

Re Premier Bay - [2018] VSC 168

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IN THE SUPREME COURT OF VICTORIA Not
Restricted

AT MELBOURNE
COMMERCIAL COURT

S ECI 2017 00129

BETWEEN

DFG SERVICES PTY LTD & Plaintiffs
ORS

v

PREMIER BAY PTY LTD & ORS Defendants

AND BETWEEN

PREMIER BAY PTY LTD & ORS Plaintiffs

v

DFG SERVICES PTY LTD & Defendants

ORS

AND

MAURO MONTALTO Plaintiff

v

DFG SERVICES PTY LTD & Defendants
ORS

JUDGE: ROBSON J

WHERE HELD: Melbourne

DATE OF HEARING: 30, 31 October, 1, 2, 9, 10, 16, 17, 20, 22 and 23 November 2017

DATE OF JUDGMENT: 13 April 2018

CASE MAY BE CITED AS: Re Premier Bay Pty Ltd

MEDIUM NEUTRAL CITATION: [2018] VSC 168

CONTRACT – Property Development Agreement – Specific enforcement – Agreement involved landowners making available land for development by the developer – The Agreement provided Lots 1, 2 and 3 of the landowners’ land to be included in the property development – Landowner refuses to carry out the obligations under the agreement – The developer seeks specific performance.

CONTRACT – Property Development Agreement – Rectification for unilateral mistake – Landowner claims that Lot 1 was not to be included in the contract – Landowner seeks to have the Agreement rectified – Consideration of ‘special circumstance’.

GUARANTEE – The landowner under the Property Development Agreement is a company – Its two directors guaranteed the obligations of the landowner – One of the directors seeks to have the guarantee set aside on equitable grounds.

DAMAGES CLAIM – Negligence – Breach of retainer – Breach of duty of care – *Wrongs Act 1958* – The landowner seeks damages against its solicitors and accountant, in the event the contract is not rectified, for failing to ensure that Lot 1 was not included in the development.

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Mr J W S Peters QC with
Mr S Rosewarne

Hall & Wilcox

For the First and Second Defendants

Mr S M Anderson QC with
Ms K O’Gorman

Holding Redlich

For the Third Defendant

Mr J P Slattery

Piper Alderman

For the Fourth Defendant by
Counterclaim

Mr J Tsalanidis

Colin Biggers &
Paisley

For the Fifth Defendant by Counterclaim

Mr S R Senathirajah SC

Wotton & Kearney

-

HIS HONOUR:

Introduction and summary

1. In the early 1990s, Tommaso Montalto, through a family-owned company, Premier Bay Pty Ltd (Premier Bay) — of which Mr Montalto and his son, Mauro, were directors — purchased a farm north of Melbourne on the Donnybrook Road, east of the Hume Highway. The farm consisted of three lots totalling some 264 hectares. The lots (1, 2 and 3) ran from west to east along the northern side of Donnybrook Road.
2. Without any disrespect to Mauro Montalto, to avoid confusion with Mr Montalto, I have hereinafter referred to him as Mauro.
3. With the growth of Melbourne, the farm became a potential site for a residential subdivision. In 2010, landowners in the area were approached by developers to make their farm available for subdivision. The Dennis Family Group (DFG) are experienced property developers. In 2010, Mr Montalto was introduced to DFG by Stephen Hay. Mr Hay is a director of Northside Land Sales, a real estate company specialising in broad hectare and land sales.
4. Proposals to develop the farm as a residential subdivision were put to Mr Montalto. On 6 July 2011, Premier Bay executed an exclusivity and confidentiality deed with DFG, which enabled DFG to commence working on the development.
5. In 2013, Mr Montalto caused Premier Bay to enter into a development agreement, by way of joint venture with DFG, that provided for the farm to be subdivided, development works to be carried out, and for the subdivided lots to be sold.
6. Under the development agreement, Mr Montalto and his son, Mauro, who was also then a director of Premier Bay, were required to provide a personal guarantee for Premier Bay's obligations under the development agreement. Premier Bay was also required, upon request, to give a mortgage over the land to secure its obligations and to finance the development.
7. The relevant companies in DFG now seek specific performance of the obligations of Mr Montalto, Mauro, and Premier Bay.
8. Mr Montalto and Premier Bay have refused to give the mortgage, as they allege that the development agreement was signed by mistake.
9. In substance, Mr Montalto alleges that he informed DFG that he was agreeable for lots 2 and 3 to be developed by DFG, but not lot 1. He alleges that he asked, and DFG agreed, that lot 1 would be included in the concept plans only, but otherwise remain and be not subject to development by DFG. DFG deny that they were ever so informed or agreed to such a proposal. They contend that Mr Montalto agreed to make lots 1, 2 and 3 available for development by DFG.

10. In the negotiations between Mr Montalto and DFG, Mr Montalto and Premier Bay were assisted by Mr Montalto's accountant, Colin Brown, of Crowe Horwath, and his solicitors, Harwood Andrews, now trading as Sladen Legal (Sladen).
11. Mr Montalto contends that he specified to DFG, Mr Brown, and his solicitors, Sladen, five conditions upon which Premier Bay would participate in the development and that DFG agreed to those conditions.
12. Mr Montalto and Premier Bay contend that, if DFG succeed in their claim for specific performance, then Crowe Horwath and Sladen should compensate him in damages, as they failed to carry out his instructions to include the five conditions in the development agreement.
13. The five alleged conditions were as follows:
 - (1) Gina Webling, who was (and is) a tenant residing in a house on lot 2, needed to be relocated to the house on lot 1 — if lot 1 was to be developed at a future date, and if at that time, it would not be appropriate for Gina to remain in the house on lot 1 (with land), then Gina would need to be relocated elsewhere (with land), and DFG were to arrange this.
 - (2) In the event that lots 2 and 3 were developed, Mr Montalto would continue to farm lot 1, as lot 1 was not developable due to the quarry buffer from the neighbouring property, which impacted upon it.
 - (3) Lot 1 was to be included in the preliminary drawings for the conceptual design phase of the development, but only so that it was part of the formulation of an initial concept design for the hypothetical future development of lot 1. Mr Montalto alleges that he stated that he wanted to see how it could look as part of an overall development, as he 'did not like to go back and add things on in the future', but that by being included in the concept sketches, lot 1 was not included in the development.
 - (4) Premier Bay was to retain a free right of sale in respect of:
 - (1) lot 1 (free of any obligations to DFG), so that it could be sold as farm land as a potential development site, or to anyone Premier Bay chose; and
 - (2) a small parcel of land on lots 2 and 3, if it became necessary for Premier Bay or Mr Montalto to raise funds at a future date.
 - (5) The Montalto name would be used in relation to the development of lots 2 and 3 and, in particular, in respect of street names.
14. DFG, Mr Brown, and Sladen deny that Mr Montalto informed them of the five conditions, or that DFG agreed to them.
15. Mr Montalto further contends that he caused Premier Bay to sign, and he signed, the development agreement between DFG and Premier Bay in the mistaken belief that it only

provided for the development of lots 2 and 3, and not lot 1; and that DFG were aware that he was under this mistaken belief.

