

(d) while acting in the course of that engagement and otherwise because of it, [Mr Barclay] and [Oliver Hume] also acquired knowledge of Investa Properties and [Investa Residential's] intentions and requirements in relation to the sale and marketing of the Fossil Site;

(e) [Mr Barclay] and [Oliver Hume] provided services in connection with the sale and marketing of the Fossil Site, particulars of which are given in paragraph 162C above; and

(f) Investa Properties and [Investa Residential], on the one hand, and [Mr Barclay] and [Oliver Hume], on the other, acted throughout on the basis that [Mr Barclay] and [Oliver Hume] were acting in the interests of Investa Properties and [Investa Residential] in relation to the sales and marketing of the properties in the Brentwood site, including the Fossil Site.

1. At para 162E the appellants alleged that Oliver Hume had, whilst providing services in relation to Lot 170, fiduciary obligations to the appellants as follows:

(i) To act in good faith and with fidelity;

(ii) To avoid and disclose to Investa Properties or to [Investa Residential] all actual or perceived conflicts of interest;

(iii) To act in the best interests of Investa Properties and [Investa Residential];

(iv) To give Investa Properties and [Investa Residential] the full benefit of the knowledge and skill of its employees, and in particular, to pass on to Investa Properties or to [Investa Residential] all information that it or they had about the marketing and sale of the properties that were the subject of its appointment that might be relevant to the marketing and sale;

(v) Not to profit from its position, and not to allow its employees to profit, other than by receiving remuneration in accordance with its appointment, without full disclosure to and the informed consent of Investa Properties and [Investa Residential]; and

(vi) Not to assist:

• Any person with whom it or any of its employees was associated; or

• Any entity in which it, or any of its employees, or a person whom it or any of its employees was associated with or had an interest in; or

• Any person or entity from whom or from which it or any of its employees could expect a benefit to purchase Lot 170, without full disclosure to and the informed consent of Investa Properties and [Investa Residential].

1. Concerning Mr Barclay, the appellants pleaded at paras 162F and 162G:

162F. Further and alternatively, as is alleged in more detail in paragraphs 29 and 30 above, and in particular, in paragraph 29(1), [Mr Barclay]:

(a) Was employed to perform [Oliver Hume's] obligations as a real estate agent to Investa Properties and [Investa Residential]; and

(b) As alleged in paragraph 162C above, was involved in a significant way in providing [Oliver Hume's] services to Investa Properties and [Investa Residential] in relation to Lot 170.

162G. Because of the facts alleged in paragraphs 162D and 162F above, [Mr Barclay] had fiduciary obligations to Investa Properties and [Investa Residential] while providing services in relation to Lot 170:

(i) To act in good faith and with fidelity;

(ii) To avoid and to disclose to Investa Properties or to [Investa Residential] all actual or perceived conflicts of interest;

(iii) To act in the best interests of Investa Properties and [Investa Residential];

(iv) To give Investa Properties and [Investa Residential] the full benefit of his knowledge and skill, and in particular, to pass on to Investa Properties or to [Investa Residential] all information that he had about the marketing and sale of the properties that were the subject of his employment that might be relevant to the marketing and sale;

(v) Not profit from his position, other than by receiving remuneration in the course of his employment, without full disclosure to and the informed consent of Investa Properties and [Investa Residential]; and

(vi) Not to assist:

• Any person with whom he was associated; or

• Any entity in which he, or a person with whom he was associated, had an interest; or

• Any person or entity from whom or from which he could expect a benefit,

to purchase Lot 170, without full disclosure to and the informed consent of Investa Properties and [Investa Residential].

1. As to the breach of fiduciary duty by Oliver Hume and Mr Barclay, the pleading was somewhat intricate, starting with para 174A as follows:

At a time unknown to Investa Properties and [Investa Residential] but before 20 January 2009, [Mr Nankervis] and [Mr Barclay] entered into an agreement with [Mr Tonuri], pursuant to which [Mr Nankervis] and [Mr Barclay] would participate in and derive profits from the sale to [Mr Tonuri] or his nominee and subsequent development of the Fossil Site.

**Particulars**

(i) Email, 20 January 2009, from [Mr Tonuri] to [Mr Nankervis] and [Mr Barclay].

(ii) Email, 24 May 2010, 10:42 am, from [Mr Tonuri] to Tony Hoffman, of Hoffman Kelly, copied to [Mr Nankervis] and [Mr Barclay].

(iii) Email, 24 May 2010, 11:11 am, from Tony Hoffman to [Mr Tonuri].

(iv) Email, 24 May 2010, 11:36 am, from [Mr Tonuri] to Tony Hoffman, of Hoffman Kelly, copied to [Mr Nankervis] and [Mr Barclay].

1. At para 186 the appellants pleaded:

From a date not later than August 2009 to a date unknown by Investa Properties and [Investa Residential], [Mr Nankervis] and [Mr Barclay]:

(a) were either engaged by or performed services for and on behalf of [Mr Tonuri] or a person or persons associated with or involved in [TETN];

(b) provided information and assistance to [Mr Tonuri] or a person or persons associated with or involved in [TETN]; or

(c) performed duties for and on behalf of [Mr Tonuri] or a person or persons associated with or involved in [TETN] and/or prepared documents and other materials for [Mr Tonuri] or a person or persons associated with or involved in [TETN].

1. As the contract for the sale of Lot 170 was completed on 31 July 2009, the relevance of those allegations is not clear. I shall return to this matter. At paras 187 and 189, the appellants pleaded:

187. The services and assistance provided by [Mr Nankervis] and [Mr Barclay] to [Mr Tonuri] or a person or persons associated with or involved in [TETN] included:

(a) preparing financial and feasibility reports;

(b) project management including managing project negotiations;

(c) managing land sales, including tracking land sales on a periodic basis;

(d) managing project negotiations, preparing contracts and liaising with, and appointing, contractors and planners; and

(c) approving and/or recommending sales prices for lots.

…

189. At the time [Mr Barclay] engaged in the conduct alleged in paragraph 186 above (other than in respect of Particular (xi) of paragraph 186), he was:

(a) employed by [Oliver Hume];

(b) a director of [Oliver Hume];

(c) the only director of [Oliver Hume] resident in Queensland;

(d) the officer in effective control of [Oliver Hume's] corporate licence;

(e) authorised by [Oliver Hume] to sign various identified types of agreements;

(f) operating with the actual or ostensible authority to act for [Oliver Hume] in relation to providing real estate agent services to Investa Properties and [Investa Residential]; and

(g) by reason of the matters identified in paragraphs 162A-162E above, a fiduciary of Investa Properties and [Investa Residential], and was providing services as such to Investa Properties and [Investa Residential] in respect of the marketing and sale of the Fossil site.

1. As I have pointed out the combined effect of paras 186, 187 and 189 was to allege that Mr Barclay performed services for Mr Tonuri, or other persons associated with TETN after the contract of sale had been completed. In paras 190‑193 the appellants pleaded circumstances relating to the removal of the sales office to which matter I have previously referred. It seems at least possible that the pleading of events which occurred after the making of the contract related to the claim concerning the removal of that office, a claim which is no longer relevant. Alternatively, the paragraphs may have been designed to establish some sort of continuity between the sale of Lot 170 and the conduct leading to the sale of Lot 191. However this seems unlikely, given that the appellants pleaded the claim concerning the sale of Lot 191 before pleading the claim relating to the sale of Lot 170. At para 195, Mr Barclay’s alleged breaches were pleaded as follows:

(aa) Entering into the agreement with [Mr Nankervis] and [Mr Tonuri], alleged in paragraph 174A above; and

...

(c) Providing services to [Mr Tonuri] and to [TETN] or to both of them, as alleged in paragraph 186 above,

[Mr Barclay] breached his fiduciary obligations to Investa Properties and [Investa Residential].

***Particulars of Fossil Site Breaches of Fiduciary Duty***

(1) [Mr Barclay] did not act with good faith and with fidelity towards Investa Properties and [Investa Residential] because of the facts alleged in paragraphs 164A-164G, 174A, 186, 187 and 189.

(2) [Mr Barclay] did not avoid and disclose to Investa Properties or to [Investa Residential] actual or perceived conflicts of interest because of the facts alleged in paragraphs 164A-164G and 174A.

(3) [Mr Barclay] did not at all times act in the best interests of Investa Properties and [Investa Residential] because of the facts alleged in paragraphs 164A-164G, 174A, 186, 187 and 189.

(4) [Mr Barclay] did not pass on to Investa Properties or to [Investa Residential] all information he had about the marketing and sale of the Fossil Site and that might be relevant to the marketing and sale of the site, because of the facts alleged in paragraphs 164A-164G and 174A.

(5) [Mr Barclay] gave assistance to persons with whom he was associated, or to persons or entities from whom or from which he could expect a benefit to purchase the Fossil Site without full disclosure to Investa Properties or to [Investa Residential], because of the facts alleged in 174A.

1. At para 196, Oliver Hume’s alleged breaches were pleaded as follows:

(aa) Barclay's entering into the agreement with [Mr Nankervis] and [Mr Tonuri], alleged in paragraph 174A above; and

...

(c) Providing services to [Mr Tonuri] and to [TETN] or to both of them, as alleged in paragraph 186 above,

[Oliver Hume] breached its fiduciary obligations to Investa Properties and [Investa Residential].

***Particulars of Fossil Site Breaches of Fiduciary Duty***

(1) [Oliver Hume] did not act with good faith and with fidelity towards Investa Properties and [Investa Residential] because of the facts alleged in paragraphs 164A-164G, 174A, 186, 187 and 189.

(2) [Oliver Hume] did not avoid and disclose to Investa Properties or to [Investa Residential] actual or perceived conflicts of interest because of the facts alleged in paragraphs 164A-164G and 174A.

(3) [Oliver Hume] did not at all times act in the best interests of Investa Properties and [Investa Residential] because of the facts alleged in paragraphs 164A-164G, 174A, 186,187 and 189

(4) [Oliver Hume] did not pass on to Investa Properties or to [Investa Residential] all information that it had about the marketing and sale of the Fossil Site that might be relevant to the marketing and sale of the site, because of the facts alleged in paragraphs 164A-164G and 174A.

(5) [Oliver Hume] gave assistance to persons with whom it was associated to purchase the Fossil Site without full disclosure to Investa Properties or to [Investa Residential] because of the facts alleged in 174A.

1. The fiduciary duties alleged by the appellants against both Mr Barclay and Oliver Hume are extensive. Some are couched in language frequently encountered in such cases. Others seem to be tailored to reflect “duties” tailored to meet the needs of this case. However there seems to have been little attempt to identify how that extensive suite of fiduciary duties was to be derived from any undertaking entered into by either Mr Barclay or Oliver Hume.
2. The trial Judge concluded that there had been no effective appointment of Oliver Hume pursuant to the PAMD Act. Her Honour observed at [152] that the, “legislative scheme does not allow for the existence of a relationship of principal/real estate agent outside [the] parameters of that scheme”, and that, “traditional equitable obligations of real estate agents to their principals have been subsumed into, and are now regulated by” the PAMD Act and the Regulations. Her Honour appears to have applied the decision of the Court of Appeal in *Yong Internationals Pty Ltd v Gibbs* [2011] QCA 161. That case certainly establishes the proposition that in the absence of substantial compliance with the provisions of s 134 (which prescribes the form which an appointment must take), the agent will not be “properly appointed and, as a consequence, will not be entitled to sue for, or recover any commission”. Section 133 of the PAMD Act provides:

(1) A real estate agent must not act as a real estate agent for a person (***client***) to perform an activity (***service***) for the client unless-

(a) the client first appoints the real estate agent in writing; or

(b) a previous appointment by the client is assigned to the real estate agent under the terms of that appointment or under section 135A and the appointment is in force.

...

(2) The appointment may be for the performance of­

(a) a particular service (***single appointment***); or

(b) a number of services over a period (***continuing appointment***).

(3) The appointment must, for each service-

(a) state the service to be performed by the real estate agent and how it is to be performed; and

(b) state, in the way prescribed under a regulation, that fees, charges and commission payable for the service are negotiable up to any amount that may be prescribed under a regulation; and

(c) state-

(i) the fees, charges and any commission payable for the service; and

(ii) the expenses, including advertising and marketing expenses, the agent is authorised to incur in connection with the performance of each service or category of service; and

(iii) the source and the estimated amount or value of any rebate, discount, commission or benefit that the agent may receive in relation to any expenses that the agent may incur in connection with the performance of the service; and

(iv) any condition, limitation or restriction on the performance of the service; and

(d) state when the fees, charges and any commission for the service become payable; and

(e) if the service to be performed is the sale or letting of property or the collecting of rents and commission is payable in relation to the service and expressed as a percentage of an estimated sale price or amount to be collected, state that the commission is worked out only on the actual sale price or the amount actually collected; and

(f) if the appointment is for a sole or exclusive agency, state the date the appointment ends.

...

(4) A continuing appointment must state-

(a) the date the appointment ends; and

(b) that the appointment, other than to the extent it relates to the sale of land or interests in land, may be revoked on the giving of 90 days notice, or some lesser period (not less than 30 days) agreed by the parties.

(5) The notice revoking a continuing appointment must be by signed writing given to the other party.

(6) The revocation of a continuing appointment does not affect existing contracts entered into by the real estate agent on behalf of the client.

(7) The appointment must be signed and dated by the client and the real estate agent or someone authorised or apparently authorised to sign for the agent.

(8) The real estate agent must give a copy of the signed appointment to the client.

...

(9) If an appointment under this section authorises a sale by auction, an appointment under section 210 is not required.

(10) This section does not apply if the service to be performed is the sale of livestock.

1. Section 141 provides:

(1) A person is not entitled to sue for, or recover or retain, a reward for the performance of an activity as a real estate agent that is more than the amount of the reward stated in the appointment given under section 133.

(2) However, if the reward for the performance of the activity is limited under a regulation, the person is not entitled to sue for, or recover or retain, a reward more than the amount allowed under the regulation.

(3) A person is not entitled to sue for, or recover or retain, expenses for the performance of an activity as a real estate agent that are more than the amount of the expenses stated in the appointment given under section 133 and actually expended.

(4) However, if the amount of expenses that may be incurred in relation to the performance of the activity is limited under a regulation, the person is not entitled to sue for, or recover or retain, an amount more than the amount allowed under the regulation.

(5) Subsection (2) does not prevent the person suing for, recovering or retaining, in addition to the amount allowed under a regulation for the reward, an amount for GST payable for a supply.

(6) A person who sues for, or recovers or retains, a reward or expense for the performance of an activity as a real estate agent other than as provided by this section commits an offence.

...

1. Two obvious questions of construction are as to:

* the meaning of the term “real estate agent”; and
* the meaning of the term “activity” used in ss 133 and 141.

1. In the dictionary in Sch 2 to the PAMD Act, the term “real estate agent” is defined by reference to s 128(1). The term “activity” is not defined in the Schedule but is effectively defined in s 128(1) which provides:

A real estate agent’s licence authorises the holder of the licence (***real estate agent***) to perform the following activities as an agent for others for reward‑

(a) to buy, sell, exchange, or let places of residence or land or interests in places of residence or land;

(b) to buy, sell, exchange, or let businesses or interests in businesses;

(c) to collect rents;

(d) to buy, sell or exchange livestock or an interest in livestock;

(e) to negotiate for the buying, selling, exchanging or letting of something mentioned in paragraphs (a) or (b);

(f) to negotiate for the buying, selling or exchanging of something mentioned in paragraph (d).

1. The terms “buy” and “sell” may not accurately describe the usual function of a real estate agent. That function, in relation to the sale of a property, is understood to be to find a buyer. Generally a real estate agent does not buy or sell. The buyer and seller make their own contract. At least that is my understanding of the long‑standing practice in Queensland. It may be, however, that the words “buy” and “sell”, when used in relation to real estate agents, should be understood as including finding a buyer or, less frequently, finding a seller. Section 128(1)(e) extends the definition to include negotiating for the buying or selling of land. There may be some doubt as to whether, in finding a buyer, a real estate agent negotiates in any real sense. However it may be that the term “negotiate”, in this context, also has a specialized meaning.
2. Despite these difficulties, I infer that the PAMD Act applied to the dealings between Investa Residential and Oliver Hume. The effect of such application is that in acting as a real estate agent without the appointment required by the Act, Oliver Hume breached s 133. Further, by virtue of s 141, it could not receive any reward for so acting. However the PAMD Act did not purport to impose liability upon the agent’s principal, or adversely to impact upon the principal’s rights as against the agent. It did not expressly prohibit any non‑conforming agreement between the principal and agent. It rather forbade the performance by the agent of any obligations imposed upon it by any such purported appointment, which obligations were those identified in the PAMD Act. Such prohibition may have led to the agent being unable to perform the contract, or being in breach of an implied warranty as to its capacity to perform. It may be that the principal could not enforce specific performance of any “contract”, given the effect of s 133. However, it does not follow that the principal could not sue for damages for non‑performance, breach of warranty as to capacity or other relief. The real question is whether fiduciary obligations could arise as a result of dealings between the parties, notwithstanding the provisions of the PAMD Act. In considering that question the existence and operation of the Act may be a relevant consideration.
3. In this case deferral of the “formalization” of the engagement must have been for a purpose. Section  133 required that fees and charges for the relevant service be specified in the appointment. It would not have been possible to do so, given the option offered to Oliver Hume concerning its commission. The PAMD Act was enacted in 2000. It would be surprising if, at the time of the events with which this case is concerned, a property developer or real estate agent were not at least broadly aware of its terms.
4. Investa Residential expected, indeed intended, that Oliver Hume find a buyer amongst a group of potential buyers known to the latter. The concern that any buyer should “perform” suggests that Investa Residential was likely to examine closely the affairs of a proposed buyer in order to ensure performance. The reference in the email of 28 November 2008 to meeting the potential purchaser or understanding the “pre‑qualifications” which Oliver Hume “had” with them suggests a similar concern. The reference to “consultants” in that email seems to suggest that such information as had been provided to Oliver Hume was by no means the whole of the available information concerning the project. It must also be kept in mind that Oliver Hume did not undertake to endeavour to sell Lot 170 to the exclusion of any other vendor clients. Nothing specific was said about the confidentiality or otherwise of any information supplied to Oliver Hume, including the price which Investa Residential was willing to accept.
5. The trial Judge found that at some time prior to the grant of the Lot 170 option, Mr Barclay had entered into the Tonuri agreement. The trial Judge found at [224], [248], [249] and especially [273] as follows:

224 In my view, these emails clearly evidence an arrangement between Mr Tonuri, Mr Nankervis and Mr Barclay in relation to a development project concerning Lot 170, in respect of which they were in receipt of accounting advice from Mr Hoffman, and in respect of which it appears Mr Tonuri had taken the lead role. In so concluding I also make the following observations.

...

248 Second, I do not accept Mr Nankervis' explanation that, prior to the sale of Lot 170 to Two Eight Two Nine, he had provided voluntary unpaid assistance to Mr Tonuri, primarily out of hours and on weekends, in Investa's interests, and had rejected Mr Tonuri's overtures to enter a business relationship with him (for example, transcript 30 September 2014 pp 2069-2071). Although Mr Tonuri gave similar evidence (transcript 21 August 2014 p 1714 l 43), for the reasons I have just given in respect of Mr Tonuri's credibility, and for other reasons I am about to give, I also reject Mr Tonuri's evidence to that effect.

249 In short, the evidence simply does not support this scenario. I find it implausible that Mr Tonuri would arrange the incorporation of a company, the name of which was an anagram of the initials of Messrs Tonuri, Barclay and Nankervis, without consulting Mr Nankervis and Mr Barclay and merely in anticipation of the prospect of one day doing business with them. Mr Nankervis' statement that Mr Tonuri had done so is, in my view, not credible. The more likely explanation is that all three men had agreed that Bandat would be incorporated to purchase Lot 170, however for various reasons decided that it would not and that Two Eight Two Nine would instead complete that purchase.

...

273 In summary, I am satisfied that at or before 20 January 2009, Mr Nankervis had entered into an arrangement with Mr Tonuri and Mr Barclay to develop Lot 170 and that the arrangement was one whereby profits were divided into thirds between them. In a memorandum of 2 February 2009, Mr Nankervis recommended that the offer of Two Eight Two Nine to purchase Lot 170 be accepted. Mr Stubbs and Mr Jenkins recommended that Lot 170 be sold in accordance with Mr Nankervis' submission. The sale was subsequently approved on 19 February 2009 for the sum of $1,454,545 (not including GST). At no time did Mr Nankervis disclose any of the arrangements involving himself, Mr Barclay and Mr Tonuri to the applicants. I have previously found that Mr Nankervis was in a fiduciary relationship with the first applicant in relation to the sale of Lot 170, and am satisfied that these facts support a finding that he breached those fiduciary obligations.

1. In *Grimaldi* (supra) the Full Court said:

177 As to who is a “fiduciary”, while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other’s interest to the exclusion of his or her own or a third party’s interest: on who is a fiduciary, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (“*Hospital Products*”) at 96-97; *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 538-541; and see generally *Conaglen, Fiduciary Loyalty*, Ch 9 (2010).

178 As Australian law presently stands, the obligation of loyalty imposed upon a fiduciary is expressed in two overlapping proscriptive “themes” which govern the fiduciary’s liability to account to his or her own beneficiary. The best known formulation of these is that of Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 198-199:

The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage.

See also *Breen v Williams* (1996) 186 CLR 71 at 113.

179 The concept of “duty” in the “conflict of duty and interest” formula of the first of these is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary’s discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines “[t]he subject matter over which the fiduciary obligations extend” for conflict of duty and interest and conflict of duty and duty purposes: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* at 408. As Lord Upjohn noted in *Phipps v Boardman* [1967] 2 AC 46 at 127:

Having defined the scope of those duties [undertaken or assumed by the fiduciary] one must see whether he has committed some breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

...

181 The second “theme” - that of misuse of a fiduciary position - overlaps with the first to a considerable degree. The agent who successfully solicits (or “extorts”) a secret commission will characteristically transgress both the conflict of duty and interest and the misuse of position proscriptions. Importantly, though, misuse of position has an area of independent operation – an area which does not require it to be shown that the fiduciary has assumed some responsibility to his or her beneficiary in relation to the matter in issue. Its concern, as Deane J indicated, is to preclude the *misuse* of the position the fiduciary has, or of knowledge or opportunity derived from it. A longstanding exemplification of this is to be found in the Partnership Act which renders a partner liable to the firm for any benefit derived from any use made of the partnership property, name, or business connection: see eg *Russell v Austwick* (1826) 1 Sim 52 57 ER 498; *Partnership Act 1892* (NSW), s 29.

