IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

Not Restricted

LIST C
S CI 2011 5977

SUNLAND WATERFRONT (BVI) LTD — First Plaintiff
SUNLAND GROUP LIMITED (ACN 063 429 532) — Second Plaintiff

v

PRUDENTIA INVESTMENTS PTY LTD (ACN 091 390 742) — First Defendant
HANLEY INVESTMENTS PTY LTD — Second Defendant
ANGUS JOHN LUXMOORE REED — Third Defendant
MATTHEW JAMES JOYCE — Fourth Defendant

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATES OF HEARING:	25, 28 - 30 November; 1, 5 – 8 and 12 December 2011; 27, 30 and 31 January; 1 and 2 February; and 7 March 2012 (by final written reply submissions);
DATE OF JUDGMENT:	8 June 2012
CASE MAY BE CITED AS:	Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)
MEDIUM NEUTRAL CITATION:	[2012] VSC 239

TRADE PRACTICES – Misleading or deceptive conduct – whether any representations were made by the Defendants in respect to the status, purchase and development of land in Dubai – execution of contract and payment of a fee by the Plaintiff – whether any conduct of, including any representations, of the Defendants was misleading or deceptive or otherwise in breach of statutory prohibitions - whether the Plaintiff relied on any conduct including misrepresentations to its detriment – causal connection between the conduct of the Defendants and the misapprehension of the Plaintiff – no reliance by the Plaintiffs on the alleged misrepresentations – whether First to Third Defendants a 'person involved' in a contravention for the purposes of accessorial liability – failure of Plaintiffs to establish loss or damage – *Gould v Vaggelas* (1985) 157 CLR 215; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 – *Trade Practices Act 1974* (Cth) ss 5(1), 6(2), 52, 53, 53A, 75B, 82 – *Fair Trading Act 1999* (Vic) ss 9, 12, 158, 159.

TORTS – Deceit – jurisdiction and choice of law - whether alleged representations were fraudulent – whether elements of deceit established - no evidence to support claim of deceit

– *Magill v Magill* (2006) 226 CLR 551 – United Arab Emirates Civil Code (Law No. 5 of 1985).

CORPORATIONS – Corporate governance – Plaintiff's announcements to Australian Stock Exchange ("ASX") – Plaintiff's failure to disclose market sensitive information in announcements to ASX – Board reporting.

EVIDENCE – Reliability of Plaintiffs' witnesses – application of *Jones v Dunkel* (1959) 101 CLR 298 – application of *Browne v Dunn* (1893) 6 R 67 (HL) – *Evidence Act 2008* (Vic) s 140.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr G.A. Thompson SC with Dr S. Monks	Thomsons Lawyers
For the First, Second and Third Defendants	Mr J.T. Rush QC with Mr H.R. Carmichael	Freehills
For the Fourth Defendant	Mr P.W. Collinson SC with Mr N.D. Hopkins	Norton Rose

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HIS HONOUR:

Background

1 This proceeding was cross-vested to the Supreme Court of Victoria from the Federal Court of Australia where it was being managed in that Court by Logan J in Brisbane. During the course of its management by the Federal Court of Australia, a variety of applications were made to and determined by Logan J and, in one instance, on appeal to the Full Court of the Federal Court of Australia. It is not necessary now to say more about the nature of these applications and their resolution as they did not leave any live issues before this Court on the cross-vesting of the proceeding. The trial in this proceeding was conducted in this Court, following cross-vesting. There were some preliminary applications prior to the commencement of the trial and some further applications made during the course of the trial - with respect to discovery, the adequacy of discovery and the production of documents (in redacted or non-redacted form) and some pleadings issues. During the course of the trial, an application was made by the first, third and fourth defendants, Prudentia Investments Pty Ltd ("Prudentia"), Mr Angus Reed ("Reed") and Mr Matthew Joyce ("Joyce"), respectively to restrain the second plaintiff, Sunland Group Limited ("Sunland") from taking any steps to prosecute the civil claim for compensation or civil remedy commenced by notice filed by Sunland in Dubai criminal proceedings number 2130/2009 against Reed and Joyce and from taking any steps to join Prudentia as a party to these civil proceedings. This application, which was made by two separate summonses, was heard on 19 December 2011 and judgment delivered on 25 January 2012.[1] The applications were successful and the anti suit injunctions, as sought, were granted.

2 These proceedings relate to a piece of land situated in Dubai in the United Arab Emirates ("UAE"). This land, known as "Plot D17", is a lot in a land development site known as "the Dubai Waterfront". At the time Plot D17 was being created in the planning and development of the Dubai Waterfront, the Dubai property market was,

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1 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 1)* [2012] VSC 1.

as it was said, very "hot" and there was a great deal of speculation in land with plots being bought and sold with significant financial gains being made by buyers and sellers, whether or not the plot had actually been developed or was to be developed by a particular buyer or subsequent purchaser. The Dubai authorities were, it seems, somewhat concerned at the degree of land speculation, both generally and insofar as it may have inhibited the process of actual land development and building on these plots. Plot D17 remains a piece of sand near the shore of The Gulf.

3 Nakheel PJSC ("Nakheel"), is one of the major Dubai government development entities and the creator of several large scale projects, including the Palm Islands, the Dubai Waterfront and the World Islands. For each project Nakheel establishes a master developer entity which owns the land and arranges plot sales and infrastructure installation. Nakheel's corporate entity for the project known as "The Dubai Waterfront" was Dubai Waterfront LLC ("DWF"). Joyce was the managing director of DWF in 2007. Other individuals with whom the Sunland entities dealt were Mr Jeff Austin ("Austin"), who was, in 2007, the Director – Project Control of DWF, Mr Anthony Brearley ("Brearley"), who, in 2007, was Senior Legal Counsel of DWF and Mr Marcus Lee ("Lee"), who, in 2007, was the Director Commercial Operations of DWF. Both Joyce and Lee are currently the subject of criminal proceedings in Dubai. Reed was, in 2007, the Managing Director of Prudentia and also a director of Hanley Investments Pte Ltd ("Hanley"). Reed is also currently the subject of criminal proceedings in Dubai. For convenience Prudentia and Hanley are referred to from time to time as "the Prudentia parties".

4 The plaintiffs, the Sunland parties, are, with respect to the first plaintiff, Sunland Waterfront (BVI) Ltd ("SWB"), a company incorporated in the British Virgin Islands and owned by the second plaintiff, Sunland. Sunland is a public company which is listed on the Australian Stock Exchange ("ASX"). Mr Soheil Abedian ("Abedian") is currently the Chairman of Sunland. In 2006, he moved to Dubai and took up the position of Managing Director of Sunland Group (Dubai branch), but was, in any event, employed by Sunland Group Limited. He is also a director of SWB.

Mr David Brown ("Brown") arrived in Dubai in March 2006 to establish a Sunland branch in the Emirate, in the role, of "International Design Director". Brown continued in that role and became the Chief Operating Officer for Sunland Group (Dubai branch) on 13 September 2007. His main area of work and responsibility was the studying of the viability of projects. Brown worked closely with and reported to Abedian, who confirmed in evidence that "…almost everything that [Brown] did that involved significant events or decision making, he would always check with [Abedian]".[2] The documentary evidence, particularly emails, supports this position. The Sunland parties plead that SWB was introduced by Sunland into the transaction for the purchase of Plot D17 on 14 September 2007,[3] though it is said that it was actually introduced on the preceding day.[4] In any event, SWB had no role prior to that date. Even after its introduction, SWB was treated as a wholly owned corporate vehicle of Sunland's and it had no independent existence in the present context in any real sense. Consequently, and against this background, I have, unless indicated to the contrary, referred to the relevant Sunland party or parties simply as "Sunland". Also, the word "it" where used with reference to Sunland connotes the singular or plural in such references, as appropriate.

5 In more recent years, the Dubai authorities became concerned about, what may be termed, the "propriety" of a number of land and associated transactions, particularly involving Dubai government entities such as Nakheel and DWF. As a result, investigations were commenced by Dubai authorities in relation to allegations of bribery in or associated with these transactions. As Logan J found in the course of these proceedings before the Federal Court, the Sunland entities were themselves under investigation by Dubai authorities in this context,[5] a position which was reinforced by the evidence before this Court, in the course of the trial.

Evidence before the Court

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2 Transcript, p 300.33 - .35.

3 Second Further Amended Statement of Claim, paragraph 26.

4 Court Book, SUN.001.001.0280; cf Transcript, p 190.39 - .40.

5 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2010] FCA 312, at [39].

6 The case was conducted on the basis of documentary and oral evidence. The documentary evidence is contained in an extensive electronic court book and includes various witness statements, letters, emails and other documents. The oral evidence is that solely of Sunland witnesses as the defendants chose to proceed immediately to closing addresses having heard the Sunland case. The defendants did, however, tender documents in the course of the Sunland case and rely upon various documents in the court book.

7 It was made clear at the commencement of the trial, and re-affirmed 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 being part of the evidence on this basis. The arrangement did not preclude the tender of further documents and the objection to parts of witness statements sought to be relied upon – both of which occurred during the trial.

8 In the course of the closing submissions stage of the trial, Sunland submitted that this arrangement was not the basis upon which documents were to be brought into evidence and objected to the defendants relying upon documents the authenticity of which was not strictly proved.[6] In this respect, Sunland made particular reference to the list of documents Sunland claimed to be false.[7] Sunland also provided lists of various documents which it says it tendered at various times, also acknowledging the tender of documents on behalf of Joyce and the tender of documents during the course of cross-examination of the Sunland witnesses.[8]

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6 See *Plaintiffs' Address* (1 February 2012), paragraphs 7, 8 and 12; and see paragraph 14 as to the statements of witnesses which were tendered by Sunland but not challenged by cross-examination.

7 *Plaintiffs Reply to the Supplementary Written Submissions of the Defendants*, Annexure A – Sunland submitted that the documents highlighted in green were false documents; also see Exh A.

8 See *Plaintiffs' Address* (1 February 2012), paragraphs 6 to 8.

9 As I said in the course of discussion of the state of the evidence in the closing stages of the trial, I understood the provision of these lists of documents by Sunland to be consistent with the evidentiary arrangements – being convenient lists of documents upon which it intended to rely and which would be referred to and relied upon in its closing submissions in accordance with the arrangements indicated previously. It was clear from these discussions that the defendants were of the same view. In any event, the question whether there are other documents in evidence and to be considered for the purpose of these reasons for judgment does not arise as a result of the position I have reached in relation to this case. This is because any documents referred to in these reasons that Sunland disputes and says "have not been proved or tested in cross-examination"[9] have not been relied upon to support any critical findings. In other words, excluding such documents from the evidence would not have affected the findings below. Similarly, no reliance has been placed in these reasons for judgment, on any basis, upon any document that Sunland alleges is false or a forgery and, in any event, excluding such documents from the evidence would not have affected the findings below.

Sunland's misrepresentation claims

10 In general terms, Sunland alleges that during 2007, Reed, a director of Prudentia and Hanley, and Joyce, the managing director of DWF, either as principal or as a "party involved", made various representations concerning Plot D17. In reliance on the representations, it is alleged that SWB entered into an agreement with Prudentia which materially provided for the payment of a "consultancy fee" of AED44 million in consideration for which Prudentia agreed to transfer its right to negotiate and enter into a plot sale and purchase agreement with DWF for the acquisition of Plot D17 ("the Prudentia Agreement"). Some time later, following a decision by Prudentia to incorporate a subsidiary, Hanley, "as part of expanding its business into Asia", SWB came to discharge its agreement with Prudentia and enter into a fresh agreement with Hanley ("the Hanley Agreement"). On 26 September 2007, SWB signed a sale and purchase agreement with DWF for the purchase of Plot D17 for a

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9 *Plaintiffs Reply to the Supplementary Written Submissions of the Defendants*, paragraph 6.

price of AED 120 per square foot. On 1 October 2007, Sunland authorised the release of a cheque payable to Hanley in the sum of AED 44,105,780 which Hanley then negotiated to its credit. Reed is alleged to have been an agent of Hanley, who was seized with the knowledge of the representations and their falsity.

11 More particularly, the basis of the claim by Sunland in this proceeding is that representations were made to Sunland concerning the status of Plot D17 and that those representations were false and misleading. As indicated previously, SWB was introduced into the impugned transaction on 13 or 14 September 2007.[10]

12 With respect to the claims against Reed, Sunland pleads that he made representations to Brown on two occasions. The first occasion was a telephone call on 16 August 2007[11] during which Reed is alleged to have told Brown words to the effect that:

> (a) Reed was in Melbourne and would be flying to Dubai on Sunday;
>
> (b) Prudentia was Reed's company;
>
> (c) through Prudentia I have the right over or I control Plot D17; and
>
> (d) he would be willing to negotiate with Brown about undertaking a joint venture with Sunland for the development of Plot D17.

The second occasion was a meeting in Brown's office in Dubai on 19 August 2007 when Reed is alleged to have told Brown words to the effect that:

> (a) the price in the area in which Plot D17 is located is as high as AED 175 per sq ft;[12]
>
> (b) I can obtain a price of AED 135 per sq ft from Dubai Waterfront;[13]
>
> (c) I want compensation of AED 40 per sq ft as part of the terms of a joint venture;[14]
>
> (d) It would be more tax effective for the compensation to be paid as a fee to Prudentia for consultancy services;[15] and

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10 See above, paragraph 4.
11 Second Further Amended Statement of Claim, paragraph 13.
12 Second Further Amended Statement of Claim, paragraph 15.1.
13 Second Further Amended Statement of Claim, paragraph 15.2.
14 Second Further Amended Statement of Claim, paragraph 15.3.
15 Second Further Amended Statement of Claim, paragraph 15.4.

(e) the payment terms on which Reed was acquiring Plot D17, terms which were exactly the same as those that Joyce told Brown on 15 August 2007.[16]

It was also alleged by Sunland that at the 19 August 2007 meeting, 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.[17]

13 Sunland claims that these representations were false and that it relied upon them in taking a number of steps in relation to the purchase of Plot D17. On this basis, Sunland claims that the making of the alleged representations constituted a breach of s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA") and a breach of s 9 of the *Fair Trading Act* 1999 (Vic) ("FTA"). Sunland also claimed that tortious liability in deceit flowed from such representations.

14 Additionally, Sunland claims that Reed made the representations as agent for Prudentia, and later Hanley, or as a *person involved in* the contraventions by Prudentia and Hanley under s 75B of the TPA. In relation to the alleged deceit, Reed is said to be liable to Sunland as a joint tortfeasor with Joyce. By reason of the conduct pleaded in the Second Further Amended Statement of Claim, Reed is also said to have engaged in conduct in breach of ss 53(aa), 53(g) and 53A of the TPA and also ss 9, 12(b), 12(k) and 12(n) of the FTA.

15 The first date upon which it is claimed that there was material reliance on the alleged representations by SWB, following the introduction of that company by Sunland Group Limited into the impugned transaction on 13 September 2007, is 18 September 2007.[18]

16 Sunland claims that each of Prudentia and Hanley breached s 52 of the TPA by reason of the alleged making of representations by Reed. Prudentia and Hanley are also alleged to have breached ss 53(aa), 53(g) and 53A of the TPA. Hanley is said to be a "person involved in" Prudentia's contraventions under s 75B of the TPA.[19]

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16 Second Further Amended Statement of Claim, paragraphs 16.1 to 16.2.
17 Second Further Amended Statement of Claim, paragraph 16.3.
18 Second Further Amended Statement of Claim, paragraph 29.
19 See below, paragraphs 371 and 372.

Prudentia and Hanley are also said to be vicariously liable for Reed's alleged deceit. Further, by reason of the conduct pleaded in the Second Further Amended Statement of Claim, Sunland claims that each of Prudentia and Hanley engaged in conduct in breach of ss 9, 12(b), 12(k) and 12(n) of the FTA.[20] By reason of the conduct pleaded against Joyce,[21] Sunland claims that Joyce contravened ss 52, 53(aa) 53(g) and 53A of the TPA. In relation to the alleged deceit, Joyce is said to be liable to Sunland as a joint tortfeasor with Reed. No claims were made against Joyce under the FTA.

17 Insofar as the pleaded conduct, the misrepresentations and related matters, may have occurred outside Australia, Sunland relies on ss 5(1), 6(2)(a)(i) and 6(3) of the TPA.[22]

18 The allegations against Joyce, with respect to these statutory "misrepresentation" provisions and with respect to the claim in deceit turn on four communications alleged to have occurred between Joyce and Brown, as follows:

(a) Between March and July 2007 Joyce said to Brown and Abedian with words to the effect that: 'there is no beachfront land left, it has all been sold to secondary developers';[23]

(b) On 15 August 2007 Joyce telephoned Brown and said words to the effect that:[24]

(i) 'a man named Reed is the contact for Plot D17';[25]

(ii) 'although I will need to check this with Anthony Brearley, Reed's company will be paying DWF AED 135 per sq ft to purchase Plot

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20 See below, paragraphs 369 and 370; and paragraphs 408 to 414.
21 See below, paragraphs 18.
22 See below, paragraphs 373 to 407.
23 Second Further Amended Statement of Claim, paragraph 9. It was submitted on behalf of Joyce that it is unclear why this allegation is pleaded, as the statement was true and Sunland has never sought to prove to the contrary. In fact, Brown gave evidence that the statement was correct. (See Transcript, p 249.45- 249.46). Plot D17 is not beachfront land.
24 Second Further Amended Statement of Claim, paragraph12.
25 Second Further Amended Statement of Claim, paragraph 12.1.

D17';[26]

(iii) '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[27]

(iv) 'a property speculator would be likely to pay about AED 175 per sq ft to purchase Plot D17'.[28]

(c) On 16 August 2007 Joyce replied to an email from Brown in which Joyce said in part:[29] 'Anyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us'.

(d) On 29 August 2007, Joyce telephoned Brown and said words to the effect that:[30] 'Sunland should come to an agreement with Reed as soon as possible because there were other buyers around including Russians who might offer Reed AED 220 per sq ft or more for the land'.

19 Sunland pleads that these communications made by Joyce, and those made by Reed referred to above,[31] conveyed three representations, namely that:[32]

(a) Reed or Prudentia or both of them had a right to acquire Plot D17 or the land on which Plot D17 was located;[33]

(b) DWF 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

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26 Second Further Amended Statement of Claim, paragraph 12.2..
27 Second Further Amended Statement of Claim, paragraph 12.3.
28 Second Further Amended Statement of Claim, paragraph 12.4.
29 Second Further Amended Statement of Claim, paragraph 14.2.2.
30 Second Further Amended Statement of Claim, paragraph 18.
31 See above, paragraph 12.
32 Second Further Amended Statement of Claim, paragraph 19.
33 Second Further Amended Statement of Claim, paragraph 19.1.

connection with the development thereof to Sunland;[34] and

(c) If Sunland wished to purchase Plot D17 or the land over 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.[35]

These representations as pleaded by Sunland are referred to as "the Representations".

20 Sunland then alleges that the Representations as pleaded were false 'in that': [36]

(a) the Representations were untrue;[37] and

(b) statements were made to Brown by Mr Mohammed Mustafa Hussein Mohammed Kamel ('Mustafa') of the Dubai Financial Audit Department[38] and Mr Khalifa Mohammad ('Khalifa') of the Dubai Police[39] to the effect that Reed *did not own* Plot D17 and that there was "no record of Reed or his entity having any right over the plot"[40].

It was submitted on behalf of Joyce that it is unclear why statements made by Mustafa and Khalifa are pleaded other than because of Sunland's ongoing desire to "keep in" with the Dubai authorities.

21 A number of criticisms were made of the pleaded claim against Joyce, particularly focusing on an argument that the Representations as pleaded are capable of a number of meanings. For example, with respect to the second of the Representations, it was said that if Sunland and Prudentia had entered into a joint venture arrangement, and this was known to DWF, it would not have been misleading for DWF to point out that it could not sell Plot D17 or the land on which

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34 Second Further Amended Statement of Claim, paragraph 19.2.
35 Second Further Amended Statement of Claim, paragraph 19.3.
36 Second Further Amended Statement of Claim, paragraph 21.
37 Second Further Amended Statement of Claim, paragraphs 21.1, 21.2 and 21.3.
38 Second Further Amended Statement of Claim, paragraph 21.4 and 21.6.
39 Second Further Amended Statement of Claim, paragraph, 21.5.
40 Second Further Amended Statement of Claim, paragraph 21.4.

Plot D17 was located, or any rights in connection with the development thereof, to Sunland without the agreement of Reed or Prudentia. Such a statement would have been unsurprising, it was submitted, as DWF would have wanted to ensure that it did not embroil itself in any dispute between Prudentia and Sunland. It is only if the second of the Representations[41] meant that DWF could not sell the land at all to Sunland (or to any other party) without Prudentia's approval, that it would have been misleading or deceptive. Additionally, a distinction would have to be made between any representation by DWF that it would not, as opposed to could not, sell Plot D17 to Sunland. If DWF had formed the view that it wanted to sell Plot D17 to Prudentia and not to Sunland then, as owner of Plot D17, that was its prerogative. It was submitted that similar points can be made about the third of the pleaded representations. For example, if Sunland wished to purchase Plot D17 or the land over which Plot D17 was located as part of a joint venture with Prudentia, then there was a need to negotiate and make a contract with Reed or Prudentia or both of them.

22 Further, despite these problems, it was submitted on behalf of Joyce, that it is apparent that the plea of falsity set out in paragraph 21 of the Second Further Amended Statement of Claim[42] and the evidence of Brown and Abedian indicates that the case put by Sunland is that Joyce represented that Reed or Prudentia had some sort of legal interest in, or right to, Plot D17 and it was on that basis that Sunland paid the fee of AED 44,105,780 to Hanley. The same applies to the manner in which the claims by Sunland are pleaded against Reed.

23 Sunland confirmed in its written and oral closing submissions that its case was put on the basis that Reed and the Prudentia parties (at least in the earlier stages of the Plot D17 transaction, Reed and Prudentia) and Joyce misrepresented that there was "an agreement which conferred upon Prudentia a 'right' [to Plot D17] which was capable of transfer to Sunland".[43] Consistently with this position Sunland

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41 Second Further Amended Statement of Claim, paragraph 19.2.

42 And the same follows from the pleading of the representations in paragraph 19 of the Second Further Amended Statement of Claim.

43 Closing submissions of Sunland *Plaintiffs' Address* (1 February 2012), paragraph 40. In any event this follows from the pleading of falsity in the particulars to the Second Further Amended Statement of Claim, paragraph 21. Those particulars allege in substance that the representations were false because

submitted:[44]

> "… Your Honour will see the written representations relied upon do go that far and so we can 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 Sub-paragraph A of the pleading - as summarised in Sub-paragraph A of our Paragraph 39, Your Honour" [emphasis added in paragraph 1, *Reply Submissions of the Fourth Defendant (Joyce)*].

24 On this basis it, was submitted on behalf of Joyce that in order to succeed in this case Sunland must establish against some or all of these parties that:[45]

(a) there were representations to the effect that Reed or Prudentia had a contractual right to acquire Plot D17;

(b) the representations were false because neither Reed nor Prudentia held a contractual right to acquire Plot D17; and

(c) Sunland had a state of mind, induced by those representations, that Reed or Prudentia had a contractual right to acquire Plot D17.

25 It was submitted against Sunland that on the case as pleaded it could not, on the evidence, possibly succeed. Thus it was submitted:[46]

Reed did not "own" Plot D17 or have any "right" over Plot D17. See also Joyce's Defence to the Further Amended Statement of Claim (8 April 2010), paragraph 21, and see, below, paragraphs 232 to 246.

44 Sunland's oral closing submissions: Transcript, p 925.20 -.27. The point was made by Sunland in its *Plaintiffs Reply to the Supplementary Written Submissions of the Defendants*, paragraph 11 that the passage quoted from the Sunland oral closing submissions omitted some prefatory words which changed the sense of the quoted material. In order to make the position clear, I now set out the two paragraphs from the transcript of these closing submissions which put the quoted material set out above in its context (Transcript, p 925.12 - .27):

> "*Paragraphs 12 to 19 are the paragraphs which plead the representations. Our learned friends have made a submission - that is Mr Collinson has pleaded it would be necessary for Your Honour to find that there was a formally binding contract entitling Reed or Prudentia to the plot or that that was the subject matter of the representation.*
> *We submit it's not necessary for Your Honour to go that far. But in any event as* Your Honour will see the written representations relied upon do go that far and so we can 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 Sub-paragraph A of the pleading - as summarised in Sub-paragraph A of our Paragraph 39, Your Honour." [emphasis with respect to the transcript material not set out in the above quote, at paragraph 23]."

45 *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 2.

46 *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraphs 3 to 8.

"3. … The relevant admissions by Brown are contained in a number of places. However, most strikingly he said the following:[47]

> 'HIS HONOUR: Are you saying that 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.'

4. It is of signal importance to observe that the plaintiffs' case was not the following:

> (a) Joyce (and/or the other defendants) represented that Reed or Prudentia had a 'hold' or 'control' over D17;
>
> (b) the representations were false because neither Reed nor Prudentia had a 'hold' or 'control' over D17;
>
> (c) the plaintiffs had a state of mind, induced by those representations, that Reed or Prudentia had a 'hold' or 'control' over D17.

5. This latter case was:

> (a) not pleaded;
>
> (b) not proved because the plaintiffs never sought to establish that the representations in those terms were false – in other words, that Reed or Prudentia did not have a 'hold' or 'control' over D17 by a means other than a legal right (for example, that there was no political control as a result of contacts between (1) Och- Ziff or the Prudentia parties and (2) DWF or other political authorities in Dubai).[48]

6. The plaintiffs' witnesses confused the pleaded case with the unpleaded case by mixing up evidence about a state of belief as to a 'hold' or 'control' over D17 with a case concerned only with an alleged state of belief that the Prudentia parties held a contractual right to acquire D17.[49]

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47 Transcript, p 192.23.

48 *Witness Statement of David Scott Brown* (6 August 2010), paragraph 142.

49 *Witness Statement of David Scott Brown* (6 August 2010): DB1[81] ("Reed had a 'hold' on the land"); DB1[84] ("Indicated that there was some sort of contract in existence"); DB1[92] ("He said to me words to the effect of either 'we have the rights over that land' or that 'Prudentia controlled that land' "); DB1[92] ("I understood them to mean that Prudentia had control over Plot D17"); DB1[121] ("Prudentia had the right over or controlled Plot D17"); DB1[142] ("Reed probably had a contact high-up in Nakheel and that it was through this contact that Reed had obtained control of Plot D17"); DB1[185] ("I also did not know how long Reed's control over the property would last for"); DB1[274] ("I believed Prudentia…had control and rights over Plot D17"); DB1[279.4] ("At all times I believed that Prudentia had control or rights over Plot D17"); Reply witness statement of David Scott Brown (27 June 2011): DB2[24] ("As I had been told by Joyce and by Austin that Prudentia had control of the land").
Witness statement of Soheil Abedian (6 August 2010): SA[45] ("I was informed by Brown and believed that he had been told that a block of land behind D5B was controlled by an Australian individual named Reed"); SA[50] ("My understanding of the email was quite clear: Reed had control over the plot"); SA[61] ("I understood this to mean exactly what it says, that Prudentia had come to an agreement with the master developer and that it was in control of the property"); SA[84] ("However we did not know the precise terms of that control by Prudentia and Reed"); SA[116] ("There is no reason why Sunland would pay any premium or consultancy fee to a party that had no control over that plot"). Prior to giving his oral evidence Abedian must have realised that it was insufficient for

> 7. The plaintiffs' closing submissions add to the confusion. Evidence relating to a 'hold' or 'control' is cited as if it supported the pleaded case concerning "contractual right to acquire".[50] Submissions are advanced which elide the distinction between 'control' and 'a legal right to acquire'. Thus, it is said to be inherently unlikely that Brown would say 'we wish you all the best with this site' if he did not believe at the time that Reed/Prudentia had some control or right over the site.[51] In the context of this proceeding there is a world of difference between 'control' and a 'right'. Elsewhere in the oral and written submissions there is reference to an 'impediment'.[52] An impediment might derive from a legal right to acquire D17 – equally it might derive from something else.
>
> 8. Overwhelmingly, at its highest the evidence established that Brown's state of mind was that an entity (Och-Ziff certainly not Reed or Prudentia) might have had some kind of inchoate standing or relationship with DWF or other political authorities in Dubai in respect of D17 which was less than a contractual right to acquire D17.[53] The pleaded case must fail. The unpleaded case need not be considered."

26 Sunland responded, submitting that none of the Representations which it alleged[54] require Sunland to show that the representations by Reed or Prudentia or Joyce were to the effect that Reed or Prudentia had a "contractual right". Further, it submitted that the representations pleaded in paragraphs 19.2 and 19.3 of the Second Further Amended Statement of Claim were made out by the email from Joyce on 16 August 2007, pleaded as a representation in paragraph 14.2 of the Second Further Amended Statement of Claim,[55] which included the words: "Anyway, the issue for us is that you can come to an arrangement with them that allows you to deal directly with us". It was said that this email should also be read in context with the statements which Joyce made earlier on 15 August 2007, the telephone conversation with Brown where it is alleged, *inter alia*, that Joyce used words to the effect that: "A man named Reed is the contact for Plot D17".[56] Further, it was submitted that the submissions on behalf of Joyce misstated Sunland's pleading.[57] Further, Sunland submitted that,

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Sunland to establish a belief that the Prudentia parties merely "controlled" D17. He altered his evidence to contend that references to "control" meant "rights under a reservation agreement": Transcript, p 318.36; Transcript, p 335.14.

50 *Plaintiffs' Address* (1 February 2012), paragraphs 80, 87, 89, 99, 101, 122 and 149.

51 *Plaintiffs' Address* (1 February 2012), paragraph122.

52 *Plaintiffs' Address* (1 February 2012), paragraph126; Transcript, p 1058.25.

53 *Closing Submissions of Fourth Defendant* (27 January 2012), Section G.

54 Second Further Amended Statement of Claim, paragraph 19; and see, above, paragraph 19.

55 See below, paragraph 72.

56 Second Further Amended Statement of Claim, paragraph 12.1. This conversation and the events surrounding it are discussed further below, see particularly, paragraph 51.

57 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 16; referring to

contrary to the submission made on behalf of Joyce:[58]

> "… in the language of non-lawyers in a practical commercial context there is not 'a world of difference' between the expressions 'right' and 'control', or the expressions 'hold on' or 'hold over'. The common or ordinary meaning of the word as appearing in the Oxford English Dictionary is: Control – '*4. To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, or command*'."[59]

Reference was also made by Sunland to an email communication between Reed and Mr Alexis Waller, a solicitor employed by Klein and Co, the Dubai legal advisers to Prudentia in 2007.[60] There is no evidence that Sunland was privy to this communication prior to any payment pursuant to the Hanley Agreement. [61]

27 For the reasons which follow, I am of the opinion that the submissions on the part of Joyce that it was necessary for Sunland to establish representations with respect to a legally enforceable right, "contractual" or otherwise, correctly state the position; but, in the present circumstances, the issue is not, in my view, critical because Sunland's case evidences no misrepresentation with respect to something less than an enforceable right, "contractual" or otherwise.

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paragraphs 4 and 5 of the *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), which are set out above, paragraph 25:

> "(a) SOC paragraph 13.3 pleads that Reed represented: *'I have the right over'* or *'I control'* Plot D17;
> (b) SOC paragraph 12.2, pleads Joyce said words to the effect: 'Reed's company will be paying Dubai Waterfront AED135 sq/ft to purchase Plot D17';
> (c) SOC paragraph in 14.2 pleads the email from Joyce stating: 'Anyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us'.
> (d) SOC paragraph 18 pleads Joyce said words to the effect: *'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'*."

Further, it was submitted that paragraph 5(b) of the submissions on behalf of Joyce that Sunland never sought to establish that the representations in the terms in which they were put by Sunland were false ignores admissions made by the defendants (see *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 18-20. For the reasons indicated below, I do not accept that this is the case (see below, paragraphs 234-239).

58 *Reply Submissions of Fourth Defendant (Joyce)* (21 February 2012), paragraph 7; set out above, paragraph 25.

59 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 21.

60 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 22; the email being an email from Reed to Alexis Waller, date 13 August 2007 (Court Book, PRU.001.007.0005) ; see below, paragraph 55.

61 As to the irrelevance of communications with third parties to which Sunland was not privy at any relevant time, see below, paragraphs 445 - 446.

28 Sunland pleads that it relied upon the Representations to:

(a) negotiate with Reed about a joint venture;[62] and

(b) later – after other communications were made to it by Lee and Brearley[63] - execute an agreement with Prudentia;[64] and

(c) later – after further misrepresentations were made to it by Reed, Prudentia and Hanley[65] - execute an agreement with Hanley and pay it the sum of AED 44,105,780.

29 The nature and effect of the Representations alleged by Sunland must be viewed in the context of the circumstances in which they are alleged to have been made including – particularly – in the context of land dealings and land information available in Dubai at the relevant time or times.[66]

30 Sunland alleges that the Representations were made in "trade or commerce" and that the result was misleading or deceptive conduct in breach of s 52 of the TPA.[67] Sunland also pleads a multitude of alternate claims under the TPA against Joyce arising from the same facts,[68] as well as a claim in deceit as a joint tortfeasor with Reed.[69] It was submitted on behalf of Joyce that it is clear that Sunland alleges that a fraud was perpetrated against it.

31 In relation to the joint tortfeasor's claim, it is alleged by Sunland that Reed and Joyce acted in concert, an allegation based on the alleged knowledge by each of Reed and Joyce that representations had been made (as alleged) and of their "joint purpose".[70] Sunland also relies, in this context, on matters such as the attendance of Reed and Joyce at the same school, Geelong Grammar, their failure to disclose this to Brown and the "coincidence" of the representations which are alleged to have been made

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62 Second Further Amended Statement of Claim, paragraph 22.
63 Second Further Amended Statement of Claim, paragraph 24.
64 Second Further Amended Statement of Claim, paragraph 30.
65 Second Further Amended Statement of Claim, paragraph 33.
66 See below, paragraph 33 to 44.
67 Second Further Amended Statement of Claim, paragraph 41.
68 Second Further Amended Statement of Claim, paragraph 57.
69 Second Further Amended Statement of Claim, paragraph 47.
70 Second Further Amended Statement of Claim, paragraph 46.

separately.

32 Sunland seeks damages equal to AED 44,105,780 and also damages for "loss of reputation".[71]

The D17 transaction

Land dealings and land information in Dubai

33 The D17 transaction involves the purchase of Plot D17 which, in turn, raises issues in relation to the law of real property and conveyancing in Dubai. In this context, care must be taken to avoid the temptation of drawing analogies, unquestioningly, with the law of real property and conveyancing in Victoria and Australia more generally. There are, however, some general analogies which might usefully be drawn. First, it is clear that a distinction is drawn in Dubai law between contractual and proprietary rights in relation to real property and that before any piece of real property can be dealt with it must, in both jurisdictions, be created and defined as a separate parcel of land which can be dealt with as such. Secondly, the property development process appears not too dissimilar in that plots or parcels of land are, in the course of the development process, created and defined within a larger development area. Once they are created and defined in Dubai, they may be purchased from the "master developer", the entity undertaking the development project and in which the defined or subdivided plots or parcels are vested in, what may be described, as fee simple ownership. A purchaser of one of these plots or parcels must enter into a "sale and purchase agreement" (commonly referred to as a "SPA") which will, as would a contract for the sale of land in Victoria, lead to a conveyance of the "fee simple" ownership in the plot to the purchaser upon payment of the purchase price in accordance with the provisions of the SPA. Although an intending purchase may proceed straight to a SPA with the master developer of the relevant project, an alternative course in Dubai is to enter into a "reservation agreement" with respect to a particular plot of land which has the effect of conferring something in the nature of an option to purchase on the intending purchaser which is exercisable during, and only during, the term of the reservation agreement. As with options to purchase in

71 See below, paragraph 425 to 442.

Victoria, a fee would be payable in consideration for this right, a fee which may or may not be payable in addition to the purchase price if a SPA is subsequently entered into. In Victoria, one would expect an optionee, properly advised, to lodge a caveat under the *Transfer of Land Act* 1958 where the land was subject to the Torrens system as established by that legislation. Here, a difference lies with respect to the D17 transaction because the area of Dubai in which that plot is situated is not subject to any Torrens system type of land registration scheme. This means that a person intending to deal with a plot or parcel of land in that general area is not able to search any public land ownership register, as is generally possible where Torrens registration systems are applicable.

34 More specifically, with respect to Dubai and the circumstances of this case, it was uncontroversial that:

(a) the register of land titles held at the Dubai Land Department is not, and at all material times was not, capable of being searched by the general public, including companies such as Sunland, or lawyers acting on their behalf;

(b) until 31 August 2008, records of all off-the-plan sales of land in master communities were kept by the master developer for that master community, not by the Dubai Land Department; and

(c) records kept by master developers of land sales and land titles are not, and at all material times were not, capable of being searched by the general public, including companies such as Sunland, or lawyers acting on their behalf.[72]

35 As in Victoria, land subject to a contract to purchase may be on-sold by the original purchaser, or, for that matter, a subsequent purchaser to a further subsequent purchaser. In Victoria, the evils of "chains" of terms purchase contracts became clear in the land speculation days of the 1950s and 1960s where land in broadacre subdivisions of outer suburban land in Melbourne was on-sold by speculators. As a result, the process was prevented in favour of a sale and mortgage back process

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72 *Plaintiffs' Address* (1 February 2012), paragraph 35.

under the *Sale of Land Act* 1962. The Victorian experience was, of course, not unique to Victoria. In the Australian context, and similar issues arose in other States, particularly New South Wales and Queensland. Dubai, apparently in a massive land development phase, recognised these potential problems and addressed them by requiring a purchaser under a SPA who wished to on-sell to obtain the consent of the master developer, that purchaser's vendor, by entering into a cancellation agreement with respect to that SPA in consideration of the payment to it by the further purchaser of a sum of money, which may be the difference between its purchase price and the on-selling purchase price; with the further purchaser entering into a new SPA directly with the master developer. Thus, it is possible to buy on "terms" and re-sell on "terms", but without the evils of a chain of terms contracts or SPAs, in the case of Dubai, because the original vendor (the master developer) and the actual purchase maintain a direct contractual relationship at all times.

36 The absence of any public land register in Dubai for the area in which Plot D17 is situated was relied upon by Sunland in support of its case. In particular, Sunland submitted on the basis of the expert evidence of Mr Duane Keighran ("Keighran"), a senior lawyer in the firm of Simmons & Simmons Middle East LLP that:[73]

> "… the unchallenged expert evidence of Mr Keighran (who was not cross-examined) was that the plaintiffs had no alternative but to rely on what they were told by Joyce (or other officers of Dubai Waterfront) as to who owned, or had rights over, plot D17".

37 It is, nevertheless, clear that the expert evidence of Keighran relied upon by Sunland in this respect is directed to a situation in which a prospective purchaser is "dealing directly with a master developer".[74] The Sunland case in this proceeding is, however, that it could not, and consequently did not, deal directly with DWF, until it came to an arrangement with Prudentia. Instead, the Sunland case is that it negotiated with Reed and the Prudentia parties to obtain a transfer of a right to

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73 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran (8 August 2010), paragraph 41.5).

74 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran (8 August 2010), paragraph 41).

acquire Plot D17.[75] The expert evidence of Keighran does, however, deal with the situation of a purchaser dealing with a seller who is not the master developer of the subject land in circumstances where there is no public land register available.

38 Keighran's expert evidence in relation to the purchase of land from a seller which is not the master developer of that land requires careful consideration in the context of the Plot D17 transaction. Addressing the process in general terms, Keighran said:[76]

> "It is necessary to check that the entity the purchaser is negotiating with had the Contractual Right (as I noted above, the contractual right to purchase the land from the master developer). If not, purchasers may run the risk of inadvertently dealing with fraudulent parties. In order to prove that the Seller had the Contractual Right, I would usually request (or advise the purchaser to request) a copy of the SPA (or a reservation contract) and any relevant correspondence from the master developer. I would also usually make an appointment (or more often, the purchaser would do this directly) with the Seller to attend the master developer's offices to check the Contractual Right details registered with the master developer's internal registry."

Continuing, Keighran said:[77]

> "Due to the fact that it can be very difficult to confirm the Contractual Right, there is a risk that that you could be negotiating with a party that does not actually possess the Contractual Right. Such a party may demand some sort of payment (such as an 'introduction fee') before the transaction is finalised. Some of these 'introducers' act essentially as brokers and had no intention of ever holding the Contractual Right themselves. For example, I advised a Western client who was attempting to purchase a plot at the Palm Jebel Ali. My client was attempting to contract with a Seller who was a speculative investor who was a number of contracting parties removed from the master developer. The person who brought the deal to my client would not allow my client to deal directly with the person who allegedly held the Contractual Right. However, the Seller could not provide any evidence that he had the Contractual Right to the plot, other than producing some plot drawings of the plot that the Seller possessed. As I discuss below, this is not sufficient. Therefore, I advised the client not to proceed without establishing further evidence."

39 Sunland submitted that Joyce had misstated the effect of Keighran's expert evidence and that the quoting from his witness statement was selective. In particular, Sunland

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75 See *Plaintiffs' Address* (1 February 2012), paragraph 40; and Transcript, p 925.19.

76 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran(8 August 2010), paragraph 42.2), .

77 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran (8 August 2010), paragraph42.4).

submitted that paragraph 42.3 of that witness statement was omitted and that in that paragraph, Keighran deals with the situation where a potential purchaser is dealing with a secondary seller, that is not the master developer, and attempting to confirm that seller's status with the master developer. Paragraph 42.3 of the Keighran witness statement is as follows:

> "*It is possible that the purchaser may not necessarily be provided with any documentary proof of the Seller's Contractual Right prior to attending the meeting to transfer the Contractual Right. As there is no prescriptive way for undertaking such transactions in Dubai and each master developer has different procedures, it is indeed possible that neither the master developer nor the Seller would ever provide any documentary evidence of the Seller's Contractual Right for a particular transaction to the purchaser in which case the only assurance that the purchaser would have as to the Seller's Contractual Right would be the participation of the master developer in the transaction.*" [underlining added by Sunland]

Sunland noted that paragraph 42.4 of Keighran's witness statement had been quoted by Joyce in which Keighran gave an example of advising a client where a broker or introducer of land "would not allow my client to deal directly with the person who allegedly held the Contractual Right". Sunland submitted that:

> "The equivalent scenario would be a broker/introducer acting on behalf of Reed not permitting Brown to deal with Reed. Keighran advised his client not to proceed without obtaining further evidence of who in fact had the right to the land. In that example, clearly the best evidence would have been confirmation from the master developer - which is exactly what Brown obtained from Joyce, and Clyde-Smith obtained from Brearley (Brown paragraph 126)".[78]

40 In my opinion, paragraph 42.3 of Keighran's witness statement does not stand alone, but needs to be read with paragraph 42.4; though, having said that, I do not regard paragraph 42.4 as in any way unhelpful or misleading if read on its own as, if anything, it emphasises the need for a seller in the circumstances postulated to obtain evidence from the seller of a contractual right to sell the particular plot, even if that were, as indicated in paragraph 42.3, the assurance in this respect from the master developer in the transaction. In the present circumstances, Sunland's submissions and reference to these parts of the Keighran witness statement serve to emphasise, in my view, the importance of it establishing a "contractual right" for the

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78 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 88.

purposes of its case[79] and the need for the basis of that right to be clearly stated. Keighran's advice is, without that evidence, that the potential seller ought not to proceed. It was submitted that such evidence was obtained by Sunland, with reference to paragraph 126 of Brown's witness statement.[80] In my view, as indicated in these reasons, exactly what Sunland did not obtain was confirmation from the master developer DWF as to the "Seller's Contractual Right", or any other right which Sunland was able to articulate with any precision.[81]

41 Sunland also relied upon Keighran's expert evidence for the proposition that he was not aware of any "policy or practice" whereby master developers tried to avoid engaging in or the appearance of engaging in gazumping purchasers.[82] In my view, this submission by Sunland is not supported by Keighran's evidence. First, in the last paragraph of point 3.1 in the letter from Hadef & Partners DLA Phillips Fox on behalf of to Sunland, which is annexed to Keighran's expert witness statement and with which he apparently agreed,[83] it is written that:[84]

> "It is our experience that master developers did try to avoid the appearance of 'gazumping' and they would generally try to negotiate with an interested party where the party was an experienced developer that the master developer wanted in the project or where deposits or security payments had been paid. It is important to note that master developers sometimes distinguished between experienced developers who build versus speculators looking to on-sell at a profit, and this might influence any decision to keep negotiating".

Secondly, Keighran also said:[85]

> "As a matter of commerciality, it may be that the master developer may elect

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79 See above, paragraphs 25-27.

80 *Witness Statement of David Scott Brown* (6 August 2010), paragraph 126, which reads:

> "I was informed by Stringer [ie Clyde-Smith] and believe that she phoned Brearley to confirm that Prudentia had development rights over Plot D17, which Brearley confirmed."

81 See, particularly, below, paragraphs 240 to 246; and noting that the reference to paragraph 126 of the Witness Statement of David Scott Brown (6 August 2010) is but one example of the confusion in this respect, noting that the reference at this point was to Prudentia having "development rights" over Plot D17.

82 *Plaintiffs' Address* (1 February 2012), paragraph 212.

83 Witness Statement of Duane Keighran (8 August 2010), paragraph 96 (with one proviso not presently relevant).

84 Witness Statement of Duane Keighran (8 August 2010), Annexure DK-1 (pp 52 – 58) (Letter Hadef & Partners (Dubai) to DLA Phillips Fox (Brisbane).

85 Witness Statement of Duane Keighran (8 August 2010), paragraph 94.

> not to negotiate with another party. However, in my experience, in that situation the master developer would require a security deposit to be paid for the plot".

Thirdly, in point 3.4 of the same letter from Hadef & Partners, it is also written that:

> "… Our experience is that security cheques (which may be refundable) are usually required in order to get negotiations started with the master developer. The situation might be different where the person looking to buy was of particular interest to the master developer. It is our experience that the master developers were not in the business of conducting extensive negotiations with potential buyers without the buyer having something on the table to lose if they did not proceed or without the buyer being a serious developer of interest to the master developer. At the time in question (August – September 2007) the market was very hot and there were a huge number of speculators in the market and therefore master developers (whilst always being polite and entertaining some discussion) didn't have the resources to negotiate with every person that expressed an interest in a plot".

Thus, the evidence establishes 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.

42 Sunland submitted that there was no evidence about whether DWF had any practice in relation to gazumping and that Keighran's evidence was that he was not aware of any master developer, including DWF, that had any policy or practice about gazumping.[86] Sunland continued:[87]

> "Keighran went on to say (paragraph 94) that a master developer may elect not to negotiate with another prospective purchaser, but that '*in my experience, in that situation the master developer would require a security deposit to be paid for the plot*'. In other words the first purchaser would be required to put a hold on the lot, or take control of the lot, or acquire a contractual right against Dubai Waterfront (Keighran paragraphs 24-25, 82-83 and 94-95)."

In my view, this does not detract from my conclusion on the evidence as stated at the end of the preceding paragraph and, rather, tends to detract from Sunland's case in that it emphasises the need for a purchaser to obtain some definite right with respect

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86 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 90, referring to Witness Statement of Duane Keighran (8 August 2010), paragraph 93.

87 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 90.

to land which was to be purchase.

43 It is against this general backdrop that the dealings between the Sunland, DWF and its officers and Reed must be viewed. In this respect it should also be kept in mind that it has not been suggested that Sunland as a sophisticated property developer, itself and through its entities in Australia and Dubai, would not be, or is not, aware of these type of general issues and the manner in which they are addressed in Australian jurisdictions, with which it must be taken to be very familiar. The position is similar in Dubai where Sunland apparently had a significant presence and was the recipient of advice from Ms Julianne Clyde-Smith (nee Stringer) ("Clyde-Smith") who was General Counsel of the Dubai branch of Sunland in 2007 and is currently employed in the Dubai law firm, Clyde and Co, which was retained by Sunland as its legal advisers.

44 In this respect, it should also be kept in mind that, at least from November 2006 to August 2007, Brown had been involved in negotiating the acquisition of another plot in the Waterfront Project on behalf of Sunland, namely Plot D5B. He had also been involved in unsuccessful negotiations for the purchase of Plots A10C and A3B in the Waterfront Project. In my opinion, it would be absurd to suggest that Sunland, Brown or Abedian, were not sophisticated participants in property development in Dubai or that they were unfamiliar with the process of development and purchase of development plots. Additionally, there is nothing in the evidence to suggest that legal advice of a well-informed and sophisticated kind was not available to them, whether from Sunland's corporate counsel or private law firms in Dubai – or Australia for that matter, depending upon relevant expertise. There is also nothing in the evidence to indicate that Sunland, through its officers and legal advisers, was in any way precluded from making inquiries of senior officials of Nakheel or DWF. In fact, as is discussed in more detail below, the evidence is that there were a number of discussions, and, by inference, ample opportunity for discussions, with senior legal and other officers of these entities who would be in a position to provide detailed information as to the state of proprietorship and contractual arrangements

(if any) with respect to Plot D17.

15 August 2007

45 Brown, together with Mr Carl Bennett (then Sunland's project manager in Dubai), met with Austin at the Sunland office in Dubai in connection with Plot D5B. It appears that prior to this meeting, Brearley had sent Reed a draft SPA for Plot D17.[88] In relation to this meeting, Sunland pleads that, amongst other things, Austin showed Brown a draft plan for the reconfiguration of an existing plot (known as D8B) in the Dubai Waterfront Project that would lead to the creation of a new plot that would have beach views and which could be named Plot D17.[89] Sunland further pleads that Austin told Brown no title plan had been prepared for Plot D17 because the redesign of the existing plot had not then been completed.[90]

46 The evidence indicates that it was at the end of the meeting that Austin showed Brown plans for a reconfiguration of some of the plots behind D5B and asked for his opinion.[91] Brown said in his oral evidence that he understood the plans to be confidential as "nobody had seen them"[92] and that "D17 was being created as a different format from a series of other plots that existed there"[93] and "wasn't created" in August 2007.[94] Further, Brown's evidence was that Austin indicated that the redesign of the existing plan was not yet officially complete.[95] Brown understood that the plans had been shown to him because "we'd just finished a design exercise for him on the foreshore and he admired our design ability and when he showed us this plan, one of his first questions was, 'What do you think of it?'".[96] Brown said that the plans gave a fairly good indication of the potential nature of the D17 plot[97] and he agreed that the FAR (Floor Area Ratio) at 9.5 was a good number for a

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88 Transcript, p 194.35 - .45; Court Book, MJJ.009.001.0092.
89 Second Further Amended Statement of Claim, paragraph 11.1.
90 Second Further Amended Statement of Claim, paragraph 11.2.
91 Witness statement of David Scott Brown (6 August 2010), paragraphs 76 and 77.
92 Transcript, p 34.04.
93 Transcript, p 23.01 - .02.
94 Transcript, p 23.10; see also witness statement of David Scott Brown (6 August 2010), paragraphs 76 and 77.
95 Reply witness statement of David Scott Brown (27 June 2011), paragraph 17.
96 Transcript, p 34.12 - .15
97 Transcript, p 34.23 - .24; and see Court Book SUN.002.008.0006.

developer.[98]

47 Brown said in his oral evidence that Austin "was the first person who told me about [D17]".[99] Brown expressed interest in Plot D17, particularly it seems because it lay immediately behind Plot D5B, which Sunland owned. He said that Austin may have said words to the effect that "Reed had a hold on D17"; and Austin also gave him Reed's name and telephone number.[100] Brown had also said that Austin had told him "… that Plot D17 was already taken", and that Austin said that Reed was the person who had "taken it".[101] This oral evidence of Brown contradicted statements and sworn testimony which he had given to the Dubai authorities in the course of an investigation into the acquisition of Plot D17 in December 2008 and through to 2009.[102]

48 Brown's evidence was also that Austin told him, when showing him the new plans on 15 August 2007, "that Plot D17 was already taken by a person called 'Andrew Angus Reed' … who was an international developer" and that Austin gave him Reed's mobile phone number.[103] Brown also confirmed that Austin was the first person to give him this name and that Austin told him "[i]f you are interested in

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98 Transcript, p 34.34.

99 Transcript, p 37.32 - .33.

100 Transcript, p 35.20 - .23 ; and see the other references to Brown saying that Austin said Reed had a "hold" on the land in *Plaintiffs' Address* (1 February 2012), paragraph 76. Reference was also made in Sunland's submissions to emails of 20 and 22 August 2007 from Lee to Joyce and from Joyce to Austin, respectively, as follows (*Plaintiffs' Address* (1 February 2012), paragraphs 123 and 124):

> "MJJ.008.001.0066 **...** is an email dated 20 August 2007 from Lee to Joyce that refers to putting '*pressure*' on Brown, stating '*…Omniyat was also in the running but I am not sure what they will be able to do*'. Omniyat owned a plot which also adjoined plot D17.
>
> In response Joyce instructs Austin: '*Jeff, these plots are not for sale, so I suggest you do not refer customers to our sales department as it will confuse everybody*' (MJJ.008.001.0023) ….

These are, however, communications internal to DWF, communications to which Sunland was not a party. Consequently, they do not assist Sunland's statutory and tortious "misrepresentation" claims. If Sunland had been a party, I am of the view that their contents would not assist Sunland's case as they, in effect, confirm Austin's statements to Brown and are consistent with the Prudentia parties', including Reed, being in negotiations with DWF for the purpose of Plot D17, but having no better position than that. The same applies to the communications referred to in the *Plaintiffs' Address* (paragraphs 56 to 72; *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraphs 8 and 16; and see the responsive submissions set out in *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraphs 86 to 96.

101 Transcript, p 35.07 to .15.

102 See below, paragraphs 304to 320.

103 Witness statement of David Scott Brown (6 August 2010), paragraph 81.

contacting the fellow that's got the hold on this plot, here is his phone number.[104] Brown agreed that he left the meeting with the impression that Austin had been talking to Reed and agreed that "the first thing you did when the clock, the 24-hour clock went around, was to ring Andrew Angus Reed".[105] Brown also agreed that "[f]undamental, … in relation to the discourse concerning D17, is the introduction to D17 by Mr Austin, [although] it was only a very brief introduction.[106]

49 The meeting between Brown and Austin is recorded in Brown's notebook.[107] Brown's notebook entries need to be viewed from the perspective of Brown's use of his notebook. In this respect, he said that he used his notebook "[t]o record conversations and meetings, to have to-do-lists so I wouldn't forget things, so I could plan my day"[108] and agreed that generally he "made the notes in [his] workbook contemporaneously [and] normally during a meeting or on a phone call, I'd be writing down at the same time".[109] Brown agreed that the general purpose of his notebook was to record important matters concerning meetings or phone calls or the like.[110] In relation to the note of the meeting with Austin, it is significant that Brown does not record that Austin used the words "Plot D17 is already taken by Angus Reed" as alleged by Sunland in paragraph 11.3 of the Second Further Amended Statement of Claim, where the allegation with respect to this aspect of the meeting alleges these words but qualifies them with the allegation that they were "words to the effect that". Consequently, given the lack of any unequivocal reference to or recording of words used by Austin in these terms, and Brown's oral evidence that Austin may have said words to the effect that "Reed had a hold on D17", the probability is, in my view, that Austin and Brown had a discussion in relation to the likely creation and possible development of Plot D17 and that Austin, in effect, informed Brown that Reed or Prudentia had expressed an interest in the Plot to DWF

104 Transcript, p 35.22 - .23.
105 Transcript, p 35.30 - .31.
106 Transcript, p 38.4 - .07.
107 Court Book SUN.002.007.0096 (Notebook page 112); and see Transcript, p 36.31 - .32.
108 Transcript, p 36.04 - .06.
109 Transcript, p 44.41 - .46.
110 Transcript, p 36.04 - .05 . Brown said that he kept his notebooks in a drawer behind his desk in his office in Dubai (Transcript, p 143.35 - .40); thus, as was not denied, the notebooks were readily accessible to him at all relevant times.

– which was concerned to see the plot sold to a desirable developer; a position consistent with the manner in which master developers of land in Dubai sought to achieve land development, rather than land speculation.[111] In any event, given the nature of Brown's conversation with Austin and his version of that conversation, one might have expected him to have asked Austin what he meant by "a hold on the plot". In cross-examination, Brown admitted that he had not asked Austin this question,[112] but sought to explain the position as follows:[113]

> "So you accepted that there was a hold on the plot and then the next day rang Mr Reed?---I accepted that Austin knew that Angus Reed had a hold on this plot, yes; he was the government, he was the City Relations manager, he would know.
>
> He would know, a hold on the plot?---He would know. He was dealing with clients every day."

This answer raises further doubts. As discussed below in relation to other discussions between Brown and senior officers of DWF, there is no evidence of any embarrassment on the part of Sunland in asking senior officers, such as Austin, for further details and information in relation to the rights that any other individual or entity might have held with respect to Plot D 17 at any time. In this answer, Brown confirms that Austin would have known the position and there is no suggestion that, if asked, Austin would not have provided sufficient information and details at that time. In this respect, it should also be noted that Austin was, according to Brown, reliable and was not criticised or questioned by Sunland in these proceedings.

50 In the course of this conversation, Brown did, however, understand that Plot D17 did not then exist and, consequently, DWF or Nakheel still owned the land in question.[114] For the same reason, Brown knew that Reed (or Prudentia) had no legal right to Plot D17, which is probably why he did not ask Austin what "a hold" meant. Nevertheless, it was clear to Brown from this meeting that Austin had already been talking to Reed about Plot D17[115] and that this meant that Prudentia was in a better

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111 A position consistent with the expert evidence of Keighran, referred to above, paragraphs 36 to 42.
112 Transcript, p 39.35.
113 Transcript, p 39.41 - .46.
114 Transcript, p 23.04 - .28.
115 Transcript, p 35.25 - .26.

commercial position than Sunland to acquire Plot D17. The negotiating position of Reed on behalf of Prudentia was important and of great value to Sunland.[116] Consequently, Brown was keen to explore the purchase of Plot D17 in a joint venture with Reed on behalf of Prudentia.[117]

51 On 15 August 2007, after his meeting with Austin, Brown and Joyce had a telephone conversation. Sunland pleaded that during this conversation Joyce said words to the effect that:

(i) 'a man named Reed is the contact for Plot D17';[118]

(ii) 'although I will need to check this with Anthony Brearley, Reed's company will be paying DWF AED 135 per sq ft to purchase Plot D17';[119]

(iii) '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[120]

(iv) 'a property speculator would be likely to pay about AED 175 per sq ft to purchase Plot D17'.[121]

52 Brown had not had many discussions with Joyce since June 2007 when Joyce had complained to Brown that Sunland had, in the context of prospective joint venture between DWF and Sunland, misused confidential information about Plot A10C or that Sunland; to use Brown's words, had "betrayed their [DWF] confidences".[122]

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116 Transcript, p 86.39 - .42.
117 Transcript, p 86.01, p 128.15 - .16 ; see Court Book SUN.009.007.5554.
118 Second Further Amended Statement of Claim, paragraph 12.1.
119 Second Further Amended Statement of Claim, paragraph 12.2..
120 Second Further Amended Statement of Claim, paragraph 12.3.
121 Second Further Amended Statement of Claim, paragraph 12.4.
122 Transcript, p 205.46.

Nevertheless, Joyce gave Brown some information about the terms on which Plot D17 might sell, including at a price of AED 135 per square foot, but said that he would need to check the terms with Brearley. Joyce left Brown with the clear understanding that Prudentia had no signed SPA in respect of Plot D17,[123] nor that it had paid any deposit.[124]

53 Issues arose as to the veracity of the claims of Sunland and Brown's evidence in relation to this conversation with Joyce. Sunland pleaded that after the meeting between Austin, Brown and Bennett on 15 August 2007, Joyce called Brown.[125] Brown's oral evidence was that there was a telephone conversation with Joyce on the afternoon of 15 August 2007, but contrary to Sunland's pleading, Brown says in his written statement that he cannot recall who called whom.[126] In cross-examination, Brown's evidence was that it was more likely that he called Joyce.[127] It was submitted on behalf of Joyce that at the time the pleading was drafted, Brown was maintaining the façade, with Sunland's lawyers, that it was Joyce who instigated the telephone call. It was submitted on behalf of Prudentia, Hanley and Reed that Brown's evidence of what Joyce said in this conversation was both uncertain and unreliable. Brown, in his witness statement, said that Joyce told him that a "man named Andrew Reed was the contact for Plot D17 and that Reed's company was partners with Och-Ziff",[128] but in cross-examination, Brown's evidence on this point was as follows:[129]

> "Mr Brown, you realise it is fundamental in this proceeding what words were spoken to you by Mr Reed and Mr Joyce on critical occasions?---Yes.
>
> And one of the conversations that's pleaded in the statement of claim in this proceeding occurred on 15 August 2007?---Yes.
>
> You understand that, don't you?---Yes, I do.
>
> Are you now saying to his Honour that Mr Joyce said more than that a man called Andrew Reed was the contact for D17, in your conversation with him

123 Transcript, p 32.07 - .08 and p 198.01 - .12.
124 Transcript, p 32.10 - .11.
125 Second Further Amended Statement of Claim, paragraph 12.
126 Witness statement of David Scott Brown (6 August 2010), paragraph 82.
127 Transcript, p 174.36 - .39.
128 Witness statement of David Scott Brown (6 August 2010), paragraph 82.
129 Transcript, p 175.26 - .47 – 176.06 - .10. .

> on 15 August?---The notes that were taken in my notebook don't obviously cover everything that was discussed that day, but Joyce did confirm what Austin had told me and that was that Reed had the plot behind D5B and that he was the contact for that plot.
>
> So your recollection to his Honour now is, is it, that Mr Joyce said to you on 15 August that Mr Reed was the person who had plot D17, used that expression?---Words to that effect.
>
> Well, why didn't you say so in paragraph 82?---I think sometimes when you're describing something, you don't necessarily put all the words in there, but that was the gist of what he was telling me.
>
> When you use the word 'gist', it immediately becomes ambiguous, Mr Brown. What do you recollect Mr Joyce actually said to you about the relationship between Mr Reed and D17 on 15 August?---That he had a plot behind D5B, that he had serious partners in the States, Och-Ziff, and talked about - - -
>
> No, I don't need to hear any more. You say to his Honour, do you, that he said that Mr Reed had plot D17?---Well, he identified the plot that Mr Reed controlled, yes. He confirmed what Austin had told me the same day.
>
> You're just making it up, aren't you?---No, I'm not; it's my recollection."

Concluding these submissions, it was said that Brown's "best shot" at what Joyce said was that there was a plot behind Plot D5B and that Reed was the "contact" for that plot.[130] On the evidence, I am satisfied that Joyce said no more than this and, in particular, did not say or imply that Reed (or Prudentia) "controlled" Plot D17 or was the beneficiary (or were the beneficiaries) of "some sort of contract" with respect to the plot.[131]

54 It is fair to say, as submitted on behalf of Joyce, that Brown's evidence about this conversation and, particularly, the way Joyce described Reed, waxed and waned in the course of his oral evidence; but Brown went back to and reaffirmed his witness statement, being that Joyce described Reed as "the contact" for Plot D17.[132] In this respect, I also note the observation contained in the submissions on behalf of Joyce that the fact that Brown was so uncertain as to what Joyce said during this conversation creates a difficulty for Sunland given the allegations of fraud and

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130 Transcript, p 176.18 - .21.

131 And see *Plaintiffs' Address* (1 February 2012), paragraphs 85 to 91; and particularly, as to paragraph 88, with respect to Austin (cf paragraphs 48 - 50, above).

132 Transcript, p 174.25 – 176.25; cf Witness Statement of David Scott Brown (6 August 2010), paragraph 82.

misrepresentation where precision is necessarily expected.[133] Further, it was submitted that in the context of Brown discussing a potential joint venture between Sunland and Prudentia, at its highest Joyce may have said that Reed was the "contact" for Plot D17,[134] which was obviously true for any joint venture with Prudentia and true anyway, given that Reed had already been sent a draft SPA by Brearley. What is clear is that Joyce did not say that Reed had a "hold" on Plot D17, that Reed "controlled" Plot D17, that Reed had a "right" to Plot D17[135] or that Reed had "reserve[ed]" Plot D17.[136]

55 Brown's oral evidence was that Joyce told him that Plot D17 had "favourable payment terms spread over 30 months and that the 'contract price is AED 135/ft² but that he would check this with Brearley" and that Brown made a note of these terms.[137] However, in the course of cross-examination, Brown admitted that Joyce "never deviated from [a price of AED 135/ft²]" during his discussions with Brown.[138] Brown also said that he knew there was no signed SPA, but that he had not been privy to an email from Brearley to Alexis Waller the previous day enclosing a draft SPA (for Reed).[139] Further, it was submitted that the unreliability of Brown's evidence is demonstrated by his answer to a question whether he was drawing from his notebook that he "thought Mr Joyce was saying to you that a contract price had already been agreed with Mr Reed of 135 dirhams/ft²", to which Brown replied "[t]hat's what we were being told, yes. It reflected there was an agreement between Prudentia and DWF on price and payment terms".[140] Subsequently, Brown admitted that Joyce did not tell him a price "in an unqualified way; … the fact that he would check it with Brearley meant that Brearley would know what it was and therefore there was some agreement in existence".[141] It was submitted that a further aspect of

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133 See *Closing Submission of Fourth Defendant* (27 January 2012), paragraph 60; and see below, paragraphs 422- 424.
134 Transcript, p 176.
135 Transcript, p 176.
136 Transcript, p 112.46 - .47.
137 Witness statement of David Scott Brown (6 August 2010), paragraph 83.
138 Transcript, p 63.31 - .33.
139 Transcript, p 195.42 - .43.
140 Transcript, p 196.03 - .06.
141 Transcript, p 200.20 - .23.

unreliability related to Brown's evidence was that Joyce told him Reed was likely to sell to another speculator at AED 175 per sq ft which "reaffirmed to me that Reed controlled the land".[142] Nevertheless, in cross-examination, Brown admitted that a typed up version of his notebook which was prepared for the Dubai prosecutor in January 2009[143] records that Joyce told Brown that "the site was likely to sell [emphasis added] to a speculative investor, around 175/ft² if it was on the open market".[144]

56 I accept that it seems possible, as suggested on behalf of Joyce, that, having been told by Brown of Sunland's interest in "doing" a joint venture with Prudentia on Plot D17, Joyce may have told Brown that Reed was the person to contact; but Brown's file note of the conversation in his notebook makes no reference to Joyce saying words to the effect that Reed was the contact for the plot. Furthermore, given the handwritten note recording that Joyce would need to check the details with "Anthony" (i.e. Brearley), I accept that it seems more likely than not that Joyce simply told Brown that the asking price for Plot D17 was likely to be AED 135 per sq ft.[145]

57 Brown did make a note of this discussion with Joyce in his notebook[146] and said that this was the only record of the conversation with Joyce on 15 August 2007.[147] The additional information which Brown had, however, recorded in his notebook about the discussions with Joyce on 15 August 2007 was omitted from his statement:[148]

> "'Likely to sell to another speculator that we've spoken to at 175.' Then you've written, 'Side deal 65 mill up-front. Hand over contract to purchaser. Enter into consultancy to avoid transfer fee and stamp duty. Agreement with Nakheel.' Where do you refer to that in your statement, that entry? ---Those last few lines?"

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142 Witness statement of David Scott Brown (6 August 2010), paragraph 85.
143 Transcript, p 37.11 - .14.
144 Transcript, p 44.08 - 09 (emphasis added in *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.4.7); Court Book, SUN.004.001.0053, at 0053.
145 Transcript, p 200.17 – 201.18.
146 Witness statement of David Scott Brown (6 August 2010), paragraph 82; transcript, p 63.28 - .29; Court Book SUN.002.007.0001 at 0097.
147 Transcript, p 177.15; Court Book, SUN.002.007.0001, at 0097.
148 Transcript, p 63.35 - .38.

It was submitted that Brown's witness statements in this proceeding contain no reference to that part of his note that records details of a "side deal". In relation to this issue, he was cross-examined by Mr Collinson:[149]

> "MR COLLINSON: Why haven't you mentioned in your statement matters that were discussed arising out of the final section of your note of 15 August, commencing with the words 'side deal'?---Because I didn't fully understand what it meant. It seemed like it was talking about some sort of fee payment of 65 million, but because Joyce had directed us to Reed, I wanted to talk to him about that, whatever that meant.
>
> So is your evidence to his Honour that Mr Joyce raised the issue of a side deal?---Well, I certainly didn't.
>
> That would be very important evidence to give in this proceeding, wouldn't it, Mr Brown, if Mr Joyce at such an early stage was suggesting the payment of a fee by Sunland?---Not fully understanding what it meant, I wasn't sure what I could actually say about it …
>
> But you understand that Sunland's case in this court is that Mr Reed and Mr Joyce were acting in league with each other?---That's what we believe now, yes.
>
> Surely, I suggest, it would be important to mention that in the very first conversation you had with Mr Joyce, he proposed that a fee of 65 million dirhams be paid?---To an extent, I would be speculating what that meant because I didn't fully understand it, and so I wasn't comfortable putting it in my statement.
>
> You were happy to speculate, I suggest, in other parts of your typed note, weren't you? Look at the second-last dot point, which says, 'He said the site is likely to sell to a speculative investor'?---Yes."