16. Mauro, for his part, seeks to have the development agreement set aside insofar as it relates to him. He says that he was under the undue influence of his father, or was otherwise at a special disadvantage when executing the development agreement, and that it is unconscionable for the relevant DFG companies to enforce the guarantee against him. At the hearing, the claim of undue influence was not pressed.
17. Mr Montalto, Premier Bay, and Mauro also claim that they are not obliged to execute the mortgage until planning is approved; at the stage of filing their defences, and at the time the trial commenced, the minister was yet to grant planning approval. By the end of the trial, planning approval had been obtained.

The parties

18. The first plaintiff, DFG (Services) Pty Ltd (formerly Dennis Corporations Pty Ltd) (DFG (Services)), is the project manager and developer for several master plans for residential estates in Victoria and Queensland. The second plaintiff is DF (Woodstock) Developments Pty Ltd (DFWD). It was established for the purpose of developing the master plan residential estates at Donnybrook. The third plaintiff is DF (Woodstock) FRR Pty Ltd (DF (Woodstock) FRR). It is a related entity of the first two plaintiffs, established for the purpose of acquiring some of the Donnybrook land in certain circumstances. The plaintiffs are each parties to the development agreement. I have referred to the plaintiffs collectively as DFG.
19. The first defendant is Premier Bay. The second defendant is Mr Montalto. The third defendant is Mauro. The defendants are all parties to the development agreement.
20. The plaintiffs to the first counterclaim are Premier Bay and Mr Montalto. The defendants to the first counterclaim are DFG (Services), the first defendant by counterclaim; DFWD, the second defendant by counterclaim; DF (Woodstock) FRR, the third defendant by counterclaim; the Lantern Legal Group Pty Ltd (formerly Harwood Andrews Pty Ltd) trading as Sladen Legal (a firm) (Sladen), the fourth defendant by counterclaim; and Crowe Horwath (Aust) Pty Ltd (Crowe Horwath), the fifth defendant by counterclaim.
21. The second counterclaim is brought by Mauro and the defendants are DFG (Services), the first defendant by counterclaim; DFWD, the second defendant by counterclaim; and DF (Woodstock) FRR, the third defendant by counterclaim.

The development

22. The development is being marketed under the name 'Peppercorn Hill' and involves the land owned by Premier Bay, land owned by Tony and Jenny Coralluzzo, and land owned by Delma Investments Pty Ltd (Delma), a company controlled by the Douglas family.
23. The business model proposed by DFG was as follows. Landowners would retain ownership of the land until it had been subdivided and sold to the ultimate purchasers of the individual residential sites. The land was not transferred to the developer at any stage. The developer would obtain all the necessary approvals to carry out the subdivision. The developer would also act as the project manager under a separate management agreement. In theory, the project

manager could have been another third party. As the project manager, the developer was responsible for building, and provision of the necessary services to the building sites, and for carrying out all the construction work on the provision of roads and services. The developer would be responsible for the sale of the lots to the ultimate purchasers. When I refer to land being developed, I am referring to a development under this model which includes the sale of the lots to the ultimate purchasers.

24. The proceeds from the development are to be divided as follows. Speaking broadly, the developer as the project manager would receive a project management fee of five per cent of the total revenue from the sale of the lots. The costs of the development would also be reimbursed to the developer. The developer would be responsible for providing the funds to carry out the development. Under the development agreement, the developer could use the land that is the subject of the development agreement as security for loans to carry out the development. The sale proceeds (net the costs of the development), would be divided amongst the landowners and the developer on the basis of 25 per cent as a project development fee to the developer, and 75 per cent to the landowners. Of the 75 per cent going to the landowners, a third (that is, 25 per cent of the whole profit) would be distributed under the consortium unit trust agreements, discussed below.
25. The development is subject to the following contractual framework. Separate development agreements have been entered into between DFG and each of the landowners. Further, a number of agreements have been entered into that govern the relationship between the contributing landowners, these are the consortium unit trust agreements, which are collectively referred to as the 'CUT agreements.'
26. The CUT agreements provide a mechanism to ensure that profits from the development will be shared between the landowners throughout the duration of the development. This allows the landowners, whose land is to be developed towards the end of the development, to receive amounts of profits from earlier sales of land owned by other landowners, and likewise the owners whose land is developed early in the development receive amounts from later sales.
27. Pursuant to the CUT agreements, each of the landowners (including Premier Bay) have been issued with units in the Woodstock Consortium Unit Trust based on the 'Developable Area' of the 'Land' that the landowner contributed to the development. That is, the land that can be sold, and thereby create profits for distribution to the unitholders.
28. The units issued to Premier Bay have been calculated on the basis that lots 1, 2 and 3 of Premier Bay's land is included in the development. The CUT agreements (like the development agreement) also define the 'Land' of Premier Bay to mean lot 1, lot 2 and lot 3.
29. Premier Bay and Mr Montalto do not seek rectification of the CUT agreements in this proceeding, despite the fact that lot 1 is treated as part of the development in the CUT agreements.

Planning

30. The planning process included a public hearing in June 2016 by Panels Victoria. The Metropolitan Planning Authority presented the precinct plan to Panels Victoria. Panels Victoria heard submissions on the precinct structure plans. Planning Victoria endorsed the precinct plan

and, following some minor amendments by the Municipal Planning Authority, they went to the Minister for planning approval (who has since approved the plan), which would result in the rezoning of the land.

31. The dispute between Mr Montalto and DFG arose soon after Mr Montalto attended the public hearing of Panels Victoria on the development.

The relevant events

32. In listing the events, I note that some of the matters that I will mention were not in dispute and some were. Insofar as they were in dispute, I have found them to be as follows. The evidence relevant to the disputed matters is discussed later.
33. As mentioned above, Premier Bay owned three lots along the Donnybrook Road.
34. The total area of Premier Bay's land is 263.76 hectares, comprising: lot 1, 61.03 hectares; lot 2, 79.93 hectares; and lot 3, 123 hectares.^[1]

^[1] Exhibit PL.

35. The lot immediately to the west of lot 1 was owned by Boral and was being held by Boral as a potential quarry site.
36. In or around mid-2000, Peter Levinge of DFG was approached by Mr Hay with a proposal to create a master-planned residential estate in the Donnybrook area. Mr Levinge is, and was, the managing director of DFG. Mr Hay conducts a business known as Northern Side Land Sales and specialises in putting together land development proposals. Mr Levinge was principally assisted in his dealings with Mr Montalto by Terry Dooling, an employee of DFG. Reference was also made during the hearing to Bert Dennis, a member of the Dennis family. He did not give evidence.
37. In late 2010, Mr Hay arranged for a bus tour to be conducted of various residential developments in the west of Melbourne that had previously been undertaken by DFG. Mr Montalto attended this bus tour, driving behind the bus in a car with Lou Di Bella. Mr Di Bella is a friend of Mr Montalto's and owns land further west of Premier Bay's land, along the Donnybrook Road.
38. In early December 2010, Mr Dooling made enquiries about whether land on the Donnybrook Road immediately west of lot 1, which was then owned by Boral, was subject to any quarry licences. These enquiries revealed that there were no existing approvals or licences in place to quarry the Boral land, however, there was the possibility that a permit to quarry could be obtained or applied for.
39. On 15 December 2010, DFG gave a presentation to a number of landowners from the Donnybrook region, including Mr Montalto, at the offices of North Side Land Sales. The attendees were given a hardcopy handout and there was a power point slideshow.

