

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2012 0117

SUNLAND WATERFRONT (BVI) LTD  
SUNLAND GROUP LIMITED  
(ACN 063 429 532)

First Appellant  
Second Appellant

v

PRUDENTIA INVESTMENTS PTY LTD  
(ACN 091 390 742)  
HANLEY INVESTMENTS PTY LTD  
ANGUS JOHN LUXMORE REED  
MATTHEW JAMES JOYCE

First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent

S APCI 2012 0017

SUNLAND GROUP LIMITED  
(ACN 063 429 532)

Appellant

v

PRUDENTIA INVESTMENTS PTY LTD  
(ACN 091 390 742)  
ANGUS JOHN LUXMORE REED  
MATTHEW JAMES JOYCE

First Respondent  
Second Respondent  
Third Respondent

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JUDGES

WARREN CJ, OSBORN JA and MACAULAY AJA

WHERE HELD

MELBOURNE

DATE OF HEARING

15 - 18 April and 29 July 2013

DATE OF JUDGMENT

6 September 2013

MEDIUM NEUTRAL CITATION

[2013] VSCA 237

JUDGMENTS APPEALED FROM

[2012] VSC 239 (Croft J)  
[2012] VSC 1 (Croft J)  
[2012] VSC 399 (Croft J)

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TRADE PRACTICES - Misleading or deceptive conduct - Appeal from trial judge's dismissal of appellants' claims for damages - Degree of precision required in pleading and proving representations where impugned conduct is alleged to be founded upon oral statements - Whether trial judge erred in not considering certain evidence said to demonstrate an intention to mislead or deceive - Whether pleaded representations were made by respondents - Whether respondents' conduct was misleading or deceptive or otherwise in breach of statutory prohibitions - Whether the appellants relied on any conduct including misrepresentations to their detriment - Whether loss or damage established by the appellants - Whether judge erred in making adverse findings as to credit of appellants' witnesses - Extra-territorial application of trade practices legislation - Appeal dismissed - *Watson v Foxman* (1995) 49 NSWLR 315 - *Gould v Vaggelas* (1985) 157 CLR 215 - *Fox v Percy* (2003) 214 CLR 118 - *Trade Practices Act 1974* (Cth) ss 5(1), 52, 53, 82 - *Fair Trading Act 1999* (Vic) ss 9, 12.

DECEIT - Claim for damages founded upon the same representations as alleged for claim based upon statutory contravention - Whether trial judge erred in not considering certain evidence said to demonstrate joint purpose - Claim failed for failure to prove alleged representations - Appeal dismissed.

PRACTICE AND PROCEDURE - Importance of pleadings in large and complex litigation - *ASIC v Rich* (2009) 236 FLR 1.

PRIVATE INTERNATIONAL LAW - Anti-suit injunction - Appeal against decision issuing an anti-suit injunction in relation to foreign proceedings - Where foreign proceedings involve similar factual dispute - Where complete relief available in the local proceedings - Whether evidence of additional cost or inconvenience required to establish that co-existence of proceedings is vexatious or oppressive - Whether vexatious or oppressive to continue foreign proceedings - Whether legitimate juridical advantage in continuing foreign proceedings - Whether abuse of court process to continue foreign proceedings - Appeal dismissed - *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

PRACTICE AND PROCEDURE - Application to adduce fresh evidence in an appeal - Application refused - *Apostolidis v Kalenik* [2011] VSCA 307.

COSTS - Appeal - Where appeal on the merits fails - Leave required to appeal against cost orders - Special costs orders - Where a proceeding is commenced or continued for some ulterior motive or in wilful disregard of the facts or clearly established law - Presumption where case hopeless - Where allegations of fraud made which are baseless - Where breaches of overarching obligations under the Civil Procedure Act 2010 - Leave refused.

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Appearances:

Counsel

Solicitors

For the Appellants

Mr D O'Callaghan SC with  
Mr P Zappia and Mr S  
Monks

Thomsons Lawyers

For the First to Third  
Respondents

Mr J T Rush QC with  
Mr H R Carmichael

Herbert Smith Freehills

For the Fourth Respondent

Mr P W Collinson SC with  
Mr N D Hopkins SC

Norton Rose

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## Introduction

1           On 1 October 2007 Sunland Water Front (BVI) Limited ('Sunland')<sup>1</sup> made an agreement with Dubai Water Front LLC ('DWF'), a government-owned land owner in Dubai, United Arab Emirates ('UAE'), to buy land in Dubai ('plot D17') for the equivalent of approximately AUD \$63 million (AED 192,846,000). On that same day, Sunland paid approximately AUD \$14 million (AED 44,105,780) as a 'consultancy fee' to Hanley Investments Pte Ltd ('Hanley').<sup>2</sup>

2           With Sunland's agreement, Hanley received the fee in place of Prudentia Investments Pty Ltd ('Prudentia'),<sup>3</sup> Hanley's parent company. It is sufficiently clear that that arrangement was made purely for internal 'structuring' (ie taxation) reasons within the Prudentia group; otherwise the fee would have been paid to Prudentia.<sup>4</sup>

3           But the reason why Sunland agreed to pay that fee at all (first to Prudentia, then to Hanley) lies at the heart of this appeal, as it did at trial.

4           At trial, Sunland contended that it was induced by misleading and deceptive conduct on the part of Prudentia and its then managing director, Angus Reed,<sup>5</sup> and on the part of Matthew Joyce,<sup>6</sup> the then managing director of the DWF, to believe that it was necessary to pay the fee to Prudentia in order to acquire the land from DWF. It was common ground that, as Sunland knew, Prudentia neither owned plot D17 nor had entered a sale and purchase agreement to buy it.

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1           The first appellant in the substantive appeal.

2           The second respondent in the substantive appeal.

3           The first respondent in both appeals.

4           In these reasons we will chiefly refer to Prudentia as it was the entity that had all relevant dealings with Sunland and DWF.

5           The third respondent in the substantive appeal and the second respondent in the anti-suit injunction appeal.

6           The fourth respondent in the substantive appeal and the third respondent in the anti-suit injunction appeal.

5 Sunland alleged that the misleading and deceptive conduct consisted of Prudentia (or Reed) and Joyce representing to it that: (1) Prudentia (or Reed) had a 'right to acquire' the land from DWF; (2) DWF could not sell the land to Sunland without Prudentia's (or Reed's) consent, and; (3) Sunland would need to reach agreement with Prudentia (or Reed) if it wanted to buy the land or acquire any rights to develop it. Sunland claimed that, induced by that belief, it agreed to pay Prudentia (ultimately, Hanley) the fee, calculated by reference to the price of the land from DWF, in order to assume Prudentia's 'right' to negotiate the purchase of the land from DWF.

6 Sunland further alleged that each of those representations was false because Prudentia did not have any existing right to acquire the land, DWF could sell the land to Sunland without Prudentia's consent, and it was not necessary for Sunland to reach any agreement with Prudentia before buying the land from DWF.

7 It claimed damages of approximately AUD \$14 million upon causes of action under s 82 of the *Trade Practices Act 1974* (Cth) ('TPA'), and Victorian statutory equivalents, as well as damages for loss of commercial reputation. Based essentially upon the same facts, Sunland also made a claim for damages upon the common law tort of deceit. Relief was claimed against Prudentia, Reed and Joyce.

8 The trial judge only heard evidence from witnesses called by Sunland; none of Prudentia, Reed or Joyce called witnesses. His Honour dismissed each of Sunland's claims, rejecting every constituent element of the various causes of action.

9 First, his Honour held that Sunland failed to prove the representations which it pleaded.<sup>7</sup> Debate on this element exposed an issue that permeated much of the proceeding, namely the sense in which the expression 'right to acquire', found in the first pleaded representation, was to be understood on Sunland's case.

10 Secondly, his Honour held that Sunland had failed to prove the falsity of the

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<sup>7</sup> *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2012] VSC 239 (Croft J) ('Reasons') [240].

representations, primarily because Sunland was unable to articulate or explain what it meant by 'right to acquire' in the first of its three alleged representations.<sup>8</sup> The judge was not satisfied that the first alleged representation was false if the word 'right' was taken to mean something less than an enforceable legal right.<sup>9</sup> However, ultimately, his Honour concluded that Sunland's pleaded case *did* require it to establish a representation with respect to an enforceable legal right (proprietary or contractual) to the land.<sup>10</sup> As it was not contended by any party that Prudentia ever held such a right, his Honour's analysis turned to the next issue, namely that of reliance.

11 Thirdly, on that issue of reliance, his Honour concluded that the fee was not paid by Sunland in the belief it would thereby acquire any legally enforceable right (proprietary or contractual), or for that matter any other 'right', in respect of plot D17.<sup>11</sup> Rather, his Honour held that Sunland, a land developer, paid the fee for commercial reasons to secure Prudentia's non-competition for the site, motivated by the prospect that it would make a very substantial return by developing the land.<sup>12</sup> For these reasons, his Honour found that, when entering the agreement to pay the fee, first to Prudentia then to Hanley, Sunland did not rely on any representation contended for by Sunland, whether pleaded or otherwise.<sup>13</sup>

12 Finally, on the question of loss and damage, the trial judge found that Sunland failed to prove it suffered any loss and damage even if it could prove that it had been induced by the statutory misconduct to enter the Hanley agreement, and pay the fee. That was so whether Sunland's hypothesis was that, but for the representations, it would not have purchased plot D17 at all (the 'no transaction case'), or that it would have purchased plot D17, alone or in a joint venture, but

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<sup>8</sup> Reasons [237].

<sup>9</sup> Reasons [240].

<sup>10</sup> Reasons [243].

<sup>11</sup> Reasons [294].

<sup>12</sup> Reasons [303].

<sup>13</sup> Reasons [302].



without paying Hanley the fee (the 'transaction case').<sup>14</sup>

13 On the hypothesised no transaction case, the judge found that Sunland failed to establish that it suffered any loss when one took into account the benefits it actually derived from having purchased the land, in the absence of any evidence of its ultimate net financial position.<sup>15</sup> On the other hand, on the hypothesis that it would have negotiated for and purchased plot D17 in any event, his Honour found that Sunland failed to establish the likelihood that DWF would have sold the land to it, rather than Prudentia, leaving the more probable inference that Sunland would have had to acquire Prudentia's rights under a sale and purchase agreement (and, presumably, pay a sum equivalent to the fee).<sup>16</sup>

14 Primarily (but not solely) for the reason that he did not find that Prudentia, Reed or Joyce had made any false representation to Sunland, his Honour also dismissed the claim brought in deceit.<sup>17</sup>

15 In addition to and in the course of making his findings on the principal elements of the various causes of action, his Honour made other adverse findings against Sunland. He made adverse findings on the application of the rules in *Jones v Dunkel*<sup>18</sup> and *Browne v Dunn*<sup>19</sup> to aspects of the evidence. He made adverse findings as to the credit of Sunland's two principal witnesses, namely its design director, David Brown, and its then managing director of its Dubai branch, Soheil Abedian. And, finally, he made adverse findings on the question whether s 52 of the TPA (and its state equivalents) invoked the Court's extra territorial jurisdiction.

16 In a separate judgment, the trial judge gave reasons<sup>20</sup> for granting an anti-suit

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<sup>14</sup> Reasons [428].

<sup>15</sup> Reasons [438].

<sup>16</sup> Reasons [439].

<sup>17</sup> Reasons [244], [424].

<sup>18</sup> *Jones v Dunkel* (1959) 101 CLR 298.

<sup>19</sup> *Brown v Dunn* (1893) 6 R 67.

<sup>20</sup> *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No1)* [2012] VSC 1 ('Anti-suit Reasons').

injunction preventing Sunland Group from pursuing substantially similar claims against Prudentia, Reed and Joyce in Dubai. Our reasons in respect of the appeal from that judgment are set out at para [419] below.

- 17 In a further judgment, the trial judge gave reasons<sup>21</sup> for the making of a special costs order against Sunland to pay the defendants' costs on an indemnity basis. Our reasons in respect of the appeal of those orders are set out at para [530] below.

## **The Substantive Appeal**

### *Grounds of appeal*

- 18 Sunland's appeal was comprehensive, challenging all of the above findings. Its Amended Notice of Appeal, dated 10 April 2013, concerning the trial judge's judgment on the substantive claim, contained no less than 67 enumerated grounds, with many sub-grounds. We will not set them out, but will endeavour to summarise and categorise the complaints.

- 19 The first broad head of complaint was that the trial judge did not properly consider the case theory that Sunland advanced in its pleadings and at trial.<sup>22</sup> One way that argument was put was that the trial judge wrongly confined Sunland's case concerning the first alleged representation to one involving only a legally enforceable right to acquire land. Another was that the trial judge failed to properly consider Sunland's allegation of joint purpose between Prudentia and Joyce, and certain evidence said to be germane to that allegation. Another, was a rolled-up complaint that his Honour failed to discuss or resolve a number of 'substantial and serious' disputed issues between the parties.

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<sup>21</sup> *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 3) [2012] VSC 399 ('Costs Reasons').

<sup>22</sup> Amended Notice of Appeal ('ANOA'), grounds [1], [1A], [1B], [8], [9], [10], [11], [14], [26], [52], [59], [60].

20           The second broad head of complaint was that the trial judge failed, on a variety of grounds, to properly evaluate the evidence concerning the representations themselves, that is whether the representations were in fact made and whether, if made, they were false.<sup>23</sup>

21           The third broad head of complaint was that the trial judge made erroneous findings, not supported by the evidence, on the question of Sunland's reliance upon the alleged false representations when agreeing to pay the fee.<sup>24</sup>

22           The fourth broad head of complaint was that the trial judge wrongly held that Sunland had failed to prove that it had suffered loss and damage (assuming the statutory misconduct or deceit claims were otherwise made out).<sup>25</sup>

23           Apart from those broad heads of complaint, there were other alleged errors raised by Sunland's notice of appeal. Those 'other alleged errors' may be summarised as follows:

- (a) wrongly making adverse findings on the credit of Brown and Abedian;<sup>26</sup>
- (b) failing to correctly apply the principles of *Jones v Dunkel* in circumstances where the respondents failed to call any witness at trial;<sup>27</sup>
- (c) failing to correctly apply the principles of *Browne v Dunn* in circumstances where the respondents allegedly failed to put their versions of events to the appellant's witnesses;<sup>28</sup>
- (d) wrongly concluding that the extra-territorial provisions of the TPA and the *Fair Trading Act 1999* (Vic) ('FTA') were not enlivened on the facts

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<sup>23</sup> ANOA [2], [3], [4], [5], [6], [7], [15], [16], [17], [18], [19], [20], [21], [22], [23], [24], [25], [25A], [27], [30], [53].

<sup>24</sup> ANOA [28], [29], [30], [31], [37], [38].

<sup>25</sup> ANOA [61], [61A].

<sup>26</sup> ANOA [31], [32], [33], [34], [35], [36], [36A], [37], [38], [39], [40], [41], [42], [43], [44], [45], [46], [47].

<sup>27</sup> ANOA [12], [13], [48], [51].

<sup>28</sup> ANOA [50].

of the case.<sup>29</sup>

24           Based upon this summary of the complaints made on appeal, we will address ourselves to the following questions:

- (a)    What was Sunland's case at trial?
- (b)    What representations did Sunland prove?
- (c)    Were the proven representations false?
- (d)    Did Sunland rely upon any false representation when paying the fee to Hanley?
- (e)    If so, did Sunland suffer any loss and damage in reliance upon a false representation made to it?
- (f)    Did the trial judge make any of the 'other alleged errors'?

25           Before turning to each of those questions in turn, we will set out in some further detail the landmark background facts.

### *Background*<sup>30</sup>

26           For ease of reference, we have set out in a schedule to these reasons a table containing the names of the persons to whom we will refer, the interest they each represented, and the capacity in which they represented that interest.

27           Reed was the managing director of Prudentia in 2007. Joyce was the managing director of DWF. Both men were Australian. They had attended the same secondary school in Victoria, at around the same time, and had at least some prior knowledge of one another before the transaction the subject of these proceedings.

28           DWF was a Dubai government owned company responsible for the master development of a very large greenfield development, known as Dubai Waterfront, intended to become a new business and residential district for the city of Dubai. The

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<sup>29</sup>       ANOA [54], [55], [56], [57], [58].

<sup>30</sup>       The narrative set out below draws heavily upon the agreed summary of facts filed by the parties.

Dubai Waterfront development was one of a number of projects undertaken by the Dubai Government. Each development project had its own master developer, established by an overarching government entity, Nakheel PJSC ('Nakheel'). DWF was Nakheel's appointed master developer for the waterfront development.

29 Prudentia was an Australian company. Its business involved land investments in Australia and internationally. In 2007 it had some form of association with a fund in the United States of America, Och-Ziff. The evidence suggested that, by some means, Prudentia sought to partner Och-Ziff in land investments in a number of countries.

30 Sunland Water Front (BVI) Limited was a company incorporated in the British Virgin Islands although, ultimately, it was a wholly owned subsidiary of a public company listed on the Australian Stock Exchange, Sunland Group Ltd. Sunland Group was a plaintiff below and is the second appellant in this appeal and the appellant in the anti-suit appeal (see para [419] below). Sunland Water Front (BVI) was the company that entered the relevant agreements and paid the fee. But until its introduction to the transaction around mid-September 2007, all relevant dealings with the Prudentia and DWF interests were undertaken by Brown and Abedian as officers for Sunland Group. No point is taken about any distinction between Sunland Group and its subsidiary Sunland Water Front BVI in the events that occurred, and (unless indicated otherwise) in these reasons 'Sunland' is a reference to the relevant Sunland party or parties, as appropriate. The abbreviation 'SWB' is used where it is necessary to refer to Sunland Water Front BVI distinctly.

31 Sunland was a designer and builder. Its core business was residential development, both house projects and high rise projects, including hotels. Abedian, an architect by training, had commenced building luxury houses in Australia under the 'Sunland' name in 1983. Brown, also an architect, joined Sunland in 2000 after 22 years in the industry. By late 2006 both Abedian and Brown had moved to a Sunland office which had been established in Dubai where Sunland was involved in two major projects, the Palazzo Versace Dubai (a hotel) and D 1 Tower. In early

2007, Sunland had also agreed to purchase a beachfront plot at Dubai waterfront, plot D5B. Sunland was interested in purchasing still more land in the Dubai waterfront precinct, if it was available, and had said so to officers at DWF.

32           Meanwhile, on 14 August 2007, Mr Anthony Brearley, in house counsel at DWF, provided Prudentia's Dubai lawyers with a copy of a draft sale and purchase agreement (SPA) for plot D17. The authenticity of a document that may have preceded the sending of that draft contract was hotly contested at trial, and on appeal. The disputed document was a letter dated 10 August 2007, purportedly written to Reed by Jeff Austin, DWF's town planning director, on Nakheel letterhead. The letter recorded Reed's attendance at DWF's office, and confirmed preliminary development and planning approval for a proposed subdivision for plot D17 by Prudentia.

33           Sunland alleged the letter was a forgery, on a number of bases. Its significance, if genuine, lay in its potential to stand as contemporaneous evidence, as at the date it bore, that Prudentia enjoyed a negotiated position with respect to the land in precedence to other suitors. But, if a forgery, Sunland contended that it supported the existence of a clandestine scheme between Reed and Joyce to mislead Sunland and extract a payment from it.

34           On 15 August 2007, Mr Jeff Austin had a discussion with Sunland's Mr David Brown about plot D17. Austin told Brown that a reconfiguration of DWF's site plan meant that a new plot, D17, would be created adjacent to plot D5B. Although plot D17 did not have absolute beachfront, the reconfiguration of the site plan would give it uninterrupted access to the beach. Austin gave Brown the name of 'Andrew Angus Reed' who was said to have had a 'hold on the plot'. Brown did not ask Austin what that meant.

35           That same day Brown telephoned Joyce about the plot. Brown had not had many discussions with Joyce since June 2007 because there had been something of a 'falling out' with Joyce. Their 'falling out' occurred in connection with a prospective

joint venture between DWF and Sunland in respect of another plot, plot A10C. Joyce had complained to Brown that Sunland, to use Brown's words, had 'betrayed their [DWF's] confidences'. Brown, for his part, believed there had been a misunderstanding. The relevance of this background event lies in one explanation advanced on behalf of Joyce at trial for Joyce's desire to have Sunland deal with Prudentia, in relation to plot D17, rather than deal directly with DWF.<sup>31</sup>

36           Brown's evidence of his conversation with Joyce on 15 August 2007 was that, at a minimum, Joyce told him that Reed was the 'contact' for plot D17. Whether Joyce said more than that to Brown about Prudentia's or Reed's relationship to the land was a matter of dispute and is discussed in greater detail below.

37           But it is not in dispute that Brown knew that Prudentia had not signed SPA in respect of plot D17 and that it had not paid a deposit. At the time of this conversation, plot D17 did not exist; it was being created from a series of other plots and was subject to final planning approval, although a planning template disclosing BUA (built up area), FAR (floor area ratio) and total land area had been prepared.

38           The next day, 16 August 2007, Brown telephoned Reed about plot D17. Reed was in Australia preparing to travel to Dubai. Reed had not met or ever talked to Brown prior to Brown's call. Brown asked Reed if he was interested in a joint venture with Sunland to acquire and develop plot D17. Reed said that he was.

39           The precise content of the two conversations Brown had, first with Joyce, and then with Reed, on 15 and 16 August 2007, was in dispute at trial. They are each examined in further detail below.<sup>32</sup> But, in short, Sunland relied on each of them for the proposition that first Joyce, and then Reed, represented to it that Prudentia enjoyed some form of right in respect of or control over plot D17.

40           Brown then exchanged emails with Joyce after his (Brown's) telephone conversation with Reed. Brown wrote to Joyce saying, 'We have spoken to the

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<sup>31</sup>       Reasons [75].

<sup>32</sup>       See [172] – [193].

gentleman in Australia [ie Reed], and have a tentative meeting with him on Sunday. It was a very positive discussion.’ Joyce replied and said, ‘Good luck, thanks. I thought they were based here? *Anyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us.*’ (our emphasis). As will be seen, Sunland placed significant reliance on the emphasised sentence from this email from Joyce in seeking to make out the second and third pleaded representations.<sup>33</sup>

41 Sunland and Prudentia thereafter engaged in negotiations concerning plot D17 during the latter half of August and throughout September 2007, and did so initially in pursuit of terms of the joint venture between Prudentia and Sunland as first proposed by Brown to Reed.