1. Her Honour appears to have concluded that there was no fiduciary relationship between Mr Barclay or Oliver Hume and Investa Residential because there was no appointment under the PAMD Act. Whilst I accept that the legislation would have quite serious effects upon a purported appointment which was not effected in accordance with its terms, I consider that an actual relationship between two parties, similar in kind to that to which the PAMD Act applies, but not formalized pursuant thereto, might nonetheless produce a fiduciary relationship. To proceed on any other basis would deny protection to the clients of real estate agents, when the legislation was, in effect, designed to protect them.
2. The question is not whether the requirements of the PAMD Act have been observed. The question is whether or not the parties have entered into a fiduciary relationship. Although her Honour concluded that the PAMD Act meant that there could be no fiduciary relationship between Oliver Hume and/or Mr Barclay and Investa Residential (a conclusion with which I do not agree) she went on to consider whether, if her conclusion were wrong, the general law would have operated to impose a fiduciary relationship. As concerns Oliver Hume, her Honour concluded that there was no such relationship because:

* Oliver Hume had not undertaken to act on behalf of Investa Residential;
* rather, Investa Residential had “opened negotiations” with Oliver Hume in order to engage it to act;
* Investa Residential was “comfortable” with Oliver Hume seeking to recover commission from any purchaser;
* Oliver Hume actively engaged in trying to find a purchaser; and
* in the absence of any agreement to engage Oliver Hume to sell or to pay it a commission, the “default position ‑ which appeared to be the final position in these circumstances – was that (Oliver Hume) would be the buyer’s agent”.

1. At [169] her Honour concluded:

In such circumstances it is not possible to identify any undertaking, either express or implied, from [Oliver Hume] to act in the interests of or for the benefit of the applicants. The business of [Oliver Hume] was clearly such that it was in a position to identify potential buyers of Lot 170, however it did so in the knowledge that the applicants were not prepared to formally appoint [Oliver Hume] to sell Lot 170 or pay it a commission exceeding 1%, and it was welcome to seek commission from the buyer. Activity by [Oliver Hume] in relation to Lot 170 was, at best, speculative on its part, with the prospect of earning commission from a buyer if it was successful in finding a buyer. The position of [Oliver Hume] vis-à-vis the applicants in this case was, in my view, more akin to that of an independent broker than an agent or any other fiduciary relationship.

1. In my view, that analysis fails to take into account the fact that in responding to the offer, Oliver Hume agreed to, “promote this offer through the Oliver Hume network Off Market”. This was clearly a service to be provided to Investa Residential. Oliver Hume volunteered an outline marketing plan, as requested, and set timelines. It agreed to winnow out “unknown developers” who might not be able to complete. It also enquired as to the availability of current consultants for a potential purchaser’s “due diligence” inquiries. It seems certain that Investa Residential assumed that Oliver Hume would be seeking to earn its commission, whether it was to come from it or a purchaser.
2. Investa Residential provided a certain amount of information to Oliver Hume. First, it disclosed that it did not expect the existing contract to be completed. Second, it gave an indication of the price which it was seeking, having regard to its understanding of the market. Third, it provided an apparently substantial amount of commercial information relating to Lot 170. Finally, it indicated the terms upon which it wished to sell.
3. There is no evidence to suggest that Investa Residential offered similar opportunities to other agents. It is true that earlier in 2008, there had been references to the use of other agents, but it does not follow that at the end of 2008, Investa Residential was still conducting itself on that basis.
4. I agree that the offer to allow Oliver Hume to negotiate a commission with a purchaser might detract somewhat from the duties undertaken by it. However in *Hospital Products*, at 69, Gibbs CJ did not demur to the suggestion in the reasons of the Court of Appeal that, “... it is not inconsistent with [the duty to act in the interests of another] that a fiduciary may retain that character although he is entitled to have regard to his own interests in particular matters.” Mason J may well have had similar considerations in mind when, at 97, he recognized that the terms of a fiduciary relationship must accommodate contractual terms between the parties. If anything, I am inclined to the view that in this case, the fact that Investa Residential was willing to trust Oliver Hume to deal fairly with it in negotiating commission with a potential purchaser, suggested the existence of a relationship of trust.
5. The intention to delay formalities suggested a less than complete commitment by Investa Residential to the appointment of Oliver Hume as its real estate agent. However the statement occurs in connection with the commission. It is quite likely that the concern was simply not to commit to any arrangement as to commission at that time, perhaps because of the need to comply with the PAMD Act. That Oliver Hume was willing to act on that basis suggests that it had a degree of trust in Investa Residential.
6. It seems fairly arguable that there was a duty on Oliver Hume to convey to Investa Residential any offers which it received, which offers fell within the stipulated terms, particularly as to price and completion arrangements. It is also arguable that there was a duty to act, with respect to Lot 170, in the best interests of Investa Residential, and not to put itself in a position in which its interests conflicted with those of Investa Residential. The express exemption made in connection with commission suggests that in other respects, there was to be no such conflict. Having had regard to Mr Barclay’s submissions I conclude that my reasoning in connection with Oliver Hume’s fiduciary duties applies equally to Mr Barclay’s case. To the extent that there was, arguably, a fiduciary relationship, the agreement between Mr Nankervis, Mr Barclay and Mr Tonuri seems, again at least arguably, to be in breach of the duties associated with such relationship. My reasoning in connection with Lot 191 may well lead to the conclusion that Mr Barclay’s knowledge of the dealings between him, Mr Nankervis and Mr Tonuri is to be imputed to Oliver Hume.
7. The question, then, is how the cases concerning Lot 170 against Oliver Hume and Mr Barclay should be resolved. My preliminary views concerning the arguable existence of a fiduciary relationship between each of Oliver Hume and Mr Barclay on the one hand, and Investa Residential on the other should not be understood as necessarily identifying the full extent of such relationships. I consider that her Honour’s view of the matter was inevitably compromised by her conclusion that there could be no fiduciary relationship because of the operation of the PAMD Act. Further, the parties’ submissions on appeal offer little assistance in identifying the incidents of any more limited fiduciary relationships. The appellants seem rather to have taken the view that any such relationship would have as many duties as have ever been ascribed to such a relationship, and perhaps more, notwithstanding the apparent acceptance that in this case, any relationship must be “fact based” and not “category based”. On the other hand, Mr Barclay and Oliver Hume have more or less denied any fiduciary relationship.
8. In the circumstances, I consider that the interests of justice require that the question of the incidents of the fiduciary relationships between each of Mr Barclay and Oliver Hume on the one hand, and Investa Residential on the other, concerning the sale of Lot 170, as pleaded, be remitted to the trial Judge for resolution in accordance with these reasons. All questions concerning the alleged breach of fiduciary obligations in connection with such sale should also be so remitted, including the question of Oliver Hume’s liability for the conduct of Mr Barclay.

# INVESTA PROPERTIES

1. The appellants also appeal against the trial Judge’s finding that there was no fiduciary relationship as between Investa Properties and Oliver Hume and/or Mr Barclay. However, notwithstanding the notice of appeal and its equivocal written submissions, counsel seems to have abandoned this aspect of the appeal in opening submissions at ts 15, ll 11‑25.

# OLIVER HUME, VERO AND MR BARCLAY – CLAIMS AND CROSS-CLAIMS

1. As I have previously observed Oliver Hume claimed against Mr Barclay for:

* indemnity or damages in respect of any liability to the appellants; and/or
* damages for breach of contract or breach of fiduciary duty;

Mr Barclay claimed against Oliver Hume for indemnity:

* “in respect of” the appellants’ claims, including in respect of any judgment against him and in favour of the appellants; and
* for the amount of any costs that he might be ordered to pay to the appellants and his own costs of the various proceedings; and

Mr Barclay claimed against Vero for, in effect, indemnity in respect of the same amounts pursuant to a contract of insurance and damages for breach of contract.

1. These various claims seem to have all related to the proceedings concerning both Lots 170 and 191. As I am of the view that Investa Residential’s claims concerning Lot 170 should be remitted to the trial Judge for further consideration, it is appropriate that the various claims and cross‑claims, to the extent that they concern Lot 170, be similarly remitted. To the extent that the trial Judge dealt with these matters her Honour did so only in connection with Lot 191. There are, in any event, problems arising out of the way in which the parties prosecuted these claims and cross‑claims, and with the trial Judge’s disposition of them.

## Oliver Hume’s claim against Mr Barclay

1. Oliver Hume asserted that if Mr Barclay engaged in conduct which was in breach of his duty to the appellants, and if Oliver Hume was liable to the appellants for Mr Barclay’s conduct, then he was in breach of duties owed to Oliver Hume. However the range of such duties identified in Oliver Hume’s statement of cross‑claim is very wide, including claims in contract, breach of duty as an employee or director, breach of fiduciary duty and perhaps others. Oliver Hume’s submissions at first instance indicated that its claim may have been based upon fraud or breach of duty as a director or as an employee, which duty may have been contractual or otherwise. Mr Barclay seems to have assumed (in his written submissions) that her Honour’s decision was based on breach of a fiduciary duty.
2. Although Mr Barclay has appealed against her Honour’s finding in favour of Oliver Hume, the latter seems not to have addressed that appeal in its written submissions. Counsel for Oliver Hume seemed to be under the misapprehension that there was no relevant appeal. As far as I can see, counsel made no submissions concerning this aspect of the appeal, even after counsel for Mr Barclay had specifically asserted that he was appealing against the primary Judge’s finding.
3. The trial Judge disposed of the matter “swiftly” as her Honour put it, concluding that as she had found that Oliver Hume was liable to Investa Residential in respect of Mr Barclay’s conduct concerning Lot 191:

* there was no evidence that anybody other than Mr Barclay knew of his conduct, which conduct breached his own and Oliver Hume’s fiduciary duties to Investa Residential; and
* it could not be “seriously disputed” that such conduct breached his duty to Oliver Hume, as an employee and director of that company.

1. Mr Barclay’s grounds of appeal are as follows:

1. The learned trial judge erred in failing to find that Barclay, as an employee and officer of Oliver Hume, was entitled to be indemnified by it for any liability imposed on him in these proceedings and the costs of defending the Appellants' claim.

2. The learned trial judge erred in failing to find that Barclay, as an employee and officer of Oliver Hume, was entitled to be indemnified by Vero Insurance Limited ABN 48 005 297 807 for any liability imposed on him in these proceedings and the costs of defending the Appellants' claim.

3. The learned trial judge erred in finding that Barclay had breached his fiduciary duties to Oliver Hume.

1. Grounds 1 and 2 will be better addressed in my consideration of Mr Barclay’s claims against Oliver Hume and Vero. As to ground 3, in his written outline of submissions on appeal, Mr Barclay submitted that her Honour erred in her conclusion concerning Oliver Hume’s claim in that:

47. *First*, the learned trial judge did not give any or any adequate reasons for the legal basis upon which Oliver Hume's breach of fiduciary duty owed to Investa Residential necessarily gave rise to a breach of fiduciary duty owed by Barclay to his employer, Oliver Hume.

48. Any obligations that Barclay owed to Oliver Hume were separate and distinct to any obligations Barclay and/or Oliver Hume owed to Investa Residential.

49. A failure to provide reasons or give adequate reasons is in and of itself an appellable error. The learned trial judge erred because it is not clear what reasons '*canvassed earlier*' in the judgment detailing the legal basis for a conclusion of a breach of duty were relied upon (if at all).

50. *Second*, despite finding that Oliver Hume lacked knowledge of Barclay's conduct, the learned trial judge erred in giving no consideration as to whether Barclay was nevertheless acting within the scope of his authority especially in circumstances in which Oliver Hume derived a commission from the sale of Lot 191.

(Footnotes omitted.)

1. The conduct on the part of Mr Barclay said to give rise to Oliver Hume’s claim against him is identified in para 2(f)(ii) of the statement of cross‑claim. With respect to Lot 191 it is, in effect, the conduct alleged in para 137 of the appellant’s statement of claim to which I have previously referred. However that paragraph relies substantially upon other paragraphs of the statement of claim. The matter is further complicated by the numerous bases pleaded by Oliver Hume in support of its claim against Mr Barclay. Her Honour’s reasons identify neither the conduct upon which the decision is based nor the duty breached.
2. It may be that the trial Judge merely relied upon the fact that Mr Barclay had not informed Investa Residential or Oliver Hume of his wife’s interest in QPC or, perhaps, the steps which he and Mr Nankervis had taken towards subdivision of Lot 191. It may be that, as Mr Barclay seems to have thought, the relevant breach was of a fiduciary duty. However neither possibility can be clearly identified as the sole basis of her Honour’s conclusions. There is, of course, the further problem concerning her Honour’s finding that Ms Barclay was the shareholder and director of Spencer Projects, upon which basis para 137(e) of the statement of claim relies, an assertion that is now known to have been incorrect.
3. Mr Barclay submits that the decision of the High Court in *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 is authority for the proposition that a failure to provide reasons or give adequate reasons, “is in and of itself an appellable error”. The relevant passage appears at [130] in the reasons of Hayne J, with which passage McHugh and Gummow JJ agreed. However Mr Barclay’s submission may be too broad. Hayne J identified two circumstances in which the failure to give adequate reasons might amount to appellable error. The first was where such failure amounted to a denial of procedural fairness. The second was where the reasons were to be understood as recording the steps which were in fact taken in arriving at the decision, which reasons might therefore demonstrate an error in reasoning.
4. This case may fall within both categories. It is difficult to see how Mr Barclay could have been expected to attack the decision on appeal, other than by making assumptions as to its factual and legal bases. To that extent, he has been denied procedural fairness. Further, the reasons suggest that the decision was based on the assumption that all of the conduct pleaded in para 137 was contrary to some or all of the identified duties allegedly owed by Oliver Hume, demonstrating a serious error in reasoning.
5. In my view Order 5 of the orders made at first instance should be set aside, and the matter remitted to the trial Judge for determination in accordance with law.

## Mr Barclay’s claim against Oliver Hume

1. By his notice of cross‑claim, Mr Barclay claims as against Oliver Hume:

* indemnity in respect of the appellants’ claims;
* indemnity in respect of any judgment against him and in favour of the appellants; and
* indemnity in respect of costs ordered against him and his own costs.

1. In his statement of cross‑claim, Mr Barclay asserted that the appellants had claimed against him for damages for breach of contract and negligent breach of duty whilst he was acting as a director, employee, servant or agent of Oliver Hume. There were no further particulars of the claim. In its defence, Oliver Hume pleaded various terms of its contractual and other arrangements with Mr Barclay. At para 4 it pleaded:

a. ... that any conduct giving rise to a claim for breach of contract or breach of duty alleged against [Mr Barclay]:

(i) did not arise from matters which were within the scope or authority of [Mr Barclay's] duties as a director, employee or agent of [Oliver Hume];

(ii) was, in breach of the duties which [Mr Barclay] owed [Oliver Hume] by reason of his position as a director and employee of [Oliver Hume] ... .

1. Oliver Hume then “repeats and relies upon” the matters contained in its cross‑claim against Mr Barclay and denies any obligation to indemnify him.
2. In his written submissions at first instance, Mr Barclay distinguished between a cross‑claim for equitable contribution as against Mr Nankervis and Oliver Hume, and a cross-claim for indemnity as against Oliver Hume. The claim to equitable contribution seems to have assumed that Mr Barclay, Mr Nankervis and Oliver Hume might all be found to have failed to make appropriate disclosure, and therefore to have breached fiduciary duties owed to Investa Residential.
3. In any event, there is no appeal in connection with the claim to equitable compensation.
4. As to the claim to indemnity in his outline of submissions at first instance, Mr Barclay seems only to have sought indemnity with respect to Lot 170. However, in his notice of appeal, he appears to assert a more general claim to indemnity. His written submissions are to similar effect. Presumably the claim now relates to both Lots 170 and 191.
5. The trial Judge’s decision concerning this aspect of the matter may go a little further than was necessary. Her Honour seems firstly to have dismissed the claim upon the ground that she could not identify any basis upon which Mr Barclay claimed entitlement to indemnity. The claim seems simply to assume a right to indemnity from Oliver Hume for liability incurred to a third party in the course of his duties. In my view her Honour correctly dismissed the claim on that basis. However her Honour went on to conclude that Mr Barclay was in breach of his duty to Oliver Hume as an employee and as a director, “in that he had placed his personal interests ahead of his duty to [Oliver Hume]”. As far as I can see, that finding adds nothing to her Honour’s conclusion that no basis was demonstrated for the assertion of an entitlement to indemnity. Mr Barclay has demonstrated no error in her Honour’s reasons concerning this aspect of the case.

## Mr Barclay’s claim against Vero

1. Mr Barclay pleads that on 30 September 2010, Oliver Hume took out a professional indemnity policy to “cover [Oliver Hume]”. The insurer was Vero. Paragraphs 6‑8 of Mr Barclay’s claim against Vero are as follows:

6. Relevantly, the Policy of Insurance provided:

(a) ***Definitions***

(i) "***Claim***" means any demand made by a third party upon the insured for compensation, however conveyed, including a writ, statement of claim, application or other legal or arbitral process;

(ii) "***Insured***" means:

A. the legal entity or entities specified in the Schedule; and/or;

B. past and/or present employees of the legal entity or entities specified in the Schedule, but only in his or her capacity as such;

C. any past and/or present Principal of the legal entity or entities specified in the Schedule, but only in his or her capacity as such;

(iii) "***Insurer***" means Vero Insurance Limited ABN 48 005 297 807;

(iv) "***Insured Costs***" means all necessary and reasonable costs and expenses incurred by the Insurer, or by the Insured with the Insurer's prior written consent, in defending, investigating, or settling any claim or claims (not being Inquiry Costs or claimant's costs and expenses);

(v) "***Principal***" means a sole practitioner, a partner of a firm or a director of a company;

(vi) "***Professional Services***" means the professional business described in-the Schedule, and no other, of the legal entity or entities specified in the Schedule;

(b) ***Insurance Preamble***

The Insured and the Insurer agree that the Insurer will provide insurance on the terms of this Policy.

(c) ***Insuring Clause***

The insurer will indemnify the Insured against civil liability for compensation and claimant's costs in respect of any Claim or Claims first made against the Insured and notified to the Insurer during the Period of Insurance resulting from the conduct of the Professional-Services but not in respect of any such Claim or Claims resulting from any act, error or-omission occurring or committed prior to the Retroactive Date.

(d) ***Insured Costs***

The Insurer will, in addition to the Limit of Indemnity, pay Insured Costs, provided that if the total amount of compensation and claimant's costs and expenses required to dispose of the Claim or Claims exceeds the Limit of Indemnity, the liability of the Insurer for such Insured Costs shall be only that proportion which the Limit of Indemnity bears to the total amount of compensation and claimant's costs and expenses required to dispose of the Claim or Claims.

(e) ***Claims Notifications***

Every claim made against the Insured shall be notified to the Insurer as soon as practicable and in any event prior to expiry of the Period of Insurance, and every letter, demand, writ summons and legal process pertaining to such Claim shall be forwarded to the Insurer as soon as practicable after receipt.

7. By the Schedule to the Policy of Insurance, Insured includes [Oliver Hume].

8. By virtue of the matters pleaded in paragraph 3 above [Mr Barclay] is an insured under the Policy of Insurance.

1. Vero denies any liability to indemnify Mr Barclay and pleads various matters relating to Mr Barclay’s employment.
2. Mr Barclay pleads that the term “insured” is defined to include past or present employees of an entity specified in the schedule to the policy. Mr Barclay does not assert that Oliver Hume was an entity so specified. However at paras 7 and 8 he effectively alleges as much. With regard to those paragraphs, Vero pleads, at para 9 of its defence to the cross‑claim:

As to the allegations in paragraph 7 and 8 of the cross-claim, Vero relies on the matters pleaded in paragraphs 10 to 14 herein.

1. At para 10, Vero pleads:

The Policy relevantly provides:

*'The Insurer will indemnify the Insured against civil liability for compensation and claimant's costs and expenses in respect of any Claim or Claims first made against the insured and notified to the Insurer during the Period of Insurance resulting from the conduct of the Professional Services but not in respect of any such Claim or Claims resulting from any act, error or omission occurring or committed prior to the retroactive date.*’

'*Insured*' is relevantly defined to mean:

…

*ii. past and or present employees of the legal entity or entities specified in the Schedule, but only in his or her capacity as such; and/or*

*iii. any past or present Principal of the legal entity or entities specified in the Schedule, but only in his or her capacity as such; ...*

1. At para 11 Vero pleads duties owed by Mr Barclay to Oliver Hume and breach of those duties. It further pleads at para 11h:

In the premises:

(i) [Mr Barclay’s] Conduct was not conduct engaged in as an agent, employee or director of [Oliver Hume] within the meaning of that term as used in the Policy;

(ii) Vero is not obliged pursuant to the Policy to indemnify [Mr Barclay].

1. At para 12 Vero alleges that Mr Barclay, “[i]n the premises”, is not an “insured” for policy purposes. In para 13 Vero pleads an exclusion of liability to indemnify for any liability, “arising directly or in respect of any dishonest, fraudulent, criminal or malicious act or omission by the insured”. At paras 14 and 15, Vero pleads that Mr Barclay’s conduct was dishonest and fraudulent, and that Vero was not liable to indemnify him, or that Mr Barclay was excluded by the terms of the policy from any right to indemnity.
2. At first instance, Vero made the following written submissions:

458. Mr Barclay makes a cross-claim against [Vero] which was an insurer of [Oliver Hume].

459. Again, if it is found that Mr Barclay has engaged in fraudulent conduct or in breach of his duties as a director of [Oliver Hume], then there is no basis upon which an insurer could be held to be liable.

460. In any event, he has led no evidence about this aspect, has not proved the contract of insurance nor established by Vero would be found to be liable.

461. The cross-claim ought be dismissed.

1. At [406]‑[407] her Honour concluded:

406 Only very brief submissions were filed by Vero in respect of this cross-claim, and no submissions by Mr Barclay. Further:

* Mr Barclay has led no evidence about this aspect of the case;
* Mr Barclay has not proven the relevant contract of insurance upon which he relies;
* Mr Barclay has not established the basis upon which Vero could be liable in this cross-claim.