40. The hardcopy handout provided at the meeting said that the Precinct Structure Plan (PSP) area was likely to cover consortium land, that is, the land subject to the CUT agreements and land south of Donnybrook Road.^[2] The handout contained a copy of a 'Quarry buffer map' at page 34. The map showed that lot 1, part of lot 2, as well as parts of the land of other landowners, fell within a potential quarry buffer zone. The handout said that '[t]he potential quarry buffer impact on land supply requires management.' The handout did not say that the land within the buffer zone was not developable. However, evidence was given (discussed below) that if the land was within a quarry buffer, there would be limitations on the extent to which the land could be developed.

^[2] CB 147.

41. As a result of enquiries that Mr Dooling had made in relation to the Boral land prior to the 15 December 2010 meeting, he arranged for the quarry buffer map to be removed from the slideshow presentation given that day. The slide was removed from the presentation, but as the handout was being printed externally, they were unable to remove this map prior to the handout being given to the landowners.
42. Mr Hay informed the landowners present at the meeting that he had met with representatives of Boral who had informed him that the quarry buffer was not going to have a negative effect on the proposed development, because Boral was looking at selling its property if it did not get involved in the proposed development itself. Subsequently, Boral sold the land to Mirvac. Mirvac is developing the land in a subdivision that is complementary to the proposed subdivision on lot 1, with a major road running across the Boral land, over lot 1, and then onto lot 2.
43. Following on from this initial meeting, the development proposal moved ahead slowly. On 29 April 2011, Mr Levinge sent an e-mail to Mr Montalto and Mr Brown, which attached cash flow models from the development of the land owned by Premier Bay.
44. In or around mid-2011, DFWD entered into an exclusivity and confidentiality deed with Premier Bay. Prior to doing so, Mr Montalto sought oral and written advice from Lou Farinotti, a solicitor at Holding Redlich Lawyers, in relation to the terms of the proposed exclusivity deed. Mr Farinotti gave written advice to Mr Montalto, enclosing a copy of title searches relating to Premier Bay land (being lots 1, 2 and 3) and explained the basis of the offer made by DFG, which was the subject of the exclusivity and confidentiality deed. Mr Montalto was advised that '... you should only proceed [with the confidentiality and exclusivity deed] if the Dennis offer is basically acceptable to you.'^[3]

^[3] *Transcript of hearing, Re Premier Bay Pty Ltd* (10 November 2017) T625 XXN.

45. The exclusivity and confidentiality deed, subsequently executed by Mr Montalto on behalf of Premier Bay, defined 'Land' as lot 1, lot 2 and lot 3 and included an offer to develop the land.
46. The exclusivity and confidentiality deed was later extended on 19 August 2011, 23 September 2011, 7 March 2012, and by further deed dated 21 May 2012. These documents were signed by Mr Montalto on behalf of Premier Bay and referred and applied to the entirety of the Premier Bay land.
47. By email dated 7 July 2011, Mr Levinge informed various persons from DFG that the quarry buffer outline in the map attached to the email (similar to the map at page 34 of the handout given to landowners at the December 2010 presentation) could be ignored, as Boral had confirmed to him that it would not be looking to quarry the Boral land.
48. On 15 July 2011, Mr Montalto signed a letter from Premier Bay to the Department of Sustainability and Environment, which noted that he was the 'owner of approximately 263.71 hectares located at 1145 Donnybrook Road' and which authorised the Department to release native vegetation time stamping data to DFG.^[4]

^[4] *Transcript of hearing, Re Premier Bay Pty Ltd (10 November 2017) T542 XXN.*

49. On 26 July 2011, Greg Bursill of DFG received an email from officers of the Department of Sustainability and Environment in relation to the release of time stamping data to DFG. The email, when referring to the Premier Bay land, noted that 'the property is two parcels of land located between the grid references G4-G6 and K4-K6 on this map.'
50. The email was relied upon by Mr Montalto in support of his contention that he had only agreed with DFG to include lots 2 and 3 in the development. DFG submit that the reference to 'two' parcels of land is not probative given that: the provided grid references cover lot 1, lot 2 and lot 3; Mr Montalto signed various documents, both before and after the date of the email, all of which made reference to the entirety of the Premier Bay land; and the email is irrelevant to Mr Montalto's state of mind, given there is no evidence that he ever saw the email.
51. On 5 October 2011, Mr Montalto attended two meetings at the offices of Hall & Wilcox, the solicitors for DFG. This was the first occasion on which Mr Montalto met any representative of Sladen, the lawyers who would be acting for him in the development.
52. The first meeting was attended by Mr Montalto, Mr Brown, Robert Jeremiah (a partner from Sladen), and Paul Goldin (a solicitor from Sladen). Mr Goldin took detailed notes of the meeting.^[5] The notes do not contain any reference to the five conditions which Mr Montalto alleges were an agreed term of his agreement with DFG.

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53. The second meeting held at Hall & Wilcox on 5 October 2011, immediately after the first meeting, was attended by Mr Montalto, Mr Brown, Alex Duonis (a tax specialist accountant from Crowe Horwath), and Mr Jeremiah. Mr Duonis took notes of the second meeting. The notes contain no reference to Mr Montalto's five conditions.
 54. Mr Jeremiah made a note of a telephone conversation with Mr Montalto on 4 November 2011. During this conversation, Mr Jeremiah says that he was instructed by Mr Montalto that all communications with him and Premier Bay were to be made through Mr Brown.
 55. On 10 October 2011, Mr Dooling of DFG emailed Mr Brown a further cash flow model in relation to the Premier Bay land. The cash flow was premised on Premier Bay contributing a gross land size of 263.76 hectares, with 211.01 hectares of net developable area (being 80 per cent of gross land size), to the proposed development. The area of 263.76 hectares encompasses lots 1, 2 and 3.
 56. On 19 December 2011, representatives of DFG gave a presentation at the Kooyong Lawn Tennis Club to a number of landowners, including Mr Montalto and his neighbours, David and Liz Douglas, and Tony and Jenny Coralluzzo, about the proposed development of the Donnybrook land. Mr Hay, Mr Brown, Mr Goldin and Mr Jeremiah also attending the 19 December 2011 presentation. Mr Jeremiah made a presentation on the commercial aspects of the proposed development, such as the development agreement and the CUT agreements. Mr Jeremiah thought that he may have been invited to the presentation by DFG. Mr Goldin also attended and made notes of the meeting.
 57. The maps and plans that were shown during the 19 December 2011 presentation made reference to the entirety of the Premier Bay land (including lot 1) forming part of the proposed development.
 58. Shortly after the Kooyong presentation, on 22 December 2011, a draft development agreement was emailed to Sladen by the lawyer for DFG, David Hart. At this stage, Sladen was retained by Premier Bay to act for it in the negotiations with DFG and with drafting the development agreement to be executed between DFG, Premier Bay, Mr Montalto, and Mauro Montalto. Mr Hart's email said that the draft versions of the development agreement and the project management agreement had been prepared for discussion with the landowners.
 59. Within Sladen, Mr Jeremiah had arranged for Victor Di Felice to act for Premier Bay in the negotiation and drafting of the development agreement and the CUT agreements. Mr Di Felice did not attend the meeting on 5 October 2011, nor did he attend the subsequent Kooyong presentation.
 60. Mr Di Felice received the draft development agreement from Mr Hart in December 2011. Mr Di Felice reviewed the terms of the agreement, made comments, and suggested amendments.