42 From very early on there were discussions between Brown and Reed about payment of a ‘premium’ to be made by Sunland to Prudentia under the terms of any joint venture arrangement. There appeared to be little if any resistance from Sunland to that notion. It was apparent from the contemplated terms of the joint venture, embodied in drafts of an agreement we come to shortly, that the concept of a ‘premium’ in this context was an uplift on the price of the land to be reimbursed to Prudentia for it having paid for the land and provided it to the joint venture. That reimbursement (incorporating the ‘premium’) was to be made at the conclusion of the joint venture development, then thought to be some six years into the future, after third party debt had been repaid but before distribution of profits to the joint venturers.

43 Although Reed did not accept the terms for a joint venture based upon the initial model proposed by Sunland, nevertheless, in emails he sent to Brown on 20 August 2007, he said his preferred approach was to acquire and develop plot D17 in a joint venture with Sunland, provided there were equitable financial contributions.

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<sup>33</sup> See [5] above.



44 By 23 August 2007 a draft implementation agreement (MOU) had been prepared to progress the parties' negotiation of headline joint venture terms. Sunland sought to make much of the fact that in the draft MOU prepared by Prudentia, and subsequent iterations of it, there appeared a recital under the heading 'Background', stating that 'Prudentia has reached agreement with [DWF] to acquire and develop [plot D17]'.

45 In any event, the parties did not ultimately enter into a joint venture agreement. But before coming to the point of departure from that concept, a further conversation allegedly took place between Joyce and Brown upon which Sunland placed great reliance in its case against Joyce. Sunland claimed that on 29 August 2007, Joyce told Brown that Sunland should come to an agreement with Reed as soon as possible because there were other buyers around who might offer Reed a significantly higher sum of money than the sum upon which the premium, priced into the joint venture, had been calculated. By his pleading, Joyce denied the conversation.

46 Sunland's pleaded case was that, by reason of the statements that had been made in documents and discussions up to and including 29 August 2007, Joyce and Reed made the three representations to Sunland set out at [5] above.

47 Soon after 12 September 2007 the parties moved from discussing a joint venture arrangement to a different arrangement.

48 On 12 September 2007, Brown emailed Reed after he had received a call from Brearley and Marcus Lee (both at DWF). Brown told Reed, amongst other things, that Brearley and Lee were concerned that DWF's marketing people were likely to try to sell the plot and that they, Brearley and Lee, would have no control over the marketing people should they do so. According to Brown's report of the conversation, Brearley and Lee suggested that 'we immediately "put our foot on the Plot" to secure it'. To do so, Brown recommended to Reed, 'we need to sign a Sale and Purchase Agreement', and he set out some proposed terms. He further

recommended that, in the first instance, Sunland should negotiate with DWF and purchase plot D17 using a Sunland subsidiary as purchaser then, later, transfer the land to a new company (presumably to be jointly owned by the parties). This email came to be known at trial, and on appeal, as the 'put your foot on it' email.

49           Reed responded to Brown by email the following day telling Brown to 'go for it'.

50           The revised structure of the transaction, prompted by the expressed need for urgency, resulted in a flurry of revisions to the then proposed MOU. Out of this process emerged a completely different proposition.

51           On 16 September 2007, at Abedian's suggestion, Brown telephoned Reed, said 'this is all getting too hard', and proposed that Sunland simply pay Prudentia AED 20 million for Prudentia to 'walk away' to allow Sunland to buy the land in its own right. Prudentia was amenable to that proposal. Thereafter the negotiation turned to finalising an arrangement of the kind proposed by Brown. Because, at the same time, it became possible for Sunland to obtain an even more favourable price for the land than the price that had been previously discussed (at AED 120/sqft rather than AED 135/sqft), and it was also to obtain some bonus land, Sunland agreed to pay Prudentia an additional fee of AED 24 million, taking the total fee to AED 44 million.

52           After several drafts and re-drafts of its terms, on 19 September 2007 Sunland and Prudentia executed an agreement. On 26 September 2007, Prudentia's solicitor requested that, for structuring purposes, Sunland discharge the agreement with Prudentia and execute a materially identical agreement with Hanley. Later that same day, Sunland and Hanley executed their agreement. A central provision of the agreement (clause 2) was in these terms:

In consideration of payment of the Consultancy Fee [AED 44,105,780], Hanley agrees to transfer to Sunland its right to negotiate and enter into a plot sale and purchase agreement for the acquisition of [plot D17] with [DWF].

53           Sunland alleged that it was induced by the pleaded representations, first to

negotiate the proposed joint venture with Prudentia then, secondly, to enter the Hanley agreement, buy plot D17 from DWF, and pay the consultancy fee. However, as will be seen, the different nature of the joint venture concept and the 'premium' as contemplated pursuant to that arrangement, on the one hand, and, on the other, the Hanley agreement and the 'consultancy fee' payable under it, assumed importance in submissions at trial, and in the trial judge's conclusions, on the question of reliance (ie causation).

54 SWB settled its purchase of plot D17 from DWF on 1 October 2007, the same day it provided Hanley with a cheque for AED 44,105,780, being the fee payable under its agreement with Hanley.

55 Certain events occurring after 1 October 2007 arguably had some bearing on the findings to be made about the events that preceded that date. We will describe those events now.

### *The 'money trail' evidence*

56 There was a body of evidence, referred to as the 'money trail' or 'money flow' evidence, which concerned the distribution of the AED 44 million *after* it was paid to Hanley, and some other evidence which might explain that distribution. We will briefly explain the nature of that evidence, but will need to return to it when we discuss the first question, viz 'What was Sunland's case at trial?'

57 Documents were in evidence before the trial judge suggesting that one half of the Hanley fee (ie approximately AUD \$7 million) was ultimately paid for the benefit of Joyce. Sunland wished to use that evidence as a basis from which to infer the existence of a covert arrangement between Reed and Joyce, made before negotiations with Sunland even commenced, that Joyce would be paid by Prudentia for deals he introduced or assisted with.

58 If that were so, Sunland contended, such a payment was relevant to the issues that had to be decided by the court. For a start, it argued that such a payment would

be relevant to the cause of action in deceit. In particular, it would be relevant to the pleaded allegation that Joyce and Reed had the joint purpose of inducing Sunland to enter an agreement with Prudentia in relation to plot D17. Additionally, Sunland contended, such evidence was relevant to establishing an intention on the part of Joyce that Sunland should rely upon the representations he made, which intention could assist Sunland prove that it did in fact so rely. That is, it was also relevant to Sunland's case on misleading and deceptive conduct.<sup>34</sup>

### *Investigation by Dubai authorities 2008/2009*

59 Fourteen months after the transaction settled, on 1 December 2008, Brown was asked to attend an interview with prosecutors in Dubai concerning Sunland's purchase of plot D17. He spoke to Mohammed Mustafa Hussein Mohammed Kamel ('Mustafa'), the director of the Financial Audit Department of the Emirate of Dubai. That commenced an investigation which, so far as Sunland was concerned, lasted well into 2009. The investigation of Sunland was, for a time, of serious concern. The investigators told Brown that the investigation was a criminal investigation into bribery and that, in their opinion, the transaction Sunland had entered into regarding plot D17 was a bribe. Brown's passport was taken by the authorities in January 2009 and not returned to him until 21 July 2009.

60 As a result of that investigation, Brown (and Abedian) made statements to the Dubai authorities, corresponded with them, and made notes and reports internally for Sunland and its lawyers. Those documents were in evidence.

61 Brown's accounts of the plot D17 transaction and of his dealings with Reed and Joyce (and other DWF officers), given both to the prosecutors and to Sunland provided a substantial body of evidence against which to test the account he gave to the trial judge; likewise for Abedian.

62 As a consequence of the investigation by the authorities Joyce, was charged

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<sup>34</sup> See *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J).

with bribery and was, for a time, imprisoned, and then later held under house arrest in Dubai awaiting trial.<sup>35</sup> One of the submissions the respondent parties have made in this case, at trial and on appeal, was that Brown tailored his account to the authorities of what occurred in the transaction to protect his and Sunland's interests. That submission has been repeated on appeal as a means of supporting the trial judge's conclusions on the credit of Brown and Abedian as witnesses.

63           The investigation, and the various accounts given by Brown and Abedian in the course of it, featured in the trial judge's conclusions on the credit of Brown and Abedian, and in his findings generally. We consider it useful to set out the course of the investigation in further detail.

64           On 21 January 2009 Brown was interviewed for about seven hours at police headquarters. He was locked in, and his mobile phone was taken away. Brown was allowed to leave after signing a statement written in Arabic and surrendering his passport and entering into a bail bond. He was told the transaction was 'illegal' as Reed did not own the site. Brown wrote a statement the following day describing Reed as saying that 'he had a plot at Waterfront' and, through discussions with Nakheel, Sunland understood 'that [Sunland] had to have an arrangement with Angus Reed to be able to develop the plot together.'

65           On 26 January 2009 a search warrant was issued pursuant to an authorisation by the Dubai authorities. Brown was present at the search and had a discussion with Mustafa and another man. He was again told that the authorities considered the transaction illegal as Reed did not own the site, that Brown was lucky to be out and that Lee and Joyce were 'frozen' which Brown assumed to mean under arrest or having their passports held also. Brown was told he should try to remember everything and withhold nothing or it would be bad for him. Brown told Mustafa that their 'contacts at Nakheel were Lee, Joyce and Brearley and they backed up Reed's claims in so far as they knew, a group from the US was involved and Reed

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<sup>35</sup> Joyce was still awaiting trial in Dubai at the time of the hearing of the proceeding before Croft J, and at the time of the hearing of this appeal. He has since been convicted.

was the spokesperson for the group.’ Brown was asked again who the contacts were in Nakheel that had put Reed in touch with Brown. Brown said that he did not know, but assumed Reed had got their contact details from someone in Nakheel.

66 To this point, no mention had been made of the role of Joyce in introducing Brown to Reed, or that Joyce had asserted that Reed or Prudentia held some right over plot D17.

67 On 1 February 2009 Brown received confirmation that Lee and Joyce had been arrested and on 2 February spoke to a person from the Sunland Board, providing them with a signed statement.

68 Brown provided a document entitled ‘Brief to Prosecutors – 15 February 2009’ to the Dubai prosecutors. There are some differences between this version and an earlier draft. In particular, the draft version of the document did not make any mention of Joyce and gave no indication of why Reed chose to contact Brown. The final version of the document is amended in that it inserts a new dot point and rewrites the dot point beneath. It states:

- In mid August 2007, Matt Joyce called us and said that we [sic] there was a gentleman who controlled a site behind our D5B, and that this man had a relationship with Lend Lease and Och-Ziff in the States. Matt said we should expect a call and meet with him to discuss the property.
- A few days later, we were telephoned by an Australian, Angus Reed, who told us he represented a Group who controlled a plot at Waterfront. This was corroborated by people at Nakheel. Reed had a company in Melbourne Australia and he flew over to meet with us.

69 Under cross-examination Brown accepted that saying ‘Matt said we should expect a call and meet with him to discuss the property’ was highly incriminating in relation to Joyce’s position, if true, and that it indicated Joyce knew Reed or knew what was going on.

70 On 16 February 2009 Brown was interrogated at the Public Prosecution Headquarters. Brown described occasions where he asked Joyce about any lots adjacent to plot D5B that also overlooked the sea and was told that none were

available. Brown said that Joyce introduced him to Reed, that Joyce contacted him and described Reed as having the plot Brown was seeking. Brown denied contacting Joyce initially about obtaining plot D17 because it was adjacent to plot D5B. Brown said that Reed called a few days later and said that he owned a lot and offered an investment in it. Brown said that Reed told him that he had strong relations with Och-Ziff, good relations with Nakheel management, and he could obtain privileges from them for this lot, including a discount on price, which was in fact obtained.

71           Brown stated that they later met and Reed offered plot D17 on the understanding that it was his. Brown said that when Reed showed him the map which Joyce had showed him, he claimed he was owner of the new plot. Brown also said that Reed spoke to him as if he had control and jurisdiction over the plot and acted as if the plot belonged to him. Brown added that Reed offered to renounce the plot in return for payment of consultation fees. Further, Brown said that he told Lee that Sunland wanted to purchase the plot from Prudentia and that Reed offered Brown the plot. He also said that he purchased the plot from Reed.

72           According to Brown, Joyce informed him that he they could not obtain the plot without reaching an understanding with Reed, that Reed needed to renounce the plot, and that Joyce repeatedly said that the plot belonged to Reed. Brown said that Lee encouraged him to get the plot from Reed. He also said that he felt Joyce and Lee were helping Reed to finalise the sale of the plot to Brown and were pushing him to purchase or obtain the plot from Reed.

73           Brown added that it would amount to fraud against him if the land did not belong to Reed or was not reserved in his name.

74           Brown was advised on 29 April 2009 that he was only to be a witness in the case. However, his passport was not returned, although he was told that it would soon be released. He was also told that without his cooperation the prosecutors would not have been able to prove the charges against Joyce.

75           It is clear from at least this stage onwards that Sunland was keeping the Dubai

authorities informed and continuing to cooperate with them while simultaneously considering civil action in Australia.

76           Brown met with the prosecutor again, on his own instigation, on 17 May 2009. The prosecutor revisited the issue of why Sunland paid the money when Reed did not have rights to plot D17. At that meeting Brown sought an update on the investigation against Joyce and Lee and was told the prosecutor's job was to deliver a conviction. Brown offered to assist in any way possible. Brown also told the prosecutor that Sunland was considering commencing legal proceedings in Australia and they wanted to check it was supported. He was told that it was supported, that it was recommended they start as soon as possible and that the prosecution would appreciate a copy of documents involved in the case. Brown was unable to obtain any certainty about when his passport would be returned and was told he might have it returned in two weeks.

77           On 18 May Brown sent an email to Soheil Abedian and Sahba Abedian (Soheil's son, and at that time Sunland's managing director) about the meeting, copying it also to Sunland's lawyer, Ron Eames at DLA Phillips Fox. Brown suggested that Sunland prepare a report that could be given to the prosecutor covering their strategy for starting civil proceedings in Australia against Reed and Brearley.

78           Brown's story, as it had evolved to that point, is more or less reflected in the DLA briefing paper, written by Eames, provided to the prosecutor on 31 May 2009. That paper, which Brown participated in creating, states, inter alia: that Joyce offered to introduce Sunland to Reed; that Joyce said Reed had the right to purchase D17; and, 'Joyce advised Sunland that it had to come to an arrangement with Prudentia before Dubai Waterfront would enter into a Sales and Purchase Agreement with Sunland.' It also said that Joyce confirmed Prudentia 'controlled' plot D17.

79           The paper said that Reed made a representation that he had development rights over plot D17. It says that 'Sunland was lead [sic] to believe and it is the case



that if Prudentia truly held the *development rights* for plot D17 then it would not have been possible for Sunland to purchase it without first coming to an agreement with Prudentia to *acquire the development rights* from it.' It also says that '[a]fter making the payment Sunland discovered that Prudentia did not have a *reservation contract* or any *rights* in relation to plot D17' and that Reed's statements were false as 'Prudentia did not have *any enforceable rights under UAE law* in relation to plot D17' (our emphasis).

80           When the paper was given to the prosecutor at a meeting on 31 May 2009, he asked for a translation as soon as possible. At that meeting the possibility of issuing proceedings in Dubai was also discussed as well as a status update as to the prosecutor's case. Another request was made for Brown's passport, on the basis that he would need to travel to Australia regarding Sunland's case. The prosecutor was recorded as respecting this need and saying it could be returned in a week or so. It was noted that the meeting was very positive, the prosecutor was keen to finalise the case and that Sunland's co-operation would play a key role in supporting the proceedings.

81           Thus, across time, Brown's version of the events in 2007 changed. At first it was that Reed merely held himself out to have development rights or a right to develop or acquire through Och-Ziff. It later evolved to Reed having said and acted as if the plot belonged to him and that Brown was under the impression that the land *belonged* to Reed or was *reserved* in his name or that Reed had some *enforceable right* under UAE law.

82           Brown's version of events also changed so that the corroboration provided from Nakheel about Reed's rights became more concrete. In addition, Joyce became more involved, ultimately being the one to introduce Reed to Brown and to confirm that Brown needed to come to an arrangement with Reed to obtain plot D17 and even confirming that Reed owned plot D17.

83           Much of this story was ultimately not Brown's evidence before the Court.

When cross-examined about the differences between the version of events in evidence before the court and that which was told to the Dubai prosecutors, Brown responded that it was his recollection at the time and he did not intend to mislead. He said he had access to his diary at the time. He also commented that some of the translations were wrong, although he made no attempt to correct them or the facts conveyed in them until July 2010. Brown generally denied that the visit to the prosecutor on 17 May 2009 was a tactic and that the giving of the report on 31 May was a lever to assist his own position and to obtain his passport. He claimed that the report was not prepared solely for the benefit of the prosecutor but rather that was only one of its purposes.

84 Sunland sent letters of demand to Brearley, Reed and Prudentia on 4 June 2009. Joyce was charged on 16 July 2009. Brown's passport was returned on 21 July 2009. Sunland issued an ASX and Media Release stating that the Dubai authorities has finished their investigations, Brown had his passport returned and Sunland was investigating civil remedies. It also said Brown was a witness in the Dubai investigations and was never investigated or detained.<sup>36</sup> This was followed by a 17.2% increase in the second appellant's share price. The Australian proceedings were issued on 10 August 2009.

*What was Sunland's case at trial?*<sup>37</sup>

85 We return to the first issue which arises on the appeal, namely Sunland's complaint that the trial judge did not properly consider its case theory as advanced in its pleadings and at trial. It has several components as we have set out above.<sup>38</sup>

*'Right to acquire'*

86 We first consider the issue of whether the trial judge wrongly confined

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<sup>36</sup> In fact, as Brown admitted at trial, he was the direct subject of investigation.

<sup>37</sup> See [24] above.

<sup>38</sup> See [19] above.

Sunland's representation case to one requiring it to establish that Reed or Prudentia had held themselves out as having a legally enforceable right to acquire plot D17.

87 It is correct to say that His Honour ultimately concluded that the case Sunland set out to prove *was* one involving a representation concerning a legally enforceable right to acquire the land:

...I think it is the position that for Sunland to establish its case it was necessary for it to establish the Representations with respect to a legally enforceable right to Plot D17, "contractual" or otherwise – and that those representations, by words or conduct, were in breach of the statutory cause or causes of action relied upon, or satisfied the elements required to establish a cause of action in deceit. Anything less than an enforceable right, on some basis, one might think would lead nowhere in either the statutory or tortious causes of action, in terms of primary liability or loss and damage.<sup>39</sup>

88 Nevertheless, his Honour did address arguments based upon a case involving a representation concerning a lesser 'right', although, for reasons which we will explain we do not think it was strictly necessary to do so. The question is, what was the case his Honour was *bound* to consider.

89 After alleging the identity and characteristics of the relevant parties to the proceeding in its Second Further Amended Statement of Claim ('SFASOC'), Sunland pleaded a series of oral and written statements made to Brown by officers of DWF and by Reed, first between 15 August 2007 and 29 August 2007,<sup>40</sup> and then between 12 September 2007 and 26 September 2007.<sup>41</sup> As we have already mentioned, the statements made up to and including 29 August 2007 were said to found the three critical representations upon which Sunland alleged it relied in various respects. The representations were alleged in these terms (with our emphasis):

19. The premises pleaded above amounted to representations ('the Representations') made by Joyce (namely paragraphs 9, 12, 14 and 18) and also made by Reed (namely paragraphs 13, 15, 16 and 17) that:

19.1 Reed or Prudentia or both of them had *a right to acquire* Plot D17 or the land on which Plot D 17 was located;

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<sup>39</sup> Reasons [243]; see also Reasons [23] and [27].

<sup>40</sup> SFASOC [10]-[18].

<sup>41</sup> SFASOC [24]-[32].

19.2 Dubai Waterfront *could not*, without the agreement of Reed or Prudentia or both of them, sell Plot D 17 or the land on which Plot D 17 was located, or any rights in connection with the development thereof, to Sunland; and

19.3 If Sunland wishes to purchase Plot D17 or the land on which Plot D17 was located, or acquire any *rights* in connection with the development of Plot D17 *it had to negotiate and make a contract* with Reed or Prudentia or both of them. <sup>42</sup>

90 As we show below, the evidence led by Sunland in support of the ‘premises’ referred to in the opening words of para [19] demonstrated that the only ‘right’ in respect of plot D17 that Reed or Prudentia held themselves out as having, was a preferred right to negotiate for its purchase. It was a commercial position, not a legally enforceable right to acquire.

91 Whether or not it was true that Reed or Prudentia did enjoy such a commercial position with respect to the land is one thing. Another is whether Sunland’s case concerning the representations that were made to it, and upon which it relied, extended to a representation that Reed or Prudentia enjoyed a position of that kind. For it is only if it did that the trial judge was called upon to consider the truth or otherwise of such a representation, or the question whether Sunland relied upon such a representation, in entering the Hanley agreement and paying the fee.

92 On this issue, the respondents’ primary arguments on appeal were that Sunland’s case at trial was confined to Joyce and Reed having held Prudentia out as having a legally enforceable right to acquire the land, that is, not merely a commercial bargaining position.

93 Thus the question arises: what was the nature of the right that Sunland alleged was the subject of the representation made to it? We address that question upon the pleadings and upon the arguments put at trial.

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<sup>42</sup> SFASOC [19].