407 On the material before me, for the reasons I have just given, and for similar reasons to those for which I have dismissed Mr Barclay's cross-claim against [Oliver Hume], I consider that this cross-claim should be dismissed.

1. The trial Judge wrongly perceived that Mr Barclay had not made submissions with respect to this claim, and that Vero had made only brief submissions. In fact, Mr Barclay had filed written submissions in which he simply asserted that as an employee of Oliver Hume, he was entitled to be indemnified. It may be stretching things to describe such assertion as “submissions”.
2. In his notice of appeal Mr Barclay seeks to set aside the trial Judge’s order, dismissing the claim against Vero on the ground that her Honour erred in failing to find that he was entitled to indemnity under the policy. Notwithstanding his unhelpful notice of appeal and the absence of any real submissions at trial, Mr Barclay, on appeal, no doubt with the assistance of counsel, produced relatively detailed submissions. In effect Mr Barclay submitted that on the admitted facts he had established an entitlement to indemnity under the policy, the relevant terms being admitted. He had not replied to Vero’s defence, and so Vero’s factual assertions were effectively denied.
3. At the heart of Mr Barclay’s submissions is the assertion that there was no dispute, or no genuine dispute concerning his claim to have been an employee and director of Oliver Hume. That proposition may or may not be true, but it is clear that Vero actively asserted that Mr Barclay was not an employee for the purposes of the policy. Mr Barclay’s allegation of employment appears in para 3 of the statement of cross‑claim. Concerning that paragraph, Vero asserted certain aspects of the relationship between Oliver Hume and Mr Barclay, but otherwise denied the allegation of employment. At paras 4, 5 and 6 of the defence, Vero pleaded Mr Barclay’s dealings with the appellants, asserting that those matters led to its denial of the allegation of employment, and of Mr Barclay’s assertion that he had at all times acted within authority conferred upon him by Oliver Hume. In other words, in paras 7 and 8, Mr Barclay alleged that he was an “insured” for the purposes of the policy. Vero denied liability on the basis that he was not.
4. Whilst Vero did not lead any evidence, much of the evidence led by the other parties would have offered support for many of the allegations contained in the defence. There has been no attempt to identify the extent to which it did so. Perhaps inadvisedly, Vero made much of the fact that Mr Barclay had, at trial, not even tendered the policy. Mr Barclay’s response was that it was not necessary that he do so, the relevant terms having been admitted. On the other hand, to the extent that Vero had pleaded other terms, Mr Barclay had not replied, and therefore had not admitted those matters. However Vero had indicated in its pleading its reliance upon the terms and conditions of the policy. It was faintly argued that Mr Barclay may have been entitled to judgment in the absence of evidence of any exclusion clause, or as to the engagement of any such clause. The case cannot be disposed of on that basis. Vero did not admit that Mr Barclay was an employee for the purposes of the policy. Her Honour seems to have simply assumed that he was an employee for those purposes, when that matter was clearly in dispute.
5. In the circumstances, the appeal on this aspect of the case must be allowed, and the matter remitted to the trial Judge for further consideration.
6. The orders in this matter will inevitably be complex. I consider that the following orders would be consistent with my reasons. However the parties should have an opportunity to make submissions concerning the appropriate orders. I would order that:

1. as between the appellants and Mr Nankervis the appellants’ appeal be dismissed, save as to costs;

2. as between the appellants, Oliver Hume and Mr Barclay:

(a) (i) **the appellants’ appeal** be allowed in part;

(ii) declarations 5(d) and 5(e) made by the trial Judge on 30 September 2015 be set aside;

(iii) all questions concerning the fiduciary duties allegedly owed to Investa Residential by Oliver Hume and/or Mr Barclay in connection with Lot 170, any breach or breaches thereof and any appropriate remedies be remitted to the trial Judge for determination according to law and these reasons;

(iv) the appellants’ appeal otherwise be dismissed, save as to costs;

(b) (i) **Oliver Hume’s appeal** be allowed in part;

(ii) declaration 4 made by the trial Judge on 30 September 2015 be amended by adding, after the number “191”, the following words:

“by its conduct as alleged in paras 139(b) and 139(c) of the statement of claim”;

(iii) the hearing of argument concerning grounds 10 and 11 of the notice of appeal be adjourned to a date to be fixed;

(iv) Olive Hume’s appeal otherwise be dismissed, save as to costs;

(c) (i) **Mr Barclay’s cross‑appeal** be allowed in part;

(ii) declaration 3 made by the trial Judge on 30 September 2015 be amended by adding, after the number “191”, the following words:

“by the conduct alleged in paras 137(b) and (c) of the statement of claim”;

(iii) the hearing of argument concerning grounds 6 and 7 of the notice of cross‑appeal be adjourned to a date to be fixed; and

(iv) Mr Barclay’s cross‑appeal otherwise be dismissed, save as to costs;

3. as between Oliver Hume and Mr Barclay:

(a) **Mr Barclay’s appeal** be allowed in part;

(b) Order 5 made by the trial Judge on 30 September 2015 be set aside;

(c) Oliver Hume’s cross‑claim against Mr Barclay be remitted to the trial Judge for determination according to law and these reasons; and

(d) Mr Barclay’s appeal, as against Oliver Hume, be dismissed, save as to costs;

4. as between Mr Barclay and Vero:

(a) **Mr Barclay’s appeal** be allowed in part;

(b) Order 4 made by the trial Judge on 30 September 2015 be set aside;

(c) Mr Barclay’s cross‑claim against Vero be remitted to the trial Judge for determination according to law and these reasons;

(d) Mr Barclay’s notice of appeal be otherwise dismissed, save as to costs;

5. all parties be at liberty to apply as they may be advised; and

6. costs be reserved.

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| I certify that the preceding two hundred (200) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett. |

Associate:

Dated: 1 September 2017

REASONS FOR JUDGMENT

GREENWOOD J:

# PART 1 – BACKGROUND

## Introduction

1. I have had the benefit of reading the draft reasons for judgment of Dowsett J in support of the orders proposed by his Honour. I agree with much of the analysis undertaken by Justice Dowsett and I am grateful for his Honour’s structural and contextual analysis of the questions in issue in the appeals and the relationship between those matters and the framing of the controversy at trial.
2. I will return to those matters later in these reasons.
3. However, the point of departure, for me, from the conclusions reached by his Honour is his Honour’s particular conclusion that, having regard to the facts found by the primary Judge (limited as they are on some important matters); inferences properly drawn upon a re‑hearing on appeal; and the framing of the case at trial, the resultant calculus of factual considerations is such that *Mr Nankervis* did *not* owe particular “fiduciary duties” or obligations to *Investa Residential Pty Ltd* (“Investa Residential”, a passive asset‑owning entity within a group of companies forming part of the so‑called “Investa Land” group) when Mr Nankervis, as an employee of *Investa Properties Pty Ltd* (“Investa Properties” which held 100% of the shares in Investa Residential), engaged in a series of events, the subject of the controversy at trial (and on appeal). Those events resulted in the sale and transfer by Investa Residential of two allotments of land owned by it (Lots 170 and 191) in circumstances, said by the appellants, to breach, put simply, a duty owed to both appellants by Mr Nankervis to disclose *all* circumstances *material* to the disposition of Investa Residential’s two lots and a duty not to allow his personal *interest* and *duty* to both appellants to conflict when so acting in that series of events.
4. Rather, I consider that the calculus of factual considerations leads to the conclusion that Mr Nankervis did assume or undertake the burden of protecting and safeguarding the interests of Investa Residential (as well as owing duties to Investa Properties) as the land asset‑owning entity within the group of companies, notwithstanding that he was an employee of Investa Properties (rather than an employee of Investa Residential), when he engaged in the relevant events which are said to have resulted in a sale and transfer of each lot in circumstances said to be a breach of the fiduciary obligations so assumed.
5. By reason of the assumption of those obligations, Mr Nankervis found himself, in my view, in a “fiduciary relationship” with Investa Residential in addition to the fiduciary relationship he had with his employer Investa Properties (which was the owner of all of the issued shares in Investa Residential).
6. It is now necessary to examine why that is so.
7. In the reasons formulated by Dowsett J, his Honour usefully addresses the following matters (among others):

* a contextual introduction to the issues to be determined in each appeal;
* the claims made by the appellants (Investa Properties and Investa Residential) at trial;
* aspects of the reasoning of the primary Judge and findings made by the primary Judge;
* the way in which the appeals (and related applications) are framed and the issues to be resolved in each appeal;
* the background circumstances relevant to the resolution of those questions;
* aspects of the principles to be applied in determining whether a person or entity has assumed fiduciary obligations giving rise to a fiduciary relationship; and
* the application of those principles to the determination of the questions in issue in each appeal.

1. Apart from the questions relating to Mr Nankervis, questions arise as to whether Mr Adam Barclay and/or a real estate agent Oliver Hume South East Queensland Pty Ltd (“Oliver Hume”) owed fiduciary duties to either or both of Investa Properties and Investa Residential in connection with the sale and transfer by Investa Residential of title to each lot in question to the particular buyers of each lot. In my view, both Mr Barclay and Oliver Hume owed particular obligations to both appellants that rendered each in a fiduciary relationship with both appellants.

## References cited later in these reasons

1. In these reasons, I have adopted the use of the following terms in relation to participants, articles and authorities in the following way:

* Investa Properties Pty Ltd (“Investa Properties”);
* Investa Residential Pty Ltd (“Investa Residential”);
* Investa Properties and Investa Residential (the “appellants”);
* Investa Property Group Holdings Pty Ltd (“Holdings”);
* Investa Residential’s former corporate name, Clarendon Residential Group Pty Ltd (“Clarendon Residential”);
* Brittains Road Pty Ltd, the prior purchaser of Lot 170 (“Brittains Road”);
* The group of companies owned by Holdings (the “Investa Property Group”);
* Mr Ashley Colin Nankervis (“Mr Nankervis”);
* Mr Adam Kimberley Barclay (“Mr Barclay”);
* Oliver Hume South East Queensland Pty Ltd (“Oliver Hume”);
* Two Eight Two Nine Pty Ltd (“TETN”);
* Mr David Tonuri (“Mr Tonuri”);
* Queensland Property Centre Pty Ltd (“QPC”);
* Spencer Projects Pty Ltd (“Spencer Projects”);
* Mr Barclay’s wife (“Ms Barclay”);
* Ms Barclay’s daughter, Jaide Spencer Crosbie (“Ms Crosbie”);
* The development site at Cardena Drive, Augustine Heights, Ipswich, Queensland (the “Brentwood site”);
* *Fiduciary Obligations*, the Hon Dr P.D. Finn (“Dr Finn”), Law Book Company Limited, 1977 (“*Fiduciary Obligations* 1977”);
* *The Fiduciary Principle,* the Hon Dr P.D. Finn,an article contained within *Equity, Fiduciaries and Trusts*, Ed, T.G. Youdan, Carswell 1989, Law Book Company Limited (“*The Fiduciary Principle* 1989”);
* *Contract and The Fiduciary Principle*, the Hon Dr P.D. Finn, UNSW Law Journal, 1989, Vol 12, p 76 (the “*UNSW 1989 Article*”);
* *Fiduciaries: Who Are They?* the late the Hon Justice B.H. McPherson CBE (“McPherson J”), April 1998, 72 ALJ 288, being an edited version of a paper presented at the Vancouver 11th Commonwealth Law Conference (“CLC Papers”), Vol 5, complete presentation at 5.4 of the Conference papers, (the “*McPherson Articles*”);
* *When Do Fiduciary Duties Arise?* the Hon Justice Edelman, (2010) 126 LQR 302 (the *“2010 LQR Article*”);
* *Bristol and West Building Society v Mothew* [1998] Ch. 1 (Court of Appeal); (“*Bristol v Mothew*”);
* *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (“*Hospital Products*”);
* *John Alexander’s Clubs v White City* (2010) 241 CLR 1 (“*John Alexander’s Clubs*”);
* *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 306 ALR 25 (“*Woodside Energy*”);
* *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (“*Codelfa*”);
* *Manildra Laboratories Pty Limited v Campbell* [2009] NSWSC 987 (“*Manildra Laboratories*”);
* *Tate v Williamson* (1866) 2 Ch. App. 55 (L.C.);
* *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 309 ALR 445 (“*ABN AMRO Bank*”);
* *News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410 (“*News Limited*”);
* *Australian Securities Commission v AS Nominees Limited* (1995) 62 FCR 504 (“*ASC v AS Nominees*”);
* *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (“*Grimaldi*”)
* *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004 (the “primary judgment”);
* *Property Agents and Motor Dealers Act 2000* (Qld) (the “PAMD Act”).

# PART 2 – SOME introductory ASPECTS OF THE FACTUAL CONSIDERATIONS

1. Investa Properties is a company within a group of companies known as the Investa Property Group. The Investa Property Group is engaged in land development projects. Investa Properties is wholly owned by Holdings. Investa Residential is wholly owned by Investa Properties. Investa Properties acted as a land development company for the Investa Property Group. In the pleading, the appellants describe Investa Properties as the “land development division” of the Investa Property Group and they say that in that capacity Investa Properties was also known and referred to as “Investa Land”.
2. It is uncontroversial that within the Investa Property Group the functions performed by Investa Properties, for the purpose of carrying out land development, were the following and as becomes apparent, Investa Residential had a very confined and discrete, but critical, role to play. Investa Properties employed all staff. It leased and maintained offices and equipment. It provided finance for the purpose of acquiring and developing land. It engaged architects, planners, engineers and other professional consultants, builders and contractors. It incorporated or acquired subsidiaries to purchase and sell land at its direction. It implemented the policy decisions of Holdings. It made managerial‑level decisions concerning the acquisition, development and sale of land. Investa Residential, however, *owned* the residential developments; held title to the allotments; and, was responsible for contracting with real estate agents in relation to the sale and marketing of land including Lots 170 and 191. It did so at the *direction* of Investa Properties.
3. The Investa Property Group was managed by a “Group Executive”. At the relevant times Mr Lloyd Jenkins was in that role and he held delegated authority from Holdings to approve submissions for the acquisition, sale or development of land. Subject to the amounts involved, he may, from time to time, have had to seek the authority of the Chief Executive Officer in relation to particular decisions. Relevantly, that was Mr Scott MacDonald.
4. Investa Properties employed Mr Nankervis initially in the position of “Development Manager” and then in the position of “Senior Development Manager” reporting to the “Queensland General Manager” although it is not clear whether that person was the Queensland General Manager of Investa Properties or the Queensland General Manager of the Investa Property Group. However, an email from Mr Nankervis to Mr Barclay concerning Lot 170 on 27 November 2008, was copied to Mr Gavin Stubbs who is there described as the “Queensland State Manager” of Investa Properties.
5. Mr Nankervis entered into a contract of employment with Investa Properties on 8 March 2006.
6. His responsibilities, as pleaded, included these matters: preparing financial and feasibility reports and reporting to internal management including making recommendations on relevant matters; project management duties including managing project negotiations and ensuring all contracts were accurately prepared and delivered in accordance with the requirements and obligations of Investa Properties; managing all projects to ensure compliance with all relevant regulatory, legislative and corporate policy requirements and obligations; managing land sales including the tracking of land sales on a weekly basis; managing project negotiations and ensuring the accurate preparation of contracts and liaising with and appointing contractors and planners on behalf of Investa Properties; and, approving and/or recommending sales prices for lots within the Brentwood site (including Lots 170 and 191, owned by Investa Residential): para 5, statement of claim.
7. Mr Nankervis was a member of the group called the “Project Control Group” which dealt with the development and sale of Lots 170 and 191.
8. On 31 October 2003, Investa Residential entered into a contract to purchase land comprising the Brentwood site for $48 million. It was able to do so because Investa Properties had made a decision to purchase the land and had arranged for the provision of finance of that amount to Investa Residential for the acquisition.
9. The purchase contract settled on 4 May 2007.
10. In mid‑2008, Investa Properties elected to sell Lot 170 as a single lot rather than develop the land and sell it as individual lots. Lot 170 comprised approximately 7.25 hectares of land. It was mostly steep land. Before turning to the applicable principles and describing the circumstances of the sale of Lot 170 and Lot 191 it is necessary to say something about the role of Investa Residential.
11. Investa Residential had no employees. It made no independent decisions other than to act in accordance with directions given to it by Investa Properties. As Dowsett J observes, this inference arises out of the scope of the duties of Investa Properties and the various assertions made by the appellants in the statement of claim to the effect that Investa Residential simply acted in transactions at the direction of Investa Properties. Moreover, Investa Residential, as a company with no employees, was in a position where its undertaking was managed by Investa Properties and the management of its undertaking included decision‑making concerning the acquisition and sale of properties. As Dowsett J also observes, in effect, Investa Residential made *no decisions*. Dowsett J also observes that an inference arises from paras 1A(c) and 5 of the statement of claim that Mr Nankervis would, from time to time, perform functions as an employee of Investa Properties but those functions included matters relevant to the affairs of Investa Residential. Paragraph 1A(c) of the statement of claim is concerned with the functions of Investa Properties as already described.
12. It follows that Investa Residential and its assets were, in every practical sense, in the hands, care, control and prudential management of Investa Properties and those who engaged in the performance of functions, duties and obligations which would ultimately lead to the functionally dependent divestment by Investa Residential of its land assets in the course of the land development undertaking of the Investa Property Group and particularly in the course of the role performed by Investa Properties in that undertaking.
13. Had Mr Nankervis honestly, but negligently, gone about the performance of his duties owed to Investa Properties under his employment contract (or otherwise arising as a matter of law) by failing to act with reasonable care in the sale and disposition of Brentwood allotments owned by Investa Residential (by, for example, causing a significant block of land objectively valued at $5 million to be sold for $500,000), there would be little doubt that *Investa Residential* would enjoy a good cause of action against Mr Nankervis and Investa Properties for the causal loss arising from that conduct. No doubt, Investa Properties would seek indemnity from Mr Nankervis. Investa Residential would be an entity Mr Nankervis ought to have had expressly in mind, in such circumstances, as an entity susceptible of, and vulnerable to, the causal loss should he so act. Investa Properties would, of course, have its own action against Mr Nankervis for breach of the implied term of the employment contract requiring him to discharge his duties with due care and in good faith. Investa Properties would be entitled to be put in the position it would have been in, in money terms, had the employment contract been properly performed and the measure of damages would be the measure of the diminution in the value of the issued shares in Investa Residential wholly held by Investa Properties. That does not mean that Investa Residential does not have its own claim in negligence for recovery of the causal loss it suffered although Investa Properties, being the relevant decision‑maker, might choose to pursue (or not) its diminution claim in relation to the shares rather than Investa Residential’s claim in respect of the sale of the hypothetical lot at the hypothetical loss. Investa Properties, of course, also has restitutionary remedies because Mr Nankervis is in a fiduciary relationship with Investa Properties, not simply contractual compensatory remedies.
14. If, however, Mr Nankervis had, let it be assumed, hatched a plan with a close friend over drinks at an hotel to form a company jointly held by the two of them for the purpose of selling a block of Investa Residential’s land into the new entity for $500,000 without disclosing to either Investa Residential or Investa Properties all material facts relating to the transaction whilst, at the same time, pursuing his own financial interests in deriving a substantial profit to the detriment of Investa Residential, would Mr Nankervis owe any relevant duty, in Equity, to *Investa Residential* or is Investa Residential simply left with whatever causes of action at law it might be able to make good in those circumstances?
15. Is it to be said in such a postulate, that the calculus of factors relating to the roles performed by Investa Properties in managing and administering property development projects; Investa Residential in holding and ultimately divesting its ownership of land assets *affected* by those developments; and Mr Nankervis as a man charged with duties and responsibilities in connection with those projects, is such that Mr Nankervis owes “no obligations” to *Investa Residential* to avoid preferring his private interests to a duty that might be owed to Investa Residential whether as an element of the *fidelity* he owes to the trust and confidence reposed in him by his employer, Investa Properties, or because the facts might suggest, in *all the circumstances*, that Mr Nankervis, in the performance of his role, *assumed* or *undertook* obligations directly to Investa Residential, as well, to look after and protect the *interests* of Investa Residential in the commercial integrity (value) of its property assets, in the course of making arrangements for the sale and divestment of those assets (for value) by Investa Residential?
16. It might be said that, on the facts, Mr Nankervis did not *undertake* to discharge such obligations to *Investa Residential* and that any obligations to be discharged by him were those owed to only Investa Properties as his employer. It might also be the true position, on the facts, that Investa Residential was the *beneficiary* of such obligations *assumed* by *Investa Properties* thus resulting in a fiduciary relationship between those two companies.
17. The appellants, however, did not plead or contend at trial that Investa Properties had assumed or undertaken to discharge particular obligations to Investa Properties rendering Investa Properties a fiduciary of Investa Residential.
18. Is it enough, however, in order to make good the appellants’ case at trial against Mr Nankervis, to prove that Investa Residential had put its assets in every practical sense in the hands of Investa Properties (or that Investa Properties had taken control of the decision‑making of Investa Residential) such that Investa Residential simply acted at the direction of Investa Properties when disposing of its land assets and that Mr Nankervis, when performing or purporting to perform his duties owed to Investa Properties, knew and understood that, put simply, the fortunes and interests of Investa Residential in its land assets were entirely in the hands of Investa Properties and, very largely, in his own hands?
19. In other words, what degree of engagement was there between Mr Nankervis, Investa Residential and Investa Properties? Was it simply a binary relationship in which Mr Nankervis had undertaken obligations only to his employer Investa Properties (with a corresponding duty of disclosure to only that company and a corresponding duty not to prefer his private interests to the duties owed only to Investa Properties)? To the extent that the fortunes and interests of Investa Residential were in the hands, care, control and prudential management of Investa Properties, could Investa Residential *only* look to Investa Properties as the *source* of obligations protective of its interests in relation to its land assets, in all the circumstances.
20. The primary Judge found that Mr Nankervis owed particular duties to Investa Properties and that Mr Nankervis was in a “fiduciary relationship” with Investa Properties. There is no challenge to those findings.
21. It seems to me that there are four answers to the questions posed at [223] to [228] of these reasons. However, as earlier mentioned, it will be necessary to examine the factual circumstances to understand the scope of the obligations undertaken in all the circumstances and by whom and at what point in the chronology obligations arose.
22. The *first* is that by reason of the degree of control by Investa Properties of the decision-making in relation to the sale of allotments in connection with the Brentwood site, Mr Nankervis owed a duty of disclosure of all material facts, in relation to the sale of Lot 170, to Investa Properties. On the facts, the interests of Investa Residential were not and could not be served in any practical sense by an obligation on the part of Mr Nankervis to make the relevant disclosure to Investa Residential because *all* aspects of the decision‑making in relation to the disposal of Lot 170 (and Lot 191) fell to Investa Properties.
23. The *second* is that because Investa Residential was the owner of each of the allotments in the Brentwood site including Lots 170 and 191 (and thus the legal entity suffering a relevant detriment), Mr Nankervis was required to ensure that there was no conflict between his own private interests and the performance of obligations owed to Investa Properties and, *as well*, a duty owed to Investa Residential to protect and look after its interests in securing a sale and transfer of each lot on terms that best served the commercial interests of Investa Residential (absent any informed consent otherwise given by Investa Properties as a properly informed decision‑maker for Investa Residential): a conflict of *interest* and *duty*.
24. The *third* is that having regard to Investa Residential’s ownership of each allotment and particularly Lots 170 and 191, Mr Nankervis was required to ensure that there was no conflict between his own private interests and the interests of Investa Residential in securing a sale and transfer on terms that best served its commercial interests (absent any informed consent otherwise given by Investa Properties as a properly informed decision‑maker for Investa Residential): a conflict of *interest* and *interest*.
25. The *fourth* is that because there is no contest that Mr Nankervis was in a fiduciary relationship with Investa Properties, Mr Nankervis was required to act in the best interests of Investa Properties and act in good faith. For the purposes of the two conflict rules at [232] and [233] of these reasons, Mr Nankervis was also required to act in good faith towards Investa Residential.