61. It was around this time that Mr Montalto alleges that he agreed with Mr Levinge and Mr Dooling to provide to DFG only lots 2 and 3 for development and stipulated five conditions that included lot 1 being part of the concept plan. As discussed below, Mr Levinge and Dooling deny that there was any mention of the five conditions on this occasion or any other.
62. On 7 March 2012, Mr Hart sent to Mr Di Felice, an updated exclusivity and confidentiality agreement for execution by Premier Bay.^[6]

^[6] CB 303.

63. On 16 March 2012, Mr Di Felice sent to Mr Brown, with copies to Mr Jeremiah and Mr Goldin, an email attaching the draft subscription agreement, draft mortgage securing the landowner's obligation to pay the subscription sum, and a draft amended development agreement. The latter was amended with tracked changes. Under the heading 'Next steps,' Mr Di Felice said that he strongly recommended that 'you review the documents and that before their release to Dennis Family, we discuss any queries you may have.' The letter continued:^[7]

The information we have been given relating to your discussions with Dennis Family to date have been at a general level and therefore in relation to the drafting of the documents (particularly the development agreement), in many cases we have made assumptions as to the terms based on our experience in similar matters. As a result, there may be matters which have been discussed directly with Dennis Family which will necessitate amendment to the documents and it would be preferable that this occur before the documents are given to Dennis Family for their review.

^[7] CB 304–305.

64. On 3 April 2012, Mr Montalto and Mr Brown met with Mr Di Felice at the offices of Sladen. The meeting went for some 3½ hours. Mr Di Felice made notes of the meeting.^[8] According to Mr Di Felice, amendments and comments that he had sent to Mr Brown regarding the development agreement were discussed. He said that they effectively reviewed the whole of the comments and amendments that he had made to the agreement.^[9] Mr Di Felice says that they discussed security, and whether the landowners would have sufficient funds to meet their obligation to make various payments, both to the developer and to other landowners. Mr Di Felice said he was given instructions to respond to the developer's lawyer with the amendments. The alleged five conditions, including the separate treatment of lot 1, were not mentioned in Mr Di Felice's notes,

[\[8\]](#) CB 361.

[\[9\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T938 XN.

65. On 7 April 2012, Mr Di Felice emailed Mr Hart attaching the amended development agreement with 'our amendments tracked.'[\[10\]](#) Mr Di Felice confirmed that no changes were made to the development agreement as to the definition of land following the meeting with Mr Montalto and Mr Brown.

[\[10\]](#) CB 362.

66. On 24 April 2012, Mr Hart emailed Mr Di Felice, responding to his email of 7 April 2012. The email contained comments on the amendments proposed by Mr Di Felice. Mr Di Felice asked Mr Goldin to arrange either a meeting or a phone call to discuss the amendments with Mr Montalto and Mr Brown.
67. Mr Hart had asked for a detailed explanation of the situation regarding the caveats lodged by Carmela Montalto, Mr Montalto's mother, over lots 1, 2 and 3.[\[11\]](#)

[\[11\]](#) CB 419.

68. On 21 May 2012, Mr Montalto signed an extension to the exclusivity agreement with DFG on behalf of Premier Bay. Mr Di Felice said that he was not asked to provide any advice on the exclusivity agreement and confidentiality deed. On 7 March 2012, Mr Di Felice received an unsigned draft of the deed and, on 7 June 2012, he received a signed copy of the deed from Mr Hart. Mr Di Felice said that he assumed he had been sent these documents as a matter of courtesy, because Mr Hart was aware that Sladen was acting for Premier Bay, who was a party to the exclusivity agreement and confidentiality deed.

69. On 23 May 2012, Mr Di Felice emailed Mr Goldin asking him to organise a meeting or a teleconference with Mr Montalto and Mr Brown, and that he needed to go through some development agreement issues with them.
70. On 23 May 2012, Mr Goldin replied by email to Mr Di Felice informing him that Mr Hart's comments on the development agreement had been sent to Mr Brown, and that he would arrange a time with Mr Brown.
71. On 24 May 2012, Mr Di Felice held a 'lengthy' teleconference with Mr Montalto and Mr Brown. Mr Di Felice said that they worked through the letter of comments that had been provided by Mr Hart. Mr Di Felice made handwritten comments on a copy of Mr Hart's letter of 24 April 2012 during the teleconference with Mr Montalto and Mr Brown.^[12] Mr Di Felice specifically raised the issue of the caveats that had been lodged by Carmela, over the Premier Bay land. Mr Di Felice was informed that there was an ongoing court proceeding relating to the caveats, and that the claim was due to be heard in August or September 2012; and that nothing would be executed, in terms of the development documents, until the claim had been resolved.^[13]

^[12] CB 427-433.

^[13] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T942 XN.

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72. Following this telephone conference, on 2 June 2012, Mr Di Felice emailed the development agreement and CUT agreement, with tracked amendments, to Mr Hart.^[14]

^[14] CB 438.

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73. On 19 July 2012, a meeting was held at the offices of Floridia Cheese attended by Mr Dooling, Mr Hart, Mr Montalto, Mr Brown, and Mr Di Felice. Mr Hart gave evidence that Mauro also attended for part of the meeting, although Mauro says he was not present. Mr Di Felice made a note of the meeting.^[15] Mr Di Felice said that this meeting followed receipt of the most recent version of amendments to the development agreement that Sladen had sent Mr Hart, and that the meeting was to review those amendments and to go through the whole of the development agreement.^[16] After the meeting, further amendments were made to the development agreement.

74. By 26 July 2012, DFG were aware that Boral did not intend to apply for a permit to quarry the land and instead proposed to sell it. The land was bought by Mirvac, as part of a neighbouring development that will share the services for the Peppercorn Hill development, such as water, gas, sewerage and electricity. The service corridor is to run from west of the railway line east along the front of lots 1, 2 and 3 (encroaching a way on the lots) along Donnybrook Road.
75. On 13 September 2012, Alexandra Tighe of Holding Redlich Lawyers sent an email to Mr Montalto, attaching copies of title searches conducted in relation to each of lots 1, 2 and 3 evidencing the withdrawal of caveats that had been lodged over those titles by Mr Montalto's mother. This email was subsequently forwarded from Mr Montalto's iPad to Mr Brown.^[17] Mr Montalto claimed that he had never used his iPad to send emails, it was simply used as a record of correspondence. As discussed below, Mr Di Felice noted that the withdrawal of caveats related to all three lots.
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76. On 19 October 2012, representatives of DFG gave a presentation to Mr Montalto, Mauro, and other members of the Montalto family at Premier Bay's offices at Floridia Cheese, and provided an update on the proposed development. A slide show was presented at the meeting and a handout was provided to attendees. The various maps and plans that were shown during the 19 October 2002 presentation made it plain that the entirety of the Premier Bay land (including lot 1) was to be part of the development, and it was noted that a key assumption underpinning the proposed returns from the development was that there was a combined 518 hectares of net developable area. The handout provided to attendees included a cash flow model in relation to the Premier Bay land that was based upon 263.76 gross hectares and 211.01 hectares of net developable area (that included lot 1).
77. On 30 November 2012, the Boral land was sold to Mirvac. Mr Montalto conceded that he knew of this fact for a '[c]ouple of years.'^[18]
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78. On 20 December 2012, Mr Di Felice emailed David Hart attaching documents setting out the information required to complete the subscription deed, unit trust deed, and unitholders agreement.^[19] Mr Di Felice said that, at this stage, there was still uncertainty regarding which landowners would be in the consortium.