94           A valuable collection of the principles concerning the significance of pleadings in a case where a dispute arises about the nature of the case being put forward, is to be found in the judgment of Austin J in *ASIC v Rich*.<sup>43</sup> There his Honour recites a number of propositions, including that:

- a properly pleaded statement of claim ensures the basic requirement of procedural fairness that the opposite party has the opportunity of meeting the case against him or her, defines the issues for decision, and enables the court to ascertain the facts forming the ingredients of the cause of action;<sup>44</sup>
- particulars define the scope of evidence to be lead in support of the material facts alleged;<sup>45</sup>
- permission to depart from the pleadings is a matter for the discretion of the trial judge, having regard to the interests of justice;<sup>46</sup>
- when litigation is large and complex, with serious consequences for the defendants if the plaintiff succeeds, and the parties are required to incur very substantial costs, the imperative to hold the plaintiff to its pleaded case is strengthened.<sup>47</sup>

95           In our view, it is fair to say this litigation was large and complex: on appeal there were 13 volumes of appeal book, and his Honour's reasons in his primary judgment ran to 295 pages. Millions of dollars were claimed in damages, and there were other potential serious consequences at stake for Joyce, in particular, with the Dubai criminal proceedings, involving the same matrix of facts, hanging over his head. Doubtless the parties have been required to incur very substantial costs.

96           These principles remind us why pleadings are important. So what did Sunland plead?

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<sup>43</sup> (2009) 236 FLR 1 [158] – [169].

<sup>44</sup> Ibid [158].

<sup>45</sup> Ibid [158].

<sup>46</sup> Ibid [159].

<sup>47</sup> Ibid [162], [163].

97           Nowhere in the paragraphs alleging the statements and conduct from which the representation was concluded does Sunland allege that Joyce or Reed ever used the particular expression 'right to acquire'. Nor, as our analysis of the evidence will show, did Sunland prove that those words were used before 29 August 2007. So the words used in the formulation of the critical representation must be words intended to capture the sense of what Sunland contends was actually said, albeit using different words. What is in issue is therefore an interpretation or imputation to be derived from the use of other words. In order to assess whether the phrase 'right to acquire' is a fair description or summary of what was conveyed by the use of different words, it is critical to be precise about what Sunland meant by 'right to acquire'.

98           One of the criticisms the trial judge made of Sunland's case – fairly in our view – was its inability to identify what it meant by its own pleading. His Honour described Sunland as having 'floundered in describing the basis of its case'.<sup>48</sup>

99           In our view, Sunland's pleadings, taken as a whole, show that Sunland set out to establish a representation as to a legally enforceable right to acquire the land.

100          It first should be observed that in formulating the first representation Sunland chose to use the expression 'right to acquire'. Sunland might have chosen 'opportunity', or 'valuable prospect', or some other description of a chance to acquire unambiguously falling short of a legally enforceable right. But it chose 'right'. Other than a moral right, the use of the word 'right' generally connotes legal enforceability. That is what is distinctive about a 'right' compared with other notions of expectations or entitlement. Particularly is that so when the word is used in conjunction with the acquisition of land in a commercial setting. The further prohibitive and imperative phrases in paras [19.2] and [19.3] of the SFASOC (emphasised above), in conjunction with the use of the phrase 'right to acquire', reinforce the idea of legal enforceability.

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<sup>48</sup> Reasons [241].

The second indication from the pleading that it carries the notion that Reed or Prudentia held themselves out to have a legally enforceable right to acquire the land, is the particulars given of the falsity of the alleged representations. Paragraphs [21.4], [21.5] and [21.6], containing those particulars, are collectively directed to there being no record of Prudentia possessing some form of ownership of the land. Those particulars allege as follows (with our emphasis):

Particulars of bases for asserting the Representations to be false

- 21.4 On 1 December 2008 Brown met with the director of the Financial Audit Department (an organ of the Emirate of Dubai), Mohammed Mustafa Hussein Mohammed Kamel ('Mustafa') at the offices of the Ruler's Court and Mustafa said to Brown words to the effect that '*Our records show that you could have bought this land from Nakheel. There is no record of Reed or his entity having any right over the plot*'.
- 21.5 On 21 January 2009, Brown was interviewed at Dubai Police Headquarters by Khalifa Mohammad and Khalifa Mohammad said to Brown words to the effect that '*The transaction with Reed was illegal (sic) as Reed did not own the land and therefore could not sell it or receive a premium for its sale*'.
- 21.6 On 26 January 2009, Mustafa and a number of officials who did not reveal their names attended at Sunland's Dubai office and conducted a search of Sunland's computer system and paper files and during the course of that search, one of the said unnamed officials spoke to Brown and during the course of that conversation said to Brown words to the effect that '*the transaction was illegal because Reed did not own the site*'.

So, on Sunland's case, the fact that neither Reed nor Prudentia owned the site falsified the representation that they or one of them had a 'right to acquire' it. These particulars strongly support the view that Sunland was alleging that Reed or Prudentia held themselves out to have a legally enforceable right to the land, tantamount to ownership.

On appeal Sunland submitted that the particulars should be construed as only demonstrating the falsity of the second and third representation, and not the first. We do not see why that is so. If that is so, there were no particulars to demonstrate the falsity of the first representation. The heading to the particulars refers to 'the Representations' without distinction. Additionally, as we will come back to shortly,

the better view is that all three representations formed a coherent set of cumulative propositions that stood or fell together.

104           The third sign from the pleadings which helps interpret the meaning of the critical phrase in the first representation is to be found in the later pleadings of Prudentia, and Sunland's reply to them.

105           In answer to the allegation that the first representation was false because neither Reed nor Prudentia had a right to acquire the land, Reed and Prudentia admitted that at no material time did they hold 'an enforceable right in the nature of a conveyance or option or other legal interest in plot D17'.<sup>49</sup> But, they said, 'at all material times ... Prudentia's interest in plot D17 was as a preferred negotiator with Dubai Waterfront for the right to purchase and develop plot D17'.<sup>50</sup> By their particulars of that assertion, Reed and Prudentia went further to explain their position, saying

'the phrase 'preferred negotiator' is a description of the fact, known to Sunland Group, that Prudentia occupied a commercial position in negotiation with Dubai Waterfront for the acquisition of Plot D17 in precedence to that occupied by Sunland Group but that such position was not based on, and did not confer, an enforceable right in the nature of a conveyance or option or other legal interest in Plot D17 whether pursuant to an executed SPA or otherwise'.<sup>51</sup>

106           In reply, Sunland denied Reed's and Prudentia's allegation that Prudentia had the interest of a preferred negotiator and re-asserted its contention that Joyce and Reed 'had made the representations pleaded in paragraph 19'. Furthermore, in written submissions at trial, Sunland argued that Prudentia's plea that it had an interest as preferred negotiator, in response to the allegation that the representations were false, was 'not responsive to the allegations of falsity of the pleaded representations'.

107           If all of that is so, it seems that the pleaded representation about Prudentia

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<sup>49</sup> Defence of the First and Third Defendants ('Prudentia's and Reed's Defence') [21.4(a)].

<sup>50</sup> Prudentia's and Reed's Defence [21.4(d)].

<sup>51</sup> Further and Better Particulars to the First and Third Respondents' Defence [2.2.2(a)].



having a 'right to acquire' the land must mean something which does not include the interest of a preferred negotiator. That inference must follow because, as Sunland would have it, the assertion of such an interest does not prove the existence of the 'right to acquire' (and therefore the truth of the representation). In other words, a preferred right to negotiate does not answer the description of a 'right to acquire', the subject of the first representation.

108 In short, the pleadings alone provide a combination of considerations which support the conclusion that Sunland's case was that Reed or Prudentia misled and deceived it to believe that one or other of them had an enforceable legal right to the land, namely:

- in the context of a land transaction, that is the usual sense in which the expression 'right to acquire' is understood;
- it was an interest of that kind which the particulars of falsity pointed to; and
- Sunland's denial that the existence of a preferred negotiator right (ie a commercial negotiating position) proved the truth of the representation, seemed to exclude the contemplation of something less than a legally enforceable right.

#### *The arguments at trial*

109 In final written submissions at trial Sunland addressed the question of how its pleaded representations were to be understood. It submitted:

Contrary to the submissions of [Joyce], the plaintiffs' case does not require the finding that the representation was to the effect that there existed a formally binding contract entitling Reed or Prudentia to the Plot. However, as will be seen, the representation was that there was an agreement which conferred upon Prudentia a 'right' *which was capable of transfer* to Sunland.<sup>52</sup>

110 A right which was less than a formally binding contract but yet was capable of transfer plainly connoted some species of legal or equitable right.

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<sup>52</sup> Plaintiffs' Address [40] (our emphasis).

111           The argument was further clarified in the oral submissions of Sunland. After submitting that it was not necessary for Sunland to go so far as to establish a representation with respect to a formally binding contract, Sunland's counsel continued:

But in any event as your Honour will see the written representations relied upon do go that far and so we put our case on the basis that the representation did involve *a representation to the effect that there existed as pleaded a contractual right to acquire Plot D17 as alleged in [subparagraph 19.1 of the SFASOC]*.<sup>53</sup>

112           However, on appeal, Sunland sought to sidestep the position it had advanced at trial. In written submissions on appeal it argued:

A representation by a party that he has "a right" is capable of inducing error without any need for the recipient to consider and form a view (if he is even capable of doing so) as to the legal nature, source and enforceability of that right. A statement that a person has "a right" is capable, objectively considered, of inducing the recipient to believe that he must deal with that person if he wishes to acquire an interest in the subject matter of the alleged right. To suggest that the recipient could only arrive at that conclusion by turning his mind to the source or legal nature of the right and forming a view as to its enforceability, is erroneous.<sup>54</sup>

113           As Joyce pointed out on appeal, Sunland's submission ignores the fact that the evidence did not establish that Joyce ever used the word 'right'. Nor did Reed. Sunland's witnesses struggled to identify what they understood the notion of 'right' meant, bearing in mind it was not a word actually used by the representors. The trial judge listed some of the inexact descriptions given in evidence of what Sunland witnesses perceived the representations meant, including 'some right', 'some control' and 'some sort of contract'.<sup>55</sup>

114           We are not persuaded that it was irrelevant, as Sunland would have it, what was the legal nature, source and enforceability of the right said to be the subject of the representation.

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<sup>53</sup> Trial Transcript, 925.

<sup>54</sup> Sunland Appeal Submissions [18].

<sup>55</sup> Reasons [241].

One must bear in mind the legal and forensic context in which the issue arises. Sunland alleges certain conduct and asks a court to evaluate that conduct to ascertain whether it was misleading or deceptive. To constitute statutory misconduct, such conduct, in the circumstances, must lead, or be capable of leading, a person into error.<sup>56</sup> Where the conduct is the speaking of words, it is necessary that they be proved – and by necessary implication pleaded – with a degree of precision sufficient to enable the court to be reasonably satisfied they were in fact misleading in the circumstances in which they were uttered.<sup>57</sup> The test for determining whether conduct does contravene the statute is objective, and the court must determine the question for itself.<sup>58</sup> And while an objective test excludes from consideration subjective matters (knowledge, intention) not known to the parties,<sup>59</sup> reasonable inferences, reasonable assumptions and reasonable expectations arising objectively from the circumstances will be in the constructive knowledge of the parties.

In view of those principles, and having regard to the business sophistication and experience of Brown and Abedian, experience which specifically included previous transactions with DWF, we reject Sunland's argument that the bald representation of a 'right' in those circumstances could be capable of inducing error without any need for the particular recipient to consider or form a view as to its nature. This may look like a consideration more relevant to whether a proven representation was misleading, or whether reliance was placed upon a particular representation as a matter of fact. We will turn to those issues below. But for now, that same consideration reinforces our conclusion that the trial judge was correct in interpreting Sunland's case in the manner in which he did, and confining Sunland to *that* case.

On appeal Sunland argued that even if its case was confined to the allegation of a representation concerning a legally enforceable right, there is (at least in

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<sup>56</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198.

<sup>57</sup> *Watson v Foxman* (1995) 49 NSWLR 315, 318-319.

<sup>58</sup> *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 91.

<sup>59</sup> *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 87.

Australian law) the notion of a legally enforceable right to negotiate. In this regard we were referred to the decision of *Coal Cliffe Collieries Pty Ltd v Sijehama Pty Ltd*.<sup>60</sup>

118 In that case the New South Wales Court of Appeal held that, provided it is supported by consideration, a promise to negotiate in good faith may, in particular circumstances, be enforceable. The recipient of such an enforceable promise would, presumably, have a corresponding 'right' to negotiate. We put aside the question whether any such 'right' could ever be transferable. But identifying this species of 'right' as a possible right the subject of Sunland's pleaded case only serves to underscore the need for precision in the context of an asserted representation which a party says was capable of inducing error (and thus misleading), was false, and was in fact relied upon.

119 Not only did Sunland fail to identify such a 'right' as the right it was asserting, either in pleadings or in argument below, but it went perilously close to denying that it was a 'right' of that kind it was relying upon. That is, it denied that Reed or Prudentia had a preferred right to negotiate and, in effect, said that any such 'right' was not of the kind it was asserting in its case.

120 In conclusion on this issue, it is our view that the trial judge correctly held that Sunland's case at trial, both on its pleadings and upon its argued case, was founded upon an essential contention that it was misled into believing that Reed or Prudentia held a legally enforceable – and, we would add, transferable – right to acquire plot D17. It was that case, and that case alone, that the trial judge had to determine.

*Disaggregated or cumulative representations?*

121 The next complaint made by Sunland concerning the judge's alleged failure to deal with the case it put at trial was that the judge failed to deal with each of the representations separately.

122 In particular, Sunland complained that the trial judge failed to adequately

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<sup>60</sup> (1991) 24 NSWLR 1.

consider the second and third pleaded representations, separately from the first. It argued that each of the representations stood alone, and could be made out upon the evidence and considered independently of the others. On the appeal this issue was discussed in terms of whether the representations could be 'disaggregated'.

123 In our view, the logical reading of the pleaded case is that each succeeding representation was to be understood as being cumulative upon the preceding representation. Thus, so read, it was alleged that Reed or Prudentia represented themselves to hold a legally enforceable right to acquire the land; because of that, DWF could not, without their agreement, sell the land to Sunland; and so it followed that if Sunland wished to purchase the land from DWF it would first have to negotiate with Reed or Prudentia.

124 Not only does that understanding flow logically, but it is reinforced by the fact that all the representations are alleged to be derived from the same undifferentiated statements, and by the use of the conjunction 'and' between the second and third pleaded representation. Further, as already stated, the particulars of their falsity are stated collectively rather than individually. Lastly, in terms of reliance, Sunland claims it relied upon 'the Representations' without ever differentiating that it relied upon one rather than another, or in the alternative to another, at any given stage.

125 It followed, in our view, that it was correct to view the three representations as following logically one upon the other, with each founded upon the preceding assertion. Since Sunland was unable to establish its first allegation, concerning the representation of a 'right to acquire', the need to focus at length on the remaining representations was largely disposed of.

126 Nevertheless, Sunland did argue at trial that the second and third representations were independently made out by Joyce's email to Brown of 16 August 2007.<sup>61</sup> Not only did the judge specifically record that argument,<sup>62</sup> his

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<sup>61</sup> As referred to at [32] above.

Honour dealt at length with that email.<sup>63</sup> He concluded, adversely to Sunland, that the email did not convey the prohibitive or imperative connotations Sunland asserted,<sup>64</sup> and that neither Brown nor Abedian relied upon the email for the representations as asserted (or at all).<sup>65</sup>

*Sunland's scheme case: the 'money trail' and other evidence*

127           The final way in which it was alleged the judge failed to deal with Sunland's case concerned the evidence relating to the distribution of part of the Hanley fee to Joyce, the issue of joint purpose, forged or false documents, and Prudentia's internal communications.

128           It will be recalled that Sunland pleaded causes of action against Joyce and Prudentia both in statutory misconduct and the common law action of deceit. The statutory misconduct claim was pleaded in paragraphs up to [41] of the SFASOC. Thereafter, Sunland pleaded its case in deceit as follows:

- Joyce knew the representations were false or was reckless as to their truth or falsity,<sup>66</sup> and he intended that Sunland would act in reliance upon them;<sup>67</sup>
- Reed knew the representations were false or was reckless as to their truth or falsity,<sup>68</sup> and he intended that Sunland would act in reliance upon them;<sup>69</sup>
- Joyce and Reed both knew the representations had been made by each other and had the joint purpose that each would make them to induce

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<sup>62</sup> Reasons [26].

<sup>63</sup> Reasons [64] – [80].

<sup>64</sup> Reasons [75], [76],[80].

<sup>65</sup> Reasons [76], [79].

<sup>66</sup> SFASOC [42].

<sup>67</sup> SFASOC [43].

<sup>68</sup> SFASOC [44].

<sup>69</sup> SFASOC [45].

Sunland to enter an agreement with Prudentia in relation to plot D17;<sup>70</sup> and

- Joyce and Reed were therefore liable to Sunland for the tort of deceit as joint tortfeasors with each other.<sup>71</sup>

129 Particulars were given of the common knowledge and joint purpose alleged against Joyce and Reed in [46] of the SFASOC. Those particulars were that:

- Joyce and Reed were friends, and had been friends since attending Geelong Grammar School together;
- Joyce and Reed did not disclose their friendship to Brown;
- the representations were made by each of them individually on separate occasions;
- Joyce and Reed both knew the representations were false, or were reckless as to their truth or falsity;
- Joyce and Reed each gave Brown identical particulars of the payment terms said to apply to Reed's purported acquisition of plot D17; and
- the use by Reed of the identical draft reconfiguration plan as shown to Brown by Austin.

130 Other than that allegation of common knowledge and joint purpose, in those terms, there was no further allegation in connection with the deceit claim of any relationship, commercial or otherwise, between Joyce and Reed (or Prudentia). Neither was there any allegation of a specific relationship or association for the purpose of pleading the misleading and deceptive conduct claim.

131 Three days before the trial was scheduled to commence Sunland made an application to the trial judge to amend its pleading. It sought to make an amendment to introduce further particulars of the alleged common knowledge and joint purpose of Joyce and Reed. In substance those particulars alleged, were that:

- on 18 January 2006 Reed (for Prudentia) and Joyce entered an

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<sup>70</sup> SFASOC [46].

<sup>71</sup> SFASOC [47], [48].

agreement whereby Joyce would be paid a fee if he identified suitable properties in the Middle East for Prudentia to buy and if Prudentia bought such properties;

- some time before 19 September 2007 Reed and Joyce agreed that Prudentia would pay Joyce a secret commission being half of any amount Prudentia obtained from Sunland by entering the Prudentia agreement [which became the Hanley agreement];
- in furtherance of that joint purpose, in about November 2007 Prudentia or Hanley, at the direction of Joyce, caused AED 22,052,890 to be transferred to a Jersey bank account; and
- neither Joyce nor Reed disclosed those matters to Brown.

132 Sunland submitted to the trial judge that the amendment was only sought out of an abundance of caution. It argued that it would be permitted to cross-examine Joyce in respect of those matters in any event because Joyce himself had addressed the subject in a witness statement filed on his behalf. Sunland claimed that these were matters which would not take anybody by surprise.

133 Unsurprisingly, the respondents (defendants at trial) vehemently objected to the late introduction of an allegation of a secret commission, a criminal offence. Furthermore, those opposing the amendment submitted that the proposed new particulars radically altered the characterisation of joint purpose and common knowledge compared to the existing version of the case.

134 As debate progressed, it emerged that the documents upon which the allegations were founded had been in the possession of Sunland for well over twelve months. Because of the lateness of the allegation being made, Joyce argued that he would suffer substantial detriment. At that time, Joyce was still in detention in Dubai awaiting a criminal trial. Any adjournment of the trial was likely to cause him significant prejudice but, equally, he was not in a position to then secure the attendance of the necessary witnesses he would need to meet the new allegations were the trial to proceed as scheduled.



135 In the result, his Honour refused the amendment application taking the view that the new matters amounted to a substantial new allegation of fraud. Procedural fairness to the defendants would require an adjournment of the trial but for a variety of reasons adjournment of the trial was simply not a practical option. Given the delay on the part of Sunland in making its application when it had the ability to make the application well in advance of the trial, his Honour refused the amendment. Sunland did not appeal that decision.

136 It is nevertheless apparent that many of the documents concerning the 'money trail' did in fact become evidence in the trial despite his Honour's ruling. This is largely explained by the regime adopted by the judge in relation to the tender of documents. His Honour explained:

It was made clear at the commencement of the trial, and reaffirmed on a number of occasions during the trial, that the documents contained in the Court Book would stand as evidence in the case without the need to undertake any formal, specific, tender process but that I would have no regard to any documents contained in the Court Book unless they were referred to and relied upon, specifically, in the closing submissions of one or more of the parties. It was made clear that this arrangement was subject to the right of any party to object to any particular document or documents being treated as part of the evidence on this basis.<sup>72</sup>

137 Such a regime, or variants of it, are not uncommon in cases conducted in the Commercial Court. As, however, the experience in this case reveals, a practice such as the one used in this case may not be desirable. His Honour's regime reveals the possibility of documents having uncertain status. On the regime as formulated, all documents in the Court Book would 'stand as evidence' but some the judge would have regard to, some the judge would not have regard to, and some would not be 'treated as part of the evidence', depending upon whether they were the subject of submission or objection.

138 The same documents which Sunland said gave rise to its secret commission allegations, disallowed by the trial judge, were nevertheless in the Court Book and referred to by Sunland in its closing submissions. They were referred to in support

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<sup>72</sup> Reasons [7].

of an argument that a 'scheme' was carried out between Prudentia and Joyce. Although both Prudentia and Joyce argued that Sunland should not be permitted to rely upon such a scheme, apparently no formal objection was taken to the documents being 'treated as part of the evidence' under the regime that his Honour described.

139           The so called 'scheme' contended for by Sunland was described, in substance, as follows:

- (a)    on 13 August 2007, three days before Reed had any conversation with Brown, Reed sent an email to Prudentia's solicitors both in Dubai and in Melbourne stating:

We will need to create a deed of Exclusivity and Confidentiality for my dealing with the potential on-sale of the property to a third party so the third party will only deal with me and via there [sic] dealing with me I will consent for the vendor to be able to deal with the purchaser once I have agreed terms with the third party for the on-sale of the Site subject to acceptable terms;

- (b)    that email described a scheme which was formulated before any communication had occurred between Reed and Brown, and was precisely the scheme that was ultimately carried into effect in the dealings between Prudentia, Reed and Sunland with respect to plot D17;
- (c)    the 'money trail' documents showing the distribution of the Hanley fee (AED 44,105,780) showed that one half of it was paid to Joyce and this was powerful evidence of a motive on the part of Joyce, fortifying the conclusion that he was party to the representations and involved in a joint purpose to mislead Sunland into making the payment;
- (d)    Joyce's motive for making the misrepresentations to Brown was to receive a share of the money paid to Prudentia/Hanley.