# PART 3 – matters of principle

1. All sources referred to in this section are fully identified at [209] of these reasons.
2. Because these rules at [232], [233] and [234] applied to Mr Nankervis having regard to the relevant matrix of fact under examination, Mr Nankervis found himself in a “fiduciary relationship” with Investa Residential “for the purposes of each rule”. In developing his seminal analysis of the coherent body of law developed by Equity in identifying “certain and distinct” obligations which define their own “fiduciary” for their own respective purposes, Dr Finn expressed this observation in *Fiduciary Obligations* 1977 (described by Millett L.J. in the Court of Appeal in *Bristol v Mothew* at p 18 as “his classic work”), at p 2:

… [Equity] has evolved a series of self-contained obligations – obligations which are themselves certain and distinct, and which individually define their own “fiduciary” for their own respective purposes. These obligations attribute no large significance to the term used to describe the persons to whom each individually applies. In some instances he is referred to as a fiduciary: in others as a confidant. The term used is unimportant. It is not because a person is a “fiduciary” or a “confidant” that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant *for its purposes*.

[original emphasis of the author]

1. The point of emphasis adopted by Dr Finn in the above passage is that a person to whom the relevant rule applies is a fiduciary *for the* *purposes* of the applied rule and not necessarily for all rules, as all rules might not apply although, plainly enough, more than one rule might apply to a person. The relevant rules, however, do not apply to a person by simply attaching a taxonomic label “fiduciary” to the person. In *Bristol v Mothew*, Millett L.J. at p 18 recognised the force of the point of principle identified by Dr Finn but detached it from the *specific relativity* of the relationship between the application of the particular rule to a person and the fiduciary relationship of trust and confidence thus arising simply *for the purposes of* *the particular rule* applied in all the relevant circumstances.
2. The matrix of fact and contextual circumstances will determine whether a relevant rule applies and if it does, the person will be a fiduciary for the purposes of the rule. Once a person is a fiduciary for the purposes of a relevant rule, remedies peculiar to the equitable jurisdiction apply which are primarily restitutionary or restorative rather than compensatory. The nature of the obligation will also determine the nature of the breach.
3. In *Fiduciary Obligations* 1977, Dr Finn took the approach at p 2 that particular obligations will be “imposed” upon particular persons in Equity because those persons might be carrying on particular activities which “require the law’s regulation”. In *Bristol v Mothew*, Millett L.J. observed, at p 18A‑B, that the application of the relevant rule rendering a person a fiduciary of another for the purposes of the rule is a function of someone having “undertaken” to act “for or on behalf of another” in a particular matter in circumstances which give rise to a relationship of trust and confidence. These duties are “special to fiduciaries”: Millett L.J. at p 18A‑B.
4. In Edelman J’s *2010 LQR Article*, Edelman J expounds a thesis that the essential unifying theme emerging from the corpus of cases involving fiduciary duties is that the “scope of those obligations” depends upon the “scope of an express or implied undertaking”, that is, a “voluntary undertaking” of one to another. However, in that article, Edelman J expressly “does not enter the debate about which duties must be owed in a voluntary undertaking before a person can be said to be a ‘fiduciary’”: the *2010 LQR Article* at p 316.
5. In the *McPherson Articles*, McPherson J describes the nature of the “undertaking” as either express, implied or inferred and cautions against the analytical sloppiness inherent in finding “constructive undertakings”: 72 ALJ 289; *CLC Papers*, Vol 5.4, Paper No. 2, p 2. McPherson J contends that the underlying explanation of “most of the decisions” is that the transaction in question is shown to be one in which “a person is expected to act in the interests of the other party”: an expectation we would now describe as reflecting an obligation derived from an undertaking, express or implied, by one to the other to so act, arising out of the forensic circumstances of the transaction between the relevant participants.
6. McPherson J put his view of the principle this way (72 ALJ 290; *CLC Papers*, Vol 5.4, Paper No. 2 at p 4):

Approaching the matter in this way is capable of explaining most of the decisions which have been vexing the minds of so many for so long. Solicitors, agents, company directors and employees are precluded from acting in their own interests from the moment they assume the conduct of another’s affairs, or a segment of those affairs. So also with an investment counsellor who advises me where to put my money. The question is one of degree. How far have I surrendered my affairs to the control of someone else?

1. In *Hospital Products*, Mason J at p 96 sought to “distil the essence or the characteristics” of a relationship which might be described as a “fiduciary relationship”.
2. That became necessary, “[b]ecause [a] distributor – manufacturer is not an established fiduciary relationship”: Mason J at p 96. His Honour observed at pp 96 and 97 that the “critical feature” of “accepted fiduciary relationships” is that a person (the fiduciary) “undertakes or agrees to act for or on behalf of or *in the interests of* another person in the exercise of a *power* or *discretion* which will *affect* the interests of that other person in a *legal* or *practical* sense” [emphasis added]. If that be so, the “relationship” between the parties is “therefore” one which gives the first person a “special opportunity” to exercise the power or discretion “to the detriment of that other person who is accordingly vulnerable to abuse by [the first person] of his position”: Mason J at p 97. Thus, the first person is understood to be a fiduciary of the second and the two stand in a “fiduciary relationship”. Although referred to as a relationship of “trust and confidence”, this “essence” or characterising “feature” so described by Mason J is “critical” to *each* such relationship: Mason J at pp 96 and 97.
3. A person agreeing or undertaking to act “for” or “on behalf of” or “in the interests of” another signifies that the fiduciary acts in a “representative” character in the exercise of “his responsibility”: Mason J at p 97. Mason J also observes at p 97 that it is “partly” because the first person’s exercise of the power or discretion “can adversely affect the interests” of the second person and also because the second person is “at the mercy of” the first person that the first person “comes under a duty” to exercise the power or discretion “in the interests of the person to whom the duty is owed”.
4. See also the observations of Gibbs CJ at pp 68‑69 and 72; Dawson J at p 142 in *Hospital Products*.
5. The questions that arise out of this formulation are these:
6. Was there a power or discretion to be exercised by Mr Nankervis which would affect the interests of Investa Residential in a legal or practical sense?
7. If so, did Mr Nankervis agree or undertake, expressly or impliedly, to act for or on behalf of or in the interests of Investa Residential in the exercise of that power or discretion or, put another way, was Mr Nankervis acting in a “representative character” in the exercise of “his responsibility”? This latter formulation must be understood as simply another way of saying the same thing as the first formulation.
8. Was Mr Nankervis afforded a “special opportunity” by reason of his position as an employee and fiduciary of Investa Properties to exercise a relevant power or discretion to the “detriment” of Investa Residential thus rendering Investa Residential “vulnerable to abuse” by Mr Nankervis of “his position”?
9. Did Mr Nankervis “come under a duty” to exercise a power or discretion in the interests of Investa Residential partly by reason of the circumstance that the exercise of the power or discretion could “adversely affect” the interests of Investa Residential in a legal or practical sense and partly because Investa Residential was “at the mercy of” Mr Nankervis in that sense?
10. In *Hospital Products*, Mason J made two further observations of importance.
11. The first concerns the co‑existence of contractual and fiduciary relationships. Often, the existence of a basic contractual relationship provides “a foundation for the erection of a fiduciary relationship”: Mason J at p 97. In *Hospital Products*, Mason J was, of course, considering a bilateral contract between a manufacturer and a distributor. Where there is a contract, “it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties”: Mason J at p 97. Mason J also said this at p 97:

… The fiduciary relationship, if it is to exist at all, must *accommodate itself* to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be *superimposed upon the contract* in such a way as to alter the operation which the contract was intended to have according to its true construction.

[emphasis added]

1. As to the question of the true construction of the relevant contract, the High Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract in accordance with the principles set out in *Woodside Energy* per French CJ, Hayne, Crennan and Kiefel JJ at [35]; see also *Codelfa*, Mason J at pp 352‑355.
2. The second is that although Hospital Products International Pty Ltd’s (“HPI”) capacity to make decisions and take action in some matters by reference to its *own interests* was inconsistent with the existence of a “general fiduciary relationship”, that circumstance did not “exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some activities but not in others”: Mason J at p 98.
3. In *Hospital Products*, Mason J concluded that a limited fiduciary obligation sprang from the United States Surgical Corporation (“USSC”) having “entrusted” the Australian distributor, HPI, with the “protection, promotion and custodianship of its product goodwill in Australia”. This gave rise to USSC’s “vulnerability” to the distributor’s abuse of its position which enabled HPI (and its controller, Mr Blackman) to “take every opportunity to enrich themselves at USSC’s expense”: as explained by the High Court in *John Alexander’s Clubs* at [93].
4. In this case there is no contract between Investa Residential and Mr Nankervis.
5. There was a contract of employment between Investa Properties and Mr Nankervis and the terms of that contract as to the scope of the duties and obligations owed to Investa Properties have already been mentioned. Mr Nankervis was found to owe particular fiduciary duties to Investa Properties *founded* upon that contract. The terms of that contract required Mr Nankervis to undertake project management duties including taking responsibility for either *recommending* sales prices for lots within the Brentwood site or, in some cases, *approving* sales prices for those lots as a Senior Development Manager (and, of course, he was relevantly a member of the Project Control Group). The authority to approve sales prices was also subject to the scope of particular delegations.
6. There is nothing, at least in the terms of the employment contract, *inconsistent* with the notion or possibility that in performing or purporting to perform his contractual and fiduciary obligations to Investa Properties in exercising the power conferred upon him by Investa Properties of either recommending or approving sales prices for the Brentwood site allotments (owned by Investa Residential), that Mr Nankervis was or could be, *as well*, acting in the “interests” of Investa Residential in the sense that the exercise of the power would “affect” the interests of Investa Residential in a “legal and practical sense” (by reason of the sale and transfer and thus divestment of titles to a third party at particular prices).
7. Mr Nankervis seemed to enjoy a “special opportunity” to exercise the power either to the benefit or “detriment” of Investa Residential. He seemed to be acting as Investa Residential’s “representative” in the exercise of “his responsibility” when recommending or approving sales prices for the Brentwood site allotments.
8. If the proper construction of the contract of employment is that Mr Nankervis, expressly or impliedly, is taken to have agreed or undertaken (to Investa Properties) to act (in addition to the duties owed to Investa Properties), for or on behalf of or in the interests of Investa Residential at the same time, when exercising the power of either recommending or approving sales prices, the express or implied undertaking coupled with the “critical” features apparent in his *role* falling within the *features* described by Mason J, placed Mr Nankervis, for the *purposes* of the conflict of duty and interest rule and the conflict of interest and interest rule, in a “limited fiduciary relationship” with Investa Residential apart from, and in addition to, the fiduciary relationship he had with Investa Properties.
9. In *John Alexander’s Club*, French CJ, Gummow, Hayne, Heydon and Kiefel JJ observed at [88] that phrases such as acting “for or on behalf of” and “in the interests of”, another person, must be understood “in a reasonably strict sense, lest the criterion they formulate becomes circular”. That caution follows because although, no doubt, undertaking to act in such a way is, as their Honours say, “inherent” in the position of a trustee administering a trust or a director participating in the control and management of a company (as two examples among other often recited “accepted fiduciary relationships” to use the phrase adopted by Mason J in *Hospital Products* at p 96) *and* although such an undertaking “may be found in the facts of a particular case” ad hoc, the task of isolating *whether* a person has undertaken to act for another especially in the context of a co‑existing contract with a multiplicity of interests may be very difficult to determine.
10. Normally, of course, these questions arise in circumstances where a person is *in* a contractual relationship with another and in such circumstances the question becomes one of whether the contended fiduciary relationship is accommodated to and consistent with the terms of the contract. The fiduciary relationship cannot be superimposed upon the contract so as to alter the way it was intended to operate according to its true construction: *John Alexander’s Club*, the Court at [91]; *Hospital Products*, Mason J at p 97. Here, of course, there was no contract between Investa Residential and Mr Nankervis. In *Manildra Laboratories*, a question arose as to whether Mr Campbell who had managed a mill for 12 years at Manildra for the first plaintiff mill owner owed fiduciary duties to his employer and to another company in the group called Honan Holdings Pty Limited. It was common ground between the parties that Mr Campbell owed fiduciary duties to his employer not to obtain a personal benefit by the use of his position or from any opportunity or knowledge the position afforded him and a duty to avoid conflict between the interests of his employer and his own interests. Although entirely obiter (as to [69]), McDougall J, in the New South Wales Supreme Court, expressed these observations:

68 The fiduciary duties that Mr Campbell owed to Manildra arose out of his employment. The implied contractual obligation of fidelity (as for convenience I shall call it) was necessarily referable to the contract of employment.

69 There may be cases where a person employed by one company in a group owes fiduciary obligations to another company within that group. For example, if a person is employed by company A to render services to company B, and is for all effective purposes, even if not in law, an employee of company B, it may be legitimate to find that the person owes fiduciary duties to company B. But this is not such a case. The contract of employment was between Manildra and Mr Campbell. Mr Campbell performed his duties for Manildra. There is nothing in the evidence to suggest that his fiduciary obligations should extend beyond Manildra to the second plaintiff, or to other members of the Manildra Group (noting, of course, that the only members of the Group that were parties to the proceedings were the two plaintiffs).

1. The expression of the possibility that person A (a manager of two companies and manager of the trusts for which each entity was a trustee) who did not have a contractual relationship with persons B and C and others (beneficiaries of the trusts) might nevertheless owe fiduciary obligations to those beneficiaries, in all the circumstances of the case, arose expressly in *ASC v AS Nominees*. I will return to that decision of Finn J later in these reasons. Before doing so, it is necessary to identify the source of the principles applied by Finn J in that decision.
2. In his *UNSW 1989 Article*, Dr Finn observes at p 85 that the received judicial wisdom is that it is “unwise” and perhaps “unhelpful” to attempt to provide a general answer to that most basic question: “when and why will a relationship be a fiduciary one?”. Dr Finn acknowledges that this may be prudent because a “useful jurisdiction should not be fettered” and the “perennially repeated observation” is that the “categories of fiduciary relationship are not closed”. Dr Finn observes, however, that, in the end, these observations are “an endorsement of uncertainty, not of understanding”.
3. Dr Finn adds this at p 85:

To the extent that judges of recent times have attempted to isolate *general characteristics* common to fiduciary relationships, they have focussed unevenly on two phenomena: first, the *capacity* (the *power* or *discretion*) one party has to *affect* the interests of the other and the corresponding *vulnerability* of that other; secondly, the *reliance* one party has upon the other because of the trust or confidence reposed in, or because of the *influence* or *ascendancy* enjoyed by, that other. The seeds, but *only* the seeds, of understanding are to be found here.

[emphasis added]

1. Dr Finn observes at p 87 that “[t]he critical matter is our evaluation [that is, on the facts] of the nature and purpose of a relationship (or of a part of it) and of the *roles* to be ascribed to one or both parties in it: whose *interests* is the relationship structured or contrived to serve and who in the relationship is responsible for serving them?”.
2. Dr Finn also says this at p 87:

The cases suggest that there are two distinct approaches to *relationship characterisation*, though they overlap in some factual contexts. They entail quite different inquiries. The first requires an analysis of the *actual legal incidents* [original emphasis] of a relationship itself in the setting in which it occurs and from this a conclusion is arrived at as to the purpose to be attributed to the relationship and to a party’s role in it. Thus the *Restatement, Second, Agency*, for example, asserts unequivocally of the principal and agent relationship that “an agent is a fiduciary with respect to matters within the scope of the agency”. The second approach focuses upon *the presence (actual or presumed)* of *factual phenomena* [original emphasis] in a relationship – an ascendancy or influence acquired, a dependence or reliance conceded, a trust or confidence given – and from these a conclusion is arrived at as to the character to be attributed to the relationship and as to the role of the ‘superior’ party in it.

[emphasis added]

1. Dr Finn also observes at p 93 that the fiduciary question is “essentially factual in character” and “if we entrust our interests to another person’s care, we should be entitled to expect that that other will act in our interests – at least where that other knows or has reason to know we are so doing and apparently accepts this”. Dr Finn also observes at p 93 that the difficulty in examining the “factual phenomena in relationships” lies in isolating whether “something more” is present in a relationship so as to characterise a person as a “fiduciary” of another. Although Dr Finn was examining these matters of “relationship characterisation” in the context of whether something more is present between parties to an existing contractual relationship so as to render one person the fiduciary of another, the quoted opinions expressed at pp 85, 87 and 93 go to matters of essential principle which determine the question of appropriate characterisation in all the circumstances of the essential forensic factual enquiry.
2. Reminiscent of some of the observations of Mason J in *Hospital Products* is this observation at p 93:

Though the raw materials of a fiduciary finding here are a trust and confidence reposed, a dependence or reliance conceded, or an ascendancy or influence acquired, the important matter is the character to be attributed to the *role* the alleged fiduciary has, or should be taken as having, in the *circumstances* of the relationship. It must *so implicate* that person in the conduct of the other’s affairs or *so align* him with the protection and promotion of that other’s *interests* (or their *joint interest*) that “foundation” exists for the fiduciary expectation: it must be such as could properly entitle that other to expect that he will act in that other’s interests (or their joint interests) – at least to the extent that he is *practically enabled* to *affect* those interests by *action, recommendation, advice or otherwise*.

[emphasis added]

1. In *Tate v Williamson*, Lord Chelmsford put the principle this way at p 61:

Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is *abused*, or the influence is *exerted* to obtain *an* *advantage* at the *expense* of the confiding party, the person so availing himself of his position will not be allowed to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

1. Dr Finn in *The Fiduciary Principle 1989* took up the notion of abuse of confidence in this way at p 46:

The shape of any country’s fiduciary law will turn in the end on the preparedness of the courts of that country to acknowledge the role of Lord Chelmsford’s “abuse of confidence” in fiduciary law’s scheme of things … [T]he courts of Canada, Australia and New Zealand, at different paces, are according it *explicit recognition*. If the *fiduciary principle* is not to suffer *artificial curtailment* then, in the writer’s view, that recognition must be given. If, from *whatever combination of factual conditions*, the parties in their relationship are *so circumstanced* that one is *reasonably entitled to expect* that the other is acting or will act in his interests, then that person should be entitled, on bare grounds of public policy, to have that expectation protected.

This said, *the* *critical question* is *when will parties be found to be so circumstanced*? It is obviously not enough that one is in an ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to *influence* the other: representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a *position of vulnerability*: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that *some degree* of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a *dependence* by one party upon the other: as the good faith cases illustrate, a party’s information needs can occasion this. Indeed elements of *all* of the above *may* be present in *a dealing* – and consumer transactions can illustrate this – *without* a relationship being in any way fiduciary.

[emphasis added]

1. What is it that renders one person a fiduciary of another and places the two of them in a fiduciary relationship? Dr Finn answers that question in this way at p 46:

What must be shown, in the writer’s view, is that the *actual circumstances* of a relationship are such that one party is entitled to *expect* that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important *only* to the extent that they *evidence* a relationship *suggesting* that entitlement. The *critical matter* in the end is the *role* that the alleged fiduciary has, or should be taken to have, in the relationship. It must *so implicate* that party in the other’s affairs or *so align* him with the protection or advancement of that other’s interests that foundation exists for the “fiduciary expectation”. Such a *role may generate an* *actual expectation* that the other’s interests are being served. This is commonly so with lawyers and investment advisers. But *equally*, the expectation may be a *judicially prescribed one* because the law itself ordains it to be that other’s entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be *accorded* that entitlement irrespective of whether he had *adverted* to the matter or because the *purpose* of the relationship itself is perceived to be such that to allow disloyalty in it would be to *jeopardise its perceived social utility*.