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.[150] It is unclear whether Brown made this offer to Joyce or whether Brown merely noted it down in his notebook. It was submitted that Brown's failure to disclose this in his witness statements and his denial of it in cross-examination wholly undermines his

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149 Transcript, p 198.42 – 199.32.

150 Transcript p 201.44 - .46.

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".[151] Brown denied that he had deliberately chosen not to include this material in his statement,[152] but did admit that he had also not mentioned any "side deal" to the Dubai prosecutor.[153]

58 As noted previously, it is clear from Brown's oral evidence that the contents of his notebook, which generally bears notes under dates appearing sequentially, included both a record of conversations, meetings and "to do" lists, so he would not forget things and could plan his day.[154] Brown agreed that he generally made notes "in [his] workbook contemporaneously and normally during a meeting or on a phone call, I'd be writing down at the same time".[155] He agreed that the purpose of his notebooks was to record important matters concerning meetings or phone calls or the like.[156] In any event, at this time, Sunland was keen to be involved in the purchase of Plot D17 in a joint venture and not as a purchaser in its own right.[157]

59 Sunland submitted that the cross-examination of Brown about the precise words said to have been spoken by Joyce amounted to no more than a "semantic quibble".[158] It was, however, submitted on behalf of Joyce that the determination of the actual words alleged to have been spoken by Joyce is crucial because for the conduct to be misleading or deceptive, the question is what the reasonable person in the position of Brown would have understood by Joyce's conduct, and not Brown's subjective understanding of the "gist" of conversations.[159] In any event, even if one were to be more inclined to have regard to the "gist" of conversations such as this, it would need to be viewed in the context of other conversations, events and circumstances

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151 Transcript, p 64.14 - .17, p 64.38 - .40; see also Transcript, p 198.42 - .46 and p 198.01 - .07.
152 Transcript, p 64.22 - .23.
153 Transcript, p 64.46 - .47.
154 Transcript, p 36.4 - .06.
155 Transcript, p 44.41 - .46.
156 Transcript, p 36.05 - .06.
157 Transcript, p 86.01, p 128.15; Court Book, SUN.009.007.5554.
158 *Plaintiffs' Address* (1 February 2012), paragraphs 29 and 275(i).
159 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [10]; *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262 at [45] – [48]; and see below paragraph 351 and following.

alleged to establish Sunland's causes of action in this respect.

60 In response to the submission on behalf of Joyce, Sunland submitted as follows:[160]

> "34. Joyce submissions paragraph 20: The paragraph cited (paragraph [10]) from *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 does not support the submission. Butcher was concerned with the liability of an agent for merely passing on information from a vendor. What the majority in *Butcher*[161] did materially say was as follows:
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> > 36. The relevant class addressed. Questions of allegedly misleading conduct, including questions as to what the conduct was, can be analysed from two points of view. One is employed in relation to "members of a class to which the conduct in question [is] directed in a general sense". The other, urged by the purchasers here, is employed where the objects of the conduct are "identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld"; they are considered quite apart from any class into which they fall. Adoption of the former point of view requires isolation by some criterion or criteria of a representative member of the class. To some extent the trial judge adopted the former approach, pointing out that the class - potential home buyers for Pittwater properties in a price range exceeding $1 million - was small (as suggested by the fact that only 100 brochures were printed), and its members could be expected to have access to legal advice.
> >
> > The former approach is common when remedies other than those conferred by s 82 (or s 87) of the Act are under consideration. But the former approach is inappropriate, and the latter is inevitable, in cases like the present, where monetary relief is sought by a plaintiff who alleges that a particular misrepresentation was made to identified persons, of whom the plaintiff was one. The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known… [footnotes omitted]
>
> 35. Similarly, in the present case it is necessary to consider the character of the conduct of Joyce in relation to Brown, bearing in mind what matters of fact each knew or which each may be taken to have known. It is important that Joyce's conduct be viewed as a whole, and not in isolated parts.
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> 36. In *Butcher*, McHugh J (although dissenting in the result), cited with approval the passage from the judgment of Lockhart and Gummow JJ in

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160 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 34-38.

161 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [36] - [37] per Gleeson CJ, Hayne and Heydon JJ.

> *Accounting Systems 2000 (Developments)* (1993) 42 FCR 470 at 504: 'it is necessary to keep steadily in mind when dealing with [the Act and, in particular, s 52] that 'representation' is not co-extensive with 'conduct'.' In proscribing conduct that is misleading or deceptive or that is likely to mislead or deceive, s 52 operates notwithstanding that the conduct may or may not amount to a representation as the term is understood in the general law.
>
> 37 His Honour went on to observe that the compound conception of conduct that is misleading or deceptive or likely to be so is not confined to conduct that involves representations, referring to the statement of Lockhart J in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* that whether s 52 'has been contravened depends upon an analysis of the conduct of the alleged contravener viewed in the light of all the relevant circumstances constituted by acts, omissions, statements or silence.'
>
> 38. In *North East Equity Pty Ltd (ACN 009 248 819) v Proud Nominees Pty Ltd (ACN 074 270 938)* [2010] FCAFC 60, a case also cited in the Joyce submission, the Full Federal Court (Sundberg, Siopis and Greenwood JJ) observed at [45]: '*In determining or "construing" the content of a representation, and whether a party has engaged in misleading or deceptive conduct, all of the surrounding circumstances must be taken into account, not just the terms of the representations standing alone*.' …"

On this basis, Sunland submitted that the telephone conversation of 15 August 2007 referred to in the submissions on behalf of Joyce[162] should not be considered in isolation. In broad terms, I accept Sunland's general proposition on the basis of the authorities cited that particular statements or conduct do need to be viewed in context.[163] Nevertheless, the conversation of 15 August 2007 is a particularly important conversation in the context of the Plot D17 transaction and is itself an important part of the context of the communications between the parties, written and oral upon which Sunland has relied. For the reasons indicated, I am of the opinion that it is consistent with the broader context of the conduct of the parties and their communications and that this context supports the submissions on behalf of Joyce in relation to its significance.

61 Sunland also responded to the submissions on behalf of Joyce on the basis that they proceeded upon the basis that the Sunland case is based upon the misrepresentation being confined to Reed or Prudentia having a "contractual right" to acquire Plot D17.

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162 See *Reply Submissions of the Fourth Defendant (Joyce)*, paragraph 21.

163 And see below, paragraphs 352 and following.

This issue is discussed elsewhere,[164] as is the further submission against Sunland that, whether or not the right is contractual or something else, Sunland has been unable to establish either the nature of the right which it says was subject to the representations or that, if any right were established as the subject of the representations, the representations were, with respect to that right, false.[165] Finally, I reject Sunland's submission that the admissions made by Brown under cross-examination which were identified in the submissions on behalf of Joyce[166] were explicable on the basis that they were simply accepted as "possible scenarios put to him in cross-examination". Viewed overall, Brown's evidence simply does not support this assertion and, rather, indicates Sunland's confusion in relation to what it says was being represented to it with respect to Reed or Prudentia's "right", contractual or otherwise, in relation to Plot D17; a position which is then exacerbated by the evidence of Abedian.[167]

62 Sunland does not allege that either Austin or Joyce represented that Reed or Prudentia had "control" over Plot D17 by expressly using the word "control". Brown's evidence as to what Austin and Joyce said to him is imprecise.[168] The conversation Brown had with Austin on 15 August 2007 has already been discussed.[169] In relation to his conversation with Joyce, his evidence, which was given in the context of questions about a Summary of Key Events attached to an email from Brown to Abedian on 11 July 2010,[170] was that:

> "[…]---[Joyce] told us Reed was the contact for the plot.
>
> That's different to saying that Mr Reed controls the property, isn't it?---It's different wording, yes.
>
> And a different meaning I suggest. Yes?---In conjunction with what Austin had told us, I think it's the same. It delivers the same message."[171]

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164 See above, paragraphs 25 - 27.
165 See above, paragraphs 25 – 27 and paragraph 40; and, below, paragraphs 232-239.
166 *Reply Submissions of the Fourth Defendant (Joyce)*, paragraph 22.
167 See, further, below, paragraphs 321-332.
168 See *Plaintiffs' Address* (1 February 2012), paragraphs 85 to 91.
169 See above, paragraphs 46 – 50.
170 Court Book, SUN.015.002.0407.
171 Transcript, p 252.19 - .25.

The entries for 15 August 2007 in Brown's notebook do not make any reference to "control" or, for that matter, any synonym of the word "control".[172] When it was put to Brown that Joyce did not say that Reed controlled the site behind Plot D5B, Brown responded "I can't recall exactly".[173] Brown confirmed in cross examination that as at 15 August 2007 he was aware that there was no signed SPA for Plot D17.[174]

63 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".[175] 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".[176] Brown's evidence was that Sunland generally looks for a return on development costs of 20% or more.[177] Feasibility revision three, dated 15 August 2007[178] 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.[179] 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

172 Court Book, SUN.002.007.001, at .0096 - .0097.
173 Transcript, p 176.34 - .35.
174 Transcript, p 195.36.
175 Witness statement of David Scott Brown (6 August 2010), paragraph 88.
176 Witness statement of David Scott Brown (6 August 2010), paragraph 88.
177 Witness statement of David Scott Brown (6 August 2010), paragraph 91; and reply witness statement of David Scott Brown (27 June 2011), paragraph 19.
178 Court Book, SUN 002.009.0064.
179 Witness statement of David Scott Brown (6 August 2010), paragraphs 78.

design team) met with Austin to discuss their further design ideas.[180]

16 – 20 August 2007

64 Sunland pleads that Brown telephoned Reed on Reed's Australian mobile number on 16 August 2007 and during that conversation Reed said to Brown words to the effect that:

(a) 'I am in Melbourne and will be flying into Dubai on Sunday'[181];

(b) Prudentia was his company[182];

(c) through Prudentia 'I have the right over' or 'I control' D17[183]; and

(d) he would be willing to negotiate with Brown about undertaking a joint venture with Sunland for the development of D17[184].

Brown's evidence was that he called Reed and told Reed that he got Reed's information from either Austin or Joyce.[185] He said that during that telephone conversation, Reed introduced himself and suggested that Brown and Reed meet on Sunday.[186]

65 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",[187] and this was Brown's "memory at the time".[188] 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[189] where Brown is recorded as giving

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180 Witness statement of David Scott Brown (6 August 2010), paragraph 79.
181 Second Further Amended Statement of Claim, paragraph 13.1.
182 Second Further Amended Statement of Claim, paragraph 13.2.
183 Second Further Amended Statement of Claim, paragraph 13.3.
184 Second Further Amended Statement of Claim, paragraph 13.4.
185 Witness statement of David Scott Brown (6 August 2010), paragraph 92.
186 Witness statement of David Scott Brown (6 August 2010), paragraph 92.
187 Transcript, p 41.6 - .12.
188 Transcript, p 42.7.
189 Court Book, SUN.014.001.0032, at .0033. The authenticity of this document was challenged by Sunland on the basis that it had not been formally proved or tested in cross examination. The primary objection made was to the accuracy of translation, a matter which could be said to have been addressed in part as a result of the cross examination of Brown in relation to its contents. In any event,

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".[190]

66 As submitted against Sunland, Brown's recollection of what Reed told him was again unclear. In particular, his accounts of the conversation as to the use of the word "control" varied. Brown said that Reed told him that either "[w]e have the rights over that land" or "Prudentia controlled that land" and that Brown understood the words to mean that Prudentia had control over Plot D17.[191] Brown said that he recorded the discussion in his notebook[192] and that although he could not recall the exact words, it "tied in with what Joyce had told me the day before"[193] and was "entirely consistent with what Austin and Joyce had told me".[194] On the other hand, Brown could not recall whether Reed told him that "he had a hold on the land", but said that "he controlled the plot with a very important partner from the US, Och-Ziff" and that Reed's words were consistent with what Austin had said which was Reed "had a hold on the land".[195]

67 Brown was questioned whether he asked Reed during this telephone conversation "[a]re you the purchaser of Dubai Waterfront plot D17".[196] Brown said "I didn't ask him if he was the purchaser, no",[197] but instead "I asked him to confirm what I'd been told by Austin and Joyce the day before and that was 'Did he control plot D17'".[198] It was put to Brown that his evidence that he had asked Reed to confirm Joyce's statements had not been said anywhere before Brown gave evidence in these proceedings. Brown's response was that "I can't recall whether I've said it anywhere

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though referred to in support of the defendants' case it is not relied upon in any way for the purpose of these reasons for judgment.

190 Brown did not make enquiries which he had made in relation to other sites, see above, paragraphs 43 and 44.

191 Witness statement of David Scott Brown (6 August 2010), paragraph 92.

192 Witness statement of David Scott Brown (6 August 2010), paragraph 92; and see Court Book, SUN.002.007.0001, at .0099.

193 Witness statement of David Scott Brown (6 August 2010), paragraph 92.

194 Transcript, p 32.26 - .28.

195 Transcript, p 32.30 - .39; and see above, paragraph 49.

196 Transcript, p 21.05 - .06.

197 Transcript, p 21.10 - .11; reply witness statement of David Scott Brown (27 June 2011), paragraph 7.

198 Transcript, p 21.15 - .16.

before, but it confirms that he controlled the plot, had a hold on the plot, they were the tones of his words".[199]

68 Nevertheless, Brown did admit under cross-examination that he knew that Reed did not hold a SPA in relation to Plot D17 at the time of the meeting on 19 August 2007,[200] having said that a SPA is "the final ownership document for a property",[201] and that neither Prudentia or Reed had paid a deposit.[202] Consequently, the fact that Reed or Prudentia may then have been negotiating with DWF for the purchase of Plot D17 does not affect the position.[203] In response to the question whether Brown knew that Prudentia did not own Plot D17, he replied "[y]es we did".[204] Also importantly, Brown also confirmed under cross-examination that he "didn't ask" [Reed] "whether he had or how he came to have an entitlement to the plot", but that "he explained about Och-Ziff, though, as his partner".[205] Brown added that "[k]nowing that the land was being created, no, we didn't" ask Reed for a document or piece of paper to indicate his hold on the land.[206]

69 It was quite clear from Brown's evidence that he knew that neither Prudentia nor Reed owned Plot D17, as the following exchanges in the course of his cross-examination indicate:[207]

> "Who did you understand owned D17?---We understood, from Austin and [Joyce[208]] that Prudentia controlled that plot.
>
> 'Controlled', what do you mean by controlled?---If there is no title plan, and in Dubai a title plan is an affection plan existing, then the plot can't be

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199 Transcript, p 48.31 - .35 (emphasis added in the *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.8.5).

200 Transcript, p 32.07 - .08; see also Transcript, p 195.36; see also Transcript, p 205.27.

201 Transcript, p 30.44 - .45.

202 Transcript, p 32.10 - .11.

203 See *Plaintiffs' Address* (1 February 2012), paragraph 95. Indeed, for the reasons discussed further below, it would be implausible to suggest that Sunland did not think this was the position as it paid the fee to the Prudentia parties to step into these "negotiating shoes" (see below, paragraphs 163 to 166; and see paragraph 222). The position is not changed by reference to internal communications between the Prudentia parties, even assuming that they were unequivocally in support of Sunland's position, which I do not accept (see *Plaintiffs' Address*, paragraph 99 (and as to paragraph 99(e), see below, paragraph 57 and see *Plaintiffs' Address*, paragraphs 103 to 107 and 137 to 140).

204 Transcript, p 32.13.

205 Transcript, p 49.5 - .09.

206 Transcript, p 33.1 - .03.

207 Transcript, p 23.04. - .24.

208 Note that the transcript says Aidarous, but clearly Aidarous was not involved.

owned.

So the plot wasn't owned?---Well, it wasn't created.

What was the DWF or Nakheel entitlement to the plot?---They owned the plots that were existing prior to the reconfiguration.

So do you say the reconfiguration changed the nature of ownership of the plot?---No, I'm saying that the D17 didn't exist at the time we were talking to Mr Reed, in the sense of it having a title plan, a formal title plan.

So at the time you were talking to Mr Reed, you say D17 didn't exist?---No, I'm saying it didn't exist as a title plan, yes.

It didn't exist as a title plan?---As a registered title plan, yes.

So who owned it?---It was being reformatted from a series of other plots."

70 Brown's evidence was that Reed asked him whether Sunland was interested in a joint venture in Dubai and that Brown said "that it would be interested".[209] This was confirmed in his cross-examination, where Brown gave evidence that Sunland was "very keen to do a joint venture, yes"[210] and agreed that Sunland "didn't need any encouragement to purchase [D17]".[211] Reed told Brown that Prudentia would put the land into a joint venture for AED 175/sqft and "would be looking for a consultancy fee of AED 60M" which, according to Brown's evidence, surprised him because it was higher than the price "Joyce had mentioned".[212] Brown said that Reed told him during the telephone call that he had a "leisure lifestyle vehicle in Australia and was partners with a large American hedge fund".[213] Brown's evidence was that he understood this to be a reference to Och-Ziff because of what Joyce had told Brown on 15 August 2007.[214]

71 Brown's evidence was that he had formed the impression, although he could not remember the exact words that were used, that Reed had high level connections within Nakheel.[215] As to who told Brown this, he said "[i]nitially, Joyce and then

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209 Witness statement of David Scott Brown (6 August 2010), paragraph 93.
210 Transcript, p 128.15 - .16.
211 Transcript, p 128.18.
212 Witness statement of David Scott Brown (6 August 2010), paragraph 93.
213 Witness statement of David Scott Brown (6 August 2010), paragraph 94.
214 Witness statement of David Scott Brown (6 August 2010), paragraph 94.
215 Transcript, p 113.6 - .10.

Reed himself".[216] However, this evidence was later contradicted, which, as was submitted against Sunland, pointed to the "utter unreliability of Brown's evidence on these critical points".[217] This is illustrated by Brown's evidence in cross-examination as to the basis of this "impression":[218]

> "Did anyone else tell you that Prudentia had such high-level connections? ---No.
>
> No? I suggest that you've told the court that, in fact, Reed and others told you that they had high-level connections with Nakheel?---Well, the words spoken by Joyce and Reed indicated that Och-Ziff was an extremely important player in this transaction and that that relationship was crucial to the deal.
>
> What you have said here to your director and chair of the audit committee, 'Reed told us he had connections, high-level connections, with Nakheel, enabling them to reserve this site.' On your evidence in court this morning, that is incorrect?---I don't agree with that because he referred to Och-Ziff for the very reason to show how important they were in the transaction, that they had this very powerful partner.
>
> Do you have your statement in front of you, Mr Brown, the first statement at SUN.013.001.0358?---Yes.
>
> I would ask you to turn to paragraph 142. You say there, do you not, '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'? Just stopping there, is that correct? ---Yes, through what he had told me.
>
> 'It seemed a reasonable guess that it was someone high up in Och-Ziff who was Reed's connection to the contact in Nakheel.' Is that correct?---Yes.
>
> 'I thought 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.' Is that correct?---It is because we Googled - - -
>
> I didn't ask - is it correct?---Yes.
>
> 'I cannot remember when I first formed this view, but comments such as these by Joyce supported it.' So based on comments by Joyce, you formed the conclusions that you set out in that paragraph; is that right?---Comments by Joyce and Reed, yes."

72 Sunland pleads that Brown and Joyce exchanged emails on 16 August 2007 after

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216 Transcript, p 75.01.

217 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.8.11.

218 Transcript, p 113.25 - .47 and p 114.01 - .09; see also Transcript, p 74.41 - .45.

Brown had spoken with Reed[219] and that an email in reply from Joyce that:

(a) was sent to Brown's email address 'dbrown@sunlandgroup.com';[220]

(b) included the words "[a]nyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us";[221] and

(c) was, in the course of being sent from Joyce's computer to Brown's computer, transmitted through a server in Australia.[222]

73 Brown sent an email to Joyce on 16 August 2007 telling him that " [i]t was a very positive discussion".[223] Brown's evidence is that Joyce's email referred to in these pleadings was sent to Brown in response[224] and that he understood the message from Joyce to mean that Sunland "would have to come to an arrangement with Reed before it could deal with Dubai Waterfront".[225] The email from Joyce must, however, be read in the context of the circumstances at that time. These circumstances, which were known to Brown and Abedian, included that:

(a) Brown had already spoken briefly to Reed by telephone;

(b) Brown had made the call to Reed in pursuit of a joint venture with Reed;

(c) Brown indicated that his discussions with Reed would continue "on Sunday"; and

(d) from Joyce's perspective (at least), Sunland had acted in an improper manner in an earlier prospective joint venture between Sunland and DWF in connection with Plot A10C.[226]

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219 Second Further Amended Statement of Claim, paragraph 14.2..1.
220 Second Further Amended Statement of Claim, paragraph 14.1.1.
221 Second Further Amended Statement of Claim, paragraph 14.2.2; and see *Plaintiffs' Address* (1 February 2012), paragraph 91.
222 Second Further Amended Statement of Claim, paragraph 14.2.3.
223 Witness statement of David Scott Brown (6 August 2010), paragraph 97; Court Book SUN.001.005.0002.
224 Witness statement of David Scott Brown (6 August 2010), paragraph 98; Court Book SUN.001.005.0002.
225 Witness statement of David Scott Brown (6 August 2010), paragraph 100.
226 Transcript, p 205.40 - 47.

74 Thus, it was submitted against Sunland, that the 16 August 2007 emails speaks for itself and that the "arrangement"[227] to which Joyce was referring in his email on 16 August 2007 was one by which Brown and Reed would agree that Sunland would be responsible for speaking to DWF about Plot D17 on behalf of the proposed joint venture and that there should be a single point of contact with whom DWF could deal in connection with Plot D17.

75 Joyce, as recently as late June 2007, was "unhappy" with Sunland to use Brown's words,[228] concerning Sunland's attempts to acquire Plot A10C on its own account soon after discussions between DWF and Sunland about potential joint ventures involving various plots. In an email to Brown, Joyce said that the circumstance "has caused us major embarrassment".[229] Joyce had complained that Sunland had acted improperly when it attempted to acquire Plot A10C on Sunland's own account and Brown agreed that there had been "something of a falling out with Mr Joyce".[230] It was submitted that it is apparent from the email dated 16 August 2007 that there were negotiations underway with Reed in relation to Plot D17 and that Joyce did not want Sunland to go behind Reed's back - as Joyce believed that Brown had done to DWF in connection with Plot A10C. In my view, there is considerable force in these submissions which do, I think, encapsulate the likely position consistently with the evidence which Brown ultimately gave.

76 This is supported by Brown's "clear statement" which he prepared on 22 January 2009.[231] 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

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227 Second Further Amended Statement of Claim, paragraph 14.2.2; Court Book SUN.001.005.0002.

228 Witness statement of David Scott Brown (6 August 2010), paragraph 57.

229 Court Book, MJJ.002.002.0675.

230 Transcript, p 205.29 - .38.

231 Court Book, SUN.004.002.0036, at .0037: "We understood from Nakheel that we had to have an arrangement with Angus Reed to be able to develop the plot <u>together</u>". (emphasis added)

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. 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.[232] 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:[233]

> "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, (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'.[234] 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.[235] 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.[236] 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,[237] that there was no signed SPA in favour of Reed, or the Prudentia parties.[238] 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

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232 Court Book, SUN.001.005.0004; and see Witness statement of David Scott Brown (6 August 2010), paragraph 123.

233 Court Book, SUN.009.003.4477.

234 See, for example, *Plaintiffs' Address* (1 February 2012), paragraph 99(e).

235 See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 114.

236 Transcript, p 186.30 - .34.

237 Court Book, SUN.009.003.4477.

238 Transcript, p 32.07 - 08 and p 198.01 - .12.

generally connote something in the nature of a legal entitlement.[239] 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.[240] 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 …".[241]

77 There was some controversy as to whether Joyce's email was in fact copied to Abedian. Abedian's evidence was that even though this email chain was not forwarded to him, he nonetheless saw it because Brown brought in a hard copy of that email for him to see and that this occurred on 16 or 17 August 2007.[242] Brown's evidence in cross-examination was that he had no recollection of sending the email

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239 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".

240 *Plaintiff's Reply to the Supplementary Written Submissions of the Defendants*, paragraph 106; and see below, paragraphs 128 and following.

241 *Plaintiff's Reply to the Supplementary Written Submissions of the Defendants*, paragraph 107; referring to the email contained in Court Book, SUN.009.003.4440.

242 Transcript, p 388.11 - .12; .25 - .26; and .34 - .35.

to Abedian and he agreed that there is no evidence that the email had been shown to Abedian.[243]

78 Sunland said that submissions against it regarding its non-reliance on the 16 August 2007 email are undermined because the Financial Audit Report discloses that Brown provided the email to the Dubai investigator on 25 February 2009.[244] Nevertheless, the date of 25 February 2009 post-dates a variety of events, referred to in submissions against Sunland, during which Brown did not refer to the 16 August 2007 email in circumstances where that would have been expected if Sunland had relied upon it:[245]

(a) Brown's emails with Mr Mustafa of the Dubai Financial Audit Department in December 2008;[246]

(b) Brown's interview with the Dubai authorities on 21 January 2009;[247]

(c) Brown's signed "clear statement" of events prepared on 22 January 2009;[248]

(d) Brown's Brief to the Dubai Prosecutor document dated 15 February 2009;[249]

(e) Brown's interview with the Dubai authorities on 16 February 2009;[250]

(f) Brown's typed "Plot D17, Diary Notes".[251]

Additionally, Brown's evidence was that he could not recall whether he had any specific recollection of the 16 August 2007 email when he began dealing with the Dubai authorities in December 2008.[252] Additionally, Abedian admitted that no

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243 Transcript, p 260.09 - .13.

244 See *Plaintiffs' Address* (1 February 2012), paragraphs 110 to 112, 213 and 318(a), and *Closing Submissions of Fourth Defendant* (27 January 2012), paragraphs 369 to 380.

245 See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 123.

246 Court Books, SUN.003.005.0015, SUN.003.005.0006, SUN.003.005.0019.

247 Court Book, SUN.014.001.0045. As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189.

248 Court Book, SUN.004.002.0036.

249 Court Book, SUN.004.002.0075.

250 Court Books, SUN.014.001.0005, SUN.014.001.0032. As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189.

251 Court Book, SUN.004.001.0053. It is unclear when Brown prepared them, however the content suggests it was after 16 February 2009, as they are consistent with the new version of events he began telling the Dubai authorities from that point.

252 Transcript, p 275.22 - .24.

reference to this email was made in the course of preparing Brown's report to the Sunland Board, dated 1 February 2009, nor could he explain why, if it was so important to Sunland, it was not mentioned.[253]

79 In spite of Brown's evidence, Abedian maintained his claim that a hard copy of the Joyce email was handed to him by Brown.[254] According to Abedian, this email was of such importance to him that he kept it in his office drawer.[255] Indeed, his evidence was that it was so important that from time to time he "showed [it] to some people that it was important to me".[256] In spite of its claimed importance, Abedian's evidence was that he no longer has a copy of this email, having disposed of it[257] in an office move around December 2006, September to December 2006, at the end of 2006.[258] This, of course, could not have occurred, as the email was not in existence at this time, being an email in August 2007. As submitted against Sunland, I must conclude that Abedian's evidence of keeping this email was a complete fabrication, as is clear from the following part of his evidence in cross-examination:[259]

> "If you were showing this email to people like Mrs Joyce and Mr Bin Haider in early 2009, how could you have disposed of the email as part of an office move in December 2006? The email didn't even exist in 2006?---No, the move, we made it in the end of 2007, 2007.
>
> I see, before Christmas?---I think so. I could not give you exact date about the move of the office.
>
> Well, if it was before Christmas, then you didn't have that email at the time Mr Joyce was arrested, did you?---No, I had because I can vividly remember that David gave me the email, that is why I am telling you, when he was arrested. Shortly after, I showed it to Angela.
>
> Your evidence is you disposed of the email, the hard copy you kept in your drawer, at the time of the office move; correct?---That's correct.
>
> Your office move was at the end of 2007?---I don't know exactly the time. I can find out and let you know.
>
> It was well prior to the arrest of Mr Joyce?---It was, correct.

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253 Transcript, p 402.40 to 403.40.
254 Transcript, p 388.28 - .29.
255 Transcript, p 389.01 - .05.
256 Transcript, p 389.13 - .14.
257 Transcript, p 389.14 - .15.
258 Transcript, p 391.45 - .46.
259 Transcript, p 392.03 - .33.

> Yes, so when you have your meeting with Mrs Joyce, you don't have that original email, do you?---With Mrs Joyce?
>
> Yes?---No, I had in my hand, I showed it to her.
>
> How could you have the original email that you kept in your drawer if you disposed of it at the end of 2007 as part of an office move?---Maybe it wasn't disposed, maybe I kept it, maybe I asked David to give me another copy. It was always there for me to access it. I didn't need to keep anything. I could have had a hundred copies of that."

On the basis of the evidence of Brown and Abedian it is clear, in my view, that Abedian never saw a copy of the Joyce email of 16 August 2007.[260]

80 Even assuming that Abedian did see a copy of this Joyce email at any relevant time, his evidence in relation to his understanding of it is similarly unbelievable. He said that he understood from reading the email that Reed had control over Plot D17 and that like any other transaction in Dubai to purchase off-plan land, if a property is in control of a person you need to come to an arrangement to pay this person a premium before you can enter into an agreement with the government entity to purchase the land.[261] A plain reading of the email does not support Abedian's contention in his evidence that this document is to be read as expressing such a condition. As a matter of plain English, the email message is simply that Reed and Brown, as representatives of a potential joint venture, must sort out between themselves who will negotiate with the vendor of Plot D17 before DWF will start dealing in respect of the site. Sunland's evidence at trial in relation to this email contorts its clear language and plain meaning and is inconsistent with the contemporaneous transactional evidence and also inconsistent with Sunland's interpretation of the document in communication with the Dubai prosecutors.[262] In view of all these factors and considerations, one would have to conclude that the evidence of Abedian in this respect is that of a person concerned only to advance his interests, and those of Sunland, as he perceived them to be.

81 Sunland pleads that Brown and Reed met at Brown's office on 19 August 2007 and

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260 And see below, paragraphs 269 to 270.

261 Witness statement of Soheil Abedian (6 August 2010), paragraph 50.

262 Court Book, SUN.004.002.0036.

that Reed said to Brown words to the effect that:

(a) "the price in the area in which Plot D17 is located is as high as AED 175 per sq ft"[263];

(b) "I can obtain a price of AED 135 per sq ft from Dubai Waterfront";[264]

(c) "I want compensation of AED 40 per sq ft as part of the terms of a joint venture";[265] and

(d) "it would be more tax effective for the compensation to be paid as a fee to Prudentia for consultancy services".[266]

82 Sunland also pleads, further, that:

(a) "Reed told Brown the payment terms on which Reed was acquiring D17";[267]

(b) "the payment terms that Reed told Brown were exactly the same as those that Joyce told Brown on 15 August 2007";[268] and

(c) "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".[269]

83 Brown's evidence was that he sent several emails to Reed on 17 August 2007 "regarding the arrangements for our meeting on 19 August 2007",[270] including one email advising that he would have an offer ready when Reed arrived on Sunday.[271] Brown said in his witness statement that he was told by Abedian before the 19 August 2007 meeting that Omniyat [Properties] was negotiating to purchase a plot, which was likely to be Plot D17[272] and that he and Abedian concluded that

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263 Second Further Amended Statement of Claim, paragraph 15.1.
264 Second Further Amended Statement of Claim, paragraph 15.2.
265 Second Further Amended Statement of Claim, paragraph 15.3.
266 Second Further Amended Statement of Claim, paragraph 15.4.
267 Second Further Amended Statement of Claim, paragraph 16.1.
268 Second Further Amended Statement of Claim, paragraph 16.2.
269 Second Further Amended Statement of Claim, paragraph 16.3.
270 Witness statement of David Scott Brown (6 August 2010), paragraph 102.
271 Court Book, SUN.001.006.0001.
272 Witness statement of David Scott Brown (6 August 2010), paragraph 103; see also reply witness statement of David Scott Brown (27 June 2011), paragraph 31.

Reed must have contacted Omniyat.[273] Abedian's evidence was that, after he learned that Reed or Prudentia were interested in Plot D17, he spoke to Mr Ahmed Afiffi, who owned a real estate agency in Dubai and then learned that Plot D17 had already been offered to another developer named Omniyat Properties ("Omniyat") – which was well known in Dubai – and concluded that Reed's objective was to find a locally based developer who could participate in a joint venture over Plot D17 or, alternatively, to on-sell the plot for a profit.[274] Brown also says in his evidence that he had discussions with Abedian based on the feasibilities which Brown had prepared and the early design concept and that Abedian wanted to ensure that Sunland would control the design, project management, construction and marketing and receive a fee for those services.[275]

84 Abedian did not attend the meeting with Reed.[276] Nevertheless, Abedian's evidence was that he was informed by Brown of the discussions Brown had with Reed following the meeting [277].

85 According to Brown's evidence, Reed told him at the meeting that he had been to see Nakheel prior to their meeting.[278] Brown said in oral evidence that he did not ask Reed for "a document or piece of paper to indicate his hold on the land".[279] This was, he said, due to his "knowing that the land was being created".[280] Brown could not recall for certain, but believed that he would have told Reed that Sunland had purchased Plot D5B nearby because it would have made sense to tell Reed of this.[281] Telling Reed about Plot D5B would have enabled Brown to explain to Reed the advantages for building on Plot D17 if the buildings on Plot D17 and Plot D5B (which was a beachfront lot) could be designed together and sold with a common or

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273 Witness statement of David Scott Brown (6 August 2010), paragraph 103.
274 Witness statement of Soheil Abedian (6 August 2010), paragraph 46.
275 Witness statement of David Scott Brown (6 August 2010), paragraph 104.
276 Witness statement of David Scott Brown (6 August 2010), paragraph 106; see also Court Book SUN.002.007.0001 at .0101.
277 Witness statement of Soheil Abedian (6 August 2010), paragraph 52.
278 Witness statement of David Scott Brown (6 August 2010), paragraph 106 - 107.
279 Transcript, p 33.01 - .03.
280 Transcript, p 33.03.
281 Reply witness statement of David Scott Brown (27 June 2011), paragraph 28.

staged marketing plan.[282] Brown's evidence was that Reed "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".[283] Brown admitted during cross-examination that Sunland was "keen to be involved, yes, as a joint venture partner" [for D17].[284] Brown also said that Reed confirmed at the meeting that "his American partners were Och-Ziff" and that he also mentioned Zoltan being "his contact in Hong Kong".[285]

86 In his initial witness statement, Brown said that Reed showed him the same plan for Plot D17 as Austin had shown to Brown.[286] Brown's evidence was that Reed informed him:

(a) the land price in this area of Waterfront would be as high as AED 175 per sq ft but he could obtain a price of AED 135 per sq ft from DWF. Based on this saving, he wanted a fee of AED 40 per sq ft x the total BUA on the site (which was AED 1,607,052), which was approximately AED 65M;[287]

(b) Reed said that the fee could be paid either by Sunland paying to have equity in the deal, or Sunland alternatively could contribute to the soft costs and land payments to the joint venture up to this value;[288] and

(c) that Prudentia's fee would be AED 65 million which was a figure calculated by taking the difference between a price per square foot of AED 175 (the price the land would be put into the joint venture) and AED 135 (the price it would cost from DWF) (ie AED 40 multiplied by the BUA of 1,607,052 ft² = AED 64.3 million).[289]

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282 Reply witness statement of David Scott Brown (27 June 2011), paragraph 28.
283 Witness statement of David Scott Brown (6 August 2010), paragraph 119.
284 Transcript, p 86.01 - .02.
285 Witness statement of David Scott Brown (6 August 2010), paragraph 108.
286 Witness statement of David Scott Brown (6 August 2010), paragraph 118.
287 Witness statement of David Scott Brown (6 August 2010), paragraph 109.
288 Witness statement of David Scott Brown (6 August 2010), paragraph 110.
289 Reply witness statement of David Scott Brown (27 June 2011), paragraph 27.

87 In cross examination, Brown admitted that "[t]he intent from our side" was that "any premium coming out of a joint venture arrangement [would come] out at the tail end",[290] the premium which would go to Prudentia, if Sunland had entered a joint venture agreement, was to come out at the end.[291] The payment of a premium into the joint venture was in fact agreed "upfront" between Reed and Brown, as was the formula for calculating the premium:[292]

> "The very first thing that you agreed on with Mr Reed on 19 August was for a premium in the joint venture agreement?---Is that a statement?
>
> Sorry?---Is that a statement?
>
> Yes, I'm putting that to you: the very first thing you agreed upon at the meeting with Reed on 19 August was the payment of a premium?---We discussed a premium, certainly. He talked about having a premium of 40 dirhams a foot."

88 Brown's evidence was also that he told Reed at this first meeting that he would provide Reed with a copy of the Sunland feasibility study which would have the basic data such as land price, BUA, net saleable area and the like.[293] In cross-examination, Brown admitted that Sunland had commenced working on feasibility prior to meeting with Reed and that as of 19 August 2007, Sunland was motivated towards the potential of a joint venture arrangement with Prudentia.[294] Brown's evidence was that by the time he first met Reed , he was up to the fifth revision of the feasibility, which was showing a project profit of 26%.[295]

89 Brown's evidence was that Och-Ziff was mentioned at the first meeting between Brown and Reed on 19 August 2007[296] and also by Joyce in discussions with Brown.[297] In February 2009, when Brown prepared reports for Mr Ron Eames, a director of Sunland Group Limited and Chairman of the Audit Committee, and partner of law firm DLA Phillips Fox ("Eames"),[298] about the investigation by the

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290 Transcript, p 53.18 - .23.
291 Transcript, p 54.10 - .12.
292 Transcript, p 54.22 - .29.
293 Reply witness statement of David Scott Brown (27 June 2011), paragraph 29.
294 Transcript, p 52.38 - .46 and p 53.1 - .04.
295 Reply witness statement of David Scott Brown (27 June 2011), paragraph 21.
296 Witness statement of David Scott Brown (6 August 2010), paragraph 108.
297 Witness statement of David Scott Brown (6 August 2010), paragraph 82.
298 Transcript, p 231.03 - .05; see SUN.004.002.0063 - .066.

Dubai authorities,[299] he reported that:

> "Reed told us that he had connections in Hong Kong and the USA, and the US group 'Och-Ziff', a strong Investment Group, had high level connections with Nakheel, enabling them to 'reserve' this site."

I also asked Brown for clarification of his statement:[300]

> "Indeed, the paragraph numbered 2 at the foot of 0065 refers to this introduction and consultancy fee. No suggestion of any legal entitlement by Prudentia to purchase the land, is there?---It talks about enabling them to reserve the site.
>
> HIS HONOUR: Sorry, where does it say that?---The second paragraph, are we still on 0065?
>
> But grammatically 'them to reserve' is a reference back to Och-Ziff, isn't it? Are you saying that paragraph is not to be read grammatically?---In my mind, the 'them' is Reed and Och-Ziff.
>
> It doesn't say that?---It doesn't say it exactly - - -
>
> But that's what you say it should have said?---Should have said."

Despite prevarication and denials, Brown speculated that Och-Ziff, through a high level arrangement with Nakheel, may hold the development rights to D17:[301]

> "HIS HONOUR: Mr Brown, just going back to your detailed summary, I'm a little unclear as to whether you're saying Och-Ziff was in a position to reserve the site or Reed was in a position to reserve the site?---I think Reed was the person on the ground in Dubai, by his visits. Och-Ziff were offshore in America, but they obviously had a partnership because Reed and Joyce both referred to them in association with Prudentia.
>
> That doesn't clarify what I asked. Who are you saying was in a position to reserve the site?---Prudentia, through Reed.
>
> Not Och-Ziff?---They were a partnership. That's how it was presented to me from Joyce and from Reed."

90 Brown admitted that his report in relation to the Plot D17 transaction in the investigation by the Dubai authorities which was prepared for the Board of Sunland Group Ltd in February 2009 did not say anywhere in it that Prudentia had a legal entitlement to Plot D17.[302] The report prepared for the Board was not the only

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299 Court Book, SUN.004.002.0063.

300 Transcript, p 233.44 - .46 and p 234.01 - .10.

301 Transcript, p 114.11 - .22.

302 Transcript, p 233.41 - .42.

formal document that referred to Och-Ziff as having rights over Plot D17. Earlier in December 2008, in communications with the Dubai authorities, Brown told Mr Mustafa in an email[303] that:

> "Angus mentioned that his company (Prudentia) had a connection with a company called 'Oxiff', and that Oxiff was based in the USA. We understood that this company may have had a high level arrangement with Nakheel for the development rights on the plot."

In cross-examination, Brown was questioned in relation to this statement:[304]

> "In the last sentence where you say, 'this company', you're referring to Och-Ziff, aren't you?---Yes.
>
> So your recollection in this first communication to Mr Mustafa is that if any entity had some kind of an arrangement relating to D17, it was Och-Ziff?---No, that's not right. Austin told us Reed had a hold on the plot and Joyce told us Reed was the contact and mentioned Prudentia and their partners, Och-Ziff.
>
> Yes. But you thought at the relevant time that Mr Reed was representing Och-Ziff, didn't you?---I knew that he had a partner called Och-Ziff and that they'd done projects together.
>
> You knew that he was representing Och-Ziff, that's what you understood from Mr Reed?---Yes, representing Och-Ziff and Prudentia.
>
> When you told Mr Mustafa, 'We understood that this company may have had a high-level arrangement with Nakheel for the development rights on the plot,' you were referring to Och-Ziff, not Prudentia?---Yes."

In relation to the possible involvement of Och-Ziff, it must be observed that if Sunland were relying on any representation with respect to the involvement of Och-Ziff in the Plot D17 transaction it did not establish that there was any misleading or deceptive conduct or that the representation was false – assuming for the moment that Sunland identified any representation in this respect or that it relied upon such a representation. Rather, the effect of Sunland's evidence with respect to Och Ziff goes more to indicating some "involvement" of that entity with Plot D17 which tends to negate Sunland's case, both as to the Representations and also reliance (assuming the Representations were established).[305]

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303 Court Book, SUN.003.005.0016.

304 Transcript, p 210.41 - .47 and p 211.1 - .10.

305 See below, paragraph 226 and following (as to the significance of Sunland's knowledge of the Och-

91 A variety of communications followed the first meeting between Brown and Reed which took place in Dubai on 19 August 2007. In an email from Brown to Reed sent on 19 August 2007, the contents of which had been checked by Brown with Abedian, Brown said that "[w]e have no issue with your Premium of AED 40 /Ft2 of BUA for the land".[306] The email also set out the Sunland model for a joint venture. Brown was also very clear in his oral evidence that there was no issue from the perspective of Sunland in relation to payment of a premium. In cross-examination he said:[307]

> "I beg your pardon, 40 dirham per square foot. Correct?---In principle, we had no problem with the premium calculation.
>
> What had he suggested to you the premium would be?---He said it would be, by his calculation, 40 dirhams per square foot times 1,607,052 square feet, which was the built-up area on the land, and that equated to about 65 million.
>
> So you had no problem, on the basis of this discussion, you are saying to him, about a premium of about 60 million dirham?---Provided he accepted the other terms listed there.
>
> They are the traditional Sunland terms for a Sunland model for a joint venture?---Yes, but these sorts of discussions go through until you sign a joint venture agreement. They are our terms."

Brown also sent an email to Austin "to let him know that I had met with Reed and put forward a JV proposal".[308] At this time, Sunland had not had any dealings with either Lee or Brearley in relation to Plot D17.[309] On 20 August 2007, Reed replied to Brown's email of 19 August 2007.[310] Of relevance in the present context was Reed's reply that:[311]

> "Firstly thank you for your proposal my intial [sic] comments is that a JV on these terms <u>would hold little appeal as the money would be all be being provided by our side</u> 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

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Ziff involvement).

306 Court Book, SUN.009.003.4429; and see PRU.001.007.0176.

307 Transcript, p 54.40 - .47 and p 55.01 - .06.

308 Witness statement of David Scott Brown (6 August 2010), paragraph 123; Court Book, SUN.001.005.0004.

309 Witness statement of David Scott Brown (6 August 2010), paragraph 128.14.

310 See Court Book, SUN.009.003.2274 (which is a chain of emails containing this email).

311 Emphasis added in the *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.14.1.

> 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." [emphasis added in the *Closing Submissions of the First to Third Defendants*]

Reed sent a further email to Brown adding, amongst other things, that he was talking to another party, but that this was not his "preferred approach" and that he would defer any further discussions with the other party until after Reed and Brown had met on 21 August 2007.[312]

92 Following receipt of Reed's emails, Brown emailed Abedian with the comment that "[h]e wants us to put in 65m".[313] Both Brown and Abedian gave evidence that they had a discussion about Reed's email[314] and that it was Abedian's opinion that the terms proposed by Reed were unacceptable to Sunland. Abedian's evidence was that the terms did not fit the Sunland joint venture model.[315] 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 respond to Reed to this effect.[316] Brown did, as instructed by Abedian, send Reed an email to tell him that "[u]nfortunately we cannot proceed on a Joint Venture based on the terms outlined in your email".[317] Brown also sent an email to Abedian noting that "[w]e will need to let Matt [Joyce] know tomorrow".[318] Reed responded to Brown's email indicating that he still wanted to meet and adding that his "clear preference having slept on it is to find an approach that can work with Sunland".[319] Brown's evidence was that after receiving this email he had a conversation with Reed and during this conversation, Reed offered to move towards the Sunland proposal and that they discussed "high level" joint venture terms.[320] Later, on 20 August 2007, at 3.13pm, Brown sent a

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312 Court Book, SUN.009.007.6582.

313 Court Book, SUN.009.003.2274.

314 Witness statement of David Scott Brown (6 August 2010), paragraph 129; Witness statement of Soheil Abedian (6 August 2010), paragraph 56.

315 Witness statement of Soheil Abedian, paragraph 56.

316 Witness statement of David Scott Brown (6 August 2010), paragraph 130; Court Book, SUN.009.003.4440.

317 Court Book, PRU.001.005.0567.

318 Court Book, SUN.009.007.6582.

319 Witness statement of David Scott Brown (6 August 2010), paragraph 132; Court Book, SUN.001.006.0010.

320 Witness statement of David Scott Brown (6 August 2010), paragraph 133.

further email to Reed referring to a call earlier in the day.[321] The email "confirmed" a "JV proposal" involving the transfer of Plot D17 to a special purpose vehicle and advised Reed that if the terms in the email were "acceptable", then Brown could meet Reed at 10.00am "and show you the Feasibility". Brown's evidence was that he sent this email after discussing the details with Abedian[322] and that at this point in the joint venture negotiations, "Soheil and I were prepared to show Reed our preliminary thoughts as to the feasibility studies but were not prepared to show him any design drawings".[323]. Brown's evidence was that the reason for this view was that "I knew he was talking to other parties and I was concerned that he may show those drawings to them".[324]

93 Brown met Reed in Sunland's Dubai office later in the day on 20 August 2007. At that meeting, Reed said that he would like to conclude this JV agreement by late September 2007. Brown said that he recalled Reed saying to him that he was heading back to Australia in a couple of days and wanted to agree the basic terms.[325] Brown's evidence was that he agreed with Reed that the program for the proposed joint venture for the three to five weeks following 20 August 2007 would be as follows:[326]

> "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;

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321 Court Book, SUN.001.001.0005; Court Book, PRU.001.007.0590.
322 Witness statement of David Scott Brown (6 August 2010), paragraph 134.
323 Witness statement of David Scott Brown (6 August 2010), paragraph 135.
324 Witness statement of David Scott Brown (6 August 2010), paragraph 135.
325 Witness statement of David Scott Brown (6 August 2010), paragraph 136.
326 Witness statement of David Scott Brown (6 August 2010), paragraph 137.

137.6 Achieve site handover between 31 January 2008 and 31 March 2008;

137.7 Commence construction work within 12 months of site handover."

The evidence that "Subject to finalising an agreement, Sunland would become the negotiating party with Nakheel"[327] 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.

94 Brown confirmed in cross-examination that he had a feasibility "on the table and we discussed it and [Reed] wrote down the notes".[328] Brown also gave evidence that "[a]part from the one on 19 August, no other feasibility study done by Sunland over the period that [they] were trying to set up a joint venture was given to Prudentia or Reed.[329]

95 Brown also said that at this second meeting on 20 August 2007 with Reed, it was agreed that Brown would negotiate with Austin on technical planning and design matters relating to Plot D17 and that Clyde-Smith (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 that Sunland was to have no role in relation to the actual purchase and the price (including the amount and timing of instalments) as Brown understood that Reed and Prudentia controlled the land, that the price was AED 135 per square foot and that the instalment schedule had already been agreed.[330] 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. Brown also gave evidence that he sent an email to Mr Sahba Abedian (Managing Director of Sunland Group) after this meeting with Reed saying "Angus has his foot on the site behind our Waterfront Plot, and we are negotiating a potential JV with him"[331] and prepared further

327 Court Book, SUN.004.001.0053, at .0054.

328 Transcript, p 53.47 and p 54.01.

329 Transcript, p 54.6 - .08.

330 Reply witness statement of David Scott Brown (27 June 2011), paragraph 35.

331 Witness statement of David Scott Brown (6 August 2010), paragraph 139; Court Book, SUN.009.003.4477.

feasibilities.[332]

Late August and early September 2007

96 Sunland pleads an email from Reed to Brown on 23 August 2007 attaching a draft document prepared by Freehills on behalf of Prudentia and entitled "Implementation Agreement" (or "MOU").[333] In this email, Reed said that he thought "it reflects our understanding". Brown said in his witness statement:[334]

> "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 reinforced Joyce, Austin and Reed's comments that Prudentia controlled the plot".

It was, however, a further term of this first draft of the Implementation Agreement, or MOU, that Sunland would hold, exclusively, the right to negotiate the terms of a SPA.

97 This draft Implementation Agreement or MOU was sent to Clyde-Smith, who marked up proposed changes and discussed it with Abedian.[335] Brown sent the marked up draft Implementation Agreement or MOU back to Reed on 30 August 2007 with a covering email which stated, relevantly, that:[336]

> "[t]he revisions reflect the terms of our email to you of 19 August, and are based on the Standard Sunland JV model which has been successful for Joint Venture partners in the past. If we can reach agreement on this basis, we can move forward and commence discussions with DWF, and add value to this Project."

In cross-examination, Brown agreed that this draft contained changes that were made to the agreement by Sunland through himself, Abedian and Clyde-Smith, which included the deletion of Sunland as a covenantor.[337] Nevertheless, the

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332 Witness statement of David Scott Brown (6 August 2010), paragraph 140.

333 Second Further Amended Statement of Claim, paragraph 17; Court Book, SUN.001.006.0037; and see Witness statement of David Scott Brown (6 August 2010), paragraph 145.

334 Witness statement of David Scott Brown (6 August 2010), paragraph 145.

335 Transcript, p 148.24; SUN.001.001.0033; and witness statement of Soheil Abedian (6 August 2010), paragraph 62.

336 Court Book, SUN.001.001.0115 and attachment (SUN.001.001.0116).

337 Transcript, p 150.9 - .14.

payment of a premium or consultancy fee was not an issue, as was confirmed by Brown in his evidence:[338]

> "At all times, I suggest, from the outset of your initial email to Mr Reed, through all the implementation agreements, the payment of 64 million dirham was never crossed out, never an issue?---It was one of many terms we had to agree to, and it was dependent on the other terms of the agreement as to whether it would be okay."

Brown said that the one of the references to a "consulting fee" in the MOU was inserted by Sunland, saying that Reed suggested it would be a consulting fee and it did not really matter to Sunland.[339]

98 In spite of the provision of paragraph 1 of the recitals, or background, to the draft Implementation Agreement or MOU, Brown did confirm in his evidence[340] that the draft provided for Sunland to negotiate the SPA for Plot D17:[341]

> "
>
> 2. General Principles
>
> The Parties agree that:
>
> (a) Prudentia will *allow* [emphasis added] Sunland to negotiate to negotiate [sic] the plot sale and purchase agreement for 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 f 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 if Sunland or a Related Party of Sunland enters into a plot sale and purchase agreement, contract of sale or other form of agreement for the acquisition of an interest in the Property, then Sunland has agreed to pay Prudentia a consulting fee being the sum of AED 64,282,080.
>
> ~~(d) the Covenator 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.~~"

338 Transcript, p 149.8 - .11.
339 Transcript, p 150.27 - .35.
340 Transcript, p 148.36 - .43.
341 SUN 001.001.0116.

The draft contains marked up amendments to clause 3, clause 3(a) clearly indicating that Sunland will negotiate the SPA:[342]

> "Prudentia agrees to introduce Sunland to the Master Developer ~~Seller~~ and *allow* [emphasis added] Sunland to negotiate the plot sale and purchase agreement for the acquisition of the Property."

Clause 3(b) of the draft Implementation Agreement or MOU provided that:

> "Prudentia is entitled to receive full details of all relevant information obtained by Sunland in the course of its negotiations with the Master Developer. ~~Seller~~"

Clause 7 of the draft Implementation Agreement or MOU provided that:

> "(a) In consideration of Prudentia *permitting* [emphasis added] Sunland to negotiate with the Seller for the plot sale and purchase agreement for the acquisition of the Property, Sunland agrees that if Sunland or a Related Party of Sunland enters into a plot sale and purchase agreement, ~~contract of sale~~ or other form of agreement for the acquisition of an interest in the Property with the Seller (Plot Sale and Purchase ~~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 Plot Sale and Purchase ~~Acquisition~~ Agreement as a consultancy fee for services provided by Prudentia to Sunland in introducing Sunland to the ~~Seller~~ Master Developer and assisting in negotiations between the ~~Seller~~ Master Developer and Sunland. If Sunland or a related Party of Sunland does not enter into a P~~p~~lot S~~s~~ale and P~~p~~urchase A~~a~~greement, then Sunland has no payment obligation whatsoever to Prudentia"

Schedule 5 of the draft described the payment to Prudentia as a "premium".

99 Sunland submitted that paragraph 1 of the recitals (the "background") to the draft Implementation Agreement or MOU 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.[343] It was also submitted that those parts of the draft which are set out above and marked in italics, together with

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342 SUN 001.001.0116. The emphasis is contained in para 132-134 of *Plaintiffs' Address* (1 February 2012), paragraph 41.

343 See *Plaintiffs' Address* (1 February 2012), paragraph 130.

the description of "premium" in Schedule 5 of the draft, in effect, reinforced or exacerbated the representation.[344] For the reasons discussed further below, I reject this submission because, first, the provisions of the draft must be read in the context of the whole document and, secondly, in the context of the then circumstances.[345] Briefly, as to the first, other provisions of the draft make it clear, in my view, that the agreement is merely the transfer of something in the nature of an opportunity to negotiate with DWF in Prudentia's shoes (with the ultimate agreement in this form as executed with Hanley absent the assignment of any right from Prudentia confirming this[346]) and secondly, subsequent events, communications and Sunland's understanding of the nature of the position of the Prudentia parties with respect to Plot D17 support the position that there was no misrepresentation inherent in this draft or, to the extent there may have been, there was no reliance on Sunland's part.[347]

100 The discussion of the significance of the provisions of the draft Implementation Agreement or MOU must be considered having regard to the time during the sequence of negotiations between the parties at which the particular draft provisions appeared. Sunland's reliance upon paragraph 1 of the recitals does not take account of this and, in effect, conflates the draft 23 August 2007 agreement with an executed agreement on 19 September 2007 ("the Prudentia Agreement") and the re-executed agreement of 26 September 2007 ("the Hanley Agreement") as if the factual background for each was the same. The facts and background to the Prudentia agreement and the substituted Hanley agreement were an effective rejection of the main object of Prudentia and, presumably, Sunland as at 20 August 2007, which was, as Brown recorded in his notebook,[348] that over the next three to five weeks, Sunland would work to agree a joint venture with Prudentia. This position was confirmed by Reed's entry in his notebook concerning this meeting[349] that they "will both work in

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344 As to the meaning of the word "premium" in the context of the D17 transaction; see below, paragraphs 205 - 211.

345 See below, paragraphs 291- 292.

346 See below, paragraphs 291- 292.

347 See below, paragraphs 240 to 246.

348 Court Book, SUN.004.001.0043 at .46.

349 Court Book, PRU.004.001.0011 at .13

good faith to facilitate entering into a JV …". The submissions of Reed and the Prudentia parties demonstrated that Brown knew that any agreement as had been reached between Prudentia or Reed and the master developer was limited.[350] Brown was in fact entrusted to act on behalf of Prudentia and Sunland to negotiate the final terms of the SPA with DWF and also technical and planning issues. The agreement reached on 20 August 2007 between Brown and Reed permitted Brown to exercise negotiating rights with DWF to secure the development opportunity for the proposed joint venture.

101 The effect of clauses 2 and 3 of the draft Implementation Agreement or MOU was to oblige Prudentia to "introduce" Sunland to DWF so that Sunland would be in a position to negotiate the acquisition of Plot D17 on behalf of the joint venture. These draft clauses are consistent with the arrangement referred to by Joyce as being an arrangement whereby Sunland would be authorised to speak to DWF about Plot D17 on behalf of the joint venture. Equally, these clauses demonstrate that all parties understood that Prudentia had not acquired Plot D17. The right to negotiate to which Clause 2 refers was not a "right" brought into existence by an enforceable agreement between Prudentia and DWF. The draft implementation agreements, the MOU agreements, brought into existence the agreed disposition of responsibilities as between the proposed joint venturers whereby Sunland was to negotiate on behalf of the joint venturers. Contrary to Sunland's submissions, there was no transfer of a "right" in the terms now contended for by Sunland when it was agreed that Sunland would exercise a "right" of negotiation on behalf of the joint venturers. The source of Sunland's ability to negotiate was the agreement in principle of 20 August 2007 supported by protection of an exclusive dealing clause.

102 In relation to sub-clause, clause 3(a), Brown's evidence was that:[351]

> "And that was consistent with your assertion at the beginning that Sunland would have control of the negotiations?---As I said yesterday, on the legal terms, the technical and design issues, not the price."

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350 See *Closing Submissions First to Third Defendants* (31 January 2012), paragraphs 4.21.6 to 4.21.7.

351 Transcript, p 150.42 - .44.

It was submitted on behalf of Reed and the Prudentia parties that there was good reason why Brown, at trial, would allege that Sunland did not negotiate a SPA as it concerned the price of Plot D17.[352] Brown would have recognised, it was submitted, that there was a breach of good faith obligations in his neglecting to inform Reed of his discussions with Brearley or Lee where he was informed Plot D17 could be obtained by Sunland at AED 120 per square foot BUA. The following part of the transcript is relevant in this respect:[353]

> "Tell me, Mr Brown, you gave evidence yesterday - remember you were asked a question why didn't you tell Reed of the 120 dirham per square foot discussion on 12 September between Lee and Brearley. That evidence, just so it's entirely correct, is at page 66 of the transcript. You were asked this question at line 5, and this was your answer, "Why didn't you tell Reed in that email that, 'I've spoken with Marcus and Anthony, they tell us we can get it at 120, we should put our foot on it.' Why didn't you say that?" You said, "I think Lee had really wanted Och-Ziff to step aside," and my question was, "Why didn't you say it in the email?" Your answer, "Because he was in charge of the negotiations with Nakheel, not me." Do you stand by that answer?---That Reed was in charge?
>
> 'That he was in charge of the negotiations with Nakheel and not me'?---In the price of the land, yes, he was.
>
> Is that truly reflective of the negotiations towards a SPA agreement?---No, that's different because the negotiations in a SPA have three components, price - - -
>
> Is there anything else you want to add?--- - - - price, legal terminology and technical issues.
>
> From the very outset, Sunland and you, Brown, were to be in charge of the negotiations concerning D17?---Only in terms of legal terminology, technical and design issues.
>
> You, I suggest, insisted on being in charge of the entirety of the negotiations?---No, that's not correct."

103 Brown also said in his evidence that the draft Implementation Agreement or MOU contained an exclusivity clause in clause 9 (but that provision would only apply if and when the parties signed the Implementation Agreement or MOU), and that the exclusivity provision was consistent with clause 2 of the Implementation Agreement or MOU.[354] In the course of cross-examination as to his understanding of the good

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352 *Closing Submissions of the First to Third Defendants*, paragraph 4.16.11.

353 Transcript, p 100.15 - .40.

354 Reply witness statement of David Scott Brown (27 June 2011), paragraph 6.

faith obligations referred to in the Implementation Agreement, the MOU, Brown said:[355]

> "If you look over the page at 0123, 4(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.' You read that, no doubt?---Yes.
>
> So you had an understanding, from your experience and what we've discussed, of what acting in good faith meant?---Yes.
>
> Then under Provision of Information at 5(a), some changes made by Sunland, 'Within 10 business days of the execution date of this agreement, Sunland must at its cost provide Prudentia with the following information concerning development, a description of Sunland's design concept for the development of the property, with the design drawings made available if the joint venture agreement is signed by both parties'?---Yes.
>
> 'A budget of soft costs to enable the parties to launch the development and a full feasibility for the development of the property,' combined with the detailed cash flow, all that to be provided?---Within 10 days of execution, yes.
>
> Then at 0126, there is a term in relation to 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,' and no doubt you read that, Mr Brown?---Yes.
>
> That was to last, as the duration says, I think, for three years; correct?---To last three years from the execution date?
>
> Yes?---Of a document that was never executed?
>
> That's right?---Yes.
>
> Are you saying because the document wasn't executed, that that in some way relieves you of your good faith obligations?---No, I'm not saying that. I'm just saying that this document in this form was never executed."

104 Clause 7(a) of the draft Implementation Agreement or MOU recognised that it was possible that Sunland might acquire Plot D17 on behalf of the joint venture; but also that Sunland and Prudentia might ultimately be unable to agree on joint venture terms. If this latter event were to happen, Prudentia would be entitled to receive the "Consultancy Fee" set out in clause 7(a) and, presumably, Sunland would retain the land. The Consultancy Fee set out in that clause was <u>not</u> a fee that Sunland would have to pay before commencing negotiations with DWF, but rather, as indicated by

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355 Transcript, p 150.46 - .47 and p 151.1 - .32.

the plain words of the draft clause, it was a fee payable if joint venture terms could not be agreed and Sunland went on to purchase the land. Clearly, the joint venture was the principal object of this agreement.

105 Sunland's payment to Prudentia to "walk away" from the negotiation, to "relinquish" rights in the negotiation involves wholly different facts from those in operation when Sunland was undertaking a negotiation to secure the terms of acquisition and development of an asset in a joint venture. This new circumstance did not involve a "transfer" of rights as a matter of legal conveyance or as a matter of fact, since Sunland was then undertaking the negotiations. Nevertheless, Sunland did require authorisation by Prudentia to negotiate acquisition and development in its exclusive self-interest capacity and to be released from any continuing obligation of exclusive dealing with Prudentia when Sunland did insist upon amendments to the 18 September 2007 draft Implementation Agreement or MOU. This is the significance of the release expressed in the underlined amendment to clause 5 of the draft, which inserted by Sunland "notwithstanding this clause…", which was adopted in the executed Prudentia agreement[356] and the executed Hanley agreement.[357]

106 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

356 Court Book, SUN.001.006.0215.
357 Court Book, SUN.004.002.0274.

unexpectedly the then agreed progress of the parties' 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.[358]

107 Sunland, on the other hand, submitted that the authorities with respect to ambiguity in a recital, such as *O'Loughlin v Mount Isa Mines*[359] and *Chacmol Holdings Pty Ltd v Handberg,*[360] are not on point. It submitted that those cases are only concerned with construing the operative provisions of a deed where there is a manifest inconsistency with recitals. Sunland submitted there is no such inconsistency here because the recital unambiguously states:

(a) Prudentia has reached agreement with the seller; and

(b) the agreement is an agreement to acquire and develop the property.

108 It was said that the recital is consistent with the representations in the operative part of the various implementation agreements: for example, "Prudentia will <u>allow</u> Sunland to negotiate to negotiate [sic] the acquisition of the Property."[361] Nevertheless, in my view, this submission merely serves to highlight the clear inconsistency between the first paragraph of the recitals and the operative parts of

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358 *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* (2nd 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."

359 (1998) 71 SASR 206.

360 [2005] FCAFC 40.

361 Court Book, SUN 001.001.0116 at clause 2 (a).

the deed, as discussed previously.

109 In this context, it is helpful to consider the nature of recitals in some further detail. In broad terms, in the words of Sir Kim Lewison "[t]he function of recitals is to narrate the history leading up to the making of the agreement in question or to express in general terms the intention with which the agreement was made".[362] More particularly, Lewison continues:[363]

> "In *Inland Revenue Council v Raphael*,[364] Lord Wright said:
>
> > 'The nature of recitals as statements of fact which are in the contemplation of the parties, is illustrated by the Scotch term "narrative".'
>
> In other cases recitals perform the function of:
>
> > '…a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made'.[365]
>
> Where the recitals purport to record the intention of the parties to the document (or, more frequently, the settler of a settlement), the court is wary of attributing much weight to such a statement. In *Mackenzie v Duke of Devonshire*,[366] Lord Watson said:
>
> > 'I think that it is a very dangerous canon of construction to admit what may be a very partial statement of intention, quite consistent with other objects, to control the whole of the other language of the deed with the effect of striking out beneficiaries whom the truster may have intended to benefit. The narrative words come to no more than this: "My intention is to do" so and so, and you may add this, "and I have accomplished that purpose by the provisions which follow." In such a case the safer and only legitimate course is to look at the provisions which follow, and to read them according to their natural and just construction.'
>
> In describing a recital as an expression of the intention of the parties to the deed, it should not be overlooked that the word intention may have different connotations in different circumstances. This was pointed out in *Inland Revenue Council v Raphael*[367] by Lord Warrington of Clyffe who said:
>
> > 'The fact is that the narrative and operative parts of a deed perform quite different functions, and "intention" in reference to the narrative and the same word in reference to the operative parts respectively bear quite different significations. As appearing in the narrative part

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362 Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 4th ed, 2007), 395, [10.10].
363 *op. cit*. 395-6, [10.10].
364 [1935] AC 96 at p 144..
365 *Mackenzie v Duke of Devonshire* [1896] AC 400 *per* Lord Halsbury LC at p 406.
366 [1896] AC 400 at p 407.
367 [1935] AC 96 at p 135.

> it means "purpose". In considering the intention of operative part the word means significance or import – "The way in which anything is to be understood" (*Oxford English Dictionary*) supported by the illustration: "The intention of the passage was sufficiently clear".'

In *Moon Ex p. Dawes, Re*,[368] Lopes LJ said:

> 'There are several well-established rules applicable to the construction of deeds. One is this, that if the operative part of a deed is clear, and the recitals are not clear the operative part must prevail. Again, if the recitals are clear, but the operative part is ambiguous, the recitals control the operative part. If, again, the operative part and the recitals are both clear, but one is inconsistent with the other, the operative part must prevail.'"

Additionally, reference is made to the words of Lord Macnaughten in *Orr v Mitchell*[369] where His Lordship says:

> "When the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous they cannot be corrected by reference to other parts of the instrument. …"

110 Having regard to the authorities and the operative parts of the draft Implementation Agreement or MOU I am strengthened in my view that paragraph 1 of the recitals, as relied upon by Sunland, cannot be regarded as governing or affecting the operative parts of the agreement. Further, insofar as the draft agreement or the Prudentia Agreement or the Hanley Agreement as finally executed, are said by Sunland to amount to a representation of the kind alleged, or as part of the context for those allegations, I am of the view that this proposition must be rejected. Such a proposition amounts to taking the provisions of a document selectively for the purpose of ascribing to them a meaning which is not sustainable when viewed in the context of the whole document on any reasonable basis.

111 Sunland pleads that Joyce telephoned Brown on 29 August 2007 and during that

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368 (1886)LR 17 QBD 275, at p 289 followed in *T&N Ltd (In administration) v Royal & Sun Alliance Plc* [2003] 2 All ER (Comm) 939.

369 [1893] AC 238 at p 254.

telephone conversation made statements to the effect that:[370]

> "Sunland should come to an agreement with Reed as soon as possible because there were other buyers around including Russians who might offer Reed AED 220 sq/ft or more for the land."

Brown's account of this conversation continued:[371]

> "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 a 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."

112 Brown gave contradictory evidence about this telephone conversation. His evidence went no further than to say that Joyce encouraged him to finalise his joint venture negotiations with Reed. Significantly, on the basis of Brown's evidence, it must be concluded that Joyce did not say during this telephone conversation that Reed had any right over Plot D17, that Reed "controlled" Plot D17 or any other statement to similar effect.[372] Brown also made a note of this telephone conversation in his notebook,[373] but these notes do not take matters any further in this respect than Brown's other evidence.

113 As is the case with each of Brown's handwritten notes in his notebook, it is not apparent on the face of the notes of the alleged conversation on 29 August 2007 whether the words that appear on the page were words spoken by Joyce or by Brown, or whether they are simply a record of thoughts that came to Brown at or about the time of the conversation. Brown did in fact concede in his evidence that his notebook also consisted of "things to do" and other matters and thoughts which he was seeking to record, rather than something in the nature of a verbatim record of

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370 Second Further Amended Statement of Claim, paragraph 18; Witness Statement of David Scott Brown (6 August 2010), paragraph 152.

371 Witness Statement of David Scott Brown (6 August 2010), paragraph 152.

372 Witness statement of David Scott Brown (6 August 2010), paragraphs 152, 153.

373 Court Book, SUN.002.007.01001 at .0109.

conversations.[374] It was submitted on behalf of Joyce that Brown's self-serving explanations of these notebook entries ought to be treated with suspicion, given the unreliability of his evidence generally and his approach to preparing the typed "Plot D17, Diary Notes".[375] 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 attributed to Joyce are wholly consistent with Reed simply being in negotiations with DWF in respect of plot D17.[376] 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,[377] 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".[378] 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

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374 See above, paragraph 49.