140           His Honour alluded to Sunland's scheme argument at several points in the judgment.

141           At one point, his Honour was considering the character of the consultancy fee

payable under the final Hanley agreement and Sunland's argument that the fee was a manifestation of a 'premium' which Sunland alleged Reed and Joyce had devised to extract from it. As well as expressing the view that Sunland incorrectly conflated the notion of 'premium', as called for under the proposed joint venture agreement, and the 'consultancy fee' paid under the Hanley agreement, his Honour continued:

Additionally, I am of the view that the Sunland submissions seek to rely on selective email communications that *purport to reinstate the "secret commission allegation" under the guise of an unpleaded alleged "scheme"*. The "scheme" for which Sunland contended is one "which had been devised to extract a premium from Sunland".<sup>73</sup>

142 At another point, his Honour was dealing with Sunland's pleading that the monies paid to Hanley were ultimately paid to Hanley's solicitors in Dubai.<sup>74</sup> In that connection his Honour noted that the fee was received by Clyde & Co, Prudentia's Dubai solicitors, on 3 October 2007, but continued:

On the basis of my findings with respect to the claims made by Sunland in this proceeding which are based on allegations of misleading and deceptive conduct and fraudulent misrepresentation, *the disbursement of the Hanley fee has no relevance whatsoever*.<sup>75</sup>

143 And finally under the heading of 'Other Matters' towards the conclusion of his Honour's judgment, his Honour said in respect to both the misleading and deceptive conduct claim and the deceit claim:

In neither case do communications between defendants, or the defendants and non-parties, to which Sunland was not privy at any relevant time – so which could not affect the impact of any alleged conduct, including representations, on Sunland or influence in any way its reliance or otherwise on such conduct – have any relevance to its case, on either basis. *The same applies to flows of money or any other conduct which was not within Sunland's knowledge at the relevant time*.<sup>76</sup>

144 A serious allegation of a covert payment of money to Joyce amounting to a secret commission (whether so identified or not) – either as evidence of joint purpose

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<sup>73</sup> Reasons [209] (our emphasis).

<sup>74</sup> SFASOC [34A(d)], [34A(e)].

<sup>75</sup> Reasons [224] (our emphasis).

<sup>76</sup> Reasons [445].

for the deceit claim *or* as evidence to aid a conclusion that Sunland was misled or deceived – had to be pleaded with adequate particulars.<sup>77</sup> For whatever purpose it might have been deployed, such an allegation was an allegation of fraud. It was not pleaded. Sunland attempted to amend its pleadings so as to properly raise the allegation, but it failed. It could not be reintroduced under another guise. Joyce and Prudentia were entitled to conduct their defence on the basis that the allegation was not to be the subject of evidence. Neither called any witnesses at trial. Joyce claimed, during the argument on Sunland’s amendment application, that if Sunland’s new case was to be admitted he would wish to call witnesses to meet the allegation. We cannot speculate what evidence he might have called. But the judge was correct not to consider the so-called ‘scheme’ and ‘money trail’ evidence given the facts that we have outlined.

145           We therefore stress that the issue of whether or not Joyce received any of the Hanley fee, or if so, why, was not a question the trial judge had to resolve. Quite properly he did not resolve that issue, nor did he discuss any evidence concerning the issue.

146           We do not, however, agree with the proposition that *if* Joyce was paid a secret commission by Prudentia for introducing Sunland to the plot D17 transaction, or somehow facilitating that transaction, that fact would necessarily have been irrelevant or immaterial to Sunland’s case on breach of s 52 of the TPA. If that is what the trial judge meant by his remarks under ‘Other Matters’ extracted above,<sup>78</sup> we respectfully disagree.

147           First, it has been said a number of times that although it is not necessary to prove an intention to mislead or deceive to make out the statutory contravention,<sup>79</sup> courts might more readily find that a defendant has engaged in misleading conduct

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<sup>77</sup>     *Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 13.10(3)(a); Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 573.

<sup>78</sup>     See [143] above.

<sup>79</sup>     See for example *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216.

where an intention to mislead can be inferred.<sup>80</sup> Moreover, where a representor intends to induce a representee to rely upon a representation, and the representee enters the contract or takes the relevant step which the representation was intended to induce, then a court may more readily infer that the representee did so in reliance upon the representation.<sup>81</sup> In this case, *if* Joyce received half the Hanley fee, and he was paid that fee pursuant to a pre-existing arrangement for facilitating a transaction under which Sunland would pay Prudentia a fee to take over a plot purchase, then that could constitute relevant evidence from which an intention to mislead might potentially be inferred.

148 But, wherever the truth lay, Sunland forewent any opportunity to advance a case based upon its alleged ‘scheme’ or by following the ‘money trail’. Neither Joyce nor Prudentia had the opportunity, nor the need, to meet such an argument.

149 By referring to evidence of the ‘scheme’ and ‘money trail’, we include not only the evidence of how the Hanley fee was disbursed *after* the transaction was concluded, but also other pieces of evidence of events from January 2006 onwards that allegedly supported the scheme hypothesis put forward by Sunland.<sup>82</sup> Included among those pieces of evidence are two categories we wish to mention specifically.

150 The first is evidence said to show that documents were forged, in particular the letter of 10 August 2007 purportedly from Brearley to Prudentia’s Dubai lawyers.<sup>83</sup> Sunland had an array of arguments why the letter was a fabrication. If so, Sunland argued, the letter demonstrated that someone – inferentially Prudentia and/or Joyce – was intent on creating a false impression that Prudentia had secured a legitimate and valuable interest in plot D17 in the form of preliminary approvals for a proposed development on the land. This, it argued, could and should have been used, with other evidence, in reasoning to a conclusion that Prudentia was

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<sup>80</sup> See for example *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45.

<sup>81</sup> *Gould v Vagellas* (1985) 157 CLR 215, 236.

<sup>82</sup> The evidence is summarised at [60] of Sunland’s Appeal Submissions.

<sup>83</sup> We refer to this at [32] above.

laying a subterfuge to pretend it had something that it did not have – ie, some right or interest in the land – and that therefore it had an intention to deceive Sunland.

151           The second category was a body of evidence – mainly snippets of internal communications within Prudentia (including to its lawyers) – said to betray elements of the wider, alleged scheme with Joyce.<sup>84</sup>

152           Each of these categories of evidence was one that the trial judge eschewed discussing.<sup>85</sup> His Honour gave two reasons for not discussing that evidence. The first was that each concerned evidence that was intrinsically part of and put forward to establish the so called ‘scheme’ which had been disallowed as an issue when the amendment application was refused just prior to trial. In our view the judge was justified in having no regard to the evidence on that ground.

153           A second reason given, particularly in relation to the evidence of internal Prudentia communications, was that the identified communications had no capacity to ‘impact’ Sunland and thus no capacity to mislead or deceive it.<sup>86</sup> For reasons we have already given, to the extent that such evidence of internal communications *might* have given rise to an inference of an intent to mislead, it might plausibly have been relevant to the question whether Sunland was in fact misled.

154           But apart from the two reasons relied upon by the judge, both categories of evidence were of questionable forensic weight. The evidence of fabrication of the 10 August letter was somewhat equivocal; made even more so by the fact that on 14 August, by an unchallenged email, DWF sent Prudentia a draft contract of sale, rather blunting the argument that Prudentia was concocting a recognised position vis-à-vis the land. Further, much of Prudentia’s internal communication that Sunland claimed was incriminating was either ambiguous or arguably supported the proposition that, within Prudentia, there was a genuinely held belief that it occupied

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<sup>84</sup> For example, see Plaintiff’s Address [146]–[149] for references to ‘Russian buyers’ etc.

<sup>85</sup> Reasons [9], [115], [234], [246], [445].

<sup>86</sup> Ibid [445].

a valuable negotiating position with DWF with respect to plot D17.

155           Furthermore, we add that the asserted evidence of intention, to be derived from these various sources, could only have supplied indirect, inferential evidence of reliance or of misleading conduct. For the reasons we give below, the direct evidence on each of those subjects was so powerfully against Sunland's case, it is difficult to see how any indirect, inferential evidence could have had any significant bearing upon the analysis.

156           In the result, we do not think the judge failed to consider the case that Sunland was entitled to advance at the trial. To the extent that the judge failed to consider or discuss certain aspects of the evidence, or arguments in favour of the case that Sunland was entitled to advance, such failure was justified or, at the least, of no material consequence.

157           Having addressed, and rejected, Sunland's contentions that the trial judge failed to address its 'case theory', we now turn to consider its complaints concerning the trial judge's analysis and findings on the evidence lead at trial. The first of these issues is: what representations did Sunland prove?

*What representations did Sunland prove?*

158           The applicable principles in relation to assessing whether conduct was considered misleading and deceptive (or likely to mislead or deceive) are well established and were not in dispute. The conduct must induce or be capable of inducing error<sup>87</sup> which is to be assessed objectively by the court in light of all relevant surrounding circumstances.<sup>88</sup> As such, the court must evaluate what a reasonable person in the position of the representee would have understood the conduct to have meant.<sup>89</sup>

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<sup>87</sup>       *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198.

<sup>88</sup>       *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109].

<sup>89</sup>       *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262 [46] - [48].

Where the impugned conduct is or includes oral statements, the court must be properly satisfied as to the content of such conduct. As McLelland CJ observed in *Watson v Foxman*:<sup>90</sup>

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

*The statements upon which the appellant relies*

160 The SFASOC pleads a series of specific statements as the basis of Sunland's claims.

161 More particularly, Sunland relies on:

- (a) statements allegedly made by Joyce to Brown during a telephone conversation on 15 August 2007;<sup>91</sup>
- (b) statements allegedly made by Reed to Brown during a telephone conversation on 16 August 2007;<sup>92</sup>
- (c) an exchange of emails between Brown and Joyce on 16 August 2007;<sup>93</sup>
- (d) statements allegedly made by Reed to Brown at Sunland's Dubai office

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<sup>90</sup> *Watson v Foxman* (1995) 49 NSWLR 315, 318-319.

<sup>91</sup> SFASOC [12].

<sup>92</sup> SFASOC [13].

<sup>93</sup> SFASOC [14].



on 19 August 2007;<sup>94</sup>

- (e) an email and draft implementation agreement forwarded to Brown by Reed on 23 August 2007;<sup>95</sup>
- (f) a telephone conversation on 29 August 2007 in which Joyce allegedly said Sunland should come to an agreement with Reed as soon as possible;<sup>96</sup>
- (g) a telephone conversation between Brown and Reed on 16 September 2007 concerning terms on which Sunland might purchase from DWF;<sup>97</sup>
- (h) a telephone conversation between Reed and Brown on or about 17 September 2007 concerning a reduction in price Reed had negotiated with DWF;<sup>98</sup> and
- (i) an email from Prudentia's solicitor to Brown of 26 September 2007 attaching a draft agreement between Hanley and Sunland in respect of a consultancy fee relating to the acquisition of plot D17.<sup>99</sup>

162 When analysing the evidence concerning each of these specific statements we will, as necessary, return to and recapitulate relevant events summarised earlier.<sup>100</sup>

*Immediate context of the first alleged representations*

163 On 14 August 2007 Brearley, the in-house lawyer employed by DWF, had forwarded a draft SPA for proposed plot D17 to a solicitor acting for Prudentia in Dubai.

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<sup>94</sup> SFASOC [15],[16].

<sup>95</sup> SFASOC [17].

<sup>96</sup> SFASOC [18].

<sup>97</sup> SFASOC [27].

<sup>98</sup> SFASOC [28].

<sup>99</sup> SFASOC [32].

<sup>100</sup> See [32]–[54] above

164           At that time, plot D17 had not been created as a separate title with specific development rights.

165           The following day Austin told Brown that the master plan for the Dubai Waterfront was to be reconfigured so as to create proposed plot D17 adjacent to a waterfront plot already owned by Sunland and known as plot D5B.<sup>101</sup>

166           The SFASOC alleges that at a meeting at Sunland's Dubai office on that day Austin:

- showed Brown a draft plan for the reconfiguration of existing vacant plot to create plot D17;
- told Brown that no title plan had been prepared for plot D17 because the redesign of the existing plot was not yet complete;
- said to Brown words to the effect that 'plot D17 is already taken by Angus Reed'; and
- gave Reed's Australian mobile phone number to Brown.<sup>102</sup>

167           The agreed summary of facts states Austin gave Brown the name of Andrew Angus Reed who was said to have had a 'hold on the plot' and that Brown did not ask Austin what that meant. The phrase 'a hold on the plot' is recorded in Brown's notebook. This was a workbook in which he recorded important information. In evidence he said that he used his notebook 'to record conversations and meetings, have to do lists so I wouldn't forget things, so I could plan my day' and agreed that generally he 'made the notes in [his] workbook contemporaneously [and] normally during a meeting or a phone call, I'd be writing down at the same time.'

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<sup>101</sup> Sunland alleges that between March and July 2007 Joyce advised Brown and Abedian that there was no beachfront land left on the Dubai waterfront and that it had all been sold to secondary developers. Joyce denies this was said but in any event whilst plot D5B was waterfront land, plot D17 with which this action is concerned, was not.

<sup>102</sup> SFASOC [11].

168 Brown said that he kept his notebooks in a drawer behind his desk in his office in Dubai; thus the notebooks were readily accessible to him at all relevant times.

169 The trial judge was correct to conclude that it is significant that the notebook does not record Austin used the words alleged in the SFASOC that 'plot D17 is already taken by Angus Reed.'

170 In cross-examination, Brown agreed that he was shown recently prepared confidential plans for the reconfiguration of the plot behind D5B, including the proposed plot D17. The plans were headed 'Increasing Development Value and Improving the Effectiveness of Open Space Provision in the Centre of Precinct D: DWF Valuation Creation Exercise August 2007'.<sup>103</sup> The plans bear an annotation, 'Site D17 and D18 created to maximise value'. The plans described the area of the proposed plot D17 (169,114 square foot), the built-up area (1,607,052 square foot), the floor area ratio (9.5), potential maximum height of development (228 metres) and proposed price of AED 216,952,020, being equivalent to a price of AED 135 per square foot of built-up area. Brown said he was shown the plans because although they were confidential Sunland had just finished a design exercise for DWF on the foreshore and Austin had admired their design work. When he showed Brown the plan his first question was, 'What do you think of it?' The plans included two areas of public open space, six proposed plots, two new roads, a kindergarten and a utility area.

171 There are five incidental aspects of this immediate context which might be thought to inform the assessment of the evidence as to the subsequent discussions between the parties:

- (a) it was Austin, not one of the defendants, who first contacted and advised Brown about plot D17, precipitating Brown's subsequent actions;

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<sup>103</sup> The plans are dated 9 August 2007.

- (b) contrary to the evidence, Brown subsequently repeatedly maintained to Dubai prosecutors in 2008-9 that he was introduced to Reed by Joyce;
- (c) Austin established a context in which further conversations with Joyce and Reed occurred. In particular, he provided the proposed development parameters of the plot but also made clear the redesign was not yet finalised;
- (d) Austin advised Brown of the proposed price of the plot which was plainly stated on the plan describing its development parameters;
- (e) at the time of Austin's contact DWF was in fact dealing with Prudentia in contemplation of a proposed sale of plot D17 (although Brown did not know of the draft SPA);
- (f) the terms of the reference to Reed by Austin alleged in the SFASOC were not proved. In particular, the words a 'hold on the plot' are not equivalent to 'already taken' and do not necessarily convey more than a de facto commercial negotiating position.

*Brown's contact with Joyce*

172           On the same day, 15 August 2007, Brown telephoned Joyce and spoke to him about plot D17.

173           As mentioned above,<sup>104</sup> and as Brown agreed in cross-examination, in June 2007 there had been something of a falling out between Joyce and Brown in connection with a prospective joint venture between Sunland and DWF relating to the development of plot A10C. Brown's witness statement of 6 October 2010 describes Joyce as 'unhappy' and in an email of 24 June 2007 to Brown, Joyce had said that the situation 'has caused us major embarrassment'.<sup>105</sup>

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<sup>104</sup> See [35] above.

<sup>105</sup> Reasons [57].

174 The SFASOC pleads the communication between Joyce and Brown on 15 August 2007 as follows:

12 Later in the day on 15 August 2007, following the meeting referred to in paragraph 10 above, Joyce telephoned Brown and during that conversation said to Brown words to the effect that:

12.1 *'a man named Reed is the contact for Plot D17';*

12.2 *'although I will need to check this with Anthony Brearley, Reed's company will be paying Dubai Waterfront AED135 sq/ft to purchase Plot D17' (namely 135 United Arab Emirates dirhams ('AED') per square foot of built up area ('BUA'));*

12.3 *'the terms of payment are more favourable than the standard terms, being 5% on execution of the contract, 10% at handover which is scheduled to take place in about 6 months, 10% at 6 months after handover, 20% at 12 months after handover, 20% at 18 months after handover, 20% at 24 months after handover, and 15% at 36 months after handover'; and*

12.4 *'a property speculator would be likely to pay about AED175 sq/ft to purchase Plot D17'.<sup>106</sup>*

175 From Sunland's point of view there is a series of difficulties both with this pleading and the evidence concerning the underlying facts:

- (a) as Brown conceded in evidence, he telephoned Joyce, not the other way around;
- (b) nevertheless Brown agreed in cross-examination that he had (incorrectly) repeatedly told the Dubai prosecutor Joyce telephoned him. His witness statement of 6 October 2010 states he cannot recall if he called Joyce or Joyce called him;<sup>107</sup>
- (c) in oral evidence Brown stated that Joyce confirmed what Austin had told him but Joyce also said he would need to check the price with Brearley;
- (d) the pleading conveys the impression that it was Joyce who first advised

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<sup>106</sup> SFASOC [12] (emphasis in original).

<sup>107</sup> Reasons [82].

Brown of the proposed price details whereas in fact they had already been provided by Austin. The combination of the omissions in the pleading with respect to the information supplied by Austin<sup>108</sup> and the positive allegations with respect to the subsequent conversation on the same day between Brown and Joyce<sup>109</sup> is thus fundamentally misleading;

- (e) a statement that Reed was 'the contact' for plot D17 was, as the trial judge concluded, not one which would amount to a statement that Reed or Prudentia 'controlled' plot D17 or had some reservation or right in respect of the plot;<sup>110</sup>
- (f) Brown's witness statement confirms the use of the phrase 'the contact for' but in cross-examination he said at various points that Joyce said that Reed 'had a plot behind our site D5B' or used words to that effect. He could not recall exactly what Joyce said.<sup>111</sup> Not surprisingly the trial judge was not persuaded of what precise words were used;
- (g) Brown's witness statement states:

Joyce said a man named Andrew Reed was the contact for plot 17 and that Reed's company was partners with [sic] Och Ziff ('Och Ziff') and had done projects with Lend Lease. Joyce suggested I should contact Reed if Sunland was interested in a joint venture. Joyce mentioned that Reed and Och Ziff had projects in India. I recall that I discussed with Joyce my meeting with Austin.<sup>112</sup>

The failure to plead any reference to Och Ziff or the prospect of a joint venture robs the pleading of material elements of the conversation. As the trial judge noted,<sup>113</sup> it would be obviously true that Reed was the

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<sup>108</sup> SFASOC [11].

<sup>109</sup> SFASOC [12].

<sup>110</sup> Reasons [54].

<sup>111</sup> Trial transcript, 176.

<sup>112</sup> Witness statement of David Scott Brown (6 August 2010) [82].

<sup>113</sup> Reasons [54].

contact for joint venture purposes;

- (h) Brown's witness statement went on to say:

Joyce said to me that the plot had favourable payment terms spread over 30 months and the 'contract price is AED135/sqft' but that he would check this with Brearley. He explained the payment schedule for this site in comparison to the standard terms and I recorded it at page '0097' of my Notebook as follows:

	Dep	H/o	6mth	12	18	24	30
Standard	20%	10	20	20	20	10	-
This site	5	10	10	20	20	20	15

This to me indicated that there was some sort of contract in existence and that terms and prices had already been negotiated. He said that Nakheel would like a proven developer such as Sunland to be involved. He suggested that Reed was an investor who needed a developer partner like Sunland who could deliver the project for him. I understood from this discussion that Joyce wanted Sunland involved in the project because he wanted buildings to be built, and not have more land speculators who would just sell the land for a quick profit.

During that phone call, he said "Reed is likely to sell to another speculator at AED175/sqft". This reaffirmed to me that Reed controlled the land;<sup>114</sup>

- (i) the proposition that there was 'some sort of contract in existence' (as was the fact, namely the draft provided by DWF to Prudentia on 14 August 2007) did not necessarily imply that the contract had been concluded. Nor did it imply that more had occurred than negotiation of some proposed terms. Indeed, the fact that Austin had advised the design was not 'complete', that Brown was aware no SPA had been signed and that the possibility of a joint venture was discussed demonstrated no contract had been concluded;
- (j) there is nothing improper in the motive attributed to Joyce, namely a desire to have Sunland involved to facilitate actual development;

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<sup>114</sup> Witness statement of David Scott Brown (6 August 2010) [83]-[85].

- (k) the assertion in the witness statement that Joyce said 'Reed<sup>115</sup> is likely to sell to another speculator at AED 175/square foot', is not pleaded. Nor is it recorded in Brown's notebook. The note is simply:

Contract is 135/ft<sup>2</sup> BUA (checking Anthony)

Likely to sell to another speculator at 175/ft;

Brown's own typed up version of this note records this part of the conversation as:

He said the site is likely to sell to a speculative investor around AED175/ft<sup>2</sup> if it was on the open market.

This tends strongly to confirm Joyce did not say Reed was likely to sell to a speculator. In cross-examination Brown agreed that what he recorded in his typed notes was, in other words, simply that if the site were on the open market you would get AED 175 per square foot for it;

- (l) Brown's witness statement omits additional information recorded in his notebook concerning the conversation with Joyce:

Side deal 65 m up-front and hand over contract to purchaser.

And enter into consultancy to avoid transfer fee and stamp duty.