[emphasis added]

1. Aspects of these observations at [265] of these reasons (the first two sentences) were adopted by the Full Court in *News Limited* by Lockhart, von Doussa and Sackville JJ, at p 541 (where the Full Court characterised those observations of Dr Finn as not just “an important question” but “the question” to be determined). The principles reflected in the views expressed by Dr Finn as set out at [261] to [269] of these reasons (and the critical features identified by Mason J in *Hospital Products* (and related authorities)) were synthesised in the observations of the Full Court by Jacobson, Gilmour and Gordon JJ in *ABN AMRO* *Bank* at [1066]. See also *Grimaldi*,particularly at [177] but also [177] to [181].
2. The decision of Finn J in *ASC v AS Nominees* has some analogical significance for the present proceedings.
3. In that case, “ASN”, “Ample” and “Securities” were three members of the AS Group (comprising 10 companies in all) founded by Mr Windsor. ASN was the trustee of a superannuation trust. Ample was the trustee of a unit trust. The companies had common boards of directors. Securities, a company controlled by Mr Windsor, acted as manager of each company. It also acted as manager of the trusts of both companies. As to ASN, members of the public who became investors executed their own deed of trust with ASN as trustee. Contributions were either invested as directed by the investor or, in accordance with the trust deed, aggregated with contributions from other investors in pooled superannuation funds called “SIPs” of which there were three. ASN was the designated trustee of each SIP.
4. As to Ample, it was, relevantly, the trustee of four unit trusts each created under their own unit trust deed. They were each trusts for specific investments.
5. As to Securities, the two issued shares were held by Mr Windsor and another AS Group company. The directors were Mr and Mrs Windsor. It provided management services (and staff, equipment and premises) to ASN and Ample. Having regard to the fees charged by Securities, the profit derived from the trust business of each company (that is, all fees derived from the SIPs and Ample trusts, less expenses; p 520) inured to the benefit of Securities and thus to Mr and Mrs Windsor: p 514. Securities managed the trusts for which ASN was trustee (the SIPs) and the unit trusts for which Ample was trustee. Securities, as manager, sought out investors in the unit trusts and contributions to the superannuation trusts. It sought out investments to be made by each trustee on behalf of the trusts. Although the investment decision “as a matter of legal form” (p 520) would be made by the board of each trust company, Mr Windsor (standing in the shoes of Securities) was pivotal to securing the examination and commitment of the trusts to a number of the investments. Relevantly for present purposes, the question addressed by Finn J was: having regard to the various *roles* and *responsibilities* of the participants, were the *investor‑beneficiaries* of each of the trusts in a fiduciary relationship (either arising as a matter of “orthodoxy” or “unusually”) with *Securities*?: p 519.
6. Finn J’s answer to the question was to be found, unsurprisingly, in the *circumstances* of the relationships and, in particular, in an examination of the *things* Securities did for the trusts and the *context* within which those things occurred. Even though, as a matter of legal form, Securities acted as the manager of, or agent for, ASN and Ample in providing services for the trusts, that formal legal relationship did *not preclude* a conclusion that, *as well*, Securities was in a fiduciary relationship with the beneficiaries of each trust when providing the services to the trustee and the trusts.
7. The forensic factors that suggested that to be so included these: the functions *actually performed* for each trust by Mr Windsor as the “alter ego” of Securities; the *level* of responsibility in fact *conceded* to Mr Windsor by the boards of each trustee; the *terms* of the responsibilities of Securities as manager; the *appreciation* Mr Windsor must reasonably be taken to have had of the *vulnerability* of the trusts to the actions taken by Securities; and the *awareness* Mr Windsor, as the alter ego and guiding mind of Securities, must reasonably be taken to have had that the *function* being performed by Securities was “for the benefit of the trust beneficiaries”.
8. An assessment of these factors led to an “irresistible” conclusion that Securities was in a fiduciary relationship with the beneficiaries of each trust when rendering its services to the trusts.
9. In *The Fiduciary Principle 1989*, Dr Finn isolates at p 46 the “critical question” of identifying when parties are “so circumstanced” in their relationship that one is reasonably entitled to expect that the other is acting or will act in his or her interests: see [268] of these reasons. In the passage quoted at [269] of these reasons, from p 46 of that work, the scope of the inquiry is identified. Those passages resonate with the conclusions expressed by Finn J at p 521 in *ASC v AS Nominees* in these terms:

The more prominent of the criteria which have been endorsed or relied upon in case law in this country for identifying fiduciary relationships – (a) undertaking (see [*Hospital Products*] at 72 per Gibbs CJ and 96‑97 per Mason J; (b) vulnerability to another’s power or vulnerability necessitating reliance ([*Hospital Products*] at 142 per Dawson J; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 200‑201 per Toohey J); and (c) reasonable expectation (*Glandon Pty Ltd v Strata Consolidated Pty Ltd* (1993) 11 ACSR 543) – when applied to the factors I have identified above, confirm in my opinion the conclusion I have reached. Securities is *so* *circumstanced* vis‑a‑vis the *beneficiaries* of the various trusts of ASN and Ample that the beneficiaries of each individual trust are *entitled to* *expect* that Securities will *act in the interests* of those beneficiaries to the exclusion of its own or any third party’s interests, in its dealings for or on behalf of that trust …

[emphasis added]

1. The decision in *ASC v AS Nominees*, of course, turns on its own facts but it nevertheless reflects an expression by Finn J of the application of the *critical method* identified by his Honour, quoted at [268] and [269] of these reasons.
2. I now turn to the questions of: what were the actual circumstances of the present case and what role, in context, did Mr Nankervis play in his relationships (or otherwise) with the various participants?

# PART 4 – THE ACTUAL CIRCUMSTANCES

1. As already mentioned, Mr Nankervis entered into a contract of employment with Investa Properties on 8 March 2006. His pleaded responsibilities are set out at [215] of these reasons. He was, obviously enough, a man of some standing and authority in the property development undertaking of Investa Properties and, it seems, the Investa Property Group at least so far as concerns the Brentwood site. He was a member of the Project Control Group and although he was appointed to the position of Development Manager initially, he was by 27 November 2008 performing the role of “Senior Development Manager – Investa Land”.
2. Plainly, he was not the General Manager or State Manager of either Investa Properties or the Investa Property Group (of companies). He reported to the General Manager of Investa Properties. An indication of the role he performed as Senior Development Manager can be seen in the content of the topics he addressed in a number of critical emails. I will turn to those emails later in these reasons. The email of 27 November 2008, for example, to Mr Barclay concerning the Lot 170 (Fossil site lot) back‑up contract illustrates the range of matters he was addressing concerning that lot. The appellants at trial, apart from seeking to make good the scope of the role to be performed by Mr Nankervis and thus the duties he was required to discharge (as a function of his contract with Investa Properties) as pleaded at para 5 of the statement of claim, also sought to make good that Mr Nankervis was “responsible” for the “overall management” of the Brentwood site and that he was “responsible” for “signing off on” all “relevant stage releases” in the Brentwood site: para 19 of the statement of claim. I accept that these contentions, framed that way at para 19, fail to reveal the content of the pleaded “responsibilities”. However, in some measure at least, these contentions seem to be conclusionary descriptions of his role consequential upon the six specific responsibilities put into the hands of Mr Nankervis pleaded at para 5 coupled with his reporting line pleaded at para 18.
3. The range of responsibilities within that reporting line might amount to the “overall management” of the particular project known as the Brentwood site although that could only be so within the limits of the content identified at para 5. Similarly, “signing off on” all “relevant stage releases” of allotments within the Brentwood site might also be an expression of one or more of his responsibilities at para 5.
4. It is thus necessary in this context to re‑examine his pleaded responsibilities as Senior Development Manager.
5. His responsibilities included preparing reports addressing “financial and feasibility” issues “on all relevant matters” which presumably means on all matters relevant to the development and realisation of the proceeds of sale of lots in a particular property development project and, specifically, lots in the Brentwood site. As to these “financial and feasibility” reports, Mr Nankervis was required to report to “internal management” on these issues and, importantly, “make recommendations” on all such relevant matters.
6. His responsibilities included “project management” duties which included “managing” the conduct of “project negotiations”. He was also required to ensure that “all contracts” were “accurately prepared” which must mean all contracts emerging out of successful project negotiations for which he was responsible as manager but also, I infer, other contracts inherent in property development projects such as sale and purchase contracts, contracts with consultants and the like. The reference to preparing contracts “accurately” presumably means accurate in the sense of properly reflecting the outcome of the negotiations for which he was responsible as manager and accurate in the sense of being certain and properly framed.
7. He was also responsible for “ensuring” that these contracts were “delivered in accordance with Investa Properties’ obligations”, that is, responsible for ensuring that Investa Properties complied with its obligations under the relevant contracts. Moreover, he was responsible for “managing all projects” to “ensure compliance” with all relevant regulatory, legislative and corporate policy requirements and obligations.
8. As to land sales, he was responsible for “managing land sales” which included “tracking land sales on a weekly basis”. Mr Nankervis was thus required, in managing land sales, to be knowledgeable on a weekly basis about the state of land sales within a development presumably, I infer, with a view to making assessments about the rate of sales, settlements, defaults, re‑sales, prices and the relativity between prices and development costs per lot, especially because he was also responsible for financial and feasibility reports.
9. In addition to managing project negotiations as earlier described, he was responsible for liaising with and appointing contractors and planners. The appellants contend that he was also responsible for approving sales prices for lots within the Brentwood site and/or recommending sales prices to other decision‑makers within Investa Properties.
10. These features of his role are described as “duties” which he owed to Investa Properties. They have their foundation in the contract of 8 March 2006 although, no doubt, the scope of the role reflects responsibilities associated with the later position of Senior Development Manager. It can be seen that these areas of responsibility conferred on Mr Nankervis are substantial. Many of them affect the interests of Investa Residential as the owner of the project development land and by the time the contractors and planners and Mr Nankervis, as manager of the processes, had converted the project land to a registered plan and a suite of subdivisional allotments, Investa Residential would become the registered title holder of each lot.
11. Mr Nankervis was a person responsible for the “overall management” of the Brentwood site within the limits, however, of the management responsibilities conferred upon him as described. No doubt, the Chief Executive Officer or the State Manager is truly charged with the overall management of each project undertaken by any one or more of the companies within the Investa Property Group under the governance of the Board of Directors (presumably Holdings). However, as to the Brentwood site, Mr Nankervis had a significant role to play and important responsibilities to discharge in the commercial fortunes of that project so far as that project affected the interests of Investa Properties and, as well, Investa Residential. It seems clear enough that Mr Nankervis, although an employee of Investa Properties, undertook steps and discharged functions directly relevant to Investa Residential; functions and steps affecting the interests of Investa Residential; and functions and steps conferring either a benefit or a detriment on the interests of that company. Investa Residential was, plainly enough, vulnerable to the consequences of decision‑making by Investa Properties because it had no independent decision‑making role of its own to play. However, it was also vulnerable to the steps undertaken by Mr Nankervis. There can be little room for doubt that when Mr Nankervis actually performed or purported to perform, the functions associated with the level of responsibilities conferred upon him by Investa Properties, he must have appreciated the extent to which the interests of Investa Residential were vulnerable to his actions.
12. The primary Judge, of course, made findings about these questions. At [71], the primary Judge said this:

71 Turning to the circumstances of Mr Nankervis in respect of the sale of Lot 191 and Lot 170, I am satisfied that Mr Nankervis owed fiduciary obligations to his employer, Investa Properties, in respect of both properties.

1. As to the significance of Investa Properties and Investa Residential being separate corporate entities in the context of whether fiduciary obligations might be owed to Investa Residential, the primary Judge said this at [72]:

72 An important point taken by the respondents during the course of the trial was that the applicants are *separate corporate entities*, and that a relationship with one of them does not *necessarily equate* to a relationship with the other. The second and fourth respondents have maintained throughout the proceedings that they in particular have no relationship with the first applicant, Investa Properties, of which Investa Residential is a wholly owned subsidiary, on the basis that Investa Properties was not the registered proprietor of any of the subject lands, had no entitlement to any claim for profits or monies for breach of contract or for any other contravention in relation to Lot 191 or Lot 170. In *Investa Properties Pty Ltd v Nankervis (No 2)* [2013] FCA 468, I accepted the proposition that a fiduciary obligation owed to a *subsidiary company does not automatically transmit fiduciary obligations owed to its holding company*. This *principle* equally applies where a fiduciary obligation is owed to the holding company – those obligations are not automatically owed to the subsidiary.

[emphasis added]

1. It may readily be accepted that a fiduciary obligation owed to a subsidiary company is not “automatically transmitted” as a fiduciary obligation owed to its holding company and nor is a fiduciary obligation owed to a holding company “automatically transmitted” as an obligation owed to its subsidiary. The question of whether a fiduciary obligation is owed by one person to another is entirely a function of the inquiries described at [236] to [280] of these reasons.
2. As to the nature of the duties conferred upon Mr Nankervis, the primary Judge said this at [73]:

73 So far as concerns Mr Nankervis however, there is no real dispute by Mr Nankervis that his duties in his employment with Investa Properties *included* duties in relation to Lot 191 and Lot 170 *as claimed by the applicants in their submissions*, notwithstanding that Investa Residential was the registered owner of both Lots. It is also clear that, so far as concerned employees in the position of Mr Nankervis, the corporate veil between Investa Properties and its subsidiary Investa Residential was blurred, such that although he was formally employed by Investa Properties he had *actual authority* to take steps in respect of land (including Lot 191 and Lot 170) *formally owned* by Investa Residential. That this is so is clear from evidence of Mr Nankervis himself to the effect that he was not actually sure *which company* was his employer (transcript 30 September 2014 p 2097 l 40). In this context I also note the evidence of Mr Holt, Chief Executive Officer of Investa Land, in his affidavit of 6 December 2013, concerning the restructure of the Investa Property group in or about August 2008 and previous names of companies in the group, and the evidence of Mr Stubbs, that in late 2008 there was a restructuring of the Investa Property Group in that the management and leadership of the commercial and industrial development business, and the residential development business, were combined (transcript 10 June 2014 p 525 ll 4-8).

[emphasis added]

1. The findings of the primary Judge at [73] seem to have a relationship with the observations at [72]. The point seems to be that although obligations owed to one entity in a group are not rendered, by the ownership arrangements, obligations owed to any other entity in a group, there nevertheless seemed to be “actual authority” conferred upon Mr Nankervis by Investa Properties to “take steps in respect of land (including Lot 191 and Lot 170) formally owned by Investa Residential)” among other considerations. Thus the authority conferred upon Mr Nankervis by Investa Properties seemed to comprehend an express authority to take steps affecting the interests of Investa Residential and in that sense at least the separate legal identity of Investa Properties and Investa Residential was not determinative of the boundaries of an obligation that might be owed by Mr Nankervis in all the *actual circumstances* of the case.
2. In terms of reporting lines and decision‑making within the Investa Property Group, the primary Judge said this at [74]:

74 The evidence of Mr Jenkins was that there was a “chain of command” in the Queensland office of Investa, by which Mr Waters, and subsequently Mr Stubbs as Queensland State Manager *had responsibility for development management requests* and *reports* as well as supervising other staff (transcript 3 June 2014 p 130). It appears that Mr Waters had initial responsibility in relation to the contract with Brittains Road Pty Ltd concerning Lot 170. Mr Waters continued to have responsibility in relation to the proposed sale of Lot 170 following the internal restructure in the Investa Property Group which resulted in Mr Stubbs moving into Mr Waters’ position of Queensland State Manager, because Mr Waters had a good relationship with Mr Bill Thompson, the principal of Brittains Road Pty Ltd. Once the contract involving Brittains Road Pty Ltd “fell over” because the purchaser was unable to complete it, it appears that Mr Waters had no further engagement with any of the lots in the Brentwood site (evidence of Mr Stubbs 10 June 2014 p 530 ll 22-32).

[emphasis added]

1. Notwithstanding the roles of Mr Waters and Mr Stubbs described at [74] of the reasons of the primary Judge quoted above, the primary Judge said this about the scope of the role played by Mr Nankervis, at [75]:

75 Notwithstanding the roles of Mr Waters and Mr Stubbs, it is also clear that in his position as senior development manager, Mr Nankervis *played a key role* in *acquiring* intimate knowledge of land under his management, including Lot 191 and Lot 170, and *passing* that knowledge with informed *recommendations* in respect of development or other use of that land to more senior management in Investa Properties. From early 2008, Mr Nankervis’ role included the preparation of the notes or minutes of Project Control Group (PCG) meetings, which were monthly meetings attended by senior representatives to discuss processes and strategies going forward for the second applicant’s residential properties in south east Queensland. Further, the evidence before the Court is that development managers in the position occupied by Mr Nankervis *prepared Board papers*, including delegated authority approval *submissions* to go to the Board for approval *in respect of dealings* with these lots (transcript 5 June 2014 pp 290-291). A key delegated authority approval submission for the Board was prepared by Mr Nankervis on 6 February 2009 in relation to Lot 170, in which Mr Nankervis wrote:

The site is irregular in shape and heavily vegetated with steep topography, rising from the south east to the north west, and is unattractive to our target market as only specialty custom built housing can be built on the site. The housing product needs to accommodate steep slope of 10 to 15 degrees, no slab on ground product will be achieved, and this is compounded by the tree retention that council require, and also approval limitations in association with the degree of earthworks allowed on the site. There is no ability to level the site …

The table above shows that the sale is at the lower end of the range, however the subject property is considered to be inferior to the other sides due to the steep topography and heavy vegetation. Essentially, the site is discounted to account for the additional house building costs.

[emphasis added]

1. As to the extent to which group executives were guided in their decision‑making by advice provided by development managers and senior development managers, the primary Judge said this at [76]:

76 Mr Jenkins gave evidence – not controverted – that group executives in his position, who made decisions concerning disposal of Investa land, were *guided by advice* provided by development managers and *senior development managers* (transcript 3 June 2014 p 148 ll 5-19, p 149 ll 1-9). This evidence was supported by Ms Nicole Prout, finance manager with Investa Properties between March 2008 and September 2013, who said during cross-examination:

It is not the case that managers like Nankervis or whatever just make a recommendation and it’s signed off; there is a *whole process of scrutiny* that must gone through before it is ultimately signed off. That was your experience with the company; was it not?---Yes. But it *very much relies on the information that you are given by the DMs; Development Managers*.

[emphasis added]

1. As to the conclusionary aspects of whether Mr Nankervis was in a fiduciary relationship with either or both of Investa Properties and Investa Residential, the primary Judge said this at [80] to [82] (recognising, of course, that in the primary Judge’s view, Mr Nankervis only owed fiduciary obligations to Investa Properties):

80 Mr Nankervis was not only a development manager, he was a senior development manager in Investa Properties. As is clear from the evidence before the Court, it was his *job* to prepare financial and other reports, make recommendations, deal directly with real estate agents on behalf of Investa, and acquire knowledge in relation to such matters as the likely prospects for development. It is not in dispute that these responsibilities extended to both Lot 170 and Lot 191.

81 These duties appeared to be exercised by Mr Nankervis *with a minimum of supervision from managers above him* in the organisational structure of Investa Properties. In this context, I note that *where* there is scope for an employee to carry out his or her duties in an unsupervised manner, the employer is vulnerable and more trust and confidence is likely to be placed in an employee. In such circumstances it may be said that there is a greater likelihood for there to be a legitimate entitlement of fiduciary loyalty (cf Batty R, “Examining the Incidence of Fiduciary Duties in Employment” (2012) 18 *Canterbury Law Review* 187 at 204).

82 It is clear that the relationship between Mr Nankervis and Investa Properties was such that persons who were required to make decisions for Investa Properties in relation to dealings or disposal of development lands *relied* on Mr Nankervis’ knowledge and recommendations to achieve the best results. While his contractual relationship with his employer was such that it could properly be said that a duty of *fidelity* was *an aspect thereof*, in my view the scope of his duties and responsibilities, and the knowledge and value judgement which were intrinsic to his role and upon which Investa Properties relied, were such that the relationship was fiduciary.

[emphasis added]

1. Although questions arise as to whether Mr Nankervis was in a fiduciary relationship with Investa Residential in addition to his unchallenged fiduciary relationship with Investa Properties, questions also arise as to whether Mr Barclay and Oliver Hume were also in a fiduciary relationship with either or both of Investa Properties and Investa Residential. In examining aspects of the factual background in relation to each of Lots 170 and 191, I propose to look at the roles played by Mr Nankervis, Mr Barclay and Oliver Hume in the chronological way in which matters emerged involving these parties. I will first consider Lot 170.

## Lot 170

1. On 27 November 2008 at 10.15pm, Mr Nankervis sent an email to Mr Barclay copied to Mr Gavin Stubbs, the Queensland State Manager of Investa Properties on the topic of the need to put in place a “Back Up Sale Contract” in relation to “Brentwood – Fossil Site”. The email was sent consequent upon a conversation between Mr Nankervis and Mr Barclay earlier in the evening. The email recites that it is of “High” importance and it attaches nine pdf files and an Excel spreadsheet. Those attachments are described as: Fossil Site RQL Approved Plans 17 June 2008; Negotiated Decision Notice 22 July 2008; Lot Calcs Plan 3 July 2008; Hyder Consulting Final Estimate 19 Nov 2008; FOSSIL SLOPES; Stage 1A, Stage 1B, Stage 1A, Stage 1B - Brentwood Rise Land Bank Price Lists 19 11 08; and Brittains Road Development DF v312 18 Sep 08. Thus, Mr Barclay for Oliver Hume was being given a great deal of information upon which to rely for the purposes of the email. As to that purpose, Mr Nankervis said this in his email to “Adam”:

Adam,

Discussions were had today at our project review meeting for Brentwood, regarding the ongoing Sale of the Fossil Site. Our recent dealings with the potential purchaser of the site do not provide us with any confidence that they will be in a position to perform as required under the Contract. As a result we have reached *a decision* at the *project level to have Oliver Hume procure a back up Sale Contract*.

As discussed *earlier this evening*, the following details are provided:

1. Current Purchase Contract Details:

Price $1,775,000 incl GST

Dep $10k

Balance Dep to 10%

Finance 30 Days

Valuation 45 Days

DD [due diligence] 60 Days

Settlement 15 Dec 2008

The Sale was Off Market procured by Mark Waters, we have not met the purchaser, the DD is now due 31 Jan 2008, with Settlement 14 days after.

2. Investa Board Approval

“The Fossil site disposal is to be reflective of market conditions and valuation. (Minimum Sale price to exceed $1.75 M), 8 August 2008.”

We are *seeking a Sale price above the Current Sale Contract and in line with valuation by JLL $1.8 M* under the margin scheme, dated June 2008.

[3] Property Details:-

Seller: [Clarendon Residential]

…

Property Description:

Lot 170 RP904872

…

4. Development Approval – Negotiated Decision Notice 22 July 2008

5. Lot Calculation Plan – 3 July 2008

[6] Engineering Cost Estimate – Dated 14 Nov 2008

6. Slope Analysis

7. Recent Sales Advice – Brentwood Rise

8. Sales Commission

We are *willing to pay* Oliver Hume *1% sales commission* for an *englobo sale*, but if you feel that you have a *better opportunity* in seeking your sales commission at the *purchaser end feel free to pursue*. We will not formalise your engagement to act on our behalf at *this stage* until *you advise*.

