

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: **Golding v Primavera Holdings Pty Ltd**

Citation: **[2024] ACTSC 29**

Hearing Date: 5 February 2024

Decision Date: 16 February 2024

Before: Ainslie-Wallace AJ

Decision: See [76]

Catchwords: **CIVIL LAW** – VALUATION – Whether Binding on Parties to Deed – whether valuer “considered” submissions of parties – trusts — cost of maintaining trust property – indemnification for costs of maintaining trust property

Legislation Cited: *Unit Titles Act 2001* (ACT)

Cases Cited: *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99
Boland v Yates Property Corp Pty Ltd (1999) 167 ALR 575
CGU Insurance Ltd v One Tel Ltd (In Liq) (2010) 268 ALR 439
Chief Commissioner of Stamp Duties (NSW) v Buckle (1998) 192 CLR 226
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337
Golding v Primavera Holdings Pty Ltd [2018] ACTSC 118
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314
Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360
Palacath Ltd v Flanagan [1985] 2 All ER 161
Plaintiff M1/2021 v Minister for Home Affairs (2022) 400 ALR 417
Strike Australia Pty Ltd v Data Base Corporate Pty Ltd [2019] NSWCA 205

Parties: Allan Jones Golding (First Plaintiff)
Eveleen Golding (Second Plaintiff)
Primavera Holdings Pty Ltd (ABN: 79 080 185 244) (Defendant)

Representation: **Counsel**
R Arthur (First and Second Plaintiff)
WD B Buckland (Defendant)
Solicitors
Taylor Legal (First and Second Plaintiff)
Minter Ellison (Defendant)

File Number: SC 31 of 2023

AINSLIE-WALLACE AJ:

1. These proceedings principally concern whether land was valued in accordance with the terms of an agreement embodied in a deed and entered into between the Plaintiffs and the Defendant.

Background facts giving rise to the dispute

2. In 1983 the Plaintiffs purchased a block of land in Hall in the Australian Capital Territory. On the land was a building, known as the “Old Bootmaker’s Shop”, which was about 100 years old. Around the time of the purchase, the Plaintiffs effected extensions to and restoration of the building. In the reconstruction, only the floor bearers, stud walls and some cosmetic features remained of the building’s original condition. On 3 January 1984, a Certificate of Occupancy was issued in respect of the building and extension.
3. Adjacent to the Plaintiffs’ block was a parcel of land known as “block 3”.
4. In 2003 the Defendant proposed a development of both the Plaintiffs’ land and block 3. It was a condition of the development approval that one entity owned the land. Thus, the Defendant entered into a contract to purchase block 3 and to purchase the Plaintiffs’ block for \$250,000. The two blocks were consolidated.
5. The parties entered into a Deed of Trust on 14 March 2003 by which the Defendant would hold a part of the consolidated block representing the Plaintiffs’ block in trust for the Plaintiffs (the “Trust Parcel”) with the intention that when the land was developed and a Units Plan registered, the Defendant would re-convey the Trust Parcel to the Plaintiffs for \$1. The Defendant agreed to provide a bank guarantee in the Plaintiffs’ favour of \$250,000 pending the re-conveyance of the Trust Parcel. In the meantime, the Plaintiffs were entitled to occupy and use the buildings on the Trust Parcel.
6. Progress of the development was slow and was not completed until 2012, however, on completion of the development, the Defendant did not register a Units Plan and did not re-convey the Trust Parcel to the Plaintiffs.
7. In 2017 the Plaintiffs commenced proceedings in the Supreme Court seeking a declaration of an express trust and a declaration that the Defendant had breached that trust. They then sought a consequential order that the Defendant perform its obligations under the trust. On 4 May 2018, McWilliam AsJ (as her Honour then was) found an express trust and ordered the Defendant to register a Units Plan and transfer the Trust Parcel to the Plaintiffs: *Golding v Primavera Holdings Pty Ltd* [2018] ACTSC 118.
8. The orders were not complied with. In 2019 the Plaintiffs began contempt proceedings against the Defendant, while the Defendant applied to vary her Honour’s orders. The

parties attended a Court ordered mediation and as a result, on 20 April 2021, entered into binding Heads of Agreement contemplating the execution of a deed of settlement. The Deed was entered into by the parties on 23 March 2022 (**'the Deed'**).