Agreement with Nakheel;

Brown gave evidence that he did not refer to this in his witness statement because he did not fully understand what it meant. The trial judge recorded:

It was submitted that Brown's evidence was not credible and that his omission of any discussion of this part of his file note makes it clear that during this conversation with Joyce, Brown had a thought about a side deal whereby Sunland would make a payment up front to Reed in order to step into his shoes. This, it was submitted, was supported by Brown's own admission to Mr Mustafa of the Dubai authorities that no-one at Nakheel or DWF ever asked him to pay a commission or premium. It is unclear whether Brown made this offer to Joyce or whether Brown merely noted it down in his notebook. It

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<sup>115</sup> Our emphasis.



was submitted that Brown's failure to disclose this in his witness statements and his denial of it in cross-examination wholly undermines his evidence regarding this conversation. Brown's evidence was that he did not refer to this in his statement because 'I didn't fully understand what was meant by those words and I presumed that it was related to a premium figure, but it was all the very first conversation and so he didn't elaborate on that'. Brown denied that he had deliberately chosen not to include this material in his statement, but did admit that he had also not mentioned any 'side deal' to the Dubai prosecutor;<sup>116</sup>

- (m) his Honour further concluded that, viewed in the context of the evidence as a whole, the submissions made on behalf of Joyce as to the significance of the conversation of 15 August 2007 should be accepted.<sup>117</sup> Viewed overall, Brown's evidence indicates Sunland's confusion in relation to what it says was being represented to it with regard to Reed or Prudentia's 'right' in relation to plot D17.<sup>118</sup>

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In summary we agree that:

- (a) the phone call of 15 August 2007 was instigated by Brown and not Joyce. The pleading (and repeated statements by Brown to the Dubai prosecutors) imputed a moving role to Joyce which he did not take;
- (b) the pleading does not acknowledge Austin had provided details of proposed price;
- (c) the pleading does not acknowledge that Joyce explicitly suggested Brown should contact Prudentia 'if he was interested in a joint venture';
- (d) discussion of some negotiated contract terms and/or of a draft proposed contract did not imply a concluded agreement had been reached with Prudentia;

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<sup>116</sup> Reasons [57] (citations in original).

<sup>117</sup> Reasons [60].

<sup>118</sup> Reasons [61].

- (e) a statement that Reed was the contact for the plot did not imply Reed or Prudentia had a vested right in the plot;
- (f) Brown's witness statement exaggerates the reference Joyce made to the open market value of plot D17. The evidence does not support the view that Joyce said Reed was likely to sell to another speculator;
- (g) Brown's witness statement omitted reference to any conversation with Joyce concerning a 'side deal', or contemplation by him of any side deal at this point in time, in circumstances where the nature and propriety of any side deal was at the heart of Sunland's case; and
- (h) the evidence did not establish that Joyce said to Brown that Reed had a 'hold' on plot D17, that Reed 'controlled' plot D17, or that Reed had a 'right' to or had 'reserved' plot D17 (noting that none of these allegations were pleaded).

*Brown's conduct after the conversation of 15 August 2007*

177 The trial judge summarised the evidence as to Brown's conduct after the conversation of 15 August 2007:

The evidence indicates that Sunland had very significant interest in purchasing Plot D17, particularly having regard to the fact that it was immediately behind Plot D5B, which one of the Sunland entities already owned. Brown discussed his conversation with Joyce with Abedian later on 15 August 2007 and the latter was 'quite interested in the possibility of a new project'. Continuing, Brown's evidence was that Abedian suggested that he prepare a draft feasibility for the plot because 'we wanted to understand whether the plot would be an appropriate one for Sunland to pursue'. Brown's evidence was that Sunland generally looks for a return on development costs of 20% or more. Feasibility revision three, dated 15 August 2007 discloses a 29.26% return on development cost. Sunland's interest was also demonstrated by its production of a series of design sketches which were shown to Austin a few days later, together with a new proposal which increased the three plots behind Plot D17 to five plots. The evidence of Brown indicated that this involved a series of design proposals that would improve the efficiency of land used by deleting the road and increasing the size of the park areas. The result would be that the net built up area ('BUA') of the new plots behind Plot D17 would increase by 12% and each plot would have a park frontage, thereby improving their value. He said that this represented a monetary increase of some 12% for the additional plots created

and added around AED 10 million to the land values. Later, in August 2007, Brown said that he and Mr Cameron McLeod (then a member of the Sunland design team) met with Austin to discuss their further design ideas.<sup>119</sup>

178           The fundamental premise of the design work Brown undertook makes clear that he understood the terms of purchase for plot D17 were not finalised.

*16 August 2007*

179           The day after Brown's conversation with Joyce concerning plot D17 Brown telephoned Reed. The SFASOC alleges:

13       On 16 August 2007, Brown telephoned Reed on Reed's Australian mobile phone number (referred to in paragraph 11.4 above) and during that conversation Reed said to Brown words to the effect that:

13.1   'I am in Melbourne and will be flying into Dubai on Sunday';

13.2   Prudentia was his company;

13.3   through Prudentia 'I have the right over' or 'I control' Plot D17; and

13.4   he would be willing to negotiate with Brown about undertaking a joint venture with Sunland for the development of Plot D17.<sup>120</sup>

180           In his witness statement Brown says:

On 16 August 2007, I called Reed on his Australian mobile phone, told him who I was and told him that I obtained his details from either Austin or Joyce. I told him that I wanted to talk to him about Plot D-17. During that phone call, I discovered that his name was 'Angus' not 'Andrew' (which was the name Joyce had told me). I corrected this name in my Notebook. He introduced himself and his company Prudentia Investments Pty Ltd (Prudentia). He said that he was in Melbourne and that he would be arriving in Dubai on Saturday and suggested we meet on Sunday. He said to me words to the effect of either "We have the rights over that land" or that "Prudentia controlled that land". I cannot recall the precise words. I understood them to mean that Prudentia had control over Plot D17. A record of this conversation is contained at page '0099' of my Notebook. This tied in with what Joyce had told me the day before.<sup>121</sup>

181           The witness statement acknowledges Brown cannot recall Reed's precise

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<sup>119</sup>       Reasons [63] (citations omitted).

<sup>120</sup>       SFASOC [13].

<sup>121</sup>       Witness statement of David Scott Brown (6 August 2010) [92].

words.

182 His notebook does not record the words 'right' or 'control' or any similar  
terms.

183 His type-written summary of the relevant part of his notes was to the  
following effect:

I received a call from Angus Reed from Melbourne, Australia. He told me he had a company called 'Prudentia Investments' and that he was arriving in Dubai on Saturday 18<sup>th</sup> August, and he would like to talk to us about a plot at Waterfront. This indicated that Matt Joyce wasn't sure of the contact as he thought his name was Andrew.

184 Once again, this nominates someone other than Brown as the instigator of the conversation when the evidence makes entirely clear that it was Brown who called Reed.

185 Indeed the witness statement is directly contrary to a number of statements made to the Dubai prosecutors:

During cross-examination, Brown admitted that contrary to the evidence in his witness statement in this proceeding, he had told the Dubai prosecutor in an email dated 3 December 2008 that '[w]e were initially contacted by Angus Reed', and this was Brown's 'memory at the time'. Brown's witness statement is also inconsistent with the agreed transcript of his interview, conducted under oath, with the Dubai prosecutors on 16 February 2009 where Brown is recorded as giving evidence to the prosecutor that 'in August 2007 I received a call from the accused Matthew Joyce, who told me an Australian called Angus Reed has relations with Och-Ziff and will discuss with me land lot on the Waterfront Project'.<sup>122</sup>

186 The reference in the typed summary diary note which we have quoted above, relating to lack of sureness on Joyce's part as to Reed's name, is also difficult to understand when Brown had himself noted on the previous day that Austin told him Reed's name was 'Andrew Angus Reed'.

187 More critically however, the typed note also fails to record any use of words whatsoever of the type alleged relating to 'right' or 'control'.

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<sup>122</sup> Reasons [65] (citations omitted).

188 In cross-examination Brown said that what he did remember was that the words used by Reed were ‘exactly consistent’ with what Austin and Joyce had told him. Brown also said that Reed used words ‘consistent with’ having a ‘hold on the land’.<sup>123</sup> Once again it should be noted that this is not what the SFASOC alleges Joyce said.

189 Brown said he did not ask Reed to provide any documentary evidence of an interest in the land because Brown knew that the land ‘was being created’.<sup>124</sup> Brown knew that there was no affection plan that is, a plan showing the dimensions, development rights and ownership of the land.<sup>125</sup> Brown knew Prudentia had not purchased the plot. When asked whether Brown asked Reed how he came to have any entitlement to the plot Brown said, ‘It was quite clear that it was through one of their partners,’ and then said Reed explained Och-Ziff was his partner.<sup>126</sup>

190 At [142] of his witness statement however, Brown referred to Reed’s statements concerning Och-Ziff in substantially more speculative terms as follows:

During my negotiations with Reed, I formed the view that Reed probably had a contact high-up in Nakheel and that it was through this contact that Reed had obtained control of Plot D17. It seemed a reasonable guess that it was someone high-up in Och-Ziff who was Reed’s connection to the contact in Nakheel. I thought that it was possible that the contact could even have been Sultan Ahmed bin Sulayem himself, as I knew that the Sultan made substantial investments around the world. I cannot remember when I first formed this view but comments such as these by Joyce supported it.

191 The trial judge found Brown’s answers in cross-examination concerning the basis of his impression of a relationship between Reed and Nakheel less than persuasive.<sup>127</sup> More critically, perhaps, ‘reasonable guesses’ made by Brown cannot sensibly found Sunland’s claim.

192 Brown’s witness statement relating to 16 August 2007 continues after the

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<sup>123</sup> Trial transcript, 32.

<sup>124</sup> Trial transcript, 33.

<sup>125</sup> Trial transcript, 33.

<sup>126</sup> Trial transcript, 49.

<sup>127</sup> Reasons [71].

passage which I have quoted above:<sup>128</sup>

Reed said that he knew what Sunland was doing in Australia and Dubai. He asked whether Sunland would be interested in doing a joint venture in Dubai and I said that it would be interested. Reed said to me that Prudentia would put the land into a joint venture (JV) for AED 175/sqft and would be looking for a consultancy fee of AED 60M. I was surprised by this as it was higher than the price that Joyce had mentioned. I did not argue with him about this on the phone, as I knew JVs often start with big demands, and the terms usually change. Reed also gave me his email address, which was 'reed@pinv.com.au'.

Reed said to me during this telephone conversation that he had a leisure lifestyle vehicle in Australia and was partners with a large American hedge fund. I understood this to be a reference to Och-Ziff, because of what Joyce had told me on 15 August 2007.<sup>129</sup>

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In summary we are satisfied:

- (a) Brown did not depose to words used by Reed with any precision;
- (b) neither his notebook, nor the typed summary of the notebook contains a note of words to the effect alleged, namely that he had 'the right over' or 'controlled' D17;
- (c) ultimately, Brown's evidence was that what Reed said was consistent with what Austin and Joyce had said. This begs the question of what was previously said. If it be accepted that at best it was proven to amount to no more than a statement Reed was the contact for the plot for the purpose of a joint venture, then it falls far short of the statements alleged. At its highest, Brown's evidence might justify a finding that Reed confirmed he had a 'hold on the land';
- (d) Brown made a series of untrue statements to the Dubai prosecutors about this conversation. In particular he repeatedly advanced the proposition that Reed was the instigator of it;
- (e) on any view of the evidence, the trial judge could not be satisfied

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<sup>128</sup> See [180] above.

<sup>129</sup> Witness statement of David Scott Brown (6 August 2010) [93]-[94].

anything said conveyed to Brown that Prudentia had a legal right to plot D17;

- (f) read as a whole, Brown's witness statement did not support the view that Reed told Brown that Reed had high level connections with Nakheel. Whether guesses made by Brown in this regard were reasonable or not is not in point.

*The email exchange between Brown and Joyce on 16 August 2007*

194 As the SFASOC alleges,<sup>130</sup> late on 16 August 2007 Brown sent an email to Joyce which said:

We have spoken to the gentleman in Australia, and have a tentative meeting with him on Sunday. It was a very positive discussion.

195 Joyce emailed Brown back later that day and said:

Good luck, thanks. I thought they were based here? Anyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us.

If it does proceed please liaise with Anthony Brearley, our Legal Counsel on contract issues and Jeff Austin on Planning. I will make myself available as required.

196 Brown says in his witness statement:

I understood Joyce's statement that '[a]nyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us' to mean that in order for Sunland to develop (or buy) the plot, it would have to come to an arrangement with Reed before it could deal with Dubai Waterfront.<sup>131</sup>

197 As the trial judge observed, the email from Joyce must be read in the context of the circumstances at the time.<sup>132</sup> These included:

- (a) Joyce had spoken to Brown about a potential joint venture with Reed

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<sup>130</sup> SFASOC [14].

<sup>131</sup> Witness statement of David Scott Brown (6 August 2010) [100].

<sup>132</sup> Reasons [73].

the previous day;

- (b) Brown had made the call to Reed in pursuit of a joint venture with Reed and it was this which was the subject of a 'very positive discussion';
- (c) Brown had indicated that his discussions with Reed would continue 'on Sunday'; and
- (d) according to Brown himself, Joyce had felt betrayed by Sunland in the earlier prospective joint venture between DWF and Sunland in connection with plot A10C.

198 On 22 January 2009 Brown made a 'clear statement of events' to the Dubai prosecutors which included the following:

We understood from Nakheel that we had to have an arrangement with Angus Reed to be able to develop the plot *together*.

199 The trial judge concluded:<sup>133</sup>

Thus, the general tenor of the then prevailing circumstances was that there had been a 'positive' discussion between Reed and Brown about a future joint venture development and in this context the message from Joyce contained in the email pleaded by Sunland is therefore no more than invitational in that it suggests to Sunland an opportunity for it and Reed and Prudentia to work out themselves which party will negotiate with DWF on behalf of the proposed joint venture. In other words, if Sunland wants to take the negotiating seat, then they can come to some arrangement with the future joint venture partner to that effect.<sup>134</sup>

200 We respectfully agree with his Honour. Joyce had been advised by Brown of a 'very positive discussion' with Reed after a conversation the previous day in which, as Brown put it in his witness statement, 'Joyce suggested I should contact Reed if I was interested in a joint venture.' The words of the email must be construed in this context.

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<sup>133</sup> Reasons [76].

<sup>134</sup> His Honour also made an incidental finding as to Joyce's possible intentions. We accept Sunland's submissions that Joyce's subjective intention is not the relevant issue.



201 The words 'if it does proceed', used in the email from Joyce, refer to the proposed joint venture.

202 The words of the email are facilitatory. They do not purport to exclude Sunland from dealing with DWF in the absence of Prudentia. They simply invite further joint dealings.

203 We further accept the submission made on behalf of Joyce:<sup>135</sup>

Sunland's case of deceit and misleading or deceptive conduct against Joyce really boils down to this one email. Although it is not even clear who the 'they' is a reference to<sup>136</sup> it is apparent that the words used do not convey a representation that Prudentia held any 'right' in respect of plot D17 or that DWF was otherwise constrained in selling Plot D17 to Sunland. The email is consistent with Prudentia (or its funding partner, Och-Ziff), rather than Sunland, simply being the party to whom DWF intended to sell Plot D17 - as was its prerogative. The judge found that 'a master developer, such as DWF, might well choose not to negotiate with every person who expressed an interest in a particular piece of land and might generally try to negotiate instead with an interested party, such as Prudentia, if that party was an experienced developer which the master developer wanted in the project'. As the judge found, the email is equally consistent with DWF desiring that there be a single point of contact between it and any joint venture between Sunland and Prudentia/Och-Ziff. In one of his early emails to the Dubai authorities, Brown himself said that he asked Brearley, Joyce and Lee whether they knew about Reed, Prudentia and Och-Ziff and '[a]ll they knew was that there had been discussions at a high level about the plot, and Oxiff [sic] was involved'.

204 The trial judge further addressed the evidence as to Brown's own understanding of the email at the time including the 'clear statement' of 22 January 2009 provided to Dubai prosecutors to which we have already referred:<sup>137</sup>

The evidence indicates that this is, in fact, how Brown read the email at the time he received it. In Brown's email to Austin on 19 August 2007, he confirmed that the discussions he had with Reed on that day were in furtherance of the joint venture on Plot D17. In Brown's email to Sahba Abedian (the Managing Director of Sunland Group Limited) (with Soheil Abedian copied in), the very next day, 20 August 2007, Brown wrote:

'Angus has his foot on the site [emphasis added] behind our Waterfront Plot, and we are negotiating a potential JV with him. We will have a Draft MOU from Freehills in the next 2 days, which we will respond to. The deal would be they would put in the land, Sunland pay the Deposit on the land,

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<sup>135</sup> Joyce's Appeal Submissions [5.16] (citations omitted).

<sup>136</sup> Joyce submitted elsewhere the probability is that 'they' is a reference to Och-Ziff.

<sup>137</sup> Reasons [76] (citations omitted except where noted).

(about AED 12m) and the JV fund the Soft Costs through to Financing or Escrow operation. 50/50 Profit Share, and we get our Fees paid through the job.'

Sunland relied on this email in support of its submission that Reed said to Brown words to the effect that he had a 'hold' on the Plot or that he 'controlled the plot'. In the context of this email, it was submitted against Sunland that the meaning of the idiom to 'put one's foot on' something meant to *lay claim* to it and, as such, Brown's choice of words in this email goes against Sunland. Brown gave evidence in cross-examination, in respect of the 12 September 2007 'put your foot on the plot' email, that he thought that to 'put our foot on the plot to secure it' meant to sign a SPA. However, I accept that the submission that Brown used the phrase in the same way in his 20 August 2007 email to Sahba Abedian is not open to Sunland, given Brown's admission that he knew when he sent this email, that there was no signed SPA in favour of Reed, or the Prudentia parties. Accordingly, it follows in my view that Brown's reference to Reed having his 'foot on the site' on 20 August 2007 must be understood according to the conventional meaning of that idiom, which does not generally connote something in the nature of a legal entitlement.<sup>138</sup> Sunland, in its responsive submissions, emphasised the use of the word 'has' with respect to Angus and his foot having some significance in relation to these idiomatic uses by reference to the difference in expression in this respect in the 'put your foot on it' email. In my view, this is merely a semantic distinction and does not affect the sense conveyed in the 20 August 2007 email, as indicated. Neither do I think Sunland's position is aided in this respect by the reference to another email sent by Brown to Reed on the same day: 'Unfortunately we cannot proceed on a Joint Venture based on the terms outlined in your email. We wish you all the best with this ...'.

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In this respect, the following entry for the word "foot" (noun) appearing in the *Oxford English Dictionary* is noted:

"33. *under foot*: (sometimes written as one word.) a. beneath one's feet; often to *trample or tread under foot (also feet)*, in lit. sense, also *fig.* to oppress, outrage, condemn. *To bring, have under foot*: to bring into, hold in subjection. *To cast under foot*: to ruin.

The expression is, however, clearly used more idiomatically. The closest formal references to similar idiomatic use appear in the following reference works; the first in the *Oxford Dictionary of English Idioms* and the second in *Webster's New World American Idioms Handbook*:

**have (or get) a foot in the door** have (or gain) a first introduction to a profession or organization.

**get one's foot in the door**

to succeed in the first small step toward a larger opportunity or success; often used in a business context. Alludes to a door-to-door salesman putting his foot in the doorway to prevent the door from being closed before he or she can make a sales pitch. ♦ *He's tried three times to meet with the director, but hasn't gotten his foot in the door yet.* ♦ *The only way to get your foot in the door with that company is to know someone who works there.*

Clearly idiomatic expressions must, when used, derive particular meaning from the context of their usage. Nevertheless these "definitions" emphasise a common thread, namely that the use of these and similar expressions do not generally connote any "right" or "entitlement".

205 We respectfully agree that these conclusions accord with the weight of the evidence and support the view that read in context Joyce's email of 16 August 2007 did no more than invite a joint venture proposal from Sunland.

206 If we are incorrect in this conclusion, there is a further substantial issue as to the reliance (if any) of Sunland upon the email. We shall come to this shortly.

*The meeting of 19 August 2007*

207 Prior to the meeting which Brown had arranged with Reed, Brown prepared a series of feasibility calculations estimating the potential yield which could be derived from redevelopment of plot D17. The final such calculation showed a potential profit of 26 per cent.

208 He also sent a number of emails to Reed including one in which he said he would have an offer ready when Reed arrived. Brown's witness statement indicates the meeting took place at Sunland's Dubai office at about noon on 19 August 2007. Reed had flown in that morning. Brown describes the meeting as follows:

Reed told me that he had been to see Nakheel before seeing me.

Reed confirmed that his American partners were Och-Ziff, who were a hedge fund with \$30 billion in investments. He also mentioned he had worked with people, or had an office in Hong Kong (I cannot remember which), who were connected with Och-Ziff in some way. He said he was representing this Group and that he was looking at property investment opportunities in Dubai. He told me that his contact in Hong Kong was 'Zoltan'.

Reed outlined the terms of a JV as he saw it. Reed stated the land price in this area of Waterfront would be as high as AED 175/sqft, but he could obtain a price of AED 135/sqft from Dubai Waterfront. Based on this saving, he wanted a fee of AED 40/sqft multiplied by the total BUA on the site, (which was AED 1,607,052), which would be approximately AED 65M. Reed requested that this uplift be paid as a consultancy fee to Prudentia for services. Reed indicated that a consultancy fee would be more tax effective for Prudentia.

Reed said the fee could be paid either by Sunland paying to have equity in the deal, or Sunland alternatively could contribute the soft costs and land payments to the joint venture up to this value.

Reed said Sunland would need to make payments if purchasers' escrow fund payments were insufficient. In Dubai, purchasers pay an initial deposit into

an escrow account and then make regular instalment payments into that account during construction, with a smaller payment at completion. Sunland would not start construction until it thought it had sold enough units to ensure that there were enough payments in the escrow account to complete construction. He said that if funding was required, then he knew ANZ Bank from Australia could be a good option as he knew that they were aggressively looking to lend development funds.

Reed said his deal with Dubai Waterfront was based on AED 135/sqft on BUA with the following payment terms:

- 5% on execution of the contract;
- 10% at handover (in about 6 months);
- 10% at 6 months after handover;
- 20% at 12 months after handover;
- 20% at 18 months after handover;
- 20% at 24 months after handover;
- 15% at 36 months after handover.