9. Deal structure

We would like an *unconditional contract, asap*, therefore we would like to reduce some of the time frames as noted in the previous contract, as follows:

Initial Deposit $50k

Balance Deposit to 10%

Finance 21 Days

Due Diligence 30 Days

Cash Settlement

Contract subject to the initial contract not completing on or before 31 January 2009

(If we can achieve a clean unconditional contract as described, we would negotiate settlement date).

10. Sale Strategy

*We would like* *you to promote this offer* *through the Oliver Hume network Off Market*. I suggest with your recent discussions re Brentwood North and your recent retail involvement in the corridor on Brentwood, Springfield Lakes and the Australand Sale you would have a *pretty good handle on potential prospects*.

As you are aware the site is constrained by slope and the potential built form, please consider *a strategy for the slope and appropriate built form solutions* at your earliest.

If you have any questions please give me a call.

*Gavin [Stubbs] and I* would like *weekly updates* and ultimately *we need a Contract/purchaser that will perform, we can not afford any further delays*.

Thanks

Ashley Nankervis

Senior Development Manager – Investa Land

Investa Property Group

[address]

[emphasis added]

1. On 28 November 2008 at 8.29am, Mr Barclay responded by email to the email from Mr Nankervis. He copied his email to Mr Stubbs. Mr Barclay said this:

Ashley,

Thank you for the *opportunity* to assist Investa with *the sale of the Fossil site* and to *strengthen the relationship* with *Gavin & yourself further*.

I will commence making contact with potential purchasers of the site *immediately upon reviewing the documentation provided*. It is my expectation that no contract will be entered into prior to [C]hristmas, however I am confident that I can have a buyer signed contract that in large part meets your requirements prior to the completion of DD on 31 January 2009. There will need to be a short DD period beyond the execution date and we may need to provide some flexibility around settlement. This is of course contingent upon an unconditional contract.

“Unknown” developers will not have the capacity to complete in this market and it appears you have been dealing with someone without the necessary credentials. *I will only put forward offers from parties that have a demonstrated ability to perform*.

I will report back to you each Monday to advise current status.

Would you please confirm the process for preparation of a draft contract and advise access arrangements to your current consultants for the purpose of DD.

Regards

Adam Barclay

General Manager

[Logo] Oliver Hume

Real Estate Group

[contact details]

[emphasis added]

1. At 10.14am that day, Mr Nankervis responded by email to Mr Barclay’s email. The email was copied to Mr Stubbs. Mr Nankervis said this:

Adam,

*The Contract can be prepared by Oliver Hume* (consistent with what you are doing with the retail Sales)[.] Consultants will be made available once you have a preferred purchaser under Contract etc. I presume some time in jan 2009 from your note below.

*Weekly updates* *can be via email*[.] [O]nce you get to a point of exchange we would like to either *meet* the potential purchaser or at [least] *understand the pre‑qualifications you have had with them*.

Thanks

[the usual sign‑off]

[emphasis added]

1. Thereafter the following exchanges occurred.
2. On 2 December 2008, Mr Barclay sent an email to Mr Nankervis and Mr Stubbs on the subject of the “Fossil Site” in which he said this:

Gavin & Ashley,

Per our discussion a *brief summary* of activity to date follows. Please note that all approaches to potential purchasers are being conducted personally by me only, and that no information is being provided prior to a broader discussion as to appetite in the current climate. I will report only names that have a genuine interest in the site along with the capacity to complete.

*Week ending 30th November*

* Broader discussion with 13 potentials
* Face to face with 5 actively looking
* 2 only interested in the site.

1. Lance Washington – currently overseas until 30 December, phone link with Lance and his son who is in Australia conducted on Thursday. Lance is interested in the corridor and has a capacity to complete. I will work with his son prior to his return to take them through the opportunity. Objective to obtain offer by 14th January 2009.
2. *David [Tonuri]* – Recently retired as MD – ANZ Capital. Currently working with several consortiums on land in ACT & NSW. Located in Sydney, I am meeting with him in my office on Saturday to advance discussions. Ashley, if available your presence may provide some benefit as to technical issues. Objective to obtain offer by 14th January 2009.

I will continue to canvass this week and next, and finalise our candidates 20thNovember for your information.

*Please confirm that this informal report is satisfactory.*

Regards

[emphasis added]

1. On 8 December 2008, Mr Barclay sent another email to Mr Nankervis and Mr Stubbs by which he provided a weekly report. The subject matter this time is described as “CONFIDENTIAL – Fossil Site Weekly Update”. It says:

Gavin & Ashley,

*Weekly update follows*, I will continue to attach to previous [week’s] email to provide *reference point* to the prior [week’s] communication.

*Week ending 7th December*

* Broader discussion with 11 potentials (total 24)
* Face to face with 2 actively looking (total 7)
* No interest in the site (total 2)

1. Lance Washington – meeting with Grant on Thursday to review the project.
2. David [Tonuri] – met with David in my office with Ashley on Saturday to present the opportunity in full. Site inspection conducted along with competitor projects. Follow up call made this morning where David suggested that he will have a formal offer this calendar year. *His preferred contract is that of a Put & Call*, can you confirm that this will be acceptable and if so commence preparation of a base document for his review:

The general sentiment is “sit and wait”. We have 2 buyers currently with genuine interest, *David [Tonuri]* is the *stronger prospect*.

I will continue to promote and advise.

Regards,

Adam Barclay

General Manager – Queensland

[emphasis added]

1. On 8 December 2008, Mr Nankervis sent an email to Mr Barclay and Mr Stubbs under the same subject reference in which he said this:

Adam,

I have had a discussion with Gavin regarding the Put & Call contract, *we are happy to transact on that basis* (standard Investa contract), however, we would not consider drafting the document until we had some absolute certainty that David [Tonuri] was in a position *to proceed*.

My observation was that the Ipswich corridor was his target area, scale of project suited his requirements and that he was going away to address his finance options. Is there anything further to add at this stage.

Thanks

[Usual sign‑off]

[emphasis added]

1. On 8 December 2008, Mr Barclay responded to that email with an email addressed to Mr Nankervis and Mr Stubbs (under the same confidential reference) in which he said: “Suggest we leave detailed discussion around terms until we have him in ‘the net’. I will advise him that a Put & Call is achievable”.
2. On 16 December 2008, Mr Nankervis received an Amended Slope Analysis for the Brentwood Fossil site. On 16 December 2008, he sent an email to Mr Barclay in relation to the Fossil site attaching initial engineering advice in relation to the design of the slope and observed: “Based on the lot improvements and the relative minor increase in construction costs, the design should be considered further”.
3. On 8 January 2009, Mr Barclay sent another confidential email to Mr Stubbs and Mr Nankervis in relation to the Fossil site. It was another weekly update. In it, he said this:

Gavin & Ashley,

*Update* on Brittains Road for your information:

1. Lance Washington – meeting with Lance this Friday to discuss further.
2. *David Tonuri – met with him on 24th December*. He has been conducting further investigations and *I have him at a point where he is ready to go to paper*. There are certain conditions that he would like included within the contract, I have suggested that they be “vendor drafted” in order to protect your interests.

In summary:

*Put & Call* Contract

Purchase Price - $1.8 m including GST

Due Diligence Period – nil

Deposit - $90,000 payable 30 days from execution of contract

Settlement – 15th December, 2009.

Special Conditions – (appropriate wording for each to be drafted by Investa legal)

1. *Vendor* *assigns all approval* to the purchaser and authorises the purchaser to advance approvals at the purchaser[’]s expense & risk.
2. *Vendor* agrees to allowing the purchaser to prepare contracts for *sale and sell lots* under disclosure *prior to settlement*.
3. Vendor agrees to the purchaser clearing the existing vegetation in accordance with any approvals at the purchaser[’]s expense & risk.

Please advise me as to how you wish to proceed.

Regards

[emphasis added]

1. On 12 January 2009, Mr Barclay sent another confidential email to Mr Stubbs and Mr Nankervis in which he said this:

Gavin & Ashley,

I met with Lance this afternoon regarding the site, he was unable to meet last Friday as indicated in my previous update. I am conducting a full inspection of the competitors on Friday morning along with a walk across the site. I expect to give you some meaningful feedback on Monday to allow us to position both prospects.

Regards

1. On 19 January 2009, Mr Barclay sent another confidential email to Mr Nankervis and Mr Stubbs in these terms:

Gavin & Ashley,

I conducted a full site inspection with Lance Washington on Friday and communicated with him over the weekend to follow up. Lance expressed concern as to [saleability] of [sloping] allotments and noted that there is in excess of *34 lots with significant slope*. While he is not dead [as a prospect] I would suggest that he will be looking for a better deal than the $1.8 m I have advised him he will need to pay to secure the site.

I spoke to *David Tonuri* this afternoon and he is waiting on a response to his queries regarding the terms put forward by me on 8th January (see email below).

David needs to be considered *our best candidate and I would [like] to get him to contract ASAP*. Please advise at your earliest.

Regards

[emphasis added]

1. On 22 January 2009, Mr Barclay sent another confidential Fossil site weekly update to Mr Nankervis and Mr Stubbs in which he said this: “I have spoken to David and he has advised that he will respond by COB tomorrow, I will advise accordingly”.
2. On 23 January 2009, another confidential weekly update was sent to Mr Nankervis and Mr Stubbs by Mr Barclay in which he said this: “I spoke with David Tonuri today and has confirmed that he will provide us with his proposed terms on Monday. I will advise accordingly”.
3. On 27 January 2009, Mr Barclay sent another confidential Fossil site weekly update to Mr Nankervis and Mr Stubbs in which he said this:

Gavin & Ashley,

David Tonuri called me *today* regarding Brittains Road. He has advised that his offer is $1.6 m including GST with settlement to occur 31st July 2009, with all other conditions remaining the same as previously discussed and agreed to.

David has advised me that he will be leaving for China for other business interests on 10th February and would require finalisation prior to his departure.

I met with Lance Washington at 3pm this afternoon in an effort to create some upward pressure. He confirmed to me this afternoon that the banks are now requiring 50% pre‑sales in order to fund the construction of a project and he is unwilling to proceed as a result.

Please advise at your earliest.

Regards

[emphasis added]

1. On 28 January 2009, Mr Nankervis prepared a memorandum addressed to Mr Jenkins, Group Executive Land and copied to Mr Stubbs, General Manager QLD, Investa Land. The subject is: “For Group Executive Residential Approval”. In that memorandum, Mr Nankervis sought approval to proceed with the disposal of the “Fossil Site” (described as a 7.24 hectare site) being Lot 170. Mr Nankervis recommended that:
2. The Fossil site is disposed of under a ‘wholesale sell off’ reflective of market conditions. The report is recommending disposal of the site for $1.6M.
3. Investa Land, General Manager Queensland, has delegated authority to execute the Sale Contract in accordance with this approval.
4. In the memorandum, Mr Nankervis explained that since August 2008, Lot 170 had been under contract for $1.75M but that the purchaser had requested three extensions of time for the completion of due diligence. No further extensions were to be granted and Mr Nankervis expected that the contract would come to an end on 31 January 2009, the expiration date. Mr Nankervis also explained that since November 2008, Oliver Hume had been undertaking an active marketing campaign for the sale of the property “off market” and that there had been little interest in the site from the “Corporate players within the property sector and accordingly only a very few entities (5 actively)” had expressed interest in “doing any type of short term deal”. He explained that Oliver Hume had “corralled the purchase down to one particular entity” which had shown “some extreme interest” and as a result of a site visit and preliminary due diligence in December 2008 and January 2009, that purchaser was willing to enter into an unconditional sale contract. Mr Nankervis set out the five essential elements of the proposed sale and the special conditions. He then set out a financial analysis which assumed a sale as at July 2009 for $1.6M compared with the existing Brentwood business plan which assumed a Fossil site sale at September 2009 for $1.775M. Mr Nankervis then set out the relevant hurdle rates in terms of the gross development profit in raw numbers, the development margin and the internal rate of return (“IRR”). Mr Nankervis also said this:

It should be noted that the Sales commission for the proposed Sale will be picked up by Oliver Hume from the purchaser; this is a saving of $17,750 in accordance with the feasibility.

Although the overall development margin and internal rate of return decrease marginally as a result of the proposed sale, it is important to note that in the current economic climate the sale of a secondary site, with topography, vegetation and ultimate built form constraints will not be easily achieved. The proposal to dispose of the site with an unconditional contract for $1.6M has merit.

1. The memorandum was sent by Mr Nankervis to Mr Stubbs and copied to Mr Long at 7.22pm on 28 January 2009.
2. However, on 2 February 2009, Mr Nankervis sent another memorandum on the same topic but on this occasion addressed to Mr Scott MacDonald, Chief Executive Officer, Investa Property Group and Mr Jenkins, Group Executive Land. It was copied to Mr Stubbs, General Manager QLD, Investa Land. In this memorandum, Mr Nankervis recommended disposal of Lot 170 for $1,454,545.00 excluding GST and that Mr Stubbs be given delegated authority to execute a sale contract in accordance with such an approval. The contract would be a Put & Call contract at the recommended purchase price with a deposit of 5% payable within 30 days of execution of the contract and settlement by 31 July 2009. Again, Mr Nankervis identified the hurdle rate consequences of a sale at that price (gross development profit, development margin and IRR) but also noted that there would be minimal above budget revenue to offset the difference in the gross development profit as a consequence of the sale at that price. He also again noted that the sales commission would be realised by Oliver Hume from the purchaser. Mr Nankervis recommended the “merit” of the sale on the proposed terms.
3. The memorandum of 2 February 2009 was addressed to Mr Scott MacDonald because, after a review of delegations, it became apparent that the sale price exceeded the limits of authority delegated to Mr Lloyd Jenkins. Thus, the memorandum had to be directed to the CEO, Mr MacDonald.
4. The author of each memorandum recommending the proposed sale was Mr Nankervis. As to the memorandum of 2 February 2009 to Mr MacDonald and Mr Jenkins, Mr Stubbs sent an email to Mr Jenkins on 6 February 2009 attaching the new submission in which he said:

… I know *I got you to sign a memo* but after a review of limits of authority, it has to go to Scott. *Same content* – just in the *standard template*. We are *proceeding* to go to contract on the expectation this will be approved as before.

[emphasis added]

1. The memorandum of 2 February 2009 was supported by a document called “Delegated Authority Approval Submission” (the “approval submission”). It recites that it is prepared by Mr Nankervis. It was signed by him and bears the date 6 February 2009. His proposal was “recommended by” Mr Stubbs. The document was signed by him and also bears the date 6 February 2009 next to his signature. In the approval submission, Mr Nankervis says this:

The “Fossil Site”, situated in the Ipswich suburb of [Bellbird] Park is a part of the “Brentwood” master planned community. It is for sale as a separate englobo parcel. The land is approved to be developed into 77 low density residential lots, averaging 660 square metres in area. The whole of the 7.25 hectare site is considered developable.

The site is irregular in shape and heavily vegetated with steep topography, rising from the southeast to the northwest and is unattractive to our target market as only specialty custom built housing can be built on the site. The housing product needs to accommodate steep slope of 10 to 15%. No slab on ground product will be achieved and this is compounded by the tree retention Council require and also approval limitations in association with the degree of earthworks allowed on the site, there is no ability to level the site.

1. Mr Nankervis then sets out an analysis based upon “englobo sales evidence” for three parcels in the Ipswich area. He compares them with the proposed sale of Lot 170. The sales data was provided by Jones Lang LaSalle. These comparators are said to be the “relevant and recent sales”. Mr Nankervis notes that none of the blocks are sloping blocks. He comments on the comparison in this way:

The table above shows that the sale is at the *lower end* of the range, however, the subject property is considered to be *inferior* to the other sites due to the steep topography and heavy vegetation. Essentially the site is discounted to account for the additional house building costs. Having regard to the *available market evidence* and *present market sentiment* for englobo residential development sites that are secondary, the disposal of the property is *reflective* to the range above and *has merit*.

[emphasis added]

1. The approval submission then says that the sales commission will be realised by Oliver Hume from the purchaser resulting in a saving of $17,750.00 in accordance with the feasibility at 1% sales commission. The hurdle rate benchmarks are then set out so as to show the position under the sale as compared with the business plan. After setting out those statistics, Mr Nankervis said this:

Although the overall development margin and internal rate of return decrease marginally as a result of the proposed sale, it is important to note that in the current economic climate the sale of a secondary site, with topography, vegetation and ultimate built form constraints will not be easily achieved. The proposal to sell the site with an unconditional contract for $1,454,545.00 excl. GST has merit.

1. The terms of the proposed sale are then set out. In terms of the risks, Mr Nankervis says that an unconditional sale contract has been negotiated “to [minimise] any further risk to revenue slip and settlement”.
2. No doubt, Mr Stubbs turned his mind to the recommendation and analysis undertaken by Mr Nankervis before he recommended the proposal to Mr Jenkins (and ultimately to Mr MacDonald). However, Mr Stubbs seemed to think that he had “got [Mr Jenkins] to sign a memo” which was then thought to be an approval. Now it would have to go to “Scott” (Mr MacDonald), “with the same content on the standard template” for approval and in any event Mr Stubbs was proceeding to contract in the expectation, based on the approval submission, that Mr MacDonald would approve the proposal. The approval seemed to be regarded as inevitable.
3. There is little room for doubt that Mr Nankervis was very influential in and had the capacity and power to substantially influence the terms upon which Investa Properties would approve a proposed sale of Lot 170 (and Lot 191) and thus the terms of a sale by Investa Residential of its two lots in issue.
4. The proposal was approved on 19 February 2009. Mr Nankervis was told that day by Mr Stubbs. The “Put & Call Option Deed” prepared by Freehills was signed on 20 February 2009 by Mr Nankervis for Investa Residential (witnessed by Mr Barclay) and by the Company Secretary for the buyer, TETN. The document enabled TETN to exercise a Call Option over Lot 170 and it conferred a right on Investa Residential to exercise a Put Option requiring TETN to purchase Lot 170. Any “Call Option Notice” by TETN had to be given to Investa Residential or Investa Residential’s solicitor: cl 2.2(a). Any Put Option Notice had to be exercised by Investa Residential and given to TETN or its solicitor: cl 4.2. Otherwise, all notices and communications to or by Investa Residential were required to be addressed to Investa Residential to the attention of Mr Nankervis or made by Mr Nankervis for Investa Residential: cl 9.1.
5. The Call Option Period commenced on 20 February 2009 and ended on 22 June 2009. The Put Option Period commenced on 23 June 2009 and ended on 29 June 2009.
6. Having regard to the emails passing between Mr Nankervis and Mr Barclay (and thus, Oliver Hume) and the steps actually taken by Mr Barclay based on those exchanges, there can be little doubt, in my respectful opinion, that Investa Properties by Mr Nankervis (with the authority of the Brentwood project review meeting participants and Mr Stubbs), and Oliver Hume struck an arrangement by 8.29am on 28 November 2008 by which Oliver Hume accepted an engagement to represent “Investa” in the sale of the Fossil site. Mr Barclay saw that arrangement as providing Oliver Hume with an opportunity to “further strengthen” the relationship with Mr Stubbs and Mr Nankervis. The arrangement contemplated that Oliver Hume might, apart from serving the interests of Investa, also serve its own commercial interests *in relation to commission*. Investa was content for Oliver Hume to seek commission from the purchaser. The following things should be noted.
7. *First*, the arrangement *in relation to commission* simply contemplated that Oliver Hume might, with the clear authority of Mr Nankervis and Mr Stubbs and thus “Investa”, seek a commercial arrangement with a potential purchaser to its own advantage as to commission so that, clearly enough, some or all or most of the commission otherwise payable by the vendor might be saved by Investa. Much was made of this saving in the approval submission.
8. *Second*, such an arrangement did not mean that Mr Barclay and Oliver Hume were thus relieved of any obligation to serve the interests of Investa in seeking to exploit Oliver Hume’s “pretty good handle on potential prospects” so as to secure a sale through the “Oliver Hume network Off Market” and in doing so keep Investa up‑to‑date “weekly” because of Investa’s “need” to secure a “Contract/purchaser” that will perform (i.e. proceed to settlement) especially because, according to Investa, “we can not afford any further delays (being a reference to the previous delays of the purchaser under the earlier contract that had collapsed)”: see the emails of 27 November 2008 and 28 November 2008.
9. I have already noted the enthusiastic way Mr Barclay embraced the assignment for Oliver Hume and the “opportunity” it presented to strengthen Oliver Hume’s relationship with Investa, Mr Stubbs and Mr Nankervis. In my respectful opinion, the primary Judge was in error in taking a different view about the arrangements struck with Oliver Hume and Mr Barclay (as to which see [165] and [169] of the primary Judge’s reasons). The email exchanges taken together with the consequential emails quoted in these reasons are entirely consistent with the arrangement I have identified. The arrangement did not render Oliver Hume the buyer’s agent as the primary Judge concluded.
10. *Third*, the reference to “Investa” raises two matters. The first is that Oliver Hume seemed to recognise that Investa was something more than Investa Properties. It must have known that to be so because it knew that Investa Residential was the vendor of the Brentwood lots. The second is that Oliver Hume, so far as Lot 170 was concerned, was acting in relation to a lot comprising 7.5 hectares approved for the development of 77 low density residential allotments all owned or to be owned by Investa Residential. In addition, Mr Nankervis had sent Mr Barclay a number of pdf attachments relating to Lot 170 identifying its engineering difficulties and other matters already mentioned. In embracing the arrangement proposed by Mr Nankervis and acting upon it, Oliver Hume and Mr Barclay, objectively viewed, undertook to act on behalf of both appellants and serve the interests of both appellants in seeking to secure a sale of Lot 170 whilst nevertheless remaining free to secure its remuneration for the services provided to each appellant by reaching a commission arrangement directly with the purchaser with the express approval of “Investa” (i.e. Investa Properties and Investa Residential).
11. As already mentioned, the express recognition that Oliver Hume remained free and was encouraged to reach an arrangement concerning its commission with the purchaser did not mean that either Oliver Hume or Mr Barclay were relieved of any obligation to make a disclosure of matters relevant to a sale Oliver Hume was seeking to bring about for “Investa” and nor was Oliver Hume relieved of an obligation not to prefer its own interests (except as to commission remuneration by arrangement with a purchaser) to those of Investa. Similarly, Mr Barclay was under an obligation to make full disclosure of any matters material to a sale and had assumed an obligation not to prefer his own interests to those of Investa Properties or Investa Residential.
12. Both Mr Barclay and Oliver Hume fell under these obligations because they must be taken to have undertaken to protect the interests of Investa Residential. Both Mr Barclay and Oliver Hume were thus in a fiduciary relationship with both appellants. Accordingly, for the reasons identified by Dowsett J, I respectfully disagree with the conclusions of the primary Judge that in the absence of an appointment by either or both of the appellants under the PAMD Act of either or both of Mr Barclay and/or Oliver Hume, no fiduciary relationship can arise between the participants to arrangements which, in all the circumstances, give rise to such a relationship. I will return to matters relating to Mr Barclay and Oliver Hume later in these reasons.
13. Although there are some anterior matters that go to the state of knowledge of Mr Nankervis about material matters concerning Lot 170 (and thus perhaps relevant to incentives to act), the central complaint made by the appellants is that on or before 20 January 2009, Mr Nankervis, Mr Barclay and Mr Tonuri are said to have entered into an agreement pursuant to which each of them would derive profit from the sale by Investa Residential of Lot 170 (with its 77 putative saleable lots) to Mr Tonuri or his nominee entity.
14. In the approval submission dated 6 February 2009 (although the footer shows that the document was prepared on 2 February 2009) there is a reference to the proposed purchaser entity, Bandat Pty Ltd. That company was incorporated on 3 February 2009. It was a wholly owned subsidiary of TETN, Mr Tonuri’s ultimate purchaser entity. Bandat’s name is the combination of Barclay, Nankervis and Tonuri: primary Judge at [213]. There is no mention in either memorandum of Mr Nankervis (28 January 2009 and 2 February 2009) of the circumstance that the proposed buyer is a company made up of those three names or that those three individuals had come together to form such a company (even if the company had not, by 2 February 2009, been incorporated). The company had been incorporated by the time Mr Nankervis signed the approval submission on 6 February 2009.
15. On 20 January 2009, Mr Tonuri sent an email to Mr Nankervis and Mr Barclay addressed to them as “Guys” which attached a model Mr Tonuri says he had “knocked up” which “focuses on how we might [finance] the project”.
16. At that date, Mr Tonuri expected the purchase costs to be, first, $90,000 payable in February 2009 and an additional $1,710,000 payable in September 2009 plus stamp duty of $73,475. The email of 20 January 2009 attaches a spreadsheet which is explained in the email. The ultimate point being made by Mr Tonuri to his project participants is that it did not really matter what the carrying cost of the equity would be for them (whether anywhere in the range 10% to 25%) because the differential cost of capital would ultimately be small. The “greater sensitivity for us”, he tells them, “is the amount of the final profit we have to pay away which in this model is $3.5m in total”. He then says:

What *we each ought to be thinking about* over the next few days is what our *pain threshold* is in terms of how much profit we would be prepared to give up, so that we can yes/no any proposal that Bill gives us reasonably [quickly].