9. Relevant to this matter, the Deed provided that, rather than the Defendant re-conveying the Trust Parcel to the Plaintiffs, the Defendant would purchase the Trust Parcel from the Plaintiffs at a value to be determined by a process set out in the Deed.
10. On 1 September 2022, the valuer appointed, Mr Steven Flannery, provided a report in which he valued the Trust Parcel at \$550,000 (**'the valuation'**). The Defendant did not purchase the Trust Parcel from the Plaintiffs in conformity with the provisions of the Deed.

The applications

11. On 20 January 2023 the Plaintiffs sought a declaration that the Deed was binding on the parties and consequentially that the Deed be specifically performed and executed. The basis of the application was the Plaintiffs' contention that, notwithstanding the valuation of the Trust Parcel being completed, the Defendant had failed to make the payment to the Plaintiffs of the sum valued as required.
12. On 28 April 2023, the Defendant sought that the Plaintiffs' application be dismissed and a declaration that the purported valuation conducted was not binding on the parties.

The valuation

13. Clause 4 of the Deed sets out the process for valuing the Trust Parcel

4.1 Determination process

The Trust property Market Value will be determined as follows:

- (a) determination will be made by a valuer, ...
- (b) the valuer will be engaged by way of a joint letter of instructions in the form of the letter at Schedule 2;
- (c) the following assumptions will be adopted by the Valuer:
 - (i) the Trust Property is a separate and saleable parcel of land with a Crown lease on the same material terms as the crown lease for the Existing Property
 - (ii) the Trust Property benefits from a right of access as required;
- (d) the Valuer will be given access to the Trust Property for an inspection; and
- (e) **the parties will be given an opportunity to make written submissions to the Valuer, which must be considered by the Valuer.**

(Emphasis added.)

14. It is in clause 4.1(e) that the present controversy resides.

15. The Defendant argues that it is apparent on the face of Mr Flannery's report that he did not "consider" the submissions and supporting material sent to him by the Defendant, and thus the valuation was not conducted in accordance with the terms of the valuer's engagement, with the result that the valuation is not binding on the parties.

Legal principles

16. Where parties have, as here, agreed that an expert determination shall be final and binding on them, mistake or error on the part of the expert will not invalidate the decision unless it is of a kind which shows that the expert determination has not been made in accordance with the contract: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335.
17. In *Strike Australia Pty Ltd v Data Base Corporate Pty Ltd* [2019] NSWCA 205, Bell P (as he then was) considered the nature of an expert determination of valuation. Bell P noted the many statements of the High Court to the effect that the valuation of land is an "art not a science" and quoted Callinan J in *Boland v Yates Property Corp Pty Ltd* (1999) 167 ALR 575 at 651 [277] that:

It should also be firmly kept in mind that valuation practice, like legal practice, cannot be an exact science. Both require the exercise of judgments and the forming of opinions, often on matters in respect of which certitude is impossible and uncertainty highly likely.

18. In commenting on terms of engagement which specified that the valuer was not to be limited or fettered by the statement of reasons or valuations submitted by the parties, Mars-Jones J in *Palacath Ltd v Flanagan* [1985] 2 All ER 161 at 166 said:

...Nor...was he obliged to accept as valid and binding on him matters on which the parties were agreed. He was not appointed to adjudicate on the cases put forward on behalf of the landlord and the tenant. He was appointed to give his own independent judgment as an expert, after reading the representations and valuations of the parties (if any) and giving them such weight as he thought proper (if any).

19. So, what did the parties mean when making it a condition of the valuation that the valuer must "consider" the parties' submissions? Although this controversy concerns the construction of a private contract, a helpful discussion on what is contemplated in that term can be found in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417 at 425-426 [24]-[25]

[24] Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations. Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman*, the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought

appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made by a former visa holder.

[25] It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. **The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations....**

(Citations omitted, emphasis added.)

20. By analogy, in a private contract, an expert required to consider a matter will be required to have a level of engagement with the representations made, which will vary depending on, amongst other things, the degree of relevance of them.
21. It is important too to bear in mind that the valuer was not required to give reasons and, here, the Defendant sought to demonstrate a failure to consider the submissions by reference to the valuation itself.