375 See below, paragraph 308.

376 Witness statement of David Scott Brown (6 August 2010), paragraph 152.

377 Witness statement of David Scott Brown (6 August 2010), paragraph 84.

378 A term which described the ongoing process of speculation on land in Dubai; as distinct from its actual development.

in more detail elsewhere,[379] 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.

114 I accept as apposite the comment or observation made in the submissions of the Reed and the Prudentia parties:[380]

> "It is not clear what Sunland wished to make of this. There is no suggestion the contents of the email are untrue insofar as the contents relate to *Russians* or other buyers. Insofar as Brown indicated in his evidence, Joyce mentioned the Russian group were not proven developers and are likely speculators [381], it could be inferred Joyce was indicating a preference that DWF be dealing with proven developers. Significantly any *premium* with the joint venture would not be payable for years. There is no evidence by which it could be inferred this email was written by Joyce in an effort to obtain a benefit from a premium for the Joint Venture."

115 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. In my view, the same applies to the internal communications between Reed and the Prudentia parties (to which Sunland was not a party) which Sunland seeks to rely upon.[382] For reasons indicated elsewhere, I do not regard such communications as relevant to Sunland's claims, it not having been privy to them at any relevant time.[383]

116 Although it would be another month until Sunland would sign the Implementation Agreement or MOU, with Hanley, sign the SPA for Plot D17 with DWF and pay the Consultancy Fee, this alleged conversation between Brown and Joyce on 29 August 2007 was the last communication by Joyce relied upon by Sunland to establish the Representations.

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379 See below, paragraph 122 and following.
380 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.17.3.
381 Witness statement of David Scott Brown (6 August 2010) , paragraph 153.
382 See *Plaintiffs' Address* (1 February 2012), paragraphs 146 to 149.
383 See below, paragraphs 445 - 446.

117 Brown sent a second email to Reed on 31 August 2007 after despatch of the marked up Implementation Agreement or MOU.[384] The email, according to Brown's evidence, re-sent his email of 19 August 2007 which set out Sunland's proposed joint venture terms. He said, "this is the style of JV we would be happy to proceed with you on". Brown's evidence was that he re-sent this email to clarify the proposed terms, adding some additional points, such as the 2% finance fee, Sunland paying the deposit and the basis on which Sunland would pay the fee if it decided to buy the site in its own right. Brown added, that the "key reason was also to try and conclude the JV after we heard that other buyers may contact Reed".[385] Brown's evidence was also that he did not think he was making some sort of agreement by sending the email to Reed.[386] The email was, however, entirely consistent with the parties securing the site and developing it in a joint venture. During cross-examination, Brown was asked about the calculation of the "40 AED premium" referred to in that email and described as being payable "if the terms of the JV aren't agreed, however if we do wish to buy the site" (emphasis reflecting the discovered document in its native format). Brown agreed that the AED 40 was the difference between AED 135 and AED 175 per square foot and that to reach the calculation, which is AED 60 million, Sunland multiplied the 40 by 1.6 million BUA.[387] Brown was asked whether, if the BUA were 1.8 million, Sunland would multiply 1.8 by 40.[388] Brown's response was that "[t]he 1.8 came up after we'd reached agreement with him, so it didn't factor into the equation".[389]

118 During cross examination, Brown recalled, prompted by a copy of an email from Mr John Roysmith (Director and Secretary of Prudentia) to Reed and other directors of Prudentia on 31 August 2007,[390] although he was unsure of the exact date, that there was a telephone "hook up" between Reed, Roysmith, Clyde-Smith, Abedian

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384 Court Book, SUN.001.006.0062; and see Witness statement of David Scott Brown (6 August 2010), paragraph 164.
385 Witness statement of David Scott Brown (6 August 2010), paragraph 164.
386 Reply witness statement of David Scott Brown (27 June 2011), paragraph 39.
387 Transcript, p 151.39 - .42 and 152.09 - .15.
388 Transcript, p 152.17 - .18.
389 Transcript, p 152.18 - .19.
390 Court Book, PRU.001.005.1450.

and Brown "concerning the terms of the proposed joint venture".[391] Brown also recalled that one issue raised during the call was the removal of Sunland as a covenantor for the agreement and that Abedian "got upset on the phone"[392] and walked out of the meeting. Brown agreed that an email dated 4 September 2007 sent by Reed after the phone hook up was "confirmation that Prudentia wanted to try and do something to continue JV discussions".[393]

119 Brown also sent an email to Mr Sahba Abedian (Managing Director of Sunland Group) after the conference call stating, amongst other things, that "we are only interested in this Site as a JV" confirming Sunland's commitment to the joint venture proposal[394] and contrary to Sunland's allegation that Joyce was acting complicitly with Reed or Prudentia to obtain payment of the consultancy fee as a precondition to Sunland's direct negotiation with DWF.

120 The 4 September 2007 email sent from Reed to Brown after the phone hook up said, amongst other things:[395]

> "Sorry to have been slow to reply to your email we have been weighing up the right next step's [sic] on the site
>
> First a clarification it was never my intent / understanding that you would be obligated to buy the land if the J/V did not proceed rather that this was a necessary option to enable you to proceed."
>
> Having spoken to our fund partners the fundamental questions I see is as follows: we would like to make a relationship work with Sunland and we would like to develop this site with you but feel that the J/V structure as put forward by you to us does not we believe lead to a formula that fully aligns the interest of the fund with Sunland. There are two alternate structures we have considered to address this issue.
>
> The main issue is you are obtaining your return of 50 % of the profit no matter how the project performs. Would you consider a set of criteria which means you get your return on a performance criteria e.g. if the project meets all kpi's then after construction debt is repaid and land money repaid you get your profit share via a formula

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391 Transcript, p 152.30 - .31.

392 Transcript, p 152.38 - .47 and p 153.01 - .02.

393 Court Book, SUN.009.003.1885; Transcript, p 158.34 - .39.

394 Court Book, SUN.009.007.5554; Witness statement of David Scott Brown (6 August 2010), paragraph 165.

395 Both emails are contained in a chain in Court Book, SUN.009.003.1885.

…

> Alternatively, the fund is putting forward the capital for the Project(less the 5% from Sunland on land deposit) therefore I would like to see that we can maybe come up with a formula that pays the fund a return of say 10% on the land as quasi interest charge which comes out first. We can call it a" preferred return " but this would be an important recognition of the money we are putting up.
>
> …
>
> Bottom line I understand your comments in the email below but just wonted [sic] to be very clear that I did not expect you to step up if the JV did not happen and rather that it was an option to protect SUNLAND."

Brown's evidence was that he spoke with Abedian by phone on 9 September 2007 and that Abedian was not keen to have Sunland's profit share linked to achieving numbers shown on the feasibility, but was more comfortable with paying interest on the land funding costs.[396] Abedian's evidence was that he had told Brown that Sunland should compromise and instead of giving 10% internal rate of return, Sunland would suggest the 7.5% capitalised interest.[397] Brown agreed that his email to Reed, dated 9 September 2007, demonstrated agreement to Reed's proposal for an interest charge. In the email Brown suggested a capitalised interest charge of 7.5% on Prudentia and Sunland's respective land instalment payments[398].

121 It is of some significance that on 11 September 2007, and prior to the discussion Brown had with Lee and Brearley on 12 September 2007, that Brown sent an email to Lee "informing Marcus Lee by [sic] Waterfront, Nakheel, however you want to refer to them, that the headline issues of the joint venture had been agreed".[399] On the same day, Brown received an email from Reed advising that Prudentia's Australian lawyers would prepare a revised draft Implementation Agreement or MOU.[400]

12 September 2007

122 A very significant telephone conversation occurred on 12 September 2007 between

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396 Witness statement of David Scott Brown (6 August 2010), paragraph 175; see also Witness statement of Soheil Abedian (6 August 2010), paragraph 79.

397 Witness statement of Soheil Abedian (6 August 2010), paragraph 77.

398 Transcript, p 159.03 - .08; Court Book, SUN.001.006.0077; Witness statement of David Scott Brown (6 August 2010), paragraph 176.

399 Transcript, p 159.18 - .20; and see Court Book, SUN.001.005.0009.

400 Court Book, SUN.001.006.0083

Brown and Lee and Brearley, a record of which appears in Brown's notebook.[401] In the course of that conversation, Brown learned that DWF's asking price for Plot D17 would be AED 120 per square foot and not AED 135 per square foot, as had earlier been indicated to him by Reed.[402] Brown's evidence was that Brearley and Lee told him 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 per square foot.[403] Brown gave further evidence in relation to this conversation in cross examination:[404]

> "You have said in your witness statement that you think one of them said, 'It would be a lot easier if Och-Ziff didn't want to proceed with the sale. We can buy at 120 per square foot'?---Yes.
>
> I want to suggest to you that that's not a correct interpretation of your handwritten note. If that had been what one of those gentlemen said, I suggest to you you would have continued the words, after 'a lot easier', you would have continued the words 'if Och-Ziff didn't want to proceed', et cetera, on the same line. Do you follow what I'm putting to you?---Yes."

And:[405]

> "They must have said something, I suggest, to the effect that, 'If Och-Ziff didn't want to proceed with the sale, Sunland could buy at 120 per square foot.' Do you accept that?---Words to that effect."

123 Brown's notes of this conversation, as they appear in his notebook, are to this effect; though clarifying that the AED 120 per square foot is per square foot of BUA. The only entry in Brown's notebook which appears to go to this reduced price for Plot D17 is an entry dated 12 September 2007 "120ft²/ BUA".[406] This entry is under the heading, or subheading to the 12 September 2007 material, "ANTHONY/MARCUS:" In any event, Brown identified this entry as "a price"[407] and continued:[408]

> "A price?---Yes.
>
> For what?---For the land.

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401 Transcript, p 264.14 - .16; and Court Book, SUN.002.007.0001 at .0122.
402 Transcript, p 67.24; p 265.47 and p 266.01.
403 Witness statement of David Scott Brown (6 August 2010), paragraph 181.
404 Transcript, p 264.18 - .26.
405 Transcript, p 264.41 - .43.
406 Court Book, SUN.002.007.0323.
407 Transcript, p 60.17.
408 Transcript, p 60.19 - .28.

For the land? What land?---D17.

D17. So what had previously been known to you as 135, Brearley and Lee indicate to you is 120?---It may be 120.

It may be 120?---(witness nods)."

Brown was then asked about a reference to the price of Plot D17 in his report, dated 2 February 2009, prepared for a Sunland Group Board Meeting in Dubai:[409]

"Then if we can look at the next paragraph, 'We agreed with Reed on a fee of 20 mill Dirham plus an additional 24 which was calculated by multiplying 1.6 BUA by the difference between 135 square foot and 120 square foot, which was the price of the land. The price of 120 square foot must have been negotiated by Reed with Nakheel, as we were told this would be the land price if we reached agreement with Angus.' Is that right? Is that consistent with your evidence yesterday?---It's summarising the - - -

So you already knew, according to your note here, that if you reached an agreement with Reed, the price of the land would be 120 Dirham a square foot. That's what you've written there, isn't it, Mr Brown?---Negotiated by Reed, yes.

No, no, you already knew that if you reached an agreement with Angus, the cost of the land would be 120 Dirham a square foot?---We were told by Lee and Brearley that if Och-Ziff would step aside, the price could be 120, but it didn't mean anything because we knew Reed had to negotiate the final figure.

What you have written there in plain and direct English, I suggest, Mr Brown, is that you knew that the land, if you reached agreement with Angus, would be 120 Dirham a square foot. Is that not what is written there?---That is written there.

That, I suggest, on 2 February was the absolute truth?---They were summarising the status as I recall it, yes.

What it makes is your evidence to this court untrue. You have told us that 120 square foot would potentially be for you, Sunland, if you did the deal?---The 120 a foot was the figure Reed told us we could buy the plot for once we reached agreement to pay him out.

What you have said, and I'm not going to go over it again much more, 'As we were told, this would be the land price if we reached an agreement with Angus,' what I suggest you are trying to avoid, Mr Brown, is your direct obligation to have informed your potential joint venture partner of what you knew the cost of the land would be?---We were told by Lee and Brearley that figure and Reed later came back and told us that would be the figure.

HIS HONOUR: That is not quite what that sentence says, is it? The first part is conclusionary, it appears to indicate you have been told by someone else and you've inferred that that must have

409 Court Book, SUN.004.002.0063; Transcript, p 116.33 - .47 and p 117.1 - .25.

been the price which Reed negotiated. Is that right?---Yes."

Abedian's evidence was that Brown told him about the call with Lee and Brearley on 12 September 2007[410] so that as from that date he knew "that this plot could be purchased by Sunland at 120 dirham a square foot".[411] Brown's evidence was that although his notebook records a conversation with Reed later on 12 September 2007,[412] he "didn't say to Mr Reed anything at all about this discussion about 120 per square foot that you had with Mr Lee and Mr Brearley".[413] Brown agreed in cross-examination that it might have been useful for Reed to know that Lee and Brearley had mentioned AED 120 per square foot.[414]

124 The Prudentia parties submitted that the failure of Sunland to inform its potential joint venturer of DWF's likely asking price for Plot D17 was a breach of fiduciary duty on Sunland's part.[415] In response Sunland submitted that this is not a breach of fiduciary duty case against Sunland.[416] In any event, the excuse offered by Sunland for the failure to advise Reed and the Prudentia parties was that it cannot be assumed that Reed had not been told by Lee or Joyce of this price. Sunland submitted that Reed knew from at least 20 August 2007 that the price could be AED 120 per sq ft:[417]

> ***"Reed knew the price was AED120 sq/ft***
>
> 108. Reed's notebook discloses that he was aware on 20 August 2007 that the price of the land is AED120 per sq ft.: PRU.004.003.0055 at 0060 **[Tab 29]**. His note contains a costing which includes a land price of 'AED281,234,100.00 – 90,000,000.00' The subtraction of AED90,000,000.00 produces the land price of AED120 per sq ft.

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410 Transcript, p 329.28.

411 Transcript, p 329.30 - .32; see also Transcript, p 464.45 - .47 and p 465.01 where Abedian confirmed that Lee and Brearley told Brown that "there was an opportunity, if Och-Ziff did not proceed with the sale, for Sunland to buy it at 120 per square foot".

412 Transcript, p 266.39 - .46; Court Book, SUN.002.007.0001, at .0122.

413 Transcript, p 267.12 - .13.

414 Transcript, p 267.22 - .25.

415 See *United Dominions Corporations Ltd v Brian Pty Ltd* (1985) 157 CLR 1; Duncan, *Joint Ventures Law in Australia* (Federation Press, 2nd ed, 2005), ; and see *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 7.1 to 7.7.

416 See *United Dominions Corporations Ltd v Brian Pty Ltd* (1985) 157 CLR 1; Duncan, *Joint Ventures Law in Australia* (Federation Press, 2nd ed, 2005); and see *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 7.1 to 7.7.

417 *Plaintiff's Address* (1 February 2012), paragraphs 108 – 109.

> 109. This notebook entry renders all the more irrelevant[418] the extensive cross-examination of Brown about whether he informed Reed in September 2007 that the plot could be purchased for AED120 sq/ft, and the assertion put in cross-examination that Sunland had breached some asserted obligation of good faith owed to Reed and Prudentia.[419] Clearly Reed knew that AED120 was the price from at least 20 August and had probably discussed that price with Joyce earlier than that date. The notebook entry is consistent with paragraph 15.2 of the first to third respondents' defences which admits that 'at the first meeting Reed is likely to have said words to the effect that Dubai Waterfront had informed him that the price range would be AED 110 per square foot to AED 135 per square foot'; whether or not Reed did in fact tell Brown this, that pleading is a clear admission that by then Reed had already been told that the price would be between AED110 and AED135."

Nevertheless, in September 2007, Brown had no basis to assume that Lee or Joyce had informed Reed of a price of AED 120 per square foot for Plot D17. It is mere speculation on Sunland's part to suppose that the position might have been otherwise. The failure of Brown to disclose the price to Prudentia, no less than whilst entrusted to secure the asset of their proposed joint venture when authorised by Prudentia to negotiate in their common interest, is a demonstration, to say the least, of the unreliability of Brown.[420] This position is reinforced by other evidence which indicates that Sunland was wrong in its submission that Reed's notebook disclosed that he was aware that Plot D17 could be obtained for this lower price on 20 August 2007:[421]

(a) the figure of 90 million in Reed's notebook is a conversion of the price of the land (at AED 135 per sq/ft) into Australian dollars;[422]

(b) the Business Case[423] indicates that the price for Plot D17 at AED 120 per sq/ft was set by DWF in early-to-mid September 2007. This is corroborated by the

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418 None of the parties' pleaded cases before this Court raise any allegation that Sunland breached any obligation owed to the Prudentia parties in the course of their negotiations.

419 The basis of any such obligation between parties negotiating at arms' length was not explored. Brown and Abedian are architects and property developers. They are not lawyers, and have no legal training. Any responses they gave to questions put to them about obligations of good faith between joint venturers are irrelevant to the legal question of what obligations, if any, Sunland owed to Prudentia.

420 As to issues in relation to the reliability of Brown and Abedian as witnesses, see below, paragraphs 304 to 332.

421 See *Plaintiff's Address* (1 February 2012), paragraph 108; and see Court Book PRU.004.003.0055, at .0060.

422 Cf the submissions of Sunland's counsel, at transcript, p 975.07.

423 Court Book, MJJ.008.001.0002; although Sunland initially objected to the Business Case being received as evidence this objection was not ultimately maintained (see Transcript, pp 909.14, 915.14 and 916.16 -.19). In any event, even if the objection were maintained the proposition for which it was relied upon by the defendants is not in any way critical to these reasons for judgment.

fact that Brown admitted that he was told about the AED 120 per sq/ft price by Lee and Brearley on 12 September 2007;[424] and

(c) Reed's file note of his conversation with Austin on 9 August 2007 contains "RECKON BASED ON SUB PLAN CAN GET $120 - $135 AT CLOSE". If Reed had done the numbers on a land price of AED 120 per sq/ft in August 2007 then it would have been more likely to have been a projection on the basis of his meeting with Austin.

125 Thus far, the 12 September 2007 conversation with Lee and Brearley is significant in two respects. First, it proceeds on the assumption that no price for Plot D17 had been fixed and agreed in any binding way with any other entity. Secondly, and this is significant in light of the subsequent conversation with Reed on that day, neither Brown nor anyone else on behalf of Sunland then informed its potential joint venture partner that DWF was prepared to sell Plot D17 for AED 120 per square foot, rather than AED 135 per square foot. If Reed did possess this knowledge, other issues in this respect may have arisen – with different consequences for the parties. It is not, however, a matter relevant to Sunland's claims as to statutory and tortious "misrepresentation". The first point is a matter to which I will now direct further attention in light of events and communications on and in relation to those of 12 September 2007.

126 Sunland pleads that on 12 September 2007, Lee and Brearley called Brown during the course of which:

(a) 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 DWF's marketing department;[425]

(b) 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

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424 Transcript, pp 65.23, 67.18 to 68.03.

425 Second Further Amended Statement of Claim, paragraph 24.1.

D17 and we will have no control over this";[426] and

(c) 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".[427]

127 Brown's evidence was that he received a call from Brearley and Lee on 12 September 2007 and that the notes of this phone call are recorded in his notebook.[428] Again, Brown's evidence lacked certainty as his typed notes of notebook entries say that this was a meeting but, after further consideration, he said that he believed it was a telephone call.[429] Brown admitted during cross-examination that his notebook contains a note of only one call with Brearley and Lee for 12 September 2007,[430] but did not admit that the telephone call recorded in his notebook was the call which led to the "put your foot on it" email to Reed on 12 September 2007. His evidence was that "[i]t may be. I can't be sure whether there was one or two phone calls".[431] Brown elaborated in cross-examination:[432]

> "When you did your statement, you had confirmed in your mind that it was a telephone call; correct? You want to change that?---No, in relation to the email, it was a telephone call.
>
> So there was another telephone call on 12 September, was there?---I can't be sure.
>
> In the email that we've been to, it referred to a sales meeting on the Tuesday night. Can you think of any reason why Brearley and Lee wouldn't tell you about it in a telephone conversation and then ring you back when you're talking about D17 and then ring you back with another bit of information about it?---It may have happened that way, I don't know.
>
> It wouldn't sort of make sense that way, though, would it?---It may have happened that way, I don't know."

Brown's explanation of why his notebook appeared to have no record of the call with

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426 Second Further Amended Statement of Claim, paragraph 24.2.
427 Second Further Amended Statement of Claim, paragraph 24.3.
428 Transcript, p 61.42 – 62.01; and see Court Book, SUN.002.007.0001 at .0122 .
429 Witness statement of David Scott Brown (6 August 2010), paragraph 180; and see Transcript, p 62.15 - .18.
430 Transcript, p 61.42 - .46 and Transcript, p 62.1; and Court Book, SUN.002.007.0001 at .0122.
431 Transcript, p 62.20 - .21.
432 Transcript, p 62.23 - .36.

Lee and Brearley was that "I may have just gone straight to an email".[433]

128 Whether or not there was one or two telephone conversations between Brown and Lee and Brearley, Brown's evidence was that during conversations by telephone, Brearley or Lee said to him that they had attended a meeting on the evening of 11 September 2007 with the marketing department of DWF and that they had concerns that the marketing people would try to sell Plot D17 and that they would have no control over it and that "you should immediately put your foot on the plot".[434] Brown's evidence was that he sent an email to Clyde-Smith after the call with a draft email to Reed in effect recording and also discussing the call with Brearley and Lee.[435] In view of the importance of this email, it is helpful to set out its contents in full (omitting formal parts, but noting that it is an email from Brown to Ms Julianne Stringer (i.e. Clyde-Smith), in her capacity as General Counsel of Sunland's Dubai branch, which was sent Wednesday 12 September 2007 at 11.35pm, the subject being "Waterfront site D-17"):

> "DRAFT For REVIEW
>
> 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

433 Transcript, p 60.05 - .07.

434 Witness statement of David Scott Brown (6 August 2010), paragraph 183.

435 Transcript, p 186.6 - .11; and see Court Book, SUN.001.001.0137 which contains the email between David Brown and Ms Clyde-Smith (nee Stringer) dated 12 September 2007.

- 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 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."

This email was, graphically, referred to as the "put your foot on it" email (or similarly) during the course of the trial – and, for convenience, is referred to as such in these reasons for judgment.

129 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".[436] Brown would not accept this obvious interpretation of the email.[437] Brown also said that "[w]e were taking advice from Marcus and Anthony about what to do",[438] 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",[439] but sought, unjustifiably in my view, to implicate Joyce in these events:[440]

> "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."

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436 Transcript, p 186.36 - .38.

437 Transcript, p 186.38 - 39.

438 Transcript, p 57.305 - .36.

439 Transcript, p 187.02 - .03; see also Abedian's evidence at Transcript p 453.12 - .13 where he says that the marketing people had never been in control and that the *marketing section is a different entity altogether* to the development section.

440 Transcript, p 187.07 - .10.

Brown was challenged on that evidence:[441]

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

130 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:[442]

> "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

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441 Transcript, p 187.12 - .45.

442 Transcript, p 57.19 - .22.

"hold" of Prudentia or Reed Plot D17:[443]

> "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."

131 In relation to the text of the email, Sunland submitted that significance should be attached to the latter part of the second last dot point in the "put your foot on it" email, "… at the terms and Conditions you have already agreed". In this vein, Sunland argued:[444]

> "152. This email is described by the fourth defendant as the main 'plank' in its submission that the plaintiffs did not rely upon the representations. The email is addressed in more detail under the section of these submissions dealing with reliance. It is relevant here to note, however, the second last bullet point in the email in reference to execution of a SPA within 24 hours which is stated to be to '*secure the Plot at the terms and conditions you have already agreed*'. That statement is only consistent with Brown believing that there is some agreement in existence which has been made by Reed and which specified the terms and conditions upon which Reed or Prudentia have agreed to acquire the plot.
>
> 153. SUN.001.001.0202 [**Tab 61**] is an email from Brown to [Lee and Brearley] sent on 13 September 2007 which materially stated:
>
> > 'Angus has agreed in principle that Sunland can enter into a Sale and Purchase Agreement with DWF using 'Sunland JV Development (BVI)

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443 Transcript, p 58.39 - .47 and p 59.01 - .13; see also Transcript, p 190.16 - .22, Transcript p 190.42 - .47 and p 191.1.

444 *Plaintiffs' Address* (1 February 2012), paragraphs 152 to 155.

> 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….' [emphasis added]
>
> 154. The emphasised words in this email identify that even if the Court was to construe the words 'put our foot on the plot' in the earlier email as some recognition that there may not be a binding agreement in existence in respect of plot D17, Brown still believed that Reed's consent was necessary for Sunland to enter into an SPA.
>
> 155. On 13 September, Reed sends an email to Sinn instructing him to 'include in the agreement for them to be able to enter into the agreement': PRU.002.015.1244 [Tab 64]. This statement is consistent with Reed persisting in the representation that he or Prudentia have some control over or right to plot D17."

132 It was submitted against Sunland that its response to the "put your foot on it" email advanced a contrived construction of that email that dictates that one consider only a fraction of its text, ignore the balance, and ignore the plain meaning of what the email was conveying to Reed and arguing that whatever the email says, Brown still held the belief that Reed or Prudentia had a contractual or other "right" to acquire Plot D17.[445]

133 As to the first matter, the construction which focuses on the words "secure the Plot at the terms and conditions you have already agreed", when read as a whole, the email plainly discloses Brown's belief that at that time neither Reed nor Prudentia held a contractual right to acquire Plot D17. The email records that the price is "*around* 130-135 AED/ft 2 over 36 months, with 5% deposit" (emphasis added). Although Brown may have believed that some terms and conditions had been informally "agreed", if the price had not then been settled, he could not have held the belief that a contractual right to acquire Plot D 17 had yet arisen. The further email from Brown to Lee dated 13 September 2007 upon which the plaintiffs' rely[446] 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

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445 See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 135.

446 Court Book, SUN.001.001.0202; and see *Plaintiffs' Address* (1 February 2012), paragraphs 153 and 154.

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.[447]

134 The Sunland submission in relation to the "put your foot on it" email also ignores the fact that the dot points in the email set out various steps that must be taken in order to secure the plot for Sunland and Prudentia.[448] Sunland's submissions fail to engage with Brown's email to Reed that he sent following the "put our foot on it" email (being Thursday 13 September 2007 at 10:27pm, the subject entitled "Waterfront Site D-17"), which included the following:[449]

> "Based on the above, Sunland can advise DWF that Sunland will enter into a SPA and will transfer the Plot into a JV company at a later date.
>
> Hopefully this will secure the site." [emphasis added]

135 In oral submissions, following my question enquiring why Sunland did not just go directly to the DWF "marketing people" following the telephone call that Brown had with Lee and Brearley on 12 September 2007, the following submission was made:[450]

> "MR THOMPSON: What was it that Prudentia, as Mr Reed has said were walking away from? And why didn't Prudentia - why didn't Sunland go straight to the sales and marketing people as postulated by Your Honour, and say, 'OK. Forget about Mr Reed. He'll pay this and what's more we don't have to pay' - they were effectively paying 175 dirhams a square foot knowing that they could buy it for 120 if they went to the marketing people. And that was Mr Brown's knowledge on the case that was put to him.
>
> HIS HONOUR: I was hoping you were going to tell me.

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447 Cf *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 137.

448 As to this, the following exchange is noted (Transcript, p 990.07 - .17):

> "HIS HONOUR: Isn't that a sequence of events? MR THOMPSON: Yes but we emphasise the - the words, 'and secure the plot at terms and conditions you have already agreed', and that doesn't follow the sequence. HIS HONOUR: Well surely you've got to read that in context of the whole email which is being debated extensively. What do you say it means if it doesn't mean what's been submitted that it means? MR THOMPSON: Well what we say is Your Honour, yes, he's saying that he's been told that it's necessary to put our foot on the plot by the execution of an SPA".

449 Court Book, SUN.001.001.0183 .

450 Transcript, p 1050.08 - .24.

> MR THOMPSON: But it's only consistent, Your Honour, with a belief in Brown that there is still some reason why he has to pay Prudentia because they have something which when we come and - I won't take Your Honour back to the Hanley agreement for the moment because there were some other things to look at. And in fact perhaps I'll do that now."

A very similar question was put to Abedian in cross-examination. His answer was that Sunland did not directly approach the marketing people, despite his belief that a Reed or Prudentia reservation agreement would shortly expire, because "we are very ethical people".[451] Abedian's evidence in relation to the suggestion of a "reservation agreement" is discussed elsewhere and, for the reasons indicated, was not credible.[452]

136 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 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 for a SPA with DWF and that this was in train.[453]

137 At this point it should be observed that there is no evidence that Brown, Abedian or Sunland had any reason to feel embarrassed or inhibited from making inquiries of

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451 Transcript, p 337.33.

452 See , for example, below, paragraph 323 and following.

453 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.

DWF in relation to the obligations or arrangements that DWF may have entered into with respect to Plot D17. Indeed, the evidence of discussions and communications between, for example, Brown and Austin or Lee or Brearley at various times indicates the contrary. In this context, and absent evidence of this kind, it seems extraordinary that the opportunity of discussions with the Director of Commercial Operations (Lee) and the Senior Legal Counsel (Brearley) of DWF on 12 September 2007 would not have provided such an opportunity. This is particularly the case given the nature of the discussions which Brown's evidence and the "put your foot on it" email indicate took place.

138 In any event, returning to the evidence, Brown's evidence as contained in his 6 August 2010 witness statement,[454] 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:[455]

> "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:[456]

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454 Witness statement David Scott Brown (6 August 2010), paragraph 185.

455 Transcript, p 189.8 - .14.

456 Transcript, p 192.01 - .33.

> "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 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".[457] 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

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457 Transcript, p 57.38 - .40.

other inconsistencies and contradictions in Brown's evidence, and with other evidence (documentary and otherwise),[458] 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.[459] 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.

139 In his witness statement of 6 August 2010, Abedian sets out[460] the text of the "put your foot on it" email which was sent by Brown to Reed, with a copy to Abedian.[461] The text of this email is in the same form as the draft of this email which was forwarded to Clyde-Smith by Brown for her approval.[462] Having set out the text of this email, Abedian set out the following comments in his witness statement:[463]

> "84. Brown discussed this email, and his telephone call from Brearley and Lee with me. The position in my mind was clear. Prudentia always had the control of the plot of land and Reed had always been looking for other JV partners in the market. However, we did not know the precise terms of that control by Prudentia and Reed.
>
> 85. I understood the reference in the telephone call from Brearley and Lee to the 'Marketing people' to mean the Dubai Waterfront sales team, and concluded that there was a risk to Sunland. The Dubai Waterfront sales team might introduce Reed to another possible JV partner or purchaser. I believed that Reed had always been considering other possible JV partners or purchasers for Prudentia because Reed had confirmed in his email of 20 August 2007 that he had been speaking with a local party, which is now shown to me [SUN.009.003.2278], and because Ahmed Afiffi had told me that Omniyat was interested in the same plot.
>
> 86. There was also some risk that the control by Prudentia and Reed might be coming to an end. In any event, it appeared that Dubai Waterfront was

458 And see below, paragraphs 304 to 332.
459 And see below, paragraphs 304 to 332.
460 Witness statement of Soheil Abedian (6 August 2010), paragraph 83.
461 Court Book, SUN.001.006.0100 ; cf SUN.001.001.0137.
462 See above, paragraph 128.
463 Witness statement of Soheil Abedian (6 August 2010), paragraphs 84 – 87.

> pressing for an SPA. I thought that pressure might be coming from the management of Dubai Waterfront (including Joyce), and not just from the sales team.
>
> 87. At the time the property market was strong and before any end user settled on a property, on average the property would change hands many times (seven times, according to public reports). To control a property and request a premium from a subsequent purchaser was a standard transaction that many businesses were involved in. An example of that is plot D5B that Sunland bought through the Dubai Waterfront sales team but the plot belonged to Al Burj."

In light of the evidence the reference in paragraph 87 of Abedian's witness statement to control of a property in the context of transactions with subsequent purchasers is, particularly having regard to the reference to Plot D5B, clearly a reference to the process described previously where a purchaser who had entered into a SPA with the master developer would on-sell at a premium, cancel and release that SPA in an agreement with a subsequent purchaser who would enter into a fresh SPA with the master developer. Indeed, this was the process which Sunland was involved in in its purchase, as a subsequent purchaser, of Plot D5B. In any event, I am of the view that in all the circumstances it is extraordinary that Abedian's reaction to the "put your foot on it" email was merely to speculate as to the "control" he thought Prudentia or Reed may have over Plot D17 without making inquiries. His further evidence in cross-examination merely serves to emphasise this, as is illustrated vividly by the evidence matters to which I now turn.

140 Abedian's evidence was that Brown discussed with him the call from Lee and Brearley, but that they "did not know the precise terms of" Prudentia or Reed's "control".[464] Abedian did, however, agree that "it would have been a comparatively simple thing to do" [to ask for evidence of Prudentia's control over Plot D17] if he had the uncertainty as expressed in his witness statement.[465]

141 Abedian's evidence was that "put your foot on it"' means buy it[466] or control it[467] or

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464 Witness statement of Soheil Abedian (6 August 2010), paragraph 84.
465 Transcript, p 354.10.
466 Transcript, p 333.34.
467 Transcript, p 333.36.

reserve it.[468] His evidence was that in Dubai there are two different kinds of control. One it is a reservation agreement, and the other one is a SPA.[469] His evidence was that the reason Sunland needed to "put its foot" on Plot D17 was because if you have a reservation agreement in Dubai, the reservation agreement usually is only for a period of time, and is not "never-ending".[470] If, prior to completion of a sale, the reservation agreement may finish, this would mean that control will be lost.[471] Abedian confirmed that it was his evidence that "[he] contemplated there was a reservation agreement between Prudentia and DWF",[472] but said further that this was not included in his witness statement because there was "[n]o need"[473] and agreed that it was also not referred to in a memorandum subsequently prepared by Eames for the Dubai authorities.[474] Abedian also confirmed that he could have asked Clyde-Smith whether there was a reservation agreement, but he did not do that.[475] Furthermore, he confirmed that he "didn't get anyone at Sunland to ask any questions as to whether one existed" as "[a]ll the executive[s] of Nakheel told us that they are in control, which it means they have some document".[476]

142 Abedian denied that the "reservation agreement" was a recent invention,[477] but admitted, nevertheless, that the word "reservation agreement" was not mentioned in discussions with Brown or Clyde-Smith at the time of Joyce's email dated 16 August 2007.[478] Also, and significantly, Brown's evidence was that "I don't know what relevance a reservation agreement would have been, as I hadn't heard the term".[479]. He subsequently acknowledged that Eames had sent him an email on 16 April 2007 which referred to a reservation agreement for the Nur site in Dubai.[480] In any event,

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468 Transcript, p 333.38.
469 Transcript, p 333.36 - 334.10.
470 Transcript, p 334.08.
471 Transcript, p 334.06 - .10.
472 Transcript, p 334.21 -.22; confirmed at Transcript, p 395.25 - .26, p 397.01 - .03.
473 Transcript, p 334.40.
474 Transcript, p 440.42 - .45; see paragraph, 324.
475 Transcript, p 335.43 - .47; see also Transcript, p 46.09 - .14 where Abedian's evidence is that he did not ask Clyde-Smith how long any reservation agreement over Plot D17 had to run.
476 Transcript, p 336.38 - .40.
477 Transcript p 337.01.
478 Transcript, p 397.14 - .29; Court Book, SUN.001.005.0002.
479 Transcript, p 279.05 - .07; see also Transcript, p 205.24 - .25.
480 Transcript, p 277.30 - .45; Court Book, SUN.009.001.0569.

Sunland does not plead a reservation agreement in respect of Plot D17.

143 Brown's subsequent evidence, in the context of questioning in relation to a report prepared for a Sunland Group Board meeting in Dubai on 2 February 2009,[481] was that his recollection at the time "was their ability to control the property was really through Och-Ziff",[482] but although the report refers to the word "reserve", "[n]obody mentioned that word 'reserve', no".[483] In response to my question, Brown said that it was Prudentia, through Reed, who was in a position to reserve the site and not Och-Ziff, "they were a partnership. That's how it was presented to me from Joyce and Reed".[484] Brown's evidence was that he had sent an email to Reed while he was considering a way for Sunland to secure the property.[485]

144 I return now to Abedian's reference with respect to the "put your foot on it" email where he was questioned in relation to the position apparently emerging from the contents of that email - that the DWF marketing department was not inhibited in any way from selling Plot D17 to any entity it chooses. In this respect, Abedian also gave the following evidence:[486]

> "The information conveyed to you, was it, that the marketing meeting on Tuesday night, the rearrangement of the plot was shown and discussed, and Marcus and Anthony are now concerned that the marketing people are likely to try and sell the plot and they will have no control over this?---That's correct.
>
> Now, that is the direct opposite of someone having a reservation agreement, isn't it?---No, it's not.
>
> How is it different? Why isn't it different?---Because when somebody has a reservation agreement and was looking in the market to find a joint venture partner, as he met with us and met with Omniyat and maybe other parties that we don't know, it could be that the marketing people of Nakheel were searching for another joint venture partner or other buyers to sell off and get the commission.
>
> Tell me, why would you pay a premium of 44 million dirham if you thought the reservation agreement was about to run out?---Because we are very

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481 Court Book, SUN.004.002.0063.
482 Transcript, p 112.43 - .44.
483 Transcript, p 112.46 - .47.
484 Transcript, p 114.21 - .22.
485 Witness statement of David Scott Brown (6 August 2010), paragraphs 184 and 185; Court Book, SUN.001.006.0100.
486 Transcript, p 337.18 - .44.

ethical people.

Is that a serious answer, is it?---Mm'hm.

So you would pay 44 million dirham, knowing the uncertainty; is that right? --- It's not an uncertainty. They had control over the land.

But you were responsible for putting a put option in the joint venture agreement, weren't you? --- That was what was agreed.

After this, you, out of the blue, decided on a put option in the joint venture agreement?---It wasn't a put option. We had to do a sales and purchase agreement."

Abedian then agreed that the email was "conveying to you that if you don't put your foot on the plot to secure it, then the marketing people might sell it to someone else"[487] and that the "marketing people are acting on behalf of Nakheel".[488] He also agreed that Lee and Brearley appeared to be saying that, "Unless you do something, Sunland and Prudentia, you're going to lose this opportunity".[489]

145 Abedian's evidence continued:[490]

"But if someone is suggesting that you take a step to secure a property – let's just leave the email to one side. If someone said to you should take over at Sunland, let's say in Queensland somewhere, a step to secure the property, you would understand them to be assuming that you don't presently have the property secured?---That's correct.

That is what that would mean, isn't it?---That's correct.

If someone says, 'Secure a property', they're saying, 'I don't think you presently have it secured'?---That's right.

So when you saw that description of what Mr Lee and Mr Brearley were saying, it meant that they were assuming that the property was not presently secured?---That's not correct."

and:[491]

"HIS HONOUR: But if you go back to Mr Collinson's hypothetical in relation to Queensland or the Gold Coast, I'm not quite sure where, and someone says you need to secure certain property, that implies that it's not presently secured?---That's correct, we don't have it secured.

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487 Transcript, p 451.08 - .09.
488 Transcript, p 451.10 - .11.
489 Transcript, p 451.13 - .14.
490 Transcript, p 451.28 - .40.
491 Transcript, p 452.01 - .14.

> Which also implies you have no control over it?---That's correct.
>
> Because if you had any control over it - - -?---We don't, yes.
>
> - - - you wouldn't need to be taking steps to secure it?---That's right.
>
> Isn't that right as a hypothetical proposition?---Yes, that's correct, your Honour, that Sunland did not have anything in their hand to secure and if we want, we should move forward and do that."

146 Abedian's evidence was that there was always some risk that the control by Prudentia and Reed might be coming to an end and that in any event it appeared that DWF was pressing for a SPA and Abedian thought pressure might be coming from the management of DWF, including Joyce, and not just from the sales team.[492] In cross-examination, Abedian explained that the doubt arose "[i]f the reservation agreement come to an end because there is a time frame on that".[493] The existence of a reservation agreement was inconsistent with the evidence in Abedian's witness statement[494] that the DWF sales team might introduce Reed to another possible joint venture partner or purchaser, given that Abedian never explained the mechanics of this process as he understood it or had previously mentioned in his witness statement the possibility of the existence of a reservation agreement; noting again that the existence of such an agreement was not pleaded by Sunland.[495]

147 Brown's evidence was that he did not know how long Reed's control over Plot D17 would last as he did not know the basis for it, but that he did know that Reed had not signed a SPA.[496] Brown's evidence was that what Brearley and Lee had said to him "could also have been consistent" with Reed losing his control of Plot D17 some time not long after the end of September 2007.[497] Brown described this during cross-examination as "a possibility […] or a scenario".[498] Nevertheless, Brown also gave evidence that he "did not know the basis for [Reed's] control"[499] and agreed that he was "speculating […], had a doubt […] as to the nature of [Reed's] control and how

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492 Witness statement of Soheil Abedian, (6 August 2010), paragraph 86.
493 Transcript, p 347.09 - .10.
494 See paragraph 85 (set out above, paragraph 139).
495 Witness statement of Soheil Abedian, (6 August 2010), paragraph 85.
496 Witness statement of David Scott Brown (6 August 2010), paragraph 185.
497 Witness statement of David Scott Brown (6 August 2010), paragraph 185.
498 Transcript, p 73.30.
499 Transcript, p 85.13.

long it would last".[500]

148 Abedian's evidence was that Brown never conveyed to him his doubt as to the nature of the hold that Prudentia had over D17.[501] When asked whether this was truthful evidence, Abedian's response was "Mr Rush, I'm saddened for you. The answer is yes".[502] Abedian was then asked whether he would "expect your deputy to convey to you a doubt that he had over the nature of the control of D17",[503] to which Abedian responded "[i]f he knew that is important, he would have told me".[504] He also said that Brown did not discuss how long the hold on Plot D17 might last[505] "because the managing director of the company said that they are in control of it and that is the highest authority, Mr Rush"[506] and "the managing director said that they have to come to an arrangement, the highest representative of the government of Dubai and the government-owned entity".[507] Abedian was then asked whether he thought the "nature of the control over D17"[508] was "important in these proceedings",[509] to which he replied "[v]ery much so".[510] However, his response when asked why his "deputy did not disclose to you his doubt about the nature of the control of D17" was to suggest that counsel "[a]sk him".[511] Apart from observing that this exchange is but one example of Mr Abedian's unhelpful and unresponsive evidence in cross-examination, it should be observed that he said nothing in his evidence which indicated expressly, or impliedly, that there was any inhibition or obstacle to Sunland making inquiries as to the precise nature of the "hold" or any "control" that Reed or Prudentia had over Plot D17. True it was that Sunland was dealing with representatives of a government-owned entity in Dubai and at very high levels in that entity, but no inhibition or obstacle was suggested,

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500 Transcript, p 85.13 - .17.
501 Transcript, p 345.24 - .25; confirmed at Transcript, p 345.41 - .45 after a direction from his Honour to please answer the question.
502 Transcript, p 345.27.
503 Transcript, p 346.17 - .18.
504 Transcript, p 346.25 - .26.
505 Transcript, p 344.43 - .44.
506 Transcript, p 345.01 - .03.
507 Transcript, p 345.05 - .08.
508 Transcript, p 346.17 - .18..
509 Transcript, p 346.28.
510 Transcript, p 346.29 - .31.
511 Transcript, p 346.43 - .46 and p 347.1 - .03.

commercial, governmental, language difficulties, lack of commercial experience or any other difficulty in this respect. In any event, it is implausible that a commercial entity like Sunland, a publicly listed company, would have allowed some unspecific feeling of inhibition to stand in the way of taking reasonable steps to seek to protect its commercial interests by making reasonable inquiries when circumstances arose which made that necessary. For a party such as Sunland seeking to secure a commercial advantage, the circumstances indicated by the "put your foot on it" email would clearly have made such enquiries necessary unless, as the evidence indicates, Sunland was fully aware of the true position with respect to the proprietary and contractual rights to Plot D17. In other words, it well knew it had no rights of any kind with respect to Plot D17 and that the "put your foot on it" email was entirely reflective of this – its only relevance being to highlight the urgent need to sign a SPA.

149 In spite of the evidence of Sunland that Reed's or Prudentia's control over Plot D17 might have a finite term, Brown's evidence was that "[t]here was clearly an arrangement between Prudentia and DWF because we were told by a number of different people."[512] He sought to explain that there was "a series of events that linked all this together for us":[513]

> "I mean, Austin started by telling us they had a hold; Joyce told us he was the contact for that plot; later said [sic] 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."

Brown explained further that "I don't know what the hold was. We weren't told what type of hold it was, but there was a hold".[514] Nevertheless, in cross-examination, it was pointed out to Brown that the series of events to which he had referred in his evidence all occurred in the period leading up to the conversation with Brearley and Lee on 12 September 2007.[515] To this Brown agreed, but explained

512 Transcript, p 192.12 - .13.
513 Transcript, p 192.15 - .21.
514 Transcript, p 192.22 - .24.
515 Transcript, p 192.39 - .41.

that "he understood that the marketing people weren't in the loop and didn't understand fully the type of hold that Prudentia had".[516] Given the positions held in DWF by Lee and Brearley and the emphasis that both Brown and Abedian had placed on the fact that they were dealing with a government-owned entity in Dubai at the highest level and were being told by those people that there was nothing they could do to prevent the "marketing people" selling Plot D17 to whomever they chose, one would have to think this an extraordinarily weak explanation for the "difficulty" with respect to the "control" of Plot D17 - that there was apparently some kind of communication problem between those in charge at the highest level and DWF and the "marketing people". One would think that there would have been no difficulty in these senior officers of DWF putting the "marketing people" in a position where they were "in the loop" and restrained from dealing with Plot D17 had there been any basis to do so; such as some legal or other right which would inhibit them from dealing with the world at large.

150 In the course of cross-examination, Brown gave further evidence[517] that "I knew Prudentia had reached agreement with the master developer"[518] and described the control as "[i]t's some form of agreement that they had reached with the master developer on the land price and the instalments, and obviously it was a real agreement because it was verified by other parties in Nakheel".[519] Nevertheless, Brown also gave evidence that "[w]e didn't understand in full what the agreement with Nakheel was"[520] and:[521]

> "You understood, as a consequence of that possible scenario, at the conclusion of that limited right of negotiation, you could come in and purchase it yourself?---No, because all indications were it would be sold to somebody at a higher price, somebody else.
>
> Have a look at what you say in the last two lines. I'll read them, '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.' It

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516 Transcript, p 192.43 - .47 and p 193.01 - .02.

517 In the context of paragraph 185 of his witness statement (6 August 2010), which contains a discussion of the "put your foot on it" email.

518 Transcript, p 73.10 - .11.

519 Transcript, p 73.16 - .18.

520 Transcript, p 73.33 - .34.

521 Transcript, p 73.39 - .47 and p 74.01 - .03.

> couldn't be clearer, could it, Mr Brown?---That it could be sold to somebody else?
>
> Yes, at the end of a negotiating period, whatever the right was, you speculated that it could be on the market, free of any encumbrance, at the end of September?---If that scenario was true, yes."

and:[522]

> "Why would you force yourself into a position of doing a deal with Prudentia if there was a possibility that this plot may come on to the free market within a week or two?---Because we understood that Prudentia had the best arrangement possible with Nakheel already.
>
> That's your supposition, is it?---Yes.
>
> So there are two suppositions here: you suppose that Prudentia had a great arrangement with Nakheel and you are supposing that this property might become available at the end of September. Is that right?---Yes. Remember the phone call with Joyce, he told us the land price, he told us the instalments and he told us Prudentia had this plot.
>
> So you are seriously saying to the court, having regard to your relationship, for example, with Brearley and Lee where they gave you information about $120 a square foot on 12 September, that you didn't feel you could go and ask them, 'What's going on'?---Dirham is a square foot.
>
> Sorry?---Dirham is a square foot.
>
> Thank you?---No, because we understood that Reed had the direct connection at a higher level to Nakheel."

151 Brown gave further evidence in cross-examination, agreeing that even with the doubts which he expressed in his witness statement,[523] including the doubt as to how long Reed's control might last over Plot D17 and speculation that it might run out at the end of September 2007, "[w]ith that possible scenario as one option that was not verified by anybody else, but we had reached a critical point in the negotiations, we were prepared to pay the fee and take over negotiations, yes."[524] Brown added subsequently, that "[w]hen we're talking directly to the government and the people who know what is happening, we don't have those sort of doubts".[525] Again, as indicated previously, one might think that the fact that Brown was talking directly to

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522 Transcript, p 74.21 - .42.

523 Witness statement of David Scott Brown (6 August 2010), paragraph 185 (which contains a discussion of the "put your foot on it" email).

524 Transcript, p 85.42 - .46.

525 Transcript, p 81.44 - .46.

the government and people who knew what was happening would have made it all the easier for inquiries to be made as to the precise nature of the "hold" or control that Sunland says it thought Reed or Prudentia exercised over Plot D17. None of Brown's evidence, Abedian's evidence or other evidence led or tendered on behalf of the Sunland entities explains why these obvious and, one would have thought, necessary inquiries were not made of DWF. The further evidence of Brown to which I now direct particular attention only serves to highlight what seems to be an inexplicable failure to inquire on the part of an experienced and sophisticated property developer, a public company in Australia, dealing with high level government officials in Dubai in circumstances where there were apparently no linguistic or other difficulties or obstacles standing in the way of such an inquiry.

152 Brown also gave evidence that Anthony Brearley was the one person at DWF who did know about all arrangements on land between DWF and buyers.[526] Further, Abedian agreed that "if there was some control contract between Nakheel and Reed, Lee and Brearley would [have known] about it".[527] However, Brown also said in response to a question as to whether Prudentia already had a hold on Plot D17 at the time of the "put your foot on it" email, that "I wasn't sure exactly what Marcus and Anthony knew about this".[528] Brown added, separately, in subsequent cross-examination that "Brearley was the senior lawyer for Waterfront and in charge of preparing all contracts for land sales".[529] The puzzle is added to when one considers that in cross-examination Brown was asked whether he had ever before requested information from Brearley and Lee about the nature of plots other than Plot D17, to which Brown replied "[w]e had".[530] Brown's evidence was that in relation to Plot A10C, Sunland requested information from Brearley because "[w]e were introduced to the other plot by a real estate agent".[531] Brown's evidence was that an email he sent to Lee (copied to Abedian, Brearley, Mr Mark Stewein (Legal Counsel in DWF)

526 Transcript, p 200.38 - .39.
527 Transcript, p 456.3 - .04.
528 Transcript, p 192.46 - .47.
529 Transcript, p 200.25 - .26.
530 Transcript, p 75.05 - .07.
531 Transcript, p 75.12.

and Clyde-Smith) seeking confirmation of ownership of the site was part of "due diligence".[532] Brown had sought to explain, however, that a similar due diligence was not necessary for Plot D17[533] because "it was a completely different situation. […] With Reed, we were introduced by Nakheel's most senior management and they told us certain things which led us to believe they had control over the plot".[534] As noted in the submissions by the Prudentia parties, in fact, as is now clear, the initial introduction of both Plot D17 and of Brown to Reed arose at a meeting with Austin. Brown also gave evidence that he did not ask Reed " what's the basis of [Reed's] existing hold" on Plot D17[535] because "we were well past the fact whether he had a hold or not, we were already a month into negotiations"[536] and "I can only say that I still believed he had a hold on the plot based on what we'd been told previously".[537] It is an extraordinary proposition, that a potential purchaser of a valuable plot of land would abstain from making inquiries as to the proposed vendor's title to that plot of land at whatever point negotiations had reached, much less in circumstances where doubts had been raised by senior officers of the undisputed then present owner of the plot as to the nature, if any, of any interest which the proposed vendor (or, in this case, joint venture partner) had in the relevant plot.

153 Although a variety of terms were used to describe the "right" alleged over Plot D17, the expression "development rights" was used on a number of occasions. This term was introduced in evidence by Brown when he gave evidence in the context of an email he sent to Jason Mahoney, an employee of Sunland, on 17 September 2007:[538]

> "I'll go back to it. You said, 'Based on getting the bonus BUA for 24 million dirham of the introduction fee.' Why did you refer to it as an introduction fee?---It's another way of describing the fact that Reed controlled the land and invited us in as a partner and then when we couldn't do a joint venture - - -

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532 Transcript, p 76.10 - .29; Court Book, SUN.003.004.0055.
533 Transcript, p 76.31 - .36.
534 Transcript, p 76.31 - .36.
535 Transcript, p 193.29 - .32.
536 Transcript, p 193.32 - .33.
537 Transcript, p 193.37 - .38.
538 Transcript, p 52.16 - .29; Court Book, SUN.009.003.5874.

> You are not seriously suggesting to the court that the payment of an introduction fee is a way of describing control over the land?---No, I'm talking about a fee paid to him for them walking away and handing over their development rights.
>
> So they're development rights now, are they? It would be handing over development rights?---Yes.
>
> So that was the entitlement that Prudentia had to the site?---Well, they controlled the plot, which includes development rights."

154 Abedian's evidence was that his belief that Reed, Prudentia and Hanley had control over Plot D17 was based on the fact that Reed was introduced to Sunland by Joyce.[539] In early cross-examination, Abedian would not admit that if the introduction of Sunland was through Austin, then "the whole base of [the] belief falls away"[540] and that, in light of sworn evidence by Brown to this effect, Abedian's witness statement in this respect[541] must be wrong.[542] However, when Abedian was asked questions in the context of Brown's formal interview with the Dubai prosecutor on 16 February 2009, he did eventually admit that "if the introduction was not by Mr Joyce, the sworn evidence" [in the transcript of the 16 February 2009 interview with the Dubai prosecutor] "that we see on the screen" [could be] wrong.[543]. Abedian added that he was not planning to say anything about that.[544]

155 Further, in relation to control issues and the extent to which Plot D17 had been secured arising out of the comments in the "put your foot on it" email, Abedian's evidence was that:[545]

> "'We', in that sentence, 'To do this, we need to sign a sales and purchase agreement,' in an email to Mr Reed is saying, 'We, Sunland and Prudentia'?---That's correct.
>
> So 'we' means both Sunland and Prudentia?---That's correct.
>
> Indeed, in the sentence above, where they suggest, 'We immediately put our foot on the plot,' 'we' there means Sunland and Prudentia?---That's correct.

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539 Witness statement of Soheil Abedian (6 August 2010), paragraph 114.
540 Transcript, p 355.14 - .18.
541 Witness statement of Soheil Abedian (6 August 2010), paragraph 114.
542 Transcript, p 355.30 - .38.
543 Transcript, p 359.34 - .35. As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189.
544 Transcript, p 359.39; where his precise words were, in the context of the question: "So what are you going to do about it?---Nothing".
545 Transcript, p 452.25 - .35.

> So that means that Mr Lee and Mr Brearley are suggesting that at the moment, when this conversation is going on with Mr Brown, Prudentia does not have the plot secured?---Or it could be that the time is running out."

Abedian did agree that if he had thought that Prudentia's control over Plot D17 would "run out", then the "logical thing to do" was for Abedian to have Brown check when the control was going to run out,[546] but he, Abedian, had no recollection of doing that.[547] He also said that he did not raise the issue with Brown because "I never talk about problem; I always give them solution" and in this case agreed, the solution was to "sign up a SPA".[548]

156 Following this evidence of Abedian in the context of the "put your foot on it" email, I said to Abedian that I was having difficulty reconciling his answers with "the plain English words that appear on the screen", which at that time displayed the "put your foot on it" email. Giving further evidence about the email, Mr Abedian said:[549]

> "So it's now, here and now, that the marketing people are likely to try to sell the plot now and Brearley and Lee can't control this?---That's right.
>
> That must mean, doesn't it, that the control has already run out?---That means that now the block of land has come so much better, the marketing people will focus on it because it was more saleable than it was before.
>
> I understand that's the marketing people, that's one part of Nakheel. Brearley and Lee, if there was some control contract with Reed - - -?---They would never know that.
>
> No, listen: if there was some control contact between Nakheel and Reed, Lee and Brearley would know about it?---That's correct.
>
> They're saying they will have no control over this?---That's correct.
>
> So they can't stop the marketing people?---That's correct.
>
> If the reservation agreement had not yet run out, they would just say to the marketing people, 'You can't sell the property because Mr Reed has a reservation agreement and it hasn't run out yet'?---No, that is not the way that it is over there.
>
> Are you saying to his Honour that if there was a reservation agreement that, say, had another three months to run, that the marketing - - -?---They would never issue it on three months' time frame, is too long. One maybe.

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546 Transcript, p 453.44 - .47.
547 Transcript, p 454.01.
548 Transcript, p 453.33 - .36.
549 Transcript, p 455.39 - .47 and p 456.01 - .47.

The time period doesn't matter. Are you saying to his Honour that if the reservation agreement had, say, one month to go, that the marketing people could ignore the reservation agreement and sell the land to someone else?---No, they couldn't.

They couldn't do that?---But what they would do, they say in case that Sunland would not go ahead, let me register the name of (indistinct) to come that the moment my name is up there, that I have registered first for that price for this time frame and therefore if the next person is in line to do the negotiation, that they can get the commission.

HIS HONOUR: Can we just go back a step, just clarifying your answers. Is my understanding correct that if a reservation agreement was in force, the marketing people couldn't sell anything?---No, they cannot sell it within the time frame, your Honour.

That is what I mean, if it is in force and it's active it is within its time frame?---That's correct.

So if that is the case, they can't sell it. It is a bit like a caveat in Australian terms?---That's correct, they could not sell it. But immediately when the time frame is over, they can go and bring other people in line. They may register five buyers and whoever registered the buyer first with the price, they get the commission.

So you are emphasising the point that as long as the reservation agreement is in force within the period of its operation, the property can't be sold?---Not to any other person, that's correct.

MR COLLINSON: And if there was a reservation agreement, Brearley and Lee would know about it?---Lee would not, had nothing to do with the sale, but Brearley would."

157 Further, in relation to this issue, I raised with Abedian issues with respect to the operation and effect of a reservation agreement. Abedian responded:[550]

"If the reservation agreement is operating in force within the period within which it applies, the property can't be sold?---Yes.

We have agreed, that's quite clear?---That's correct, your Honour.

and:[551]

"But doesn't it follow if Marcus and Anthony are saying to you they are concerned that there is no way they can stop the marketing people selling a plot, doesn't that mean there can't be a reservation agreement in force because otherwise they could stop the marketing people?---Your Honour, at that time, when we received that, we thought that is running out, whatever agreement, which we were not privy to that.

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550 Transcript, p 457.16 - .19.

551 Transcript, p 457.33 - .43.

> You might have thought that, but if you saw a statement in relation to the views of Marcus and Anthony, wouldn't you think that, 'Perhaps we had better review our thoughts. It would appear that there can't possibly be a reservation agreement in force'?---No, that really wasn't in our thinking at that time, but what we knew is that we have to move as fast as possible and pay the 5 per cent."

13 September 2007

158 On 13 September 2007, Reed emailed Brown in response to the "put your foot on it" email, telling Brown to "[g]o for it" attaching "a marked up document for your review, which I feel covers all the issues".[552] Brown's evidence was that this was sent after Brown and Reed had had a telephone discussion during which Reed told Brown that "I think I can get the property more cheaply than 135".[553] Brown agreed that he knew at this point that "there wasn't a fixed price that had been negotiated by Och-Ziff or Prudentia"[554] and that at this time Brown's "impression [was that] it could be cheaper".[555] Brown then agreed that you would normally have a price agreed in order to have a binding contract[556] and in response to my question then said:[557]

> "I was asking you a general question, not necessarily relating to those discussions. The proposition was put to you that you couldn't have a contract without an agreed price. You disagreed with that and I would be interested to know how you would overcome that difficulty, because if you've got to settle a purchase contract ultimately, you have to know how much money to pay?---In certain situations, verbal agreements are adequate, certainly they are in this country.

Brown's cross-examination continued in this context:[558]

> "MR COLLINSON: Assume that, assume a verbal agreement, but the price hasn't been agreed. You can't enforce a contract to buy real estate without the price being agreed, can you?---I mean, a lot of negotiations focus on price as the key issue and that can be locked in quite early without having a contract in front of you ready to sign.
>
> I'll put it again: to have a contract to buy real estate, you have to agree the price?---To have a contract, yes, you do.

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552 Court Book, PRU.001.007.0098..
553 Transcript, p 267.38 - .40.
554 Transcript, p 268.11 - .13.
555 Transcript, p 268.12 - .13.
556 Transcript, p 268.18 - .25.
557 Transcript, p 268.38 - .43.
558 Transcript, p 268.45 - 269.19.

> And if you don't have that, you don't have anything that's binding at law?---Under normal circumstances, yes.
>
> Under any circumstances. What circumstances would you say are abnormal that would allow you to enforce a contract where the price for the real estate is not specified?---The only comment I can make about that is that in Dubai things are done a little differently and the normal events that we are used to in Australia aren't necessarily followed.
>
> HIS HONOUR: Assuming that's right, and we won't get into a discussion about Dubai law, but as a matter of practicality, you've got a contract, no price is agreed. When you come to settle the contract, what do you write the cheque for?---No, you would have to have a contract prior to writing the cheque, obviously."

159 Returning to the joint venture, Abedian confirmed in the course of his cross-examination that Reed's email of 13 September 2007 indicated that he wanted to proceed with the joint venture agreement and to do it quickly, in accordance with the urgency demonstrated in that email.[559]

160 The nature and state of the joint venture negotiations at the time Reed's 13 September 2007 email was received is indicated by the following evidence which Brown gave in cross-examination in the context of questions about the report dated 2 February 2009 prepared for the Sunland Group Board:[560]

> "That was in discussions, I see. Look at 2, 'Reed wanted about 65 mill for a consultancy fee.' How was that a hurdle or a stumbling block? You agreed to it on your first meeting, said it was no problem. How was that a stumbling block, Mr Brown?---It was subject to the balance terms in the joint venture agreement.
>
> How was it a stumbling block, when you told him after the first meeting that that was not a problem?---On its own, we accepted it, but it had to be accepted as part of the joint venture negotiations, which were never concluded.
>
> Then you say, 'Reed wouldn't accept our fee, saying they were too high.' That's just not true, is it?---He did say they were too high at one point, yes, and then he asked - - -
>
> 'Reed wouldn't accept our fee, saying they were too high,' I suggest that was never a stumbling block to the joint venture?---It was at one point, it was an issue that he had, and he tried to offset that by asking for a finance fee.

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559 Transcript, p 339.45 - .46; see also Transcript, p 372.27 - .29.

560 Transcript, p 115.30 - .47 and p 116.01 - .17; see also Witness statement of David Scott Brown (6 August 2010), paragraph 150 where he identifies the fee as a 'stumbling block'; and see Court Book, SUN.004.002.0063 and SUN.004.002.0064 in relation to the report to the Sunland Group Board.

> Tell me, was it a stumbling block to entry to the joint venture? When he came back to you and said, 'Go for it,' how were your fees a stumbling block to the joint venture?---By that time, we had progressed further on the terms of the agreement.
>
> So they weren't a stumbling block when it came to the crunch and you said, 'We've got to put our foot on it,' correct?---We had a number of negotiations between those - - -
>
> No, my question wasn't that. It wasn't a stumbling block when you wrote your email to him on 12 September and he immediately responded and said, 'Go for it,' your consultancy fees were not a problem, were they?---No, but this is at a point in time, this comment here.
>
> So we should read that the three key stumbling blocks to the entry of a joint venture and agreement of a joint venture relate to points in time. Tell me, were any of them a stumbling block when it came to your email and Reed's response to you on 12 September?---No, because we had gone through a lot more discussions on these matters at that point."

161 Brown subsequently agreed in the course of his evidence that at this time, that is in the period prior to 12 September 2007, Sunland was, "subject to negotiating the other terms of a joint venture with Mr Reed, happy to pay this sum, whatever we call it, premium or fee of some kind, uplift, of 65 million dirhams"[561] and that this sum was "calculated on the basis of a 40 dirhams per square foot uplift multiplied by the BUA of 1.6".[562] Brown said in his evidence that he and Reed exchanged emails about the terms and conditions of the SPA on 13 September 2007 and that he, Brown, believed he called Reed to tell him that an Implementation Agreement or MOU, would be sent to him, but Brown could not recall the specifics of that conversation.[563] Brown also said that he sent Reed's email of 13 September 2007 on to Clyde-Smith because he wanted her to review the agreement that Reed had sent. Further, he said that he thought that he met with Clyde-Smith to discuss the document, but could not recall what they discussed.[564]

162 Abedian's evidence, on the other hand, was that his only interest in Reed's email was whether Prudentia had accepted the 7.5% capitalised interest and that he noticed

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561 Transcript, p 266.31 - .34.

562 Transcript, p 266.36 - .37.

563 Court Book, SUN.001.006.0101; Court Book SUN.009.004.1839; Witness statement of David Scott Brown (6 August 2010), paragraphs 190 and 191.

564 Witness statement of David Scott Brown (6 August 2010), paragraphs 186 - 188; and see Court Book, SUN.001.001.0143; Court Book, SUN.001.001.0146; Court Book, PRU.001.007.0098 and attachment (PRU.001.007.0101).

that this had been reflected in the draft Implementation Agreement, the MOU.[565] Abedian also said that after receiving a copy of an email from Sinn dated 13 September 2007, Brown had sent Abedian an email explaining how the new figures in Sinn's email might change the feasibility.[566]

163 Sunland pleaded that Brown's negotiations on behalf of Sunland with Reed for Sunland (or a related entity) and Prudentia to incorporate a new entity and use it as the vehicle to undertake a joint venture for the purchase, development and sale of units in Plot D17 was in reliance on the representations alleged to have been made between 16 August 2007 and 12 September 2007.[567]

164 On 13 September 2007, Brown sent an email to Reed enclosing a draft of the Implementation Agreement or MOU, identifying the following as key points:[568]

- We have included a provision for Sunland to transfer its shares in the JV to Prudentia in the event we cannot reach agreement on the JV terms;
- In this event, Prudentia repays Sunland the initial Deposit, and can then sell or develop the Land as it wishes;
- Have made a few corrections to other clauses to recognise the allowance for interest charges on the land; and
- Based on the above, Sunland can advise DWF that Sunland will enter into a SPA and will transfer the Plot into a JV company at a later date.

Brown also added in this email that "Hopefully this will <u>secure</u> the site". (emphasis added).

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565 Witness statement of Soheil Abedian (6 August 2010), paragraph 89.
566 Witness statement of Soheil Abedian (6 August 2010), paragraph 92.
567 Second Further Amended Statement of Claim, paragraph 22.
568 Court Book, SUN.001.001.0183; Court Book, PRU.001.006.3199 and attachment (Court Book, PRU.001.006.3202). The authenticity of this document appears to have been challenged by Sunland on the basis that it had not been formally proved or tested in cross examination. Even though the document was relied upon in support of the defendants' case it is not, however, relied upon in any way for the purposes of these reasons for judgment as it is, in any event, part of the narrative of events more than adequately supported by other evidence.

165 Brown agreed that the first of the "key points" was a "put option",[569] but that until this point was raised in this email, the "put option" had not been discussed before.[570] He said that he believed that the put option was Abedian's idea.[571] Brown also said in his evidence:[572]

> "That was an option that came the day after you were informed of the potential at least of this site to be sold for 120 dirham per square foot?---It came after we had discussed Sunland negotiating an SPA, legal terms and technical issues, and Reed wanting us to secure the site. Yes, so this was the next phase of those discussions."

Nevertheless, Brown said in his evidence that the agreement which Sunland was seeking to reach was that which was reflected in clause 7 of the draft Implementation Agreement or MOU which was in the following terms:[573]

> "7 Payment of Consultancy Fee
>
> In consideration of Prudentia permitting Sunland to negotiate with the Seller for the plot sale and purchase agreement for the acquisition of the Property, Sunland agrees that if Sunland or a Related Party of Sunland enters into a plot sale and purchase agreement, or other form of agreement for the acquisition of an interest in the Property with the Seller (**Plot Sale and Purchase Agreement**) and the Parties have not entered into the Formal Agreement by 17 October 2007, Sunland must, subject to the provisions of clause 2(c):
>
> (a) pay to Prudentia the sum of AED 64,282,080; or
>
> (b) transfer the Property to Prudentia.
>
> If Sunland or a related Party of Sunland does not enter into a Plot Sale and Purchase Agreement, then Sunland has no payment obligation whatsoever to Prudentia."

The reference to clause 2(c) is a reference to the following provisions:

> "2 General Principles
>
> The Parties agree that:
>
> …
>
> (c) in the event that the parties are unable to negotiate and agree on the form

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569 Transcript, p 159.35 - .37.
570 Transcript, p 159.37.
571 Transcript, p 160.01; a position subsequently confirmed in Abedian's evidence, see Transcript, p 373.11.
572 Transcript, p 159.39 - .42.
573 Transcript, p 160.15 - .16; Court Book, SUN.001.001.0184.