[emphasis added]

1. The reference to “Bill” is a reference to an investor who was likely to also join the “project”. At this point, the spreadsheet was suggesting a development profit from the 77 lots of $3.5m.
2. As to the arrangements between Mr Tonuri, Mr Nankervis and Mr Barclay, the primary Judge made these findings at [273]:

In summary, I am satisfied that at or before 20 January 2009, Mr Nankervis had entered into an arrangement with Mr Tonuri and Mr Barclay to develop Lot 170 and that the arrangement was one whereby profits were divided into thirds between them. In a memorandum of 2 February 2009, Mr Nankervis recommended that the offer of Two Eight Two Nine to purchase Lot 170 be accepted. Mr Stubbs and Mr Jenkins recommended that Lot 170 be sold in accordance with Mr Nankervis’ submission. The sale was subsequently approved on 19 February 2009 for the sum of $1,454,545 (not including GST). At no time did Mr Nankervis disclose any of the arrangements involving himself, Mr Barclay and Mr Tonuri to the applicants. I have previously found that Mr Nankervis was in a fiduciary relationship with the first applicant in relation to the sale of Lot 170, and am satisfied that these facts support a finding that he breached those fiduciary obligations.

1. It is very likely that the “arrangement” between Mr Nankervis, Mr Barclay and Mr Tonuri was struck at least by 8 January 2009. The email from Mr Barclay to Mr Nankervis and Mr Stubbs of 8 January 2009 says that he has Mr Tonuri “at the point where he is ready to go to paper” and the recited terms include a price of $1.8m including GST with a deposit of $90,000 within 30 days of contract. That is entirely consistent with Mr Tonuri’s spreadsheet of 20 January 2009 showing a $90,000 deposit in February and $1,710,000 (i.e. $1.8m in all) in September 2009. If Mr Tonuri was “ready to go to paper” on 8 January 2009, it seems that the essential elements of his arrangement with his other project participants must have been in place even if a spreadsheet of cash flows and the cost of debt and equity had yet to be calculated.
2. On 15 May 2009, Mr Nankervis sent an email to Mr Barclay and Mr Tonuri to which he attached a “Summary of Comparison to current Valuation” (the “Comparison document”). Mr Nankervis observed that the key issue in the Comparison document is the method adopted for the valuation of the internal rate of return as this would make a “huge difference to the way the ‘Purchaser Feasibility’ looks”. He then set out four different approaches to valuation. He then said this:

Effectively the Valuation is on the basis of IRR calculated on 28% [i]nterest expense being the 8% [the annual interest rate adopted for debt funding] plus the effective discount rate of 20%.

We have the potential to sell this site to a purchaser at $4.8M on this basis.

1. At no point was either appellant entity told of these arrangements. No mention is made by Mr Nankervis in either of his memoranda or the approval submission that the 77 subdivisional allotments ultimately making up Lot 170 might be developed and realised in a way which might generate profit of $3.5m or that Investa Properties or Investa Residential or both might consider jointly developing Lot 170 with Mr Tonuri. No mention is made by Mr Nankervis of the arrangement with Mr Barclay and Mr Tonuri. Mr Stubbs was not told of it. Nor was Mr Jenkins or Mr MacDonald told about it. Nor is there any mention of the matters the subject of the email from Mr Nankervis of 15 May 2009. There was little point in making the disclosure to Investa Residential because all the decision‑makers were relevantly within Investa Properties or Holdings. Proper disclosure ought to have been made to Investa Properties. Mr Nankervis and Mr Barclay were both in a position, by reason of the roles they were required to perform, where they were plainly able to affect the interests of Investa Residential in a practical and legal way to the detriment of that company as the owner of Lot 170.
2. On 25 June 2009, Investa Properties and TETN entered into a contract of sale and purchase of Lot 170 at $1,454,545 with a date of completion of 31 July 2009. The sale was the expression of the implementation of the agreed project arrangement made between Mr Barclay, Mr Nankervis and Mr Tonuri.
3. In my view, each of Mr Nankervis, Mr Barclay and Oliver Hume owed duties to each of the appellants not to put themselves in a position of conflict and not to make a profit from their positon without the informed consent of each appellant. They were required to act in the best interests of both appellants subject to the right in Oliver Hume to negotiate a commission arrangement with a purchaser. They owed a duty not to take advantage of their position to the detriment of either appellant and not to allow their own interests to conflict with duties owed to the appellants. They owed a duty to Investa Properties to make full disclosure of the joint project arrangements.
4. Returning to the questions at [247] of these reasons: Mr Nankervis was in a role in which he enjoyed a power or capacity to affect the interests of Investa Residential; he undertook, expressly or impliedly, to act for, or on behalf of, or in the interests of, Investa Residential in the exercise of the power conferred upon him by Investa Properties; he was afforded a special opportunity by reason of his position and role to exercise the power conferred upon him to the detriment of Investa Residential thus rendering Investa Residential vulnerable to abuse of his position. As a result, he thus came under a duty to exercise the power according to the duty rules already mentioned.
5. Put another way, the circumstances going to the functions *actually performed* by him; the level of *responsibility* conceded to him; the *capacity* to shape and influence decision‑making concerning Lot 170; the *vulnerability* of Investa Residential to action taken by him and the *awareness* he must reasonably be taken to have had that the function he was performing was *in fact* for the benefit of Investa Residential, *as well*, resulted in Mr Nankervis “coming under a duty” not to put himself in a position of conflict without informed consent; a duty not to make a profit from his position without informed consent; and a duty to act in the best interests of Investa Residential, as well as, Investa Properties, unless instructed to act otherwise by Investa Properties.
6. Mr Barclay and Oliver Hume came under the same duties by reason of the engagement reflected in the emails quoted at [302] to [316] of these reasons.
7. They all breached all of these duties.
8. I now turn to the circumstances relating to Lot 191.

## Lot 191

1. For the reasons identified by Dowsett J, there can be little doubt at all in my view that Mr Barclay undertook to act in the best interests of Investa Residential in relation to Lot 191 and not to engage in any conduct of preferring his own private interests to the interests of Investa Residential. Oliver Hume must be taken to have also undertaken to act in the best interests of Investa Residential and not to engage in any conduct of preferring its interests to those of Investa Residential. Once any conflict between the interests of either Mr Barclay or Oliver Hume on the one hand and Investa Residential on the other hand arose, Mr Barclay and Oliver Hume owed a fiduciary obligation to Investa Residential to cease acting. They each owed Investa Residential a fiduciary obligation, of course, to avoid any such conflict arising. Once a conflict of interest arose, they owed Investa Residential a fiduciary obligation to disclose it to Investa Residential through the appropriate decision‑making organs of that company which for all practical purposes were the responsible officers of Investa Properties.
2. Any disclosure to Mr Nankervis would not represent proper disclosure to Investa Residential due to his engagement in the arrangements with Mr Barclay to seek approval to subdivide Lot 191 in the pursuit of their own interests to the disadvantage of the interests of Investa Residential and due to their “joint interests” in connection with Lot 170 along with Mr Tonuri. Mr Barclay’s expectation in his dealings with Mr Nankervis, plainly enough, was that Mr Nankervis would not disclose to Investa Residential (through the decision‑making structures within Investa Properties) the material matters going to a conflict of interests between the interests of Mr Barclay (and/or those of Oliver Hume) and those of Investa Residential.
3. Each of Mr Barclay and Oliver Hume owed obligations to Investa Residential to keep it informed of all material matters in relation to Lot 191 including that Lot 191 had potential for subdivision, as a matter directly relevant to the market value of the lot. Mr Barclay was also obliged to tell Investa Residential (through the mechanism earlier described) that the option to be granted to QPC (especially because it contained a call option exercisable by the grantee) was, in effect, an option granted to his wife, Ms Barclay. The non‑disclosure of these matters engaged Mr Barclay in a breach of his fiduciary obligations to Investa Residential.
4. It is difficult to understand how Mr Barclay could seriously believe that a licensed real estate person performing the functions of a real estate agent on behalf of licensed real estate agency entity, Oliver Hume, expressly engaged by an owner of real estate (as a company operating within a property development undertaking), has *no obligation* or duty to disclose material facts known to him relevant to the subdivisional potential of an allotment the subject of Oliver Hume’s engagement by the owner and *no obligation* to disclose that *Ms Barclay* was to be the beneficiary of the grant of the call option.
5. To contend otherwise is sophistry.
6. Moreover, Mr Barclay was entirely a functionary of Oliver Hume. The non‑disclosures occurred in the course of his performing his role and function as a real estate agent for Oliver Hume recognising, of course, his particular position within Oliver Hume. There can be little doubt that the opportunity to engage with Mr Nankervis on Lot 191 and learn particular facts about Lot 191 and its potential for subdivisional development arose because of his position at Oliver Hume and the role Oliver Hume was to play in the affairs of Investa Residential and Investa Properties. Mr Barclay acted for and on behalf of Oliver Hume at all relevant times. His knowledge *is*, in substance and effect, *the knowledge* of Oliver Hume because it is knowledge imputed to Oliver Hume. Thus, Oliver Hume, by reason of the non‑disclosure of the relevant matters, failed to discharge fiduciary obligations owed by it to Investa Residential.
7. The obligation of Mr Barclay and Oliver Hume was to seek out responsible officers of Investa Properties, standing relevantly in the shoes of Investa Residential for all practical purposes, such as persons in the roles of General Manager or CEO of Investa Properties or CEO or Chair of Holdings and make a full disclosure of all material matters and by doing so, in effect, make disclosure to Investa Residential.
8. The termination of Oliver Hume’s appointment from 8 February 2010 is not relevant to the question of whether, prior to that date, Mr Barclay and Oliver Hume engaged in conduct in breach of fiduciary obligations owed to Investa Residential by reason of conduct occurring when a fiduciary relationship *subsisted* between them and Investa Residential. It may well be relevant to conduct occurring after 8 February 2010 but it should be remembered that the obligation to disclose the relevant matters (because of the burden of the fiduciary obligations owed to Investa Residential arising during the subsistence of the fiduciary relationship) continues *beyond* the end of the fiduciary relationship. Every day of non‑disclosure beyond 8 February 2010 was another day that each of Mr Barclay and Oliver Hume engaged in a continuing breach of fiduciary duty owed to Investa Residential. Each of them had an enduring obligation to tell Investa Residential of the subdivisional potential for Lot 191 and each of them had an enduring obligation to tell Investa Residential that the grantee of the option was, in effect, Ms Barclay. Put another way, the termination on 8 February 2010 by Investa Residential of the engagement or appointment of Oliver Hume did not bring the undertaking to act in the interests of Investa Residential to an end. The undertaking endured beyond the formal termination of Oliver Hume’s appointment.
9. Entry into the option granted to QPC on 23 December 2009 without the informed consent of the appellants was simply one expression of a breach of fiduciary duty owed to Investa Residential. The breach itself is the conduct of Mr Barclay and Oliver Hume acting or continuing to act in, and in the face of, a conflict of interest. It ultimately became manifest in the grant of the call option to, in effect, Ms Barclay.
10. Had, at any time between 8 February 2010 and 20 April 2010, for example, Mr Barclay and Oliver Hume made the disclosures required of them by reason of their undischarged fiduciary obligations characterising or “circumstancing” as Dr Finn would put it, their relationship with Investa Residential *up to* 8 February 2010, would Investa Residential have extended on 20 April 2010 the then expired option granted to Ms Barclay? One imagines not. Otherwise, presumably this aspect of the litigation would not have arisen. Would Investa Residential have sold Lot 191 to Spencer Projects connected, as it was, to Ms Crosbie, the daughter of Ms Barclay, had Mr Barclay and Oliver Hume put Investa Residential on notice of the earlier non‑disclosed matters even assuming that, by that point, or on 25 June 2010 when Lot 191 was sold to Spencer Projects, there was no obligation to disclose the connection between Spencer Projects, Ms Crosbie and Ms Barclay and thus Mr Barclay.
11. There is no suggestion in the evidence of any disclosure after 8 February 2010 of the matters not disclosed in the period up to 8 February 2010. The conduct after 8 February 2010 in failing to disclose the relevant matters constitutes a continuing breach of the fiduciary obligations beyond 8 February 2010 of both Mr Barclay and Oliver Hume.
12. It follows from these observations that, in my view, Mr Nankervis had assumed fiduciary obligations to Investa Residential (in addition to the fiduciary obligations owed to his employer Investa Properties) for the reasons summarised at [349] and [350] of these reasons in relation to Lot 170. Those obligations required Mr Nankervis to disclose to Investa Residential all matters material to the sale of Lot 170 by disclosing those matters to the relevant officers of Investa Properties, as those decision‑makers were, in every practical sense, the decision‑makers for Investa Residential. Those obligations required Mr Nankervis to not allow his own interests to come into conflict with his fiduciary duty to each appellant to disclose all matters material to the sale and, put simply, his duty to protect and further the interests of the appellants in securing a sale of Lot 170 in the best interests of both appellants. The duties are described at [350] of these reasons.
13. It also follows that Mr Nankervis had assumed fiduciary obligations to Investa Properties and Investa Residential (comprised of the same content) in relation to Lot 191. I will return to issues in relation to Lot 191 later in these reasons.

# PART 5 – OTHER ASPECTS OF THE SPECIFIC MATTERS IN ISSUE IN THE APPEALS

1. As to Mr Barclay and Oliver Hume, these further matters should be noted.

## Lot 170

1. The appellants pleaded at para 162E that Oliver Hume had assumed particular fiduciary obligations to each of them. Those obligations were said to comprehend an obligation to act in good faith and with fidelity; avoid and disclose any and all perceived conflicts of interests; to act in the best interests of each appellant; to give each appellant the full benefit of Oliver Hume’s skill and expertise; not to profit from its position; and not to assist any person to obtain a benefit in relation to Lot 170 without full and frank disclosure to each appellant.
2. As to Mr Barclay, the appellants pleaded his particular relationship with Oliver Hume and his significant role in the provision of Oliver Hume’s services to each appellant and pleaded that he too assumed fiduciary obligations to each appellant in similar terms to those obligations assumed by Oliver Hume.
3. The appellants then pleaded many of the chronological matters described in these reasons at [302] to [330] although in more concise terms. In particular, the appellants rely upon the agreement struck between Mr Nankervis, Mr Barclay and Mr Tonuri as earlier described.
4. The appellants also pleaded events which occurred after August 2009 notwithstanding that the contract for the sale of Lot 170 was settled on 31 July 2009. The events pleaded at paras 186, 187 and 189 concern the provision of services by Mr Barclay to Mr Tonuri or other persons associated with the ultimate transferee, TETN, after completion of the sale. Questions have arisen as to the relevance of these later events. For my part, I infer that the appellants pleaded these matters in order to establish continuity in the conduct undertaken by Mr Nankervis, Mr Barclay and Mr Tonuri during the period fiduciary obligations were said to subsist (between each appellant and Mr Barclay and Oliver Hume), and those events which occurred later in time which show continuing engagement between Mr Barclay (whilst still employed by Oliver Hume) and Mr Tonuri, TETN and other persons associated with TETN in relation to Lot 170.
5. The appellants pleaded at para 195 that Mr Barclay breached the pleaded duties by entering into the agreement with Mr Nankervis and Mr Tonuri and by providing a suite of services to Mr Tonuri and TETN in connection with that transaction made in breach of duty. Oliver Hume was said to have breached its duty by reason of Mr Barclay’s entry into the agreement with Mr Nankervis and Mr Tonuri and by reason of Mr Barclay having provided the suite of services to Mr Tonuri and TETN.
6. As mentioned earlier, the primary Judge concluded that Oliver Hume had not been appointed in accordance with the provisions of the PAMD Act and thus no fiduciary obligations arose as between either appellant and Oliver Hume because the legislative scheme did not allow for the *subsistence* of a relationship of principal and real estate agent *outside* the scope of the scheme and, more particularly, traditional equitable obligations owed by real estate agents to their principals had been subsumed into and were governed by the PAMD Act and regulations made under that Act. However, I agree with the observations of Dowsett J at [151] of these reasons, that the effect of the application of the PAMD Act to the dealings between Investa Residential and Oliver Hume is that Oliver Hume, in acting as a real estate agent without appointment under the Act, breached s 133 of that Act and by reason of s 141 of that Act, Oliver Hume was precluded from receiving any reward for so acting. Moreover, the PAMD Act did not have the effect of prohibiting any agreement between a principal and agent which did not conform to the Act. Other consequences arose under the Act as described by Dowsett J at [151].
7. The critical question is whether fiduciary obligations could subsist between relevant parties notwithstanding that the principal and agent had failed to comply with the provisions of the PAMD Act in reducing that arrangement to formal terms. The primary Judge took the view that no fiduciary relationship subsisted between Mr Barclay or Oliver Hume on the one hand and Investa Residential on the other hand because there was no appointment in accordance with the provisions of the PAMD Act. I agree that, as a matter of statutory construction, that result does not arise. The true position is that once the character of the relationship between the relevant participants is one in which Oliver Hume *assumed* fiduciary obligations, a fiduciary relationship arose between Oliver Hume (and Mr Barclay) on the one hand and Investa Residential on the other. Thus, the true question is whether the parties have entered into a fiduciary relationship having regard to the tests earlier described.
8. Notwithstanding the primary Judge’s view about the operation of the PAMD Act, the primary Judge went on to consider, should she be wrong about that conclusion, whether Oliver Hume and Mr Barclay had assumed fiduciary obligations owed to Investa Residential with the result that a fiduciary relationship arose between them.
9. At [157] and [158] of these reasons, Dowsett J identifies the factors which informed the primary Judge’s thinking on that question resulting in the conclusion that no such relationship subsisted. For the reasons I have already identified, I take the view that a fiduciary relationship did subsist between Oliver Hume (and Mr Barclay) on the one hand and Investa Residential on the other hand. As I indicated earlier in these reasons, I respectfully depart from the primary Judge’s views about that matter for the reasons I have indicated.
10. At [159] to [163], Dowsett J identifies a sequence of factors which leads his Honour to conclude that it seems *fairly arguable* that a duty was assumed by Oliver Hume to convey to Investa Residential any offers which it received falling within the terms stipulated in the email exchanges already described and, *arguably*, a duty to act, with respect to Lot 170, in the best interests of Investa Residential and not to put itself in a position where its interests conflicted with those of Investa Residential (subject to the express reservation of Oliver Hume’s right to seek commission remuneration from a purchaser). Dowsett J concludes at [164] that his Honour’s reasoning about those matters equally applies to Mr Barclay’s case. Dowsett J also observes that to the extent that there was, *arguably*, a fiduciary relationship, the agreement struck between Mr Nankervis, Mr Barclay and Mr Tonuri seems, *again at least arguably*, to be in breach of the duties associated with such a relationship. Dowsett J also concludes that Mr Barclay’s knowledge of the dealings between Mr Barclay, Mr Nankervis and Mr Tonuri *may well lead* to the conclusion that such knowledge is to be imputed to Oliver Hume.
11. I have emphasised, by italics the various qualifications adopted by Dowsett J that these conclusions arise only at the level of being arguable. As a result of that view, Dowsett J concludes that there may be other features of the relationship and thus other features of obligations owed to Investa Residential which have not been properly identified because the process of fact‑finding by the primary Judge was compromised by her Honour’s conclusion that no fiduciary relationship could subsist between the participants due to the operation of the PAMD Act. Dowsett J also concludes that the submissions of the parties on appeal have offered little assistance in identifying the “incidents of any, more limited fiduciary relationships” and, because the scope of the relationship is a factual inquiry requiring findings of fact (and not simply category based), the proceeding ought to be remitted to the trial Judge to resolve, on the facts, all incidents of the relationship.
12. For my part, I am very reluctant indeed, respectfully, to remit the proceeding to the primary Judge for a further determination of these factual matters. This litigation has already consumed a great deal of cost and time. If at all possible, the content of the fiduciary relationship between Oliver Hume (and Mr Barclay) and Investa Residential ought to be resolved having regard to the existing fact‑finding and the weight of evidence. The obligations of an appeal court in this regard are put this way by French CJ, Bell, Keane, Nettle and Gordon JJ in *Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550 at [43]:

The fact that the judge and the majority of the Court of Appeal came to different conclusions is in itself unremarkable. A court of appeal conducting an appeal by way of rehearing is bound to conduct a “real review” of the evidence given at first instance and of the judge’s reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge’s findings of fact unless they are demonstrated to be wrong by “incontrovertible facts or uncontested testimony”, or they are “glaringly improbable” or “contrary to compelling inferences”. [citations omitted]

1. For my part, I am satisfied, having regard to the evidence I have set out and discussed at [302] to [352] of these reasons, that the content of the obligations owed to Investa Residential (and Investa Properties), assumed by Oliver Hume and Mr Barclay in connection with the sale of Lot 170 included: (a)  an obligation to act in the best interests of Investa Residential; (b)  an obligation to convey to Investa Residential any offers falling within the terms of the emails exchanged between Mr Nankervis and Mr Barclay for Oliver Hume as described in these reasons (as an expression of the obligation at (a)); (c)  an obligation to disclose to Investa Residential (through the mechanism earlier described) any matters material to the sale of Lot 170 (as an expression of the obligation at (a)); (d)  an obligation not to put themselves in a conflict of interest and duty (or interest and interest); and (e)  an obligation to disclose the particular arrangements struck between Mr Nankervis, Mr Barclay and Mr Tonuri described at [302] to [316] and [338] to [352] of these reasons. That obligation fell not only to Mr Barclay but also Oliver Hume because Mr Barclay’s knowledge is imputed to Oliver Hume for all the reasons identified by Dowsett J.
2. I am satisfied that Mr Barclay failed to discharge these obligations by entering into the agreement with Mr Nankervis and Mr Tonuri thus embracing a conflict of interest and duty and by failing to disclosure the content of the agreement at any relevant time. Oliver Hume failed to discharge the obligations it assumed by failing to disclose the relevant information known to Mr Barclay and imputed to Oliver Hume by reason of the role and position of Mr Barclay in the structure and activities of Oliver Hume.
3. The orders to be made on appeal concerning Lot 170 ought to reflect the conclusions I have mentioned.