^[19] CB 461.

79. On 15 January 2013, Mr Dooling emailed Mr Montalto, the ‘first cut’ of the proposed development program. The email, being a ‘phasing plan,’ showed that lot 1 was to be developed as part of a sequential development of all the landowners’ developable land.

80. In early 2013, discussions began about executing the development agreement. As the development agreement with Premier Bay had effectively been resolved, Mr Hart suggested that Premier Bay execute the development agreement and that it be held by Mr Hart, in escrow.

81. A meeting was held between Mr Di Felice and Mr Jeremiah with Mr Brown and Mr Montalto. At this meeting, Mr Jeremiah explained the implications of the development agreement being held in escrow and how it could be used as an incentive for the other landowners to more quickly wrap up where they were up to.^[20] The intent was that the developer could say to the other landowners: ‘One of the other landowners has already signed up. You’re holding things up, effectively.’^[21]

^[20] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T948 XN.

^[21] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T948 XN.

82. On 28 February 2013, Mr Hart emailed Mr Di Felice asking for the terms upon which he would hold the development agreement in escrow.

83. On 8 March 2013, Mr Hart emailed Mr Di Felice, with a copy to Mr Dooling, advising of the developable areas for Delma (104 hectares), Premier Bay (208 hectares), and Coralluzzo (37 hectares). On 8 March 2013, Mr Di Felice replied to Mr Hart saying that: ‘One of the gaps we had was Developable Area, so I will now confirm that with our client.’^[22]

84. Mr Di Felice said that 208 hectares essentially must include the three lots (lots 1, 2 and 3) because it was greater than the gross area of lots 2 and 3. The gross areas of lots 2 (79.73) and 3 (123) total 202.73 hectares.
85. As discussed earlier, the developable land is calculated at approximately 80 per cent of the gross area of the land. Thus, speaking roughly, being informed that the developable area was 208 hectares would have indicated that the gross area subject to the development agreement was some 260 hectares. The total gross area of lots 1, 2 and 3 was in fact 263.76 hectares.
86. On receipt of the information about the developable area, Mr Di Felice forwarded the email to Mr Brown.^[23] In the email to Mr Brown, forwarding the email from Mr Hart, Mr Di Felice said:^[24]

Also, DFG has now informed us of the total developable area included in the consortium. Ultimately, only the Premier Bay and Coralluzzo land is currently included. At this stage it seems the other land owners have opted not to be part of the consortium. The total area included is 245ha, with Premier Bay having 208 ha and Coralluzzo having 37ha. This is significantly different to what was initially expected, and even significantly different to what [Mr Montalto] had said at our most recent meeting.^[25] You/[Mr Montalto] may need to consider whether this affects the total projected return from being involved in the consortium.

Feel free to contact me with any queries. Paul and I will call you later today to run through the information we need.

^[23] CB 477.

^[24] CB 477.

^[25] Mr Di Felice said that the most recent meeting referred to, was the meeting where they discussed escrow, referred to at paragraph 81 above.

87. On 22 March 2013, Mr Hart emailed Mr Di Felice about finalising the CUT documents and confirming that Premier Bay's executed development agreement was to be delivered to Mr Di Felice shortly.^[26] Mr Di Felice responded, setting out the terms of escrow whereby the executed

development agreement would be held by Mr Hart, and the development agreement would not be deemed to be entered into until it has been fully executed and exchanged.^[27]

^[26] CB 481.

^[27] CB 480.

88. On 27 March 2013, Mr Di Felice emailed Mr Hart, attaching several documents relating to the CUT agreement and the development agreement, but not the development agreement itself.^[28]
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^[28] Exhibit 4D, 2.

89. At 4.54 pm, on 28 March 2013, Mr Di Felice sent an email to Mr Hart attaching a copy of a letter then being delivered to his office with attachments. At 4.55 pm, on 28 March 2013, Mr Di Felice sent an email to Mr Hart saying that he had been instructed that ‘our client’ delivered the development agreement directly to Mr Hart’s office.^[29]
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^[29] Exhibit D2, 2.

90. On 2 April 2013, Mr Hart emailed Mr Di Felice, referring to Mr Di Felice’s email of 28 March 2013, advising that the development agreement had been delivered in that day’s mail, and enclosing a copy of the development agreement as Mr Di Felice had requested.^[30]
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^[30] CB 482.

91. The time at which the development agreement was executed is in issue between the parties. As discussed below, I find that the development agreement was executed by Premier Bay prior to 2 April 2013, at a meeting that took place at the Floridia Cheese factory, attended by Mr Montalto, Mr Brown, and Lou Farinotti of Holding Redlich lawyers, and was then held in escrow by Mr Hart.
92. On 10 April 2013, a signing ceremony was held at Floridia Cheese at which Mr Montalto, Mauro, Mr Di Felice, Tony and Jenny Coralluzzo, and representatives of DFG and others attended. The CUT documents, consisting of a Woodstock Consortium Trust Deed dated 10 April 2013, a Woodstock Consortium Unitholders Agreement dated 10 April 2013, and a Subscription Deed dated 10 April 2013, were signed at this meeting.
93. Who attended and what took place at this meeting is a matter of dispute, which is discussed below.
94. Pursuant to the terms of the CUT agreements, Premier Bay as landowner agreed that MCRD Pty Ltd, as trustee for the Montalto Donnybrook Trust, would subscribe for 208 units in the Woodstock Consortium Trust. It should be noted that 208 units corresponds in number to the 208 hectares of developable land that Premier Bay was to have in the development that included lot 1.
95. Under the Montalto Donnybrook Trust, Mauro is a primary beneficiary. Mauro is also a shareholder in MCRD, the trustee for the trust.
96. DFG has held and continues to hold regular meetings with the landowners involved in the development. Mr Montalto claimed he has attended meetings, except for maybe four or five in the six years that they have been happening. At these meetings, landowners have been provided with updates about the progress of the development, and presented with reports and maps about the development. In the 'Landowners Presentation,' forming part of the report given in February 2016, various maps were included showing roads and services being built over, and development occurring on, each of lots 1, 2 and 3.
97. On 1 July 2014, Delma agreed that it would contribute its land, and become part of the development and the Woodstock Consortium. To give effect to this, various amending agreements were entered into and other documents signed; the Woodstock Consortium Subscription Deed was varied, and Woodstock Consortium Pty Ltd, Premier Bay, and Tony and Jenny Coralluzzo executed a 'Deed of Variation — of the Subscription Deed — Woodstock.' The Deed of Variation was executed by Mr Montalto and Mauro, on behalf of Premier Bay.
98. In June/May 2016, Planning Victoria held a public hearing to discuss the PSP. On day 11, on 10 June 2016, Mr Montalto and Mr Levinge attended the PSP panel hearing.
99. Mr Montalto raised with Mr Levinge concerns that he had about the proposed development at this meeting.