This payment plan was the same one advised by Joyce in the 15 August 2007 phone call that I discuss above.

Reed said to me that his lawyers would draft up a MOU.

I told Reed that Sunland would consider his proposal and discuss it with Soheil, and suggested that we meet again the next day.

Reed presented himself to me as a person whose objective was to identify a partner who was a strong developer that could deliver for his investment group in the Waterfront project.

...

Reed showed me the Nakheel plan for the re-design of Plot D17 at that meeting. It was the same plan that Austin had shown me on 15 August 2007, namely the plan now shown to me [SUN.002.008.0006]. We discussed the shortcomings of the plan and I told him Sunland was working on some ideas to improve it.

There were a number of things he was telling me that tied in with what Joyce had told me. It all added up. He came across as a serious JV partner, looking for a premium on the land. This was not unlike Sunland, which would normally charge a JV partner a fee for Sunland securing a site and producing a concept design which optimised the site yield.<sup>139</sup>

209           Brown also says both Joyce and Reed told him that no payments had been

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<sup>139</sup>           Witness statement of David Scott Brown (6 August 2010) [107]-[116], [118]-[119].

made on the plot to date and payment of five per cent would be made on execution of a SPA. In cross-examination Brown said he did not ask Reed for any documentary evidence of Reed's hold on the land because he knew the land 'was being created'.<sup>140</sup> He also agreed that Sunland was keen to be involved in a joint venture.<sup>141</sup>

210           The SFASOC focuses upon the request Reed made at this meeting for a premium as part of the joint venture proposal.

15       On 19 August 2007, Brown met with Reed at Sunland's Dubai office and during that meeting Reed said to Brown words to the effect that:

15.1   'the price in the area in which Plot D17 is located is as high as AED175 sq/ft';

15.2   'I can obtain a price of AED135 sq/ft from Dubai Waterfront';

15.3   'I want compensation of AED40 sq/ft as part of the terms of a joint venture'; and

15.4   'it would be more tax effective for the compensation to be paid as a fee to Prudentia for consultancy services'.

16       At the meeting on 19 August 2007 referred to in paragraph 15 above:

16.1   Reed told Brown the payment terms on which Reed was acquiring Plot D17;

16.2   the payment terms that Reed told Brown were exactly the same as those that Joyce told Brown on 15 August 2007, as pleaded in paragraph 12.3 above; and

16.3   Reed showed Brown exactly the same draft plan for the re-configuration of the land containing Plot D17 that Austin had shown Brown in their meeting on 15 August 2007, as pleaded in paragraph 11.1 above.<sup>142</sup>

211           The evidence as to what was said at this meeting raises a series of matters relevant to Sunland's case upon reliance but insofar as the case on representation is concerned:

- (a)   there is no allegation or evidence of an assertion by Reed of any legal right to plot D17;

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<sup>140</sup>   Trial transcript, 33.

<sup>141</sup>   Trial transcript, 86.

<sup>142</sup>   SFASOC [15]-[16].

(b) the allegations and evidence as to the request for a premium concern compensation for the difference in price which Reed asserted he could obtain below market price. On its face there is nothing inherently improper in seeking such a fee;

(c) nor does the basis of the request imply a legal right to acquire the land. The premise of the request is simply an asserted bargaining position.

212 Brown's evidence further established that the intention on Sunland's part was if any payment was payable to Prudentia it would come out at the completion of a joint venture development.

213 Following the meeting on 19 August 2007 Brown and Reed exchanged emails about the proposed joint venture. Whilst accepting that a premium of the type sought by Reed might be paid in principle, Sunland put forward its own model of joint venture. Reed rejected this proposal on 20 August 2007:

Firstly thank you for your proposal my intial [sic] comments is that a JV on these terms would hold little appeal as the money would be all be being provided by our side the basic approach I was proposing was that you valued the land as proposed below [in Brown's email] plus the 40 upliift [sic] and that this formed the equity amount for our side and that you put forward an equal amount of equity this covering the soft cost and land purchacse [sic] until the project pre sales reach an acceptable level for funding to be put in place and then if further equity is required beyond this to deliver the project then both parties contribute 50/50.

214 Reed sent a further email to Brown indicating amongst other things that he was talking to another party, but this was not 'his preferred approach' and he would defer any discussions with the other party until after Reed and Brown had met on 21 August 2007.

215 After receipt of Reed's emails, Brown emailed Abedian with the comment that Reed wanted 'us to put in 65m'. The evidence of Brown and Abedian was that they had a discussion about Reed's email and that Abedian's opinion was that the terms proposed by Reed were unacceptable to Sunland because they did not fit the Sunland joint venture model. Brown's evidence was that Abedian 'instructed me to

respond to Prudentia that we could not proceed with the JV and to wish them luck' and that Brown responded to Reed to this effect. Brown sent an email to Reed stating 'unfortunately we cannot proceed on a joint venture based on the terms outlined in your email.' Brown also sent an email to Abedian noting that 'we will need to let Matt [Joyce] know tomorrow'. Reed responded to Brown's email indicating that he still wanted to meet with Brown and adding that 'his clear preference having slept on it is to find an approach that can work with Sunland'. Brown's evidence was that after this email he had a conversation with Reed and during the conversation Reed offered to move towards the Sunland proposal and they discussed 'the high level JV terms'.

216           After a further discussion between Brown and Abedian, Brown sent a further email to Reed stating:

Based on our discussion I can confirm the following JV proposal-

- The Site will be transferred to a SPV comprising a 50/50 Shareholding for each Partner, and a JV Agreement will be signed
- The first Land Instalment payment of 5% Deposit will be paid by Sunland
- All the other conditions of our previous email will stand.
- In the event that our JV Partner fails to fulfil the payment obligations for Land as required by DWF, Sunland has the right to take over the JV and make the other Land Payments
- Under this scenario, the JV would be at an end, and the Partner's shares in the JV would transfer to Sunland, with no Premium payable.
- Soft Costs through to the stage of adequate Presales will be funded equally by both parties

We understand that there are no Transfer Fees applicable to the JV.

If these terms are acceptable, we can meet with you at 10am and show you the Feasibility

At this point I am not in a position to show you our Design Concept ...

217           Brown's evidence was that at this point in the joint venture negotiations Abedian and Brown were prepared to show Reed their preliminary thoughts as to feasibility studies but were not prepared to show him any design drawings because

Brown knew he was talking to other parties.

218 Later that day (20 August 2007) Brown again met Reed at Sunland's Dubai office and they agreed a program for developing the proposed joint venture over the next three to five weeks:

- 137.1 The parties would agree to joint venture headlines and prepare a MOU;
- 137.2 There would be a due diligence period including planning and design discussions with Dubai Waterfront;
- 137.3 Subject to finalising the MOU, Sunland would become the negotiating party with Nakheel;
- 137.4 If Prudentia and Sunland could not agree to a joint venture agreement then Sunland could step into Prudentia's shoes and buy the site at the pre-agreed rate of AED 135/sqft;
- 137.5 The target date for signing a joint venture agreement would be 30 September 2007;
- 137.6 Achieve site handover between 31 January 2008 and 31 March 2008;
- 137.7 Commence construction work within 12 months of site handover.<sup>143</sup>

219 As the trial judge observed:

The evidence that 'Subject to finalising an agreement, Sunland would become the negotiating party with Nakheel' is consistent with the arrangement referred to by Joyce on 16 August 2007 as being one by which Sunland would be authorised to speak to DWF on behalf of the joint venture.<sup>144</sup>

220 Brown also said in his reply witness statement that at this second meeting on 20 August 2007 with Reed, it was agreed Brown would negotiate with Austin on technical planning and design matters, and that Julianne Stringer<sup>145</sup> (then General Counsel of the Dubai branch of Sunland) would negotiate the final terms of the SPA with Brearley (then the Senior Legal Counsel for DWF). Brown said Sunland was to have no role in relation to the terms of the actual purchase and the price as Brown understood that Reed and Prudentia controlled the land and that the price of

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<sup>143</sup> Witness statement of David Scott Brown (6 August 2010) [137].

<sup>144</sup> Reasons [93] (citation removed).

<sup>145</sup> Later, Julianne Clyde-Smith and referred to in the trial judge's reasons by that name.



AED 135 per square foot and the instalment schedule had already been agreed. The trial judge observed:

This evidence is inconsistent with his earlier evidence that Sunland would conduct negotiations with Nakheel and is also inconsistent with his dealings with Brearley and Lee on 12 September where a price of AED 120 per square foot was discussed with respect to Plot D17.<sup>146</sup>

221 After the second meeting on 20 August 2007, Brown sent an email to Sahba Abedian which provided Reed's email details to him and stated in part, 'Angus has foot on the site behind our Waterfront Plot, and we are negotiating a potential JV with him.'

*The draft implementation agreement of 23 August 2007*

222 Sunland next pleads an email from Reed to Brown sent on 23 August 2007:

17 On 23 August 2007, in an email Reed sent to Brown:

17.1 Reed attached a draft document prepared by Freehills solicitors in Melbourne on behalf of Prudentia, entitled 'Implementation Agreement';

17.2 Reed referred to the attached Implementation Agreement and then stated that he 'did read it through last night and think it reflects our understanding';

17.3 The attached Implementation Agreement:

17.3.1 recited in clause 1 'Background' that 'Prudentia has reached agreement with [Dubai Waterfront LLC] to acquire and develop [Plot D17]'; and

17.3.2 provided in clause 3(a) of the operative part that 'Prudentia agrees to introduce Sunland to [Dubai Waterfront LLC] and allow Sunland to negotiate the acquisition of [Plot D17]'; ...<sup>147</sup>

223 In his witness statement Brown said:

In paragraph 1 of the 'Background' the draft agreement [referring to the Implementation Agreement] stated '*Prudentia has reached agreement with the Seller to acquire and develop the Property*'. I understood this to mean that Prudentia had a right to acquire and develop Plot D17, which further

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<sup>146</sup> Reasons [95].

<sup>147</sup> SFASOC [17].

reinforced Joyce, Austin and Reed's comments that Prudentia controlled the plot.<sup>148</sup>

224 When reference is made to the implementation agreement as a whole it contained the following relevant statements (emphasis added):

- Background**
- 1 Prudentia has reached agreement with the Seller to acquire and develop the Property.
  - 2 Sunland has proposed to Prudentia that it could develop the Property into 2 residential towers and other ancillary uses. It is proposed that the residential towers will comprise 71 floors and 45 floors respectively (Development).
  - 3 Sunland has agreed to provide further information regarding the proposed Development subject to the terms of this agreement.
  - 4 This Implementation Agreement records the arrangements agreed between the Parties and serves as a basis for the Parties moving forward in good faith.

...

## 2 General principles

The Parties agree that:

- (a) Prudentia *will allow* Sunland to negotiate to negotiate [sic] the acquisition of the Property;
- (b) the Parties will act reasonably and in good faith in an endeavour to negotiate and agree upon the form of a joint venture agreement in respect to the development of the Property;
- (c) in the event that the parties are unable to negotiate and agree on the form of a joint venture agreement in respect to the development of the Property and Sunland or a Related Party of Sunland enters into a sale and purchase agreement, contract of sale or other form of agreement for the acquisition of an interest in the Property, Sunland has agreed to pay to Prudentia the sum of AED 64,282,080.
- (d) the Covenantor has agreed to guarantee to Prudentia the payment of the consulting fee by Sunland, subject to, and in accordance with, the terms and conditions set out in this agreement.

## 3 Sunland to negotiate acquisition of the Property

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<sup>148</sup> Witness statement of David Scott Brown (6 August 2010) [145].

- (a) Prudentia agrees to introduce Sunland to the Seller and *allow Sunland to negotiate the acquisition of the Property.*
- (b) Prudentia is entitled to receive full details of all relevant information obtained by Sunland in the course of its negotiations with the Seller.
- (c) Sunland must, at its cost, promptly:
  - (1) give Prudentia any report and information reasonably required by Prudentia from time to time; and
  - (2) on becoming aware of any information of importance, forward a copy of it to Prudentia.
- (d) Sunland must, during working hours and on reasonable notice to Sunland, give Prudentia full rights of access to and inspection of all information under Sunland's control relating to the Development.

#### **4 Joint Venture Agreement**

- (a) The Parties must act, and must procure that their lawyers act, reasonably and in good faith in an endeavour to negotiate and agree upon the form of a joint venture or other form of agreement acceptable to the Parties for the development of the Property (Formal Agreement).
- (b) The Formal Agreement must contain those matters referred to in Schedule 2.
- (c) The Parties agree that the precise structure and terms of the Formal Agreement are to be advantageous from a financing corporate governance and asset protection perspective.
- (d) The Parties shall use their best endeavours to execute the Formal Agreement by 30 September 2007.

#### **5 Provision of Information**

Within 5 Business Days of the date of this agreement, Sunland must at its cost provide Prudentia with the following information concerning the Development:

- (a) Sunland's design concept for development of the Property
- (b) a budget of soft costs to enable the Parties to launch the Development;
- (c) a full feasibility for development of the Property;
- (d) a development timeline highlighting key milestones for the Development including dates for achieving desired presale targets, project delivery targets and construction milestones;
- (e) a detailed cash flow analysis for the Development based on Sunland's feasibility;
- (f) a marketing budget and timeline; and

- (g) any other information reasonably requested by Prudentia relating to Sunland's proposal for development of the Property.

## 6 Joint Venture Discussion Group

- (a) A control group will be established as soon as practicable by the Parties and will comprise two representatives of each of Prudentia and Sunland. Representatives may be replaced at the discretion of the nominating Party. Representatives may nominate alternates to attend meetings of Joint Venture Discussion Group at their discretion.
- (b) The Parties acknowledge that the initial members of the Joint Venture Discussion Group are:
- Prudentia representatives: Angus Reed and John Roysmith
- Sunland Representatives: David Brown and [#]
- (c) Quorum for a meeting of Joint Venture Discussion Group shall be the attendance of at least one representative (or alternate) nominated by Prudentia and at least one representative of Sunland.
- (d) The tasks of Joint Venture Discussion Group are to determine the terms and conditions of a joint venture arrangement between Prudentia and Sunland for the development of the Property.

## 7 Payment of Consultancy Fee

- (a) In consideration of Prudentia *permitting* Sunland to negotiate with the Seller for the acquisition of the Property, Sunland agrees that if Sunland or a Related Party of Sunland enters into a sale and purchase agreement, contract of sale or other form of agreement for the acquisition of an interest in the Property with the Seller (**Acquisition Agreement**) and the Parties have not entered into the Formal Agreement, Sunland must, at the election of Prudentia:
- (1) pay to Prudentia the sum of AED 64,282,080; or
- (2) provide Prudentia with a credit note in the sum of AED 64,282,080, on the date that Sunland enters into the Acquisition Agreement as a consultancy fee for services provided by Prudentia to Sunland in introducing Sunland to the Seller and assisting in negotiations between the Seller and Sunland.
- (b) The Covenantor guarantees to Prudentia the payment of the consulting fee by Sunland.

...

## 9 Exclusivity

The Parties agree that, except as expressly contemplated in this agreement, they will not, either alone or with any other entity, participate or be involved in the acquisition or development of the Property.

## 10 Duration of exclusivity and confidentiality obligations

The Parties must observe the obligations of exclusivity and confidentiality expressed in this agreement for 3 years from the date of receipt of the Confidential Information, notwithstanding termination of this agreement.

225            Schedule 2 of the draft agreement (referred to in clause 4 of the operative part set out above) included the following (emphasis added):

**1        Overview**

- (a)    Prudentia will incorporate or acquire a new special purpose company to hold the freehold interest in the Property (LandCo).
- (b)    The Parties will incorporate a new special purpose company to undertake the development of the Property (NewCo).
- (c)    Prudentia and Sunland will each hold a 50% interest in New Co.
- (d)    LandCo will enter into a development agreement with NewCo granting NewCo all development rights over the Property. LandCo would make the land available as security for the land acquisition and construction facilities.
- (e)    Prudentia would be responsible for all land payments due under the sale and purchase agreement with the Seller except for the deposit of AED 10,847,601 which would be payable by Sunland.
- (f)    Prudentia will seek to finance payment of the land payments from third party debt financiers and the cost of finance shall be treated as a joint venture cost.

...

**5        Premium**

Prudentia is to be paid a premium of AED 40 for the land based on a developable area of 1,607,052 square feet.

**6.       Distribution of Profits**

Profit is equally shared, with the distribution of moneys *at Project Completion* as follows-

- (a)    Senior Debt repaid
- (b)    Mezzanine Debt repaid
- (c)    Land *and Premium* repaid
- (d)    Profit Share distributed

226            Sunland submitted that para [1] of the 'Background' recitals to the draft agreement constituted an unambiguous representation that Prudentia had reached a

clear agreement with the seller of plot D17 and that it was an agreement to acquire and develop the property. It further submitted that the provisions of the agreement which referred to Prudentia 'allowing' or 'permitting' Sunland to negotiate reinforced the representation.

227           The trial judge rejected this submission because other provisions of the draft made it clear that the agreement was merely the transfer of something in the nature of an opportunity to negotiate with DWF in Prudentia's shoes. He did so, secondly, because subsequent events, communications and the evidence as to Sunland's understanding of the nature of the position of the Prudentia parties with respect to plot D17 supported the proposition that there was no misrepresentation inherent in the draft or, to the extent that there may have been, there was no reliance upon it on Sunland's part.<sup>149</sup>

228           Clauses 2, 3 and 7 of the draft implementation agreement make clear in our view that the parties understood the terms of the acquisition of the property and any formal joint venture agreement had yet to be negotiated. If no joint venture agreement was entered, Sunland could buy the property for itself alone and the consultancy fee which was contemplated in those circumstances was payable 'for services provided by Prudentia to Sunland *in introducing Sunland to the seller and assisting in negotiations between the seller and Sunland.*' Alternatively, if the land could be purchased and a joint venture agreement was concluded, Prudentia was to receive a different amount (called a 'premium') out of the joint venture profits at the conclusion of the development. The agreement as a whole demonstrates that the parties understood that Prudentia had not reached a final agreement with DWF to acquire and develop plot D17.

229           As we have said, one of the points of agreement between Reed and Brown on 20 August 2007 was that: 'Subject to finalising the MOU, Sunland would become the negotiating party with Nakheel.' The implementation agreement directly reflected

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<sup>149</sup>       Reasons [99].

this agreement in principle. In cross-examination Brown maintained that his understanding was that Reed remained in charge of negotiations with DWF in respect of price but Sunland was intended to be in charge of negotiations in terms of legal terminology and technical and design issues.<sup>150</sup> This is not a distinction drawn either in the points of agreement reached on 20 August 2007 or in the draft agreement.

230 The trial judge concluded:<sup>151</sup>

The Sunland submissions with respect to paragraph 1 of the recitals, or background, to the draft Implementation Agreement or MOU or their final executed emanations in the form of the Prudentia agreement or the Hanley agreement are inconsistent with the express and unambiguous operative terms of the agreement and also inconsistent with the admissible surrounding circumstances known and understood by Brown and Abedian on 30 August 2007 when Brown returned the draft Implementation Agreement the MOU with marked up changes to Reed; when Sunland procured Prudentia's agreement to stand in the shoes of both Prudentia and Sunland to secure Plot D17 for their proposed joint venture; and in the particular circumstances leading to the offer and acceptance of a "walk away" fee which was proposed, unilaterally, by Abedian in terms which cut across entirely and unexpectedly the then agreed progress of the parties' [sic] towards a joint venture. In any event, the significance which Sunland sought to accord to paragraph 1 of the recitals is inconsistent with longstanding authority which is to the effect that if there is any ambiguity in a recital to an agreement and its operative clauses are clear and unambiguous, then the latter, the operative clauses, prevail in the construction of the agreement or instrument.<sup>152</sup>

231 In our view, it is sufficient to say that the statements made in para [1] of the

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<sup>150</sup> Trial transcript, 100.

<sup>151</sup> Reasons [106] (citation in original).

<sup>152</sup> *O'Loughlin and Ors v Mount Isa and Anor* (1998) 71 SASR 206 and *Chacmol Holdings Pty Ltd v Handberg* [2005] FCAFC 40 where Tamberlin J, at [44] quoted with approval the judgment of Lander J, at 218-219 in *O'Loughlin*; North and Dowsett JJ concurring. See also *Franklands Pty Ltd v Metcash Trading Limited* [2009] NSWCA 407 at [379] – [390] per Campbell JA with whom Allsop P at [29] and see Giles JA at [49], [63]. *Norton on Deeds* (2<sup>nd</sup> ed by Robert F. Norton QC, Sweet and Maxwell, London 1928) states the principle very clearly (at p 197, with examples from the cases, pp 197-201):

If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

'If the recitals are ambiguous and the operative part is clear, the operative part must prevail': *per* Lord Esher, M.R., *Ex p. Dawes* (1886), 17 Q.B.D. 275, at p. 286.

It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the operative part will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals.

'Background' recitals in the draft agreement must be read in the context of the further provisions of the draft agreement. For the reasons we have explained, when the document is read as a whole, we do not accept that it could be understood to represent that Prudentia had finalised an agreement to acquire and develop plot D17.

*The telephone conversation of 29 August 2007*

232 Sunland next alleges as follows:

18 On 29 August 2007, Joyce telephoned Brown and during that telephone conversation said to Brown words to the effect that 'Sunland should come to an agreement with Reed as soon as possible because there were other buyers around including Russians who might offer Reed AED220 sq/ft or more for the land'.<sup>153</sup>

233 In his witness statement, Brown says:

152 Joyce said to me that Sunland should come to agreement with Reed as soon as possible at a premium of AED 40/sqft for Plot D17 as there were other buyers around who might offer Reed AED 220/sqft or more for the land. Joyce mentioned the name of a group called 'Patalli', who he said were a Russian group, and said words to the effect of 'they have been pressing Dubai Waterfront for Reed / Prudentia's names. They only need to go to the sales department and will get his name and talk to him'. This indicated to me that the sales team were keen to have an SPA finalised and signed on this plot and if they could introduce one of the Russian buyers to Reed / Prudentia who could be Reed / Prudentia's JV partner the transaction could be concluded faster. My concern was that this could make Reed keener to work with a group like Patalli rather than Sunland as he may be able to obtain a higher premium from that group.