> of a joint venture agreement in respect to the development of the Property and Sunland or a Related Party of Sunland has entered into a plot sale and purchase agreement, contract of sale or other form of agreement for the acquisition of an interest in the Property, then Sunland will either pay to Prudentia a consulting fee being the sum of AED 64,282,080 or alternatively transfer the Property to Prudentia, such option to be decided by Sunland in its absolute discretion. If the Property is transferred to Prudentia, Prudentia will refund to Sunland the deposit paid by Sunland under the sale and purchase agreement to the Master Developer."

166 The "put option" had not been previously discussed, as Abedian confirmed in cross-examination.[574] The put option provisions had the effect of giving the right to Sunland to put the property back to Prudentia and for Prudentia to repay its deposit, a provision which Abedian agreed was a "stumbling block" and one that arose "at the critical time".[575]

167 In cross-examination of Abedian in relation to the effect of "put option" being raised at this time, it was suggested to Mr Abedian that the "stumbling block" to the joint venture agreement was Sunland, rather than Prudentia and that Sunland did not wish to pursue the joint venture but, rather, wanted to acquire Plot D17 itself, alone. In this context, the following exchanges took place:[576]

> "But even then, I suggest Prudentia came back to you and said, 'Look, we'll even accept that, but we'd like to see some feasibility.' Isn't that right?---That's correct.
>
> They were prepared to accept the put option, but just wanted to see your feasibility?---That's correct.
>
> And what did you say to that request?---We are not going to give anything until the documentation has been signed.
>
> So the stumbling block to a joint venture agreement was not Prudentia, it was Sunland?---You can call it like that. We don't see it that way. It is our intellectual property."

The exchange continued:[577]

> "You see, Mr Abedian, the fact of the matter is, I suggest, at this stage you were keen to go it alone, you didn't want to do a joint venture with Prudentia?---Mr Rush, you are wrong. As before and as now, you don't even know the industry.

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574 Transcript, p 372.45.
575 Transcript, p 373.01 - .09.
576 Transcript, p 373.13 - .24
577 Transcript, p 373.41 - .46 and p 374.1 - .23.

> The reason being, that you saw the potential of a $A50 million premium if you could on-sell this to another joint venture?---You are wrong, Mr Rush.
>
> Is that what you informed the board in September?---Mr Rush, you are wrong.
>
> Is that what you informed the board in September?---No, we didn't have any joint venture partner at that time.
>
> Did you inform the board in September of 2007 that, with a joint venture arrangement, you could get $A50 million premium on re-entering with another joint venturer?---Mr Rush, people are lining up to do joint venture with us.
>
> HIS HONOUR: Mr Abedian, please answer the question?---Yes.
>
> How many times do I have to ask you?---Yes.
>
> MR RUSH: Did you inform the board you could get a $A50 million premium in September 2007 by entering another joint venture?---We didn't have anybody at that time.
>
> Did you inform the board that you could get a $A50 million premium by entering an agreement with another joint venturer?---At that time, we didn't have anybody else.
>
> I'll ask it one more time: did you inform the board that you could get a $A50 million premium by entering an agreement over D17 with another joint venturer?---I don't recall that."

When it was put to Abedian that he was lying, his response was "Mr Rush, you are lying".[578]

168 Brown received a further email from Sinn on 13 September 2007, copied also to Reed, advising that the revised Implementation Agreement or MOU terms "appear acceptable" and seeking confirmation that the Implementation Agreement or MOU "is now in a form acceptable to Sunland".[579] Receipt of this email was acknowledged by Brown in cross-examination and he also confirmed that he sent Sinn's email on to Clyde-Smith.[580]

169 SWB, the first plaintiff, was incorporated on 18 December 2007 as a company particularly or specifically incorporated to acquire Plot D17.[581] There were email

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578 Transcript, p 374.29.
579 Court Book, SUN.001.006.0123.
580 Transcript, p 160.40- .44; and see Court Book, SUN.001.001.0204.
581 Transcript, p 380.28 - .29.

communications on 14 September 2007 between Clyde-Smith and Brown to let Brown know that she had sent an application document to Nakheel for Plot D17, but had left the price details blank, and Brown confirmed that the application document was a standard form for DWF.[582] Sunland pleaded that Clyde-Smith informed DWF, Prudentia, Joyce and Reed on 14 September 2007 that the legal entity to acquire Plot D17 would be this company.[583]

170 Brown's evidence was that an email to Sinn on 14 September 2007 was to report on the steps Sunland was taking with DWF.[584] Brown's email notes that as "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".[585] These statements, usefully viewed in the context of Brown's evidence in relation to the purchase of land in Dubai, are set out in his witness statement:[586]

> "20. 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 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.
>
> 21. In Dubai, the price of land is usually based on the square footage price of BUA, which means that the price is calculated on the size of the building you can build, not the size of the land. Normally the BUA of each plot is fixed by the Master Developer as it relates directly to the demand on infrastructure services required in the 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."

The contents of this email and Brown's knowledge of land dealing in Dubai adds further weight to the defendants' submissions that Sunland understood that neither Prudentia nor Reed had any enforceable right to any interest in Plot D17 at any relevant time. Neither does this evidence indicate the nature or possibility of any other right subsisting with respect to Plot D17 at any relevant time; or at all.

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582 Transcript, p 161.30.
583 Second Further Amended Statement of Claim, paragraph 26.
584 Witness statement of David Scott Brown (6 August 2010), paragraph 203.5.
585 Court Book, SUN.001.001.0288.
586 Witness statement of David Scott Brown (6 August 2010), paragraphs 20 and 21.

171 On 15 September 2007, Brown received an email from Sinn that set out Prudentia's response to the "put option" that had been proposed by Sunland:[587]

> "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."

Brown accepted that this was not an unreasonable request and that, assuming that Prudentia were only dealing with Sunland, it would not be an unusual request, adding that it had previously been agreed to provide all that information ten days after signing the agreement, and that Sunland was holding to that.[588]

16 September 2007

172 Sunland pleads that on 16 September 2007, Brown telephoned Reed and in the course of that telephone conversation:

(a) Brown said words to the effect that 'due to our inability to agree terms and the fact that DWF wants an agreement signed, Sunland offers to purchase Prudentia's rights to Plot D17 for a flat fee of AED 20 million';[589] and

(b) 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 AED 20 million flat fee'.[590]

173 The first significant event on 16 September 2007 appears to be Brown's forwarding Sinn's email of 15 September 2007 to Clyde-Smith, with a copy to Abedian. In that email, Brown wrote:[591]

> "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.

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587 Court Book, SUN.001.006.0165 and Court Book.
588 Court Book, SUN.001.006.0165; Transcript, p 163.05 - .09, p 163.18 - .19.
589 Second Further Amended Statement of Claim, paragraph 27.1.
590 Second Further Amended Statement of Claim, paragraph 27.2.
591 Court Book, SUN.001.001.337.

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

Brown's evidence was that the reference in that email to "in from the start" was a reference to Prudentia being part of the purchasing entity in the SPA.[592]

174 Later on 16 September 2007, Brown called Reed from the Sunland office in Dubai to an Australian mobile phone.[593]. Brown's evidence was that he believed he made the call to an Australian mobile phone from a Sunland office [594]. Brown said that during that call, Brown said to Reed words to the effect that "this is all getting too hard. How about we buy your development rights for AED20M and you walk away?".[595] In cross-examination, Brown's evidence was that he used words to the effect that "[w]e're prepared to buy your development rights for 20 million dirham and you walk away"[596] and that his offer to Reed came about following a suggestion from Abedian that "we offer Prudentia a fee to remove them [from the transaction]".[597] Brown also gave further evidence that:[598]

> "But you weren't purchasing a legal asset called Development Rights, were you?---No, but that was the sort of terminology we were discussing at the time."

This evidence is, however, at odds with other evidence which Brown gave subsequently in cross examination that he was "not sure whether [he] did [use the term 'development rights'] or not".[599]

175 It appears from Brown's evidence that Reed was interested in what he, Brown, had to say, but did not appear to be convinced by the offer, as Brown said: [600]

> "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".

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592 Witness statement of David Scott Brown (6 August 2010), paragraph 209.
593 Witness statement of David Scott Brown (6 August 2010), paragraph 212.
594 Witness statement of David Scott Brown (6 August 2010), paragraph 212.
595 Witness statement of David Scott Brown (6 August 2010), paragraph 212.
596 Transcript, p 95.44 - .45.
597 Transcript, p 95.16 - .19.
598 Transcript, p 253.05 - .06.
599 Transcript, p 270.27 - .28
600 Witness statement of David Scott Brown (6 August 2010), paragraph 213.

176 Meanwhile, Mr Sahba Abedian (the Managing Director of Sunland Group Limited) apparently remained unaware that the joint venture negotiations had come to an end, because on 17 September 2007, he sent an email to Brown, copied to Abedian, stating:[601]

> "Hi David/Soheil
>
> I feel that under the present circumstances, and with the pending approach from the 'other party', it may be prudent for us to refrain from expending further capital in the region. I feel that by undertaking the JV with Angus Reed it provides us with sufficient exposure to not only Waterfront Jebal Ali but also Dubai in the short term.
>
> Please feel free to contact me and discuss."

Brown was asked during cross-examination about this email and explained that he thought this email indicated that Mr Sahba Abedian was "concerned about over-investing in the Middle Eastern market",[602] but did, however, admit that the recommendation contained in the email was that Sunland should do the deal with Reed.[603] Brown was then asked why he would not tell Mr Sahba Abedian that the joint venture had "fallen through" and gave evidence that "I honestly can't recall the events around that email, in terms of the timing of it I'm talking about now. Soheil [Abedian] would have advised Sahba [Abedian] what was happening".[604]

177 The evidence of Brown contained in his witness statement of 6 August 2010 was that "Soheil suggested to me that perhaps Sunland offer 20 million dirham premium to obtain the rights to plot D17. It's not unusual for a buyer to pay a premium to a seller in Dubai in order to secure a site from them".[605] Brown confirmed this evidence in cross- examination, adding that it was "because the negotiations were getting too difficult".[606] Brown did, however, also agree that this "would enable [Sunland] to buy the site direct from Nakheel"[607] and that "[w]hat you were told

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601 Court Book, SUN.009.003.5852.
602 Transcript, p 99.17 - .19.
603 Transcript, p 99.21 - .24
604 Transcript, p 100.8 - .10.
605 Witness statement of David Scott Brown (6 August 2010), paragraph 211; see also Transcript, p 270.01 - .05; Abedian's evidence confirms this at Transcript, p 361.17 - .18.
606 Transcript, p 95.21 - .27.
607 Transcript, p 95.29 - .31.

was if you could get Och-Ziff out of the road, you could do it at 120 dirham per square foot".[608] Brown also said in cross-examination that "when [he and Soheil] pitched the 20 million to Reed, [they were] assuming [that they] can indeed get the land for 120 per square foot".[609] Abedian did, however, disagree, saying that Brown was "wrong because we paid the difference to Prudentia".[610]

178 It was put to Abedian that "the managing director of Sunland, it would appear from the face and reading of this email [that is the email of 17 September 2007[611]], was not aware of the decision that had been made not to proceed with a joint venture with Prudentia".[612] Abedian's evidence in response was that "[w]e didn't make a decision not to proceed with Prudentia [on that date]".[613] It would have to be said that Abedian was then evasive in his evidence as to when a decision was made, referring only to 17, 18 or 19th[614] but conceding, nevertheless, that "[i]f you terminated the joint venture agreement, you would expect your managing director to know about it".[615] Abedian then gave most unconvincing and unhelpful evidence in relation to Mr Sahba Abedian's ignorance of Sunland electing to "go it alone":[616]

> "So you knew it was over?---Sorry?
>
> So you knew it was over on the 16th?---Nothing is finalised until the documentation is completed, Mr Rush.
>
> You're lying, Mr Abedian, aren't you?---I'm not lying, Mr Rush.
>
> You cannot explain to the court how your son can write that email, and you're attempting to excuse yourself by lying to the court?---I'm not lying, and you know that, Mr Rush. You can hide behind everything you want. You know that I'm not lying.
>
> It would be incredible for the managing director of a company as significant as Sunland not to be aware of these sort of transactions, wouldn't it?---That's correct.
>
> It would be equally incredible if your operations manager in Dubai wrote

608 Transcript, p 95.40 - .41.
609 Transcript, p 270.16 - .17.
610 Transcript, p 465.25 - .26.
611 See above, paragraph 176.
612 Transcript, p 377.05 - .08.
613 Transcript, p 377.9 - .11.
614 Transcript, p 377.47.
615 Transcript, p 378.01 - .02.
616 Transcript, p 378.45 - .47 and p 379.01 - .16.

> back to him and said, 'Thank you, Sahba, we'll take note of what you say'?---That's correct.
>
> And that is what he did?---That's correct."

In subsequent cross-examination, Abedian said that Mr Sahba Abedian was informed of the decision not to proceed with a joint venture "[w]hen we suggested to buy the right, which they didn't have"[617] and agreed that this was "[a]fter 17 September".[618] Abedian also admitted that he had not told his "son in early September" that he and "Mr Brown were considering the plot, buying D17 alone, without any input from Prudentia".[619]

179 A number of other events occurred during the exchange of emails between Reed and Brown on 12 September 2007 (including the "put your foot on it" email and the "go for it" email) relevant to events as at 16 September 2007. Brown agreed that on 16 September, Soheil Abedian said to Brown, effectively, "It's too difficult, offer them 20 million dirham and we'll go alone".[620] Abedian's evidence was that after receiving the amended Implementation Agreement or MOU sent by Sinn to Clyde-Smith and Brown, he was of the view that the terms of the deal were changing constantly from Prudentia's side, so Abedian suggested to Brown that Sunland should proceed by attempting just to buy Plot D17 from Prudentia.[621] More particularly, Abedian's evidence was that the joint venture negotiations were "becoming very difficult at that time [12 September]"[622] because "they were changing all the deals and all the condition on the deals".[623] In my view, this evidence is at odds with the documented facts and other evidence as to the nature and progress of these negotiations – and, importantly, suggests a position on Sunland's part not consistent with its clear commercial purpose, which was to acquire Plot D17 on its own to enjoy the very substantial return indicated by its feasibility studies.

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617 Transcript, p 544.22 - .23.
618 Transcript, p 544.25.
619 Transcript, p 545.05 - .07.
620 Transcript, p 105.30 - .32.
621 Witness statement of Soheil Abedian (6 August 2010), paragraph 94.
622 Transcript, p 329.36 - .37.
623 Transcript, p 329.43 - .44.

180 Brown was cross-examined in relation to the status of events as at 16 September 2007 and said:[624]

> "So is the position this over time: you were told on 12 September you could get the plot for 120 square feet; over this time, you had prepared plans that made this lot far more attractive; and then on 16 September, you pulled out of any joint venture arrangement? Is that a chronological sequence you agree with?---Chronologically, yes.
>
> You never told Prudentia or Angus Reed you could get the plot for 120 square feet and you never disclosed the plans that you had agreed upon, it appears, that made this lot far more attractive?---We didn't change the position of the lot in terms of its aspect over the park, but we did improve the plots behind it actually for the benefit of Nakheel.
>
> HIS HONOUR: I take it that means you otherwise agree with the proposition put to you by Mr Rush?---Yes."

Brown's evidence was that in a conversation with Abedian on 16 September 2007, Abedian suggested to Brown that Sunland offer an AED 20 million premium to Prudentia to obtain the rights to Plot D17 and, further, that it was not unusual for a buyer to pay a premium to a seller in Dubai in order to secure a site from them.[625] It might be said that this evidence, viewed in the context of the discussion which appears in Brown's witness statement, is merely a comment on the common property conveyancing process in Dubai whereby a purchaser, a party to a SPA, might "on-sell" the property at a premium, going through the process of arranging for the cancellation of that SPA with the agreement of the master developer and the entering into of a new SPA between the master developer and the new purchaser, with agreement for a "premium" payment to the original purchaser. I do not, however, accept this view of Brown's evidence because at this time the subject matter of the Plot D17 transaction was, as Sunland irrefutably knew, no different from that which Brown had understood on the basis of the facts as at 15 August 2007, as is clear from Brown's further evidence in cross-examination:[626]

> "What did you understand 'development rights' to mean?---That he had a hold on the plot, had reached agreement with Nakheel to develop it, that a purchase price had been agreed and payment schedule, and that they could move forward and develop once they had signed a SPA."

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624 Transcript, p 126.31 - .44.

625 Witness statement of David Scott Brown (6 August 2010), paragraph 211.

626 Transcript, p 217.18 - .21.

In other words, as this and other evidence previously discussed indicates, Sunland clearly knew that neither Reed nor Prudentia held a signed SPA in its or their favour with respect to Plot D17 and that Sunland had refrained from making any inquiries of DWF in relation to the nature of the "hold" Prudentia or Reed had over Plot D17.

181 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.

17 September 2007

182 Sunland claims that Reed called Brown on 17 September 2007 and said to him words to the effect that "I succeeded in negotiating a reduction of 15 dirhams per square foot in the price for Plot D17".[627] Brown's evidence was the telephone call from Reed took place on 16 or 17 September 2007,[628] but that although it was "fairly important", he cannot recall making a note of this call.[629] On the basis that Brown "told Lee what Reed had told me",[630] Brown said that the call from Reed must been prior to the meeting with Lee.[631] According to Brown, Reed told him that "the land price would

627 Second Further Amended Statement of Claim, paragraph 28.
628 Transcript, p 292.22 - 23.
629 Transcript, pp 28-31.
630 Transcript, p 293.07.
631 Transcript, p 292.37 - .39.

be AED 120 per sq ft and that he wanted the difference in additional premium"[632] As discussed above,[633] Brown's further evidence in cross-examination suggests that Brown, hence Sunland, was aware of the price at which Plot D17 was available prior to the alleged phone call from Reed on 17 September 2007 and prior to Brown's call to Reed on 16 September 2007.

18 September 2007

183 Sunland pleads that on 18 September 2007,[634] Brown (on behalf of Sunland) met with Lee (on behalf of DWF) and relying on the Representations made an agreement that:

(a) 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 DWF at AED 120 per sq ft;[635] and

(b) if SWB agreed to acquire Plot D17 from DWF at AED 120 per sq ft;[636] then

(c) DWF would compensate SWB for the 15 dirhams per square foot payment to Prudentia (being approximately AED 24 million), by permitting SWB to construct an additional 200,881.5 square feet of BUA on Plot D17 at a purchase price of AED 120 per sq ft (being approximately AED 24 million), with payment of the said purchase price being waived by DWF if SWB completed construction of its development on Plot D17 within four years of the handover date for Plot D17.[637]

184 Clearly, Reed's counter proposal to Sunland was more expensive from its perspective, and this meant that Brown, on Sunland's behalf, had a strong commercial incentive to approach Lee and ask for additional BUA on Plot D17 to "compensate" for the higher fee that would have to be paid to Prudentia. It was, according to Abedian's evidence, common practice for Sunland to seek additional

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632 Witness statement of David Scott Brown(6 August 2010), paragraph 214.
633 See above, paragraph 122.
634 Second Further Amended Statement of Claim, paragraph 29.
635 Second Further Amended Statement of Claim, paragraph 29.1.
636 Second Further Amended Statement of Claim, paragraph 29.2.
637 Second Further Amended Statement of Claim, paragraph 29.3.

BUA on its developments:

> "… We get [it] on every single development extra bonuses to be able to not speculate on the block of land, to sell it to a third party."[638]
>
> "We get it in every project, Mr Rush, every single project, in Australia, overseas, anywhere."[639]
>
> "We get BUA on every single project. We got it in Versace in Dubai, we got it in the D1 (indistinct) every project."[640]

In my view, for the reasons indicated below, the evidence supports the inference that Brown, acting on behalf of Sunland in accordance with its common practice, pursued Sunland's commercial interests by approaching Lee seeking additional BUA.

185 Although there is no entry in Brown's notebook of any meeting with Lee on 17 September 2007,[641] his evidence was that he did have a meeting on that date with Lee at the DWF offices and that he and Lee discussed "How things were going with Reed"[642] Brown's witness statement of 6 August 2010 suggests that Austin may also have been at the meeting, or part of the meeting, as reference is made to discussions on a particular subject matter, but that Brown could not recall if he was or not.[643] Returning to the substance of the meeting, Brown's evidence was that he told Lee that Reed had advised that the land price for Plot D17 would be AED 120 per square foot and that Reed wanted an additional fee of AED 24 million for the price reduction.[644] Brown's evidence in cross-examination was that:[645]

> "[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."

186 Brown's evidence was that Lee offered to compensate the land uplift fee by

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638 Transcript, p 343.22 - .24.
639 Transcript, p 343.45 - .46.
640 Transcript, p 344.01 - .03
641 Transcript, p 96.22 - .29.
642 Witness statement of David Scott Brown (6 August 2010), paragraph 215.
643 Witness statement of David Scott Brown (6 August 2010), paragraph 222.
644 Witness statement of David Scott Brown (6 August 2010), paragraph 215.
645 Transcript, p 96.08 - .13.

additional BUA, but which Lee would need to discuss with Brearley.[646] During cross-examination, Brown confirmed that his evidence was that "the additional built-up area was a suggestion from Nakheel".[647] Continuing, he said that he thought that the BUA had been offered because, first, Sunland had worked with Austin to the benefit of District D in the Dubai Waterfront Project and, secondly, that Sunland was endeavouring to reach agreement with Reed and had accepted the additional uplift fee demanded by Reed.[648] Brown did, however, concede in the course of cross-examination that he could not recall an entry in his notebook, in spite of his surprise at such an offer.[649] Nevertheless, in his witness statement of 6 August 2010,[650] Brown referred to a copy of typed notes of his notebook[651] recording a meeting with Lee on 18 September 2007. In cross-examination, Brown conceded that the date in the typed notes was incorrect[652] and that the notes are "an accurate recollection, except for that day".[653] Although Brown initially gave evidence that these typed notes had been provided to the Dubai prosecutor, he subsequently retracted that evidence.[654]

187 Contrary to Sunland's pleading,[655] Brown admitted, in the course of cross-examination, that he had told the Dubai prosecutor (as recorded in a transcript of his interview on 16 February 2009[656]) that Lee offered the additional BUA if Sunland purchased Plot D17 and started developing within five years, and also that this statement was "[n]ot entirely correct, no".[657] It was then put to Brown in cross-examination:[658]

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646 Witness statement of David Scott Brown (6 August 2010), paragraph 215; and see Transcript, p 96.4 - .17 and see also *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 208-210.

647 Transcript, p 81.06.

648 Witness statement of David Scott Brown (6 August 2010), paragraph 241.

649 Transcript, p 96.24 - .26.

650 Paragraph 221.

651 Court Book, SUN.004.001.0053 at p 0055.

652 Transcript, p 97.12.

653 Transcript, p 97.28.

654 Transcript, p 97.47 and p 98.01. And see *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 120-122.

655 Second Further Amended Statement of Claim, paragraph 29.

656 Court Book, SUN.014.001.0032. As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189.

657 Transcript, p 124.01 - .02.

658 Transcript, p 124.04 - .11; cf *Plaintiffs' Address* (1 February 2012), paragraphs 164 to 166.

> "No, it's a lie, isn't it?---The BUA came straight after the additional fee to Reed and it certainly was an enticement to purchase, yes.
>
> What you have been prepared to do on 16 February, Mr Brown, is lie, incriminate other Australians who are incarcerated to protect yourself?---No, I was not lying at the time. These were my recollection of the events.
>
> I suggest, Mr Brown, that that also is a lie. […]"

188 Brown's evidence was that he went back to his office in Dubai after his meeting with Lee and told Abedian about the BUA compensation.[659] Abedian's evidence was that Brown told him on 17 September 2007 that Lee had offered additional BUA, at no additional cost, for Plot D17 and that he, Abedian, was very pleased as the additional area was needed for the project due to the design that Sunland envisaged to create on Plot D17.[660] Abedian's evidence was that he was not surprised to receive this offer because it was common practice, even in Australia, that developers with good track records receive additional height and BUA based on the architectural concept that they provide.[661] He explained, further, that "[w]e never charged them anything. We gave them foreshore design, park design, even the shopping centre at the back, utility, everything we did for them, because we had a good relationship with them".[662] Nevertheless, Abedian did agree, subsequently, that he was surprised that "it would be offered in the context of compensating your company for the payment of the higher amount"[663] because "[i]f it was for compensation, it means it was something going on in the background and we were stupid not to know that".[664] Abedian then explained that he did not mention this in his witness statement because "[m]aybe I forgot".[665] Somewhat inconsistently with this evidence, Abedian said, further, that in the case of Plot D17, it made sense that DWF would offer to provide additional BUA because Sunland had assisted DWF without charge with the redesign of the park and redesign of the master plan which in the long term would benefit DWF.[666] In assessing this evidence, regard should be had to Abedian's

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659 Witness statement of David Scott Brown (6 August 2010), paragraph 215.
660 Witness Statement of Soheil Abedian (6 August 2010), paragraph 95.
661 Witness Statement of Soheil Abedian (6 August 2010), paragraph 95.
662 Transcript, p 466.15 - .19.
663 Transcript, p 473.16 - .17.
664 Transcript, p 473.16 - .19.
665 Transcript, p 473.25.
666 Witness Statement of Soheil Abedian (6 August 2010), paragraph 95.

admission in the course of cross-examination that "[i]t is very important for you in your sworn evidence and in your statement to put forward the proposition that Mr Lee offered the increase in BUA isn't it",[667] to which Abedian replied "[t]hat's correct".[668]

189 Following the meeting Brown claimed to have had with Lee, he then sent Lee a draft letter by email[669] which Lee acknowledged.[670] The draft letter opens with the words:

> "Following our meetings with you regarding **Plot D-17** at Dubai Waterfront, we confirm that we are prepared to proceed with the Purchase of this Plot on the following basis."

It is, in my view, of some significance in relation to the question whether Brown or Lee sought or offered the additional BUA that it was Brown who prepared the letter setting out the terms of the additional BUA and not Lee. The letter continued making reference to BUA as "compensation". Brown's evidence in cross-examination was that he referred to the additional BUA as "compensation" because "that's the term Marcus Lee used".[671] Brown also admitted that the letter he had drafted "doesn't mention that this additional BUA is being offered because of all the great work you're doing around precinct D".[672] Abedian's evidence was that he was not aware that Brown sent a draft letter to Lee, but that he had seen the draft letter before and whenever it was written.[673]

190 It was submitted on behalf of the Prudentia parties that, on its face, the draft letter prepared by Brown contains the following concepts:[674]

> "… first, that the price for D17 is no more than AED 135 sq/ft; secondly, that a fee is payable calculated as the difference between the final price and AED 135 sq/ft; thirdly, that this fee will be compensated by the granting of additional BUA by Dubai Waterfront to Sunland [675]. The Prudentia parties

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667 Transcript, p 326.13 - .14.
668 Transcript, p 326.14 - .15.
669 Court Book, SUN.001.005.0027 and Court Book, SUN.001.005.0028.
670 Court Book, SUN.001.005.0030; Witness statement of David Scott Brown (6 August 2010), paragraph 215; and see above, paragraph 185.
671 Transcript, p 93.18; see also Transcript p 272.8 - .12.
672 Transcript, p 274.03 - .04.
673 Transcript, p 342.31 - .34; note also evidence of Abedian at Transcript, p 466 where he says that he cannot recall whether he saw the letter before it was sent.
674 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.30.10.
675 See observations by Croft J at Transcript, p 468.33 - .44.

> submit that neither the evidence of Brown or Soheil (in their written statements and during the hearing) nor documents discovered or otherwise produced in the proceeding, contradict those concepts."

Brown's evidence was that Lee sent an email back with a letter drafted by Brearley[676] and that he negotiated the final terms of the letter concerning the BUA with Lee and that during the negotiations either Lee or Brearley said to Brown that the letter was never to see the light of day.[677] In this respect, Brown's evidence was that he thought DWF would not want other developers to find out about the offer.[678] In cross-examination, Brown's evidence was that the offer of the additional BUA "effectively brought the average price for the plot down to about 131 dirhams a foot"[679] and that "all the negotiations and the surprise announcement of 200,000 extra BUA came [around the same time as] the negotiations with Prudentia had fallen through".[680]

191 It was submitted on behalf of the Prudential parties that the implications of the conduct of Brown in the pursuit of additional BUA and his non-disclosure to Reed of the 12 September 2007 conversation with Brearley and Lee as to price, and the implications of such conduct for parties arguably in a fiduciary relationship in pursuit of a joint venture is a matter of significance and concern. Brown gave evidence during cross-examination that he had not told Reed or Prudentia about the additional BUA because "by that time we'd concluded the financial terms of the transaction".[681] This is in spite of the fact that the "offer" of additional BUA was raised in a meeting between Lee and Brown on 17 September 2007, which was at least two days before SWB and Prudentia signed their agreement and nine days before SWB and Hanley signed the final Implementation Agreement, the MOU. It was submitted against Sunland, and I think with some force, that Abedian's past experience in obtaining extra BUA in every project[682] gave rise to the foresight and expectation of a grant of additional BUA in respect of Plot D17. This, it was

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676 Court Book, SUN.001.005.0044 and Court Book SUN.001.005.0046 ; Witness statement of David Scott Brown (6 August 2010), paragraph 238.
677 Witness statement of David Scott Brown (6 August 2010), paragraph 241.
678 Witness statement of David Scott Brown (6 August 2010), paragraph 241.
679 Transcript, p 95.04 - .05.
680 Transcript, p 95.07 - .09.
681 Transcript, p 65.42 - .44; see also Transcript, p 94.32 - .33.
682 Transcript, p 473.13 - .14.

submitted, provided a commercial motive for Sunland to "lock in" the Prudentia premium of AED 40m and for not disclosing to Reed that the property, Plot D17, was potentially available for AED 120 per square foot with additional BUA.[683]

192 It was also noted that Brown conceded that he had not disclosed to the Dubai authorities the pursuit of additional BUA as compensation.[684] Sunland responded to the criticism of Brown on the basis that he did not provide the Dubai authorities with a copy of the draft BUA letter he prepared and sent to Lee on 17 September 2007.[685] In the course of these submissions, Sunland said:

> "In fact it is clear that the Dubai authorities did have a copy of the email and the draft letter [**Tab 136**] SUN.002.003.0071 at 0114."

193 This proposition was also put, directly, in Sunland's oral closing submissions.[686] However, it was submitted against Sunland, that on the face of the document referred to in these submissions,[687] it is clear that the letter was not in fact provided to the Dubai authorities by Brown but, rather, was obtained from a search of Lee's records.

194 Sunland also submitted that the letter, drafted by Brearley, sent by Austin to Brown stated that the additional BUA was offered as compensation for design work which had been undertaken by Sunland.[688] However, a review of the terms of the letter indicates that is not what the letter says.[689]

> "We refer to your purchase of Plot D-17 ("Plot").
>
> We confirm receipt of your concept design for your proposed development of the Plot. We believe your proposed development will enhance this great city which will be constructed at Dubai Waterfront.
>
> On the basis of this development proposal we agree to add to the Plot an additional 200,881.5 square foot Built Up Area ('BUA'). This additional BUA

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683 Transcript, p 94.32 - .33.
684 Transcript, p 124.38 - .47, p 125.1 - .22.
685 *Plaintiffs' Address* (1 Feburary 2012), paragraph 162; Court Book, SUN.001.005.0027; see also cross-examination of Brown at Transcript, p 124.38.
686 Transcript, p 981.12 - .14.
687 i.e. Court Book, SUN.002.003.0071.
688 *Plaintiffs' Address* (1 February 2012), paragraph 164.
689 Court Book, MJJ.001.001.0744.

will be sold to you at the rate of AED 120 per square foot.

⋮

We look forward to receiving from you more detailed design drawings for our further consideration."

195 Nevertheless, the only "design work" which had previously been undertaken by Sunland consisted of a series of design sketches for the precinct in which Plot D17 was located.[690] The Brief to Prosecutor dated 15 February 2009,[691] which was provided, as its name would indicate, to the Dubai prosecution authorities, described this work as "our design work on the Master Plan and the enhancements we added to the Precinct". This work did not, however, constitute a "concept design" for a "proposed *development* of [Plot D17]" itself. In my view, it is quite clear from the documents relied upon by Sunland that the claimed design work was not such that could sensibly support consideration as valuable as the additional BUA, which Brown had negotiated with DWF. A simple arithmetic calculation of the value of the additional BUA at the apparently lower end of the price range at AED 120 per square foot produces a figure many times greater than any fees that might have been contemplated for design work, much less the extent of design work the Sunland documents indicate. I accept the submissions against Sunland that the real deal negotiated by Brown with DWF was that contained in the BUA letter dated 17 September 2007 which Sunland never volunteered to the Dubai authorities. Additionally, Brown appeared to accept the proposition that the additional BUA was compensation for the additional fee to be paid by Sunland to Prudentia,[692] denying this was initiated by him.[693]

196 Further, as noted previously there is no entry in Brown's notebook of any meeting with Lee on 17 September 2007, being the date on which Brown sent his draft

690 See Witness statement of David Scott Brown (6 August 2010) , paragraphs 78-80..
691 Court Book, SUN.004.002.0075.
692 Transcript, p 274.13.
693 Transcript, p 274.25.

compensation letter to Lee.[694] On the basis of the evidence, it appears that Brown invented an entry for a meeting with Lee when he prepared the typed "Plot D17, Diary Notes" that he supplied to the Dubai authorities.[695] When making that typed entry, Brown listed the date of the meeting as 18 September 2007: that is, after his draft compensation letter to Lee. The 18 September 2007 date was also pleaded in Sunland's statement of claim[696] and is the date that appears in Sunland's closing submissions.[697] Brown's evidence in cross-examination was that the 18 September 2007 date was an error.[698] On its own, one might be prepared to accept the error explanation, but having regard to other matters which go to throw considerable doubt on the reliability of Brown and Abedian as witnesses, I think it is more probable that the typed notes of a meeting on 18 September 2007 were a fabrication and that omitting to provide the Dubai authorities with Brown's email[699] in relation to the "compensation" was deliberate. This is particularly so having regard to the pressure Brown was then under personally in explaining the Plot D17 transaction to the Dubai authorities in a way that convinced them that it was lawful, together with the commercial consequences for Sunland were they to find otherwise.[700]

197 Sunland also submitted that a further inference should be drawn that the proposal for additional BUA was made by Lee at the suggestion of Joyce.[701] I accept the submissions against Sunland on the assumption, which is unsupported, that Joyce was the only possible source of relevant information about the status of the Plot D17 negotiations.[702] Rather, the documentary trail commencing with Brown's draft compensation letter to Lee on 17 September 2007 shows that Joyce was informed of the BUA proposal by Brearley or Lee, not the other way around.[703]

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694 Transcript, p 96.22 - .29; and see above, paragraph 185
695 Transcript, p 98; and see below, paragraphs 304 and following.
696 See Second Further Amended Statement of Claim, paragraph 29.
697 See *Plaintiffs' Address*, paragraph 161.
698 Transcript, p 96.47 – p 97.12; see also Witness statement of David Scott Brown (6 August 2010), paragraph 215, in which Brown says the meeting was on 17 September 2007.
699 Court Book, SUN.001.005.0027 and SUN.001.005.0028.
700 See below, paragraphs 304 and following.
701 *Plaintiffs' Address* (1 February 2012), paragraph 336; see also Transcript p 1004.10 -.28.
702 *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 134.
703 Court Book, MJJ.001.001.0744 at .0745.

Feasibility on 17 and 18 September 2007

198 On 17 September 2007, Brown sent an email to Jason Mahoney (a Sunland employee), copied to Mr Sahba Abedian and to Soheil Abedian, which included the following:[704]

> "The attached Feasibility for Waterfront Reed is based on SDG buying this site ourselves, and paying Reed an Introduction Fee of AED 44m, and they walk away.
>
> Based on getting Bonus GFA for the AED 24m of the Introduction Fee, the Feasibility looks OK at 26% return and AED 590m Profit plus our normal Fees."

Abedian accepted that in this email Brown referred to the payment as an "introduction fee"[705] and agreed that at this time "you accepted [noting that he did not recall the specific email] that as an accurate description of the nature of the fee being paid to Mr Reed's company".[706] Abedian did not accept, however, that the fee was paid "because of [Reed's] role in introducing the opportunity to your company to buy D17".[707]

199 Clyde-Smith would later describe the fee in similar terms, as a "spotters fee premium … for the guys that introduced this deal".[708] Brown gave evidence that a "spotters fee" does not involve the recipient of the fee having any legal right.[709]

200 Brown prepared a further feasibility study for Plot D17, dated 18 September 2007, that showed, with the extra BUA and allowing for the Consultancy Fee for Prudentia, that Sunland had a potential return from the purchase and development of this plot of 37.3%. It was conceded, unsurprisingly, that this was a "phenomenal"

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704 Court Book, SUN.009.007.4958.

705 Transcript, p 492.10 - .11; Court Book, SUN.009.007.4958.

706 Transcript, p 492.13 - .15.

707 Transcript p 492.17 - .18.

708 Transcript, p 51.03 - .06; Court Book SUN.001.002.0227.

709 Transcript p 49.39. It was submitted on behalf of Joyce that Brown was lying when he gave the following evidence under cross-examination (Transcript p 220.17 - .24):

> "MR COLLINSON: … why did you describe it in various documents as an introduction fee?---Because that's sometimes the terminology that you use. It is, Mr Brown, it's used for the situation where someone introduces you to an opportunity to buy some land, but without themselves owning the land or having a contractual entitlement to buy it. That's the phraseology you use, isn't it, for that situation?---It can be, and in this case it was based on the fact that they did have a right to the property".

return.[710]

Final Implementation Agreement or MOU

201 Sunland pleaded that on 19 September 2007, amongst other things, SWB executed an agreement with Prudentia which:

(a) was signed on behalf of Prudentia by both Reed and Nigel Wimble Sharp (who at that time was a director of Prudentia);[711]

(b) Prudentia's solicitor, Sinn, had forwarded to Brown by email for execution;[712]

(c) recited in clause 1 "Background" that 'Prudentia has reached agreement with [DWF] to acquire and develop [Plot D17]';[713]

(d) 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 [DWF]';[714] and

(e) defined the total Consultancy Fee as being AED 44,105,780.[715]

202 Brown sent an email to Reed after receiving email comments from Abedian clarifying the basis of the consultancy fee:[716]

> "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."

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710 Transcript p 105.34 - .47.
711 Second Further Amended Statement of Claim, paragraph 30.1.1.
712 Second Further Amended Statement of Claim, paragraph 30.1.2.
713 Second Further Amended Statement of Claim, paragraph 30.1.3.
714 Second Further Amended Statement of Claim, paragraph 30.1.4.
715 Second Further Amended Statement of Claim, paragraph 30.1.5.
716 Witness statement of David Scott Brown (6 August 2010), paragraph 219; Court Book, SUN.001.002.0078.

Brown's evidence was, nevertheless, that he and Abedian signed the Implementation Agreement or MOU with Prudentia after receiving an email from Sinn attaching the Implementation Agreement or MOU signed by Prudentia.[717] Brown also said that he spoke to Sinn and Reed on 19 September 2007.[718]

203 In cross-examination, Brown agreed that Sunland was not "purchasing a legal asset called Development Rights from Prudentia",[719] but "that was the sort of terminology we were discussing at the time".[720] Further, he said that "[w]e were buying their rights to this property, that was quite clear".[721] In this context regarding exclusivity, it is noted that clause 5 of the Implementation Agreement or MOU provided that:[722]

> "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."

204 Abedian confirmed in cross-examination that the context of these provisions was that Sunland was "paying to have Prudentia withdraw from any entitlement, anything to do with the development of D17".[723] This is consistent with the evidence already discussed in relation to the progress of the Plot D17 transaction as Sunland apparently retreated from any desire to development Plot D17 as a joint venture with Prudentia.

Nature of proposed premium

205 Clause 2 of the Implementation Agreement or MOU provided that SWB was acquiring the:

> "right to negotiate and enter into a plot sale and purchase agreement for the acquisition of the Property with the Master Developer".

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717 Witness statement of David Scott Brown, paragraphs 230 and 231; Court Book, SUN.001.006.0214 and Court Book, SUN.001.006.0215.
718 Witness statement of David Scott Brown (6 August 2010), paragraph 227.
719 Transcript, p 253.05 - .06.
720 Transcript, p 253.06.
721 Transcript, p 253.23 - .24.
722 Court Book, SUN.001.006.0197.
723 Transcript, p 347.42 - .43.

Clause 3(a) imposed an obligation on SWB to pay the "Consultancy Fee", the term which was defined in clause 1.1 as:[724]

> "the sum of AED 20 million plus an additional fee of AED 24,105,780, calculated as the difference between AED 135/Ft2 and AED 120/Ft2 (i.e. AED 15/Ft2 times the BUA of 1,607,052 Ft2) 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."

206 The various ways in which Sunland referred to the payment is an indication of the imprecision of evidence as to the nature of the alleged "control" of Reed or Prudentia over Plot D17. There were a significant variety of descriptors given to the "Consultancy Fee" by Sunland representatives at the time of the various steps involved in the Plot D17 transaction and following. On 31 August 2007 when Brown first raised the prospect in an email to Reed that Sunland might purchase Plot D17 independently of Prudentia, Brown confirmed that "if we do wish to buy the site and the JV terms aren't agreed, we will pay you the 40 AED Premium upon execution of an SPA with DWF".[725] However, on 17 September 2007 when sending Jason Mahoney (a Sunland employee), Sahba Abedian and Abedian an updated feasibility based on Sunland "buying this site ourselves",[726] Brown referred to the payment as an "Introduction Fee" for Prudentia to "walk away".

207 In an email to Michael Lunjevich (in 2007 a partner of Hadef & Partners, then Sunland's legal advisers in Dubai) ("**Lunjevich**") dated 19 September 2007, Clyde-Smith referred to the payment as a "'spotters fee' premium whatever you want to call in for the guys that introduced this deal".[727] Abedian's evidence was that the payment was a "premium",[728] but that if it had been described as a "spotter's fee", it "[d]oesn't matter".[729] Brown's evidence was that the nature of a "spotter's fee" "depends on the situation, but it can be identifying something for sale and passing on information to someone else".[730] Brown's evidence was that there was no legal

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724 Court Book, SUN.001.006.0197 defined at .0200.
725 Court Book, PRU.001.007.0510.
726 Court Book, SUN.009.003.5874.
727 Court Book, SUN.001.002.0227.
728 Transcript, p 336.08 - .09.
729 Transcript, p 336.13 - .18.
730 Transcript, p 49.35 - .37.

right to a "spotter's fee".[731] Brown then reverted to the concept of a "premium" in his initial communications with Mr Mustafa of the Dubai authorities in December 2008[732] with the explanation that the "Consultancy Fee" "was effectively a premium on the land and allowed Sunland to purchase the property directly from Dubai Waterfront.".

208 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",[733] 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)[734] 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.

209 Sunland, in its submissions, sought to draw inferences in relation to the use of the word "premium" in email correspondence between Reed and Brown and other documents, including the various drafts of the Implementation Agreement or MOU as indicative of Reed and the Prudentia parties representing that their interest in Plot D17 was more than something in the nature of a preferred negotiating position or right to negotiate with DWF for the purchase of Plot D17, and hence supported Sunland's case.[735] These submissions do, however, in my view, both misstate the

731 Transcript, p 49.39.
732 Court Book, SUN.003.005.0022 at 0022 and at 0023.
733 Transcript, p 340.34.
734 See below, paragraphs 213 - 216.
735 See *Plaintiffs' Address* (1 February 2012), paragraphs 60, 61(b) and (e) and 62.

effect of the provisions of the draft Implementation Agreement or MOU both generally and in seeking, in effect, to conflate the use of the word and expression "premium" and "consultancy fee" as used in various drafts of this agreement. 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".[736] As submitted against Sunland, and for reasons upon which I will now elaborate, I am of the view that the Sunland submissions wrongly conflate the word "premium" and the expression "consulting fee" as if they were one and the same and, further, that the Sunland submissions contradict the clear transactional record following rejection by Brown of Reed's first "uplift" proposal which did not involve Sunland paying Prudentia money.[737] Following this rejection, it is clear from the terms of the drafts of the Implementation Agreement or MOU that up until the "walk away agreement", the terms "consultancy fee" and "premium" had fundamentally distinct operations according to different commercial circumstances. This position continued until Reed and the Prudentia parties agreed to "walk away", in which circumstance a payment of the "premium" provided for in Schedule 2 of the draft agreement became redundant.

210 The conflating of the terms "consultancy fee" and "premium" is clear from the Sunland submissions where reference is made to various drafts of the Implementation Agreement or MOU and also to an email from Sinn to Reed dated 14 September 2007.[738] In my view, it is misleading, as submitted by Sunland, that the email from Sinn on 14 September 2007 is to be treated as any indication that the two

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736 See *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraph 10.1.1; and see below, paragraphs 445 and 446.

737 See *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraphs 10.1.1 to 10.1.13; and see also *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraphs 97 to 103.

738 *Plaintiffs' Address* (1 February 2012), paragraphs 61(e)(ix) and (x); referring in the first of these sub-paragraphs to an email from David Sinn of Freehills to Reed dated 14 September 2007 describing the payment as "premium/consultancy fee" (see Court Book, PRU.001.006.1552); see also *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 98 and 99, 196 and 197 and Annexure B.

terms are one and the same. Sinn was, in this email, reporting to Reed and his reference to these terms is merely shorthand for what is contained in the draft Implementation Agreement or MOU which refers to both terms separately:

(a) in clause 7 of the draft, reference is made to the term "consultancy fee" in circumstances of Sunland unilaterally acquiring Plot D17; and

(b) in Schedule 2 of the draft agreement, clauses 5 and 6 refer to a "premium" if the joint venture proceeds, in which event the "premium" was to be paid at the end of the project.

Thus, on the basis of the draft agreement to which this email referred, there is no treatment of the terms "consultancy fee" and "premium" as one and the same and it could not be contended seriously that the covering email from Sinn should be read as indicating a contrary position. Further, in my view, this position is not affected by the terms of the responsive email from Brown to Sinn dated 14 September 2007.[739] Brown and Abedian understood the basis of the calculation of the sum of the "premium" as the sum of the difference between AED 175 as the agreed price to the joint venture and the final purchase price of the land x BUA: "Jules [t]hey picked up their error in the premium, which is now 45AED/Ft 2 of BU assuming a land price of 130 AED/Ft 2."[740]

211 As indicated previously, the Sunland submissions on this particular issue do not, in my view, have regard to the evolving and different commercial circumstances which were spanned by the period during which the drafts of the Implementation Agreement or MOU were developed and provided to Sunland and leading up to the execution of the final agreement flowing from these drafts, first by Prudentia and then, subsequently, by Hanley as the first executed agreement was superseded. In my opinion, this process and its consequences are accurately summarised and justified by the Prudentia parties in their reply submissions, both in terms of content and the documents and Sunland's submissions and pleadings to which reference is

739 Court Book, SUN.001.006.0163.

740 See Court Book, SUN.001.001.0294.

made:[741]

> "10.1.7 The Sunland parties' willingness to conflate the two terms is also evidenced from the new allegation made in paragraph 16 of the Sunland parties' Supplementary Address. However, the error in this new position is not simply that it is unpleaded and exposes internal contradictions in the Sunland parties' pleaded and unpleaded claims, it again obscures the reality established by the evidence on the pleaded matters in issue which reveal an evolving commercial transaction in a chronology involving periods of time in which circumstances were different or changed unilaterally by Sunland, and in particular by Soheil Abedian.
>
> (a) **19 to 20 August:** Reed proposed equity *uplift* into JV vehicle; that is, no payment of money. Brown recorded Reed's proposal in his notebook entry for 19 August '07[742]. The note recorded in part "*65M either equity or SDK(sic) soft costs (sic) land payments up to this value*". Reed documented this proposal in an email to Brown dated 20 August 2007[743] in response to Brown's proposed joint venture structure sent by email dated 19 August 2007[744].
>
> Brown rejected Reed's proposal, re-affirmed Sunland's proposed structure of JV in which Prudentia would be responsible for making all land payments but the 5% deposit, leading to the 23 August draft MOU sent to Sunland[745].
>
> (b) **30 August to 12 September 2007:** Brown, Soheil Abedian and Clyde-Smith amend the draft MOU but confirm the core terms of MOU and Schedule 2 in which the distinction between *consulting fee* and *premium* is express[746].
>
> Brown's '*put our foot on it*' email,[747] represents, inter alia '*we will sign the MOU which will note the agreement to transfer the land to the new co when it's ready*'.[748]
>
> (c) **Events following 16 September 2007:** The events following the walk away offer and the need to accommodate the *flat fee* of 20 M AED and *additional fee* and then an agreed *combined* fee as terms of an agreement which released Sunland to negotiate exclusively with DWF for the purchase of the land.[749]
>
> 10.1.8 Brown was materially involved in these permutations, and in resolving the terms and calculation of the *consultancy fee* to effect Prudentia

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741 *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2021), paragraphs 10.1.7 to 10.1.12. See also *Reply Submissions of the Fourth Defendant (Joyce)*, paragraphs 97-103.

742 SUN.004.001.0043 at 0045.

743 PRU.001.007.0176.

744 SUN.009.003.4429.

745 SUN.001.006.0036 and SUN.001.001.0031.

746 SUN.001.001.0075; SUN.001.001.0115; SUN.001.006.0062.

747 SUN.001.001.0137.

748 See also SUN.001.005.0009 and SUN.001.001.0202

749 For example see SUN.001.006.0165; SUN.001.001.0314; SUN.001.001.0335

walking away[750]. On the same day Brown identified the total sum of AED 44M as *an introduction fee*.[751]

10.1.9 It is important to note that while a number of drafts of the implementation agreement / MOU passed between Sunland and Prudentia, the fundamental terms of the implementation agreement and proposed joint-venture had been agreed prior to Sunland's proposal to offer Prudentia a fee to *walk away*:

(a) On 11 September 2007, Brown notified Lee that '*[w]e have agreed the headline issues*'[752].

(b) On 12 September 2007 when Brown sent Clyde-Smith the draft of his '*put our foot on the plot*' email to Reed, Brown relevantly stated '*[w]e will sign the MOU…*'

(c) On 13 September 2007, Brown emailed Lee and Brearley (copied to Joyce, Reed and Soheil Abedian) and stated: '*[w]e 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.*'

10.1.10 Accordingly, any suggestion by Sunland that the joint-venture negotiations between Prudentia and Sunland was *all getting too hard*[753] or that there was an *inability to agree terms*[754] is entirely inconsistent with the contemporaneous documents.

10.1.11 Almost half of the variations to the implementation agreement / MOU were made after Sunland had proposed that it pay Prudentia a sum to walk away. Further, of the drafts of the implementation agreement / MOU that were exchanged prior to Soheil Abedian instructing Brown to make the walk away offer, the majority of the clauses had remained constant, including the exclusivity provision.

10.1.12 Of those clauses that underwent amendment, most of changes were largely insignificant; while there were changes to the wording of the requirements for a premium and any *consultancy fee* the substance of the difference remained constant and that they were to be calculated on the same formula. Further, the only changes of substance that were introduced prior to Sunland's decision to acquire D17 unilaterally, were changes introduced by Sunland; the alteration that a joint-venture corporate vehicle would acquire the land and not a Prudentia entity, Prudentia bearing sole responsibility for financing the joint-venture (with the exception of the deposit) and the insertion of the *put option*. The evidence of the commercial facts show that pursuant to the proposed JV model, the substantive risk on capital outlaid to commence the venture was carried 95% by Prudentia and that thereafter, Sunland's financial risk was offset by generous fees throughout the life of the project."

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750 See: SUN.001.005.0027.

751 See: SUN.009.003.5874

752 SUN.001.005.0009.

753 See *Plaintiffs' Address* (1 February 2012), paragraph 158.

754 See Further Amended Statement of Claim, paragraph 27.1.

For the reasons indicated, in my opinion, the submissions on behalf of Joyce in relation to this issue accurately conclude the matter:[755]

> "103. All of the plaintiffs' [Sunland] submissions about the use of the term "premium" miss the point:
>
> (a) The submissions suggest that because that term was used therefore Sunland thought that there was a contractual entitlement to the plot, because 'premiums' are paid to persons who have a prior contractual right. However, that submission is not open in the light of Brown's evidence, in particular his admission that he did not know whether the "hold" was contractual or not.[756]
>
> (b) Brown must have known that his use of the word "premium" in his dealings with the Dubai authorities would be understood by the authorities to imply that Reed either had, or had represented to Brown that he had, an SPA."

Negotiation of the SPA

212 On 17 September 2007, Brearley sent an email to Clyde-Smith attaching the draft SPA for Plot D17.[757] Brown's evidence was that this was a standard agreement and that it was "the first step in finalising the terminology".[758] Brown also agreed during cross-examination that with this SPA, Brown was "on the way to securing D17, on Sunland's behalf"[759] and that at this time he was aware of 1.8 million BUA.[760]

Introduction of Hanley

213 Sunland pleaded that on or about 26 September 2007, Hanley retained Sinn and instructed him:

(a) to prepare an agreement identical to the Prudentia Agreement, except that it would be expressed to be between SWB and Hanley;[761]

(b) that such agreement would take the place of the agreement between Prudentia and SWB referred to in paragraph 30.1 of the Second Further

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755 *Reply Submissions of the Fourth Defendant (Joyce)*, paragraph 103.
756 Transcript, p 192.23.
757 Court Book, SUN.001.002.0001 and attachment (Court Book, SUN.001.002.0002).
758 Transcript, p 163.45 - .46.
759 Transcript, p 164.01.
760 Transcript, p 164.03 - .09.
761 Second Further Amended Statement of Claim, paragraph 31.1.

Amended Statement of Claim;[762] and

(c) 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.[763]

Sunland claims that the retainer of Sinn by Hanley can be inferred from an email from Sinn to Brown on 26 September 2007[764] advising that a company had been incorporated in Singapore, and attaching a draft agreement with Hanley. Brown's evidence was that he understood that the money, the "Consultancy Fee", was to be paid to Hanley for taxation reasons (since it was a Singapore company) and that Reed wanted the money to remain offshore for further investment.[765] Brown said that he forwarded a copy of this email on to Clyde-Smith and then discussed this with her and Abedian, but cannot recall details of the discussions.[766] Abedian's evidence was that he thought that the change from Prudentia to Hanley was made for taxation reasons that were important to Reed and Prudentia, but that that was of no concern to him.[767] Abedian's evidence was that it was only important to him that as between Reed, Prudentia and DWF, whatever corporate entity was appropriate gave the consent necessary to allow DWF to sell Plot D17 to Sunland, given that he had been led to believe that Reed and Prudentia had control over the plot.[768] Again, this was consistent with his evidence that all he really wanted of Prudentia and the Prudentia parties was that they would just "go away". The allegations by Sunland with respect to the representations by Hanley are pleaded in terms of its knowledge and adoption of the Representations – in terms of knowledge as at 26 September 2007 after it allegedly retained and instructed Sinn (and when it executed the Hanley Agreement at about that time) and in terms of adoption when it adopted and repeated the Representations as its own by causing Sinn to send the 26 September

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762 Second Further Amended Statement of Claim, paragraph 31.2.
763 Second Further Amended Statement of Claim, paragraph 31.3.
764 Court Book, PRU.004.001.0073.
765 Witness statement of David Scott Brown (6 August 2010), paragraph 256.
766 Witness statement of David Scott Brown (6 August 2010), paragraphs 257 and 258.
767 Witness statement of Soheil Abedian (6 August 2010), paragraph 109.
768 Witness statement of Soheil Abedian (6 August 2010), paragraph 109.

2007 email to Brown ("the Hanley Representations").[769]

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769 The Hanley Representations are pleaded in paragraph 34 of the Second Further Amended Statement of Claim, with reference to paragraphs 31 and 32 of that pleading, in the following terms:

"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 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 reference 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.

…

34 Hanley:

34.1 through its agent Reed knew, when it retained and instructed Sinn as pleaded in paragraph 31 above, that the Representations had been made;

34.2 executed the Hanley Agreement on or shortly after 26 September 2007;

34.3 through its agent Reed knew, when it executed the Hanley Agreement, that the Representations had been made; and

34.4 by doing the acts pleaded subparagraph 34.1 herein, and causing Sinn to send the email referred to in paragraph 32 above:

34.4.1 adopted the Representations as its own;

The agreement with Hanley

214 The Hanley Agreement (between Hanley and SWB) was executed by SWB on 26 September 2007.[770] As indicated, the agreement was attached to the 26 September 2007 email which Brown received from Sinn by which Prudentia requested:[771]

> "… 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"

Brown's evidence was that he did not really mind whether the money went to Prudentia or Hanley, as he understood, from Sinn's email, that Hanley was wholly owned by Prudentia.[772] Hanley, at least at that time, was a 100% subsidiary of Prudentia and was incorporated in Singapore on 27 August 2007. As is relevant to other issues, there is no evidence of Hanley conducting business in Australia, though Sunland sought to rely upon its retaining Freehills, an Australian legal firm, in this context.[773] Abedian signed the agreement with Hanley and Brown and emailed the signed copy to Reed.[774]

215 It was submitted against Sunland that the reason why Brown, and as I interpolate and understand also Abedian, did not mind whether the fee went to Prudentia or Hanley was because Brown and Abedian knew that Sunland was not acquiring a legal right, or, it follows, a right of any kind, that needed to be transferred from Prudentia to Hanley before it could be transferred from Hanley to Sunland. In this respect, the point was made that there was no document in existence, at least nothing has been produced by Sunland (which would be expected if such a document did exist), transferring any legal or other right from Prudentia to Hanley to put it in a position to convey this right under the "replacement" Implementation Agreement or MOU. It follows that the position as put in Sunland's closing submissions that "…

> 34.4.2 repeated the Representations to Sunland and SWB as its own representations ('the Hanley Representations').

770 Court Book, SUN.001.003.0054; Court Book, SUN.004.002.0274 ; Court Book, PRU.005.012.0001.

771 Court Book, SUN.001.006.0257 and Court Book, SUN.001.006.0259.

772 Witness statement of David Scott Brown (6 August 2010), paragraph 256.

773 In that Sinn was then a partner of Freehills, in Melbourne; and see, below, paragraphs 379to382.

774 Court Book, SUN.001.003.0053 and Court Book, SUN.001.003.0054.

there was an agreement which conferred upon Prudentia a 'right' which was capable of transfer to Sunland" is not established.[775]

216 Brown's evidence was that a payment of the kind made by SWB to Hanley is sometimes described as an "Introduction Fee"[776] and this was, in fact, the descriptor used by Brown in his email to Jason Mahoney (a Sunland employee) on 17 September 2007.[777] Brown's evidence was that he "saw an introduction as a premium"[778] and that in the context of Prudentia and Reed and Och-Ziff, "introduction-premium means the same thing".[779]

Execution of the SPA for Plot D17

217 Sunland claims that in reliance on the Representations, telephone conversations between Brown and Reed on 16 and 17 September 2007, the meeting between Brown and Lee on 18 September 2007, the execution of the Prudentia Agreement and the alleged retainer of Sinn by Hanley (including the email sent from Sinn to Brown on 26 September 2007):[780]

(a) on 26 September 2007 SWB signed a sale and purchase agreement with DWF for the purchase by SWB of D17 for a price of AED 120 per sq ft (and by

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775 See *Plaintiffs' Address* (1 February 2012) and this quoted passage in the context of paragraph 40 of these Sunland submissions:

> "Contrary to the submissions of the fourth defendant, 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."

In oral submissions, Sunland similarly described its position as (Transcript, p 925.20 - .27):

> "… Your Honour will see the written representations relied upon do go that far and so we can put our case on the basis that the representation did involve a representation to the effect <u>that there existed as pleaded a contractual right to acquire Plot D17</u> as alleged in Sub-paragraph A of the pleading - as summarised in Sub-paragraph A of our Paragraph 39, Your Honour" (emphasis added).

See also *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraph 2.2.8 and *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 1. cf *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 10; and see above, paragraph 27.

776 Transcript, p 220.17 - .18 ; see also references by Brown to the Dubai authorities for the fee being paid to Reed so he would *"go away"* and *"it was like a premium to remove them from the deal"* – Court Book, SUN.004.001.0314.

777 Court Book, SUN.009.007.4958.

778 Transcript, p 234.29 - .31.

779 Transcript, p 234.37 - .39.

780 Second Further Amended Statement of Claim, paragraph 33.

1 October 2007, the last of the DWF representatives had signed the SPA for D17);[781] and

(b) Sunland and SWB authorised the release on 1 October 2007 to Hanley's solicitors, Clyde & Co of a cheque that was payable to Hanley for AED 44,105,780 and banked by, and paid upon full to, Clyde & Co on behalf of Hanley on or shortly after 1 October 2007.[782]

218 Reed and the Prudentia parties submitted that this pleading is inconsistent with Brown's evidence that Abedian and Brown (as directors of SWB) resolved, amongst other things, to enter into a SPA with DWF on 18 September 2007,[783] seven days before Brown received an email from Sinn advising of Prudentia's decision to "incorporate a new company in Singapore as part of expanding its business into Asia".[784] It was submitted that it also fails to take into account:

(a) Brown's email to Jason Mahoney (a Sunland employee) copied to Abedian and Sahba Abedian on 17 September 2007 attaching a feasibility for Plot D17 showing a 26% return and AED 590 million profit;[785] and

(b) Brown's agreement during cross examination that this feasibility is based on a BUA of 1.8 million.[786]

Brown admitted that the email he sent to Jason Mahoney on 17 September 2009 is not referred to in his written statement in this proceeding.[787] Brown's evidence was that he met with Clyde-Smith, Brearley and Mark Stewien (who worked with Brearley at DWF) ("Stewien") at the DWF offices on 26 September 2007 to execute the SPA and hand over a cheque for AED 9,642,312.00.[788]

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781 Second Further Amended Statement of Claim, paragraph 33.1.4.
782 Second Further Amended Statement of Claim, paragraph 33.3.
783 Witness statement of David Scott Brown (6 August 2010), paragraph 226; Court Book, SUN.005.001.0241.
784 Court Book, PRU.004.001.0073.
785 SUN.009.003.5874; see Transcript, p51:43 - .44 where Brown explains that Mahoney is a financial analyst with Sunland.
786 Transcript, p 164.06 - .09.
787 Transcript, p 492.04 - .08.
788 Witness statement of David Scott Brown (6 August 2010), paragraph 265; Court Book,

219 The effect of clause 3(c) of the final Implementation Agreement or MOU was that Hanley would not receive the Consultancy Fee until SWB had entered into a SPA with DWF. In this respect, sub-clause 3(c)(2) of that agreement provides that:[789]

> "… Hadef Al Dhahiri & Associates are hereby authorised by Sunland to hold the Consultancy Fee and disburse the said Lawyers Trust cheque for the Consultancy Fee to Hanley upon Sunland or the Master Developer [DWF] providing confirmation or evidence to the said Hadef Al Dhahiri & Associates that Sunland has entered into the Plot Sale and Purchase Agreement."

220 It is clear from these provisions that they were included in the Agreement to ensure that SWB had entered into a SPA with DWF before triggering the obligation to pay the Consultancy Fee. If follows that if Sunland believed that SWB was taking a contractual right to acquire Plot D17 from Hanley, then they would not have required the security given by these provisions. In other words, SWB could simply have enforced the right to compel DWF to enter into a SPA.

221 Brown's evidence was that around the time of the extra BUA negotiations,[790] he had a further meeting with Lee, Joyce and someone from Clyde & Co, perhaps Clyde-Smith.[791] Brown's evidence was that during the meeting, the Clyde & Co representative told Lee and Joyce that Sunland could execute a SPA with DWF, but Joyce asked for this to be confirmed in writing.[792] Brown's evidence was that after the meeting, he emailed Reed in relation to a letter from Clyde & Co[793] and that he sent this email after he received an SMS from Reed confirming that a new document had been sent for execution with a Singapore entity and that Reed would call Brown "7am your time",[794] but Brown could not recall whether Reed did in fact call him.[795] In spite of his involvement in the preparation of the letter from Clyde & Co, Brown's evidence was that he only saw the letter from that firm to Brearley for the first time

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MJJ.001.001.0417.

789 Court Book, SUN.001.003.0054.

790 See above, paragraph 183 and following.

791 See Witness Statement of David Scott Brown (6 August 2010), paragraph 242.

792 See Witness Statement of David Scott Brown (6 August 2010), paragraph 242.

793 See Witness Statement of David Scott Brown (6 August 2010), paragraph 243.

794 See Witness Statement of David Scott Brown (6 August 2010), paragraph 253; and see Court Book, SUN.002.010.0262.

795 See Witness Statement of David Scott Brown (6 August 2010), paragraph 254.

as a result of the present proceeding.[796] Abedian's evidence was that the email from Reed enclosing the proposed wording of the letter from Clyde & Co to DWF reinforced statements which had been made by Reed and Joyce that Reed had control over the property and that Sunland could not deal directly with the master developer.[797] It must be remembered, however, that the alleged statements were made to Brown and not to Abedian.[798] Abedian's evidence was that the control was the only justification for Clyde & Co to be giving instructions to DWF to deal with Sunland to finalise the SPA and requiring DWF to provide them with a copy of the finalised SPA.[799] On the basis of this evidence, neither the Clyde & Co letter nor the discussions leading to or in relation to it support Sunland's case.

Payment under Implementation Agreement, the MOU

222 The Sunland entities plead that:[800]

(a) the monies paid to Hanley included monies transferred by Sunland from its bank in Australia to Dubai for the sole purpose of paying the Consultancy Fee[801] to Hanley; and

(b) that the monies paid to Hanley were paid to Hanley's solicitors in Dubai.

223 Clyde-Smith's email to Brown dated 21 September 2007[802] states that "The money arrived from Australia yesterday and HSBC have advised that they will transferred [sic] to Hadef tomorrow". The AED 44,105,780 payable under the Hanley agreement ("the Hanley fee") was received by Clyde & Co on 3 October 2007.[803]

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796 See Witness Statement of David Scott Brown (6 August 2010), paragraph 264; and see Court Books, PRU.001.007.0341 and PRU.001.007.0342 for the letter from Clyde & Co.

797 See Witness Statement of Soheil Abedian (6 August 2010), paragraph 98.

798 Transcript, p 335.28 - .31; See also Transcript, p 356.10.

799 See Witness Statement of Soheil Abedian (6 August 2010), paragraph 98.

800 Second Further Amended Statement of Claim, paragraph 34A (d) and (e).

801 Second Further Amended Statement of Claim, paragraph 32.2.4.

802 Court Book, SUN.001.002.0298.

803 See email from Ravi Puthiyaparavil of the Finance Department of Clyde & Co to Mr David Sinn dated 7 January 2008 contained in Court Book, PRU.004.001.0167. The authenticity of this document was challenged by Sunland on the basis that it had not been formally proved or tested in cross examination. Although the document was referred to in support of the defendants' case it is not, however, relied upon in any way for the purposes of these reasons for judgment as the payment of this money by Sunland is not in dispute.

224 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.[804]

Communications involving Joyce

225 It was submitted on behalf of Joyce that it is unclear what point was being made in the plea regarding statements made by Joyce to Brown and Abedian between March and July 2007 that: "There is no beachfront land left, it has all been sold to secondary developers". It was submitted that it cannot possibly convey any of the three Representations. In any event, as Brown said in evidence, Joyce's statement was true.[805]

Och-Ziff

226 It was submitted on behalf of Joyce that further evidence that he did not make any of the Representations is provided by the numerous references throughout Brown's prior statements to the effect that he thought it was Och-Ziff who had some sort of arrangement with Nakheel that allowed Och-Ziff to reserve Plot D17.

227 Brown admitted during cross-examination that this was his state of mind.[806] For example, he said, in the course of questioning:[807]

> "MR RUSH: 'Reed told us that he had connections in Hong Kong and the USA, US group Och-Ziff, strong investment group, had high-level connections with Nakheel enabling him to reserve this site,' and you put the word 'reserve' in inverted commas. Why did you do that?---Because my recollection at the time was their ability to control the property was really through Och-Ziff."

It was submitted on behalf of Joyce that the fact that this was Brown's state of mind wholly contradicts the allegations that Joyce misrepresented that Prudentia had some legal or other right to Plot D17. It was also submitted that this undermines Sunland's case that Reed made any of the Representations. It appears that Brown

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804 And see below, paragraphs 445 and 446.
805 Transcript, p 249.45.
806 Transcript, p 60; p 61.15; p 65.25; p 67.36; p 210.41.
807 Transcript, p 112.40 - .44.

later appreciated the inconsistency with his position and evidence that any "control" was in fact exercised by Och-Ziff as he sought to resile from his earlier evidence in response to my questions. In this respect, it is, in my view, an accurate observation as was made in the submissions on behalf of Joyce, that Brown's evidence on this point became "increasingly nonsensical".[808]

228 The documentary evidence does, however, provide consistent evidence of Brown's true state of mind in relation to the involvement or role of Och-Ziff in relation to Plot D17. In his email to Mr Mustafa dated 10 December 2008, Brown made statements to the following effect:[809]

(a) he understood that Och-Ziff may have had a high level arrangement with Nakheel for the development rights on Plot D17;

(b) he asked Brearley, Joyce and Lee whether they knew about Reed, Prudentia and Och-Ziff and all they knew was that there had been discussions at a high level about Plot D17, and Och-Ziff was involved; and

(c) in the end, the Sunland entities agreed a price to "pay Prudentia out", and Sunland then negotiated a sale and purchase agreement with DWF.