100. On 8 September 2016, Mr Montalto presented a written list of his concerns entitled 'Redevelopment — Matters of Concerns — Montalto' at a meeting with representatives of DFG, held at his offices. Anna Tran-Bursill of DFG took notes of the meeting.^[31] Mr Montalto was represented by Will Elder, a solicitor from Phillips & Wilkins.

^[31] Exhibit P10.

101. On 13 October 2016, a further meeting was held at Mr Montalto's offices, attended by Mr Montalto, Mr Elder, Mr Levinge, Greg Bursill, Bonnie Levinge, and Ms Tran-Bursill, at which Ms Tran-Bursill took comprehensive notes. At this meeting, Mr Montalto says that he did not want lot 1 to be in the development agreement.
102. On 25 May 2017, proceedings were commenced by DFG. DFG claimed relief against Premier Bay, Mr Montalto, and Mauro, in the form of a declaration that lot 1 forms part of the land subject to the development agreement; specific performance of the development agreement; indemnity; damages in addition to or in lieu of specific performance; costs on an indemnity or, alternatively, standard basis; any such further order as the Court deems fit.

Mr Montalto's pleaded case

103. Mr Montalto pleads in defence to the claim of DFG and counterclaims against:
- (a) DFG (Services), the first defendant to the counterclaim;
 - (b) DFWD, the second defendant to the counterclaim;
 - (c) DF (Woodstock) FRR, the third defendant by counterclaim;
 - (d) Sladen, the fourth defendant by counterclaim;
 - (e) Crowe Horwath, the fifth defendant by counterclaim.
104. Mr Montalto admits that he, Premier Bay, and Mauro signed the development agreement. He admits that the land to be developed, referred to in the development agreement, included lot 1. Mr Montalto says that he believed there was a further term in the development agreement dealing with how lot 1 was to be treated separately.
105. Mr Montalto says that, at the time he and Premier Bay signed the development agreement, they had no knowledge that the development agreement defined the land to include lot 1, as well as lots 2 and 3, and believed that it did not and should not have been included in the land to be developed.

106. Mr Montalto says that he and Premier Bay were of the mistaken belief that the development agreement:

- (a) applied to lot 1 only to the extent that it provided for the formulation of an initial concept design for a hypothetical future development that would include lot 1;
- (b) applied to lots 2 and 3 to the extent that it provided a free right of sale to Premier Bay (free of any obligation to DFG) should it become necessary for Premier Bay to sell a small parcel of the land comprising lots 2 and 3 at a future date to any third party;
- (c) did not apply to lot 1 to the extent that it provided for the development of the land comprising lot 1; and
- (d) did not apply to lot 1 to the extent that it limited Premier Bay's free right of sale of lot 1 unencumbered to any third party.

107. In support of these allegations, Mr Montalto alleges six conversations, set out below, took place where Mr Montalto alleges that the above arrangement was discussed. I have numbered these conversations for ease of reference.

108. Conversation no 1:^[32] Mr Montalto alleges that, at a meeting with Mr Levinge, Bert Dennis, and Mr Dooling around the end of 2010, DFG gave Mr Montalto a brochure which contained (at page 34) a map that showed a quarry buffer impacting on lot 1. Mr Montalto says that his neighbour, Mr Di Bella, asked a question about the quarry buffer. Mr Montalto alleges that, in response to his question about the buffer zone, one of the DFG representatives said words to the effect that 'the blue line is a buffer because of the quarry next door and that land is not developable.'^[33] Mr Montalto alleges that, at no time after this meeting, did any representative of DFG, or any other person, explain to him that the quarry buffer had an impact on lot 1, and that lot 1 was developable land.

^[32] Second Further Amended Counterclaim, 31 October 2017 (SFACC) particular (ai) to [7].

^[33] SFACC, particular (ai) to [7].

109. Conversation no 2:^[34] Mr Montalto alleges that, at an initial meeting held with Mr Dooling and Mr Levinge sometime around the end of 2011 and the beginning of 2012, Mr Montalto offered lots 2 and 3 to DFG as lots to be subject to a development agreement and said, in respect of lot 1, words to the effect that:

[34] SFACC, particular (aii) to [7].

(a) 'I'm happy to farm lot 1 for another 30 years or 40 years, seeing as it's not developable' (referring to the quarry buffer that impacted lot 1 from the neighbouring property and prevented lot 1 from being developed).

(b) 'If you take what I'm offering, I've given you twice what you have now,' meaning that the land comprising lots 2 and 3 was approximately double the land that the other adjoining landowners had — at the time of the conversation — offered to DFG for development.

(c) 'I want lot 1 included in the concept plans, but it is not part of the development. But I want it included in the plans so it can be added in years to come, after the quarry has gone.'

110. Conversation no 3 (five conditions): Mr Montalto alleges that, at a further meeting with Terry Dooling and Peter Levinge, which was held sometime around the end of 2011 and the beginning of 2012, Mr Montalto told DFG that he would enter a development agreement with DFG on the following five preconditions (the five conditions). These have been set out above, but will be repeated here, namely, that:[35]

[35] SFACC, particular (ii) to [7].

1. Gina Webling, who was (and is) a tenant residing in a house on lot 2, needed to be relocated to the house on lot 1 — if lot 1 was to be developed at a future date and if, at that time, it would not be appropriate for Gina to remain in the house on lot 1 (with land), then Gina would need to be relocated elsewhere (with land), and DFG were to arrange this.
2. In the event that lots 2 and 3 were developed, Mr Montalto would continue to farm lot 1, as lot 1 was not developable due to the quarry buffer from the neighbouring property, which impacted upon it.
3. Lot 1 was to be included in the preliminary drawings for the conceptual design phase of the development, but only so that it was part of the formulation of an initial concept design for the hypothetical future development of lot 1. Mr Montalto alleges that he stated that he wanted to see how it could look as part of an overall development, as he did not like to go back and add things on in the

future. But that by being included in the concept sketches, lot 1 was not included in the development.

4. Premier Bay was to retain a free right of sale in respect of:
 - (1) lot 1 (free of any obligations to DFG), so that it could be sold as farm land to a developer, as a potential development site, or to anyone Premier Bay chose; and
 - (2) a small parcel of land on lots 2 and 3, if it was necessary for Premier Bay or Mr Montalto to raise funds at a future date.
5. The Montalto name would be used in relation to the development of lots 2 and 3 and, in particular, in respect of street names.

III. Conversation no 4:^[36] Mr Montalto alleges that, at the meeting on 12 April 2013 (referred to as the signing meeting), the development agreement was executed and, immediately before Mr Montalto executed the agreement:

^[36] SFACC, particular (iii) to [7].