## The valuation issues

1. Questions arose, on the face of the notices of appeal, going to valuation issues. It is convenient to deal with Lots 170 and 191 together on these issues. The questions arising are these: *first*, whether the primary Judge ought to have found that the market value of Lot 170 was greater than $1,454,545.00; *second*, whether the primary Judge ought to have found that the market value of Lot 191 was less than $290,000.00. These questions of valuation go to the quantification of the claimed compensation for breach of the fiduciary obligations owed to the appellants and not to questions of the assumption and subsistence of fiduciary obligations, the content of the obligations or breaches of duty. They go only to the measure of the compensation. As Dowsett J observes, no party contended that the Court could presently determine, in these proceedings, questions of valuation, principally because, *first*, there is no “order” appealed from to which the assessments of value relate and, *second*, questions of *relief* were separated out by the primary Judge for later determination. Those matters are yet to be determined.
2. Further, the issue of the causal link between a breach of duty and the loss for which compensation is sought also goes to the question of remedies separated out for later determination by the primary Judge. I agree that the Full Court ought not to decide those matters in the course of this hearing.

## Lot 191

1. As to Lot 191, Oliver Hume and Mr Barclay admitted on the pleadings that as at 23 June 2010, Ms Barclay was the sole director of and shareholder in Spencer Projects. In the face of that admission, the primary Judge, not surprisingly, so found. However, the evidence put on at trial demonstrates that the sole director and shareholder was not Ms Barclay but rather, Ms Crosbie, Ms Barclay’s daughter. It may be that Mr Barclay and Oliver Hume made the admission because they were willing to treat, for the purposes of the issues in the proceedings, Ms Barclay’s daughter as standing in the shoes of Ms Barclay for all practical purposes due to the mother/daughter relationship between the two individuals. The pleaded case is breach of fiduciary duty by reason of a failure by Mr Barclay and Oliver Hume to disclose to Investa Residential, Ms Barclay’s interest in Spencer Projects rather than a case based upon non‑disclosure of Ms Barclay’s daughter’s interest. Notwithstanding these complications, Investa Residential says that it suffered loss as a result of the sale of Lot 191 to Spencer Projects and such loss has a causal relationship with the breach of duty by Mr Barclay and Oliver Hume in failing to disclose Ms Barclay’s interest in *QPC* and the non‑disclosed steps relating to the proposed subdivision of Lot 191.
2. I agree with the observations of Dowsett J contained in the last two sentences of [99] of his Honour’s reasons.
3. I also agree with the observations of Dowsett J at [100] to [112] of his Honour’s reasons in relation to the questions in issue between the appellants, Mr Barclay and Oliver Hume concerning Lot 191, subject to one matter discussed by his Honour at [117] to which I will return.
4. The critical consideration concerning Mr Barclay is that he owed (and conceded it to be so) fiduciary duties to Investa Residential from the date of Oliver Hume’s appointment on 16 July 2009 until at least the date of termination of the retainer on 8 February 2010. He failed to discharge his duty by failing to disclose, at least during the period of the fiduciary relationship and thus at any time prior to 8 February 2010, his wife’s interest in QPC and the subdivisional opportunities for Lot 191.
5. Oliver Hume also owed a fiduciary obligation to Investa Residential to make those disclosures at least at any time up to 8 February 2010 because it had Mr Barclay’s knowledge of the relevant matters, as a matter of imputation as discussed earlier, and thus had an obligation of disclosure.
6. At [117], Dowsett J concludes that Declarations 3 and 4 made by the primary Judge should be amended so as to reflect a proven breach of duty by conduct of non‑disclosure *prior* to 8 February 2010. I would, respectfully, depart from such amendments because once it is accepted that Mr Barclay owed a duty of disclosure to Investa Residential of the relevant matters, his *duty* of disclosure did not conveniently end with the termination of Oliver Hume’s retainer. Although the fiduciary relationship might have come to an end, he had a *continuing obligation* of disclosure from the moment the obligation arose and the duty to do so did not fall away on termination of the retainer. There was a continuing breach of the duty to tell Investa Residential of the material things. Oliver Hume had its own duty of disclosure which did not end on termination of the retainer, either. Each of them, whether before or after 8 February 2010, ought to have told Investa Residential of the material matters and their failure to do so was a continuing breach on and after 8 February 2010.
7. Dowsett J observes that whilst fiduciary obligations owed to Investa Residential may have survived the termination of the agency relationship, Investa Residential did not plead a case, as against Oliver Hume and Mr Barclay, based on continuing duties. Rather, the duties were said to have subsisted “while [Oliver Hume or Barclay was] providing real estate agent services in relation to Lot 191 …”.
8. However, both Oliver Hume and Mr Barclay concede that they owed fiduciary obligations to Investa Residential from the period of the appointment on 16 July 2009 until termination of the retainer on 8 February 2010. Notwithstanding the limitation they place on the scope of the concession, the appellants have nevertheless made good their case (ultimately by reason of the concession) that Oliver Hume and Mr Barclay owed Investa Residential fiduciary obligations by reason of their engagement to provide “real estate agent services in relation to Lot 191”. It follows, as a matter of law, that the termination of the retainer did not conveniently extinguish the obligation to disclose the relevant matters after 8 February 2010.
9. The relevant matters are the subdivisional potential for Lot 191 which Mr Nankervis and Mr Barclay were working upon at least by 19 October 2009 and the circumstance that Ms Barclay was to be the beneficiary of the grant of the call option of 23 December 2009 to QPC at $195,000.00.
10. The focus of the issues on appeal on this topic concerned the question of the content of the fiduciary obligations owed by, particularly, Oliver Hume to Investa Residential; whether Oliver Hume was to be treated as impressed with Mr Barclay’s knowledge of the relevant matters for all the reasons discussed in these reasons overall; and whether Oliver Hume had a duty of disclosure of the things known by Mr Barclay. If so, no pleading point was ever taken as a contended answer to a continuing obligation to disclose once Oliver Hume was found to have an obligation of disclosure by force of the retainer.
11. A question will, no doubt, arise about whether the loss said to have been suffered by reason of the sale of Lot 191 to Spencer Projects is causally related to the conduct the subject of the declarations but that is a matter for the split hearing on loss and damage. Obviously enough, the loss will need to be demonstrated to be a “but for” loss related to the non‑disclosure. The non‑disclosure after 8 February 2010 might be shown to have resulted in a sale at an under‑value (if a sale at an under‑value ultimately be the proven case). That will, no doubt, raise the sequence of events concerning the grant of the option to QPC, its extension and other related matters. However, I would not limit the declarations in the way suggested by Dowsett J although I accept that the declarations need to be framed carefully so as to precisely reflect the relevant conduct.

## Investa Properties

1. As to Investa Properties, I agree with the observations of Dowsett J at [167] of his Honour’s reasons.

## Matters as between Oliver Hume, Vero and Mr Barclay in relation to the various claims and cross‑claims between these parties

1. Although I am reluctant to remit any aspect of the proceedings to the trial Judge due to the additional time and cost involved in doing so, I accept that the various claims and cross‑claims going to the matters identified at [168] and [169] of the reasons of Dowsett J so far as they relate to Lot 170 have not been addressed by the primary Judge in any dispositive way. I also accept that even though the difficulties identified by Dowsett J require these particular matters to be remitted to the primary Judge, I nevertheless remain of the view that the question of the content of the fiduciary obligations concerning Lot 170, the subject of the observations of Dowsett J at [166] of his Honour’s reasons, ought not to be remitted to the primary Judge and that those matters ought to be determined by this Court in the way I have indicated.
2. Nevertheless, there are matters which need to be addressed by the primary Judge and I now turn to those matters.
3. The context is this. Mr Barclay contends that he is entitled to an indemnity from Oliver Hume in respect of any claim of the appellants made good by either of them against him; an indemnity in respect of any costs he might be ordered to pay to either appellant in the various proceedings; and an indemnity in respect of the costs he has incurred in answering and responding to the various proceedings. Apart from these claims, Mr Barclay also turns to Vero and contends that the policy “responds” to such claims and that he is entitled to be indemnified under it.
4. Oliver Hume contends that if Mr Barclay engaged in classes of conduct which resulted in breaches of his duties to either appellant, and should Oliver Hume be liable to either appellant in respect of any of Mr Barclay’s conduct, then Mr Barclay is necessarily in breach of his duties owed to Oliver Hume. Oliver Hume says that those duties are to be found in the orthodox duties Mr Barclay owes as an employee; fiduciary duties he owes to Oliver Hume; duties owed as a director of Oliver Hume; and duties derived from claims based in contract.
5. Questions arose about whether Oliver Hume was also contending at trial that Mr Barclay had engaged in fraud and whether the primary Judge had made findings suggesting that Mr Barclay’s conduct had been fraudulent or dishonest. No such finding was made by the primary Judge and those matters are addressed at paragraphs of the Judgment of Dowsett J with which I have already expressed agreement; see particularly [101] of Dowsett J’s reasons.
6. As to Lot 191, the Court declared that Mr Barclay breached his fiduciary duties to Investa Residential (Declaration 3) and that Oliver Hume breached its fiduciary duties owed to Investa Residential (Declaration 4). The Court upheld Oliver Hume’s cross-claim against Mr Barclay (Order 5) and although the cross-claim is ultimately in respect of a liability arising out of a breach of fiduciary duty owed to Investa Residential, it is not clear (subject to what follows) whether the obligation to indemnify Oliver Hume, as found by the primary Judge on the cross‑claim, is based upon a breach of a fiduciary duty owed to Oliver Hume or one or more of the other pleaded grounds of breach of duty owed by Mr Barclay to Oliver Hume.
7. Mr Barclay challenges Order 5 upholding Oliver Hume’s cross‑claim.
8. The elements engaged in upholding the cross‑claim seemed to be these. The primary Judge found that Mr Barclay’s conduct breached his duty to Investa Residential; such conduct was the source of Oliver Hume’s own breach of its fiduciary duty owed to Investa Residential; and that the only person within Oliver Hume who knew of the relevant conduct was Mr Barclay. The primary Judge seemed to conclude (on the footing that the contention could not be seriously doubted) that Mr Barclay’s conduct breached a duty he owed to Oliver Hume as an employee of the company and also breached his duty to Oliver Hume as a director of the company. Mr Barclay’s grounds of challenge and his contentions in support of those grounds are set out by Dowsett J at [173] and [174] of his Honour’s reasons. It is not necessary to repeat them here. I accept that, with respect to Lot 191 (there being no dispositive treatment so far as Lot 170 is concerned), the reasons of the primary Judge fail to identify the *particular conduct* upon which the decision is based and the *duty breached*, as explained by Dowsett J at [175] of his Honour’s reasons. I also accept, as Dowsett J observes at [178] of his Honour’s reasons, that it was difficult for Mr Barclay to challenge the decision under appeal other than by making assumptions about the factual and legal basis for the decision. I therefore agree with the observations of Dowsett J at [178] and [179] of his Honour’s reasons.
9. Apart from the challenge to Order 5 upholding Oliver Hume’s cross‑claim against him, Mr Barclay presses his own claim for an indemnity as earlier described.
10. The foundation for that claim is explained by Dowsett J at [181] to [186] of his Honour’s reasons and it is not necessary to further describe those matters here. It should be noted, however, that the claim to an indemnity as earlier described, now relates to matters arising in relation to both Lot 170 and Lot 191.
11. The cross‑claim by Mr Barclay against Oliver Hume was dismissed by the primary Judge: Order 3. That followed because Mr Barclay had failed to identify a basis for such a claim. For the reasons identified by Dowsett J at [186] of his Honour’s reasons, I agree that the primary Judge correctly dismissed the claim on that ground. The primary Judge, however, did not simply conclude that Mr Barclay had sought (and failed to make good) a right of indemnity, on the contended footing that Oliver Hume had an *obligation* to indemnify Mr Barclay as an *employee* in respect of liabilities incurred to third parties in the course of the employee’s employment. The primary Judge also seemed to conclude, in effect, that *even if* a basis for an indemnity had been demonstrated on the facts and the law, Mr Barclay had nevertheless failed to discharge his duties owed to Oliver Hume as its employee and was also in breach of his duties to the company as a director. The expression of those duties were said to be conduct of placing his own interests ahead of those of Oliver Hume (that is, failing to avoid a conflict of interest and continuing to act in the face of a conflict of interest). Presumably these breaches were regarded by the primary Judge as conduct *otherwise* disentitling Mr Barclay to an indemnity. It seems to me that the primary Judge was relying on both limbs of the reasoning in support of Order 3 although these other matters of breach of duty as an employee and director are *conclusionary* rather than reasoned. That is why the primary ground of dismissal of the cross‑claim by Mr Barclay was a failure to identify on the facts and the law a reasoned basis for such a claim.
12. By Order 4, the primary Judge dismissed Mr Barclay’s claim against Vero for indemnity. As to the questions in issue between Mr Barclay and Vero, I agree with the observations of Dowsett J at [187] to [199] of his Honour’s reasons. It is not necessary to add anything further as to that matter.
13. I propose to simply give a general indication of the scope of the orders that ought to be made based upon these reasons. The parties ought to formulate the appropriate orders giving effect to these reasons supported by submissions where necessary. The principles governing the orders are these:
14. The appellants (and, in particular, Investa Residential) have made good their claims, as formulated on appeal, against Mr Nankervis concerning Lot 170 and Lot 191. Declarations ought to be framed reflecting those matters especially in relation to the position of Investa Residential.
15. Declaration 5(c) cannot stand.
16. Further declarations may also be necessary to give proper effect to the matters described at points (1) and (2).
17. As to Mr Barclay, the appellants have made good their claims, as formulated on appeal, that:

(a) Mr Barclay assumed fiduciary obligations and was in a fiduciary relationship with Investa Residential in relation to Lot 170;

(b) the content of the fiduciary duties are those set out at [380] of my reasons;

(c) Mr Barclay breached his fiduciary duties having regard to the matters described in my reasons at [337] to [352] as explained more broadly at [302] to [352];

(d) I would not remit the question of the incidents, content and scope of the fiduciary relationship between Mr Barclay and Investa Residential in relation to Lot 170 to the primary Judge;

(e) Declaration 5(d) cannot stand.

1. As to Oliver Hume, the appellants have made good their claims, as formulated on appeal, that:

(a) Oliver Hume owed fiduciary obligations to the appellants in relation to Lot 170;

(b) the content of the fiduciary duties are those set out at [380] of my reasons;

(c) Oliver Hume breached its fiduciary duties as described at [381] of my reasons having regard to the elaboration at [337] to [352] and [302] to [352] more generally, of my reasons;

(d) these questions ought not to be remitted to the primary Judge;

(e) Declaration 5(e) cannot stand.

1. As to Lot 191, Declarations 3 and 4 ought not to be amended to limit them to a proven breach prior to 8 February 2010 for the reasons explained earlier.
2. Order 5 of the orders made on 10 September 2015 be set aside.
3. Oliver Hume’s cross‑claim against Mr Barclay be remitted to the trial Judge for determination according to law and in accordance with these reasons.
4. Mr Barclay’s appeal as against Oliver Hume be dismissed save as to costs.
5. Order 4 made by the primary Judge on 10 September 2015 be set aside.
6. Mr Barclay’s cross‑claim against Vero be remitted to the primary Judge for determination according to law and these reasons.
7. Orders be formulated as to the disposition of the appeals more generally in the light of the specific orders described above.
8. All parties be given liberty to apply.
9. Costs be reserved for later determination.

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| I certify that the preceding two hundred and nine (209) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 1 September 2017

REASONS FOR JUDGMENT

WHITE J:

1. The circumstances of these appeals are set out in the respective reasons of Dowsett J and Greenwood J.
2. I will state my conclusions by reference to the issues identified by Dowsett J in [24] of his reasons.
3. Issue (a) – Whether Oliver Hume and Mr Barclay owed fiduciary duties to Investa Properties and Investa Residential in respect of Lot 170.

I respectfully agree with the reasons of Greenwood J for concluding that both Oliver Hume and Mr Barclay owed and breached fiduciary duties to Investa Properties and Investa Residential in respect of Lot 170. I add that I also agree with much of the reasons of Dowsett J on this issue but, like Greenwood J at [379]‑[382], consider that it is possible (and preferable) for this Court to determine the issues in dispute without remitting them for further consideration by the primary Judge.

1. Issue (b) – Whether Mr Nankervis owed fiduciary duties to Investa Residential in respect of Lots 170 and 191 and, if so, whether he breached those duties.

I respectfully agree with the reasons of Greenwood J for concluding that Investa Residential has made out this aspect of its appeal.

1. Issue (c) – Whether, as at 25 June 2010, Oliver Hume and Mr Barclay owed fiduciary duties to Investa Residential in respect of Lot 191.

I respectfully agree with the reasons of Greenwood J on this issue and would dismiss those grounds of appeal by Oliver Hume and Mr Barclay which give rise to it. On the question of whether a fiduciary obligation which arises during the subsistence of a contractual relationship may continue after the termination of that relationship, I add references to *Longstaff v Birtles* [2001] EWCA Civ 1219, [2002] 1 WLR 470 at [1], [35]; *Conway v Raitu* [2005] EWCA Civ 1302, [2006] 1 All ER 571 at [75]‑[77]; and *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612 at [33]‑[35].

1. Issue (d) – Whether, in the event that Oliver Hume and Mr Barclay did owe fiduciary obligations to Investa Residential in respect of Lot 191, the primary Judge nevertheless erred in the findings concerning the breach of those obligations.

I respectfully agree with the reasons of Greenwood J for rejecting these grounds of appeal by Oliver Hume and Mr Barclay. I also respectfully agree with the reasons of Dowsett J on this topic, save that I do not agree with that part of His Honour’s reasons which would result in declarations [3] and [4] made by the primary Judge being amended so as to limit them to breaches occurring before 8 February 2010.

1. Issues (e), (f) and (g) – These issues arise from Oliver Hume’s complaints about the findings of the primary Judge concerning the actual or apparent authority of Mr Barclay in relation to the conduct which Investa Properties and Investa Residential impugn, the attribution of Mr Barclay’s conduct to Oliver Hume, and the attribution of Mr Barclay’s state of mind to Oliver Hume.

It is convenient to consider these issues together. I respectfully agree with the reasons of Dowsett J, at [99]‑[109], for dismissing these grounds.

1. Issues (h) and (j) – The issues of loss arising from the valuations of Lots 170 and 191.

Again, it is convenient to consider these issues together. Like Dowsett J at [25]‑[26] and Greenwood J at [383]-[384], I consider that these grounds go to the question of remedies and are not raised by the appeal against the primary Judge’s orders following the trial of the liability issues in the proceedings. Accordingly, it is inappropriate to address them in the context of the present appeal. I would dismiss Grounds (h) and (j).

1. Issue (i) – Whether the primary Judge erred in ordering that the cross claim of Oliver Hume against Mr Barclay “be upheld”.

I consider that this ground of appeal by Mr Barclay should be upheld. I respectfully agree with the reasons of Dowsett J on this issue, at [170]‑[175], and agree that the matters should be remitted to the trial Judge for further consideration according to law.

1. Issue (k) – Whether Mr Barclay should have been found to be entitled to indemnity by Oliver Hume.

I respectfully agree with Dowsett J, for the reasons he gives at [180]‑[186], that this ground of appeal by Mr Barclay should be dismissed.

1. Issue (l) – Whether Mr Barclay should have been found entitled to indemnity from Vero.

I consider that this ground of appeal should be upheld and the matter remitted to the primary Judge for further consideration. I respectfully agree with the reasons of Dowsett J at [187]‑[199].

1. As each of Dowsett J and Greenwood J have indicated, the making of orders appropriate for the disposition of these appeals is a matter of some complexity. I favour the approach of Greenwood J in order that the parties may have some input to the formulation of the orders. Accordingly, I would make orders of the general kind proposed by Greenwood J requiring the parties to prepare minutes of the orders appropriate to give effect to the reasons of this Court as summarised by Greenwood J at [409], that there be liberty to apply, and that costs be reserved.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 1 September 2017