Additionally, in his statement to Mr Khalifa, of the Dubai Police dated 22 January 2009, Brown asserted that Reed had told him that Prudentia had "the development rights" over Plot D17, but he then said, in the same statement:[810]

> "We understood the company in the USA to be Och-Ziff (I have checked the internet for the spelling), and [Reed] said this company had high level connections with people in Nakheel … The people at Nakheel said they knew that this plot [D17] was controlled by a group from the USA, and Matt Joyce said he had heard of the Och-Ziff Company, but they didn't know any details" [underlining added in Joyce submissions]

I accept the submissions on behalf of Joyce that this reference to Och-Ziff is completely contrary to Brown's assertion that he thought it was Prudentia which

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808 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 286.
809 Court Book, SUN.003.005.0019 at .0020.
810 Court Book, SUN.004.002.0036 at .0037.

controlled Plot D17. Further, I note that Brown resisted making this obvious concession under cross-examination.[811] Abedian said that he reviewed this statement of 22 January 2009.[812]

229 Additionally, further evidence in relation to Och-Ziff's involvement and Brown's understanding in that respect was provided in Brown's report to the Sunland Group Board of Directors dated 1 February 2009:[813]

> "Reed told us that he had connections in Hong Kong and the USA, and the US group 'Och-Ziff', a strong Investment Group, had high level connections with Nakheel, enabling them to 'reserve' this site".

In the course of cross-examination, I asked Brown some questions in relation to his response to questions from Mr Collinson SC on behalf of Joyce in relation to this paragraph:[814]

> "HIS HONOUR: But grammatically 'them to reserve' is a reference back to Och-Ziff, isn't it? Are you saying that paragraph is not to be read grammatically?---In my mind, the 'them' is Reed and Och-Ziff.
>
> It doesn't say that?---It doesn't say it exactly - - -
>
> But that's what you say it should have said?---Should have said."

Additionally, in his Brief to Prosecutor in Dubai, Brown wrote:[815]

> "Reed told us his company had a relationship with an American group called Och-Ziff, and that they had an arrangement with Nakheel to acquire and develop a plot at Waterfront"

Other examples of evidence to this effect are to be found in his first witness statement:[816]

> "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

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811 Transcript, p 212.25 and p 217.41 - .46; cf *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 31.

812 Transcript, p 426.22.

813 Court Book, SUN.004.002.0063 ; Court Book, SUN.004.002.0064 at .0065.

814 Transcript, p 234.04 - .10.

815 Court Book, SUN.004.002.0075.

816 Witness statement of David Scott Brown (6 August 2010), paragraph 142.

> 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."

Entries in Brown's notebook also support this position.[817]

230 It was submitted on behalf of Joyce that, on this additional basis, Sunland's case fails before one even considers reliance issues. The Representations are premised on the wrong entity, Prudentia and not Och-Ziff, and on a plea of legally enforceable or other rights as opposed to some high-level arrangement between Och-Ziff and senior, unnamed and unknown, Nakheel officials. Whether or not the Prudentia parties did in fact have any agreement with Och-Ziff is not to the point in terms of Sunland's case. If, as Brown said, "[i]t seemed a reasonable guess that it was someone high-up in Och-Ziff who was Reed's connection to the contract with Nakheel",[818] it follows, in my view, that the submissions against Sunland, that the Representations would be premised on the wrong entity, are correct and that its case would, consequently, fail on this basis. In this context, Sunland again relies in its submissions on an internal Prudentia communication to which it was not a party as confirming that Prudentia had no agreement with Och-Ziff.[819] In my view, the contents of this email do not establish the position put by Sunland, and are at best equivocal. In any event, I do not regard such communications as relevant to Sunland's claims it not having been privy to them at any relevant time.[820]

Evidence as to representations

231 The representations as pleaded against Prudentia and Reed were allegedly made to Brown. Abedian agreed during cross-examination that "at no time [was he] a party to any conversation between Mr Brown and Mr Reed".[821] His evidence was that "[i]n relation to the content of those conversations, [he] relied totally on Mr Brown to inform [him] about the context and content of them".[822] Abedian's evidence was

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817 Court Book, SUN.002.007.0001 at.0122.

818 See above, paragraph 229.

819 See *Plaintiffs' Address* (1 February 2012), paragraph 150 (an email from Mr James Goldberg (a Director of Prudentia) to Reed, dated 3 September 2007; Court Book, PRU.001.005.1456).

820 And see below, paragraphs 445 and 446.

821 Transcript p 302.47 and p 303.01.

822 Transcript, p 303.09 - .10.

that:[823]

> "HIS HONOUR: You weren't present during the discussions?---Your Honour, I wasn't present, but all the documentation from the lawyers that lead to preparing the documentation testified that Mr Brown was accurate.
>
> That's not quite the question. You weren't present so you can't judge between your own observations and recollections of the conversations and what Mr Brown has conveyed to you, can you?---Your Honour, the whole documentation based on the information that I received from Mr Brown testifies that his assessment and reporting to me was correct; otherwise it would reflect differently in the documentation."

Abedian also said that he "worked with Mr Brown for a very long time; he would never be inaccurate".[824] Abedian's evidence to this effect was proven wrong by a number of events considered during the trial as indicated in these reasons. Consequently, in light of Abedian's admission that he was not a party to any of the alleged representations, his evidence must be regarded as irrelevant to the question whether the Representations or the Hanley Representations were made as alleged, or at all.

Falsity of representations

232 Sunland pleads that the Representations were false because:[825]

(a) Neither Reed nor Prudentia had a right to acquire Plot D17 or the land on which it was located;[826]

(b) DWF could (without agreement of Reed or Prudentia or either of them) sell Plot D17 or the land on which it was located, and the right to develop Plot D17, to Sunland or any other person;[827] and

(c) It was not necessary for Sunland to negotiate with or make a contract with either Reed or Prudentia in order for Sunland to purchase Plot D17 or the land on which Plot D17 was located or to acquire rights in connection with the

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823 Transcript p 303.34 - .42.
824 Transcript, p 303.14 - .15.
825 Second Further Amended Statement of Claim, paragraph 21.
826 Second Further Amended Statement of Claim, paragraph 21.1.
827 Second Further Amended Statement of Claim, paragraph 21.2.

development of Plot D17.[828]

233 Sunland says by way of particulars that Brown met with Mustafa on 1 December 2008 and that Mustafa told Brown that "[o]ur 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".[829] Sunland also referred to Brown's interview at the police station in Dubai on 21 January 2009 when Brown was told "the transaction with Reed was unlegal [sic] as Reed did not own the land and therefore could not sell it or receive a premium for its sale"[830] and a search of the Sunland computer system and paper files by Mustafa and others on 26 January 2009 when unnamed officials told Brown the transaction was illegal because Reed did not own the site. Brown's evidence was that Sunland had no idea that Prudentia in fact never had any right or control over Plot D17 until 1 December 2008 when Brown was questioned by Mustafa.[831] Brown also says that at all times until he was advised by the Dubai authorities to the contrary, he believed that Prudentia, or its subsidiaries, had control and rights over Plot D17 based on what Austin, Reed, Brearley, Lee and Joyce had said to Brown and the email exchanges between them.[832] As discussed in detail in these reasons, Brown's evidence to this effect cannot be accepted, having regard to the contents of the various documents that have been examined in detail and on the basis of his evidence during the course of the trial.

234 It was submitted against Sunland that it did not prove a component vital to its claim, namely that the pleaded representations were false.[833] Sunland responded that such a submission failed to address what the Sunland parties submitted were the "admissions" contained in paragraph 21 of the Defences of the Prudentia parties.[834] More particularly, Sunland contended that the defence of the Prudentia parties, at paragraph 21.4, referred to Prudentia as a "preferred negotiator" with DWF and that

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828 Second Further Amended Statement of Claim, paragraph 21.3.
829 Second Further Amended Statement of Claim, paragraph 21.4.
830 Second Further Amended Statement of Claim, paragraph 21.5.
831 See Reply Witness Statement of David Scott Brown (27 June 2011), paragraph 8.
832 See Witness Statement of David Scott Brown (6 August 2010), paragraph 274.
833 See *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 1.6; and see *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 5.
834 *Supplementary Address in Reply to the Address of the First to Third Defendants* , paragraph 11.

this contention was never put to Brown or Abedian and, further, that Prudentia relies upon a forged document in paragraph 21.4 of its Defence – namely the letter from Austin to Reed of 10 August 2007.[835] In my view, it is clear that where a defendant, such as Reed or Prudentia, submits that the plaintiff, Sunland, has failed to make out its case, any failure to put a positive assertion from a plea in the Defence concerning evidence the defendant may call in its case cannot be used against the defendant. The defendant, in forensic terms, has no case to make and the focus is on the plaintiff's case, in this instance, Sunland's. In any event, I am of the view that Sunland's assertion is not supported by the evidence.

235 The qualified admissions of the Prudentia parties contained in their Defences are as follows:

(a) Prudentia did not hold a right to acquire plot D17;[836]

(b) DWF could sell plot D17 to Sunland or any other person;[837]

(c) it was not necessary for Sunland to contract with Reed or Prudentia in order to acquire rights in connection with D17.[838]

Each of these "admissions" was subject to the qualification contained in paragraph 21.4 of the Defence which states:[839]

(a) at no material time did they [Prudentia] hold, nor did they represent that they held, an enforceable right in the nature of a conveyance or option or other legal interest in Plot D17;[840]

(b) at no material time did they [Prudentia]hold, nor did they represent that they

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835 Court Book, PRU.004.001.0178; and see *Plaintiffs' Address* (1 February 2012), paragraph 44. Whether or not this document is a forgery is not a matter which it is necessary to decide as it is not relied upon or otherwise referred to in these reasons for judgment.

836 Defence paragraph 21.1.

837 Defence paragraph 21.2.

838 Defence paragraph 21.3.

839 Defence of the First and Third Defendants to the Second Further Amended Statement of Claim (29 November 2011).

840 Defence paragraph 21.4(a)

held, any right pursuant to an executed SPA;[841]

(c) at all material times, the final reconfiguration of … plot D8B leading to the creation of a new plot named Plot D17 was incomplete and unresolved, as was final approval of the development template and terms of contract of sale in respect of Plot D17;[842]

(d) at all material times, the fact was and Sunland knew, that Prudentia's interest in Plot D17 was as a preferred negotiator with DWF for the right to purchase and develop Plot D17.[843]

236 On this basis, and for the reasons discussed elsewhere,[844] the Sunland submission that "it is uncontroversial that neither Reed nor Prudentia had any 'right' in relation to Plot D17"[845] cannot be sustained. Additionally, the assertion that the defence and paragraph 21.4(d) "… doesn't constitute a denial of the representations pleaded in paragraph 20" [of the Second Further Amended Statement of Claim] and that such representation were "not false"[846] does not survive proper analysis of the pleadings. The Prudentia parties provided Further and Better Particulars of paragraph 21.4(d) of the Defence at the request of Sunland. These Particulars stated in part:

> "2.2.2 (a) 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." [emphasis added]

Sunland submitted in its *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants* that (paragraph 158):

> "Keighran's unchallenged evidence [paragraph 82 of his statement] was that

841 Defence paragraph 21.4(b)
842 Defence paragraph 21.4(c).
843 Defence paragraph 21.4(d).
844 See below, paragraph 237, in relation to the critical need in the context of these proceedings for a plaintiff in Sunland's position to clearly articulate – in its pleadings and in the conduct of its case – exactly what it says 'right' is to be taken to mean in terms of its allegations.
845 *Plaintiffs' Address* (1 February 2012), paragraph 46 (a).
846 Transcript, p 928.27 - .31.

> 'There is no concept of a "preferred negotiator" under Dubai or UAE law, either as a matter of commercial practice or a matter of law'."[847]

Further, Sunland submitted in its *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants* that (paragraph 155):

> "155. ... The term 'preferred negotiator' was referred to in only one question, and Brown responded *'I don't know what you mean by "preferred negotiator"'* (T86 L36). That answer was consistent with Brown's first statement at paragraph 279 that:
>
> > I did not believe that Prudentia's interest in Plot D17 was as 'preferred negotiator';
> >
> > I was not aware of any concept of a 'preferred negotiator' in Dubai;
> >
> > At all times I believed that Prudentia had control or rights over Plot D17;
> >
> > I did not believe that the 'right to negotiate' referred to in the Prudentia and Hanley Agreement meant that Prudentia and Hanley did not have control over the plot. I believed that they had reached agreement with Dubai Waterfront, that they did have control over the plot and that it was only the price of the plot and the SPA terms to be finalised."[848]

237 The suggestion in the Sunland submissions that the Prudentia parties failed to put their case in relation to the nature of the negotiating arrangement it or they obtained with DWF is, in my view, without foundation. The Prudentia parties' admissions in paragraph 21 are to the effect that Prudentia did not have a conveyance, option, legal interest, or right pursuant to a SPA. Prudentia did not admit that it had no right at all in respect of Plot D17. However the significance of this pleading position crucially depends on what is meant by the term "right"; and given that Sunland is a plaintiff making claims based on representations, as it asserts, in relation to a "right" with respect to Plot D17 it is for Sunland to clearly plead and explain the nature of such a "right". The same applies with respect to allegations of "hold or "control". In spite of this it is Sunland that has failed to make out its case and explain the nature of the "right" or "control" it contended was the subject of the alleged representations. In

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847 In my view, this does not assist Sunland's case, but merely serves to illustrate its failure to establish any representation that Reed of Prudentia held any "right" as it claimed, whether contractual or not.

848 Again, this evidence reinforces both the same point and also the failure of the Sunland case to clearly articulate what it was that it was claimed was the subject of the alleged representations.

the course of his cross-examination, Brown prognosticated a "…limited right of negotiation" may be what Prudentia possessed.[849] This evidence of Brown is entirely consistent with the defence of Reed and the Prudentia parties at paragraph 21.4 and the Further and Better Particulars provided by these parties. In summary, it is the position that the failure of Sunland to describe the alleged representation has consequently produced the inevitable result, that Sunland has failed to prove the representation was false.

238 Reed and the Prudentia parties also provided the following Further and Better Particulars which were also the subject of cross-examination:

> "2.2.1
>
> (g) …the limits of the negotiation rights with Dubai Waterfront in respect of Plot D17 held by Prudentia and by Sunland Group were put beyond doubt on 12 September 2007 by reason of the matters alleged in paragraph 24 of the Statement of Claim. Prudentia and Reed will rely on a report by Brown to Reed as to the alleged telephone call referred to in paragraph 24 of the Statement of Claim with such report contained in an email from Brown to Reed dated 13 September 2007, 12:53am, with subject: FW: Waterfront Site D17 and copied to Abedian, the relevant part of which records:
>
> I received a call from Marcus Lee (Matt Joyce's no. 2) and Anthony Brearley (the DWF lawyer) regarding Plot D17. 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 and sell the plot, and they will have no control over this.
>
> They suggest we immediately '<u>put our foot on the plot</u>' to secure it.
>
> To do this, we need to sign a sale and purchase agreement (SPA …). [emphasis added]."[850]

This email was also sent to Abedian. As indicated elsewhere in these reasons, the email is entirely consistent with the limited nature of the "hold" or "control" Reed or Prudentia possessed with respect to Plot D17, which is indicated by the evidence. It is also entirely consistent with the nature of the arrangement pleaded by Reed and the Prudentia parties in their Defence and also as contained in the Further and Better Particulars.

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849 Transcript, p 73.36 -.38.

850 Court Book, SUN.001.006.0100.

239 It was for Sunland to prove that Prudentia or Reed had no "right" over Plot D17. Sunland has called no such evidence.[851] It might well have been thought that Brearley or Mustafa would have provided critical evidence to support such an assertion if indeed it be true (but which on the evidence it could not be). Sunland has not demonstrated by evidence the falsity of the Representations, as best as the Representations as alleged by Sunland could be understood, that were, as Sunland contended, relied upon by its witnesses, Brown and Abedian.[852] Thus, in Sunland's contention that on a "… proper analysis of the pleadings, it was unnecessary for the Plaintiffs to adduce evidence as to the falsity" of the Representations,[853] Sunland has ignored the necessity of proof of a vital element of the allegations put against Reed, the Prudentia parties and also against Joyce.

Conclusions on representations

240 Sunland's case failed to establish its allegations in terms of the Representations or the Hanley Representations. Further the evidence Sunland relied upon evidences no misrepresentation, by words or other conduct, with respect to something in the nature of a "right" of negotiation or a preferred negotiating position on the part of Reed or Prudentia in relation to Plot D17. Rather, the Sunland case evidences that Prudentia did hold such a position in relation to Plot D17. Sunland has failed to adduce evidence which casts doubt on the apparent preferred negotiation position enjoyed by Prudentia in relation to Plot D17 and the evidence shows that Sunland did in fact step into Prudentia's shoes to hold negotiations with DWF and, ultimately, sign a SPA for the purchase of Plot D17.

241 Sunland's closing submissions demonstrate an inability, even in a rudimentary way, to encapsulate the position it relied upon with respect to the Representations. Sunland floundered in describing the basis of its case, referring to Prudentia having "some right";[854] "some right" from time to time morphed into "some control";[855]

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851 See Statement of Claim paragraph 21.4-21.6.

852 As to the credit of these witnesses, see below, paragraphs 304 to 332.

853 *Supplementary Address in Reply to the Address of the First to Third Defendants*, paragraph 13 .

854 Transcript, pp 977.23, 984.13, 1001.4: *Plaintiffs' Address* (1 February 2012), paragraphs 91 (have 'control'); 102, 136, 215 ("some right or control").

855 Transcript, pp 967.21, 984.02, 969.31: *Plaintiffs' Address* (1 February 2012), paragraphs 122, 155, 159.

and there were even at stages "some sort of contract".[856] These inexact descriptions must be considered with the multiplicity of descriptions of the payment ultimately agreed to be made to the Prudentia parties upon the unilateral decision of Abedian to end the joint venture proposal that was being negotiated between Sunland and Prudentia. The confusion continued with Clyde-Smith describing the payment as a "spotter's fee",[857] for Abedian it was payment "…to remove Prudentia from the transaction",[858] and for Brown, amongst other versions, he agreed that it was "… a fee to remove them from the transaction"[859] and an introduction fee for Prudentia to "walk away".[860] Brown also said that he considered the payment "… a fee paid to him for them walking away and handing over their development rights".[861] It was submitted against Sunland that these various descriptions "reveal the fictions which are at the heart of the Sunland parties' case".[862] There is much to be said for this view as the pleading and the Sunland evidence elaborate an amorphous "right" and "control" in development land yet to come into existence in terms which the Prudentia parties did not represent. As submitted against it, Sunland sought "… to contrive conjecture as if inferences were available and where no inference may at law be drawn, so as to now construct an unpleaded *scheme* which the evidence falsifies. A case such as the one advanced by Sunland, as does any case so serious, the requirement of nothing less than strict and cogent proof upon admissible matters arising from and limited to the pleading".[863]

242 Sunland submitted that the payment made by Sunland was not a "spotter's fee", an "introduction fee" or a "consulting fee". This was, as indicated, contrary to the evidence particularly as Sunland's in-house lawyer, Clyde-Smith, had used terminology such as "spotters fee" and other descriptions inconsistent with this

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856 Transcript, p 958.20: *Plaintiffs' Address* (1 February 2012), paragraph 85.
857 Court Book, SUN.001.002.0227; see also paragraph 207 above.
858 Transcript, p 340.34.
859 Transcript, p 95.16 - .19.
860 Court Book, SUN.009.003.5874.
861 Transcript, p 52.21 - .23.
862 *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraph 2.2.4.
863 *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraph 2.2.4.

submission had been applied by both Brown and Abedian. Rather, Sunland suggested that a seminal description was provided by Reed in an email to Sinn of 17 September 2007[864] when Reed described the payment as a "consulting fee to walk away". "Walk away with what?", was the rhetorical question posed by Sunland.[865] As submitted against Sunland, it is unclear what point was sought to be made of this; the so-called seminal description of the fee, "a fee to walk away", was also one of the various descriptions used by both Brown and Abedian.[866] If Sunland was in doubt as to what Reed and the Prudentia parties were walking away from and what Sunland believed was obtained as a consequence of payment of the "fee", the issue could have, and should have, been clarified with Brown and Abedian in re-examination. In any event, as discussed previously, it is clear, in my view that Sunland's commercial imperative was to obtain Plot D17 exclusively so that Sunland, and Sunland alone, would enjoy the very significant returns it anticipated on the development of that land.[867] In further support for this submission Sunland made reference to its willingness to increase the sum it was offering to pay to Prudentia, and ultimately Hanley. This does not, however, affect my assessment of the position. The profit Sunland expected to enjoy from the development of Plot D17 remained extremely attractive. In this context the increase in the sum offered by Sunland remained insignificant – both as to the increase itself and the total sum offered, as increased. Sunland also submitted that the absence of "any process of real negotiation where they [Sunland] try and beat Mr Reed or Prudentia down …"[868] is evidence in support of the proposition it advances. I am, however, of the opinion that this is but further evidence in support of the view I have formed in this respect – namely that acquiring Plot D17 solely by Sunland was such an attractive commercial proposition for it that the money it was contemplating paying to Prudentia, and ultimately Hanley, was insignificant. Again the answer to the, so called, "rhetorical question" is clear – and it does not involve Sunland's allegations, the

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864 Court Book, PRU.001.006.1557.
865 Transcript, p 1044.18 - 1045.03.
866 See, for example, above paragraphs 206 and 204, respectively.
867 See above, paragraph 208.
868 Transcript, p 1046.29 - .30.

Representations or the Hanley Representations.

243 In spite of the manner in which the Representations were pleaded, Sunland maintained that it was not necessary for it to establish that the representations connoted an enforceable right by Reed or Prudentia with respect to Plot D17. In this respect, it was submitted against Sunland:[869]

> "2.2.8 The Sunland parties maintain that their case *does not require the finding that the representation was to the effect that there was a formally binding contract entitling Reed or Prudentia to the plot*. Rather, in submissions the Sunland parties contended the alleged representation amounted to what is the vague and undefined … agreement which conferred upon Prudentia a 'right' which was capable of transfer to Sunland[870].
>
> 2.2.9 A right to negotiate is no less a *right* where conferred *in personam* between contracting parties in joint venture pursuit of a land development opportunity where one party (Prudentia) allows the other party (Sunland) to negotiate in the proposed venture to secure an assent of their venture. That Sunland would exercise the negotiation rights with DWF was an agreed and central term of the MOU agreements exchanged between them. Such a *right* conferred *in personam* is distinguishable from and is in no sense dependent upon Prudentia having an enforceable *'agreement*' with DWF in respect to D17 and is not inconsistent with Prudentia having *'a limited right of negotiation'*.
>
> 2.2.10 The facts show that what Prudentia offered as a funding party to Sunland joint venture model and brought to the table in terms of its *hold* in respect of a development proposal was sufficient to engage Sunland in negotiation with Prudentia whereby, over time, Sunland could fully evaluate the feasibility of the project and its willingness to enter a JV with Prudentia. A right to negotiate final terms of the SPA, the legal terminology and the planning and timing and technical issue[871] in respect of a plot of land not finally configured and having the status of a design plan is consistent with the terminology and utility of *hold* over D17 used by Austin (and noted by Brown) on 15 August 2007.
>
> 2.2.11 Sunland obtained and exploited that hold as a matter of fact pursuant to Brown's *'put our foot on it*' proposal, which Reed accepted (*'go for it*') and by which he entrusted Brown to secure D17 on the basis that inter alia:
>
> > (a) *the purchaser can be in the name of Sunland JV Development (BVI) Limited which we have in place already*;
> >
> > (b) *we will sign the MOU which will note the agreement to transfer the land to the new co when it is ready*.

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869 *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraphs 2.2.8 to 2.2.14.

870 *Plaintiffs' Address* (1 February 2012), paragraph 40.

871 Transcript, p 218.09 – .11

> 2.2.12 The MOU 'already agreed' contained no put option. The put option was a unilateral imposition inspired by Soheil Abedian.[872] An agreement on these terms containing a put option would be effective to *control* not simply D17, but if exercised, would oblige Prudentia to do what neither Sunland or Prudentia had agreed previously, that is to purchase D17 independently. Reed had expressly repudiated that Sunland was obliged to buy the land in an email to Brown on 4 September 2007.[873]
>
> 2.2.13 The evidence is, however, that Prudentia accepted this Soheil Abedian inspired turn-about on re-statement of the prior agreed obligation expressed in the MOU that Sunland would provide to Prudentia its feasibility. Brown spoke candidly when he said *'We were well past the fact whether he had a hold or not'*.[874] This concession points out how elaborate are the Sunland parties' fictions and how divorced they are from the proved and evolving commercial facts known and understood by the parties at the time of their commercial negotiation.
>
> 2.2.14 The Sunland parties' submissions do not reveal what it is that the Sunland parties allege, and have proved, was actually the subject of the representations."

As I indicated previously, 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. In any event the only non-enforceable "right" ("contractual" or otherwise) which Sunland's case conceivably established – particularly having regard to its inability to articulate, at all or consistently, the "right" it was relying upon was that of a "right" to negotiate or a "preferred negotiating position", the latter apparently more consistent with the evidence relied upon (assuming a difference between these descriptors; which, if any, was never explained).[875] If this is the position then this "right" with respect to negotiation was one which Sunland was ultimately able to avail itself of – as anticipated in the

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872 SUN.001.001.0183 and attachment at SUN.001.001.0184

873 SUN.009.003.1885.

874 Transcript, p193.32 - .33

875 Though the "right" was also described as "some limited right of negotiation" (see below, paragraph 266).

Prudentia and Hanley Agreements.

244 On the basis of my consideration of the evidence in relation to the transaction or transactions involving various parties with respect to Plot D17, I am of the opinion that Sunland has entirely failed to establish that the Representations were made by any of the defendants in breach of the statutory provisions relied upon as alleged and consequently the basis of its claims based on misrepresentation, under the TPA and the FTA must fail at the outset. Additionally, this also means that the claim in the tort of deceit must fail as one does not even reach the position of considering whether any representation or representations were fraudulent in the relevant sense as there are, in my view, none to consider which would fall into this category.

245 Further, for the reasons indicated previously, the evidence led by Sunland fails with respect to proof of the Representations or the Hanley Representations, both for the reasons set out above with respect to the Plot D17 transaction and related matters, and also having regard to the admission by Abedian that the representations as pleaded against Prudentia and Reed and the Hanley representations were alleged in circumstances where Abedian was not a party to any of the alleged representations.

246 As I have already indicated, it follows from my findings with respect to Sunland's claims in this proceeding which are based on allegations of conduct in breach of the statutory provisions relied upon and also fraudulent misrepresentation in terms of deceit that the disbursement of the Hanley fee is not a relevant issue.[876] The same applies with respect to allegations made by Sunland that information that may have been confidential to DWF or Nakheel and Sunland was provided by Joyce to Reed or Prudentia without any necessary authority or consent. More generally, the same also applies with respect to Sunland's allegations of a "common purpose" or "joint purpose" involving Joyce and Reed, and the other Prudentia parties.[877]

No reliance by Sunland

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876 See above, paragraph 224; and see below, paragraphs 445 and 446.

877 And see *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraph 4; and *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraphs 9 to 19; and see below, paragraphs 445 and 446.

247 It was submitted on behalf of Reed and the Prudentia parties and also on behalf of Joyce that even if it were held that the Representations or any of them were made out, Sunland has failed to demonstrate the pleaded reliance on the Representations.[878] The same applies to the Hanley Representations. There must, of course, be a causal connection between the conduct of the defendants, or any of them, and the misapprehension on behalf of Sunland as plaintiff.[879]

248 Assuming that there were any relevant representations as pleaded by Sunland (which, for the reasons already indicated, I am of the view that there were not), the extent of any liability of any of the defendants in respect of claimed loss or damage caused by those representations and the extent of any liability of any of the defendants in respect of that loss and damage is dependent upon:

(a) whether Brown and Abedian in fact believed the Representations or the Hanley Representations as pleaded by Sunland; and

(b) if they did believe them, then whether Sunland would have paid the consultancy fee to Hanley, even if they had known the true position.

The defendants submitted that there can be no doubt that Sunland did not rely upon the Representations or the Hanley Representations as pleaded in that it knew at all times that Reed and the Prudentia parties had no legally enforceable right of any kind, proprietary or contractual, to Plot D17. To the extent that Reed or the Prudentia parties may have had some other, non-enforceable "right" that proved either to be of no significance of insofar as such "right" may be described as a "preferred negotiating position" this was a "right" which Sunland was able to obtain, and to its advantage.[880]

249 A broad issue of critical importance was the notion of "control" with respect to Plot

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878 The Sunland entities pleaded reliance in the Second Further Amended Statement of Claim, paragraphs 22, 25, 29, 30 and 33 and 36. It is also noted that in paragraphs 25, 30 and 33 of the Second Further Amended Statement of Claim, the Sunland entities allege reliance on the pleaded representations together with other alleged conduct of Brearley, Lee and Reed, but not Joyce.

879 *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 as cited in *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76.

880 And see above, paragraph 243.

D17, which was repeatedly raised by Sunland and its witnesses in their written and oral evidence. Consequently, it was of the utmost importance for Sunland's case that Brown and Abedian give credible evidence about the "control" they thought Prudentia or Reed had over Plot D17, and the basis on which they held that belief.

250 Having regard to the importance of this issue, what is indeed notable throughout the history of this matter, and particularly during trial, is the inability of Brown and Abedian to identify exactly what it was that Reed or Prudentia had that gave them, or either of them, "control" over Plot D17; in other words, the precise nature of the interest that they say they thought that Reed or Prudentia held in respect of Plot D17.

251 It is striking that Sunland did not discover any contemporaneous transactional document, such as any internal email, in which any of Brown, Abedian or Clyde-Smith referred to Prudentia or Reed as having either "control" or some legal right to Plot D17. Rather, when Brown, Abedian and Clyde-Smith do raise the nature of that alleged "interest", it is variously described as an "Introduction Fee", a "spotter's fee" or as Reed having his "foot on the site"; to cite but a few examples, with others referred to below and also in the more extensive preceding discussion of the events of the Plot D17 transaction.[881]

252 The witness statements relied upon by Sunland contain various references to Reed or Prudentia having "control" of Plot D17, but other, inconsistent, statements are also made. Both Brown and Abedian asserted that, if they had known Reed did not have "control and rights" over Plot D17, they would not have dealt with him.[882] In relation to Joyce, Sunland does not even plead that he used the words "control" or "rights" in his dealings with them. Consistently, Brown gave no evidence that Joyce actually used those words in their two relevant conversations. Abedian never spoke to Joyce regarding Plot D17. Similarly, Brown also gave evidence that "nobody"

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881 See, for example, above, paragraphs 199, 206-208 and 242.

882 Witness statement of David Scott Brown (6 August 2010), paragraph 275; Witness statement of Soheil Abedian (6 August 2010), paragraph 116; but in other parts of their witness statements, they contradict that assertion: for example, Reply witness statement of David Scott Brown (27 June 2011), paragraphs 5 and 26.

ever used the word "reserve" in relation to Plot D17.[883]

Alleged reliance on representations between 16 August and 12 September 2007

253 Sunland pleads that:[884]

(a) between 16 August and 12 September 2007, Brown relied on the Representations to negotiate on behalf of Sunland with Reed for Sunland (or a related entity) and Prudentia to incorporate a new entity and use it as the vehicle to undertake a joint venture for the purchase, development and sale of units in Plot D17; and

(b) say further that if the Representations had not been made, they would not have entered into any negotiations with Reed and would have negotiated with Joyce (or other agents of DWF) for the purchase of Plot D17.

254 Brown's evidence was that:

(a) if he had known at the time of the first meeting with Reed that Prudentia did not in fact control the land but was merely a prospective purchaser who also had the ability to arrange funding for the project, then Sunland would have explored a different joint venture model;[885]

(b) the negotiations would have been very different in those circumstances as Sunland would have been able to pursue the purchase of the land itself, on the basis that if it was unable to negotiate a joint venture with Prudentia providing finance, it could have looked for an alternative joint venture partner;[886]

(c) because Brown thought Prudentia had control of the land, the attraction for Sunland of negotiating a joint venture with Prudentia, rather than simply offering to pay Prudentia a premium in order to be able to buy Plot D17 for

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883 Transcript, p 112.46 - .47.
884 Second Further Amended Statement of Claim, paragraph 22.
885 Reply witness statement of David Scott Brown (26 June 2011), paragraph 26.
886 Reply witness statement of David Scott Brown (26 June 2011), paragraph 26.

itself, was that it seemed that Prudentia was able to fund the land instalment payments.[887]

255 As submitted by Reed and the Prudentia parties, Brown's evidence was challenged and impugned in the course of cross-examination, the results of which are helpfully summarised in those submissions:[888]

> "(a) Brown was unable to provide evidence of the so-called *control* Prudentia had over the land. Certainly he was unable to explain it in terms that demonstrated there was any legal right or entitlement of Prudentia to the land.
>
> (b) At various stages of the Sunland evidence the alleged *control* was described as:
>
> (i) A *hold* on the plot, as described by Austin [889]. But Brown did not ask what this meant [890];
>
> (ii) Soheil said *hold* [means] he had an *agreement* over the plot but Soheil never explained the nature of this agreement [891];
>
> (iii) Brown's evidence of a conversation with Joyce on 15 August 2007 is no better than that the *gist* of what Joyce said is that Reed was the *contact* for D17 [892];
>
> (iv) Brown's evidence of what Reed said to him concerning the issue of so-called *control* is also vague and imprecise. Reed said (19 August in Dubai) he had *the rights* or *Prudentia controlled* the land [893]. Later in evidence Brown said Reed *controlled* the plot, had a *hold* on the plot, they were the *tones of the conversation* [894]. Brown said that this was *the style of the discussion* [895]."

256 As was submitted on behalf of Joyce, the term "control" is also employed inconsistently in Brown and Abedian's witness statements. In some instances, in those witness statements, it appears to mean that Prudentia had a "legal right to Plot D17", but in other instances, it appears to encompass control in some looser sense.

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887 Reply witness statement of David Scott Brown (26 June 2011), paragraph 26.

888 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 6.2.3; and see *Reply Submissions of the First to Third Defendants of the Closing Submissions of the Plaintiffs* (22 February 2012), section 2 (paragraphs 2.1-2.4).

889 Transcript, p 35.12 - .23.

890 Transcript, p 39.35.

891 Transcript, p 360.26 -.27.

892 Transcript, p 175.24 - .47; p 176.01 - .10.

893 Witness statement of David Scott Brown (6 August 2010), paragraph 92.

894 Transcript, p 48.31 - .35.

895 Transcript, p 48.40 - .44.

Brown and Abedian admitted that they "did not know the precise terms of that control by Prudentia and Reed".[896]

257 Turning to Brown's evidence in cross-examination, it was submitted on behalf of Joyce that "Brown has not been able to get his story straight in reconstructing his version of events". Continuing, it was submitted:[897]

> "… According to his evidence, the 'right' he claims he believed Prudentia held over D17 was one that:
>
> (a) was in respect of a plot that did not yet exist;[898]
>
> (b) was in respect of a plot that therefore couldn't be owned;[899]
>
> (c) may not have been contractual;[900]
>
> (d) might be merely some limited right of negotiation;[901]
>
> (e) was undocumented;[902]
>
> (f) did not arise from a signed sale and purchase agreement (SPA);
>
> (g) did not arise from Prudentia having paid any money against Plot D17;[903]
>
> (h) did not involve any agreement on the price of the land;[904]
>
> (i) did not require cancellation by means of a "cancellation agreement" (with which Sunland was familiar because of its acquisition or proposed acquisition of Plots D5B and A10C);[905]
>
> (j) could expire at some unspecified time on some unspecified basis;[906] and
>
> (k) was one held variously by both Prudentia and Hanley (notwithstanding that Hanley was incorporated on 28 August 2007).

258 The position of a party with respect to land ownership under Dubai property law

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896 Transcript, p 353.25 - .29; Witness statement of David Scott Brown (6 August 2010), paragraph 185 and Witness statement of Soheil Abedian (6 August 2010), paragraph 84.
897 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 310.
898 Transcript, p 205.16.
899 Transcript, p 23.08.
900 Transcript, p 192.23.
901 Transcript, p 73.36.
902 Transcript, p 33.01 and Witness statement of David Scott Brown (6 August 2010), paragraph 276.
903 Transcript, p 32.11 - .12
904 Transcript, p 91.30 and pp 268 – 269.
905 Transcript p 26.36.
906 Witness statement of David Scott Brown (6 August 2010), paragraph 185.

was, in my opinion, uncontroversial to the extent that it was summarised by Sunland's expert witness, Keighran, as follows:[907]

> "…[a] party either has a Contractual Right to land by way of a reservation agreement or by an executed SPA (although I note my comments above about contract formation) or nothing." (Emphasis added in closing submissions on behalf of Joyce.)

259 It was plain during the cross-examination of Brown and Abedian that they both understood that neither Reed nor Prudentia had any binding agreement in respect of Plot D17 and no legal interest in that plot. By way of example:

(a) Brown knew that Plot D17 had not been created and, therefore, was not capable of being "owned" by Prudentia.[908] Brown knew Nakheel owned the Plots that were to be reconfigured to make, amongst others, Plot D17. Accordingly, he knew that, when Plot D17 was "created", it would be owned by Nakheel;[909]

(b) Brown and Abedian knew Prudentia had no SPA, had paid no deposit and did not own Plot D17;[910]

(c) Brown thought that it was possible Prudentia had no more than a right to negotiate;[911]

(d) Brown referred in his 22 January 2009 statement[912] to the transfer of a "right to negotiate …" which, he admitted during cross-examination, may mean that no legal right to land existed.[913]

Both Brown and Abedian believed (and as the evidence indicates, correctly) that Reed was ahead of them in time and already negotiating with DWF to purchase Plot D17. The negotiating position of Prudentia, hence Reed, with DWF was important

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907 Witness statement of Duane Matthew Keighran (8 August 2010), paragraph 82.
908 Transcript, p 23.08; p 23.15; p 32.17; and p 205.15.
909 See, for example, above, paragraph, 69.
910 Transcript, p 32.07 - .17.
911 Transcript, p 73.36.
912 Court Book, SUN.004.002.0036.
913 Transcript, p 218.17; and see below, paragraph 281.

and of great value to Sunland, and it appears from the evidence that it was this, and nothing else, which they contracted to obtain; though ultimately the commercial imperative was to obtain Plot D17 for itself, exclusively, so that it did not have to share the anticipated very significant returns on its development.[914] Further, until mid-September 2007, Sunland's "interest" with respect to Plot D17 was as a joint venture partner with Prudentia and not on its own account,[915] though joint venture negotiations were continuing. When the joint venture negotiations faltered in mid-September 2007, it was Abedian on behalf of Sunland who originated the idea of paying Prudentia the fee to get Reed and Prudentia out of the way or, as Brown put it, "so he would 'go away'" and "to remove them from the deal".[916]

260 In his witness statement, Abedian set out his understanding of the right he thought Reed had over Plot D17, as at mid-August 2007, stating that "Reed had control over the plot".[917] Abedian was cross-examined in relation to his notional understanding of "control" in this context. His evidence was that:

(a) "We have in Dubai two different kinds of having the control: 1, it is a reservation agreement, and the other one is a sale and purchase agreement.";[918]

(b) To buy a plot in Dubai is to "control it", and to control it is to "reserve"[919] it; and

(c) Control means to have a reservation agreement.[920]

As has been noted previously, Abedian said nothing about a "reservation agreement" in his witness statement or in any contemporaneous record; and Brown's evidence was that he had never heard of the term.[921] In relation to this

914 See above, paragraphs 208 and 242.
915 Transcript, p 86.01 - .02; p 128.15 - .16; and see Court Book, SUN.009.007.5554.
916 Court Book, SUN.004.001.0314, dot points 10 and 12.
917 Witness statement of Soheil Abedian (6 August 2010), paragraph 50.
918 Transcript, p 318.36 - .36.
919 Transcript, p 333.36 - .38.
920 Transcript, p 335.14.
921 See above, paragraph 142.

evidence, it is convenient to set out the submissions made on behalf of Joyce which, which, in my view, accurately summarise the position:[922]

> "322. ... Because Abedian claimed to understand 'control' over a plot to mean that one either had a sale and purchase agreement or a reservation agreement in effect and because he knew that he could not assert that Reed had entered into a SPA for D17[923], he had to assert that he believed Prudentia had entered into a 'reservation agreement'. This is despite the fact that he had given no such evidence in his witness statement. It was just another invention.
>
> 323. Incredibly, had it been true, Abedian failed to tell his fellow Board members or lawyers at any time that he believed at all relevant times that Reed or Prudentia had a 'reservation agreement'[924] despite conceding that it would have been an important thing to tell them.
>
> 324. Furthermore, when preparing his witness statement Abedian failed to tell his lawyers in this proceeding that he believed there was a reservation agreement in existence over D17.[925]
>
> 325. Indeed, if it were true, his evidence in the witness box would be the first time he actually articulated this belief. He also failed to explain how he obtained the 'belief' given that there was no evidence of anyone (whether or not external to Sunland) saying anything remotely consistent to it.
>
> 326. Abedian swore that he believed Brown also thought there was a reservation agreement in existence despite being told that Brown had given evidence that he had never heard of a reservation agreement (let alone considered one in existence over D17) and that he never uttered the words 'reservation agreement' to Abedian.[926] Brown also gave evidence that no person ever used the word "reserve" in their dealings with him regarding D17.[927]
>
> 327. Abedian could not produce one document or email that supported his contention that there was a reservation agreement in existence in relation to D17 or that he believed Prudentia was party to a reservation agreement in relation to D17.

261 Immediately prior to the purchase of Plot D17, another company within the Sunland Group acquired Plot D5B, which, as indicated previously, was a beachfront plot on the Gulf side of Plot D17. In relation to the Plot D5B purchase, Brown signed three documents to which DWF was a party: a SPA,[928] a cancellation agreement[929] and

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922 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraphs 322 to 327.
923 Transcript, p 395.17 - .26.
924 Transcript, p 441.05 - .21.
925 Transcript, p 442.01 - .34.
926 Transcript, pp 460 – 461.
927 Transcript, p 112.46.
928 Court Book, SUN.002.001.0317; Witness statement of David Scott Brown (6 August 2010), paragraph 40.3.

variation agreement.[930] As indicated previously, the purpose of the cancellation agreement was to cancel the interest of the prior "owner" of the plot immediately prior to the plot being transferred to the Sunland purchaser. It is clear that Brown knew that the usual practice of DWF was to cancel the interest of the previous owner and for the new owner to enter into a new SPA with DWF, as opposed to a transfer of that interest. However, when Brown and Clyde-Smith negotiated the documentation for Plot D17, there was no cancellation agreement.[931] As submitted against Sunland, it is clear that Brown knew that Prudentia had no "right" to Plot D17 that required cancellation. Reflecting again on the Plot D5B transaction, it is noted that Sunland did not immediately pay a deposit for the purchase of Plot D5B following Brown's email to DWF dated 6 December 2006 that contained Sunland's offer to purchase that plot.[932] Brown had thereby laid claim to Plot D5B on behalf of Sunland but knew that Sunland had no legally enforceable right to the plot. As submitted on behalf of Joyce, doubtless, Sunland would have objected strenuously if DWF had offered Plot D5B to some other purchaser in the meantime.

262 Brown admitted that Joyce had told him on 15 August 2007 that Reed had not signed a SPA for Plot D17, or words to that effect.[933] Brown also gave evidence that he believed that to "secure" Plot D17, Sunland needed to sign a SPA.[934] Again, it is instructive to consider the Plot D5B transaction where, when negotiating the purchase of that plot, Brown sent an email to DWF, on 11 March 2007, in which he wrote:[935]

> "we are now in advanced discussions with your legal team at Nakheel in respect of the contract, and in reliance of this <u>we are making these payments in good faith</u> subject to finalization of the contracts and the design guidelines which will enable us to finalize exactly what we are buying" [emphasis added in submissions on behalf of Joyce]

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929 Court Book, SUN.002.001.0304; Witness statement of David Scott Brown (6 August 2010), paragraph 40.1.

930 Court Book, SUN.002.001.0311; Witness statement of David Scott Brown (6 August 2010), paragraph 40.4.

931 Court Book, SUN.002.001.0177.

932 Court Book, MJJ.002.001.0557.

933 Transcript, p 32.07; p 198.01 - .12.

934 Transcript, p 58.44.

935 Court Book, MJJ.002.001.0266; Transcript, p 30.

Brown admitted that he wrote in this email that DWF needed to act in "good faith" towards Sunland because Sunland had not yet signed a SPA for Plot D5B.[936]

263 Additionally, Sunland paid a deposit to DWF when it purchased Plot D5B.[937] Brown gave evidence in his witness statement of 6 August 2010[938], that he believed that the usual process to reserve a plot was to make some sort of down payment. He confirmed in cross-examination that that was his understanding.[939] With this knowledge, Brown admitted that Joyce had told him on 15 August 2007 that Reed had not paid a deposit on Plot D17, or words to that effect.[940]

264 Another difficulty for the case put forward by Sunland is that Brown thought that, whatever priority existed in respect of Plot D17, it rested with Och-Ziff, not Prudentia. He admitted as much during his cross-examination.[941] Brown wanted to remove Och-Ziff (and thereby Prudentia) from the picture if Sunland could not come to terms on a joint venture with Prudentia. As indicated previously, on the evidence, it appears doubtful that Sunland ever truly wanted to enter into a joint venture and that it did eventually reveal its hand as events unfolded, namely, that it wanted to pay to get Reed and Prudentia out of the way.[942]

265 In my view, the evidence does establish that, as submitted on behalf of Reed and the Prudentia parties and also on behalf of Joyce, both Brown and Abedian were, from the outset, prepared to act knowing that the so-called "control" of Plot D17 by Prudentia or Reed was limited by the absence of a SPA or payment of a deposit. Additionally, they knew that the plot had not been created. Even having regard to all these circumstances, Brown did not ask for and never saw a document or piece of paper relating to such "control", though there was apparently more than adequate opportunity to make inquiries in this respect, whether by way of a separate approach to DWF or as a matter which could have been raised in the course of meetings with

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936 Transcript, p 30.41 - .42; p 30.41.
937 Transcript, p 25.37.
938 Witness statement of David Scott Brown (6 August 2010), paragraph 22.
939 Transcript, p 28.15 - .16.
940 Transcript, p 32.10.
941 Transcript, p 60, p 61.15, p 65.25, p 67.36 and p 210.41; and see above, paragraphs 226 and following.
942 See, for example, above, paragraph 208.

senior officers of DWF who, on the evidence, it must be concluded, would have been in a position to respond to inquiries of this kind in an entirely comprehensive and complete way. Additionally, Brown and Abedian must have appreciated the lack of "control" because of the words used by Brown in his email to Reed of 12 September 2007 (the "put your foot on it" email) where he used the words "we immediately **put our foot on the plot** to secure it".[943] It was clear from the oral evidence of Brown and Abedian that they merely speculated as to the nature of any arrangement involving Prudentia or Reed with respect to Plot D17. They simply did not know "the precise terms" of the "control" of Prudentia or Reed.[944]

266 At no stage did the in-house lawyer for Sunland, its General Counsel in its Dubai branch, Clyde-Smith, describe Prudentia or Reed as having "control" of Plot D17. At no stage did she use words that could be considered consistent with this terminology. Indeed, the contrary was the position, as internal correspondence of Sunland indicates that Clyde-Smith referred to the fee paid as a "spotter's fee".[945] Elsewhere in the evidence led by Sunland, the terminology used to describe the "thing" (to use a neutral term) for which the fee was paid as "some limited right of negotiation"[946] in circumstances where the price of the land, Plot D17, had not been agreed. The effect of no agreement on price was, as Brown agreed in cross-examination, that there was no contract.[947] In this context, the concession that there was no contract can mean nothing else other than that there was no legal right or entitlement on the part of Prudentia or Reed to Plot D17. To add to the confusion, the fee was also referred to as an "introduction fee",[948] which simply serves to reinforce the views I have indicated and the strength of the submissions made on behalf of Reed and the Prudentia parties in this respect to which reference has been made.

267 I have found for the reasons set out previously, that Sunland was not misled or

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943 Court Book, SUN.001.006.0100; and, at to the "put your foot on it" email, see above, paragraph 128
944 Transcript, p 353.25 - .29.
945 Court Book, SUN.001.002.0227.
946 Transcript, p 73.36.
947 Transcript, p 91.30; p 268.38 - .48 to p 269.1 - .5.
948 Court Book, SUN.009.003.5874.

deceived into negotiating a fee with Prudentia or Reed by any misrepresentation by the defendants as to any "right" or "control" with respect to Plot D17. Nevertheless, as I have indicated, even if such a representation or representations were made out, I am of the view that Sunland did not rely on any representation. On this basis, I turn now to evidence in more detail which establishes, in my view, that Sunland decided to pay the fee to remove Reed and the Prudentia parties and to "do the deal" to purchase Plot D17 itself.[949] This evidence is further considered in the context of reliance issues. In this respect, Abedian said:[950]

> "There was also some risk that the control by Prudentia and Reed might be coming to an end. In any event, it appeared that Dubai Waterfront was pressing for a SPA."

The earlier evidence of Abedian serves to demonstrate the desire of Sunland to act quickly:[951]

> "However, we did not know the precise terms of that control by Prudentia and Reed."

There were two reasons why Sunland had acted precipitously to acquire Plot D17, both of which were unrelated to any representations from Reed, the Prudentia parties or Joyce (even assuming that there were any such representations):[952]

> "(a) D17 was important to Sunland because Sunland owned the adjoining plot D5B. Sunland had enhanced the design of D17. Sunland wanted the D17 plot and needed no encouragement to purchase it.[953] The speed with which Sunland acted to secure the plot for itself, after removing Reed, is best demonstrated by the internal emails of Clyde-Smith.[954]
>
> (b) The potential return for Sunland, upon removing Reed from the deal was enormous. Paying Reed to go away with a *spotter's fee* meant Sunland could attract a new joint venture partner who would pay a premium for the privilege of joining Sunland in a joint venture concerning D17."

268 In his "clear statement" of events which Brown prepared on 22 January 2009 for Mr

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949 See above, paragraphs 208, 242 and 259.
950 Witness statement of Soheil Abedian (6 August 2010), paragraph 86.
951 Witness statement of Soheil Abedian (6 August 2010), paragraph 84.
952 *Closing submissions of the First to Third Defendants* (31 January 2012), paragraph 6.2.13.
953 Transcript, p 86.1-.10; p 320.19 - .23.
954 Court Book, SUN.001.001.0248; Court Book, SUN.001.004.0029.

Khalifa Mohammad of the Dubai police, he wrote: "we understood from Nakheel that we had to have an arrangement with Angus Reed to be able to develop the Plot together."[955] It was submitted against Sunland that this "unremarkable" proposition constitutes a significant admission that Brown well understood what Joyce was referring to in their limited discussions. The passage in the "clear statement" is followed, significantly, by the sentence: "As we couldn't agree on a joint venture with Prudentia, we suggested to Angus Reed that we could pay them a fee and take over the negotiations on the plot with Nakheel".[956] It was clear to Brown that Joyce was concerned about clarity of negotiations given the involvement of both Prudentia and Sunland in developing the same block by way of a joint venture and Joyce's experience of dealing with Sunland in relation to the proposed Plot A10C joint venture. Joyce welcomed the idea of a proven developer like Sunland being involved in Plot D17, but wanted one established and agreed point of contact for any joint venture. As submitted against Sunland, this statement demonstrates, in my view, that Brown never thought that Joyce had instructed him that Nakheel would not deal with Sunland unless it paid some money to Reed.

269 It was submitted against Sunland that Abedian's evidence about the 16 August 2007 email from Joyce to Brown was to be described as "quite extraordinary".[957] In my view, this was an entirely appropriate observation. In cross-examination, Brown commented that Abedian was not a man who kept much paper around him, a comment which I accept does have a "ring of truth" about it.[958] As was clear from the documentary and oral evidence, Brown had a habit of forwarding emails to Abedian that he regarded as important.[959] As was submitted against Sunland, it is relevant and telling that Brown did not forward the 16 August 2007 email to Abedian. I accept that this was because the email was completely innocuous and

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955 Court Book, SUN.004.002.0037 (p 2) (emphasis added in *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 369.

956 Court Book, SUN.004.002.0036 (p 2); which is entirely consistent with the position that Sunland knew that Prudentia or Reed was no more than, possibly, a "preferred negotiator" for Plot D17; cf *Plaintiffs' Address* (1 February 2012), paragraph 44.

957 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 371.

958 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 372.

959 Transcript, p 388.15 - .17 and 31 - .32.

was not seen by Brown as of great importance at that time or subsequently. Brown did not even remember it in his early discussions with the Dubai Prosecutors. It was only after DLA Phillips Fox involvement through Eames that the email was noticed and both Brown and Abedian decided to give it a significance and meaning which, on the basis of the evidence, documentary and otherwise, of events in August and September 2007, it did not have and was never understood to have had. Additionally, Abedian admitted that no reference to this email was made in the course of preparing Brown's report to the Sunland Group Board, dated 1 February 2009, and he could not explain why, if it was so important to Sunland, it was not mentioned.[960]

270 Abedian was cross-examined in relation to the 16 August 2007 email. The nature and effect of his evidence was the subject of detailed submissions on behalf of the fourth defendant, as follows:[961]

> "374. In his cross-examination Abedian acknowledged (as he had to) that the email was never sent to his email address. Nevertheless, he was determined to give evidence that he had seen it and relied heavily upon it. To that end he fabricated a convoluted and fanciful story about a hard copy of the email he kept in his desk. This story fell apart as he was telling it.[962]
>
> 375. Brown himself had no recollection of showing the email to Abedian, much less printing off a copy and handing it over to Abedian at a meeting.[963]
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> 376. Similarly, in his witness statement Abedian had given no evidence of being provided with a hard copy of the email that was of such importance that he showed it around the office to his wife and kept in his top drawer thereafter. Nevertheless, this was the story Abedian told in the witness box.
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> 377. Abedian gave evidence that Brown brought in a hard copy of this email for him to see on either 16 or 17 August 2007. Abedian swore he kept this hard copy email in his drawer in his office in Dubai. He also swore that he showed this document to his wife on or around 16 August 2007. If this was not enough he then swore that he showed it to his external local lawyer in Dubai, Mr Bin Haider, after the Dubai authorities started investigating the matter in early 2009 and he also showed it to his internal lawyer, Georgia Carter, at a date that he could not recall. Finally, Abedian also swore that he showed this hard copy document to Joyce's wife, Angela, when she

960 Transcript, p 402.03 – p 403.41.
961 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraphs 374 to 380.
962 Transcript, p 387.43 onwards.
963 Transcript, p 260.12 - .17.

supposedly visited Sunland's office in or around late January 2009.[964]

> 378. Of course, no well-worn hard copy email was ever discovered by Sunland as being the email Abedian had carefully preserved for years in his top drawer. When questioned about this, Abedian swore that he disposed of the hard copy document when Sunland had an office move in Dubai. When asked, Abedian swore that this office move occurred at the end of 2007.[965] This was, of course, more than a year before the date he had just sworn he had shown the document to three other individuals.
>
> 379. Thus, Abedian invented the story of the hard copy email and unwittingly exposed it as a lie. If the matters in issue in this proceeding were not so serious, if Mr Abedian's position at Sunland (a listed public company) was not so senior and if the obligation to tell the truth under oath was other than fundamental, Abedian's evidence might be seen as farcical. However, for all these reasons these lies cannot be so easily dismissed. Further, they are but part of a dishonest scheme by Abedian and Brown to pervert the course of justice in two separate jurisdictions.
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> 380. Abedian eventually realised the mistake he had made and, as with other unhelpful evidence, (such as the meaning of 'house arrest') tried to backtrack and became more evasive and untruthful. This ultimately required the intervention of His Honour[966] to direct Abedian to answer a very simple question regarding the disposal of the hard copy of the 16 August email. Abedian ultimately claimed that he could not recall when he disposed of the email.[967]"

For the reasons indicated in the submissions, I accept that Abedian's evidence in relation to the 16 August 2007 email is quite implausible and ought not to be accepted. For the sake of clarity, it is noted that the reference to the meaning of "house arrest" was or is a reference to Abedian's evidence to the effect that a person whose passport was being held by the Dubai authorities was regarded as being under "house arrest" in Dubai, a situation which Brown found himself in for a period of some months subsequent to the events now being considered.[968] As to the other matters or assertions, these are matters for consideration in other contexts.[969]

271 On 15 August 2007 when Austin allegedly said to Brown that Reed had a "hold on the plot", Brown never asked what that meant.[970] It was submitted against Sunland that this could only be explained on the basis that Brown well understood from the

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964 Transcript, p 389-391.
965 Transcript, p 392.
966 Transcript, p 394.11.
967 Transcript, p 395.09.
968 See below, paragraphs 334 to 335.
969 See below, paragraphs 334 to 341.
970 Transcript, p 39.35.

outset that Reed had no rights over Plot D17. Brown's contacts with DWF from June to August 2007 were mainly with Lee, Brearley and Austin and not Joyce.[971] Brown took advice from Lee and Brearley about Plot D17[972] and the evidence indicated an established pattern, on the part of Sunland, of checking the legal position with Brearley.[973] According to Brown's, apparently very careful answer during cross-examination, when Clyde-Smith spoke to Brearley about Prudentia, all he said was that "we should be comfortable with Prudentia",[974] a comment which she passed on to Brown. As submitted against Sunland, this is quite different to the account contained in Brown's witness statement[975] in which asserted that Clyde-Smith confirmed Brearley had said Prudentia had "development rights" over Plot D17. Clearly, Brearley's statement or comment in relation to Prudentia did not amount to confirmation that Prudentia owned Plot D17 or had any rights to that plot, even assuming such a question had been asked. It does, however, appear far more likely that Brearley's comment or statement was a response to an inquiry about Prudentia as a possible joint venture party. None of the defendants are, of course, responsible for this comment or statement by Brearley, even assuming it were to be construed in a manner asserted by Brown. In any event, Brown did not ask Reed for any documents that showed that Reed had a right to Plot D17.[976] This is in marked contrast to the situation when Brown and Clyde-Smith were investigating the purchase of Plots A10C and A3B with DWF where they made numerous email enquiries of Stewien and Brearley to check who owned those plots and the nature of their interest.[977] For example, on 1 July 2007, Brown sent the following email to Lee (copied to Abedian, Clyde-Smith, Stewien and Brearley) regarding Plot A10C:[978]

> "We are looking forward to working with you also. In anticipation of moving forward on this site, we need to confirm the Site ownership status. We understand that Sheikh Salah Al-Bassam doesn't have a formal contract on the site yet, but is in the process of Transfer. We have asked for evidence of

971 Transcript, p 206.39.
972 Transcript, p 57.35 - .36.
973 Transcript, p 75.05 - .29; p 76.07 - .08.
974 Transcript, p 278.46 – 279.01.
975 Witness Statement of David Scott Brown (6 August 2010), paragraph 126.
976 Transcript, p 33.01; p 49.07.
977 Witness Statement of David Scott Brown (6 August 2010), paragraphs 65, 66, 68 and 69.
978 Court Book, SUN.003.004.0055; Transcript, p 76.10 - .27.

> legal ownership, but it would assist if your legal guys could tell us what we need to effect speedy transfer."

Similarly, on 17 July 2007, Brown was copied in on an email from Clyde-Smith to Stewien (which was addressed to Stewein and Brearley and copied to Lee), in which she wrote:[979]

> "We are being placed under considerable pressure from our Seller to complete the transfer as a matter of urgency, they have even suggested that this can occur today. We are happy to facilitate this but of course will be guided by you both as to when this will be achievable.
>
> As you know we have not yet been provided with any evidence of the Sellers right to sell, and we know that you are not yet in possession of the re-sale documents to Bassam for execution by DWF so it would not seem likely.
>
> Can you please advise a realistic timeframe in which you believe the transfer to Bassam will be complete (we appreciate this is difficult to do especially if you are still awaiting documents) and when you expect to provide us with re-sale documents for our review as this will give us a sense of timing in relation to making funds available."

272 It is a reasonable inference, and one which I draw in the context of this and other aspects of the evidence, that Brown and Clyde-Smith made no equivalent enquiries regarding Plot D17 either because they each knew that neither Prudentia nor Reed had any legal interest in Plot D17, or because it was not important to them whether Prudentia or Reed had any such right to Plot D17. In relation to the latter point, in his second witness statement,[980] Brown said that:

> "Had Reed said to me that he would not talk to me unless I promised not to attempt to buy D17 directly from Dubai Waterfront, I would not have agreed to that. Had Reed said that to me, it would have flagged to me that Prudentia were just looking for sites as Sunland was, and had no legal rights over D17. In that case, I would not have given up Sunland's ability to purchase D17 directly from Dubai Waterfront. In that case, I would still have been willing to talk to Reed about a JV on a non-exclusive basis, because you never really know what a prospective JV partner may be able to bring to the table" [emphasis added in Closing Submissions of the Fourth Defendant][981]

And also in the same witness statement, Brown said:[982]

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979 Court Book, SUN.003.004.0046.

980 Reply Witness Statement of David Scott Brown (27 June 2011), paragraph 5.

981 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 387.

982 Reply Witness Statement of David Scott Brown (27 June 2012), paragraph 26. These statements are inconsistent with paragraph 275 of Brown's first witness statement:

> "If I had known at the time that Prudentia did not in fact control the land but was merely a prospective purchaser who also had the ability to arrange funding for the project, then we would have explored a different JV model with them. The negotiations would have been very different …"

Alleged reliance on the representations after 12 September 2007

273 Sunland pleaded that after the 12 September 2007 phone call from Lee and Brearley, which led to the "put your foot on it" email, it continued negotiations with Reed for Sunland to purchase Plot D17 pending final joint venture terms.[983] Further, Sunland pleads that they did so in reliance on:

(a) the Representations; and

(b) the 12 September 2007 phone call to Brown from Lee and Brearley.[984]

In light of the evidence which has already been considered in detail, I accept the submissions against Sunland that the assertion of Brown and Abedian that after the 12 September 2007 email, Brown or Abedian still thought that Prudentia or Reed controlled Plot D17 cannot be sustained. It is not credible in all the circumstances discussed against the plain English, Brown's own words, in the email of that date to Reed. In view of the importance of events on and after 12 September 2007 and the "put your foot on it" email, it is helpful to make some further, detailed reference to those events, more specifically in the context of reliance issues.[985]

274 As discussed previously, on 12 September 2007, Brown spoke to Lee and Brearley, two senior executives of DWF, who would have known the legal status or ownership of Plot D17, who told Brown that they had been at a marketing meeting and were

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> "If I had been told (or believed) that Prudentia (or its subsidiaries) did not have control and rights over Plot D17, I would not have negotiated with Reed (and SWB would not have entered into the agreements with Prudentia and Hanley) but would have negotiated directly with Dubai Waterfront".

983 Second Further Amended Statement of Claim, paragraph 25.

984 Second Further Amended Statement of Claim, paragraph 24.

985 A number of matters were relied upon by Sunland in the context of reliance issues which, in my view, also go to the nature and extent of the Representations. These matters are the point in relation to the second dot point in the "put your foot on it" email which made reference to "terms and conditions you have already agreed", the 13 September 2007 email from Brown to Reed, the further "Implementation Agreement" or MOU sent by Freehills on 13 September 2007 and the threat of "Russians" as potential buyers on 29 August 2007 (see *Plaintiffs' Address*, paragraphs 201 to 207). The issues raised in this context by Sunland have already been relevantly considered (see above paragraphs 111 and following and 122 and following.

"now concerned that marketing people are likely to try to sell the Plot, and they would have no control over this".[986] In view of this, Lee and Brearley suggested to Brown that Sunland and Prudentia should immediately "put their foot on the Plot" to secure it.[987] Brown understood that to secure the plot, Sunland and Prudentia needed to sign a SPA.[988]

275 It must follow that if Brown believed that Reed or Prudentia had a legal interest in Plot D17 (or for that matter any other "right" or "control" with respect to that land), this advice from Lee and Brearley would, having regard to their positions in DWF, have come as a complete surprise. In my view, it is clear that any fair reading of Brown's email, which recorded Lee and Brearley's words, is that Plot D17 was "up for grabs" and available to be sold by the "marketing people" of DWF to any willing purchaser. Brown did accept in cross-examination that a "general explanation" of having to put your foot on the plot would be that your foot was not yet on the plot.[989] It would then follow that Brown would have been asking some very serious and pressing questions of Brearley, Lee and Reed about how such a sale could possibly occur if Reed or Prudentia had "control" or "rights" in respect of Plot D17 if he really believed that Reed or Prudentia (or, possibly more accurately, Och-Ziff) had any such "right" or "control". Brown did no such thing and responded, in cross-examination, that "I can't recall why I didn't ask that" when this was put to him.[990] Instead of asking questions and making enquiries as one might have expected had Brown held the belief he claimed, he quickly prepared a draft email to Reed, for approval by Clyde-Smith, which recounted the conversation and referred to the advice that "we immediately 'put our foot on the Plot' to secure it".[991] Clyde-Smith clearly regarded this draft email as appropriate, as it was, after being sent to her for approval, sent unaltered by Brown to Reed, copied to Abedian.[992] Neither

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986 See above, paragraphs 126 and following.
987 Brown understood the reference to "we" to be to Sunland and Prudentia (see Transcript, p 190.29 - .31).
988 Transcript, p 191.10 - .13.
989 Transcript, p 191.21.
990 Transcript, p 193.05 - .06.
991 Court Book, SUN.001.001.0137.
992 Court Book, SUN.009.003.5707.

she nor Abedian apparently raised any issue or surprise about it the need to "put our foot on the Plot to secure it". Neither Brown nor Abedian could give any credible explanation as to why they did not raise any concern at this time about the message from Nakheel through DWF that neither Reed nor Prudentia had any "control" or "right" in respect of Plot D17.[993] In my opinion, the only rational and reasonable explanation for this failure to act or inquire is that Brown and Abedian well understood that neither Prudentia, nor Reed, had secured Plot D17 in any enforceable sense and, consequently, did not therefore control it; and nor did they enjoy an "right" with respect to the land on any other basis. In any event, it must also follow that, had they been labouring under any misapprehension in this respect, that this apprehension was clearly and decisively dispelled by this conversation with Lee and Brearley, as evidence by Brown's "put your foot on it" email.

276 Having regard to these and other circumstances with respect to the conversation between Brown and Lee and Brearley on 12 September 2007 and the "put your foot on it" email, I do not accept the argument put by Sunland that a "… compelling reason why Brown did not question the nature of the agreement which he believed gave Reed or Prudentia a "hold" on or "control" over the plot was that he believed that Sunland was dealing with government officials and did not question the veracity of what he was being told".[994] In fact the "put your foot on it email" indicates very clearly that these very government officials were telling Brown that the position was entirely different from that which he said he believed. While the expert evidence of Mr Keighran, an Australian property lawyer who practised in Dubai as a property specialist for five years, which was relied upon by Sunland (and not challenged), is that in the absence of a property register, a party in Sunland's position must rely on the statements from relevant government officials,[995] there is no evidence that Sunland could not have made reasonable enquiries of those officials – a step which it did not take.[996] In any event the "relevant government officials" had

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993 Transcript, p 57.03 - 59.13.
994 *Plaintiffs' Address* (1 February 2012), paragraph 208.
995 See *Plaintiffs' Address* (1 February 2012), paragraphs 208 to 212.
996 See, above, paragraphs 148, 149, 272, 275.

made the position very clear adversely to Sunland's claimed belief – as recorded in the "put your foot on it" email.

277 Brown's attempts to explain away the plain words of his "put your foot on it" email were, in my view, contrived to say the least. This is well illustrated by his evidence in response to some queries I raised in the course of his cross-examination, quoted above.[997]

278 There is, as submitted against Sunland, a further, simple, logical inconsistency in Brown and Abedian's "tortured" attempts to explain away the significance of the "put your foot on it" email. Brown's evidence was that Lee and Brearley told him that the risk was that the "marketing people" might try to sell Plot D17 to some other party, a contingency over which Lee and Brearley had no control.[998] Brown's email to Reed records that this risk had arisen because plans for the rearrangement of Plot D17 had been "shown and discussed" at a marketing meeting attended by Lee and Brearley. If, in fact, Reed or Prudentia had some right to Plot D17, then one would naturally have expected that Lee and Brearley would have simply told those who were present at the "marketing meeting" that that was the case and consequently, that the "marketing people" could not sell Plot D17. If that were so, then nobody would have expected that there would be any likelihood of the "marketing people" trying to sell Plot D17 to some other party on behalf of Nakheel. Only if Reed or Prudentia did not have any "right" or "control" with respect to Plot D17 does it make any sense that this risk had arisen as a result of what was happening at the "marketing meeting".

279 It was also submitted against Sunland that Abedian's attempts to explain away the "put your foot on it" email were "even more fanciful than the account given by Brown".[999] On Abedian's version of events, which now included for the first time

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997 Transcript, p 192.01 - .33; see above, paragraph 138.