What material was provided to the valuer?

22. Both parties sent submissions and supporting documents to the valuer.
23. Here, the focus of the argument about the valuer's consideration of the submissions of the Defendant rested significantly on an affidavit dated 12 June 2019 of John Bates, a structural engineer and building certifier, and the submissions of the Defendant to the valuer, which outlined what the Defendant said were flaws in the block which would "significantly restrict" the amount that a purchaser might pay for the Trust Parcel.
24. The affidavit of Mr Bates addressed the history of the development and difficulties encountered throughout it which resulted in the provision of partial Certificates of Occupancy.
25. In his affidavit, Mr Bates considered the problems associated with bringing the Trust Parcel into the Units Plan. At paragraph 31, he turned to consider the heritage listed building on the Trust Parcel, the "Old Bootmaker's Shop". Mr Bates noted that the building was very old, more than 100 years, made of timber and built well before the Australian Building Code was in existence. He said it looked like the building had been extended, altered and reclad at regular intervals over its lifetime.
26. While the heritage listing entitled the building exemption from the building code in a number of respects, he said that there are "still core aspects of the problem which would

need very substantial rectifications". Mr Bates made the context of what follows clear because he said at [34]:

A separate aspect of the "Old Bootmaker's Shop" is that I understand it is proposed to be incorporated into a present-day Units Plan. Some of the exemptions which might apply to a free-standing heritage building definitely do not apply to a building incorporated into a Units Plan.

27. He set out all of the compliance requirements necessary to bring the Old Bootmaker's shop in the Trust Parcel into the Units Plan and for which no exemptions applied, and concluded at [41]–[43]:

41. The essence of the problem with the "Old Bootmaker's Shop" is this:

(i) Because it is heritage listed it ought not to be changed or destroyed.

(ii) To make it compliant with the Building Code it would have to be very substantially altered which almost amounts to changing or destroying it.

(iii) The cost of such work, involving the removal and replacement of original materials and the reconstruction of an "old" building, would be astronomical and might be far greater than the cost of simply building a replica.

42. For the above reason, I do not believe it is feasible to incorporate Unit 1 being the "Old Bootmaker's Shop" into a Units Plan.

43. If I were asked to advise on such a project, I would recommend subdividing the land so that Unit 1 sat on a standalone block in its present heritage condition and could be remain (sic) unmodified. ...

28. The Plaintiffs sent submissions to the valuer and supporting documents. In particular, the Plaintiffs sent a report of Susan Proctor, a solicitor specialising in property law, in which she addressed amendments to the *Unit Titles Act 2001* (ACT) and how those amendments might operate in relation to unit titling. She was also asked to comment on Mr Bates' affidavit in relation to the matters which might need to be addressed in a unit title assessment.

29. The Plaintiffs' submissions comment on Mr Bates' affidavit and in particular some of his assumptions about the Old Bootmaker's Shop. In that submission, the Plaintiffs note:

... The conclusions drawn by John Bates at paragraphs 31-42 are based on uninformed speculation. The building was in fact extensively renovated in 1983 as described in paragraphs 8-10 of the Golding affidavit September 2019. As a result it would have been capable of being incorporated into a Units Plan at the time of the original transaction 20 years ago and, with appropriate treatment still today.

30. The Plaintiffs relied on Ms Proctor's report to support the proposition that the Old Bootmaker's Shop could be incorporated into a Units Plan.

31. Also attached to the Plaintiffs' submission were the documents relating to the building work done by the Plaintiffs in 1983 including a Certificate of Occupancy in relation to the restoration of the "Old Bootmaker's Shop" and the new extension.
32. Finally, the Plaintiffs attached a copy of the reasons for decision of McWilliam AsJ in *Golding v Primavera* [2018] ACTSC 118 with particular reference to [47]-[58] in which her Honour comments on the failure of the Defendant to apply for registration of a Units Plan and notes that the Defendant contended that it was a costly exercise requiring further structural works. In concluding that the Defendant breached the trust document of 2003, McWilliam AsJ noted at [49] that:

On the evidence before the Court, this is not a case where the first defendant has used all reasonable endeavours to comply with its obligation in clause 2 of the Trust Deed but its efforts have been frustrated, in that a units plan has not been registered for reasons outside its control. It is simply that no attempt has yet been made because it has chosen not to spend the money required to comply with its obligations.