153 Joyce said to me that these groups were not proven developers and are probably speculators but Reed might increase the price if Sunland did not lock in the premium quickly.<sup>154</sup>

234 The trial judge concluded:<sup>155</sup>

In any event, even on Brown's account of the conversation on 29 August 2007, the words said to have been spoken by Joyce do not convey a representation that Reed or Prudentia had some legal or other right to Plot D17. The words

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<sup>153</sup> SFASOC [18].

<sup>154</sup> Witness statement of David Scott Brown (6 August 2010) [152]-[153].

<sup>155</sup> Reasons [113], [115] (citations omitted except where noted).



attributed to Joyce are wholly consistent with Reed simply being in negotiations with DWF in respect of plot D17. As was submitted on behalf of Joyce, there is no doubt, as Sunland knew from experience, that there were a huge number of property speculators, as opposed to the proven developers Joyce was most interested in getting involved in the Waterfront project, doing business in Dubai who might be interested in offering DWF larger sums of money for Plot D17. According to Brown, Lee and Joyce were keen to get proven developers in to actually build on the land in Precinct D, rather than perpetuate the speculative cycle of plot "flipping".<sup>156</sup> Accordingly, it was submitted on behalf of Joyce that the statements attributed by Sunland to Joyce were neither misleading nor deceptive. Indeed, it was submitted, they were exactly what one might have expected from someone of Joyce's seniority. On the basis of these submissions and the evidence already considered in relation to the Plot D17 transaction, I am of the view that this is entirely correct, both in terms of Joyce's statements being neither misleading nor deceptive and also that, in the circumstances, they were the sort of statements one would have expected from a senior officer of DWF, such as Joyce. Finally, I also accept that, in any event, whatever transpired during this conversation, it was entirely superseded by the advice given to Brown in his telephone conversation with Lee and Brearley on 12 September 2007 in which they told Brown that Sunland and Prudentia had better "put their foot on" Plot D17 to secure it. For reasons indicated in more detail elsewhere, I regard that conversation and the emails and other events which flowed from that as making it absolutely clear, if it was not already clear, that no representations were being made by Joyce, Reed or the Prudentia parties which were misleading or deceptive or, in terms of the tort of deceit, fraudulent.

...

In my opinion, the Sunland evidence in relation to this 29 August 2007 conversation does not assist Sunland's case. It is equivocal in critical respects and, further, is, in my view, quite consistent with Joyce simply urging Sunland to "get on with" its joint venture arrangements in relation to Plot D17. ...

235 We respectfully agree with this last conclusion.

*The rolled-up pleading as to representations*

236 Sunland alleges that the statements pleaded by it to which we have already referred 'amounted to representations':

19 The premises pleaded above amounted to representations ('the Representations') made by Joyce (namely paragraphs 9, 12, 14 and 18) and also made by Reed (namely paragraphs 13, 15, 16 and 17) that:

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<sup>156</sup> A term which described the ongoing process of speculation on land in Dubai; as distinct from its actual development.

- 19.1 Reed or Prudentia or both of them had a right to acquire Plot D17 or the land on which Plot D17 was located;
- 19.2 Dubai Waterfront could not, without the agreement of Reed or Prudentia or both of them, sell Plot D17 or the land on which Plot D17 was located, or any rights in connection with the development thereof, to Sunland; and
- 19.3 if Sunland wished to purchase Plot D17 or the land on which Plot D17 was located, or acquire any rights in connection with the development of Plot D17 it had to negotiate and make a contract with Reed or Prudentia or both of them.<sup>157</sup>

237 We have already explained why the trial judge was correct in treating:

- (a) the first pleaded representation as the assertion of a representation as to a legally enforceable (and transferable) right to acquire plot D17; and
- (b) the three representations as a rolled-up whole, each building logically from the preceding proposition and all dependent upon the first.

238 Remembering that the court's task was to evaluate what a reasonable person in the position of Brown and Abedian (for Sunland) would have understood the relevant statements to mean, assessed in the light of all the surrounding circumstances, in our view the trial judge was correct to conclude that:

- (a) none of the oral or email statements of Joyce or Reed amounted to representations that Reed or Prudentia had a right to acquire plot D17. In particular the weight of the evidence supported the following conclusions:
  - an initial statement by Joyce on 15 August 2007 that Reed was the 'contact for' plot D17 as alleged in the SFASOC would not amount to a statement Reed or Prudentia had a right to acquire D17;
  - Brown's evidence was that he was aware from the outset that the design was not complete and no SPA had been signed;
  - Brown's evidence was that Joyce referred to Reed specifically in the

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<sup>157</sup> SFASOC [19].

context of a potential joint venture;

- the evidence as to what Reed first said to Brown when Brown rang him on 16 August 2007 does not support the conclusion Reed conveyed to Brown that Prudentia or Reed had a right to acquire plot D17;
  - the email from Joyce of 16 August 2007 was sent in the mutually understood context of a proposed joint venture and did not impliedly represent Reed or Prudentia held a right to acquire plot D17;
  - the discussion between Reed and Brown at Reed's office on 19 August 2007 did not involve or amount to an assertion on the part of Reed or Prudentia of a right to acquire plot D17.
- (b) para [1] of the 'Background' recitals to the draft implementation agreement coupled with cl 3(a) did not amount to a representation of a right to acquire plot D17 when read in the context of the document as a whole or in the light of the parties' clear mutual understanding that no agreement for acquisition of the land had in fact been finalised.
- (c) none of the statements relied upon amounted to representations that DWF could not without the agreement of Reed or Prudentia sell the land proposed to be comprised in D17. In particular no statement was made by Reed remotely suggesting this. No oral statement was made by Joyce to this effect and the email of 16 August 2007 when understood in context does not represent this.
- (d) no statements were made by either Reed or Joyce to the effect that if Sunland wished to purchase plot D17 or the land on which plot D17 was located, or acquire any rights in connection with the development of plot D17 it had to negotiate and make a contract with Reed or

Prudentia or both of them.

*The further September 2007 negotiations*

239 Sunland next alleges that two officers of DWF (not joined as defendants) told Brown on 12 September 2007 that plot D17 might be sold on the open market.

24 On 12 September 2007, Marcus Lee ('Lee'), the Project Control Group Director at Dubai Waterfront, and Anthony Brearley ('Brearley'), the Senior Legal Counsel at Dubai Waterfront made a joint telephone call to Brown during the course of which:

24.1 one or both of them (Brown cannot now recall which) said to Brown words to the effect that they had attended a meeting on the evening of Tuesday 11 September 2007 with Dubai Waterfront's marketing department;

24.2 one or both of them (Brown cannot now recall which) said to Brown words to the effect that 'I am concerned that the marketing people will try to sell Plot D17 and we will have no control over this'; and

24.3 one or both of them (Brown cannot now recall which) said to Brown words to the effect that 'you should immediately put your foot on the plot'.<sup>158</sup>

240 In his witness statement Brown says:

On 12 September 2007, I received a telephone call from Brearley and Lee at Waterfront. My file notes of this call are contained at page '0122' of my Notebook and at page '0055' of the document now shown to me. In my typed notes, I say that this was a meeting. After further consideration, I believe that it was a telephone call.

Brearley and Lee said to me that it would be a lot easier if Och-Ziff did not want to proceed with the site and Sunland could buy the site itself for AED 120/sqft.

I understood, from this discussion, that Dubai Waterfront still required Sunland to deal with Reed, Prudentia and Och-Ziff prior to having any rights to the plot. By Brearley and Lee stating that it would be easier if Och-Ziff did not want to proceed with the site, I understood that this meant Och-Ziff or Prudentia had control over the property.

During this telephone call, either Brearley or Lee said to me:

That they had attended a meeting on the evening of 11 September 2007 with the marketing department;

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SFASOC [24].

That they had concerns that the marketing people will try and sell Plot D17 and that they would have no control over it;

You should immediately "put your foot on the plot".

After this telephone call, on the same day, I sent an email to Reed, a copy of which is shown to me. This email said:

Angus,

Looking forward to receiving the MOU tomorrow, but heard some news today which I felt I needed to pass on to you.

I received a call from Marcus Lee (Matt Joyce's No. 2) and Anthony Brearley (the DWF Lawyer) regarding Plot D-17.

They were at a Marketing meeting on Tuesday night and the rearrangement of the Plot was shown and discussed.

Marcus and Anthony are now concerned that the Marketing people are likely to try to sell the Plot, and they will have no control over this.

They suggest we immediately "put our foot on the Plot" to secure it.

To do this, we need to sign a Sale and Purchase Agreement (SPA)

This Agreement will spell out the Price and Payment Plan, which you have advised me is around 130-135AED/Ft2 over 36 months, with 5% Deposit.

Can I recommend a way to proceed with this as follows-

- \* Sunland meet immediately with DWF lawyers to draft the SPA
- \* The Purchaser can be in the name of Sunland JV Development (BVI) Ltd which we have in place already.
- \* We can agree with Nakheel that the plot will be transferred to a Newco when it is established, for a fee of 5,000 AED.
- \* This can occur within 24 hours, and secure the Plot at the terms and Conditions you have already agreed.
- \* We will sign the MOU which will note the agreement to transfer the Land to the newco when it is ready.

If you have an alternative (quick) solution which is better, please let me know.

A day in Dubai is like 6 months anywhere else.

As is apparent from this email, I was considering a way for Sunland to secure the property. I believed that if Sunland did not move quickly, there was a risk that the opportunity could be lost. Prudentia could be introduced to someone else by the Nakheel sales and marketing department, who could potentially pay Prudentia a higher premium. I thought that this could be someone like the Patalli group that Joyce had mentioned to me in our conversation on 29 August 2007. I also knew that Prudentia was negotiating with other potential investors like Omniyat. I also did not know how long Reed's control over the

property would last for, as I did not know the basis for it, but I did know that he had not signed an SPA. At our meeting on 20 August 2007, Reed had indicated a strong desire that our negotiations be concluded by late September 2007. What Brearley and Lee had said to me could also have been consistent with Reed losing his control of D17 some time not long after the end of September 2007, at which point the Nakheel sales and marketing department might have been able to arrange for the property to be sold by Nakheel directly to someone else.<sup>159</sup>

241 The best evidence of what was said to Brown by Lee and Brearley is the email quoted above which he first forwarded in draft form to Julianne Stringer, in her capacity as General Counsel of Sunland's Dubai branch, on the day of the phone call.

242 As the trial judge found, the plain meaning of that email was that Brown was advised that following finalisation of the redesign of the plot the 'marketing people' at DWF might sell the plot and neither those in Joyce's office nor Brearley would have any control over this.

243 The suggestion that 'we immediately put our foot on the plot' to secure it is only consistent with the view that Prudentia and Sunland had not at that point secured the plot. The statement that it would be necessary to sign a SPA to do this is only consistent with the absence of any existing SPA or other entitlement to purchase the land on the part of Prudentia. The trial judge summarised the effect of Brown's oral evidence concerning the 'put your foot on it' email as follows:

In the course of cross-examination, it was suggested to Brown that if he were to write to Reed saying '[t]hey suggest we immediately put our foot on the plot to secure it, it follows, doesn't it, that at that time you don't have your foot on the plot'. Brown would not accept this obvious interpretation of the email. Brown also said that '[w]e were taking advice from Marcus and Anthony about what to do', but never asked the nature of the Prudentia or Reed 'hold' on Plot D17. Brown also said that he was 'not sure what DWF told the marketing people about Reed's rights to the plot', but sought, unjustifiably in my view, to implicate Joyce in these events:

there was a conversation with Joyce at the same time, who also referred to the marketing people and said the price could affect the price to Sunland and that all they had to do was to find Reed and potentially introduce somebody else who could pay more. That's in my notes.

Brown was challenged on that evidence:

What, a conversation with Mr Joyce, did you say?---Yes, it's in my notebook.

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<sup>159</sup> Witness statement of David Scott Brown (6 August 2010) [180]-[185].

What date?---I don't have it in front of me.

Don't you recall this conversation? It would be quite important, I suggest?---I do recall the conversation.

You don't recall when it occurred?---Around the same time.

Do you mean a conversation in September 2007?---Yes.

You've got your witness statement there, haven't you?---No.

Could the witness be shown his witness statements, please. September 2007, in your witness statements, begins around paragraph 165. Do you see that?---Yes.

I don't see in your witness statement any conversation you depose to with Mr Joyce in September 2007. Can you find one, Mr Brown?---Well, if I can direct you to 183 and 185.

Yes?---183 refers to the conversation you're talking about.

Yes?---185 refers to a conversation I had with Joyce, which was actually earlier, the end of August, and he said, 'Prudentia could be introduced to someone else by the Nakheel sales and marketing department who could potentially pay Prudentia a higher premium. I thought that this could be someone like the Patalli group that Joyce mentioned to me in the conversation on 29 August.'

Yes, but that conversation with Mr Joyce that you depose to occurred on 29 August; correct?---Correct.

This is a discussion on 13 September, which is two weeks later?---Yes, but the tone of the conversations was remarkably similar and if you see the diary note or notebook note, you'll see there is more information actually there ...

Brown was asked further questions in cross-examination in relation to Reed's 'entitlement' to Plot D17 in light of the 'put your foot on it' email:

That's not quite my question. If the marketing people could sell the plot, what sort of entitlement to the plot - when you were told this - did you believe Reed or Prudentia had? --- I believed Reed and Prudentia still had an agreement with Nakheel on the plot and that the marketing people perhaps weren't in the loop on that.

Again Brown affirmed that he did not ask Lee or Brearley as to the nature of the 'hold' of Prudentia or Reed Plot D17:

Because of the background? This didn't cause you any concern? You said it did cause you concern. So even though it caused you concern, you didn't ask Lee or Brearley, who you dealt with, what the nature of the hold on the plot was?---No, we didn't.

When you wrote 'Put our foot on the plot to secure it,' what did you mean by the words 'secure it'?---To sign a sale and purchase agreement.

I couldn't hear that?---To sign a sale and purchase agreement.

And why did you need to do that?---Because that was the final event in owning a plot of land.

To tell someone you've got to put your foot on the block to secure it, I suggest to you, Mr Brown, is words from a state of mind that knows that the block is not secured until you put your foot on it?—No, what they were trying to do was to take it to the next step ---

No, just answer the question please, Mr Brown. It's a pretty straightforward question. To say that in the terms you did, to say it needs to be secured, comes from a person that was of the state of mind that knew until you put your foot on it, it wasn't secure?—No, I don't agree. That was an arrangement between Prudentia and Nakheel on this point.<sup>160</sup>

244       The trial judge also referred to Sunland's submission that the reference to securing the plot 'at the terms and conditions you have already agreed' demonstrated a continuing belief on Brown's part that Prudentia had already acquired the plot. In our view, the trial judge was correct to reject this submission as contrary to the plain tenor of the email, as a whole, that the plot had not been secured and that critical terms of the agreement such as price had not been finalised. The dot points contained in the email set out what might be done in order to secure the plot.

245       On 13 September 2007 Brown received an email from Reed responding to Brown's email of 12 September 2007:

On 13 September 2007, I received an email from Reed that responded to my email of 12 September 2007. A copy of that email is now shown to me. This email said:

Hi Dave,

I agree with your approach go for it

I have attached a marked up document for your review which I feel covers of all the issue if you can review this and if as I hope it covers all the issues lets sign it today

I will facilitate communication of this agreement with our Indian partner and have him contact his people in Dubai on the matter please confirm your agreement on above and let's move forward.<sup>161</sup>

246       Later that day Brown sent an email to Lee and Brearley.

We have had a number of discussions with Angus Reed over the last 2 days, and have reached agreement on the terms for a Joint Venture MOU.

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<sup>160</sup>       Reasons [129]-[130] (citations omitted).

<sup>161</sup>       Witness statement of David Scott Brown (6 August 2010) [186].



Angus has agreed in principle that Sunland can enter into a Sale and Purchase Agreement with DWF using 'Sunland JV Development (BVI) Ltd', and that we will transfer the land to the Joint Venture Company at a later date. Julianne can provide you with the documents on the Sunland Entity now.

Angus has prepared a detailed advice document for you Anthony, which he will forward in the next day or so. Please prepare the SPA Documents, in anticipation of receiving his confirmation ...

247 Lee responded (copying in Joyce and Brearley):

Thanks for the update Dave. Good news. I'll speak to anthony to see what he needs. I think he already has the contract prepared

Should be able to go through sunday am [sic]

248 Sunland relied on Brown's email of 13 September 2007 as demonstrating Brown still believed Reed's consent was necessary for Sunland to enter into an SPA. The trial judge rejected this submission:

The further email from Brown to Lee dated 13 September 2007 upon which the plaintiffs' [sic] rely draws attention to the misconceptions attending Sunland's case. The words 'in anticipation of receiving his confirmation' which appear in the 13 September 2007 email refer to confirmation from Reed that Sunland may enter into a SPA with DWF. I accept that whilst this might support a belief by Brown that Reed or Prudentia had some kind of non-legal influence with respect to Plot D17, this falls far short of any basis for believing that Reed or Prudentia had any legal or other right with respect to the land; hence has nothing to do with Sunland's case in this proceeding.<sup>162</sup>

249 Ultimately his Honour concluded:<sup>163</sup>

In my opinion, the position argued for by Sunland is, in the context of the evidence in relation to the 12 September 2007 conversation between Brown and Lee and Brearley and the 'put your foot on it' email, simply implausible in all the circumstances. Additionally, the text of the email is Brown's and it is entirely possible that the latter part of the second [last] dot point is either his assumption or a general reference to the previous discussions he had had in relation to the likely price per square foot that DWF would accept for Plot D17. There is no evidence that Lee or Brearley used these words and, even if they did, this explanation for these words still holds good. As to the 13 September 2007 email from Brown to Reed and the email to Mr David Sinn (in his capacity as a partner of Freehills, the Australian legal advisers to Prudentia) ('Sinn') of the same date, I am of the view that, in the circumstances of the communications between the parties at that time, they are consistent with Reed or Prudentia having agreed that, in the context of proposed joint venture arrangements, Sunland would take over negotiations

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<sup>162</sup> Reasons [133] (citations omitted).

<sup>163</sup> Reasons [136] (citation in original).

for a SPA with DWF and that this was in train.<sup>164</sup>

250 We respectfully agree.

251 His Honour further observed that the evidence demonstrated no basis upon which Reed would have had any reluctance to enquire of Lee and Brearley what was the nature of Sunland's 'hold' if any upon plot D17.<sup>165</sup>

252 His Honour rejected Brown's evidence as to his understanding of the 'put your foot on it' email.

In any event, returning to the evidence, Brown's evidence as contained in his 6 August 2010 witness statement, was that as a result of the 'put your foot on it' email, Brown thought 'Prudentia could be introduced to someone else by the Nakheel sales and marketing department, who could potentially pay Prudentia a higher premium'. Presumably, this was an allusion to the practice in Dubai of entities purchasing plots of land from another entity which had entered into a SPA with the master developer for that plot by paying a premium to the then existing purchaser and obtaining a SPA themselves, having obtained the consent and agreement from the master developer, which would be a party to the new SPA. The previous SPA would, in the course of this transaction, be cancelled and released by agreement with the then existing purchaser and the master developer. Brown was cross-examined in relation to his written statement:

My point is the inconsistency, Mr Brown. In your oral evidence in response to questions from Mr Rush you said, 'Oh, well, the email might reflect the fact that the marketing people weren't in the loop.' Do you understand that answer?---Yes.

Whereas in paragraph 185 [of your witness statement], you said the belief you had was that they could introduce Prudentia to another buyer. They're different answers, aren't they?---They are different scenarios, yes."

Brown also gave evidence in response to my questions on this issue:

HIS HONOUR: Mr Brown, it says, 'I suggest we immediately put our foot on the plot to secure it.' We've debated what you think that means. But in the preceding sentence, 'Marcus and Anthony are now concerned that the marketing people are likely to try to sell the plot and they will have no control over this.' On a plain reading, it seems to indicate that that plot is up for grabs at that stage by whoever comes along and negotiates with the marketing people. Can you explain to me why that is not a fair reading of that document and if there is some control over the plot that you assert, explain to me exactly what it is?---I know it sounds like that, your Honour, but I mean at the time I felt that the marketing people just weren't in the loop

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<sup>164</sup> The same applies with respect to the development of the draft Implementation Agreement, the MOU, and the 16 September 2007 conversation between Brown and Reed for the reasons discussed elsewhere (see *Plaintiffs' Address* (1 February 2012), paragraphs 156 to 160.

<sup>165</sup> Reasons [137], [152].

on what arrangement Prudentia had.

What control was there over the plot?---There was clearly an arrangement between Prudentia and DWF because we were told by a number of different people.

That is the explanation for the control, is it?---Yes, yes. I mean, Austin started by telling us they had a hold; Joyce told us he was the contact for that plot; later said to us an email that we had to reach agreement with Prudentia before we could deal with Nakheel; the Prudentia documents all referred to that they had reached agreement with the master developer to acquire and develop the plot; and then it was confirmed by Brearley as well. So there was a series of events that linked all this together for us.

Are you saying the hold is contractual?---I don't know what the hold was. We weren't told what type of hold it was, but there was a hold.

So you don't know the nature of the hold and you don't know whether it's contractual?---No, but I mean we're not talking about real estate activities in Australia, we're talking about real estate activities in Dubai, which are quite different.

I appreciate that, but I would have thought there is still an explanation on the basis of accepted legal concepts?---I think our impression was we were talking to very high level in the government, we'd been given quite clear, distinct information about it, and we relied on that and that's the basis for our actions.