998 Transcript, p 190.08 - .22.

999 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 351; noting that as I stated in the course of Abedian's cross- examination regarding this email:

> "HIS HONOUR: We are looking at the English, the words and the grammatical construction. That is the proposition that is being put to you? – I'm sorry. In fairness to

the notion that a reservation agreement was due to expire and, having conceded that the "we" in the email meant Sunland and Prudentia, he still accepted that immediate steps had to be taken to secure Plot D17. As noted previously, Brown's evidence was that he had not even heard of a reservation agreement at the relevant time.[1000] It is fair to say, as was put against Sunland, that Abedian's evidence in this respect made little sense. My attempts to clarify his evidence and make sense of it, quoted above, yielded little fruit.[1001] In relation to the reference to "the 5%" in the evidence of Abedian, it should be noted that Brown's evidence of his conversation with Lee and Brearley was that they had told him that immediate steps needed to be taken to secure the plot and not, for example, that some present form of security over the plot was due to expire.[1002]

280 The other matter that Brown learned from Lee and Brearley on 12 September 2007 was that the price that DWF would be asking for Plot D17 would be AED 120 per sq ft[1003] and not AED 135 per sq ft, as had previously been indicated to him by Reed.[1004] As the evidence indicates, because no price had been agreed between Prudentia or Reed and DWF, Sunland must have known that there could be no binding contract or right over Plot D17 in favour of Reed or Prudentia.[1005] Brown's evidence in cross-examination, quoted above, is illustrative of this.[1006]

281 On 17 September 2007, Brown sent an email to Mr Jason Mahoney, an employee of Sunland, in which he attached a feasibility study for Plot D17 based on Sunland buying the site itself and "paying Reed a [sic] Introduction Fee of AED44m, and they walk away".[1007] It was submitted against Sunland that Brown had implausibly, and dishonestly, tried to assert in cross-examination that an Introduction Fee was

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you, I must say that I have difficulty in reconciling your answers with the plain English words that appear on the screen."(Transcript, p 454.13 - .17)

1000 Transcript, p 205.24 - .25.

1001 Transcript, p 457.33 - .43; see above, paragraph 157.

1002 Cf Witness statement of David Scott Brown (6 August 2010), paragraph 185.

1003 Transcript, p 65.23 - .25.

1004 Transcript, p 67.24 - .28.

1005 Transcript p 91.31 and p 268.08– 269.08.

1006 Transcript, p 268.45 - 269.19; .see above, paragraph 158.

1007 Court Book, SUN.009.007.4958.

consistent with Reed or Prudentia having rights over Plot D17,[1008] but, later, when discussing introductions to opportunities, had no trouble understanding the true nature of an introduction fee in that context.[1009] When the investigations by the Dubai authorities commenced in late 2008, Brown's initial description of the fee was much the same. In his first meeting with Mr Mustafa, Brown stated that Sunland paid "Reed's company a fee so he would 'go away'" and that "it was like a premium to remove them from the deal".[1010] Brown also referred in the 22 January 2009 letter to the transfer of a "right to negotiate …", which he admitted during cross-examination may mean that no legal right to land existed.[1011]

282 Sunland sought to rely upon the use of the word "premium" in various communications between Reed and Clyde & Co (Dubai legal advisers to Prudentia in 2007) in the context of a potential "on-sale" and then to draw the implication that this is the sense in which Reed used the word "premium" in email correspondence with Brown – though the emails referred to are all from Brown, rather than to Brown.[1012] Reliance was also placed on the manner in which Reed and Prudentia were also said to have used the word "premium" to describe the Sunland payment in various emails with Prudentia personnel and its Melbourne solicitors, and in drafts of the Implementation Agreement or MOU.[1013] In my view, these submissions and the documents referred to do not advance Sunland's case. Regardless of whether Reed or Prudentia hoped to purchase Plot D17 from DWF, sign a SPA, and on-sell it at a "premium" to Sunland[1014] in the manner apparently common in Dubai, this did not occur. An important question is whether, if the word "premium" was used in communications with Sunland, how it was understood by the recipient. Brown has answered this question consistently with my view of Sunland's understanding of the position – which is that it was under no illusions that the

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1008 Transcript, p 52.16; p 220.17 - .24.
1009 Transcript, p 220.02 -.05.
1010 Court Book, SUN.004.001.0314, dots points 10 and 12.
1011 Transcript, p 218.17 - .18.
1012 See *Plaintiffs' Address* (1 February 2012), paragraphs 60 and 61.
1013 See *Plaintiffs' Address* (1 February 2012), paragraph 61.
1014 And as to this possibility (which did not materialise) see *Plaintiffs' Address* (1 February 2012), paragraphs 103 to 107 (and the documents to which reference is made).

Prudentia parties had any interest in Plot D17, proprietary or contractual or other relevant "right". In all the circumstances, it would also be implausible, in my view, to think that Sunland would have thought the use of the word "premium" in the drafts and final form of the Implementation Agreement or MOU indicated a contrary position. It knew the position and, in any event, the provisions in these drafts indicate, clearly in my view, that the fee to be paid under the Implementation Agreement or MOU was for a "right" to negotiate only. This "right was clearly accepted by the parties as a rather nebulous concept, based on no legal entitlement. As discussed, it was, in reality, a payment to the Prudentia parties to "go away".[1015]

283 In his "Detailed Report" to the Sunland Group Board, dated 1 February 2009,[1016] Brown stated that there were three key stumbling blocks in negotiations with Reed, referring, in particular, to Reed's position that he wanted about AUD$65m for a Consultancy Fee "presumably for his introduction and the good price and payment terms". As submitted against Sunland, these words were not included in Brown's witness statement,[1017] which appears to borrow from this document. Nowhere in the Board Report did Brown refer to Reed or Prudentia as having any legal entitlement to Plot D17.

284 On 19 September 2007, Clyde-Smith sent an email to Sunland's external lawyer, Lunjevich in which she said:[1018]

> "I also want to check that it is okay for you to hold the 'spotter's fee' premium whatever you want to call in for the guys that introduced this deal, I sent you MOU but I've not yet really spoken to you, things just way too out of hand at present."

Clyde-Smith was not called to explain this email, and, in my view, on the basis of the rule in *Jones v Dunkel*,[1019] bearing in mind this is an issue going to Sunland's case,[1020] it can be inferred that her answer would not have assisted Sunland.[1021] It can also be

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1015 See, above, paragraphs 208, 213 and 259; and below paragraph 301.
1016 Court Book, SUN.004.002.0064; Transcript, p 222.07 - .45.
1017 Witness Statement of David Scott Brown (6 August 2010), paragraph 146.
1018 Court Book, SUN.001.002.0227.
1019 (1959) 101 CLR 298.
1020 Cf the position discussed below, paragraphs 342 - 349.
1021 See below, paragraphs 342 - 349.

assumed, in my view, that the description of the fee was something she would have discussed with Brown or Abedian, or both of them. Brown agreed in cross-examination that a "spotter's fee" usually means that the person receiving the fee does not have any legal right[1022] to the thing "spotted" which, in this context, is Plot D17.

Alleged reliance on the Representations on 18 September 2007

285 Sunland pleads that it made an agreement with DWF for additional BUA on 18 September 2007 and did so in reliance upon:[1023]

(a) the Representations;

(b) a phone call from Brown to Reed on 16 September 2007[1024] during which:

(1) Brown is alleged to have said to Reed words to the effect that 'due to our inability to agree terms and the fact that DWF wants an agreement signed, Sunland offers to purchase Prudentia's rights to Plot D17 for a flat fee of AED 20 million'; [1025] and

(2) Reed is alleged to have responded to Brown with words to the effect that 'I will talk to Nakheel and attempt to negotiate the land price down from AED 135 per sq ft, and if I can, any benefit will be a "land uplift fee" that must be paid to Prudentia in addition to the AED 20 million flat fee';[1026] and

(c) a phone call from Reed to Brown on or about 17 September 2007 during which Reed is alleged to have said words to the effect that 'I succeeded in negotiating a reduction of 15 dirhams per square foot in the price for Plot D17'.[1027]

In my view, the evidence simply does not support a proposition that Sunland and

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1022 Transcript, p 49.35 - .39.
1023 Second Further Amended Statement of Claim, paragraph 29.
1024 Second Further Amended Statement of Claim, paragraph 27.
1025 Second Further Amended Statement of Claim, paragraph 27.1.
1026 Second Further Amended Statement of Claim, paragraph 27.2.
1027 Second Further Amended Statement of Claim, paragraph 28.

Prudentia were unable to agree on terms as of 16 September 2007 for the reasons already discussed.[1028] Quite simply, the offer of AED 20 million was not made because of a breakdown in negotiations between joint venture partners.

Alleged reliance on Representations and the Hanley Representations

286 Sunland pleads that in reliance on:[1029]

(a) the Representations;

(b) a phone call from Brown to Reed on 16 September 2007;[1030]

(c) a phone call from Reed to Brown on or about 17 September 2007;[1031] and

(d) the agreement with DWF for the additional BUA made on 18 September 2007,[1032]

they took the following steps:

(e) SWB executed an agreement with Prudentia ('the Prudentia Agreement') on 19 September 2007;[1033]

(f) Sunland and SWB negotiated with DWF the remaining terms on which Plot D17 would be purchased;[1034] and

(g) Sunland made arrangements for the payment to Prudentia of approximately AED 44 million.[1035]

287 Nevertheless, Sunland pleads, subsequently,[1036] that, but for the Representations and the Hanley Representations, they would have undertaken these (and other, later) steps. For the reasons indicated previously in the course of considering the evidence in relation to the Plot D17 transaction, I am of the view that to the extent that Sunland claims that these steps were taken in reliance on both the Representations

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1028 See above, paragraphs 172 to 181.
1029 Second Further Amended Statement of Claim, paragraph 30.
1030 Second Further Amended Statement of Claim, paragraph 27.
1031 Second Further Amended Statement of Claim, paragraph 28.
1032 Second Further Amended Statement of Claim, paragraph 29.
1033 Second Further Amended Statement of Claim, paragraph 30.1.
1034 Second Further Amended Statement of Claim, paragraph 30.2.
1035 Second Further Amended Statement of Claim, paragraph 30.3.
1036 Second Further Amended Statement of Claim, paragraph 36.

and the Hanley Representations, the claim cannot be made out according to the pleaded chronology to the extent that the steps were undertaken prior to the introduction of Hanley to the transaction on 26 September 2007.

Reliance on Representations from 26 September 2007 and in relation to the Implementation Agreement or MOU

288 Sunland pleads that on 26 September 2007, SWB:

(a) executed an agreement with Hanley;[1037]

(b) consented to the discharge of the Prudentia agreement, by the signing of the Hanley agreement on 26 September 2007;[1038]

(c) by Brown, emailed the signed Hanley agreement to Reed and Sinn;[1039] and

(d) executed a SPA with DWF for purchase of Plot D17 for AED 120 sq/ft.[1040]

Sunland pleads that it did so in reliance on:[1041]

> "(a) the Representations;
>
> (b) the phone call from Brown to Reed on 16 September 2007 (pleaded in paragraph 27 of the SFASC) during which *Sunland offers to purchase Prudentia's rights to Plot D17 for a flat fee of AED 20 million* [1042];
>
> (c) the phone call from Reed to Brown on or about 17 September 2007 (pleaded in paragraph 28 of the SFASC) during which Reed allegedly says *I succeeded in negotiating a reduction of 15 dirhams per square foot in the price for Plot D17* [1043];
>
> (d) the making of the agreement on 18 September 2007 with Dubai Waterfront for additional BUA [1044];
>
> (e) the execution of the agreement with Prudentia on 19 September 2007;
>
> (f) the continuing negotiations with Dubai Waterfront for the purchase of D17;
>
> (g) the arrangements by Sunland for payment to Prudentia of

1037 Second Further Amended Statement of Claim, paragraph 33.1.1.
1038 Second Further Amended Statement of Claim, paragraph 33.1.2.
1039 Second Further Amended Statement of Claim, paragraph 33.1.3.
1040 Second Further Amended Statement of Claim, paragraph 33.1.4.
1041 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 6.6.2 .
1042 Second Further Amended Statement of Claim, paragraph 27.1.
1043 Second Further Amended Statement of Claim, paragraph 28.
1044 Second Further Amended Statement of Claim, paragraph 29.

approximately AED 44 million;

(h) the email from Sinn to Brown on 26 September 2007 advising of Prudentia's intention to incorporate a Singapore entity [1045]; and

(i) the draft Hanley agreement [1046].

However, the Sunland parties plead subsequently [1047] that, but for the Representations and the Hanley Representations:[1048]

(a) SWB would not have executed an agreement with Prudentia on 19 September 2007;

(b) Sunland and SWB would not have negotiated with Dubai Waterfront the *remaining terms […] on which Plot D17 would be purchased*;

(c) Sunland would not have made arrangements for the payment to Prudentia of approximately AED 44 million;

(d) SWB would not have signed the agreement with Hanley on 26 September 2007 and thereby consented to the discharge of the agreement with Prudentia;

(e) Brown would not have emailed the signed Hanley agreement to Reed on 26 September 2007;

(f) SWB would not have signed the SPA with Dubai Waterfront for the purchase of D17; and

(g) Sunland and SWB would not have authorised the release on 1 October 2007 of the cheque for the Consultancy Fee."

Again, for the reasons already indicated, I accept that to the extent that Sunland claims that these steps were taken in reliance on both the Representations and the Hanley Representations, the claim cannot be made out to the extent that the steps were undertaken prior to the introduction of Hanley to the transaction on 26 September 2007. I turn now to the details of the Prudentia Agreement, ultimately the agreement with Hanley, and to events leading to it in terms of the development of the Implementation Agreement or MOU.

289 The first draft of the Implementation Agreement or MOU provided by Freehills on behalf of the Prudentia parties to Sunland contemplated a joint venture between the

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1045 Second Further Amended Statement of Claim, paragraph 32.1.
1046 Second Further Amended Statement of Claim, paragraph 32.2.
1047 Second Further Amended Statement of Claim, paragraph 36.
1048 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 6.6.3.

parties. The first draft of this agreement was forwarded by Freehills to Sunland on 23 August 2007.[1049] Clause 7 of the draft provided for the "Payment of Consultancy Fee" in the following terms:

> "In consideration of Prudentia *permitting Sunland to negotiate* with the Seller [DWF] for the acquisition of the Property [D17], 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 [D17] with the Seller [DWF] (Acquisition Agreement) and the Parties have not entered into the Formal Agreement, Sunland must, at the election of Prudentia, … pay to Prudentia the sum of AED64,282,080 … as a consultancy fee for services provided by Prudentia to Sunland in introducing Sunland to the Seller [DWF] and assisting in negotiations between the Seller [DWF] and Sunland." [Emphasis added]

This clause did not change in any significant way, despite various amendments made by both Brown and Clyde-Smith.[1050]

290 Subsequently, a different form of agreement was prepared by Freehills, simply entitled "Agreement"[1051] when, by 17 September 2007, it had been decided that Sunland and Prudentia would not enter into a joint venture agreement, but that Sunland would simply purchase Plot D17 from DWF and pay Prudentia a consultancy fee. Clause 2 of this different form of agreement was cast in the following terms:

> "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 the Property with the Master Developer." [Emphasis added]

Ultimately, the agreement with Hanley was in the same form as this document, save for the replacement of Prudentia with Hanley as the contracting party.[1052]

291 Sunland sought to place great significance on the background provisions or recitals to this different form of agreement and corresponding preceding provisions in the

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1049 Court Book, SUN.001.001.0011 and Court Book, SUN.001.001.0012.

1050 Court Book, SUN.001.001.0031, SUN.001.001.0033 at .0041; SUN.001.001.0075, SUN.001.001.0076 at .0084; SUN.001.001.0094, SUN.001.001.0096; SUN.001.001.0115, SUN.001.001.0116; SUN.001.001.0204, SUN.001.001.0208.

1051 Court Book, SUN.001.002.0212.

1052 Court Book, SUN.001.003.0024; as to the use of the terms "Consultancy Fee" and "Premium" in the preceding agreement with Prudentia paragraphs 201 and following.

drafts of the Implementation Agreement or MOU provided on and from 23 August 2007 on behalf of the Prudentia parties. The provisions to which reference was made were those contained in paragraph 1 of the "Background" that: "Prudentia has reached agreement with the Seller to acquire and develop the Property". Sunland submitted that this provision as it appeared in the agreement executed by Prudentia and the preceding drafts of that agreement amounted to a representation on the part of the Prudentia parties that Prudentia had some right or entitlement to Plot D17.

292 In my opinion, for reasons already indicated, it would be wholly artificial to view these provisions and the recitals to the Implementation Agreement or MOU and various drafts as amounting to a representation, or a critical representation as submitted by Sunland.[1053] As indicated previously, these documents were provided in the context of a range of other communications, written and oral, between the various parties, as have now been considered in detail. Viewed in this context, I am of the opinion that Sunland could not treat these recital provisions as anything in the nature of a representation or a relevant representation for a variety of reasons. First, to do so would reflect a position which was, in my view, on the basis of the evidence already considered, at odds with their real understanding of the position with respect to any "control" or "right" that Reed or Prudentia might have had in respect of Plot D17. Secondly, the recitals, which must be viewed in the context of the operative parts of the Agreement, are not consistent with those operative parts, which clearly state that the "thing" being transferred to Sunland is merely a "right to negotiate". Thirdly, as indicated previously, any misapprehension which Sunland might have had in relation to any "control" or "right" with respect to Plot D17 must have been dispelled by Brown's conversation with Lee and Brearley of DWF on 12 September 2007, which led to the "put your foot on it" email.[1054] Finally, the substitution of Hanley for Prudentia in the Implementation Agreement must, in my view, absolutely dispel any suggestion that Sunland had any illusion that Reed or Prudentia had any "control" of or "right" with respect to Plot D17. It is to this

1053 See above, paragraphs 99 and following.
1054 See above, paragraphs 126 and following.

matter that I now turn in more detail.

293 Brown, in his first witness statement, referred to an email he received from Sinn on 26 September 2007 regarding Hanley, part of which is as follows:[1055]

> "For structuring purposes, Prudentia has decided to incorporate a new entity in Singapore as part of expanding its business 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 client 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."

294 The agreement with Hanley was in the same form as the signed agreement with Prudentia, save for the replacement of Prudentia with Hanley as the contracting party.[1056] The late introduction of Hanley and the failure of anyone at Sunland to raise any concern about this change in the contracting party is, as I have indicated, completely inconsistent with Sunland believing that Prudentia (or Reed) had any legally enforceable rights to Plot D17 (or, for that matter, any "right" or "control" with respect to that land). If Sunland had thought that Prudentia (or Reed) had any such rights, very different contractual documents would have been prepared, addressing that issue, and with Prudentia (and possibly Reed) as a necessary party (or parties) to convey its (or his or their) contractual, proprietary or other rights to Hanley so that they could, in turn, be dealt with by Hanley by way of transfer to Sunland. In other words, if any of Brown, Abedian or Clyde-Smith had believed that Prudentia (or Reed) had any right with respect to Plot D17, then one would also have expected them to have satisfied themselves that that the "right" or "rights" had been vested in Hanley at the time the agreement was entered into with Hanley. However, neither Brown nor Abedian gave any evidence that, or to the effect, that they did any such thing. [1057] There are no contemporaneous documents that show that either

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1055 Witness statement of David Scott Brown (6 August 2010), paragraph 255; the full email to be found in Court Book, SUN.001.006.0257.

1056 Court Book, SUN.001.003.0024.

1057 Witness Statement of Soheil Abedian (6 August 2010), paragraph 109.

Brown or Abedian, or Clyde-Smith, made any enquiries to ensure that Hanley held any "right" which Brown and Abedian claim they thought Prudentia (or Reed) had with respect to Plot D17. Brown could not even recall the details of any conversation with Abedian or Clyde-Smith about the substitution of Hanley.[1058] I accept that it follows that the reason why the substitution of Hanley did not trouble Sunland was because the fee was in fact paid in return for the Reed and the Prudentia parties walking away from Plot D17 and not for the purchase of any legally enforceable right, proprietary or contractual, or any other "right" In my view the steps that were taken (or, rather, not taken) in relation to the substitution of Hanley make this position absolutely clear.

Administration Fee for Land Transfer

295 It was submitted against Sunland that it had relied, opportunistically, on a passage in the evidence given by Abedian in the course of his cross-examination. This was his evidence about a line entry for AED5,000 "Administration Fee for Land Transfer" which appears in some of the feasibilities in relation to Plot D17 which were prepared by Brown. In cross-examination, Abedian said:[1059]

> "MR COLLINSON: What I want to suggest to you is that this document is inconsistent with your evidence because it shows that on the day after the offer was made, Mr Brown has prepared an analysis of the feasibility of the project on an assumption that Sunland purchases the property at 120 dirhams per square foot?---That's not correct because if you look at it, there's a number of feasibility, version number 11, number 12, number 13, number 14, which go through different assumptions. Interesting, and I thank you for that, because when you look at it, administration fee of the land transfer is 5000, which means somebody owned it before and we paid 5000, otherwise is zero.
>
> I put it to you that that document gives the lie to your suggestion that the offer of 20 million dirhams was not on the assumption of a purchase price of 120 dirhams per square foot?---It says, 'Land premium'. Yes, 'Land premium 20 million'?---Exactly, land premium, it means somebody owned it before and that is the transfer fee of 5000, exactly our point, that they had a control.
>
> I think I'm putting to you a different point?---But it is there."

1058 Witness Statement of David Scott Brown (6 August 2010), paragraph 258.

1059 Transcript, p 493.10 - .27.

In re-examination on this point, Abedian said:[1060]

> "MR THOMPSON: Yes?---May I give some explanation about that feasibility?
>
> Yes, Mr Abedian?---When you look at the top area of that feasibility, is three lines: the price for the land, next is the premium, and then it is the transfer fee. In Dubai, when you buy a property directly from the government, it does not attract any transfer fee because you are the first person who is buying it. On 17 September, just two days before we finalised the documentation, Mr Brown and myself still believed that the ownership of the property, based on the document that they have the control on, belonged to Prudentia and that is why it was called Premium of 20 million, transfer fee of 5000. That is the proof alone, that is what we believed and what is we believe today."

296 In my opinion, the true nature of this transfer fee is as set out in the following submissions on behalf of Joyce, and on the bases indicated in those submissions:[1061]

> "As the above passages demonstrate, Abedian seized on the line entry for the transfer fee in an attempt to support his position that he believed that Prudentia had the control of D17 or that the plot 'belonged to Prudentia'. This untruthfulness of this evidence by Abedian is quite simply demonstrated.
>
> In the first feasibility, the line entry appears as: [1062]

Administration Fee for Land Transfer	208,916,760 AED	0.00%	**5,000 AED**

> In the second feasibility, the line entry appears as:[1063]

Administration Fee for Land Transfer	216,952,020 AED	0.00%	**5,000 AED**

> In paragraph 38 of his witness statement, Sunland's own expert, Mr Keighran, states that a master developer (such as DWF) would usually charge a transfer fee to an incoming purchaser which, in his experience, was generally about 2% of the total purchase price. The above entries clearly show a flat fee and not a percentage fee.
>
> The true nature of the AED 5,000 transfer fee is set out in Brown's email of 12 September 2007, the relevant paragraphs of which are set out below.[1064] The underlining has been added:

1060 Transcript, p 548.11 - .21.

1061 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraphs 397 - 402.

1062 Court Book, SUN.002.009.0071 (Revision 10, 13 September 2007).

1063 Court Book, SUN.009.007.4960 (Revision 11, 17 September 2007).

1064 Court Book, SUN.001.006.0100.

'* 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.'

Accordingly, Abedian misrepresented this transfer fee as a fee that would be payable on the transfer of D17 from Prudentia to Sunland as opposed to the true position – which was that it was a nominal fee payable to transfer D17 from 'Sunland JV Development (BVI) Ltd' to 'Newco' as set out in Brown's email of 12 September 2007."

General position of Sunland

297 Concluding its submissions on reliance issues, Sunland sought to rely on *Gould v Vaggelas*[1065] in support of, what amounts to, a general proposition that there must have been a misrepresentation relied upon, otherwise why would Sunland have paid the fee? More particularly, Sunland submitted:[1066]

"215. Why did Sunland agree to pay Prudentia $13.5 million, and what was it getting for that amount? What type of rights in relation to a $59 million purchase would be worth $13.5 million, i.e. nearly 23% of the purchase price? If Prudentia was merely a competing negotiator, why wouldn't Sunland have at least attempted to negotiate directly with DWF, from whom it had previously purchased plot D5B. There is no evidence that Sunland ever negotiated with or ever contemplated direct negotiations with Dubai Waterfront to buy the Plot. As experienced developers and having negotiated for many development sites previously they would have certainly commenced negotiations with Dubai Waterfront directly if they believed it was possible to do so. The fact that Sunland did not do this is only consistent with a continuing belief that Reed or Prudentia had some right or control over the land.

216. Or putting the question the other way, if the representations were made to the plaintiffs, but they did not rely on them in dealing with the Prudentia parties, what *did* the plaintiffs rely on? There is no evidence that they relied on anything else.

217. Mr Collinson SC suggested to Mr Brown that the payment was purely for an introduction (in the strict sense) – unsurprisingly Brown rejected the suggestion.[1067] Why would Sunland pay $13.5 million merely for an introduction to a property that it already knew about?

1065 (1985) 157 CLR 215.

1066 *Plaintiffs' Address* (1 February 2012), paragraphs 215 to 221.

1067 Transcript, p 222.45. Also Transcript, p 245.37 'That they had control of that plot, yes, because we were told that by Nakheel. Otherwise, we would have dealt directly with Nakheel on the land.'

218. The Dubai investigators had no difficulty in reaching the obvious conclusion: '*The Financial Audit Department thinks that the consultancy fees required to be paid by Sunland are exaggerated, as they amounted to 44,105,780 dirhams, equal to 22.9% of the plot price, confirming that such amounts were paid to acquire the plot*'.[1068] They do not think that Sunland paid $13.5 million for meetings or advice or an introduction. They understand that such a substantial premium (on percentage terms) would only be paid by someone who believed that were paying it in order to acquire a right to the land.

219. In answer to a question from your Honour as to the explanation for Prudentia's control, Mr Brown stated that '*Austin started by telling us they had a hold; Joyce told us he was the contact for that plot; later said [sic] 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*.'[1069]

220. Brown's evidence was that although he did not know whether the Prudentia parties' hold on the plot was contractual, the context was the conduct of real estate transactions in Dubai[1070] and at that '*we knew at that time that there was all sorts of ways of putting holds on plots in Dubai, because we had come across some of them in negotiating other potential properties' including letters between parties that were not formal contracts*.[1071] Although Mr Brown said in his first statement (para 22) that he had not heard of reservation agreements at the relevant time, in cross-examination he was shown an email that showed he may well have been aware that a reservation agreement was another way of putting a hold on a plot.[1072]

221. Reference should also be made to the internal Dubai Waterfront email from Marcus Lee to Joyce dated 20 August 2007 and disclosed by Joyce (MJJ.008.001.0066, [Tab 30]), which refers to Brearley and Lee telephoning Brown and putting '*pressure*' on Brown, and recording that Brown told them that Sunland *'would sign right away if they could get in there now independently*'. This is important contemporaneous evidence that Brown and Abedian believed and relied on the representations that they had to reach an agreement with Reed, and that but for those representations, Sunland would have sought to sign an agreement to purchase D17 directly from Dubai Waterfront, i.e. Sunland would 'get in there now independently'."

This issue has been referred to as the 'rhetorical' question.[1073] In closing submissions, Sunland submitted:[1074]

> "… commercially why would - well there would be no sensible reason for Sunland to contemplate paying such a fee unless at the time Mr Brown believed that Reed or Prudentia did have some right to the plot "

1068 Financial Audit Department Report dated 1 April 2009, Court Book, SUN.002.003.0133.
1069 Transcript, p 192.15 - .20.
1070 Transcript, p 192.26 - .28.
1071 Transcript, p 196.45 197.02.
1072 Transcript, p 277.29 - 278.24.
1073 See *Plaintiffs' Address* (1 February 2012), paragraphs 102, 215 and 216.
1074 Transcript, p 977.19 - .23.

298 It was submitted against Sunland that the commercial reason for the fee was obvious from the evidence, namely that Sunland believed that DWF was likely to prefer Prudentia over Sunland as the purchaser of Plot D17 if the two of them were to compete for that plot after the termination of their joint venture negotiations. As submitted against Sunland, the evidence discloses why Sunland held that belief:[1075]

(a) Prudentia had laid claim to Plot D17 before Sunland. Austin had told Brown this on 15 August 2007;

(b) Sunland believed that Och-Ziff "may have had"[1076] some high-level connections in Dubai;[1077]

(c) Prudentia, in combination with Och-Ziff, was an attractive purchaser of D17;

(d) Brown knew that Joyce had taken an adverse view of Sunland in connection with Plot A10C and he did not want to upset Joyce by proposing to cut Prudentia out of the Plot D17 transaction - a company with whom Sunland had been deeply engaged in joint venture negotiations.[1078]

For reasons indicated previously, I am of the view that Sunland paid the fee to "remove them [Prudentia Parties] from the deal",[1079] so that they would "walk away"[1080] and not compete to acquire Plot D17. That was Sunland's commercial imperative, so that it could enjoy the significant fruits of the Plot D17 development

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1075 *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 27.

1076 Tab A of Cross-Examination Tender Bundle (David Brown) Court Book, SUN.003.005.0019 at p 0020.2: "… Angus mentioned that his company (Prudentia) had a connection with a company called "Oxiff", and that Oxiff was based in the USA. We understood that this company may have had a high level arrangement with Nakheel for development rights on the plot".

1077 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraphs 283-294 and 340-342.

1078 Witness statement of David Scott Brown (6 August 2010), paragraph 282, penultimate sentence.

1079 See dot points 10 and 12 on Court Book, SUN.004.001.0314.

1080 Court Book, SUN.009.003.5874 "The attached Feasibility for Waterfront Reed is based on SDG buying this site ourselves, and paying Reed an Introduction Fee of AED 44m, and they walk away". See also Exhibit DB1, paragraph 212 "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'" (**NB:** In cross-examination, Brown conceded that he had no recollection whether he in fact used the words "development rights": Transcript, p 270.27 - .28). In cross-examination (Transcript, p 95.11 - .19) Brown said he used words to the effect that his offer to Reed came about following a suggestion from Soheil that "we offer Prudentia a fee to remove them, yes". The true nature of the fee as payment to Hanley to "walk away" was put to Brown and Abedian in cross-examination (Transcript, p 168.45, p 253.02 and p 270.21 - .25 (Brown) and Transcript p 361.17 - .18 and p 341.27 - .41 (Abedian)).

alone.[1081]

299 The Plot D17 transaction also needs to be assessed by reference to the feverish state of the Dubai property market in 2007.[1082] Further, having regard to the feasibility analyses which Brown had prepared for Plot D17,[1083] Sunland knew that its return on this plot would be "phenomenal",[1084] even taking into account the fee to Hanley. That fee was small compared to the premium Sunland paid on Plot D5B[1085] and considerably less than fees it later negotiated to receive from Likeitalot Investments Pty Ltd on Plot D17.[1086] In my view, the evidence indicates that Brown and Abedian simply did not care about the legal basis for paying a fee to Hanley: they were merely intent upon removing Prudentia from a negotiating position with DWF for the acquisition of Plot D17. Sunland's commercial imperative to pay the fee to Hanley is, in these circumstances, quite clear. The prospect of a very significant return on the Plot D17 redevelopment is clearly the answer to the "why" of the "rhetorical question". In my view these factors not only answer the, so called, "rhetorical question" but also indicate that no credence ought to be given to the argument by Sunland that the lure of such a profitable venture somehow made it particularly vulnerable to the alleged representations. There is, in my view, no basis for such asserted vulnerability – even assuming it could be a relevant factor in the particular circumstances Sunland was a sophisticated and knowledgeable party in the dealings with respect to Plot D17 and experienced and knowledgeable in relation

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1081 See above, paragraphs 208, 242 and 259; and see, below, paragraphs 299 and 303.

1082 Witness Statement of Duane Keighran (8 August 2010), paragraphs 28 and 31; Court Book, SUN.001.006.0100 "… If you have an alternative (quick) solution which is better, please let me know. A day in Dubai is like 6 months anywhere else".

1083 Court Book, SUN.002.009.0071 (Revision 10, 13 September 2007); Court Book, SUN.009.007.4960 (Revision 11, 17 September 2007).

1084 Transcript, p 105.34 - .47.

1085 Sunland paid Al Burj a premium that was more than the price of the land itself. See Transcript, p 27.09 - .10. The premium agreement (Court Book, SUN.002.001.0297 at .0298) discloses that the premium was AED 149,062,888.

1086 Exhibit #D17, "Shareholders Agreement between Sunland Development Dubai (BVI) Limited and Likeitalot Investments Pty Ltd dated 31 October 2008" discloses that: (1) In consideration for a 40% interest in the joint venture company (which was to develop D17), the 'Scott Entity' would pay to Sunland an amount of AED 225,000,000 (clause 4.2(d)). At October 2008, this was approximately $90 million AUD (i.e. more than the purchase price of D17 to Sunland); and (2) In addition to this fee, Sunland would receive AED 140,000,000 for "project supervision services and construction management services" (clause 7.1(a)) and another AED 20,000,000 for "specialist design services" (clause 7.2(a)). At October 2008, the total of these additional fees was approximately $64 million AUD.

to property purchasing and development in Dubai, as the evidence clearly shows. There is no evidence of any vulnerability on Sunland's part.

300 For reasons already discussed, I cannot accept these submissions of Sunland as consistent with the position as indicated by the evidence I have examined in detail. I particularly reject the assertion that there is, in all the circumstances, a "natural inference of fact" to be drawn in favour of Sunland's position. In this respect, it is instructive to reflect on the passage from the judgment of Wilson J in *Gould v Vaggelas*[1087] relied upon by Sunland:[1088] Sunland also relied on the statement of Wilson J in *Gould* that:[1089] "A knave does not escape liability because he is dealing with a fool". Colourful though this statement is it does not advance the analysis in the present circumstances. As already discussed it is clear that Sunland is not a "fool"; rather, the evidence indicates, in my view, that it is very astute in looking to its own commercial interests in a many-faceted way. Secondly to attempt to characterise the defendants as "knaves" simply begs the question whether or not there was any conduct on their part which could be regarded as a breach of the statutory prohibitions relied upon by Sunland. For the reasons I have set out in detail there was no such conduct – in the form of representations or otherwise.

301 In the context of the statement of the law by Wilson J in *Gould*, I note that I have not found there to be any representations of the kind alleged by Sunland or that whatever representations were actually made (assuming that they are properly regarded as representations) were false. Additionally, I have found that email and other communications, such as that referred to in paragraph 221 of the Sunland submissions set out above, are equivocal at best in the context of Sunland's position and in any event are, in my view, are explicable on the basis that at the time, Sunland was a proposed joint venturer with the Prudentia parties. Further, and very relevantly in the context of these submissions, I have found that there is an explanation for the payment for the Prudentia parties to "go away", a position well

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1087 (1985) 157 CLR 215 at 235-9 (which is set out below, paragraph 362.

1088 See *Plaintiffs' Address* (1 February 2012), paragraph 197.

1089 (1985) 157 CLR 215 at 252.

supported by the circumstances of the Plot D17 transaction.[1090] Having regard to these circumstances, the Sunland submissions are an exercise in the *post hoc, ergo propter hoc* fallacy.[1091]

302 In any event, for the reasons indicated previously, I have found no reliance on Sunland's part, even assuming any representations were made as it alleged. In my view, as discussed in some detail, the "put your foot on it" email on the basis of the preceding discussions between Brown and Lee and Brearley made the true position perfectly clear to Sunland (if it was not already) – as indicated by this email,[1092] which Brown himself authored.

Conclusion

303 Brown's evidence was that if he had been told (or believed) that Prudentia (or Reed) did not have "control" or "rights" with respect to Plot D17, he would not have negotiated with Reed and SWB would not have entered into agreements with Prudentia and Hanley, but would have negotiated directly with DWF.[1093] For the reasons indicated, this proposition contended for by Brown is contrary to his evidence, which recognised the value of Prudentia's (or Reed's) negotiating position even if it were no more than "a limited right of negotiation". The evidence establishes, in my view, that the payment made to "walk away" was a payment which was effected to secure Prudentia's (and Reed's) non-competition for the site, Plot D17, pursuant to the release given to Sunland to negotiate exclusively for Plot D17 in the agreement SWB signed with Hanley on 26 September 2011. The execution of the Hanley Agreement came about purely as a consequence of the unilateral decision of Abedian to offer a "walk away" fee to Prudentia. Further, it should be remembered that the fee was paid by Sunland in the frenzy of a white-hot Dubai

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1090 See, above, paragraphs 208, 242, 259, 298, 299 and 303.

1091 Burchfield, RW, *The New Fowler's Modern English Usage* (Oxford University Press, 3rd ed,1996) illustrates the fallacy (pp 610-11):

> "'after it, therefore due to it': the fallacy of confusing consequence with sequence. On Sunday we prayed for rain; on Monday it rained; therefore the prayers caused the rain."

1092 See above, paragraph 128.

1093 Witness statement of David Scott Brown (6 August 2010), paragraph 275.

property market[1094] and in the context of Sunland having missed out on buying some other plots. As appears from the evidence, Sunland was desperate to purchase Plot D17[1095] and all the more so because it sat immediately behind their beachfront plot, Plot D5B. Brown had forecast extraordinary profits for Sunland in the feasibilities he had prepared, even taking the fee into account.[1096] The fee was a minor sum in the context of Brown's financial assessments. Compared to the premium Sunland had paid Al Burj for Plot D5B, it was insignificant.[1097]

Reliability of Sunland witnesses

General matters

304 Even taking the evidence of Brown and Abedian at face value, so to speak, and without considering issues which, in my view, raise serious questions in relation to the veracity of that evidence – particularly arising from the investigation of bribery allegations by the Dubai authorities – I am of the opinion, as already indicated, that the Sunland case fails against Reed and the Prudentia parties, and also against Joyce. Sunland submitted that the attack on its case by these parties was primarily an attack on the credit of its witnesses, Brown and Abedian, and failed to take account of the documentary and other evidence in support of the Sunland case. For the preceding reasons, I reject this submission and have found, on the basis of the documentary and other evidence, that the Sunland case against all these parties fails.

305 Having regard to the position I have reached in relation to the Sunland case, it is not necessary to consider in any significant detail issues that arise with respect to the veracity of the evidence of Brown or Abedian arising out of the investigation of bribery allegations with respect to the D17 transaction. Nevertheless, there are some particular matters that should be mentioned, as they go some way to explaining the

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1094 Transcript, p 22.18 - .23; see also Witness statement of Duane Keighran (8 August 2010), paragraphs 28 and 31; Court Book, SUN.001.006.0100 "… If you have an alternative (quick) solution which is better, please let me know. A day in Dubai is like 6 months anywhere else".

1095 Transcript, p 86.01 - .09; and see above, paragraphs 299, in relation to the assertion by Sunland that it was vulnerable to the alleged representations in this environment (a position which I reject).

1096 Transcript, p 105.34 - .37, where Brown agreed that he had forecast a return in respect of Plot D17 (the "Atrium Project") to be constructed on that plot of 37.3%. He agreed in cross-examination that this was a "phenomenal return".

1097 Sunland paid Al Burj a premium that was more than the price of the land itself (see Transcript, p 27.09 - 10 Brown's cross-examination); see above, paragraph 299

evidence of Brown and Abedian in relation to significant issues in the Sunland case – and why these witnesses took positions in their evidence at odds with what would be regarded as a fair reading of significant documents and also other evidence.

306 As indicated previously, I think that the true position may be summarised quite succinctly. Sunland regarded the purchase of Plot D17 as highly desirable, from its own commercial point of view, as it provided the potential for its development in conjunction with other land it owned in the same Dubai Waterfront area and, in any event, owning and developing Plot D17 would enable it to make a very substantial profit. Such a substantial profit, it seems, that the fee paid to Hanley was not particularly significant – though out of this context and viewed as a raw monetary figure, one's first impression may be to the contrary.

Brown

307 Brown's unreliability as a witness is, in my view, indicated by the evidence he gave in relation to a number of key issues:

(a) The introduction of the Sunland parties (through Brown) to Plot D17;

(b) Brown's state of mind when he sent the 'put your foot on it' email to Reed;

(c) The failure of the Sunland parties to disclose to their potential joint venture partner the availability of the additional BUA; and

(d) Brown's status within the Dubai authorities' investigation commenced in December 2008, that is, that he was under investigation for bribery.

Brown's evidence of introduction to Plot D17

308 Brown's evidence in relation to his introduction to Plot D17 has already been considered in detail. In spite of the contents of his typed diary notes provided to Mr Mustafa of the Dubai Financial Audit Department stating that Sunland had been approached by Reed with respect to Plot D17, this was not true, as Brown admitted in cross-examination.[1098] In fact, the position reached with Brown's evidence was

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1098 Transcript, p 177.35 - .37; and see p 79.26.

that he telephoned Reed after obtaining his mobile telephone number from Austin.[1099] Initially, Brown had no explanation for not having included the reference to Austin in his notes for Mr Mustafa, but later tried to explain it by saying that the documents he produced for the Dubai authorities were not meant to be "exhaustive".[1100] More improbably, he said that he must have overlooked the previous page of his notebook.[1101] Brown's evidence was that he always kept his notebooks behind him at his desk in Dubai, and there has been no suggestion that they were not readily accessible at all relevant times. The relevant notebook has two entries for 15 August 2007,[1102] the first of which is a note containing eight points, the last of which is:

> "8. Call + 61 [Mobile number]
>
> Andrew Angus Reed (int'l Developer)
>
> has a hold on D-17 lot"

This note is very clear and it is just not plausible that Brown would have overlooked this note when preparing the material for the Dubai authorities.

12 September 2007 conversation and email

309 The 12 September 2007 conversation was one between Brown and Lee and Brearley; noting that Brown maintained in cross-examination that he had had two phone calls with Lee and Brearley on this date.[1103] There is, however, only one phone call recorded in Brown's notebook for 12 September 2007.[1104] Additionally, only one call on 12 September 2007 was pleaded by Sunland[1105] and there is only one phone call on that date cited in the chronology prepared by Sunland.[1106]

310 The submissions on behalf of Reed and the Prudentia parties raised the rhetorical questions: "Why did Brown suddenly assert a second phone call?".[1107] They answer

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1099 Transcript, p 35.17 - .20.
1100 Transcript, p 37.25 - .27 and p 40.01 - .18.
1101 Transcript, p 38.14 - .15.
1102 At pp 112 and 113 of the relevant notebook; Court Book, SUN.002.007.0001 at .0096 and .0097.
1103 See above, paragraphs 127 to 128.
1104 At p 138 of the relevant notebook; Court Book, SUN.002.007.0001 at .0122.
1105 See Second Further Amended Statement of Claim, paragraph 24.
1106 The chronology provided to the Court on 24 November 2011.
1107 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 12.3.2.

their rhetorical question as follows:[1108]

> "There is but one explanation; Brown could not explain why he would not have entered critically important information as to the potential of the marketing department of Nakheel selling D17 in his note of conversation with Lee and Brearley on this day. Appreciating this Brown concocted the second phone call of which there is no note."

In my view, having regard to the nature of Sunland's pleaded case and the evidence in relation to the Plot D17 transaction which has already been considered, it is most surprising, to say the least, that if Brown then really thought that Reed or Prudentia had some right, interest in or the ability to control the disposition of Plot D17, that there would not have been some note as to the ability of the marketing department to sell Plot D17 without regard to the position of Reed or Prudentia or, for that matter, Sunland. Consequently, I think it is most likely that the Prudentia parties' answer to their rhetorical question is correct.

311 Consistently with this submission, Reed and the Prudentia parties submitted that Brown needed to maintain a story consistent with the Sunland case of "right" or "control" with respect to Plot D17 and that the urgency to move quickly to "secure" Plot D17 was created as a consequence of the risk that the sales department may introduce Prudentia to another buyer:[1109]

> "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."

Brown's oral evidence was, however, at odds with this evidence:[1110]

> "Your answer to Mr Rush was, '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.' Do you see that?---That's right.
>
> So you were saying that the marketing people might be trying to sell on behalf of Nakheel, but they weren't aware of the arrangement between Nakheel and Prudentia?---That was my understanding, yes.
>
> That is one version, and then in your witness statement you say, 'Oh, well,

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1108 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 12.3.2.

1109 Witness statement of David Scott Brown (6 August 2010), paragraph 185 (being the second and third sentences of that paragraph).

1110 Transcript, p 189.23 - .43.

> the sales and marketing department could introduce Prudentia to another buyer'?---Because that tied in with what Mr Joyce had told me earlier.
>
> Why didn't you say what's in the third sentence of paragraph 185 when you were asked about this topic by Mr Rush?---I think because under a court situation, not everything comes immediately to your mind when you're asked a question.
>
> But what I want to put to you is that this is an incredibly important email, Mr Brown, because on the face of it it suggests that you concede that no-one has a foot on the plot at the time of the email, so you need to explain it somehow, don't you?---I explained it by the fact that we were told Prudentia had a hold on this plot and we still believed that at the time."

312 I accept the submission against Sunland that Brown's comment in the passage just quoted that "… because under a court situation, not everything comes immediately to your mind when you're asked a question" is quite implausible coming, as it does, from a senior executive of Sunland, the party bringing the claim; the person who is the principal witness to its misrepresentation claims. This was clearly critical evidence and in relation to a critical conversation or conversations which led to the "put your foot on it" email, which has already been discussed in detail.[1111] In my view, it is clear that the plain words of the "put your foot on it" email do not support Brown's explanation in support of Sunland's case of "right" or "control" for which it contended. In Brown's plain words in that email, summarising his conversation with Lee and Brearley, he said: "They suggest we immediately '**put our foot on the Plot**' to secure it".[1112] In my view, for the reasons indicated previously, this is unequivocal evidence, in Brown's own words, against the "right" or "control" that Sunland contended was the basis for its conduct in deciding to remove Reed and Prudentia from the Plot D17 transaction by paying a fee.

The bribery denial

313 It was submitted against Sunland that Brown's lack of credibility as a witness was nowhere more obvious than in his denial that he was the subject of the investigations of the Dubai authorities in relation to the D17 transaction, which commenced in December 2008.[1113]

1111 See above, paragraphs 126 and following.

1112 Court Book, SUN.001.006.0100; and see above, paragraph 123.

1113 See *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 12.4.1.

314 Initially, Brown denied, quite explicitly, that he was the subject of a bribery allegation by the Dubai authorities. His explicit denial was as follows:[1114]

> "You see, at this time you were a person under investigation for paying a bribe, weren't you?---They were gathering the facts. The Ruler's Court was writing up a report.
>
> No, my question is: at this time, you were a person under investigation for paying a bribe?---They were certainly asking me questions. I don't know what their view of me was.
>
> Surely you looked at the search warrant that's been translated in relation to the approach of Dubai authorities to the Sunland offices?---I have.
>
> Do you remember the date of it?---The search?
>
> No the date of the warrant?---It would be around 26 January, around that time.
>
> Was the reason given in the warrant that you, David Scott Brown, were under investigation for paying a bribe of 45M Dirham?---There was bribery mentioned. I don't believe I was accused of that, but there was a bribery case being investigated."

315 Brown was then taken specifically to the translation of the search warrant:[1115]

> "So, 'Dubai Police General HQ General Department State Security, on 26 January 2009, to the Prosecutor General on Duty. David Scott Brown, Australian national, director of operations at Sunland,' Gold and Diamonds complex and the building. 'Further to the public prosecution's authorisation dated 22/1/2009 purporting that a group of employees working at Nakheel are rigging the sales process in return for bribes by using sham reservations of lots or selling them at lower than the market, and giving employees orders not to dispose of them and then selling them through brokers in return for obtaining sums of money, it has been decided to pass this information to the Financial Audit Department at the KK the Ruler's Court, who have found that an Australian national called David Scott Brown obtained Lot D17 at the Nakheel's Waterfront project in return for paying 45 million dirhams as a bribe to obtain this lot at a cost lower than its market price."

316 Brown was then asked:[1116]

> "You knew that, didn't you?---Yes, I knew the case was about bribery, yes."

Following this acknowledgment, the cross-examination continued:[1117]

1114 Transcript p, 45.43 – 46.14.

1115 Court Book, SUN.014.001.0012 (English translation) As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189; Transcript, p 46.22 - .33.

1116 Transcript, p 46.33 - .34.

"Why couldn't you tell us that you were being investigated for bribe?---I'm not denying I was being asked many questions, yes.

You've read that, haven't you [the search warrant]?---Yes.

What it says that you were under investigation for bribery, doesn't it?---It does there, but---

And you knew that at the time I suggest, Mr Brown?---I can't recall that document when you are asking me the previous questions.

Are you saying to the court that you are unable to recall whether you were under investigations for bribery in January 2009?---What I recall is that the Ruler's Court were talking about bribery and commissions and I understood that they did not have the facts about what this transaction was based on. There was no bribe, there was no commission, there was a premium paid.

HIS HONOUR: Could you answer the question?---Can you repeat the question, please?

MR RUSH: Are you saying to the court that you are unable to recall whether you were under investigation for bribery in January 2009?---No, I'm not.

What is the position, do you recall or not recall---I do recall.

You do recall?---Yes.

That you were under investigation for bribery?---Yes.

Why didn't you tell us that five minutes ago?

HIS HONOUR: There's no doubt about it is there? I think one could infer the average person would be horrified to get a document like that in Dubai?---Yes.

MR RUSH: And you were horrified, weren't you---I was."

317 I accept the submissions against Sunland that Brown's evidence in relation to the bribery allegations indicates, very clearly, that Brown cannot be taken as a reliable witness of truth. More particularly, it establishes that, on his own reluctant admission, Brown was being investigated for bribery, he was clearly horrified at the possible consequences of such an investigation. This explains instances, discussed previously, where, in his evidence, he sought to deny a clear and obvious meaning of documents which do not support Sunland's version of events with respect to the Plot D17 transaction. A clear instance is his seeking to explain away the significance of the "put your foot on it" email and Sunland's failure to take the opportunity, which

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1117 Transcript, p 46.36 to p 47.23.

was clearly available to it, to make full and comprehensive investigations of DWF and its senior officers to establish clearly and unequivocally the nature of any interest which Reed or the Prudentia parties might have had in Plot D17, contractual or otherwise.

318 Brown's denial that he or Sunland was being investigated for bribery is, in my view, all the more extraordinary when one considers the findings of Logan J in these proceedings in the Federal Court of Australia that "The Sunland parties were under investigation themselves by the authorities in Dubai".[1118]

Brown report for Eames

319 Brown prepared a report for Eames dated 1 February 2009.[1119] This report was set out in a file note of a meeting between Eames, Brown, Abedian and Ms Anne Jamieson, General Manager of the Dubai branch of the Sunland Group on 2 February 2009. Brown's report set out, so-called, stumbling blocks to the entering into of a joint venture arrangement with Reed with respect to Plot D17, which were described as follows:[1120]

> "Soheil [Abedian] and I worked with Reed during this time to try and agree the terms of a JV, but there were 3 stumbling blocks-
>
> 1. Reed wanted us to show him a Design Concept for the site, but we were not prepared to show him our ideas until we had signed an Agreement on the site.
>
> 2. Reed wanted about AED 65m for a Consultancy Fee (presumably for his introduction and the good price and payment terms)
>
> 3. Reed wouldn't accept our fees saying they were too high (PM, Design and CM fees)" [Emphasis added in the submissions by Reed and the Prudentia parties]

1118 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2010] FCA 312 at [39]; On the hearing of that application, Sunland's Senior Counsel, Mr O'Shea SC, submitted that (Transcript of hearing on 15 December 2009, Transcript, p 129.45):

> "The second matter, your Honour - and I will come back to this at the end - is when these matters were first investigated, Sunland was also the subject of, and, indeed, Mr Brown in particular was the subject of investigation."

1119 Court Book, SUN.004.002.0064. Eames, with input from Brown, prepared a memorandum on the letterhead of DLA Phillips Fox, dated 29 May 2009 [Court Book, SUN.002.002.0500], which was formally lodged with the Dubai Courts on 1 June 2009. The representations which this memorandum alleged had been made by Reed were quite different from those alleged in the Second Further Amended Statement of Claim.

1120 Court Book, SUN.004.002.0064 at .0065.

In the context of the D17 transaction as already examined in detail, it is, I think, clear that both Brown (and Abedian) were attempting to use this report to disguise Sunland's unilateral decision and action to offer a payment to remove Reed and the Prudentia parties from the deal to acquire Plot D17. The report sought to provide some explanation or basis for Sunland's allegation that the reason for the breakdown of the joint venture negotiations lay in Reed and the Prudentia parties' intransigence in relation to reasonable negotiating requests raised by Sunland, rather than the latter's unilateral action of seeking to pay to remove Reed and the Prudentia parties from the deal to purchase Plot D17.

320 More particularly, there was no evidence that Reed or Prudentia at any stage wanted the "design concept" for the site. A request was made for the Sunland feasibility for Plot D17, but this request was made only after Sunland, at the last minute, unilaterally placed a put option in the draft Implementation Agreement, the MOU. The consultancy fee of AED 65 million was never a stumbling block to the joint venture. It was agreed upon immediately after the first meeting between Brown and Reed on 19 August 2007.

Abedian

321 References have already been made to the detailed discussion of the D17 transaction from the perspective of considering whether there were any misrepresentations as alleged by Sunland or, assuming that there were, whether there was any reliance on such misrepresentation on its part. It is clear from the consideration of these matters and the references to Abedian's evidence that he was a consistently uncooperative witness and clearly prepared to give evidence in a manner which he saw as being advantageous to Sunland's commercial interests in Dubai. In short, Abedian presented as an unreliable witness and, as indicated previously and as explored further in relation to some corporate governance issues which arise with Sunland, could not be regarded as a reliable witness of truth. I accept that the key issues on which Abedian gave clearly unreliable evidence included evidence relating to the following:

(a) Abedian's belief that Prudentia or Reed or Och-Ziff had a 'right' over Plot D17 (although because Abedian admitted that he was not party to any of the pleaded meetings or communications on which the Sunland parties rely for their claim, Abedian's evidence in this area is irrelevant);

(b) Abedian's knowledge and understanding of Joyce's 16 August 2007 email;

(c) Sunland's knowledge of the price at which Plot D17 could be acquired;

(d) Sunland's entitlement to additional BUA (and, in particular, when this first became known to Sunland and why it was not disclosed to the Prudentia parties);

(e) Abedian's reaction to the "second" call from Lee and Brearley to Brown on 12 September 2007 (leading to the "put your foot on it" email);

(f) the existence of a "reservation agreement" for Plot D17;

(g) the status of negotiations with Prudentia on 17 September 2007; and

(h) the investigation by the Dubai authorities commencing in December 2008, including the role of Brown in that investigation and Abedian's communications with the Dubai prosecutor.

The Joyce email of 16 August 2007

322 The email from Joyce to Brown dated 16 August 2007 was said to have been relied upon by Sunland, having regard to its inclusion, as pleaded, with the words "*[a]nyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us*".[1121] It is not clear how Abedian came to receive this email as it is not part of the email chain,[1122] but he claimed in evidence that it was handed to him by Brown in hard copy. Furthermore, his evidence was that this email was of such importance to him that he kept it in his office drawer and from time to time

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1121 Second Further Amended Statement of Claim, paragraph 14.2.2; and see *Plaintiffs' Address* (1 February 2012), paragraph 91; and see above, paragraphs 70-77.

1122 Court Book, SUN.001.005.0002.

"showed [it] to some people that it was important to me".[1123] Abedian's evidence was that he no longer had a copy of this email, having disposed of it in an office move around December 2006, at the end of 2006.[1124] As indicated previously, this could not have occurred as the email was not in existence at this time. As concluded previously, Abedian's evidence of keeping this email was completely unreliable, as was clear from part of his evidence in cross-examination, which has been set out previously.[1125]

Reservation agreement

323 The concept of a "reservation agreement" for Plot D17 was first raised by Abedian during cross-examination when he said that "[w]e have in Dubai two different kinds of having the control: one it is a reservation agreement, and the other one is sales and purchase agreement".[1126] He then expanded on this concept in response to questions about the meaning and impact of the "put your foot on it" email and the 12 September 2007 telephone call which preceded this email.[1127] As discussed previously, Abedian sought to explain the meaning of the "put your foot on it" email in a manner which was tortured, to say the least, having regard to its actual language,[1128] and also sought to explain away its effects on the basis of the possible existence of a "reservation agreement" in circumstances where no previous reference had been made to a "reservation agreement" or something similar. The unsatisfactory nature of Abedian's evidence in this respect is demonstrated from the following part of his cross-examination:[1129]

> "So if you recall correctly, Mr Brown told you that Marcus Lee and Michael Brearley told you that you should put your foot on the plot?---That's right.
>
> Why do you need to put your foot on a plot that you come to this courtroom and say Prudentia control?---Because if you have a reservation agreement in Dubai, the reservation agreement usually it is for a period of time, it's not never-ending. If the time near to completion and the reservation agreement may finish, it means that the control will be lost.

1123 Transcript, p 389.13 - .15; and see above, paragraph 79.
1124 Transcript, p 391.45 - .46; and see above, paragraph 79.
1125 See above, paragraph 79; referring to the passage from Abedian's cross-examination at Transcript, p 392.3 - .33.
1126 Transcript, p 318.36 - .38.
1127 Transcript, p 334.3 - .46.
1128 See above, paragraphs 141 - 146.
1129 Transcript, p 334.3 - .46.

> Tell me, Mr Abedian, anywhere in your statement, anywhere in either statement, do you refer to the words 'reservation agreement'?---In my words, in my statement?
>
> Anywhere in your statement do you use the words 'reservation agreement'?---Maybe not.
>
> So is it your evidence that you thought there was a reservation agreement?---Control means to have at least a reservation - - -
>
> No, just listen to the question, please: is it your evidence that you contemplated there was a reservation agreement between Prudentia and DWF?---That's correct.
>
> If it is, in fact, your evidence, why did you not refer to that in your statement?---I don't know where it is.
>
> Is this something that you've recently thought of?---No.
>
> I'm sorry?---Control is the same as reservation agreement, when somebody has a control over the plot of land.
>
> Control can mean - you say control is the same as a reservation agreement?---When you have a reservation agreement, you have a control of the land.
>
> Tell me, Mr Abedian, when did you think this up? When did you first think that there was a reservation agreement?---From the day one.
>
> So why didn't you refer to it in your statement?---Control means that.
>
> Why didn't you refer to a reservation agreement in your statement?---No need.
>
> No need?---No need.
>
> Because control means that?---That's correct.
>
> And that's a truthful answer?---That's a truthful answer."

324 In spite of this evidence, Abedian agreed in cross-examination that his witness statement did not mention that he believed that there was a reservation agreement[1130] and he confirmed that he had not told his lawyers when he was preparing his witness statement that at relevant times he believed that Prudentia or Reed had a reservation agreement.[1131] Abedian also agreed that "[t]here's not one email, is there, to you or from you over the period that we're talking about that

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1130 Transcript, p 442.01 - .02.

1131 Transcript, p 442.11 - .30.

mentions the words 'reservation agreement'".[1132] Further, Abedian agreed that it would have been very important at the time the Eames memorandum was prepared for the Dubai prosecutor to have told Mr Eames that he believed there was a reservation agreement but that he had not done so.[1133]

325 Abedian again raised the concept of a "reservation agreement" when asked why he had said in his written statement that he had not understood the nature of the alleged Prudentia "control":[1134]

> "Why then did you say in your statement that you didn't understand the nature of the control?---Control means to have a reservation agreement.
>
> No, why did you say in your statement you didn't understand the nature of the control?---Control means to have a reservation agreement.
>
> So 'put the foot on the plot' means, as I understand your evidence, that there is a reservation agreement, but it might be running out?---It might be running out.
>
> Then why do you need to put your foot on the plot if there's a reservation agreement?---Because maybe it is limited to a time frame.
>
> Who did you ask?---No-one.
>
> No-one?---No-one.
>
> So is it your evidence you felt there might be a reservation agreement, that the timing might be running out, but you didn't get Mr Brown, for example, to ask Mr Reed, 'How long have we got?' Is that your evidence?---I didn't ask Mr Brown, no, I didn't.
>
> Why wouldn't you?---Because Nakheel executive told Mr Brown that you have to move and put your feet on the block."

326 Apart from the fact that Abedian's evidence with respect to the existence or otherwise of a "reservation agreement" was not consistent with his witness statement or other documentary evidence, his evidence directly contradicted that of Brown, who agreed in cross-examination that he had not heard of a reservation agreement.[1135] This is an extraordinary state of affairs to have a serious conflict of evidence on such a significant issue in Sunland's case between a person in Abedian's

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1132 Transcript, p 463.25 - .26.
1133 Transcript, p 441.43 - .47.
1134 Transcript, p 335.12 - .34.
1135 Transcript, p 205.24 - .25.

position and that of Brown, Sunland's chief operating officer of its Dubai branch in 2007, a director of SWB, a person upon whom Abedian said he relied and someone who, according to the evidence, reported fully on his activities to Abedian. Additionally, Abedian's evidence is also contradicted by the fact that no reservation agreement has been discovered by any party to the proceeding and the further fact that following Abedian's evidence, no call was made by the Sunland parties for the Prudentia parties or Joyce to produce a "reservation agreement" for Plot D17.

Contact with the Dubai prosecutor

327 Abedian also gave inconsistent and unreliable evidence in relation to the information given to the Dubai authorities and in relation to his role in that respect. His evidence was that he was not in contact with the Dubai prosecutor,[1136] but this evidence was completely inconsistent with Brown's file note of 31 May 2009, which recorded a meeting between Brown, Abedian and Mr Al Zarouni.[1137] Abedian then admitted that "Mr Brown gave a statement and we gave it to the Prosecutor".[1138] When Abedian was asked "[w]hy did you tell us you've had no contact with the Prosecutor if you actually attended at the Prosecutor?", he replied "[a]bout this contact, I didn't have contact with him. I only had one meeting, which I went and gave him a report".[1139] Additionally, it appears from Brown's evidence that this meeting with the prosecutor had some significance. When Brown was asked why he was contacting the prosecutor, rather than the other way around, he responded that "We wanted to keep the prosecutor informed of what we were doing in Australia".[1140] The purpose of this meeting is set out in Brown's notes as follows:[1141]

> "1. To deliver the DLA Phillips Fox briefing note on the legal proceedings strategy in Australia
>
> 2. To seek his advice with respect to Sunland taking action against Matt Joyce and ultimately Nakheel in Dubai
>
> 3. To understand the status of the case with respect to timing and the return of my passport."

1136 Transcript, p 324.39 - .40.
1137 Transcript, p 358.38 - .43.
1138 Transcript, p 325.11 - .12.
1139 Transcript, p 325.14 - .16.
1140 Transcript, p 137.41.
1141 Court Book, SUN.003.005.0013.

In relation to the second point, Brown explained that one of the reasons why Abedian attended this meeting was because he had some concerns about taking legal action against Joyce because, if Sunland sued Joyce, it might be seen or involve ultimately taking on Nakheel.[1142]

328 On its own, Abedian's evidence in relation to the contact, or lack of it, with the Dubai prosecutor may not, perhaps, be of such significance, but it is, as indicated in many other places in these reasons, not an isolated instance of Abedian's approach to his evidence in these proceedings. Having regard to the seriousness of the bribery allegations and investigations in Dubai, which was abundantly clear from Brown's evidence, and having regard to Brown's evidence and his notes in relation to the purpose of this meeting with the Prosecutor, it is simply not believable that Abedian would not have remembered Brown's statement and the meeting with the Dubai prosecutor.

The Plot D17 transaction

329 Abedian's evidence was again unreliable in relation to the detail of the D17 transaction. In particular, he said that he did not "think it matters about who contacted who [about Plot D17]".[1143] This evidence was given in spite of the evidence in his witness statement that "[m]y belief that Reed, Prudentia and Hanley had control over Plot D17 was based on the fact that Reed was introduced to Sunland by Joyce […]".[1144] As submitted against Sunland, I am of the view that the reason for this contradictory evidence was Abedian's realisation that Brown's initial statement concerning contacts with Reed and Joyce over Plot D17 were wrong. Abedian's initial belief that Joyce introduced Reed to Sunland was the foundation for his understanding of Reed's, Prudentia's and Hanley's control of Plot D17, as he said in his witness statement. That foundation was clearly undermined by the evidence given at trial.[1145] I also accept the conclusion advanced in the submissions against

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1142 Transcript, p 138.34 - .39.
1143 Transcript, p 315.36 - .40.
1144 Witness Statement of Soheil Abedian (6 August 2010), paragraph 114.
1145 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 12.10.2.

Sunland:[1146]

> "Soheil [Abedian] was left, in reality, with nowhere to go. His evidence as to the fact (now established) that Brown called Reed (and not the other way around) was that Soheil [Abedian] told the Court he *did not care* whether it was right or wrong to say Brown contacted Reed or Reed contacted Brown.[1147]"

The price of Plot D17

330 Abedian also gave contradictory evidence in relation to his knowledge of the price of Plot D17. Initially, he stated in his evidence that right from the outset of negotiations, the land could be bought for AED 120 if Sunland reached agreement with Reed, and that was what Brown told him at the "very beginning".[1148] Abedian also agreed "from the beginning, it's your evidence that at least Mr Brown knew if the deal could be done, it could be done at 120 a square foot".[1149] Abedian's evidence in this respect was, however, later contradicted by his evidence in which he said:[1150]

> "So can you just tell His Honour again when you first knew that this deal could be done for D17 at 120 dirham a square foot?---After we did not continue with the joint venture between the parties and I suggested to buy him out for his premium that he had the control for 20 million, he came back and said "Whatever I negotiate down, you have to pay at the top of it" which we agreed.
>
> I put to you that's entirely inconsistent with the question and the answer I just read to you?---Ok. I don't understand you, I'm sorry."

Abedian's explanation for the contradiction, in terms of lack of understanding, is unacceptable and implausible, having regard to his earlier clear and unequivocal answers.

The role of Abedian and Brown

331 Contradictory evidence was given by Abedian in relation to the role that he and Brown took in negotiations with respect to Plot D17. He agreed, first, that Brown was in the front line, doing the negotiations with Reed[1151] and described him as "the person at the front and he was consulting with me".[1152] Then, he gave evidence

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1146 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 12.10.3.
1147 Transcript, p 317.20 - .23.
1148 Transcript, p 321.13 - .20.
1149 Transcript, p 321.24 - .25.
1150 Transcript, p 322.09 - .16.
1151 Transcript, p 458.32 - .33.
1152 Transcript, p 450.36 - .38.

which, at best, must be regarded as completely inconsistent, when he said "I was the person who was doing the deals and … [m]y duty, my task, it was that I was concluding every single deal, selling or buying, to do the documentation, to agree with the price, to agree with the terms. Mr Brown never ever on any transaction was involved in the terms of it. Even if he signed as a director, I was telling him, 'I agree with that, go ahead and sign'".[1153] Again, in contrast, Abedian said on several occasions during the trial that he was entirely reliant on Brown.[1154] More particularly, Abedian gave evidence that he reviewed Brown's report on 1 February 2009,[1155] Brown's "clear statement" of events dated 22 January 2009[1156] and the Brief to the Prosecutor prepared on 15 February 2009.[1157] Consequently, in my opinion, it can be concluded safely that Abedian was fully informed in relation to the D17 transaction and was well aware of the nature and extent of the Dubai authorities' investigation of bribery allegations insofar as they involved or affected Sunland.

332 Abedian's evidence in relation to the bribery investigation of Brown by the Dubai authorities is riddled with inconsistencies and the unwillingness to accept reasonable inferences of various events and documents. Critical parts of his evidence indicative of these deficiencies are conveniently and accurately summarised in the closing submissions of Reed and the Prudentia parties:[1158]

> "Soheil [Abedian] feigned ignorance of the bribery investigation, telling the Court, when it was put to him that Brown had admitted during cross examination that he was under investigation for bribery in February 2009 that he *would be very surprised if he said that* [1159]. Soheil's evidence of denial of knowledge that his chief lieutenant in Dubai was under investigation for bribery is unbelievable. Soheil was aware of the execution of a search warrant on the Dubai offices of Sunland on 26 January 2009 [1160]. Soheil was aware of Brown's account of the execution of the search warrant [1161]. Part of this account was put to Soheil in cross examination:[1162]

1153 Transcript, p 458.22 - .30.
1154 Transcript, p 356.10; p 303.44 - .46; p 355.28; and p 357.11 - .12.
1155 Transcript, p 403.19.
1156 Transcript, p 424.22.
1157 Transcript, p 356.41.
1158 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 12.13.2 to 12.13.7.
1159 Transcript, p 305.44 - .45.
1160 Transcript, p 306.31 - .39.
1161 Court Book, SUN.004.001.0314.
1162 Transcript, p 306.46 – p 307.9.

'If we go to the last dot point on that page, this document that you say you read which is as follows, "Another local man arrived an hour later and he seemed to be in charge. After an hour, I asked him about my passport. He told me that this was a criminal investigation into bribery and the transaction we had done on D17 was a bribe, in their opinion"?---Yes.

What did you make of that when you read it?---Very simple fact, that Mr Angus Reed has given bribe to Mr Joyce.

Is that your answer to the question?---Yes, it is.'

Brown wrote in the report that he was informed at the time of the execution of the search warrant that in relation to the investigation into bribery *I was lucky to be out*. Soheil's explanation of these words was disingenuous.[1163]

'What did you understand by the term "lucky to be out" when you read it?---That he is lucky to be out.

What's that mean?---He's out. I don't know.

I'm sorry?---That he's lucky to be out.

Lucky to be out of what?---Out of this investigation.

Lucky to be out of the investigation?---Yes.

Is that the way you read it?---Of course.