33. Her Honour turned to the question of the heritage issue. At [58] Her Honour said:

The Plaintiffs in the present case submitted that any difficulties for the first defendant in relation to the heritage listing of the site only arose due to the first defendant's failure to adhere to the existing development approval by making variations to the buildings that were not in accordance with the heritage guidelines. Having regard to the Tribunal's decision in respect of the development, I accept that submission.

34. While both parties sent other documents to the valuer, the submissions focussed heavily on those I have mentioned.

The valuer's report

35. In describing the property, the valuer said; "The original building, being the "Bootmaker's Shop" was constructed in the early 1900's and has been fully renovated and extended in the early to mid-1980's..."
36. Later in the report, dealing with his physical inspection of the property, the valuer said that it; "... presented in average condition commensurate with its age and use having been renovated and extended in the 1980's."
37. He dealt with the submissions received from the parties at 4.1, and at 4.1.1 to 4.1.3 set out the submissions received from the Defendant:

- 4.1.1 On 21 July 2022, Primavera Holdings Pty Ltd provided a submission on the market value as at the date of valuation, namely 20 April 2021. They described that on 14 March 2004 they purchased the whole of Block 12 Section 2 (which included the subject land) at full market value. A condition of the sale was reportedly that Block 3 Section 2, which then became Block 19 Section 2, would be subject to a trust deed dated 14 March 2003, wherein Goldings would retain an equitable interest in the

property and that Primavera through their best endeavours would unit title the property and sell the interest for one dollar.

4.1.2 Primavera Holding's submission has provided information and their opinion on various issues, including but not limited to:

- The assumed Crown Lease;
- Heritage matters;
- The buildings suitability for leasing;
- Their opinion of the legal status of the current and former lettings;
- GFA limitations; and
- Carparking provisions

4.1.3 As part of their submission they also provided commentary on the various affidavits and submissions made on the properties. Furthermore, Primavera Holdings Pty Ltd. have provided me, as the valuer appointed, with commercial rental evidence relating to other commercial property interests held within the Village of Hall. In preparing this valuation, I have also had regard to this rental evidence as partially described in this report, however Primavera Holdings Pty Ltd have requested this information to be held 'Commercial in Confidence'.

38. The valuer then turned to the submission provided by the Plaintiffs and said:

4.2.1 In a letter dated 25 July 2022, A & E Golding have provided their view of the following;

- (1) Correction of matters asserted by Primavera Holdings Pty Ltd with respect to the historical background of the Old Bootmaker's Shop and its current status under the building legislation
- (2) Terms of the Crown Lease for Block 19 applicable to the assumed Crown Lease; and
- (3) Rental evidence.

4.2.2 Although brief, the Golding submissions states that their lack of response to other matters asserted in the Primavera Holdings submission should not be seen as an agreement with what is said.

4.2.3 The Goldings Submission confirms that the property provides three parking bays and not four and also provides copies of and comments on;

- Affidavits of Alan Golding dated 12 September 2019;
- Report from Susan Proctor; and
- Report of the decision of McWilliam AsJ dated 4 May 2018.

The Defendant's contention

39. The Defendant argued that it was plain that the valuer did not "consider" its submission and in particular the Bates affidavit because, had he done so, he would have

accommodated into the valuation a discussion of the impediments to sale flowing from the difficulties identified by Mr Bates. At 7.2.2 of the valuation, the valuer exposes his calculations for arriving at the valuation. Under the heading “Adjustments” there is provision for “other budgeted capital expenditure over next 12 months”. No amounts are specified. The Defendant argued that had the valuer considered the Bates affidavit, he would have had to include at that point the cost of bringing the Old Bootmaker’s Shop into compliance with the relevant codes and terms of the Crown Lease.

40. The Defendant also points to the valuer’s description of the property and argued that had he considered the Bates affidavit, he would there have mentioned the deficiencies to which Mr Bates referred.