- (a) Mr Montalto said to Sladen, in the presence, and within the hearing distance of Burt Dennis, Mr Levinge, Mr Dooling, and Mr Bursill: 'Have I got the free right to sell?' and 'Lot 1 is separate?';
- (b) Mr Jeremiah of Sladen said to Mr Montalto: '[y]es you have the free right to sell, it's here,' and he gestured towards the development agreement;^[37]
- (c) No person took Mr Montalto through the pages of the development agreement, or any other agreement, in order to explain the meaning of its terms to Mr Montalto, or otherwise drew any term of the development agreement to Mr Montalto's attention.

^[37] During the trial, Mr Montalto said that he had mistakenly recalled that he said this to Mr Jeremiah, but understood now that it was Mr Di Felice who was at the meeting from Sladen.

112. Conversation no 5:[38] Mr Montalto alleges that, sometime around the end of 2011, in a meeting held at Premier Bay's offices at 327 Settlement Road, Thomastown, Mr Montalto advised Mr Brown of the five conditions that Premier Bay and Mr Montalto had for entering into a development agreement with DFG, which Mr Montalto had previously explained to the representatives of DFG, as set out at alleged conversation no 3 (the five conditions),

[38] SFACC [30].

113. Conversation no 6:[39] Mr Montalto alleges that sometime around the end of 2011 or the beginning of 2012, and in a meeting held at Sladen's offices on William Street, Melbourne — which was either the first or second meeting that Mr Montalto attended at Sladen's offices for the purpose of providing instructions and receiving advice under the retainer with Sladen — Mr Montalto explained the five conditions in the presence of Mr Brown,

[39] SFACC [31].

114. Thus, as regards to DFG, Mr Montalto makes allegations regarding the alleged conversations no 1 (the Kooyong presentation), no 2 (not clear where the conversation took place), no 3 (the five conditions) (not clear where the conversation took place), and no 4 (the signing meeting),
115. As regards to Sladen, Mr Montalto makes allegations regarding the alleged conversations no 4 (the signing meeting) and no 6 (the five conditions), which took place at Sladen's offices,
116. As regards Mr Brown, Mr Montalto makes allegations regarding the alleged conversations no 5 (the five conditions), in the meeting at Settlement Road, and no 6 (the five conditions), in the meeting at Sladen's offices,
117. Mr Montalto alleges that at no time prior to execution of the development agreement did:
- (a) any representative of DFG;
 - (b) any representative of Sladen; or
 - (c) any representative of Crowe Horwath, who Mr Montalto says were engaged to:
 - (i) advise Mr Montalto or Premier Bay in the negotiations with DFG, drafting and execution of the development agreement; and/or

- (ii) instruct Sladen on their behalf, and convey to Premier Bay and Mr Montalto the advice received from Sladen regarding negotiations with DFG, and the drafting and execution of the development agreement;

inform Premier Bay or Mr Montalto that:

- (d) the development agreement defined 'Land' to include lot 1 as well as lots 2 and 3;
- (e) the development agreement applied to lot 1 in any way other than to the development of lot 1 only by way of the formulation of an initial concept design for a hypothetical development;
- (f) that the belief of Premier Bay and Mr Montalto, as referred to above at paragraph 106, was mistaken.

- 118. As discussed below, Mr Montalto gave evidence that, not only did these conversations take place, but that Mr Levinge and Mr Dooling of DFG agreed that they could work with Mr Montalto's proposal/conditions.
- 119. Mr Levinge, Mr Dooling, Mr Brown, and the solicitors from Sladen all gave evidence denying the alleged conversations, insofar as they are alleged to have been present and to have heard the conversations.

Findings between DFG and the defendants

- 120. I set out the findings, in substance, that I have come to on the major issues between the parties. I do so now as the oral evidence was substantial, and will be dealt with below. I also deal below with why I have not accepted the evidence of Mr Montalto in regard to the alleged conversations with DFG officers, Mr Brown, and Sladen.
- 121. I am not satisfied that, at the time the development agreement was executed, Premier Bay and Mr Montalto were operating under the mistaken belief that lot 1 was not included in the development agreement.
- 122. If, contrary to my finding, Mr Montalto and Premier Bay did hold the mistaken belief that lot 1 was not included in the development agreement, I am not satisfied that DFG had knowledge of such a mistaken belief.
- 123. Accordingly, I find that Premier Bay and Mr Montalto have not established that the development agreement should be rectified as sought.
- 124. I find that Premier Bay and Mr Montalto have failed to execute the mortgages in breach of the development agreement.
- 125. I find that DFG is entitled to specific performance requiring Premier Bay and Mr Montalto to perform their obligations under clause 15 of the development agreement to provide them with a mortgage.

126. I find that the guarantee and indemnity contained in clauses 30.1 and 30.2 of the development agreement should not be declared void, as against Mauro, on the grounds of unconscionable conduct.
127. I find that Mauro has failed to establish that he was under a special disadvantage as alleged.

Counterclaim against Crowe Horwath

128. I am not satisfied that Mr Montalto informed Mr Brown (of the fifth defendant by counterclaim, Crowe Horwath), sometime around the end of 2011, of the five conditions.
129. I am not satisfied that Mr Montalto, in the presence of Mr Brown, informed the fourth defendant by counterclaim (Sladen), sometime at the end of 2011 or the beginning of 2012, of the five conditions.
130. I am satisfied that Mr Montalto at all material times was aware that lot 1 was to be included, and was included, in the development agreement.
131. I find that Crowe Horwath was not obliged to ensure that Mr Montalto knew, comprehended, and understood the content of any documents that he executed or procured to execute.
132. I am not satisfied that Mr Brown knew (actually or constructively) that Mr Montalto had a special disability as alleged.
133. I find that Mr Montalto has failed to establish that he was under a special disability as alleged.
134. I find that Premier Bay and Mr Montalto have failed to establish that Crowe Horwath breached any duty of care owed to Premier Bay or to Mr Montalto.
135. I find that Mr Montalto has failed to establish that he would not have executed the development agreement, if he had been informed that lot 1 was to be included in the land to be developed.

Counterclaim against Sladen

136. I am not satisfied that Mr Montalto informed Sladen, sometime around the end of 2011 or the beginning of 2012, of the five conditions.
137. I find that it is not necessary to find whether or not Sladen was under a duty to ensure that Mr Montalto knew, comprehended, and understood the content of any documents that he executed or he procured Premier Bay to execute.
138. I find that it is not necessary to find whether or not Sladen was retained, or was under a duty to read the development agreement to Mr Montalto, or to explain to him the effect of each term of the development agreement.
139. I find that it is not necessary to find whether or not Sladen ensured that Mr Montalto knew, comprehended, and understood the contents of the development agreement prior to execution.
140. I find that it is not necessary to find whether or not Sladen complied with the retainer and discharged its duty by receiving instructions from, and providing advice to, Mr Brown on behalf of Mr Montalto.

141. Accordingly, I will give judgment to the plaintiffs, dismiss the counterclaim, and dismiss the third party claims.

The witnesses

142. DFG called the following witnesses:

- (a) Stephen Hay;
- (b) Peter Levinge;
- (c) Terry Dooling;
- (d) David Hart;
- (e) Anthony Coralluzzo.

143. Mr Montalto called two expert witnesses on his ability to read, Dr Tailby and Dr March, and he gave evidence himself. He called no other witnesses.