You see, I suggest the meaning is completely obvious Mr Abedian, when you read it: that your employee was being investigated for bribery and he was lucky to be out of jail?---I totally disagree with your comment.'

It is to be remembered at the time of these words Brown's passport had been taken.

…

Soheil's explanation of a note from Brown to Sahba [Abedian] and Sahba's response of 29 April 2006 [1164] again demonstrated a person refusing to tell the truth about his knowledge of the bribery investigation:[1165]

'MR RUSH: *He was delighted at the news that your chief lieutenant in Dubai was only a witness and no longer, as far as Mr Mustafa was concerned, the subject of investigation for bribery. That is what that's about?---Mr Mustafa has said to Mr Brown and Georgia Carter that you are a witness, and that is exactly what the company believed from the first time.*

You know exactly what it's about, Mr Abedian, but you won't come to terms with what is written with the email, will you?---I believe you're wrong, Mr Rush.'

Soheil was referred specifically to transcript from a hearing before Justice

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1163 Transcript, p 307.17 - .33.

1164 Exhibit #D2.

1165 Transcript, p 328.13 - .20.

Logan in the Federal Court of Australia on 15 December 2009 [1166]:

> *'I just want to read something to you from the transcript of 15 December 2009 that was said by Mr O'Shea … "Sunland was also the subject of investigation and, indeed, Mr Brown in particular was the subject of investigation". Did you at least understand that to be the position of the first series of investigation in Dubai, that Mr Brown, in particular was the subject of investigation?---No.*
>
> *What I've read to you is your counsel, Sunland's counsel, told His Honour in December 2009. Does it seem that you are out of the loop in relation to what went on in December 2008 and January 2009 in relation to Mr Brown?---I don't think so.*
>
> *Well how do you explain Mr O'Shea telling His Honour Justice Logan that Mr Brown was the subject to use his words "particularly was the subject of investigation"? How can you explain that if you were not …?---Investigation means asking questions.*
>
> *Investigation means asking questions?---That's right.'*

Again the evidence of Soheil on this further point is untenable."

In my view, it is clear from Abedian's evidence that he was determined to deny that Brown or Sunland was being investigated for bribery in Dubai. This, in my view, made very clear when, what are conveniently termed, the corporate governance issues for Sunland are considered. It is these to which I now turn.

Corporate governance issues for Sunland

333 The Sunland corporate governance issues arise in respect of its announcements to the Australian Stock Exchange ("the ASX") and also in relation to its Board reporting. These issues are relevant in the present context because they demonstrate, further, the unreliability of the evidence of Abedian and reinforce my opinion that the evidence of both Brown and Abedian in relation to the D17 transaction was cast by them, as far as possible, to rebut any suggestion of a transaction of a type which might be characterised by the Dubai authorities as bribery. This characteristic of their evidence is, in my view, well illustrated by Brown's initial forthright response to Mr Mustafa that Sunland had paid a "premium" to obtain exclusive rights to Plot D17 in the absence of a SPA where Brown apparently did not see such a payment as being unusual or untoward; though clearly the Dubai authorities found this quite

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1166 Transcript, p 332.34 – p 333.08.

unusual or untoward.[1167] In the present context, Abedian's approach to the ASX announcements is, in my opinion, significant. This is not to suggest that his approach to reporting to the Sunland Board was not significant, but those issues do not need to be examined in such detail for present purposes.

ASX announcements

334 Abedian's evidence was clear that he was responsible for all the announcements made by Sunland to the ASX.[1168] The evidence in relation to the ASX announcements is conveniently and, in my view, accurately summarised in the closing submissions of the Reed and the Prudentia parties. For present purposes, it is convenient to set out the relevant part of those closing submissions in full:[1169]

> "16.1.2 Soheil agreed during cross examination that the fact that a senior executive of Sunland Group is being investigated for bribery in Dubai would be considered market-sensitive information[1170] *[b]ecause no company should do a bribery*[1171] and that *if it be the case that a senior executive of Sunland was being investigated for bribery, that that would be market-sensitive information that should be made known to shareholders in the Australian Stock Exchange*.[1172] It was then put to Soheil that *rather than tell the truth about it, you put out a direct deceit in relation to what was going on*.[1173] Soheil's response was that *[y]ou are very wrong* [1174]
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> 16.1.3 Sunland made issued (sic) an announcement to the ASX dated 20 February 2009.[1175]
>
> 16.1.4 This announcement stated, relevantly, that:
>
> 'In reference to today's article on page 52 of The Australian Financial Review, International property Group, Sunland (ASX:SDG) advises that no allegations have been made against Sunland in respect of its activities in Dubai and there is no investigation into Sunland or its activities.'
>
> 16.1.5 Soheil accepted responsibility for this announcement [1176].
>
> 16.1.6 Brown gave evidence [1177] that the announcement *doesn't reflect what*

1167 For example, see transcript p 206.42 – 208.35.
1168 Transcript, p 309.01 - .12; confirmed at Transcript, p 313.26 - .28.
1169 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 16.1.2 to 16.1.22.
1170 Transcript, p 313.13 - .19.
1171 Transcript, p 313.20.
1172 Transcript, p 314.43 - .47.
1173 Transcript, p 315.1 - .2.
1174 Transcript, p 315.2.
1175 MJJ.011.001.0111.
1176 Transcript, p 309.14 - .19.
1177 Transcript, p 284.26 - .39; MJJ.011.001.0111.

was actually going on in Dubai. In answer to a question from the trial judge he agreed it was inaccurate [1178]. The inaccuracy was that at the time of this announcement to the ASX Brown was being investigated for bribery.

16.1.7 Whilst Soheil denied his alleged ignorance of Brown being under investigation for bribery was to justify the ASX announcement, his denial cannot be considered an honest answer.

16.1.8 Sunland also made an announcement to the ASX dated 2 March 2009 [1179].

16.1.9 This announcement stated, relevantly, that:

'Sunland Group Limited (ASX:SDG) reconfirms no allegations have been made against Sunland or its executives in respect of its activities in Dubai.

Furthermore Sunland advises its Chief Operating Officer – Middle East, Mr David Brown, is a witness to the authority's investigation. He is not the subject of investigations, nor has he been arrested or detained as is stated in the press articles.

Sunland Managing Director Sahba Abedian said: "Sunland fully supports the Dubai Government's commitment to ensure the region's property market is transparent["].

"We will continue to provide assistance where required. Maintaining the highest ethical standards in all our dealings has long been a core value of Sunland."'

16.1.10 Soheil accepted responsibility for this announcement [1180].

16.1.11 Brown was asked about this announcement and agreed that in the context of he being under investigation in Dubai for bribery, the announcement *was totally inaccurate* [1181]. Further Brown agreed that having his passport confiscated and being confined to Dubai could be argued as being *detained* [1182]. Brown agreed that the announcement could not have been written less accurately.[1183]

16.1.12 The information for the ASX announcement was, according to Brown, the responsibility of Soheil [1184].

16.1.13 Brown's evidence is that information about the Dubai investigation was *mainly provided by Soheil* to the company secretary.[1185] Brown said he *told [Soheil] precisely – [Brown] gave [Soheil] precise accounts of what was happening to [Brown], what was*

1178 Transcript, p 284.26 - .39.
1179 Court Book, SUN.006.001.0170.
1180 Transcript, p 309.24 - .25.
1181 Transcript, p 285.11 - .12.
1182 Transcript, p 285.38 - .42.
1183 Transcript, p 285.47.
1184 Transcript, p 286.01 - .05.
1185 Transcript, p 286.04 - .06 .

being said to [Brown] and what [Brown] was saying to the Dubai prosecuting authorities.[1186]

16.1.14 The question of 'detention' was subject to further cross examination and questions from his Honour in the context of evidence about a dissatisfied purchaser of property from Sunland in Dubai (Carole Alderson) having her passport confiscated. Soheil was *caught out* by his own evidence. The evidence is supportive of Soheil being aware of the allegations of bribery against Brown as the reason for his *house arrest*.

'She was arrested and her passport confiscated. Did you know that that occurred?---I know that, yes, that's correct.

She was placed under house arrest in Dubai for some 18 months?---The house arrest, it means when somebody's passport is removed, it's called house arrest. It means because they cannot leave the country.

HIS HONOUR: So if your passport is taken in Dubai, you are regarded as being under house arrest?---That's correct, but you can go anywhere in Dubai, anywhere in UAE. You are not allowed to go outside the border.

So Mr Brown was under house arrest while his passport was held by Dubai authorities?---When somebody take it, you are not allowed to leave the country, but it doesn't mean that you are in the house.

No, but he would have been regarded as under house arrest as well, on that basis?---You could interpret that, yes.

Well, that's what you've said?---Yes, what I'm saying is that if it is, somebody has to come as a witness. If, for example, I am a witness in an accident, they take my passport until such a time that I go to court.

And you're under house arrest during that period?---That is the expression that they are using, your Honour. I'm saying that is not correct, it is not a house arrest.

You're not actually confined to your house, you are confined to Dubai?---No, to United Arab Emirates.

I see?---To United Arab. Because you don't have a passport, you cannot go outside the country.

I see, thank you?---I was trying to just explain that somebody is not physically in the house.'

16.1.15 A Sunland board meeting was held on 10 March 2009 after the release of the 2 March 2009 announcement. The board papers indicate that Brown attended this board meeting. Brown's

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1186 Transcript, p 286.19 - .21.

evidence is as follows:[1187]

'I take it you are present by invitation to give a full account of what has occurred to you and Sunland in Dubai?---Well, to be part of a discussion with the board, yes.

Because that meeting, in fact, was in Dubai, wasn't it?---I think it may have been.

So did you seek to correct the misleading statement to the stock exchange?---Well, I didn't write that, had no input into it.

No, my question was did you seek to correct it?---No, I didn't.'

16.1.16 It was put to Soheil during cross examination that it was *very important to you, as you stand here now, to say that these exchanges are accurate, isn't' it* [1188], to which Soheil replied *[t]hat's correct* [1189]. Soheil also agreed that it was a very serious thing to mislead the Australia Stock Exchange and shareholders.[1190]

16.1.17 The final announcement to the ASX which was the subject of cross examination in this proceeding was 21 July 2009.[1191] This announcement stated, relevantly, that:

'Mr Abedian also confirmed that, as a consequence of the Dubai authorities finalising their investigations, the chief operating officer of Sunland's Dubai branch, David Brown, had his passport returned. Mr Brown was a witness to the Dubai authorities' investigations and was never subject of the investigations, nor detained.'

16.1.18 Soheil's evidence is that he would have reviewed this document for accuracy prior to its release to the market[1192] and that he is aware that there are severe penalties attached to misleading the market.[1193]

16.1.19 Soheil agreed with the proposition put to him by his Honour that *in Australia wouldn't we describe [what happened to Brown on 26 January 2009] as someone being detained*[1194] and also agreed that this press release *would be read in Australia*.[1195] Soheil was not prepared to concede that *Australians reading the word 'detained' in that paragraph would understand it by reference to the Australian concept of being detained*.[1196] Soheil was also not prepared to concede that at the time the press release went out, Soheil knew that the sentence

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1187 Transcript, p 286.33 - .41.
1188 Transcript, p 309.45 - .46.
1189 Transcript, p 309.46.
1190 Transcript, p 310.01 - .05.
1191 Court Book, SUN.006.001.0082.
1192 Transcript, p 414.45 - .46; see also Transcript, p 443.5 - .06 where Soheil's evidence is that he read the document carefully.
1193 Transcript, p 415.01 - .02.
1194 Transcript, p 416.03 - .04.
1195 Transcript, p 416.06.
1196 Transcript, p 416.14 - .47.

quoted above was wrong.[1197]

16.1.20 The following evidence was then given in the context of the share price for Sunland on 21 and 22 July 2009 and an exchange of letters between the Australian Stock Exchange and Sunland on 22 July 2009 (including a statement in the Sunland letter that *Other than announcements made by the company, the company does not have any other explanations for the price change in the securities of the company*).[1198]

16.1.21 The above statement was made by Sunland after the share price jumped from 75.5c to 88.5c immediately following the announcement. Soheil maintained this was a coincidence following the announcement.[1199] Soheil said further it could have been due to the share buyback program undertaken by Sunland but he was unable to inform of the date of the commencement of that buyback program.[1200] This was not provided as a reason in the letter of Sunland to the ASX when asked to explain the share jump.

16.1.22 Soheil was then asked about the letter of explanation to the ASX and the fact that it did not include any assertion of the share price being due to the share buyback program:[1201]

'Thinking back to your answers just before the break in relation to the 21 July announcement and the 22 July correspondence with ASX, I'm just having a bit of a problem understanding your answers in light of paragraph 5 of the letter of response from your company secretary, which seems to indicate that the only explanation for changes in the price of the securities of the company is as a result of its public announcements. It seems to state that quite clearly, so I'm just wondering if you would clarify that?---Your Honour, it says, "Other than announcement made by the company, the company does not have any other explanation for the price change of the security of the company."

That is pretty clear, isn't it?---It means we don't have any other news to tell the market.

Doesn't it mean what it says, that you have no other explanation, there is no other reason that your company could provide to the ASX for changes in the share price or securities prices other than public announcements, and that letter is focusing on the 29 July 2009 ASX and media release? Isn't that right?---That's correct, your Honour. But if I may expand on that a little bit. Generally, the response we give to ASX, we say whatever we have is in the

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1197 Transcript, p 445.01 - .04.

1198 Exhibit D13 – Letter from ASX to Mr Harrison, Company Secretary Sunland Group Limited, dated 22/7/2009; Exhibit D14 – Letter from Mr Harrison, Company Secretary Sunland Group Limited, to ASX Markets Supervision Pty Ltd dated 22/7/2009; Transcript, p 445.6 - .46 and Transcript, p 446.1 - .18.

1199 Transcript, p 446.01 - .02.

1200 Transcript, p 446.06.

1201 Transcript, p 448.47 - 449..31.

> announcement we made before, we don't expand on anything else.
>
> No, but they are asking is there any other explanation - they are asking you what is the explanation for the 17.2 per cent change in the share price?---We didn't have any other explanation.
>
> So your only explanation is the public announcements of the company?---That could be, your Honour.
>
> That is what paragraph 5 says, isn't it?---Okay, that's correct.
>
> So you are confirming that's right, there is no other explanation?---There's no other explanation, that's correct.'"

335 As this summary indicates, the evidence was clear that in fact Brown was effectively under "house arrest" in Dubai – consequently being confined to the United Arab Emirates – while the Dubai authorities investigated the bribery allegations. . Brown had actually been detained for questioning by the Dubai Police for a period of seven hours (from 4.30pm until 11.30pm) on 21 January 2009 and was not permitted to leave the Dubai Police Headquarters during that time, and during which he was questioned by Mr Khalifa of the Dubai Police Brown admitted that this event was "very scary"[1202] and he was not allowed to leave the Police Headquarters until he had surrendered his passport, which had to be obtained from his home by his driver.[1203] Brown did not arrive home from the Police Headquarters until the early hours of the next morning, and for the next six months, remained under "house arrest" in Dubai, his passport being held during that time by the Dubai authorities.

336 These events, given their seriousness, must have been well known to Abedian, events which occurred just short of one calendar month prior to the first ASX announcement on 20 February 2009. As the summary set out above notes, Brown's evidence was that this announcement did not reflect what was actually going on in Dubai. The statement in the second ASX announcement that Brown had not been arrested or detained is, on the evidence, clearly inaccurate. Brown agreed that this announcement was totally inaccurate and also agreed that having his passport

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1202 Transcript, p 213.34.

1203 As noted elsewhere (see above, paragraph 334, referring to the *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 16.1.14), Abedian's evidence was that having your passport confiscated in Dubai amounted to "house arrest", even though you are not physically confined to your house and can move about within the United Arab Emirates.

confiscated and being confined to Dubai could be argued as being detained. However, it is simply playing with words to suggest that if one were to spend seven hours at the Dubai Police Headquarters, not being allowed to leave and then surrendering one's passport, that this situation could be described as anything else than "being detained".

337 The final ASX release can only be described as making matters worse and stating that Brown was never the subject of investigations, nor detained. No satisfactory explanation was provided by Abedian in relation to the terms of this final announcement.

Board reporting

338 The deficiencies in relation to the reporting to the Sunland Board are, in my opinion, also accurately summarised in the submissions on behalf of the Reed and Prudentia parties.[1204] Although it is not necessary to examine these deficiencies in detail, it is relevant in the present context to highlight some more important matters which cast further doubt on the reliability of both Brown's and Abedian's evidence.

339 First, Sunland produced no minutes or Board papers in relation to or evidencing any Board discussion about the proposed joint venture or the final purchase of Plot D17. The first reference to a Sunland Board report relating to Plot D17 is Brown's evidence that he and Abedian drafted a report to the Sunland Board members after the execution of the SPA.[1205] Although this report was not discovered by Sunland, there are, nevertheless, minutes of a meeting of SWB resolving to enter into the agreement with Prudentia and to execute a SPA for the purchase of Plot D17.[1206]

340 It is also significant that there was an absence of reporting in relation to the bribery investigation in Dubai in relation to the Plot D17 transaction. Thus, Reed and the Prudentia parties submitted (again, accurately, in my view):[1207]

1204 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 16.2.

1205 Court Book, SUN.009.003.6353; and see Witness Statement of David Scott Brown (6 August 2010), paragraph 267.

1206 Court Book, SUN.005.001.0241.

1207 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 16.2.7 and 16.2.8.

"The absence of comprehensive reporting is also apparent through the period from December 2008 when the Dubai authorities first involved Brown in their bribery investigation over the D17 transaction. Whilst there is evidence that the board was made aware of the investigation, in particular, at a board meeting in Dubai on 9 February 2009, the board's knowledge of the criminal investigation and then proceeding was tainted by the same inaccuracies and omissions which had featured so obviously in the evidence given by Brown to the prosecutors and endorsed by Soheil. The failure of Soheil to ensure that his board was across the events in Dubai was in spite of Brown's evidence that the board of Sunland was concerned about what was happening to Brown in Dubai[1208] and that Soheil himself admitted that the Sunland board *has an interest in the outcome of the criminal proceedings in Dubai*[1209]. Soheil's evidence included the following exchange:[1210]

> *'So you saw it, no doubt, as your responsibility to give the board a full and proper appreciation of the litigation that was taking place in its name in Dubai?---Correct.*
>
> *Because a listed company such as Sunland, it is essential that its board is aware of such information?---That's correct.*
>
> *As it is necessary for board members to be made aware of significant ventures that the company may be undertaking in Dubai?---That's correct.*
>
> *And you would ensure that the board was kept up to date in relation to both those matters, the court case and any significant ventures that were being undertaken?---That's correct.'*

The first written report of the bribery investigation and the role of Brown was prepared by Brown on 1 February 2009[1211] in advance of a board meeting scheduled for 9 February 2009 in Dubai. Brown gave evidence that at this time Soheil was his *boss*, holding the position of *Managing director of Emirates Sunland*[1212] and that *almost everything [Brown] did that had any significant decision-making, [Brown] would always check through [Soheil]*[1213]. Brown also gave evidence that Ron Eames was a director of Sunland Group Limited, chairman of the audit committee and a partner of law firm Phillips Fox and that Eames was visiting Dubai in February 2009 for the board meeting[1214] to attend a board meeting and *as the events had recently happened, we took advantage of him being there to bring him up to speed with what was going on*.[1215] Although Brown said further that he wanted to tell Eames about *the history and the investigations and where it was at at that point in time* [1216], he also told the Court that the report was *the first information given to Ron Eames about what was going on*.[1217]"

1208 Transcript, p 136.05 - .06.
1209 Transcript, p 541.37 - .38.
1210 Transcript p 537.20 - .31.
1211 Transcript, p 109.23 - .31; Court Book, SUN.004.002.0063.
1212 Transcript, p 109.45 - .46 and Transcript, p 110.1.
1213 Transcript, p 110.03 - .04.
1214 Transcript, p 110.39 - .42.
1215 Transcript, p110.42 - .47; see also Transcript, p111.18 - .19.
1216 Transcript, p111.04 - .05.
1217 Transcript, p231.44 - .45.

341 It seems that there was also a paucity of reporting to the Sunland Board in relation to the Dubai proceedings, which was clearly a very important matter.[1218]

Jones v Dunkel

342 Reed and the Prudentia parties and Joyce submitted that it was not open for Sunland to make submissions on the application if the rule in *Jones v Dunkel*,[1219] which they said was not applicable in the circumstances of this case.

343 There is no question that Sunland made allegations of a most serious nature against parties in this case; particularly against Reed, Prudentia and Joyce. Those allegations are based on representations which Sunland alleged were made with respect to Plot D17 and in relation to Sunland's alleged reliance on those representations. The allegations and issues in relation to them have already been considered in some detail. Sunland's case, based on these allegations has, for the reasons already set out, failed comprehensively. I found, even accepting the Sunland evidence at face value,[1220] that Sunland failed to establish its case based on both the alleged representations and alleged reliance. Sunland has demonstratively failed to meet its burden under s 140 of the *Evidence Act* and, in my view, has not even come close to establishing its pleaded causes of action; statutory or tortious.

344 It follows that none of the defendants, Reed, Prudentia, Hanley or Joyce, has any case to answer. Consequently, it is not open to the Court to draw inferences adverse to any of the defendants on the basis of the rule in *Jones v Dunkel*. This rule, or its equivalent in other jurisdictions, has been referred to and discussed in many cases and texts, but its nature and rationale remains the same:[1221] for example, *O'Donnell v Reichard*[1222] and *Kuhl v Zurich Financial Services Australia Ltd* to which Sunland made reference.[1223] *Kuhl* provides an example of the application of the rule in *Jones v Dunkel* in terms of the significance of the failure to call a party as a witness, which

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1218 See Abedian's evidence in cross-examination at Transcript, p 363.32 - .46 and p 364.01 - .20.

1219 (1959) 101 CLR 298.

1220 Cf the discussion of the reliability of the Sunland witnesses, Brown and Abedian, discussed at paragraphs 304 to 332, above.

1221 See, for example, *Wigmore on Evidence* 3rd ed, 1940, vol 2, [285], p 162; referred to in *Jones v Dunkel* (1959) 101 CLR 298 at 320-321.

1222 [1975] VR 916 (FC) at 929 (Newton and Norris JJ).

1223 (2011) 243 CLR 361.

the High Court said may carry greater weight in persuading the Court to draw an unfavourable inference against that party. In this respect, Heydon, Crennan and Bell JJ said:[1224]

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

This application of the rule in *Jones v Dunkel* in *Kuhl* does, however, proceed on the basis that the rule is, in the circumstances, otherwise applicable. In the circumstances of this case, the rule does not apply against the defendants because, for the reasons indicated, the threshold for its application is not reached.

345 As I made clear in *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd*,[1225] no inference is to be drawn against a defendant in circumstances where a submission was made that the plaintiff has not made out a case for the defendant to answer:

> "Applying the reasoning in *Jones v Dunkel*, I am of the opinion that no inference can be drawn in the present circumstances unless and until the party bearing the burden of proof of its case (the plaintiff) has by the evidence it relies upon established a case for the defendant to answer. If and when the plaintiff were to establish its case, then the defendant may, if it did not call evidence to rebut the case, be left in the position of arguing its case against the plaintiff's unchallenged or uncontradicted evidence. This may of itself, or with the aid of inferences according to the rule in *Jones v Dunkel*, establish the plaintiff's case. However, I am of the opinion that the rule in *Jones v Dunkel* may not be resorted to by a party, in effect, to fill in the facts of its case before the threshold for the operation of the rule is reached…"

It was submitted by Sunland that this case was distinguishable.[1226] It is not clear from the Sunland submissions on what basis it is said that *Tenth Vandy* is distinguishable. In any event, I do not accept that this statement from the judgment in that case is anything but a statement of universal application with respect to the

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1224 (2011) 243 CLR 361, at 584-585, [63]-[64].

1225 [2010] VSC 2, [17]; a passage approved by the Court of Appeal in *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd* [2012] VSCA 103 at [154]-[156] (Nettle and Neave JJA; with whom Bell AJA agreed).

1226 See *Plaintiffs' Address*, paragraph 22.

rule in *Jones v Dunkel*, which, on the authorities, applies in circumstances such as the present, where a plaintiff has failed to reach the threshold of establishing a case for a defendant to answer.

346 In similar circumstances, Kaye J in *Jason Henry Oakley and Lisa Tomlinson v Insurance Manufacturers of Australia Pty Ltd*[1227] said on a no case submission:

> "On a no case submission, the judge cannot draw an inference against the party making the submission ('the moving party') based upon the absence of evidence from that party." [footnotes omitted]

347 More specifically, the rule in *Jones v Dunkel* "… cannot be used to fill gaps in the evidence, or to convert conjecture and suspicion into evidence".[1228] In this respect, Kitto J stated:[1229]

> "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed."

348 The reason for these constraints on the ambit of the rule in *Jones v Dunkel* are clear. Without them, it would be open to a party in civil proceedings, in effect, to reverse the usual onus of proof, by putting up a weak or spurious case and then requiring evidence in rebuttal from the defendant which the plaintiff might hope to use to make out its own case – to "fill in the gaps". Sunland's reliance on the rule in the present circumstances is, in my view, a paradigm "gap filling" exercise which the rule does not permit.

349 The rule also applies to evidence in chief when, in the particular circumstances, the most natural inference is that the party feared the answers if it did so.[1230] In this

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1227 [2008] VSC 68 at [3].

1228 See *Cross on Evidence* (8th Austn ed by J.D. Heydon; Lexis Nexis, 2010), [1215] p 42 and the reference (n 271) to *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320-1 and the other cases to which reference is made.

1229 *Jones v Dunkel* (1959) 101 CLR 298 at 305.

1230 See *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 (CA) at 418-9 (Handley JA); and see *Cross on Evidence*, [1215] at p 45 (n 308); noting the explanation for Clyde-Smith not giving evidence (personal and family reasons (see Transcript, p 556.43)) and explanation which was said, against Sunland, to be unsatisfactory in all the circumstances. And see, generally, *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303.

respect, it was submitted against Sunland that adverse inferences should be drawn against it as a result of its failure to ask a variety of questions in re-examination.[1231] It is not, however, necessary to consider those issues because of the view I have taken in relation to Sunland's case. Neither is it necessary, and for the same reason, to consider submissions against Sunland that the rule should be applied and inferences drawn against it as a result of its failure to call a number of witnesses, including Austin, Brearley and Clyde-Smith, who, it was said, might reasonably be expected to provide evidence relevant to critical parts of Sunland's case.

350 Additionally, in the present circumstances, there is no basis for application of the rule in *Browne v Dunn*.[1232] The rule in *Browne v Dunn* is an important rule of practice, designed to ensure fairness by seeking to ensure that the witnesses of each party have the opportunity to respond to the opposing case, as is indicated by the formulation of the rule by Hunt J in *Allied Pastoral Holdings Pty Ltd v FCT*:[1233]

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn."

This rule does not, however, apply in the present circumstances because, again, Sunland's case never reached a threshold which would require, as a matter of fairness, any case against it to be put to its witnesses. Further, and in any event, the defendants chose not to put a contrary case, in which case the rule of practice, which is *Browne v Dunn*, had no application.

1231 See above, paragraph 242.

1232 (1893) 6 R 67 (HL); cf *Plaintiffs' Address*, paragraphs 23 and 24.

1233 [1983] 1 NSWLR 1 at 16; and see *Cross on Evidence* (8th Austn ed by J.D. Heydon, Lexis Nexis, 2010), [17435], at pp 602-3.

Trade Practices Act

Misleading or deceptive conduct

351 As noted in more general terms previously, the Sunland case seeks to establish liability on the basis of provisions of the TPA, the provisions of the FTA and also on the basis of tortious liability in deceit. More particularly, reliance is placed by Sunland on ss 52 and 82 of the TPA[1234] and also ss 53(aa), 53(g) and 53A of the TPA.[1235] These latter provisions prohibit the making of false or misleading representations in connection with the promotion or supply of goods or services; "services", being defined broadly.[1236] These provisions might be said to complement the more broadly based provisions of s 52 of the TPA, which prohibits misleading or deceptive conduct. In this vein, Miller observes:[1237]

> "Section 53 supports s 52 by enumerating specific types of conduct which, if engaged in by a corporation in trade or commerce in connection with the promotion or supply of goods or services, will give rise to a breach of the Act. Although a number of the enumerated types of conduct refer to 'false or misleading' representations rather than 'misleading or deceptive' representations (s 52) there is no material difference when dealing with misleading conduct: *ACCC v Dukemaster Pty Ltd* [2009] FCA 682; (2009) ATPR 42-290.

Sunland also relies upon the accessorial liability provisions of s 75B of the TPA and also s 82 of that Act which provides for actions for damages. The effect of s 82 of the TPA is to give a plaintiff a right to recover their "loss or damage conduct of another person that was done in contravention of Part … V …". Part V of the TPA includes ss 52 and 53 of that Act.

352 The principles applicable to the application of s 52 of the TPA are most helpfully summarised by Gordon J in *ACCC v Dukemaster Pty Ltd*,[1238] by reference to *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*.[1239] It is helpful in the present context to set out the principles which were restated by Gordon J:[1240]

1234 Second Further Amended Statement of Claim, paragraphs 38 to 41.
1235 Second Further Amended Statement of Claim, paragraphs 54, 55 and 56.
1236 TPA, s 4.
1237 *Miller's Annotated Trade Practices Act* (31st ed, 2010), 662, [1.53.5] (Outline).
1238 [2009] FCA 682, [10].
1239 (1984) 2 FCR 82 at 87-90 (Bowen CJ, Lockhart and Fitzgerald JJ).
1240 *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682, [10].

"**[10]** The following principles are worth restating.

1. A contravention of s 52(1) of the TPA is established by 'conduct' which is misleading or deceptive or likely to mislead or deceive: *Global Sportsman Pty Ltd* 2 FCR 82, 87. The 'conduct', in the circumstances, must lead, or be capable of leading, a person into error (*Hannaford (t/as Torrens Valley Orchards) v Australian Farmlink Pty Ltd* [2008] FCA 1591 at [252] citing *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 200; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198) and the error or misconception must result from 'conduct' of the corporation and not from other circumstances for which the corporation is not responsible: *Global Sportsman Pty Ltd* 2 FCR 82, 91. 'Conduct' is likely to mislead or deceive if there is a 'real or not remote chance or possibility regardless of whether it is less or more than fifty per cent': *Global Sportsman Pty Ltd* 2 FCR 82, 87.

2. Section 52(1) is concerned with the effect or likely effect of 'conduct' upon the minds of that person or those persons in relation to whom the question of whether the 'conduct' is or is likely to be misleading or deceptive falls to be tested. The test is objective and the Court must determine the question for itself: *Global Sportsman Pty Ltd* 2 FCR 82, 87. Section 52 is not designed for the benefit of persons who fail, in the circumstances of the case, to take reasonable care of their own interests: *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 241. Moreover, it would be wrong to select particular words or acts which although misleading in isolation do not have that character when viewed in context: *Elders Trustee* 78 ALR 193 at 241 citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199.

3. 'Conduct' can, of course, include making a statement which is misleading or deceptive or likely to mislead or deceive: *Global Sportsman Pty Ltd* 2 FCR 82, 88.

4. By making a statement of past or present *fact*, a corporation's state of mind is irrelevant unless the statement involved the state of the corporation's mind: *Global Sportsman Pty Ltd* 2 FCR 82, 88. Contravention of s 52(1) does not depend upon the corporation's intention or its belief concerning the accuracy of the statement of fact but upon whether the statement conveys a meaning which is false. A false meaning will be conveyed if what is stated concerning the past or present fact is inaccurate but also if, although literally true, the statement conveys a meaning which is false.

5. Precisely the same principles control the operation of s 52(1) to statements involving the state of mind of the maker when the statement was made (eg promises, predictions and opinions). A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or impliedly) that the maker of the statement had a particular state of mind when the statement was made and, commonly, that there was a basis for that state of mind: *Global Sportsman Pty Ltd* 2 FCR 82, 88.

6. A statement of opinion will not be misleading or deceptive or likely to mislead or deceive merely because it turns out to be incorrect, misinforms or is likely to do so: *Elders Trustee* 78 ALR 193, 242 and *Bateman v Slatyer* (1987) 71 ALR 553 at 559. An incorrect opinion does not of itself establish that the

opinion was not held by the person who expressed it or that it lacked any or any adequate foundation: *Global Sportsman Pty Ltd* 2 FCR 82, 88. An expression of an opinion which is identifiable as an expression of opinion conveys no more than that the opinion is held and perhaps that there is a basis for the opinion. If that is so, an expression of opinion however erroneous misrepresents nothing: *Global Sportsman Pty Ltd* 2 FCR 82, 88.

7. However, an opinion may convey that there is a basis for it, that it is honestly held and when it is expressed as the opinion of an expert, that it is honestly held upon rational grounds involving an application of the relevant expertise. If the evidence shows that the opinion was not held or that it lacked any or any adequate foundation, particularly if the opinion was expressed as an expert, a statement of opinion may contravene s 52 of the TPA: *Elders Trustee* 78 ALR 193, 242, proposition (4): see also *Hannaford* [2008] FCA 1591 at [253] and *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th Australian Edition, 2008), [11.116]."

353 In the context of these principles of more general application with respect to the operation and application of s 52 of the TPA, Reed, the Prudentia parties and Joyce sought to identify the principles applicable in the particular circumstances of this proceeding:[1241]

> "27. The principles that assist this Court in applying section 52 of the TPA are as set out below:
>
> (a) Section 52(1) is concerned with the effect or likely effect of 'conduct' upon the minds of that person or those persons in relation to whom the question of whether the conduct is or is likely to be misleading or deceptive falls to be tested. The test is objective and the Court must determine the question for itself.[1242]
>
> (b) Reasonable inferences, reasonable assumptions and reasonable expectations arising from objectively determined circumstances will be in the constructive knowledge of the parties. An objective test excludes from consideration subjective matters (knowledge, intention) not known to the parties.[1243]
>
> (c) The 'conduct', in the circumstances, must lead or be capable of leading a person into error[1244] and the error or misconception must result from conduct of the alleged contravenor and not from other circumstances for which the alleged contravenor is

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1241 *Closing Submissions of Fourth Defendant*, paragraphs 27 – 31; submissions adopted by the Prudentia parties in their *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 19.1.

1242 *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87.

1243 *Owston Nominees No 2 Pty Ltd* v *Clambake Pty Ltd* (2011) 248 FLR 193 at [62].

1244 *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591 at [252]; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198.

not responsible.[1245]

(d) Conduct is likely to mislead or deceive if there is a 'real or not remote chance or possibility regardless of whether it is less or more than fifty per cent'.[1246]

(e) It is wrong to select some words or acts which although misleading in isolation do not have that character when viewed in context.[1247] The identification of the impugned conduct and what it conveys or communicates to the persons to whom it is directed must be assessed with regard to all relevant surrounding circumstances. Not all circumstances are relevant: conduct cannot be attributed to a defendant unless he or she had actual or constructive knowledge of the circumstances that affect its content. That means that contextual circumstances of which a defendant had no actual or constructive knowledge that alter the scope of what would otherwise be attributed to him or her, are irrelevant.[1248]

(f) As a general proposition, s 52 does not require a party to commercial negotiations to volunteer information that will be of assistance to the decision-making of the other party. It does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard for its own interests of another party of equal bargaining power and competence.[1249]

(g) By making a statement of past or present fact, the state of mind of the person who makes that statement is irrelevant unless the statement involved the state of that person's mind.[1250]

28. Whether particular conduct is likely to mislead or deceive involves considering a notional cause and effect relationship between the conduct and the state of mind of the relevant person. The test is necessarily objective.[1251] In this case, one asks what the reasonable person in the position of Sunland would have understood by the alleged conduct of Joyce, against the context of all relevant surrounding circumstances. Any error must result from conduct of Joyce and not from other matters for which he is not responsible.

29. In characterising the alleged conduct of Joyce in relation to the plaintiffs, one must bear in mind what matters of fact each knew about the other of them as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.[1252] Relevant considerations include that each of Joyce, Brown and Abedian were

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1245 *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 91.

1246 *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87.

1247 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199.

1248 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [27].

1249 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [22] (per French CJ and Kiefel J); *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 241.

1250 *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 88.

1251 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [25] (per French CJ).

1252 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [37]; and see above, paragraph 60.

sophisticated and experienced businessmen.[1253]

> 30. A person does not avoid liability for breach of s 52 because the person who has been the subject of misleading or deceptive conduct could have discovered the misleading or deceptive conduct by proper inquiries.[1254] However, depending on the circumstances, other related conduct may have the effect of modifying or erasing whatever is misleading in the conduct complained of.[1255]
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> 31. For example, the fact that the plaintiffs in this case had the opportunity to but did not take steps which might or would have corrected a misapprehension or wrong assumption can be relevant to an inquiry as to whether conduct should be characterised as misleading or deceptive.[1256]"

I accept this identification of relevant principles as both supported by the authorities and as being directed to the relevant issues in this case.

354 In relation to the general principles applicable with respect to the application and operation of s 52, as restated by Gordon J in *Dukemaster* and as applied in the submissions of Reed and the Prudentia parties and Joyce, as set out above, I do not understand Sunland to be submitting to the contrary in terms of the general principles but, rather, to the contrary with respect to their application in the present circumstances. Nevertheless, Sunland could not gainsay that each of Reed, Joyce, Brown and Abedian were sophisticated and experienced businessmen.

355 Applying these principles in the present circumstances, and on the basis of the matters discussed in some detail in the preceding reasons, I am of the opinion that there has been no misrepresentation by the defendants, or any of them, by words or other conduct with respect to Plot D17 in breach of the provisions of s 52 of the TPA as alleged by Sunland.[1257] Rather, the position with respect to that plot was very clear, particularly in the conversation leading up to the "put your foot on it" email.[1258] Furthermore, it was clear that Sunland was not even able to articulate,

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1253 *Jireh International Pty Ltd t/as Gloria Jean's Coffee v Western Exports Services Inc* [2011] NSWCA 137 at [94].

1254 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [111].

1255 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [152]; *Midcoast County Council (t/as Midcoast Water) v Reed Constructions Australia Pty Ltd* [2011] NSWCA 268 at [84].

1256 *Midcoast County Council (t/as Midcoast Water) v Reed Constructions Australia Pty Ltd* [2011] NSWCA 268 at [50], referring to *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [19].

1257 In this respect, particular reference should be made to paragraphs 240 to 246

1258 See above, paragraphs 127 to 130.

with any degree of clarity or consistency, the nature of the representations or other conduct about which it complained;[1259] or, more particularly, the nature of some "right" or "control" alleged with respect to Plot D17.[1260] Quite apart from this particular event or events in the course of communications between and the conduct of the parties, it should be noted that the authorities emphasise that "conduct" is not coextensive with "representation".[1261] It is clear that the likely effect of "conduct" upon the mind of a party such as Sunland must be considered objectively and in the context of all relevant surrounding circumstances; a position emphasised in the detailed consideration of the D17 transaction. In this context, it is also clear that liability for a breach of s 52 is not avoided simply because the person claiming to be the subject of the misleading and deceptive conduct could have discovered the misleading or deceptive conduct by proper inquiries.[1262] Nevertheless, other related conduct may have the effect of "erasing whatever is misleading in the conduct" complained of. In this respect, McHugh J said, in *Butcher v Lachlan Elder Realty Pty Ltd*:[1263]

> "[152] This is not to say that a disclaimer should be ignored for the purposes of assessing whether a contravention of s 52 has occurred. As Miller notes in *Miller's Annotated Trade Practices Act*,[1264] the conduct must be considered as a whole. This requires consideration of whether the conduct in question, including any representations and the disclaimer, is misleading or deceptive or is likely to mislead or deceive. If a disclaimer clause has the effect of erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct. However, a formal disclaimer would have this effect only in rare cases. Thus, in *Benlist Pty Ltd v Olivetti Australia Pty Ltd*, Burchett J said:[1265]
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> > 'It has been held on many occasions that the perpetrator of misleading conduct cannot, by resorting to [a disclaimer] clause, evade the operation of the [Act]. *Of course, if the clause actually has the effect [of]*

1259 See above, paragraph 241; see also paragraphs 153 to 157.

1260 See above, paragraphs 227 to 230 (in relation to the entity Och-Ziff).

1261 See *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, at 623 [103] (though dissenting in the result but not with respect to the statement of principles) (McHugh J); and see above, paragraph 60.

1262 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, at 625-6 [111] (McHugh J).

1263 (2004) 218 CLR 592, at 638-9 [152].

1264 *Miller's Annotated Trade Practices Act*, 25th ed (2004), p 475. Miller states that the courts should consider "whether the representation in question, including the disclaimer or exclusion clause, is misleading or deceptive", which appears to confine the conduct to representations (p 475); however, he observes earlier that s 52 is not confined to circumstances which constitute some form of representation (p 453).

1265 [1990] ATPR ¶41-043 at 51,590. See also the similar remarks of his Honour in *Lezam* (1992) 35 FCR 535 at 557.

> *erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct.* However, I should think it would only be in rare cases that a formal disclaimer would have that effect.' (Emphasis added)"

356 In the circumstances of the D17 transaction, the circumstances which have been considered in detail, Sunland's failure to make any enquiries that would have been likely to establish the position with respect to "rights" in or "control" of Plot D17 is inexplicable. Throughout the transaction, Sunland had the ability to do so at any time, it was familiar with land transactions of the same kind in Dubai (and had previously dealt with DWF with respect to the purchase of nearby Waterfront land) and, in any event, proper inquiries became an imperative after the conversations with senior officers of DWF which led to the "put your foot on it" email.[1266]

357 Consequently, I am of the opinion that there was no conduct on behalf of Reed, the Prudentia parties or Joyce (to the extent that any allegations in this respect were made against him)[1267] prohibited by s 52 of the TPA. Moreover, to the extent that particular instances of conduct might, viewed in isolation, be said to be misleading or deceptive, that position is dispelled when they are viewed in the context of the whole and, particularly in the context of events such as those evidenced by and with respect to the "put your foot on it" email. Similarly, the provisions of the Implementation Agreement or MOU in draft and final form, including the agreement with Hanley, properly construed in light of the surrounding circumstances and having regard to the totality of the provisions of these documents (draft and final), does not amount to a species of conduct of a prohibited kind. In this respect, one cannot focus, for example, on a recital which was explicable and understandable in general terms and, in any event, governed by the operative parts of those documents in a manner which made the position quite clear.[1268]

Causation and reliance

358 The relevant provisions of s 82 of the TPA provides that:

> "… a person who suffers loss or damage by conduct of another person that

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1266 See above, paragraphs 151 and 152.

1267 See below, in relation to accessorial liability, paragraphs 371 to 372.

1268 See above, paragraphs 106 to 110.

> was done in contravention of a provision of Part … V … may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

359 As the language of s 82 makes clear, in order to establish liability under these provisions, it is necessary first to identify "conduct" prohibited by s 52 of the TPA and, secondly, to establish a causal connection between that conduct and the loss and damage sought to be recovered. This point is emphasised by the High Court in *Campbell v Backoffice Investments Pty Ltd*[1269] where, in the context of the provisions of ss 42 and 68 of the New South Wales *Fair Trading Act* 1987 (provisions which correspond to ss 52 and 82 of the TPA), the Court said:[1270]

> "[102] Using tools of analysis drawn from the common law of deceit (misrepresentation and reliance) within the statutory framework provided by ss 42 and 68 of the *Fair Trading Act* may sometimes be helpful in identifying contravening conduct and deciding whether loss or damage was suffered by the contravention. But as McHugh J correctly pointed out in *Butcher v Lachlan Elder Realty Pty Ltd*,[1271] the 'conduct' with which s 52 of the *Trade Practices Act* 1974 (Cth) deals is not confined to '"representations", whether they be representations as to matters of present or future fact or law'.[1272] This proposition applies with equal force to s 42 of the *Fair Trading Act*. References to misrepresentation or reliance must not be permitted to obscure the need to identify contravening conduct (here, misleading or deceptive conduct) and a causal connection (denoted by the word 'by') between that conduct and the loss and damage allegedly suffered. As McHugh J also pointed out in *Butcher*,[1273] with particular reference to s 52 of the Trade Practices Act, but with equal application to s 42 of the *Fair Trading Act*:
>
> > "The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. *It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself.*[1274] *It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct.*[1275] Thus, where the alleged contravention of

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1269 (2009) 238 CLR 304.

1270 (2009) 238 CLR 304 at 341-2, [102] (Gummow, Hayne, Heydon and Kiefel JJ).

1271 (2004) 218 CLR 592 at 623 [103].

1272 McHugh J dissented in the result of the particular case but not as to these questions of principle.

1273 (2004) 218 CLR 592 at 625 [109]. See also the judgment of the Court in *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 84 [200].

1274 See *Equity Access Ltd v Westpac Banking Corporation* [1990] ATPR ¶50,943 (40-994) at 50,950 per Hill J; see also *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202-203 (Deane and Fitzgerald JJ).

1275 See, eg, *Trade Practices Commission v Lamova Publishing Corporation Pty Ltd* (1979) 42 FLR 60 at 65-66; 28

> s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole.[1276] The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document.'
>
> (Emphasis added)"

360 The requirement under s 82 of the TPA that the loss or damage be suffered "by" the contravening conduct generally results in the damages being assessed not on the basis of expectation loss but, rather, by reference to the detriment actually suffered as a consequence of reliance upon the contravening conduct.[1277]

361 Subjective factors relevant to the particular individual or individuals claiming to have been misled or deceived may need to be taken into account but, again, in the context of the particular circumstances, including any contemporaneous disclaimer. Thus, French CJ said in *Campbell v Backoffice Investments Pty Ltd*:[1278]

> "[27] In *Butcher v Lachlan Elder Realty Pty Ltd*[1279] the approach to characterisation of conduct directed to identified individuals was set out in the joint judgment of the majority as follows:[1280]
>
> > 'The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.'
>
> Although this passage begins by referring to the need to establish a causal link between the impugned conduct and the claimed loss, it is clear that thereafter their Honours were addressing the task of characterisation.
>
> [28] Determination of the causation of loss or damage may require account

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ALR 416 at 421-422 (Lockhart J).

1276 See, eg, *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 at 541 (Sheppard J, Hill J agreeing).

1277 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 6–7 (Gibbs CJ); 11–12 (Mason, Murphy, Dawson JJ); *Henville v Walker* (2001) 206 CLR 459, at 502 [132] (McHugh J); *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd* [2011] FCAFC 119 at [125] (Gilmour, Jagot and Nicholas JJ).

1278 (2009) 238 CLR 304 at 319-20, [27]-[29].

1279 (2004) 218 CLR 592 ; [2004] HCA 60.

1280 (2004) 218 CLR 592 at 604–605 [37] (Gleeson CJ, Hayne and Heydon JJ).

> to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.
>
> [29] A person accused of engaging in misleading or deceptive conduct may claim that its effects were negated by a contemporaneous disclaimer by that person, or a subsequent disclaimer of reliance by the person allegedly affected by the conduct. The contemporaneous disclaimer by the person engaging in the impugned conduct is likely to go to the characterisation of the conduct. A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation.[1281]"

It follows that the fact that the party claiming to be misled or deceived had the opportunity to but did not take steps which might or would have corrected a misapprehension or wrong assumption can be relevant to an inquiry as to whether loss or damage has been suffered by the particular conduct.[1282] Clearly, this was the position as a result of events leading up to the "put your foot on it" email and, more generally, having regard to Sunland's access to senior DWF officers.[1283]

362 It is not necessary for the impugned conduct to be the sole cause of the loss and damage in order for a party to claim an award of damages under s 82 of the TPA. It is sufficient that the contravening conduct was a cause of the loss and damage.[1284] Nevertheless, there must be established a sufficient and direct link between the conduct and the consequences;[1285] there must be a causal connection between the defendant's conduct and the plaintiff's misapprehension.[1286] These aspects of the statutory requirements were helpfully amplified by Sunland's submissions on the propositions in relation to reliance flowing from the authorities:[1287]

> "193. The following propositions in relation to reliance may be extracted:

1281 See the discussion in Heydon, *Trade Practices Law*, (2008) Vol 2 at [11.720]–[11.730].

1282 See *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 138 (Hill J).

1283 See above, paragraph 355.

1284 *PE Kafka Pty Ltd v Hermitage Motel Pty Ltd* [2009] FCAFC 94 at [6] (Ryan, Gordon and Foster JJ); *I & L Securities Pty Ltd v HTW Valuers Pty Ltd* (2002) 210 CLR 109 at 121-2 [33] (Gleeson CJ), 128 [57] (Gaudron, Gummow and Hayne JJ) and 177-8 [216] (Callinan J).

1285 *McCarthy v McIntyre* [1999] FCA 784 at [48] (Hill, Sackville and Katz JJ).

1286 *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45.

1287 *Plaintiffs' Address*, paragraphs 193-200.

(a) In the context of the TPA, in order for there to be the required causal relationship between a contravention of section 52 and loss or damage, so as to satisfy the requirements of section 82(1), it is not necessary that the contravention be the sole cause of the loss or damage: *Henville v Walker* (2001) 206 CLR 459 at 469 [14], at 497 [119] and at 509 [163].

(b) It is not a bar to recovery that that there is another cause, even a cause which, on its own account, satisfies the 'but for' test.

(c) It is enough to demonstrate that contravention of a relevant provision of the TPA was a cause of the loss or damage sustained: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 128 [57] per Gaudron, Gummow and Hayne JJ; *MAM Mortgages Ltd v Cameron Bros* [2002] QCA 330 at [10] per McPherson JA.

(d) The expression 'a cause' means 'materially contributed to': *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 130 [62] per Gaudron, Gummow and Hayne JJ. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach, without more, would not have brought about the damage: *Henville v Walker* (2001) 206 CLR 459 at 493 [106].

194. Particularly relevant to this case is the deceit case of *Gould v Vaggelas* (1985) 157 CLR 215, where the test for reliance was addressed by Wilson J and Brennan J at some length.

195. Wilson J observed at 236 that a representation will be regarded as a cause of loss even though it played only a minor part in contributing to the loss.

196. In *Gould* Brennan J observed at 251 - 252:

> 'If the desire for ownership be sufficiently intense, a prospective purchaser is wont to discount the doubts and suspicions that might otherwise hold him back from acting on anything contained in a vendor's representation and, by giving credence to at least part of what he has been told, to tip the scales in favour of buying. If the representor leads the representee to believe any part of the representation which is, and is known by the representor, to be untrue and the representee acts on that belief and suffers damage, the representor does not escape liability because the representee did not believe the representation in full. If the representee's desire to own what was for sale leads to the giving of some credence to the representation which would not otherwise have been given, the representee's self-induced gullibility is no defence to the representor. A knave does not escape liability because he is dealing with a fool.'

197. Wilson J addressed the test for reliance at 235-239 in the following passage:

> 'Having made those findings [i.e. as to the fraudulent misrepresentations made by Mr Vaggelas], the trial judge proceeded to deal with the submission strongly advanced at the trial by Mr. Pincus and maintained both before the Full Court and this Court that

a misrepresentation is no ground for relief unless it induces the representee to enter into the contract and that on the evidence the Goulds had failed to establish the fact of inducement. His Honour correctly elucidated … the applicable principles, which can be re-stated as follows:

1. Notwithstanding that a representation is both false and fraudulent, if the representee does not rely upon it he has no case.

2. If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.

3. The inference may be rebutted, for example, by showing that the representee, before he entered into the contract, either was possessed of actual knowledge of the true facts and knew them to be true or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation.

4. The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract.

… However, decisions of this Court leave no room to doubt that the ultimate onus of proving inducement rests upon the party seeking relief in respect of the fraudulent misrepresentation. …

… At the same time, one can readily understand why it is in cases of deceit that a tribunal whose duty it is to find the facts may require a defendant to make some answer to the case that is put against him. Such cases are of a kind where in the general experience of mankind the facts speak for themselves. Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations. It is entirely accurate to speak of an onus resting on a defendant to draw attention to the presence of circumstances such as those I have described in order to show that the inference of the fact of inducement which would ordinarily be drawn from the fraudulent making of a false statement calculated to induce a person to enter into a contract followed by entry into that contract should not in all the circumstances be drawn. But it is no more than an evidentiary onus — an obligation to point to the existence of circumstances which tend to rebut the inference which would

ordinarily be drawn from the primary facts. When all the facts are in, the fact-finding tribunal must determine whether or not it is satisfied on the balance of probabilities that the misrepresentations in question contributed to the plaintiff's entry into the contract. The onus to show that they did is a condition precedent to relief and rests at all times on the plaintiff. …

… Once it be established, as was found by the trial judge, that without any assurance whatever of the profitability of the resort save that which was fraudulently misrepresented to them by Mr Vaggelas the Goulds were prepared to pay more than two million dollars for the property the conclusion that those misrepresentations played some part in persuading them to engage in the transaction is well-nigh irresistible. The members of the Full Court were unanimous in upholding the decision of Connolly J. I respectfully agree with them.'[1288]

198. Brennan J observed at 250:

'An inference of inducement may be drawn when a party enters into a contract after a material representation has been made to him, but it is no more than an inference of fact and it is settled law that such an inference may be rebutted by the facts of the case: *Holmes v Jones*; *Smith v Chadwick*. The tribunal of fact may infer that such a material misrepresentation induced the representee to enter into the contract and the fact that there were other inducements to him to do so does not necessarily preclude the drawing of that inference. The relevant question for the tribunal of fact to answer on all the evidence is whether the misrepresentation alone, or with or notwithstanding other things that accompanied it, was a real inducement, or one of the real inducements to the plaintiff to do whatever caused his loss: *Nicholas v Thompson*, per Cussen ACJ; *Edgington v Fitzmaurice*, per Bowen LJ; *Arnison v Smith*, per Lord Halsbury L.C'

199. Wilson J's four principles in *Gould* have been referred to and adopted in a number of subsequent cases.[1289]

200. Beazley JA put it simply:

'*Reliance can be inferred from all the circumstances, including from a party's conduct: see Hanave Pty Ltd v LFOT Pty Ltd (1999) 43 IPR 545 where the court held that causation does not have to be established by direct evidence of the part the relevant representation played. It is open to the court to determine "what effect must be taken to have resulted": per Kiefel J at 556.*'[1290]"

1288 (1985) 157 CLR 215, extracts from pages 235-239, with footnote references omitted.

1289 *Ackers v Austcorp International Ltd* [2009] FCA 432 at [177] (Rares J); *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd* (1993) 41 FCR 229 at 234 (Lockhart, Gummow and French JJ); *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 at 482-483 (Beaumont, Foster and Hill JJ); *Sutton v AJ Thompson Pty Ltd* (1987) 73 ALR 233 at 240 (Forster, Woodward and Wilcox JJ).

1290 *Abigroup Contractors Pty Ltd v Sydney Catchment Authority* (2004) 208 ALR 630 (NSWCA) at [85] (Beazley JA), Ipp and Tobias JJA concurring at [104] and [105].

363 On the basis of these authorities and the conduct of the parties and the events which have already been examined in detail, I am of the opinion that it is clear that there was no reliance on the part of Sunland on the representations or conduct of Reed, the Prudentia parties or Joyce which could be said to have caused any loss or damage to it.[1291] In particular, I am of the opinion that, for the reasons already set out in detail, Sunland simply made a commercial decision to ensure that it was in a position to purchase and develop Plot D17 exclusively without having to do so under any joint venture arrangement with the Prudentia parties, having regard to the very significant profit potential that it assessed was likely to flow to it on this exclusive basis.[1292] Consequently, Sunland was little concerned about the basis upon which it paid the fee – it simply wanted Reed and the Prudentia parties to "walk away".[1293]

Sections 53(aa), 53(g) and 53A of the TPA

364 Sunland alleges that each of Reed, the Prudentia parties and Joyce contravened ss 53(aa), 53(g) and 53A of the TPA.[1294] Section 53(aa) prohibits false representations in connection with, among other things, the supply or possible supply of goods or services; including the "quality" of goods or services.[1295] Section 53(g) prohibits the making of a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

365 In *Given v CV Holland (Holdings)Pty Ltd,*[1296] the Federal Court adopted the definition of "quality" set out in *The Shorter Oxford Dictionary*, being "an attribute, property, special feature; the nature, kind or character (of something)". The Court said, further, that "if a representation is in fact not correct, it comes within the words of

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1291 See above, paragraphs 301 to 303; noting also the Sunland submission as to the "rhetorical question" – namely that there must have been a representation relied upon, otherwise why would Sunland have paid the fee? – relying on *Gould v Vaggelas* (1985) 157 CLR 215 in support (discussed, above, paragraphs 302 to 303 and 362).

1292 See above, paragraphs 208, 242, 259, 299 and 303.

1293 See the references in the preceding footnote, particularly to paragraph 208, above.

1294 Second Further Amended Statement of Claim, paragraphs 54, 55, 56 and 57.

1295 In the context of the provisions of s 53(a) of the TPA which, among other things, prohibits a false representation that "goods" are of a particular quality. Subsequently (in 1988), s 53(aa) was inserted in these provisions which, among other things, prohibits false representations that "services" are of a particular quality. "Services" is broadly defined and extends to "rights in relation to, and interests in, real or personal property" (see TPA sub-s 4(1)).

1296 (1977) 29 FLR 212 at 216 (Franki J).

the section because [t]here is nothing novel in equating 'false' with 'contrary to fact'".[1297] Consequently, in this and other cases in which the Court has examined s 53, a similar analysis has been brought to bear as is applied to claims under s 52 of the TPA.[1298] More particularly, the purpose of these sections of the TPA has been described as being to "[support] s 52 by enumerating specific types of conduct which, if engaged in by a corporation in trade or commerce in connection with the promotion or supply of goods or services, [would] give rise to a breach of the Act".[1299]

366 Section 53A of the TPA provides, as far as is relevant, that:

> "(1) A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:
>
> (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; …"

367 For the purposes of the provisions of s 53A of the TPA, the word "interest" means, relevantly, "… a legal or equitable estate or interest in land by right, power, or privilege over, or in connection with, the land".[1300] Sunland provided no particulars of any alleged breach of s 53A. Nevertheless, the evidence of Brown and Abedian as to their knowledge of the price of Plot D17[1301] and the role played by Sunland in assisting DWF to "create" Plot D17[1302] makes it clear that Sunland's pleading insofar as it relates to "price" and "characteristics" is not sustainable on the basis of these provisions. Consequently, the question for the Court arising out of the s 53A provisions is limited to whether the alleged misrepresentations concern "the nature of the interest in the land". As is clear from the previous detailed discussion in

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1297 (1977) 29 FLR 212 at 217 (Franki J).

1298 *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 at [14] (Gordon J), referring to *Foxtel Management Pty Ltd* (2005) 214 ALR 554 at [94]; *ACCC v Target Australia Pty Ltd* (2001) ATPR 41-840; *ACCC v Harbin Pty Ltd* [2008] FCA 1792; *ACCC v Prouds Jewellers Pty Ltd* [2008] FCAFC 199 at [42].

1299 *ACCC v Dukemaster Pty Ltd* [2009] FCA 682, at [15] (Gordon J).

1300 See TPA, s 53A(3).

1301 Transcript, p 60.17 - .28.

1302 Transcript p 23.12 - .24 and p 338.9 - .18.

relation to the D17 transaction, there was no misrepresentation or conduct on the part of any of the defendants in relation to the "nature of the interest in the land". Rather, the issue in relation to Plot D17 goes to entitlement to deal with the "interest" in that land which was being sold. There was no issue as to the nature and extent of that "interest". Additionally, it does follow that pleading on the basis of the provisions of s 53A cannot be sustained in relation to a plot of land which did not exist at the relevant time or times; which was the position with Plot D17.

368 Additionally, ss 53(aa), 53(g) and 53A require a representation to be "false" and, in the latter provision, also "misleading", or both, as opposed to being "misleading or deceptive". In the present proceedings, no meaningful distinction is usefully drawn between the two bases for the operation of these provisions and s 52 of the TPA. The vast majority of cases that discuss an alleged breach of the s 53 provisions coupled with an alleged breach of s 52 of that Act and deal with the "false or misleading" and "misleading or deceptive" aspect of the conduct without relevant distinction.[1303] Consequently, it follows that claims pursuant to ss 53(aa), 53(g) and 53A fall to be determined upon the same basis as applicable to s 52 of the TPA, namely, whether the alleged representations were "misleading or deceptive or likely to mislead or deceive".[1304] In any event, for the reasons already set out, I have not found any representation or conduct on the part of any of the defendants to be "misleading" or "deceptive" or that there were any representations that could be characterised as "false" in any respect.[1305] Additionally, I have found, specifically, that Sunland failed to prove the falsity of any of the pleaded representations.[1306]

Fair Trading Act

369 Sunland also pleads breaches of ss 9, 12(b), 12(k) and 12(n) of the FTA against Reed and the Prudentia parties; that is, Reed, Prudentia and Hanley. No allegation under

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1303 *Foxtel Management Pty Ltd v Australian Video Retailers Association Ltd* (2004) 214 ALR 554 at [94] (Conti J); *ACCC v Harbin Pty Ltd* [2008] FCA 1792; *ACCC v Prouds Jewellers Pty Ltd* [2008] FCAFC 199 at [42] (Black CJ, Ryan and Gordon JJ).

1304 *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 at 217 (Franki J); *ACCC v Gary Peer and Assoc* (2005) 142 FCR 506 at [57] (Sundberg J).

1305 See above, paragraphs 355 and 356.

1306 See above, paragraphs 237 to 239.

this legislation is made against Joyce.

370 Section 12(b) of the FTA prohibits a person from falsely representing that services are of no particular value; s 12(k) prohibits the making of a false or misleading representation concerning the existence, exclusionary effect of any condition, warranty, guarantee, right or remedy; and s 12(n) prohibits the making of a representation that was false, misleading or deceptive in a material particular. The submissions made by Reed and the Prudentia parties and also by Joyce in relation to the operation and effect of ss 52, 53(aa), 53(g) and 53A of the TPA are equally applicable to these corresponding provisions of the FTA, as are my views with respect to these provisions. I do note, however, that the FTA does not contain any provision dealing specifically with false representations or other misleading or offensive conduct in relation to land, as does s 53A of the TPA. Nevertheless the field covered by the provisions of the FTA and the TPA, to which reference has been made, is not, in the present circumstances different in any relevant respect. Sub-s 159(1) of the FTA corresponds with s 82 of the TPA. Consequently my views with respect to s 82 are also equally applicable with respect to these FTA provisions. Section 158 of the FTA confers a broad power on the Court to make any order it considers fair in the circumstances provided for in that section. In view of the fact that, as I have found, there is no contravention of the FTA these provisions are not enlivened.

Accessorial liability under the TPA

371 Sunland also relies upon the accessorial liability provisions contained in s 75B of the TPA against Reed and Hanley.[1307] It is, however, clear that for these provisions to be applicable, it is necessary that the relevant conduct had taken place in Australia; the provisions of s 75B not being enlivened by any extended jurisdiction under sub-s 5(1) of the TPA.[1308] Sunland submitted that this requirement was satisfied as a result of Reed's conduct in making telephone calls and sending emails from Victoria and by

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1307 Second Further Amended Statement of Claim, paragraphs 49 and 50.

1308 *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR at 14, [55]; [2002] FCA 243 (Merkel J), a finding that was not disturbed on appeal; see *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153; and see *TPC v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299 at 355 (Wilcox J).

Hanley's conduct by engaging Freehills in Melbourne to forward the Implementation Agreement or MOU on its behalf on the basis that this amounted to misleading and deceptive conduct which took place in Australia.[1309] Further, it was submitted that Hanley had the requisite knowledge[1310] because Reed, who at all material times was its agent within the meaning of s 84(2) of the TPA, and who was a director of Hanley from 16 October 2007.

372 Having regard to my findings that there has been no breach of the prohibitions of s 52 and those parts of s 53 and also s 53A of the TPA relied upon by Sunland the question of accessorial liability does not arise; whether or not the requisite Australian connection were established.

Jurisdictional issues

Extra territorial claims

373 The Australian operation of the TPA is reinforced and extended by its provisions in sub-ss 5(1), s 6(2)(a)(i) and 6(3); each of which extends the territorial operation of ss 52, 53(aa), 53(g) and 53A of the TPA to offshore conduct and the latter provisions in other respects.

374 Briefly, the provisions of sub-s 5(1) extend the operation of the TPA to "engaging in conduct outside Australia" with respect to the presently relevant provisions to bodies corporate incorporated or carrying on business within Australia; Australian citizens; or persons ordinarily resident within Australia.[1311] Sub-section 6(2)(a)(i) extends the territorial operation of the TPA to conduct between Australia and places outside Australia, and sub-s 6(3) extends to representations using telegraphic or telephonic services.

375 Sunland seeks to rely upon:

(a) section 5(1) of the TPA to extend the operation of ss 52, 53(aa), 53(g) and 53A

1309 These issues are considered further below: see paragraphs 379-382.
1310 See *Yorke v Lucas* (1985) 158 CLR 661.
1311 See sub-ss 5(1)(g), (h) and (i).

to Hanley[1312] and to its offshore conduct;

(b) section 5(1) of the TPA to extend the operation of ss 52, 53(aa), 53(g) and 53A to Reed[1313] and to his offshore conduct;

(c) section 6(2)(a)(i) of the TPA to extend the operation of ss 52, 53(aa), 53(g) and 53A to Prudentia and Hanley's offshore conduct[1314]; and

(d) section 6(3) of the TPA to extend the operation of sub-ss 52, 53(aa), 53(g) and 53A to Reed.[1315]

376 Sunland did not plead that s 5(1) of the TPA extended the operation of ss 52, 53(aa), 53(g) and 53A to Prudentia and to its offshore conduct. In any event, it was submitted on behalf of Prudentia, that sub-s 6(2)(a)(i) of the TPA has no application in the present case and, consequently, Prudentia's offshore conduct is not caught by the TPA and the claims against it should be dismissed.[1316]

Section 5(1) - extra territorial application of the TPA

377 Sunland submitted that all of the defendants fall within reach of sub-s 5(1) of the TPA so that even if their conduct is regarded as occurring solely outside Australia, they are still caught by that Act. In this respect, Sunland submitted that:[1317]

(a) Prudentia is an Australian company;

(b) Reed is an Australian citizen and an Australian resident;

(c) Joyce is an Australian citizen; and

(d) Hanley should be regarded as carrying on business in Australia for the purposes of these proceedings, as it acted in effect as Prudentia's nominee, and it dealt with the plaintiffs through a Victorian solicitor, Sinn (of Freehills).

1312 Second Further Amended Statement of Claim, paragraphs 4.4, 31 and 32.
1313 Second Further Amended Statement of Claim, paragraph 5.3.
1314 Second Further Amended Statement of Claim, paragraph 34A.
1315 Second Further Amended Statement of Claim, paragraph 20.
1316 See below, paragraphs 385 to 389.
1317 *Plaintiffs' Address*, paragraph 234.

It matters not, Sunland submitted, whether as a matter of formality Sinn was engaged or instructed by Reed or Prudentia. Hanley must, it said, have consented to Sinn acting for it, and given instructions to Freehills. The work done for Hanley, namely drawing the Hanley Agreement, communicating with the plaintiffs, and settling the transaction was done in Australia by Freehills.

378 Sunland notes that under s 5(3) of the TPA, Ministerial consent must be obtained prior to a hearing where damages are sought under s 52 of the Act for conduct that occurred outside Australia. It is apparently uncontroversial that the necessary consent was obtained by Sunland shortly after these proceedings were commenced in the Federal Court.

379 In relation to Hanley, Sunland pleads that because Hanley retained Sinn (hence Freehills) and instructed Freehills to prepare the Hanley Agreement, it was "carrying on business within Australia" within the meaning of sub-s 5(1) of the TPA.[1318] Hanley denied that it retained Freehills and says, rather, that Prudentia was the party retaining that firm.[1319] There is, however, no evidence of any engagement of Freehills by Hanley. Indeed, when these proceedings were before the Federal Court of Australia, Sunland obtained an order from Logan J, on 19 August 2010, that the Prudentia parties discover any letter of engagement by Hanley of Freehills. No letter of engagement was discovered. Reed and the Prudentia parties submitted that this was because none existed and on the evidence before the Court there is nothing to suggest to the contrary.

380 Additionally, Reed and the Prudentia parties submitted that even if there were evidence of Freehills being retained by Hanley and instructions given to that firm, this would not constitute "carrying on business" by that company. In this respect, reliance was placed on *Hope v Bathurst City Council*[1320] where Mason J (with whom

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1318 Second Further Amended Statement of Claim, paragraphs 4.4, 31 and 32.

1319 Paragraph 31 of the Defence of the First and Third Defendants to the Second Further Amended Statement of Claim dated 29 November 2011 and paragraph 31 of the Defence of the Second Defendant to the Second Further Amended Statement of Claim dated 29 November 2011.