Affidavit of Carolyn Mowbray

41. In the hearing the Defendant sought to rely on two reports of Carolyn Mowbray, a Certified Valuer, in which she opined on the matters of valuation which Mr Flannery should have taken into account in determining the value of the Trust Parcel and the application or purported application of industry standards by Mr Flannery in valuing the property had he “considered” the Defendant’s submissions.
42. The Plaintiffs objected to reliance on the affidavit. The conclusions and opinions of Ms Mowbray had not been provided to Mr Flannery for comment, nor was there a request for Mr Flannery to be available for cross-examination on the matters Ms Mowbray raised in her affidavit.
43. On this basis alone, to rely on the opinions of Ms Mowbray and her criticisms of Mr Flannery represents a significant procedural unfairness.
44. It is to be observed too that the challenge here to the valuation of Mr Flannery is whether he conducted the valuation in accordance with the terms on which he was engaged and in particular whether he “considered” the submissions and information provided by the Defendant in assessing the value of the property. It is not to the point that another valuer may have taken a different approach or indeed whether Mr Flannery, in the opinion of Ms Mowbray, made an error. The question is whether Mr Flannery had performed his task in accordance with the contract (*Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335).
45. I do not propose to accept Ms Mowbray’s reports as part of the evidence in determining this issue.

The Plaintiffs' contention

46. Counsel for the Plaintiffs submitted that the Bates affidavit was solely directed to the difficulties and expense of bringing the Trust Parcel into compliance with the necessary codes to enable it to be brought within a Units Plan, while the question for the valuer was to value the Trust Parcel as a stand-alone block. Thus Mr Bates' opinions on the difficulties and expenses necessary to bring the building into compliance were irrelevant to the valuer's task.
47. Further, it was submitted that, in any event, the submission of the Plaintiffs made it obvious that Mr Bates' opinion about the state of the building was uninformed by the knowledge of the extensive renovations and refurbishment conducted in the 1980's, and the accompanying Certificate of Occupancy.
48. The Plaintiffs contended, and it is uncontroversial, that there is no evidence and certainly nothing before the valuer to the effect that the Trust Parcel could not be sold in its present state or more particularly that before it could be sold (as opposed to being incorporated into a Units Plan) all of the non-compliant aspects of the property must be addressed.

Conclusion

49. It is important to note that the valuer was asked to value the land "as is" and accepting that it was then leased (valuation page (i)). In dealing with comparable properties, the valuer acknowledged that others were in superior condition to the building on the Trust Parcel.
50. I do not accept the proposition that the valuer failed to consider the submission and evidence proffered by the Defendant. It is clear from his summary at part 4 of the report that he was aware of the material sent to him and his summary of the topics addressed in both the submissions for the Defendant and Mr Bates' affidavit lend support to his having read the documents and engaged with them.
51. I accept the submission of the Plaintiffs that Mr Bates' evidence and the submission about the defects in the building which would prevent its incorporation into a Units Plan had little relevance to the valuation task. That no accommodation of the cost of rectification of those difficulties appears in the valuation is not, as the Defendant submitted, because the valuer had failed to consider the evidence of Mr Bates and the submission, but because they were irrelevant to his task.
52. As to the description of the property contained in the report, it accords with the evidence of Mr Golding and the supporting documents about the extensions and renovations conducted in the 1980's. Mr Bates' affidavit makes it tolerably clear that he was unaware

of the 1983 renovations and the associated Certificate of Occupancy. The Plaintiffs' evidence and submission provides a strong basis for the description given by the valuer and again, the contention that because he did not accept Mr Bates' description of the property, does not mean he did not "consider" the affidavit or submissions.

53. I thus reject the contention that the valuer did not comply with the terms of his engagement and did not "consider" the submissions of the parties.

54. It follows that the valuation was conducted according to the agreed terms and is thus final and binding on the parties.

Bank Guarantee

55. At or about the same time as the first deed was entered into by the parties, March 2003, the Defendant provided a bank guarantee of \$250,000 in the Plaintiffs' favour. That guarantee has not been returned to the Defendant.

56. Heads of Agreement were reached on 20 April 2021, later to be embodied into the Deed between the parties executed on 23 March 2022.