Brown added that he did not ask anyone about the nature of the entitlement that Prudentia or Reed had over Plot D17 because '[w]e were already told they controlled the plot; we didn't need to ask'. In view of the contents of the 'put your foot on the plot' email and Brown's statement in that email that 'we need to sign a Sale of Purchase Agreement (SPA)', and for the reasons already expressed, one would have to be very sceptical of this evidence – in fact, so sceptical as to regard it as somewhere between an attempt to rationalise these events *ex post facto* in support of Sunland's case and a fabrication, an untruth. On the basis of these and other inconsistencies and contradictions in Brown's evidence, and with other evidence (documentary and otherwise), Brown cannot, in my view, be regarded as a reliable or truthful witness with respect to critical matters. Additionally, it is clear that, at various times, Brown's personal interests (including the fear of remaining the subject of investigation for bribery by the Dubai authorities), together with his and Sunland's commercial interests, coloured his statements and communications at various times. This view, both generally and in relation to these events, is reinforced by the further evidence of Brown and Abedian to which I now turn; and also having regard to the lack of any evidence that Clyde-Smith was at all surprised by the 'put your foot on it' email or Brown's inclusion of the comment as to the need to sign a SPA.<sup>166</sup>

253 His Honour also rejected Abedian's evidence in this regard.<sup>167</sup>

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<sup>166</sup> Reasons [138] (citations omitted).

<sup>167</sup> Reasons [139]-[142].

Moreover, as was put to Abedian in cross-examination, the terms of the 'put your foot on it' email are plainly inconsistent with the existence of a reservation agreement.<sup>168</sup> Brown's evidence was that he received the 'go for it' email from Reed on 13 September 2007 after they had had a telephone discussion during which Reed said 'I think I can get the property more cheaply than 135'.<sup>169</sup> Brown agreed he knew that at this point no fixed price had been negotiated by Och-Ziff or Prudentia. He also agreed that at this time his impression was that the land could be obtained more cheaply.<sup>170</sup> On 13 September 2007 Brown sent an email to Reed enclosing a further draft of the implementation agreement which included as a key point a 'put option', namely a provision for Sunland to transfer its shares in the joint venture to Prudentia in the event that agreement could not be reached on the final joint venture terms and a further provision for Prudentia to repay Sunland with the initial deposit.

Brown received a further email from David Sinn (of Freehills, Prudentia's Australian lawyers) on 13 September 2007, copied also to Reed, advising that the revised implementation agreement terms 'appear acceptable' and seeking confirmation that the implementation agreement 'is now in a form acceptable to Sunland'. On 14 September 2007 Brown sent an email to Sinn noting that 'we have been through the SPA process already with DWF (Nakheel), their suite of documents is well known to us, and we expect the process on this plot to be quite straightforward.' Brown describes the usual process in his witness statement as follows:

A Sale and Purchase Agreement (SPA) is the form of land purchase contract commonly used when buying from a master developer. The SPA sets out the land area, the Built up Area (BUA) and the land price, which is usually calculated as a UAE Dirham rate (AED) multiplied by the BUA. All of the SPAs that I have seen set out payment plans over a number of years.

In Dubai, the price of land is usually based on the square footage price of BUA, which means the price is calculated on the size of the building you can build, not on the size of the land. Normally the BUA on each plot is fixed by the Master Developer as it relates directly to the demand on infrastructure

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<sup>168</sup> Reasons [144].

<sup>169</sup> Trial transcript, 267.

<sup>170</sup> Trial transcript, 268.

services required in a development precinct. The Master Developer engages consultants who design the utility services (power, water, sewer) based on the aggregate BUA of all the plots in the Master Plan.<sup>171</sup>

256 As his Honour found,<sup>172</sup> Brown's knowledge of the SPA process reinforces the view that he understood that neither Prudentia nor Reed had any enforceable right or interest in plot D17 at any relevant time. On 15 September 2007 Brown received an email from Sinn that set out a response to the 'put option' proposal:

Further to my email last night, I have received comments from our American partners and the board members of Prudentia and the revised draft. As you are aware the put option was only inserted on Thursday and was not previously proposed.

As you are aware it was originally proposed that Prudentia and Sunland would enter into the MOU, use best endeavours to negotiate a JV agreement and then finalise an agreement with the Master Developer for the acquisition of the Property.

As the programme has now been accelerated and it is proposed that Sunland will enter into an agreement with the Master Developer without Prudentia having an interest, our American partners are concerned about Sunland's ability to put the property back to Prudentia in its absolute discretion when Prudentia has not been provided with your feasibility and plans for the development.

Accordingly, I have been instructed that Prudentia can only accept the put option on the basis it has received Sunland's feasibility and other information and has confirmed that it is prepared to proceed on the basis of this information. Attached is a revised draft reflecting the proposed wording for your review and comments.

257 Brown accepted that this was not an unreasonable request.<sup>173</sup>

258 Sunland next pleads elements of continuing negotiations between Brown and Reed and collateral negotiations between Brown and Lee of DWF:

25 In reliance on the Representations and on the telephone conversation pleaded in paragraph 24 above [ie 12 September 2007], Brown proceeded to negotiate with Reed whereby with the consent of Prudentia, an entity related to Sunland would proceed to an expedited purchase of Plot D17 from Dubai Waterfront, and hold the land pending the agreement of joint venture terms between Sunland (or an entity related to Sunland) and Prudentia.

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<sup>171</sup> Witness statement of David Scott Brown (6 August 2010) [20]-[21].

<sup>172</sup> Reasons [170].

<sup>173</sup> Trial transcript, 163.

- 26 On 14 September 2007, Sunland (by email sent from its General Counsel Julianne Stringer to Joyce, Reed and Brearley) informed Dubai Waterfront, Prudentia, Joyce and Reed that the legal entity that would acquire Plot D17 would be SWB.
- 27 On 16 September 2007, Brown telephoned Reed and in the course of that telephone conversation:
- 27.1 Brown said words to the effect that 'due to our inability to agree terms and the fact that Dubai Waterfront wants an agreement signed, Sunland offers to purchase Prudentia's rights to Plot D17 for a flat fee of AED20 million'; and
- 27.2 Reed replied to Brown's said offer with words to the effect that 'I will talk to Nakheel and attempt to negotiate the land price down from AED 135 sq/ft, and if I can, any benefit will be a "land uplift fee" that must be paid to Prudentia in addition to the AED20 million flat fee'.
- 28 On or about 17 September 2007, Reed telephoned Brown and in the course of that telephone conversation said words to the effect that 'I succeeded in negotiating a reduction of 15 dirhams per square foot in the price for Plot D17'.
- 29 On 18 September 2007, Brown (on behalf of Sunland and SWB) met with Lee and Brearley (on behalf of Dubai Waterfront) and relying on the Representations and the matters pleaded in paragraphs 27 and 28 above, made an agreement that:
- 29.1 if Sunland or SWB agreed with Prudentia to pay Prudentia a fee of AED 20 million plus 15 dirhams per square foot of BUA in return for Prudentia permitting SWB to acquire Plot D17 from Dubai Waterfront at AED120 sq/ft; and
- 29.2 if SWB agreed to acquire Plot D17 from Dubai Waterfront at AED120 sq/ft; then
- 29.3 Dubai Waterfront would compensate SWB for the 15 dirhams per square foot payment to Prudentia (being approximately AED24 million), by permitting SWB to construct an additional 200,881.5 square feet of BUA on Plot D17 at a purchase price of AED120 sq/ft (being approximately AED24 million), with payment of the said purchase price being waived by Dubai Waterfront if SWB completed construction of its development on Plot D17 within 4 years of the handover date for Plot D17.<sup>174</sup>

259 It can be seen on the face of the pleading that:

- it was plain that the price payable to DWF for the land had not been finalised at this point in time;

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<sup>174</sup>

SFASOC [25]-[29].

- both Reed and Brown negotiated with DWF as to the pricing arrangements potentially available to the joint venture partners; and
- Brown negotiated with DWF as to additional development rights if the land were purchased by Sunland in conjunction with a collateral agreement to pay Prudentia a fee.

*16 September to 18 September 2007*

260 On 16 September 2007 Brown forwarded Sinn's email of 15 September 2007 to Stringer and said:

The proposed changes are not acceptable as they require Sunland to pay AED 72m if Prudentia decide not to proceed.

To avoid this requirement, we must have them in from the start.

This requires a Purchase Entity as a JV.

Please review this option and advise the quickest way to proceed.

261 In his witness statement, Brown says further:

At this point it was getting very difficult to get a deal with Prudentia as we seemed too far apart in our respective positions.

In a conversation on 16 September 2007, Soheil suggested to me that perhaps Sunland offer an AED 20M premium to Prudentia to obtain the rights to Plot D17. It is not unusual for a buyer to pay a premium to a seller in Dubai in order to secure a site from them.

Accordingly, I called Reed on that date to discuss this. I believe that this was a call to an Australian mobile phone from a Sunland office phone. I said to Reed words to the effect of 'this is all getting too hard. How about we buy your development rights for AED20M and you walk away'.

Reed was interested in what I had to say, but did not appear to be convinced by this offer and said to me that he would talk to Nakheel and see if he could negotiate down the land price. Reed advised that if he could negotiate with Nakheel a better land price than the AED 135/sqft already discussed, any benefit would be considered a 'Land Uplift Fee' that would add to the AED 20M Sunland had just offered to Prudentia. ...

In the following days Reed called me back and advised that the land price would be AED 120/sqft and that he wanted the difference in additional premium. This meant that Sunland would pay Prudentia a further AED 24M. This was calculated by the difference between AED 135/sqft to AED 120/sqft

multiplied by the BUA of 1,607,052 sqft.<sup>175</sup>

262 The trial judge considered the evidence as to breakdown in the joint venture arrangements and concluded as follows:

In summary, the evidence establishes that Abedian gave Brown the idea of paying Prudentia a lump sum to remove it from the transaction. This meant that the idea of paying Prudentia a one-off fee in the short term, as opposed to it receiving a payment out of a joint venture some time after 2013, was an idea that came from Sunland and not from Prudentia. In response to this proposal, Reed told Brown that if Reed could negotiate with Nakheel, a better land price than AED 135 per square foot, a fee corresponding to the difference between AED 135 per square foot and the better land price would be payable to Prudentia in addition to the AED 20 million that Brown had just offered. Although he did not say as much to Reed, Brown knew from his conversation with Lee and Brearley on 12 September 2007 that the price of Plot D17 would be AED 120 per square foot. Under Reed's counter-proposal, the total Consultancy Fee payable to Prudentia was the AED 20 million proposed by Sunland plus another AED 24 million (approximately) based on the difference between a land price of AED 135 per sq/ft and AED 120 per sq/ft.<sup>176</sup>

263 On 18 September 2007 Brown met with Lee and reached agreement that DWF would compensate SWB by permitting additional built-up area on plot D17 at a purchase price of AED120 per square foot (being approximately AED 24 million) to offset the premium demanded by Prudentia for the lower price of AED120 per square foot which Reed had negotiated. Brown's evidence in cross-examination was that:

[w]e were communicating with Marcus Lee regularly on what was going on and we told him that we had reached an agreement with Reed and explained that we were paying a premium and that he had to negotiate the final price and that there would be an extra fee based on the difference from 135 down to whatever the figure was, and once Reed told us what that figure was, we communicated that to Lee.<sup>177</sup>

264 Brown's evidence was that Lee offered to compensate the land uplift fee by additional BUA and said he would confirm this in writing subject to discussing the letter with Brearley.<sup>178</sup>

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<sup>175</sup> Witness statement of David Scott Brown (6 August 2010) [210]-[214].

<sup>176</sup> Reasons [181].

<sup>177</sup> Trial transcript, 96.

<sup>178</sup> Witness statement of David Scott Brown (6 August 2010) [215].



265 Contrary to Sunland's case, Brown admitted in the course of cross-examination that he told the Dubai prosecutor<sup>179</sup> that Lee offered the additional BUA free of charge provided Sunland built up the whole lot and developed it within five years.<sup>180</sup> Brown also admitted that this statement was 'not entirely correct, no'.<sup>181</sup> Brown also admitted that he had told the Dubai prosecutor that the additional BUA was offered because of the design work Sunland had done on the site and that this was 'not exactly' reflected in the draft letter concerning the BUA offer and 'not complete information'.<sup>182</sup>

266 On 17 September 2007 Brown sent an email to Jason Mahoney (a Sunland employee) copied to Sahba Abedian and to Soheil Abedian and attaching a feasibility calculation based on Sunland buying the site itself and paying Reed an 'Introduction Fee of AED 44m, and they walk away.' The estimated return based on getting bonus floor area for AED 24m of the introduction fee was 26 per cent with AED 590 million profit plus normal fees.

267 The notion of an introduction fee is ordinarily fundamentally different from a fee payable for the acquisition of an interest in the land.

268 Stringer subsequently described the fee in similar terms as a "'spotter's fee" premium ... for the guys that introduced this deal.' Brown prepared a further feasibility study for D17 dated 18 September 2007 which showed that with the extra BUA, even allowing for a 'consultancy fee' payable to Prudentia, Sunland had a potential return of 37.3 per cent. He conceded in cross-examination that this was a 'phenomenal' return.<sup>183</sup>

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<sup>179</sup> As recorded in a transcript of his interview on 16 February 2009.

<sup>180</sup> Trial transcript, 123-4.

<sup>181</sup> Trial transcript, 124.

<sup>182</sup> Trial transcript, 88-9.

<sup>183</sup> Trial transcript, 105.

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The SFASOC next alleges:

30 In reliance on the Representations, and the matters pleaded in paragraphs 27 to 29 above:

30.1 on 19 September 2007, SWB executed an agreement with Prudentia ('the Prudentia Agreement') which:

30.1.1 was signed on behalf of Prudentia by both Reed and Nigel Wimble Sharp (who at that time was a director of Prudentia);

30.1.2 Prudentia's solicitor David Sinn ('Sinn'), a partner of Freehills solicitors in Melbourne, had forwarded to Brown by email for execution;

30.1.3 recited in clause 1 'Background' that 'Prudentia has reached agreement with [Dubai Waterfront LLC] to acquire and develop [Plot D17]';

30.1.4 provided in clause 2 of the operative part that 'In consideration of payment of the Consultancy Fee, Prudentia agrees to transfer to Sunland its right to negotiate and enter into a plot sale and purchase agreement for the acquisition of [Plot D17] with [Dubai Waterfront LLC]'; and

30.1.5 defined the total Consultancy Fee as being AED44,105,780.

30.2 Sunland and SWB negotiated with Dubai Waterfront the remaining terms (that is, other than the price already agreed as pleaded in paragraph 29 above) on which Plot D17 would be purchased; and

30.3 Sunland made arrangements for the payment to Prudentia of approximately AED44 million.<sup>184</sup>

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For like reasons to those we have given with respect to the recital contained in the previous draft agreements, the recital contained in the 'Background' introduction to the agreement quoted above could not have been understood as representing that Prudentia had a right to acquire plot D17. Indeed the September negotiations had made manifestly clear that Sunland understood Prudentia had no such right.

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On the appeal, Sunland emphasised the terms of cl 2 of the operative part of

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<sup>184</sup> SFASOC [30].

the agreement. In our view, the trial judge was correct to conclude that the reference to 'its right to negotiate and enter into a plot sale and purchase agreement' read in context was a prospective right relating to future dealing and did not imply an existing right to purchase. In turn the provisions of cl 2 were buttressed by an exclusivity condition. Clauses 5 and 6 provided:

5 Exclusivity

The Parties agree that, except as expressly contemplated in this agreement, they will not, either alone or with any other entity, participate or be involved in the acquisition or development of the Property. Notwithstanding this clause the parties acknowledge that provided Sunland has paid Prudentia the Consultancy Fee in Clause 3 Sunland shall be entitled to develop the property.

6 Duration of exclusivity and confidentiality obligations

The Parties must observe the obligations of exclusivity and confidentiality expressed in this agreement for 3 years from the date of receipt of the Confidential Information, notwithstanding termination of this agreement.

272 The total consultancy fee was calculated as follows:

Consultancy Fee	the sum of AED 20 million plus an additional fee of AED 24,105,780, calculated as the difference between AED 135/Ft <sup>2</sup> and AED 120/Ft <sup>2</sup> (i.e. AED 15/Ft <sup>2</sup> times the BUA of 1,607,052 Ft <sup>2</sup> ) which will be the price in the Plot Sale and Purchase Agreement between Sunland and the Master Developer. The total Consultancy Fee is AED 44,105,780.
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273 Brown sent an email to Reed after receiving the following comments from Abedian seeking to clarify the basis of the consultancy fee:

DAVID, CLAUSE 3 IS NOT CORRECT SINCE IT READS THAT SUNLAND SHOULD PAY THE CONSULTANCY FEE + ANY AMOUNT THAT IS NEGOTIATED FROM THE ORIGINAL PRICE OF AED135 PSFT. ALSO IN AN EARLIER CLAUSE IT STATES THAT THE CONSULTANCY FEE IS AED44M. THIS MEANS THAT WE HAVE TO PAY AED44M + THE DIFFERENCE BETWEEN AED136 PSFT TO AED120 PSFT.

CLAUSE 3 SHOULD READ ...THAT THE CONSULTANCY IS CALCULATED BASED ON AED20M BASE FEE + ANY AMOUNT NEGOTIATED DOWN FROM AED135DHS PSFT.

274 Brown then exchanged a number of emails and had a series of telephone

conversations with Reed regarding the payment of the proposed consultancy fee. It was eventually agreed Sunland would deposit a fee in the trust account of its Dubai lawyers who would hold it in escrow until the transaction was finalised. On 19 September 2007 Prudentia's solicitor confirmed this arrangement by email and forwarded a copy of the implementation agreement executed on behalf of Prudentia. Brown and Abedian then signed the agreement.

275 Fundamentally, the agreement required Prudentia to withdraw its interest in plot D17. As already noted, in an internal company communication on 17 September 2007, Brown referred to the payment of an 'introduction fee' for Prudentia to 'walk away' and on 19 September 2007 that Stringer referred to the payment as a "'spotter's fee" premium ... for the guys that introduced this deal'.

276 The trial judge concluded, after referring to this and other evidence of the manner in which those associated with Sunland had described the payment, as follows:

In light of this evidence, I am of the view that Abedian's agreement during cross-examination that Sunland had 'paid to remove Prudentia from the transaction', is an accurate statement of the position, which was that given the profit potential of the Plot D17 development, Sunland wanted the project for itself and was prepared to pay Prudentia simply to 'go away'. Further, it was prepared to allow this to happen, and hoped that this would happen, without any thought of consideration flowing from Prudentia (or ultimately, Hanley) in terms of anything in the nature of a legal or other right with respect to Plot D17, proprietary, contractual or otherwise. It was quite simply a payment made by Sunland to Prudentia in consideration of its agreement to 'go away' – regardless of whatever connection or rights it may have had to or with respect to Plot D17, matters which Sunland then regarded as irrelevant. The commercial driver for this is clear when Brown's projected rate of return – even factoring in the payment to Prudentia – on the development of Plot D17 is considered.<sup>185</sup>

277 For reasons set out at [209]-[211] of his judgment, his Honour rejected the Sunland submission that the use of the word 'premium' in email correspondence between Reed and Brown and in other documentation justifies the inference that Reed and Prudentia regarded their interest in plot D17 as more than something in

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<sup>185</sup> Reasons [208] (citations omitted).

the nature of a preferred negotiating position. We agree that the use of the term 'premium' must be understood in the context of the transaction as it is otherwise evidenced and that, so understood, it does not support the inference contended for.

278 On 17 September 2007 Brearley sent an email to Stringer attaching a draft SPA for plot D17.<sup>186</sup> Brown's evidence was that this was a standard agreement and constituted 'the first step in finalising the terminology.'<sup>187</sup> Brown was 'on the way to securing D17 on Sunland's behalf.'<sup>188</sup>

### *Hanley*

279 Sunland alleges:

31 On or about 26 September 2007, Hanley also retained Sinn and instructed him:

31.1 to prepare an agreement identical to the Prudentia Agreement, except that it would be expressed to be between SWB and Hanley;

31.2 that such agreement would take the place of the agreement between Prudentia and SWB referred to in paragraph 30.1 above; and

31.3 to write to Sunland and SWB asking them to agree to discharge the Prudentia Agreement and replace it with an agreement between SWB and Hanley on terms otherwise identical with the Prudentia Agreement.

### Particulars

31.4 Hanley's retainer and instructions pleaded in this paragraph are to be inferred from the facts pleaded in paragraph 32 below.

32 On 26 September 2007, Sinn sent an email to Brown (cc'd to Reed) that:

32.1 included the words:

'Great news!

For structuring purposes, Prudentia has decided to incorporate a new company in Singapore as part of expanding its business

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<sup>186</sup> SUN.001.002.0001 and SUN.001.002.0002.

<sup>187</sup> Trial transcript, 164.

<sup>188</sup> Trial transcript, 164.

into Asia and it is Prudentia's desire to arrange for the monies to be received from Sunland to go to this new entity.

Accordingly, my clients would be grateful if Sunland would agree to the cancellation of the existing agreement and the execution of a new agreement on identical terms and conditions to the existing agreement except that Hanley Investments Pte Ltd (an entity incorporated in Singapore which is 100% owned by Prudentia Investments Pty Ltd) will be the other party to Sunland'; and

32.2 attached a revised version of the Prudentia Agreement ('the Hanley Agreement') that:

32.2.1 replaced all references to Prudentia with references to Hanley, and which had not been executed by Hanley;

32.2.2 recited in clause 1 'Background' that 'Hanley has reached agreement with [Dubai Waterfront LLC] to acquire and develop [Plot D17]';

32.2.3 provided in clause 2 of the operative part that 'In consideration of payment of the Consultancy Fee, Hanley agrees to transfer to Sunland its right to negotiate and enter into a plot sale and purchase agreement for the acquisition of [Plot D17] with [Dubai Waterfront LLC]'; and

32.2.4 defined the total Consultancy Fee as being AED44,105,780.<sup>189</sup>

280 The Hanley agreement, containing the terms alleged, was executed by SWB on 26 September 2007. The full terms of the 'Background' recitals were:

- 1 Hanley has reached agreement with the Master Developer to acquire and develop the Property.
- 2 Sunland has proposed to Hanley that it could develop the property into two residential towers and other ancillary uses.
- 3 This Implementation Agreement records the arrangements agreed between the Parties regarding the assignment of the development rights for the property from Sunland to Hanley.

281 No documentation was executed purporting to transfer a right of any kind from Prudentia to Hanley. Nor, importantly, did Sunland ask for any evidence of such a transfer. As the trial judge accepted, the circumstances of the substitution of Hanley demonstrate that the parties understood that Hanley had not in fact reached

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<sup>189</sup> SFASOC [31]-[32].