1320 (1980) 144 CLR 1.

the remainder of the High Court agreed) defined "carrying on business" as activities engaged in for the purpose of profit on a continuous and repetitive basis which possess something of a permanent character.[1321] Further, in *Bray v F Hoffman La Roche Ltd*,[1322] Merkel J said that the notion of carrying on business does not require that the foreign entity actually have an office in Australia.[1323] In so doing, his Honour applied the approach of Mason J in *Hope v Bathurst City Council* and emphasised that it does not matter whether the company claimed to be carrying on a business in Australia is making a profit, merely that it is carrying out repeated transactions of a commercial nature.[1324] A similar approach was adopted and applied by Palmer J in the Supreme Court of New South Wales in *R T & Y E Falls Investments Pty Ltd v New South Wales*[1325] where his Honour outlined propositions arising from previous cases in relation to the definition of "carrying on a business" for the purposes of the TPA and also State Fair Trading legislation:[1326]

> "[78] A number of cases have examined the principles upon which a government department or agency will be held to be carrying on a business for the purposes of the *Fair Trading Act* and the corresponding provisions of the *Commonwealth Trade Practices Act*. From those cases, the following propositions can be derived:
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> > - a government department or agency will be carrying on a business for the purpose of the *Fair Trading Act* and the *Trade Practices Act* when it is doing what any private trader might do, such as supplying goods or services for remuneration or buying and reselling goods;
> >
> > - that the proceeds derived from the activity are not commercially adequate or are calculated to produce a loss does not, in itself, detract from the character of the activity as a business. The definition of 'business' in the *Fair Trading Act* and the *Trade Practices Act* includes a business not carried on for profit. Government departments or agencies may be expected in many cases to be carrying on a business not for the purpose of profit but to achieve a policy objective of government, ultimately at the expense of the public purse;
> >
> > - the concept of carrying on a business requires that the subject activity be conducted with a degree of system, continuity and repetition. A single instance of the activity or engaging in the activity only in an ad

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1321 (1980) 144 CLR 1, pp 8 and 9 per Mason J with Gibbs & Stephen JJ concurring at p.3, Murphy & Aickin JJ concurring at p 11.

1322 (2002) 118 FCR 1.

1323 (2002) 118 FCR 1, p 19 at [63] per Merkel J.

1324 (2002) 118 FCR 1, pp 19-819 at [62] - [63].

1325 [2001] NSWSC 1027.

1326 [2001] NSWSC 1027, at [78].

> hoc response to infrequent occurrences or circumstances will not normally indicate that a business is carried on;
>
> - system, continuity and repetition in carrying out an activity are not sufficient on their own to characterise the carrying on of a business. There must always be present some element of commerce or trade such as a private citizen or trader might undertake. What is a sufficient degree of commerciality is a question of fact in each case;
>
> - a person claiming under the *Fair Trading Act* or the *Trade Practices Act* in respect of a dealing with a government department or agency which carries on a business must show that the dealing occurred in the course of, and as part of, the carrying on of that business:
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> see *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134, esp at 167 per Deane J; *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 (Emmett J); *Fasold v Roberts* (1997) ATPR 41-561 (Sackville J); *Plimer v Roberts* (1997) 80 FCR 303; *Paramedical Services Pty Ltd v The Ambulance Service of New South Wales* [1999] FCA 548 (Hely J); *Easts Van Villages v Minister Administering the National Parks & Wildlife Act* [2001] NSWSC 559 (Matthews AJ); *Corrections Corp of Australia Pty Ltd v Commonwealth* (2000) ATPR 41-787 (Finkelstein J). With these principles in mind, I turn to the facts of the present case."

381 Additionally, in *National Commercial Bank and Anor v Wimborne and Ors*,[1327] Holland J said that presence in Australia is not established by showing that the foreign corporation has appointed a local solicitor to commence or defend particular legal proceedings within the jurisdiction:[1328]

> "At the test is one of being present by carrying on its business here it is hardly necessary to add that such presence is not established by showing that the foreign corporation has appointed a local solicitors to commence or defend particular legal proceedings in the jurisdiction; see *Attorney-General v Bailey (Malta) Ltd* [1963] 1 Lloyd's Rep 617 at 625".

382 In the present circumstances, there is no evidence of Hanley engaging in any commercial activities in Australia on a continuous, repetitive or systematic basis and, further, Hanley denies that it is carrying on business in Australia.[1329] This position is reinforced by the statement of Holland J in *Wimborne*, which supports my view that even if there were evidence of a retainer of Freehills by Hanley in the absence of evidence of any other commercial activities in Australia which would be consistent

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1327 (1979) 11 NSWLR 156.

1328 (1979) 11 NSWLR 156 at 166.

1329 See paragraph 4.4 of the Defence of the First and Third Defendants to the Second Further Amended Statement of Claim dated 29 November 2011 and paragraph 4.4 of the Defence of the Second Defendant to the Second Further Amended Statement of Claim dated 29 November 2011.

with it carrying on a business in this country, the mere engagement of a local firm of solicitors is not sufficient to produce this result.

383 More generally, it was submitted against Sunland that the critical conduct and aspects relevant to it took place in or was located within Dubai and not Australia:[1330]

(a) Plot D17 is land located in Dubai Waterfront, Dubai, in the UAE[1331];

(b) The vendor of Plot D17 was a limited liability company incorporated in the Emirate of Dubai[1332];

(c) The proposed joint venture between Prudentia and the Sunland parties concerned a development in Dubai;

(d) Brown was the International Design Director and then the Chief Operating Officer for the Dubai branch of Sunland at the relevant times and was in Dubai at the time he received the Representations and Hanley Representations[1333];

(e) The agreement that was acted upon by the parties was the Hanley Agreement[1334];

(f) The parties to the Hanley Agreement were SWB (incorporated in the British Virgin Islands[1335]) and Hanley (incorporated in Singapore)[1336];

(g) The governing law of the Hanley Agreement was the laws of the Emirate of Dubai and federal laws of the UAE[1337]; and

(h) Payment of the Hanley fee was from the Dubai account of the Sunland

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1330 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 20.2.2.
1331 Second Further Amended Statement of Claim, paragraph 11.
1332 Second Further Amended Statement of Claim, paragraph 17.
1333 Second Further Amended Statement of Claim, paragraph 9; Notice Disputing Facts (and Authenticity of Documents) dated 26 October 2010 (SUN.008.004.0004).
1334 See SUN.001.003.0054.
1335 Second Further Amended Statement of Claim, paragraph 1.1.
1336 Second Further Amended Statement of Claim, paragraph 4.
1337 See clause 9.1 at SUN.001.003.0054 at 0063.

parties' Dubai based solicitors to Hanley, a Singaporean company[1338], via cheque with the exchange occurring in Dubai[1339].

My view that Hanley was not carrying on business in Australia at any relevant time is reinforced by these considerations.

384 Nevertheless, accepting this position, it appears clear that sub-s 5(1) of the TPA will, on the basis of its provisions, enliven the extraterritorial jurisdiction of the Act in the present circumstances for the reason that Prudentia is an Australian company, Reed is an Australian citizen and an Australian resident, and Joyce is an Australian citizen. This general position is, however, subject to some tension between the provisions of sub-s 5(1) and those of s 6 of the Act; a matter discussed further below.[1340]

TPA sub-s 6(2)(a)(i) – representations and Hanley Representations were made in trade or commerce between Australia and places outside Australia

385 Sub-section 6(2)(a)(i) of the TPA extends its operation to "trade or commerce between Australia and places outside Australia".

386 Sunland submitted that the transnational nature of the D17 transaction, with parties based in Victoria, Queensland and the UAE, with communications made between Australia and the UAE and decisions taken in both Australia and the UAE means that this case falls squarely within the reach of these provisions.[1341]

387 Further, in *Olex Focas Pty Ltd v Skodaexport Co Ltd*, on an application for an injunction, Batt J said:[1342]

> "I consider that there is a serious question whether (and I find provisionally that) not only have there been communications between those parties between Australia and places outside Australia, namely India and the Czech Republic, but also some part of the plant contracted for was to be manufactured in Victoria and delivered in India: see, e.g., cl. 2 of the preliminary agreement of 20 March 1994 and various clauses in the Olex-Focas and Olex contracts cited for the first defendant. There is, therefore, a prima facie case and a serious question whether as between the plaintiffs

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1338 Second Further Amended Statement of Claim, paragraph 4.1.

1339 See SUN.003.002.0495 and SUN.001.003.0098 and attachment (SUN.001.003.0099).

1340 See below, paragraph 401.

1341 Arguing that the case falls squarely within the principles discussed in, but must differ from the outcome of, *Strang Aniokaka Ltd v Lihir Gold Ltd (No 2)* [2010] FCA 1065 at [87]-[94] (Rares J).

1342 (1998) 3 VR 380 at 401-402.

> and the first defendant there is trade and commerce between Australia and places outside Australia and whether conduct by way of making demands or authorising the making of demands under the guarantees is in trade and commerce between those parties between Australia and places outside Australia."

Similarly, it was accepted by Finn J in *Leeks v FXC* that a United States manufacturer of parachuting equipment which was sold in Australia (and which caused an accident in Australia) was caught by the provisions of sub-s 6(2) of the TPA.

388 In response, Reed and the Prudentia parties submitted that the Representations (and also the Hanley Representations), as pleaded, occurred on three separate occasions:

(a) representations made by Reed in a telephone conversation on 16 August 2007[1343] received by Brown in Dubai;

(b) representations made at a meeting on 19 August 2007 between Brown and Reed at Sunland's Dubai office;[1344] and

(c) representations within a draft of what became the Hanley Agreement attached to an email sent on 23 August 2007 by Reed (who was in Melbourne) to Brown (who was in Dubai).[1345] It is irrelevant, it was submitted, that this email may have been transmitted through an Australian server.[1346]

Consequently, it was submitted that the Representations and the Hanley Representations were not made in trade or commerce between Australia and places outside Australia and, accordingly, these provisions of sub-s 6(2) of the TPA have no application. Submissions were also made in the context of submissions referred to previously in support of the position advanced by the defendants that the conduct and events in relation to that conduct occurred in Dubai and not Australia.[1347]

389 In my opinion, cases such as *Leeks v FXC* which involved a foreign manufacturer exporting to Australia and similar situations where transactions and conduct clearly

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1343 Second Further Amended Statement of Claim, paragraph 13.
1344 Second Further Amended Statement of Claim, paragraphs 15 and 16.
1345 Second Further Amended Statement of Claim, paragraph 17.
1346 Witness Statement of Vitali Parkhomenko dated 29 September 2010, paragraphs 14 – 42.
1347 See above, paragraph 383.

transcends international boundaries, are to be distinguished from the present circumstances where the conduct and events relevant to that conduct occurred in Dubai, rather than Australia. At best or worst (depending on the party perspective), any communications from Australia were incidental to the conduct in or with respect to the D17 transaction which occurred in Dubai – which, for the reasons previously set out, I have not found to be representations in any relevant sense. None of the "conduct", involving representations or otherwise, has been found to be within the statutory prohibitions and even if this were the case, it has not been relied upon by Sunland. For these reasons, I am of the opinion that the provisions of sub-s 6(2) of the TPA which were relied upon by Sunland have no application in the present circumstances.

TPA sub-s 6(3) – representations using telegraphic or telephonic services

390 In relation to sub-s 6(3) of the TPA, Sunland pleaded that an email sent by Joyce to Brown that contained misrepresentations was transmitted through a server located in Australia[1348] and, further, that an email sent by Reed to Brown that contained misrepresentations was transmitted through a server located in Australia[1349] and that the making of those misrepresentations was conduct that involved the use of postal, telegraphic or telephonic services within the meaning of sub-s 6(3) of the TPA.[1350] Reed and the Prudentia parties admitted that if the representations were made, they were made using telegraphic or telephonic services. Joyce, however, denied the allegation.

391 The evidence which Sunland sought to rely upon in support of the application of these provisions with respect to Joyce are set out in its closing submissions.[1351]

1348 Second Further Amended Statement of Claim, paragraph 14.2.

1349 Second Further Amended Statement of Claim, paragraph 17.4.

1350 Second Further Amended Statement of Claim, paragraph 20.

1351 *Plaintiffs' Address*, paragraphs 242-248 as follows:

> "242. Accordingly a number of IT witnesses made statements to the effect that the relevant emails would have passed over internet cable infrastructure located in Australia, en route from Prudentia's email server in Melbourne to Sunland's email server on the Gold Coast, and from Joyce's computer in Dubai to Sunland's email server on the Gold Coast.
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> 243. Mr Vitali Parkhomenko is an IT manager at DLA Phillips Fox, the plaintiffs' former solicitors. He has 13 years' experience in the IT industry, and holds a masters degree in mathematics from the State University, Rostov-on-

Concluding in relation to the evidence that would have been subject to cross-examination in the usual way, Sunland submitted that because, in the course of the trial, Joyce's Senior Counsel indicated that he did not intend to cross-examine any IT witnesses produced by Sunland that Reed and the Prudentia parties indicated that this was also their position, the defendants should be taken to have conceded the point. In my opinion, in the circumstances of the trial and the party submissions, that is the appropriate inference. Sunland did, however, rely upon a number of authorities for the proposition that the transmission of web pages or emails over the internet amounts to the use of telephonic services for the purposes of sub-s 6(3) of the TPA, a position which, if established, would, in my view, indicate that sub-s 6(3) of the TPA would have the effect of applying the provisions of that Act to all

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> Don in Russia. He used publicly available search tools, and a document discovered by the first respondent entitled 'Prudentia Investments Computer System Documents', to conclude that the first respondent's email server was physically located in Dorcas Street, Southbank, Melbourne when the relevant email was sent by Reed.
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> 244. In relation to the receipt of Joyce's email and Reed's email by Brown, Mr Dumka gave evidence that prior to June 2008, all email to or from Sunland employees, wherever in the world they were, passed through Sunland's Exchange mail server located in Sunland's offices on the Gold Coast. He states that the only internet service provider used by Sunland for its Gold Coast premises was GCOMM.
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> 245. Mr Michael Bellears of GCOMM has worked in the IT field for over 13 years. His evidence is that in August 2007, all of Sunland's internet traffic passed through two cable services, known as x.163 or E1 services, which GCOMM provided to Sunland, having obtained them from its wholesale supplier, a company called PacNet, which was previously known as AsiaNetcom.
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> 246. Mr Craig Deutscher of GCOMM has over 14 years' experience in the IT industry. Mr Deutscher's evidence is that he personally configured and maintained Sunland's email server, and so knew that it was physically located at Sunland's Gold Coast offices during 2007. His evidence is that any email sent to Brown's email address dbrown@sunlandgroup.com.au in August 2007 would have passed through GCOMM's cable infrastructure between GCOMM's data centre and Sunland's premises.
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> 247. Notice was given before and during the trial of an intention to subpoena a witness from PacNet, to give evidence to the effect that the cable infrastructure for the x.163 or E1 services provided to Sunland's offices is ultimately owned by Telstra, but leased by PacNet for on-sale to its customers, and a statement of anticipated evidence (SUN.013.002.0001) was served on 14 July 2011.
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> 248. On 16 November 2011, the Prudentia parties gave notice that they wished to cross-examine the IT witnesses, including the PacNet representative. However on day three of the trial, Mr Joyce's counsel indicated that he did not intend to cross-examine any IT witnesses produced by Sunland (T169 L39), and the Prudentia parties indicated that was also their position. In those circumstances, the defendants can be taken to have conceded the point."

defendants.

392 In *Abrahams v Biggs*, Jessup J said:[1352]

> "The route by which the applicant sought to make the respondent liable under the *Trade Practices Act* involved s 6(3) thereof. His case was that, since the statements complained of were communicated over the Internet, they 'involved the use of … telephonic services'. At the level of pleading, that allegation was denied by the respondent. However, in her case as conducted in court, the respondent said nothing on the subject: that case was conducted on the silent premise that ss 52 and 53 applied to her as an individual. Although the matter was not dealt with in the evidence, it has been recognised so often in judgments of the court that the Internet involves the use of telephonic services that I think it would be quite unrealistic, particularly in light of the way the respondent conducted her case, not to proceed by reference to that fact: see, for example, *Australian Competition and Consumer Commission v Chen* (2003) 201 ALR 40, at [32]; *Macquarie Bank Ltd v Seagle* [2005] FCA 1239 at [23]; *Jones v Australian Competition and Consumer Commission* [2010] FCA 481 at [30][1353]."

393 Focusing on the means of transmission, Greenwood J, in *Mason v MWRECD Ltd*, said:[1354]

> "… the use of an email engages telephonic services by means of the relevant data lines and thus the email was a communication to a person involving the use of telephonic services for the purposes of s 6(3) of the Act."

394 Again, more broadly, in *Australian Competition and Consumer Commission v Jutsen (No 3)*, Nicholas J said:[1355]

> "The expression 'postal, telegraphic or telephonic services' as used in s 6(3) of the Act extends to conduct involving the use of the internet. I think this must be so having regard to the very broad way in which the word 'telegraphic' is defined in most of the well known dictionaries. For example, The Macquarie Dictionary (3rd ed, The Macquarie Library, 1997) at p 2176 defines telegraph as:
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> > '1. an apparatus, system or process for transmitting messages or signals to a distance, especially by means of an electrical device consisting essentially of a transmitting or sending instrument and a distant receiving instrument connected by a conducting wire, or other communications channel, the making and breaking of the circuit at the sending end causing a corresponding effect, as on a sounder, at the receiving end.'

1352 [2011] FCA 1475, at [88].
1353 *Abrahams v Biggs* [2011] FCA 1475 at [88].
1354 [2011] FCA 1512, at [69].
1355 [2011] FCA 1352, at [100].

> The word 'telegraphic' ought to be given a correspondingly broad meaning. It is open to the court to take judicial notice of the fact that the internet is a 'telegraphic' apparatus or system used to transmit and receive electronic communications: see s 144(1) of the Evidence Act 1995 (Cth)."

395 Various other authorities to this effect were relied upon.[1356]

396 On the basis of these authorities, it is, in my view, clear that sub-s 6(3) of the TPA does, in the present circumstances, extend the operation of the Act to the defendants.

Trade or commerce

397 Many of the provisions of the TPA which prohibit misleading or deceptive conduct require that that conduct engaged in be "in trade or commerce". In this case, the issue arises in relation to Joyce, against whom Sunland seeks to apply the TPA provisions, relying upon the application of sub-s 6(3) on the basis that "telegraphic or telephonic services" were used by Joyce in the course of engaging in the prohibited conduct.

398 Section 52 of the TPA applies only to corporations, whereas the provisions of s 6 extend the operation of various provisions of the Act, including s 52, to certain conduct of natural persons. Similarly, sub-s 6(2) applies where, for example, individuals engage in overseas or interstate trade or commerce in a manner which breaches the prohibitions of s 52. Clearly, the provisions of the TPA are drafted to enliven various heads of Commonwealth constitutional power. Provisions such as s 6 of the Act are intended to give the legislation "wider constitutional support".[1357]

399 Reference has already been made to submissions against Sunland that the critical

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1356 *Australian Competition and Consumer Commission v Sensaslim Australia Pty Ltd (in liq) (No 1)* [2011] FCA 1012, at [17], [25] and [38] (Yates J); para 12 of the orders made against Willessee Healthcare Pty Ltd by Dodds-Streeton J in *Australian Competition and Consumer Commission v Willesee Healthcare Pty Ltd* [2011] FCA 301; *Australian Competition and Consumer Commission v Jones (No 5)* [2011] FCA 49, at [5] and [10] (Logan J); *Jones v Australian Competition and Consumer Commission* [2010] FCA 481 at [30] (Collier J); *Macquarie Bank Limited (ACN 008 583 542) v Seagle* [2008] FCA 1417 at [17] and [19] (Jagot J); *Cairnsmore v Bearsden* [2007] FCA 1822 at [130]-[131] (Jacobson J); *Lewarne v Momentum* [2007] FCA 1136 (Stone J) at [164]; *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309 at [20] and [32]; *Australian Competition and Consumer Commission v Hughes* [2002] FCA 270 at [77]-[79] (Allsop J).

1357 *Zhu v Treasurer of NSW* (2004) 218 CLR 530, [96] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

conduct upon which Sunland relied occurred in Dubai and not in Australia.[1358] As discussed, this raised the question whether there was any relevant conduct which took place within Australia which s 52 of the TPA might apply, or whether its provisions could only apply through the operation of the provisions of the TPA which give that Act extraterritorial operation.

400 The Commonwealth Parliament has the power to pass legislation which operates extraterritorially provided it is "for the peace, order, and good government of the Commonwealth with respect to" one or more heads of power conferred by the *Commonwealth Constitution*. It is trite law that a statute will be presumed to apply only to the territory or nationals over which the legislature has jurisdiction, though the presumption may be displaced by a clear indication to the contrary.[1359]

401 The TPA does specifically provide for its extraterritorial operation, particularly in sub-s 5(1) as extending the reach of its provisions to companies incorporated or carrying on business in Australia, Australian citizens or persons ordinarily resident in Australia. As noted previously, Joyce was and is an Australian citizen. The effect of these provisions is that in spite of the fact the conduct of Joyce relied upon by Sunland took place outside Australia, it is the conduct of an Australian citizen within the scope of s 5(1) of the TPA and if the necessary prohibited elements were established, within the prohibition of s 52 of that Act. Consequently, there is potentially some tension between the operation of ss 5 and 6 of the TPA in relation to the extension of the reach of this legislation. The relationship between these provisions is, however, unsettled.[1360] In the present circumstances it is not necessary to attempt to resolve this position as the point was not pressed on behalf of Joyce, but left on the basis that whether or not sub-s 5(1), 6(2) or 6(3) of the TPA extends the

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1358 See above, paragraph 383; and also paragraph 389.

1359 See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed, LBC, 2011), [5.9]-[5.11] and [6.38]; and see Bennion, *Statutory Interpretation* (4th ed, Butterworths, 2002), 315-322; and see *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1 at 12, [47]; [2002] FCA 243, (Merkel J) referring to *R v Jameson* [1896] 2 QB 425 (CA) at 430 (Lord Russell CJ).

1360 Some authorities suggest that these sections operate together to apply s 52 to the conduct of persons other than corporations (s 6) and then to conduct outside Australia (s 5): *ACCC v Hughes* [2002] FCA 270; *Unilan Holdings Pty Ltd v Hon Kerin* [1992] FCA 179 at [11].

operation of s 52 of that Act to the conduct of Joyce, Sunland must still establish the various elements of s 52 for liability to attach to him. In my opinion, this was an entirely appropriate concession as a basis on which to proceed, particularly as I am inclined to the view, without deciding, that the effect of ss 5 and 6 of the TPA is expansive, rather than limiting, in terms of the extended operation of that Act. Nevertheless, the "trade or commerce" dimension and the extraterritorial effect of s 52 of the TPA, by means of sub-s 5(1) and the modifying effect of sub-s 6(2), both require that the relevant conduct occur in "trade or commerce". In relation to sub-s 5(1), this is because the language of s 52 of that Act requires that the conduct be "in trade or commerce". Insofar as sub-s 6(2) is concerned, this limitation follows because these provisions confine the extended operation of s 52 of that Act with respect to natural persons by reference to the "trade or commerce" requirement with respect to the particular conduct. In *Bright v Femcare*,[1361] Lehane J explained the extraterritorial operation of s 52 of the Act as follows:

> "Conduct, then, gives rise to a liability under, for example, s 52 if two conditions are met: first, it is engaged in within Australia (by a corporation) or outside Australia (by a body referred to in s5(1)); secondly, it is conduct in trade or commerce (including trade or commerce between Australia and a place outside Australia)."

On this basis, I turn now to consider the meaning of "trade or commerce" in the context of the issue now considered.

402 Section 4 of the TPA defines "trade or commerce" as meaning "… trade or commerce within Australia or between Australia and places outside Australia". In considering the constitutional head of power relied upon as underpinning these provisions of the TPA, the High Court in *W & A McArthur Ltd v Qld* said:[1362]

> "… it is impossible to limit the 'trade and commerce' either 'among the States' or 'with other countries' to the mere act of transportation over the territorial frontier. The notion of a person or a thing, tangible or intangible, moving in some way from one State to another is no doubt a necessary part of the concept of 'trade commerce and intercourse among the States.' But all the commercial dealings and all the accessory methods in fact adopted by

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1361 [2000] FCA 742 at [77] – [78]; and see *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62 at [172]-[174].

1362 (1920) 28 CLR 530 at 549 (Knox CJ, Isaacs and Starke JJ).

> Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end. Commercial transactions are multiform, and each transaction that is said to be interstate must be judged of by its substantial nature in order to ascertain whether and how far it is or is not of the character predicated."

403 It was submitted on behalf of Joyce that while his alleged conduct does bear a trading or commercial character, it does not constitute trading or commercial activity between Australia and places outside of Australia. In this respect, a number of authorities were relied upon.

404 In *ACCC v Global Prepaid Communications*, Gyles J said:[1363]

> "The mere fact that parties to dealings are in different States or that an international party may be involved is not sufficient to establish the necessary connection. The conduct must take place in the course of interstate or international trade or commerce."

Similar comments had been made earlier by the High Court in *Hospital Provident Fund Pty Ltd v State of Victoria*[1364] in relation to the meaning of interstate commerce:

> "… it is very clear that a person may carry on business in every State of the Commonwealth and yet never engaged in an act of interstate commerce … The fact that directors of one company reside in different States and meet sometimes in the one and sometimes in the other can in no way affect the nature of the business carried on by that company. The facts that the company in one State makes contracts with person in other States and receives 'contributions' from persons in other States, that it makes payments from its office in one State to persons in other States, that its servants and agents travel from one State to another on the company's affairs, that documents and communications are transmitted from one State to another — these things, severally or in combination, do not mean that the business in which the company is engaged or any part of that business possesses the character of interState commerce".

In the same vein, it was held, in *Swan v Downes*,[1365] that a transaction that involved the making of a contract and the acceptance of payment for goods which both took place within one State but which involved parties from different States was not one of trade or commerce among the States.

405 Sunland claims that the alleged prohibited conduct in which Joyce was engaged was

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1363 [2006] FCA 146 at [50].
1364 (1953) 87 CLR 1 at 38.
1365 (1978) 34 FLR 36 (Franki J).

in trade or commence between Australia and places outside Australia within the meaning of sub-s 6(2)(a)(i) of the TPA on the basis of various matters particularised in its Second Further Amended Statement of Claim.[1366] In substance, Sunland's pleaded allegations are that the conduct relied upon was in trade or commerce between Australia and places outside Australia based on the incorporation of the second plaintiff, Sunland Group Limited, in Queensland and it being listed on the Australian Securities Exchange together with the allegation that the monies ultimately paid by the first plaintiff, Sunland Waterfront (BVI) Ltd, to Hanley were sourced from Sunland Group Limited.

406 On the basis of the authorities to which reference has been made, Joyce submitted that the Sunland claim failed to establish the application of sub-s 6(2)(a)(i) of the TPA because, more generally, the critical conduct with respect to the Plot D17 transaction concerned matters that occurred in Dubai and not Australia[1367] and, more particularly, because:[1368]

(a) the land the subject of the transaction is located in Dubai;

(b) the joint venture that was the subject of discussions between the second plaintiff and the first defendant was a joint venture to be carried out in Dubai;

(c) the vendor was and is an organ of the Emirate of Dubai;

(d) the purchaser was and is a company registered in the British Virgin Islands;

(e) the company to whom the Fee was paid was and is a company registered in Singapore; and

(f) the evidence of Sunland is that it considers there to be no 'recourse' from their Dubai operations back to Australia because the management of the Dubai

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1366 Paragraph 34A.

1367 See above, paragraph 383.

1368 *Closing Submissions of Fourth Defendant* (27 January 2012), paragraph 425.

operations is controlled outside Australia.[1369]

407 In my opinion, the factual matters relied upon in this context by Joyce are both correct and establish, in light of the authorities, that the conduct of Joyce upon which Sunland relies is not conduct in trade or commerce between Australia and Dubai. My opinion in this respect is also reinforced by the observation made on behalf of Joyce that if the position advanced by Sunland were correct then almost all commercial negotiations conducted outside Australia would be governed by the provisions of the TPA if one of the parties to those negotiations were an Australian citizen or corporation. Sunland has not advanced any basis upon which it could be concluded that the intent of the legislature was to give the TPA such a broad operation.

Jurisdiction under the Victorian Fair Trading Act

408 Section 6 of the FTA provides for its extraterritorial operation in the following terms:

> "**6. Extra-territorial application of this Act**
>
> (1) This Act applies within and outside Victoria.
>
> (2) This Act applies outside Victoria to the full extent of the extra-territorial legislative power of the Parliament.
>
> (3) Without limiting subsection (1) or (2), this Act applies to—
>
> (a) the engaging in conduct in Victoria by persons outside Victoria;
>
> (b) the engaging in conduct outside Victoria by persons in Victoria;
> …"

409 In *Jack Brabham Engines Limited v Beare*, Jagot J found that for this legislation to apply, there needs to be some connection between the critical events in issue and the State of Victoria.[1370] Relying on two decisions of the Victorian Civil and Administrative Tribunal ("VCAT"), Sunland submitted that a liberal approach should be taken.

410 Thus, in *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd*, Judge Harbison,

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1369 Transcript, p 301.22 - .30.

1370 [2010] FCA 872, [333].

sitting as a Vice-President of VCAT, said:[1371]

> "215. The High Court has considered the ambit of the extraterritorial application of state law in *Union Steamship Company of Australia Pty Ltd v King* HC of A 1988 at p2.
>
> 216. At page 13 of the judgment the High Court applied the following passage of Dixon J in *Broken Hill South v Commissioner of Taxation (NSW)* 56:
>
> > 'It is within the competence of the state legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority Courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases which cannot have been foreseen.'
>
> 217. The Court said further at page 14:
>
> > 'It is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce* (1976) 135 CLR at p 518 where His Honour stated that the requirement for a relevant connexion between the circumstances on which the legislation operates and the state should be liberally applied and that even a remote and general connexion between the subject matter of the legislation and the state will suffice.'
>
> …
>
> 220. Accordingly it is my view that by reason of the application of the *Union Steamship* principles, part 2B of the *Fair Trading Act* applies to all of the consumer contracts that the respondent enters into, even though some of those contracts may also be governed by the law of another state, because the registration of the respondents business in Victoria, and the physical location of the business in Victoria provide a relevant connexion between the circumstances on which Part 2B operates and the State of Victoria."[1372]

1371 [2009] VCAT 754, [215]-[220]; see also *Apollo Marble and Granite Imports Pty Ltd v Industry + Commerce* [2008] VCAT 2298, [18]-[21] (Judge IJK Ross, sitting as a Vice-President.

1372 *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754, [215]-[220]. Also see *Apollo Marble and Granite Imports Pty Ltd v Industry + Commerce* [2008] VCAT 2298, [18]-[21].

411 Similarly, Morris J, sitting as President of VCAT, said:[1373]

> "43. The FTA is a law enacted by the Parliament of Victoria. Section 6 of the FTA provides that the Act applies 'within and outside Victoria'; and that it applies outside Victoria 'to the full extent of the extra-territorial legislative power of the Parliament'. This may mean that the FTA only operates in relation to subject-matter that has a relevant connection with Victoria, although the extent of the connection is to be considered liberally. Thus it is unlikely that the (Victorian) FTA would have application to the supply of goods or services where this is exclusively a Queensland transaction: that is, both the supplier and the purchaser of the goods or services are resident in Queensland and where the supply occurs in Queensland. However where the supply, or possible supply, of goods or services occurs, or is proposed to occur, in Victoria, the (Victorian) FTA applies to any dispute or claim arising in relation to such a supply or possible supply. The Victorian Parliament may pass a law regulating the supply of goods to Victorian purchasers – at least where the goods are supplied in Victoria – whether the supplier is resident in Victoria or not.
>
> 44. The jurisdiction of VCAT to hear an action for damages under section 159 of the FTA, or to hear and determine a consumer and trader dispute, does not depend upon the existence of a contract. The word 'contract' does not appear in section 159; nor does it appear in section 107 of the FTA. Rather it turns on whether there has been a contravention of the FTA or a supply of goods or services in Victoria. Hence VCAT's jurisdiction cannot depend upon the place in which a contract is made, or a provision in a contract that the contract is formed in a particular location, or that a named jurisdiction is to be the exclusive jurisdiction for determining disputes under the contract."

412 On the basis of these decisions, Sunland submitted:[1374]

> "258. Prudentia is registered in Victoria, and Hanley is a wholly owned subsidiary of it. Mr Reed lives in Victoria. Reed, Prudentia and Hanley engaged, or used, or had acting on their behalf in the transaction, a Victorian solicitor, namely Mr Sinn of Freehills. Reed made his initial misrepresentations to Brown by telephoning Brown from Melbourne, and Reed subsequently emailed Brown from Victoria, and through a computer server located at Prudentia's offices in Melbourne. The Prudentia parties have no connection with any other Australian State apart from Victoria. Indeed their connection is emphasised by the fact that when they sought to have the matter cross-vested from the Federal Court of Australia to another Australian superior court, the first and only court that they approached was the Supreme Court of Victoria.
>
> 259. Joyce's conduct was in concert with that of the Prudentia parties, and it may safely be inferred that in order for Joyce and Reed to plan their deception of the plaintiffs, Joyce communicated with Reed by emailing Reed in Victoria, and by speaking to Reed when Reed was in Victoria.

1373 *Law v MCI Technologies Pty Ltd* [2006] VCAT 415, [43]-[44].

1374 *Plaintiffs' Address*, paragraphs 258-260.

> 260. In the light of the above authorities, there is clearly sufficient connection between the events pleaded and the State of Victoria, to engage section 6 of the FTA."

413 Although the provisions of the FTA do not mirror those of the TPA in terms of extraterritorial operation, the discussion and my findings in relation to the latter legislation significantly informs the position with respect to the application of the FTA. In my opinion, any relevant conduct which might be relied upon by Sunland for the purposes of the prohibitions provided for under the FTA is, as indicated previously, primarily, if not exclusively, conduct which took place in Dubai; in relation to land in Dubai.[1375] There are, however, some connections with Victoria. If the evidence established that Hanley had engaged or used a Victorian firm of solicitors, then it may be that this would have provided a sufficient connection with Victoria for the purposes of the FTA, though not under the provisions of the TPA. However, as discussed previously, there is no evidence of the retainer of the Victorian legal firm, Freehills, by Hanley and so the issue does not arise under the FTA.[1376] In relation to telephone conversations and transmission of communications through computer servers located from and in Victoria, I am of the opinion that absent a provision such as sub-s 6(3) of the TPA, it should not be assumed that this, on its own, necessarily provides a sufficient connection with Victoria to enliven the application of the FTA. In my view, the contrary follows from the decision of Morris J in *Law v MCI Technologies Pty Ltd*.[1377] Indeed, to construe the requirement of a connection so liberally would be to give the State legislation a significantly broad extraterritorial operation because almost any email or internet communication with or involving Victoria would enliven the jurisdiction.[1378] In my view, the Victorian legislature could not have intended such a potentially world-wide operation for the FTA; or the uncertainties which would flow from the need to consider some incidental connection with Victoria as a result of the use of internet servers or other

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1375 See above, paragraphs 406 and 407.

1376 See above, paragraph 379.

1377 [2006] VCAT 415, [43]-[44]; set out above, paragraph 411.

1378 For example, a call from one Australian mobile phone to another Australian mobile phone, both in Dubai, may involve Victoria if the routing of those calls via Australia uses telecommunications facilities in Victoria.

telecommunications equipment in Victoria.

414 Even if it were found that Sunland was correct in its submissions as to the extent of the extraterritorial operation of the FTA, that would not have the effect of giving any broader application to the prohibitions contained in that legislation with respect to the conduct of the defendants as alleged by Sunland. In other words, it remains the position that Sunland must establish conduct in breach of the provisions of the FTA. For the reasons already set out, it is clear, in my view, that it has failed to establish this position under the corresponding or analogous provisions of the TPA and, consequently, the same result follows with respect to the prohibitions of the FTA. Consequently, any argument that a relevant connection to Victoria for the purposes of the application of the FTA would arise on the basis of Joyce's alleged conduct in concert with that of the Prudentia parties does not arise.[1379] As discussed elsewhere, neither does this issue arise in more general terms because of the findings made with respect to the conduct of the parties which Sunland alleges is relevant in terms of the statutory prohibitions and tortious liability.[1380]

Tortious liability in deceit

Jurisdiction and choice of law

415 The proper law applicable to a claim in tort is an issue distinct from the question of jurisdiction. There can be no doubt that the Court has jurisdiction over the defendants because each has been properly served and the proceeding now lies in a State superior court which has the subject matter jurisdiction to decide the substantive rights and duties of the parties in the litigation.[1381]

416 Sunland submitted that in relation to the tort of deceit, the established position in Australia is that the *lex loci delicti* applies whether the tort is an intra-Australian tort or an intentional tort.[1382] As indicated in its submissions, this begs the question;

1379 Noting that Sunland pleads no allegation against Joyce under the FTA.

1380 And see below, paragraphs 445 and 446.

1381 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 520, [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); see also the High Court's explanation of the meaning of "jurisdiction" in *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 570, [2]-[3] (Gleeson CJ and Gaudron and Gummow JJ).

1382 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 and *Regie Nationale des Usines Renault SA v Zhang*

what is the place of the tort? It was submitted by the parties that in *Renault v Zhang*,[1383] the High Court applied the same choice of law rule to international torts as it had earlier adopted in *John Pfeiffer Pty Ltd v Rogerson*[1384] for intra-Australian torts; namely, that questions of substance must be decided according to the law of the place where the tort occurred.[1385] The High Court examined some important policy reasons for that rule, which were explained in *John Pfeiffer*:[1386]

> "The chief theoretical consideration in favour of applying the law of the place of commission of the tort to decide the substantive rights of the parties (at least in intra-national torts) is that reliance on the legal order in force in the law area in which people act or are exposed to risk of injury gives rise to expectations that should be protected."

The cases indicate that Australian choice of law rules are to be applied in determining where the tort occurred;[1387] rules which require the Court to look to the substance of the action, not to where the last act in the chain occurred or where the damage occurred.[1388]

417 Sunland referred to a variety of authorities in support of the argument that there were very strong Australian connections and that the tort, the fraud, was perpetrated by Australians on Australians through communications prepared in Australia and sent from Australia and received (if Sunland's server is the place of receipt) in Australia. Sunland asks, rhetorically, "Why shouldn't Australia be regarded as the place 'where in substance, the deceit took place' within the meaning of the passage relied upon from the judgment of the majority of the High Court in *Voth v Manildra*

(2002) 210 CLR 491.

1383 *Renault v Zhang* (2002) 210 CLR 491.

1384 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

1385 The *lex loci delicti*. Matters of procedure are determined by the *lex fori.*

1386 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 536, [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

1387 *Renault v Zhang* (2002) 210 CLR 491 at 517, [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

1388 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567: "One thing that is clear … is that it is some act of the defendant, and not its consequences, that must be the focus of attention. Thus, in Distillers the act of ingestion of the drug Distaval by the plaintiff's mother was ignored, the place of that act being treated like the place of the happening of damage, as one that might have been 'quite fortuitous'. Cf *Virgtel v Zabusky* [2006] 2 QdR 81 at 91 (de Jersey CJ), where the application of Australian law is discussed in relation to equity proceedings and the jurisdiction of a court of equity, *in personam*.

Flour Mills Pty Ltd."[1389] Reed and the Prudentia parties, on the other hand, submitted that the authorities indicate that electronic communications when received in an intended jurisdiction, Dubai in the case of various communications relied upon by Sunland, are taken to be conduct in that jurisdiction (at least as a matter of Australian law).[1390]

418 In any event, the conclusion to the debate between the parties on this issue is summarised in the Sunland submissions, as follows:[1391]

> "The defendants appear to take the position that the *lex locus delicti* is UAE law. If they are correct, then the starting point is the presumption that the UAE law on the point is the same as Australian law,[1392] or as Nygh puts it 'a default rule; namely that the substantive law of the forum will be applied absent the proof, or the satisfactory proof, of the foreign law indicated by the statutory or common law choice of law rule'.[1393] In any event, it is for the defendants to have pleaded and proven that UAE law differs from Australian law; if they do not, then this Court assumes that UAE law and Australian law are the same."

419 On this basis and on the assumption that Australian and UAE law in relation to the tort of deceit are in substance the same, I turn to consider the elements of the tort, set out in the judgment of the High Court in *Magill v Magill*, as follows:[1394]

> "[37] The elements of the tort of deceit were stated by Viscount Maugham, in *Bradford Third Equitable Benefit Building Society v Borders*,[1395] as follows

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1389 (1990) 171 CLR 538 at 568 (Mason CJ, Deane, Dawson and Gaudron JJ).

1390 See *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 21.1, footnote 1319, as follows:

> "As to communications by telephone and email (and previously by facsimile), see *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 44 FCR 485; *Rock Solid Surfaces Pty Ltd v Biesse Group (Australia) Pty Ltd* [2011] FCA 42 where in the contrary position to that which concerns the Sunland parties, Gilmour J observed at [24] that:
>
> > *For the purposes of the TPA, if emails were directed to Australia, were expected to be received in Australia, and were in fact received in Australia, then they amount to conduct taking place in Australia, regardless of where the emails originated: ; Bray v F Hoffman-LaRoche Ltd [2002] FCA 243; (2002) 118 FCR 1 at [147] where Merkel J held that communications into Australia by a parent company to officers of a subsidiary, expected to be received in Australia constituted conduct in Australia for the purposes of s 45 of the TPA.*
>
> See also: *Electronic Transactions Act 1999* (Cth), s 14(5), s 14(6);"

1391 *Plaintiffs' Address*, paragraph 266; and see also paragraph 273.

1392 The presumption is not without its difficulties: see *Neilson v Overseas Projects Corporation* (2005) 223 CLR 331, per Gleeson CJ at 343, per McHugh J at 348-349, per Gummow and Hayne JJ at 372, per Kirby J at 395-396.

1393 Nygh's Conflict of Law (8th edn) at [17.37].

1394 (2006) 226 CLR 551 at 567, [37] and [38] (Gleeson CJ).

1395 [1941] 2 All ER 205 at 211.

(omitting his Lordship's citation of authority):

> 'First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit. Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing.'
>
> [38] His Lordship's reference to 'mere silence' contemplates, by way of contrast, the possibility of a case where there is a legal or equitable duty to speak and disclose the true facts."

420 Although, for the reasons indicated, it is appropriate to proceed on the basis that the elements of the tort of deceit in both jurisdictions, Dubai and Australia, are relevantly the same, it is helpful to set out a passage from the *Closing Submissions of the Fourth Defendant* which conveniently (and, in my view, accurately) summarise the basis upon which the content of foreign law would be accepted by an Australian court and also the elements of the tort of deceit under the *UAE Civil Code*:[1396]

> "In an Australian court, the content of foreign law is a matter for evidence.[1397] If there is any gap in that evidence, the court will assume that the foreign law is identical to the law of the forum, being Australia.[1398] The expert evidence in this proceeding establishes that:
>
> (a) Part 1 (Contracts) of the UAE Civil Code (**UAE Code**) does not apply to Joyce because Joyce is not, as is required by the UAE Code, a 'contracting party'.[1399]

1396 *Closing Submissions of the Fourth Defendant*, paragraph 41.

1397 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [25].

1398 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [116].

1399 Paragraph 3.3 of the Witness Statement of Ali Al Aidarous dated 20 March 2011 - being a paragraph with which Ms Hamade for the plaintiffs did not disagree (cf *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 202 and 203 where it is submitted that if Hamade adopted parts of Al Aidarous' opinion as being accurate statements of UAE law, those parts of the opinion are in her evidence; but that the rest of Al Aidarous' opinion is not evidence other than for the limited purpose of providing context to the comments of Hamade in responding to that report – and further that if the report is in evidence it is of no weight. In my opinion, this is a somewhat artificial position and does not take account of the nature of the Hamade report which does raise the inference of agreement with respect to matters not responded to. In any event, the point made does not appear to lead anywhere, given Sunland's submissions on the proper approach to be adopted

(b) Part 3 (Acts Causing Harm) of the UAE Code contains Article 285, which states that:

'If a person deceives another he shall be liable to make good the harm resulting from that deception'[1400]

(c) Deception under Article 285 of the UAE Code requires a deliberate falsehood. James Whelan's commentary on the UAE Code states: [1401]

'… there is no *ghurur* save where it is exercised in respect of the subject matter, and is used as a means of inducement by the deceiver by false and lying means designed to make facts appear otherwise than they are, practised deliberately by the deceiver, and in bad faith' [emphasis added]

(d) Damages under Part 3 of the UAE Code are compensatory in nature.[1402]

(e) Whelan's commentary on Article 282 of the UAE Code states that liability to make compensation arises out of any harm done, and the harm can pertain to an act or a failure to act, and it must have arisen out of the damage, and there must therefore be both the act (either positive or negative) and the harm, and the causal relationship between them.[1403]

(f) Article 290 of the UAE Code states that it is permissible for the judge to reduce the level of damages or not to order damages at all if the person suffering the harm participated by his own act in bringing about or aggravating the harm.[1404]

(g) Article 291 of the UAE Code states that if a number of persons are responsible for a harmful act then each of them shall be responsible in proportion to his share in it and the judge may make an order against them in equal shares or by way of joint or several liability as between them.[1405]

(h) Article 292 of the UAE Code states that the losses that are considered to be a natural result of the harmful act are those for which it was not possible for the aggrieved party to avoid by exerting reasonable

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with respect to the tort of deceit (see above, paragraph 417) and my findings with respect to this issue). See also Transcript, p 506.09 - .30 and the last paragraph of point 5.1 of the Witness Statement of Diana Hamade.

1400 Hamade Statement, paragraph 5.1

1401 Hamade Statement, *Appendix 7, page 196 (being Whelan J, "UAE Civil Code and Ministry of Justice Commentary – 2010", Sweet & Maxwell, ISBN: 9780414046450). See Transcript, page 508 at lines 7 to 13: although those comments were made regarding Article 185 of the Code, they apply equally to Article 285: Hamade Statement, paragraph 5.1.* The evidence of Ms Hamade with respect to conduct that would amount to "gross cheat" under Article 187 of the *UAE Civil Code* does not take matters further as she assumed for the purposes of her expert evidence that the conduct alleged by Sunland had in fact occurred, the critical issue within the province of this Court, not an expert witness. As to this assumption, see *Plaintiffs' Address*, paragraph 270.

1402 Hamade Statement, paragraphs 5.1 and 5.2. Hamade Statement, Appendix 7, pages 199 to 201.

1403 Hamade Statement, Appendix 7, page 191.

1404 Hamade Statement, Appendix 7, page 199. Hamade Statement, paragraph 6(a).

1405 Hamade Statement, Appendix 7, page 199. Hamade Statement, paragraph 6(b).

> efforts.[1406] Ms Hamade's evidence is that if a party has reduced its loss by mitigating actions then this is to be taken into account by the judge.[1407] Mitigation is required by virtue of the fact that the only losses that are recoverable are those which the obligee could not have averted.[1408]"

421 On the basis of these submissions, it was further submitted that the requirement under Article 285 of the *UAE Code* to prove deliberate falsehood, inducement and bad faith are relevantly the same as the elements (two and three) of the tort of deceit as stated in *Magill*. Similarly, it was said, Sunland must prove that any loss and damage suffered was caused by the conduct of the defendants.

422 In relation to the standard of proof, reference was made to sub-s 140(1) of the Victorian *Evidence Act* 2008 which prescribes the standard of proof in civil proceedings; namely, that the Court must be satisfied that the plaintiffs have proved their case on the balance of probabilities. Sub-section 140(2) prescribes certain non-exhaustive matters the Court may take into account in deciding if it is satisfied. This includes the "gravity of the matters alleged".[1409]

423 In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, the majority of the High Court said:[1410]

> "The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*:
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> > 'The seriousness of an allegation made, the inherent unlikelihood of

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1406 Hamade Statement, paragraph 6(b).
1407 Hamade Statement, paragraph 5.2.
1408 Hamade Statement, paragraph 5.2.
1409 See sub-s 140(2)(c).
1410 (1993) 67 ALJR 170 at 170-1 (Mason CJ, Brennan, Deane and Gaudron JJ); (1992) 110 ALR 449, at 449.

> an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved …'

This statement of the High Court concerned the position at common law. Since that case, the Full Court of the Federal Court decided that his is also the correct approach with respect to the standard of proof under s 140 of the *Evidence Act* 1995, (Cth) (which is in the same terms as the Victorian *Evidence Act* provisions).[1411]

424 For the reasons indicated previously in the detailed discussion of the D17 transaction, conduct and related events, there is no evidence against the defendants in support of any of the elements of the tort of deceit as set out in *Magill*. Crucially, this is because there was no representation made of the kind relied upon by Sunland.[1412] Moreover, to the extent that any such representation was made, it was not relied upon by Sunland and, in any event, the evidence would not support a finding that it was false. This position is reinforced when regard is had to the higher standard of proof required and the more onerous elements constituting the tort of deceit, by comparison with the elements necessary to establish the application of the statutory provisions upon which Sunland relied. Additionally, the elements of the tort of deceit require Sunland to establish not only that the representations relied upon were made but, further, that the person or persons making them knew them to be false.[1413] In the absence of a finding that any relevant representations were made, it is unsurprising that there is no such evidence of knowledge. Neither would Sunland's allegations of "joint purpose" assist its case in this respect. Even assuming that, absent a finding in Sunland's favour of any representations or conduct in breach of the statutory provisions or something in the nature of a fraudulent representation, evidence could be led against the defendants, or some of them, of some "joint purpose" adverse to Sunland's interests, this could not amount to evidence of fraudulent intent or knowledge in the absence of such a finding. This

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1411 *Qantas Airways Ltd v Gama* (1992) 247 ALR 273 at 309.

1412 And see, above, paragraphs 355 - 357.

1413 See *Magill v Magill* (2006) 226 CLR 551 at 567, [37] (Gleeson CJ); and also Article 285 of the *UAE Civil Code* (and, above, paragraph 419).

follows because the base element for the statutory breach(es) or deceit is not established.

Loss and damage

Bases of claim

425 Sunland alleges that it suffered the following loss and damage:[1414]

(a) payment by Sunland to Hanley (by Sunland Group Limited on behalf of Sunland Waterfront (BVI) Ltd) of the fee of AED 44,105,780; and

(b) loss of reputation by Sunland in Dubai for having been party to a transaction characterised by the Dubai authorities as illegal.

426 Sunland seeks to recover these alleged losses as compensatory damages pursuant to s 82 of the TPA and as damages for the tort of deceit. As indicated previously, the nature of damages awarded pursuant to s 82 of the TPA is usually assessed by reference to the detriment suffered as a consequence of reliance upon the contravening conduct, rather than the amount required to make good the expectation created by that conduct.[1415] Consequently, although both the statutory and tortious causes of actions are pleaded, they would, if established in terms of liability, lead to an award of damages on the same basis. For the reasons already set out, I am of the opinion that Sunland has failed to establish any basis of liability against any of the defendants in either the pleaded statutory causes of action or the claim in tort for deceit. Consequently, issues of loss or damage do not arise, but it may, nevertheless, be helpful if I express my views in this respect in case this proceeding is taken further.

427 The contradictory evidence given by Brown and Abedian makes it difficult to discern or understand the basis upon which Sunland puts its case in relation to loss and damage. As submitted against Sunland, does it allege that, if not for the Representations and the Hanley Representations, it would have:

1414 Second Further Amended Statement of Claim, paragraph 37.

1415 See above, paragraph 360

(a) Withdrawn from all negotiations to acquire Plot D17 with the result that Sunland would not have become the owner of that plot ("the No Transaction Case");

(b) Successfully negotiated with DWF to purchase Plot D17 in its own right, such that Sunland would have become the owner of D17 without paying the Fee to Hanley ("the Transaction Case"); or

(c) Negotiated some form of joint venture with Prudentia but on different terms to the final Implementation Agreement ("the Joint Venture Case")?

428 Sunland alleges that, had the Representations and the Hanley Representations not been made, Sunland would not have entered into the Hanley Agreement or the Prudentia Agreement and would not have paid the fee.[1416] As a matter of pleading, it was submitted on behalf of Joyce that only the Transaction Case is open to Sunland on its pleadings, because the No Transaction Case and the Joint Venture Case are not pleaded. In my view, this is correct as a matter of pleading, but for the reasons which follow, it makes little difference in the ultimate result because Sunland fails to establish loss and damage however its case is made.

429 The confused, inconsistent and contradictory evidence of Brown and Abedian is particularly clear when one comes to examine Sunland's allegation that, but for the alleged representations, it would not have entered into the Agreements and would not have paid the fee.

430 Turning first to Brown's, clearly contradictory, evidence:

(a) In paragraph 282 of his first witness statement,[1417] Brown said:

> "If I had been told (or believed) that the basis for Reed's 'control' of Plot D17 (or the status of Reed / Prudentia as 'a preferred negotiator') was Joyce had resolved that he would personally attempt to ensure that Plot D17 was sold to Reed, then Sunland would not got involved in the sale. Also, given the earlier encounter with Joyce on Plot A10C, I would not want to upset him again as Sunland (and I) saw him as someone who held substantial power at Dubai

1416 See Second Further Amended Statement of Claim, paragraphs 36 and 37.

1417 Witness statement of David Scott Brown (6 August 2010).

Waterfront. Therefore, Sunland would have just backed out and let Reed buy the site."

(b) However, in paragraph 275 of his first witness statement,[1418] Brown said that Sunland would have negotiated directly with DWF to acquire Plot D17:

"If I had been told (or believed) that Prudentia (or its subsidiaries) did not have control and rights over Plot D17, I would not have negotiated with Reed (and SWB would not have entered into the agreements with Prudentia and Hanley) but would have negotiated directly with Dubai Waterfront."

(c) Then, in paragraph 5 of his second witness statement,[1419] Brown gave the following evidence:

"Had Reed said to me that he would not talk to me unless I promised not to attempt to buy D17 directly from Dubai Waterfront, I would not have agreed to that. Had Reed said that to me, it would have flagged to me that Prudentia were just looking for sites as Sunland was, and had no legal rights over D17. In that case, I would not have given up Sunland's ability to purchase D17 directly from Dubai Waterfront. In that case, I would still have been willing to talk to Reed about a JV on a non-exclusive basis, because you never really know what a prospective JV partner may be able to bring to the table."

(d) In paragraph 26 of his second witness statement,[1420] Brown gave the following further evidence:

"If I had known at the time that Prudentia did not in fact control the land but was merely a prospective purchaser who also had the ability to arrange funding for the project, then we would have explored a different JV model with them. The negotiations would have been very different, as Sunland would have been able to pursue the purchase of the land itself, on the basis that if it was unable to negotiate a JV with Prudentia providing the finance, it could have looked for an alternative JV partner. Because I thought that Prudentia had control of the land, the attraction for Sunland of negotiating a joint venture with Prudentia, rather than simply offering to pay Prudentia a premium in order to be able to buy D17 for itself, was that it seemed that Prudentia was able to fund the land instalment payments."

431 In this respect, Abedian gave the following evidence:

(a) In paragraph 116 of his first witness statement,[1421] Abedian said that the plaintiffs would have negotiated to purchase Plot D17 directly from DWF and would have sought out other joint venturers at the same time:

1418 Witness statement of David Scott Brown (6 August 2010).
1419 Reply witness statement of David Scott Brown (27 June 2011).
1420 Reply witness statement of David Scott Brown (27 June 2011).
1421 Witness statement of Soheil Abedian (6 August 2010)

"If I had been told that information by any representative of the Dubai Waterfront management at the time, I would never have caused Sunland to enter into any agreement with Prudentia, Hanley or Reed. There is no reason why Sunland would pay any premium or consultancy fee to a party that had no control over that plot. Instead I would have caused Sunland, through Brown and me, to negotiate directly with Dubai Waterfront for the purchase of Plot D17. At the same time or following the purchase of the land from Dubai Waterfront, I would have caused Sunland to enter into JV negotiations with appropriate parties so as to find an appropriate JV partner to participate in the funding of the project."

(b) In paragraph 117 of his first witness statement,[1422] Abedian stated that the plaintiffs would have abandoned all negotiations regarding Plot D17 and would have instead attempted to purchase Plot A10C or any other plot that was then available:

"If I had been told (which I was not) that the position was that Reed and Prudentia's 'control' of Plot D17 was not due to Prudentia having any legal right over the plot but rather was because Joyce had made a personal decision that he wanted Dubai Waterfront to sell Plot D17 to Reed, then I would have resolved that Sunland should abandon its negotiations in relation to Plot D17 and should instead attempt to negotiate a purchase of Plot A10C or any other plot that might have been available."

(c) In paragraphs 9 and 10 of his second witness statement,[1423] Abedian said that if he had been told at the outset that Sunland could acquire Plot D17 directly from DWF, then he would have negotiated for a SPA to purchase Plot D17 directly and would have sought out alternative joint venture partners. However, in paragraph 11 of that statement, he said that Sunland's preferred approach to its projects was to establish a joint venture in which the other joint venture party brought the land to the joint venture and Sunland was responsible for project design, obtaining development approval, sales and marketing and seeking and obtaining finance for construction costs.

432 Compensatory damages under the TPA are, as in tort in the present circumstances, measured as equivalent to the amount of money that would put a party in Sunland's

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1422 Witness statement of Soheil Abedian (6 August 2010).

1423 Reply witness statement of Soheil Abedian (16 June 2011).

position back into the position it would have been in but for the misleading or deceptive conduct and the like under the statutory provisions or the fraudulent misrepresentations in the context of the tort of deceit. This requires a comparison of the actual position of the party with a hypothetical position. Consequently, whichever case is advanced by Sunland, it must establish what its actual position is as a result of entering into the transaction in respect of Plot D17.

No Transaction Case

433 If Sunland's case were put on this basis, it would need to establish that it would have withdrawn from negotiations to acquire Plot D17 had it known the true position. The result would have been that it would not have become the owner of that piece of land. This does, however, appear to be a most unlikely position having regard to the enthusiasm of Brown and Abedian for that land and the close proximity of Plot D17 to Plot D5B, the high profitable feasibility studies prepared by Brown and the likelihood of Sunland being able to sell part of the project to a joint venturer such as Likeitalot Investments Pty Ltd (ACN 122 604 326) at a very significant profit.[1424] Moreover, even if one assumes that this is a likely outcome, it is unclear whether Sunland could have undertaken The Atrium project[1425] with Plot D5B alone. Sunland led no evidence as to what other project they would have done on Plot D5B.

434 A further difficulty is that on the evidence adduced by Sunland, it is not possible to determine its actual net financial position as a result of its having acquired Plot D17. For example, if Sunland made a profit as a result of purchasing Plot D17, it follows that it is not suffering any loss as a result of entering into the D17 transaction. Thus, it was submitted against Sunland that its merely seeking a return of the Fee is a simplistic approach to its loss and damage claim, and one not supported by authority.

435 In *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd*,[1426] Finkelstein J (with whom Jacobson and Besanko JJ agreed) said that the proper

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1424 See above, paragraphs 208, 242, 259, 298, 299 and 303.

1425 The proposed development of Plot D17.

1426 *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants* (2011) 190 FCR 299.

approach where a plaintiff is alleged to have received a benefit as a result of the wrongdoer's act is to consider the following questions:

(a) Should the benefit be taken into account at all in assessing damages?

(b) If yes, how should the benefit be taken into account?

It follows that one must keep in mind that the goal or purpose of the assessment of damages is to compensate, which means that both losses and benefits accruing to Sunland as a result of purchasing Plot D17 should be taken into account in assessing damages.[1427] Consequently, it is artificial to ignore a benefit simply because it is of a different character to the loss pleaded by a plaintiff if the broad aim of an award of damages is to restore that plaintiff to its position but for the wrongdoer's breach.[1428]

436 A similar position is adopted under the law of Dubai. Damages under Part 3 of the *UAE Code* are compensatory[1429] and Article 292 of that Code provides that losses that that are considered to be a natural result of the harmful act are those for which it was not possible for the aggrieved party to avoid by exerting reasonable efforts.[1430] The expert evidence of Ms Hamade on Dubai law was that if a party reduced its loss by taking actions in mitigation, then this is a matter to be taken into account by the judge.[1431]

437 In this context, the Sunland evidence is as follows:

(a) After SWB acquired Plot D17, it entered into a joint venture with another party known as "EWM".[1432] Brown could not recall the amount of the premium payable to Sunland by EWM under this joint venture and a call was made for documents to establish the quantum of that premium.[1433] Sunland

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1427 *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants* (2011) 190 FCR 299 at [22] – [23].

1428 *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299 at [26].

1429 Hamade Statement [SUN.013.001.0771], paragraphs 5.1 and 5.2. Hamade Statement, Appendix 7, pages 199 to 201.

1430 Hamade Statement, paragraph 6(b).

1431 Hamade Statement, paragraph 5.2.

1432 Transcript, p 106:10; Likeitalot Investments Pty Ltd.

1433 Transcript, p 106:21.

produced a Shareholders' Agreement[1434] for SWB between Sunland Development Dubai (BVI) Limited and Likeitalot Investments Pty Ltd ACN 122 604 326, pursuant to which:

(i) In consideration for a 40% interest in the joint venture company (which was to develop Plot D17), the 'Scott Entity' would pay to Sunland an amount of AED 225,000,000 (clause 4.2(d)). At October 2008, this was approximately $90 million AUD (i.e. more than the purchase price of D17 to Sunland).

(ii) In addition to this fee, Sunland would receive AED 140,000,000 for "project supervision services and construction management services" (clause 7.1(a)) and another AED 20,000,000 for "specialist design services" (clause 7.2(a)). At October 2008, the total of these additional fees was approximately $64 million AUD.

(b) On 27 March 2009, Sunland issued a release to the ASX advising that EWM had defaulted on the joint venture terms but that Sunland had retained AUD $14 million already paid to SDG by EWM.[1435]

(c) The plaintiffs' evidence showed that it is usual for them to fund development in Dubai through pre-sales.[1436] However, the plaintiffs failed to lead evidence as to the value of pre-sales obtained by them in respect of The Atrium project on Plot D17.

(d) Sunland is currently exiting its Dubai investments.[1437] It is not clear from the plaintiffs' evidence what benefits the plaintiffs have obtained from their joint venture partners, by virtue of SWB's ownership of Plot D17, in exiting those investments.

(e) The plaintiffs allege that the additional BUA received on Plot D17 was compensation for the Fee paid to Hanley and wording to that effect appears in the letter authored by Brown regarding the extra BUA.[1438] If that is the

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1434 Exhibit D17, "Shareholders Agreement between Sunland Development Dubai (BVI) Limited and Likeitalot Investments Pty Ltd dated 31 October 2008".

1435 [MJJ.011.001.0001]; Tab TT of Cross-examination Tender Bundle (David Brown).

1436 Transcript, p 302; Transcript, p 368 – 369; [SUN.001.006.0010].

1437 Transcript, p 251.

1438 DB[215]; [SUN.001.005.0027] and [SUN.001.005.0028].

plaintiffs' argument then it follows that they would not have received that BUA if they had not paid the Fee to Hanley. Accordingly, the value of this additional BUA would be considered a benefit received by the plaintiffs as a result of the alleged wrongdoing and would need to be taken into account in assessing damages.

438 It was submitted against Sunland that it had not adduced evidence to enable the Court to determine its net financial position with respect to Plot D17. It may be, it was said, that Sunland has made a net return in respect of Plot D17, in which case it has suffered no compensable loss. It is, however, a matter for Sunland to establish; something which it did not seriously attempt to do. It follows that it is not possible for the Court to compare that current net position with what would have been the position under any of the hypothetical alternatives advanced by Sunland, a difficulty which is compounded by the lack of evidence as to what Sunland's alternative position would have been under the hypothetical alternatives.

Transaction Case

439 If this were the case pursued, it would be on the basis that Sunland successfully negotiated with DWF to purchase Plot D17 in its own right without paying the fee to Hanley. Nevertheless, to the extent that any finding could be made based on the evidence adduced by Sunland, that evidence, in my view, suggests that, given its apparently superior negotiating position, Prudentia would have entered into a SPA with DWF and then on-sold the plot to Sunland for a premium in the usual way. There was no dispute between the parties that it was a matter for DWF to determine to whom Plot D17 would be sold.[1439] In my view, Sunland's evidence fails to establish that DWF would have sold Plot D17 to Sunland and not to Prudentia.

440 Further, in this hypothetical situation, it is unknown what price Sunland would have paid for Plot D17. Brown's evidence was that Sunland could not have obtained Plot D17 for the 120 sq/ft by dealing directly with DWF and bypassing Prudentia because

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1439 Notice Disputing Facts (and Authenticity of Documents) dated 26 October 2010 [SUN.008.004.0004]: "At any time prior to 1 October 2007 Dubai Waterfront was able to sell Plot D17 to someone other than the applicants if Dubai Waterfront so chose".

"all indications were it would be sold to somebody at a higher price."[1440] Consequently, if Sunland would have had to pay a higher price to purchase Plot D17 because of competition for the plot, assuming Prudentia walked away, this would mean that the hypothetical alternative position may be no better than the actual position. In any event, Sunland led no evidence that would allow the Court to determine this point.

Joint Venture Case

441 In this hypothetical situation, Sunland would have negotiated some form of joint venture with the Prudentia parties, but on different terms to the final Implementation Agreement or MOU. This possibility was contemplated in paragraphs 5 and 6 of Brown's Second Witness Statement,[1441] a position broadly consistent with paragraph 11 of Abedian's Second Witness Statement.[1442] Sunland did not, however, adduce any evidence to enable the Court to determine what the terms of this other joint venture agreement would have been and, consequently, determination of loss and damage on this basis is not possible.

Loss of reputation

442 Sunland led no evidence in support of its claim for loss and damage on this basis. In fact, the evidence as it stands, indicates that it has successfully persuaded the Dubai authorities that it is a "victim" of a fraud perpetrated against it and further, this is the message which it has apparently been disseminating to the world through the ASX releases to which reference has already been made.[1443] In any event, as submitted against Sunland, any loss or damage to its reputation would not crystallise unless or until there was a ruling in the Dubai courts in relation to the legality or otherwise of the D17 transaction, and a finding in relation to Sunland's involvement in that transaction.

Summary

443 As Sunland has not led evidence that enables the Court to determine whether, in

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1440 Transcript, p 73:42.
1441 Reply witness statement of David Scott Brown (27 June 2011).
1442 Reply witness statement of Soheil Abedian (16 June 2011).
1443 See above, paragraph 334 - 339.

fact, it did suffer any loss and damage and, if so, how it should be assessed, it might be expected that its case would also fail in this respect. Sunland did, however, make submissions in support of the position that a court should nevertheless make a general award of damages in circumstances where no evidence has been led that can enable the court to quantify a specific amount for such damages. By way of example in support of this submission, reference was made to the judgment of Foster J in *FAI General Insurance Co Ltd v RAIA Insurance Brokers Pty Ltd* where his Honour said:[1444]

> "Doing the best I can on what is extremely exiguous material I think it appropriate that I award damages in the sum of $15,000. In arriving at this award I have accepted that it is open to award damages for vindication of commercial reputation under s 82: see *Brabazon v Western Mail Ltd* (1985) ATPR 49-549 at 46,453; *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd* (1986) 65 ALR 500 at 525; *Typing Centre of NSW Pty Ltd v Northern Business College Ltd* (1989) ATPR 40-943 at 50,290."

It was also submitted that two judgments of Merkel J are also relevant: *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd*[1445] and *Nixon v Slater & Gordon*,[1446] where two surgeons were held to be entitled to payments of $200,000 and $100,000, respectively, both for defamation and by way of damages under s 82 TPA for misrepresentations published about them. These cases do not, however, advance Sunland's position for two reasons. First, the possible No Transaction Case, the Transaction Case and the Joint Venture Case raise matters necessary for consideration for the purpose of quantifying any award of loss and damage which cannot fairly be addressed by some arbitrary award of a global sum by way of general damages which is not calculated by reference to any relevant facts and circumstances. Secondly, in relation to loss of reputation, there is no evidence upon which any reasonable assessment could be based, even assuming that there is any loss of reputation which, for the reasons indicated previously, I discount entirely on the basis of the evidence before the Court. For these reasons, Sunland's case does, nevertheless, fail in this respect.

444 Finally, I should stress that the loss and damages issues discussed only follow for

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1444 (1992) 108 ALR 479 at 509.
1445 (1997) 144 ALR 528 at 538.
1446 (2000) 175 ALR 15 at [84] and [88].

consideration if Sunland established its case in terms of liability, a position which has not been reached. For all these reasons, it is not necessary to consider apportionment issues with respect to Sunland's damages claim.[1447]

Other matters

445 As discussed in considerable detail in the preceding pages the Sunland case is one founded, on the one hand, on alleged prohibited conduct under various statutory provisions contained in the TPA and the FTA. In broad terms, the statue-based case relies on allegations of misleading or deceptive conduct on the part of the defendants. The other aspect of the case, the case in tort, relies on establishing the elements of the tort of deceit. 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.

446 Sunland's attempt to rely on these matters in support of its case is merely another exercise on its part in the *post hoc, ergo propter hoc* fallacy.[1448] There can be no "joint purpose" or "joint tortfeasors" without first establishing the "purpose" or the "tort". For the preceding reasons Sunland has failed to establish any base upon which any of the internal communications, subsequent dealings or flows of money could possibly become relevant; either for the purpose of its statute-based case or its case in deceit.

Conclusion

447 For these reasons, Sunland's case fails in all respects and will be dismissed.

448 Additionally, I will forward a copy of these reasons (and make any papers available) to the Australian Securities and Investments Commission with a request that the

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1447 See *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 18.4.

1448 See above, paragraph 301.

Commission consider the corporate governance issues for Sunland (including its ASX announcements) which are raised by these proceedings and take such further action as considered appropriate.

449 Nothing in these reasons affects the continuing operation of the orders I made in this proceeding on 27 January 2012, which were consequent on my reasons for judgment published on 25 January 2012.[1449]

450 I will hear the parties in relation to the question of costs and final orders.

1449 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 1)* [2012] VSC 1.