57. Clause 2.1 concerns payment by the Defendant to the Plaintiffs for the Trust Parcel:

(a) without any admission of liability, Primavera will pay Mr and Mrs Golding;

(i) An amount equal to the current market value of the Trust Property ... as determined in accordance with clause 4 of this deed;

58. Clause 3 of the Deed provides for certain releases.

59. Under the subheading: *Release by Mr and Mrs Golding*, the following paragraphs deal with the Plaintiffs giving the Defendant certain releases. Clause 3.2(d) is:

(d) Upon Primavera complying with its obligations under clause 2.1 of this deed, Mr Golding and Mrs Golding:

(i) Release Primavera from its obligation to provide a bank guarantee in favour of Mr Golding and Mrs Golding, and

(ii) Will immediately return the bank guarantee to Primavera, at an address to be notified by Primavera.

(e) In the event that the bank guarantee is not returned to Primavera prior to 30 June 2021, for whatever reason, Mr Golding and Mrs Golding must pay to Primavera the cost of maintaining the bank guarantee thereafter, with costs being payable in the amount identified in writing by the bank as then being due within 7 days of demand being made by Primavera.

60. The Defendant contends that although it has not complied with its obligations under the Deed in paying the Plaintiffs for the Trust Parcel, 3.2(e) nonetheless entitles them to

claim the costs of maintaining the guarantee from 30 June 2021. It was argued that clause 3.2(e) has a separate meaning and intent from the balance of that clause.

61. The Plaintiffs argued that since the deed was not entered into until March 2022 it is difficult to imagine that the parties agreed for a liability to commence at an antecedent date, but rather when read within the whole of clause 3 and in the context of Deed itself, it was intended that the clause would come into operation at a time after the Defendant had complied with its obligations.
62. More particularly, it was argued that the guarantee was given against the Defendant's compliance with its obligations under the earlier deed. They have not yet complied with their obligations specified in clause 2.1 of the deed, thus it was argued that they are not entitled to call for a return of the guarantee.
63. In the alternative, counsel for the Plaintiffs argued that if there is a liability in the Plaintiffs then it did not arise until March 2023, which is when the Defendant notified the Plaintiffs of the amount to be paid.
64. To determine this controversy, it is necessary to discover the intention of the parties by having regard to the clause in its context and against the entire text of the document: see *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109 and *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352.
65. In the background preamble to the Deed, it states:

B Primavera maintains a bank guarantee in favour of Mr Golding and Mrs Golding (**Bank Guarantee**), which is held by Mr Golding and Mrs Golding.

....

D It has been agreed by the parties that;

- (i) subject to stated obligations of Primavera, Mr Golding and Mrs Golding will jointly and severally release and discharge Primavera and its Related Parties from all present and future claims:
 - (a) that are the subject of, or relating to matters raised in, the Proceedings;
 - (b) under or arising by virtue of the Sale Contract and/or Declaration of Trust; and
 - (c) that are in any way connected with the circumstances recited in this deed.
- (ii) subject to stated obligations of Mr Golding and Mrs Golding, Primavera will release and discharge Mr Golding, Mrs Golding and their Related Parties from all present and future claims:
 - (a) that are the subject of, or relating to matters raised in, the Proceedings;

- (b) under or arising by virtue of the Sale Contract and/or the Declaration of Trust; and
 - (c) that are in any way connected with the circumstances recited in this deed.
- 66. Turning then to the part of the Deed which contains the releases, the context in which clause 3.2(e) appears provides for the Plaintiffs to release the Defendant from certain liabilities, including the provision of the guarantee when the Defendant had complied with its obligations under clause 2.1 of the deed.
- 67. That the Plaintiffs would return the guarantee to the Defendant absent that compliance is incongruent with the whole of that clause and indeed the purport of the Deed. Furthermore, that the date on which the Plaintiffs were obliged to return the guarantee had already passed, it cannot have been the expressed intention of the parties that the Plaintiffs obligations to return the guarantee to the Defendant had already arisen with consequential liability. In coming to that conclusion, I take into account that the Deed's nature is commercial and that the parties were legally represented when it was brought into existence and signed.
- 68. The proper construction of the Deed makes it clear that it was not intended that the Plaintiffs would lose the protection of the guarantee without the Defendant having complied with its obligations as provided in the deed.
- 69. I therefore dismiss the Defendant's claim to the costs of maintaining the guarantee as and from the 30 June 2021.

Reimbursement of costs of maintaining the Trust Parcel.

- 70. The Defendant claimed indemnity from the Plaintiffs for the costs of maintaining the Trust Parcel arguing that the Defendant, as proprietor of the whole of Block 19 which includes the Trust Parcel, has been obliged to pay rates, taxes and other outgoings on the whole of the property and is entitled to indemnification from the Plaintiffs for so much of the outgoings as are referable to the Trust Parcel. The Plaintiffs have agreed to pay to the Defendant a sum referable to these costs and charges arising before 20 April 2021 (the date on which the parties entered into the Heads of Agreement). The dispute is in relation to the costs incurred in this regard since that time.
- 71. The Defendant argued that there was an ongoing obligation on it as trustee to maintain the trust properties by paying the rates and taxes levied on it by reason of the trust. The Plaintiffs argued that as the Defendant was a "bare trustee" it was not required other than by being the proprietor of the land to pay those expenses and the Plaintiffs were not liable to indemnify the Defendant because of them.

72. While the Defendant is indeed a “bare trustee”, that is one in whom is only vested the proprietary interest in the land, it nevertheless has an obligation to “protect” the trust property. In *CGU Insurance Ltd v One Tel Ltd (In Liq)* (2010) 268 ALR 439, the Court (French CJ, Heydon, Crennan, Kiefel and Bell JJ) held at 446[36]:

The trustee of a bare trust has no interests in the trust assets other than those which exist by reason of the office of trustee and the holding of legal title. Further, the trustee of a bare trust has no active duties to perform other than those which exist by virtue of the office of the trustee, with the result that the property awaits transfer to the beneficiaries or awaits some other disposition at their direction. One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it.

73. It was an incident of the Defendant’s role as trustee to “protect” the trust property; here, in the form of paying the costs associated with being the proprietor of the land.
74. It seems not to be in doubt that the Defendant, properly exercising its role as trustee, has paid expenses in relation to which, so far as the Trust Parcel is concerned, gives rise to a right to recoupment: see *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369 and also *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245 [44]-[47].
75. It follows that the Defendant is entitled to recoupment from the Plaintiffs in relation to the costs incurred in maintaining the trust property. The Defendant prepared an updated schedule of costs claimed. Plaintiffs’ counsel sought time to consider and seek instructions on the updated schedule. It is assumed that that figure will ultimately be agreed and the parties will be directed to provide a short minute reflecting the sum referable to those costs.

Orders

76. I therefore make the following declarations and orders:
- (1) The document headed Deed of Settlement and dated 23 March 2022 and signed by Allan Jones Golding and Eveleen Golding (“the Goldings”) of the one part and Primavera Holdings Pty Ltd ACN 080185244 (“Primavera Holdings”) of the other part is binding on those parties with immediate effect according to its terms.
 - (2) The Deed of Settlement be specifically performed and carried into execution.
 - (3) Within 28 days of these orders being made, the Defendant will pay to the Plaintiffs the sums referred to in clauses 2.1 (i), (ii) and (iii).

- (4) Within 28 days of receipt of the payments referred to in Order 3, the Plaintiffs will hand over occupation of the Trust Property and do all acts and provide all documents in accordance with clause 5.3(a) and (c) of the Deed of Settlement.
- (5) On receipt of the payments referred to in Order 3 and otherwise compliance by the Defendant with its obligation under clause 2.1 of the deed, the Plaintiffs will release the Defendant from its obligation to provide a bank guarantee in favour of the Plaintiffs and will immediately return the bank guarantee to the Defendant in accordance with the Plaintiffs obligations under clause 3.2(d).
- (6) Within 21 days of agreement between the parties as to a figure, the Plaintiffs will pay to the Defendant the agreed sum being the costs incurred by the Defendant in maintaining the Trust Property from 20 April 2021 to the date on which payment to the plaintiff is made in accordance with Order 3.
- (7) Within 14 days of these orders, the parties file and serve written submissions of no more than 4 pages on the question of costs of the applications.

I certify that the preceding seventy-six [76] numbered paragraphs are a true copy of the Judgment of her Honour Acting Justice Ainslie Wallace

Associate:

Date: 16 February 2024