144. Crowe Horwath called:

- (a) Colin Brown;
- (b) Alexander Duonis.

145. Sladen called:

- (a) Robert Jeremiah;
- (b) Victor Di Felice.

Mr Montalto's special disability

146. Before going to the negotiations leading up to the signing of the development agreement, it is necessary to address Mr Montalto's 'special disability.' Mr Montalto claims that he only has the reading ability of a grade three student, despite having gone to school until grade 10. Mr Montalto says that, accordingly, he relied on Mr Brown to inform him of the terms of business documents that he was called on to sign or read. Mr Brown had acted as the accountant and advisor to Mr Montalto's father, and to Mr Montalto, for over 40 years. Mr Montalto says that he took Mr Brown to important business meetings, so that Mr Brown could inform him of what he was being asked to sign or read, and to assist Mr Montalto in understanding what was being discussed.

147. Mr Brown denies that he was ever informed by Mr Montalto of his alleged special disadvantage, nor did he know of it. Further, Mr Brown denies that Mr Montalto ever informed him that Mr Montalto was relying on Mr Brown to inform him of the terms of any written documents.

148. For the reasons discussed fully below, I am not satisfied that Mr Montalto relied on Mr Brown as alleged by Mr Montalto.
149. Mr Montalto called Dr Tailby and Dr March to give evidence in support of his claim of special disadvantage.

Evidence of Dr Tailby

150. Dr John Day Tailby, a clinical neuropsychologist, gave an expert report dated 26 September 2017,^[40] and an updated version dated 1 November 2017.^[41] Dr Tailby assessed Mr Montalto's ability to read and comprehend written English texts. Dr Tailby administered the Wechsler adult intelligence scale, and the Wechsler individual achievement test, which Dr Tailby explained are industry standard tests for assessing aspects of general intelligence and specific literacy skills.

^[40] (Titled: Expert Report of Chris Tailby dated 18 September 2017).

^[41] Exhibit D14; Exhibit D15.

151. Dr Tailby found that Mr Montalto performed in the 'extremely low'/impaired range for single word reading. On spelling abilities, he also scored in the 'extremely low'/impaired range. On the reading comprehension test, Mr Montalto's performance fell into the 'borderline' impaired range. Mr Montalto performed better than 3 per cent of his peers or, conversely, his reading ability fell below 90 per cent of his peers for age. Mr Montalto's listening comprehension abilities fell in the 'low average' range. Mr Montalto's general intellect and memory test scores ranged from 'borderline' impaired to 'superior'.
152. Dr Tailby said that Mr Montalto's clinical history and test results suggested that Mr Montalto has developmental dyslexia. Dr Tailby stated in his report:

Mr Montalto exhibits very poor single word reading, decoding and spelling abilities, difficulties with comprehension of passages of written text; and reduced verbal reasoning abilities. These deficits occur against a backdrop of average nonverbal reasoning abilities and average to superior memory abilities. He has a long history of using work-arounds to compensate for his reading and writing difficulties. It was not possible to corroborate the history provided by Mr Montalto with an informant report. Nevertheless, the caveat notwithstanding, the history provided by Mr Montalto and the clinical and psychometric presentation are characteristic of developmental dyslexia.

153. Dr Tailby was provided with the development agreement dated 10 April 2013 and the email from Mr Di Felice to Mr Brown dated 16 March 2012 at 4.16 am. Dr Tailby was asked to give his expert opinion on Mr Montalto's ability to read either of those documents. Dr Tailby gave the opinion that, 'given his reading impairment, Mr Montalto would not be capable of reading and comprehending a document similar to the email or the development agreement without assistance from another person,' and 'that in order for Mr Montalto to understand and comprehend the contents of a document similar to the email and the development agreement he would require the assistance of an individual familiar with the types of matters dealt with in these documents, who could read them aloud to him and who could translate the jargonistic and technical language into lay terms as necessary.'^[42]

^[42] Exhibit D14, 7.

154. Dr Tailby agreed that it is likely that Mr Montalto 'could have extracted that there were three lots' comprising 'land', as stated in schedule 1 to the development agreement.^[43]

^[43] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T372 XXN.

155. Dr Tailby was cross-examined on how he could verify results that relied on Mr Montalto's subjective answers and truthfulness. Dr Tailby agreed that, in some instances, he would not be able to verify whether Mr Montalto was giving his full effort on the tests administered. In other instances, Dr Tailby said that failure is a marker of invalid effort.^[44] Dr Tailby said that, even if the information given by Mr Montalto was inaccurate, he did not think his opinion would be invalidated as such information only contributed to his diagnosis and, in determining the percentile of Mr Montalto's abilities, Dr Tailby said that was solely based on the tests administered.^[45]

^[44] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T354 XXN.

^[45] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T354 XXN.

156. Dr Tailby said that, in forming his opinion, ‘it’s not only that they are failing the tests, so to speak, but it’s the nature in which the failures occur. So it’s more just the quantitative information of the test; it’s also — I’ll just repeat myself. It’s the nature of the failures.’^[46]

^[46] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T353 XXN.

Evidence of Dr March

157. Dr Evrim March is also a clinical neuropsychologist. Dr March tested Mr Montalto and prepared an expert report dated 15 September 2017.^[47] Dr March assessed Mr Montalto’s reading ability at grade three level, stating that, on reading and comprehension tests, Mr Montalto misses meaningful aspects of written texts. Dr March was of the opinion that Mr Montalto suffers from dyslexia; that is, difficulty in reading and associated writing difficulty.

^[47] Exhibit D16 (Titled: Expert Report of Dr Evrim March dated 23 August 2017).

158. Dr March was also provided with the development agreement dated 10 April 2013, and the email from Mr Di Felice to Mr Brown dated 16 March 2012 at 4.16 am. Dr March was asked to assess Mr Montalto’s ability to read either of those documents. Dr March stated that:^[48]

Mr Montalto is not capable of reading and comprehending a document similar to the email and development agreement. Both documents include relatively uncommon (i.e., low frequency) words. The documents, in my opinion, require at least upper high school level of reading. Mr Montalto’s reading capacity is well below this level ...

^[48] Exhibit D16.

159. Dr March continued:^[49]

Mr Montalto has adequate vocabulary knowledge and abstract verbal reasoning. He has also age-appropriate verbal memory. He has relied on auditory means throughout his life. Assistance would be required in the form of verbally explaining

written contents of a document. For important and crucial information, it is recommended that Mr Montalto then repeat the content in his own words to confirm that his understanding reflects the content of the document.

[49] Exhibit D16.

160. Dr March was also cross-examined on the validity and accuracy of her opinion, and on the potential for Mr Montalto to have manipulated the test outcomes. Dr March said that as well as Mr Montalto's truthfulness, her assessment was based on her clinical impression of Mr Montalto and on the test performances, and that when administering tests, steps can be taken to 'actually ascertain that the person is not exaggerating their symptoms or performances or in other words malingering.' [50] Dr March did not agree that she was not able to tell if Mr Montalto was being honest in performing the tests.
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[50] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T421 XXN.

161. As to understanding the definition of 'land,' as set out in schedule 1 of the development agreement, Dr March did not agree that Mr Montalto would be able to discern that lots 1, 2 and 3 are to be treated in the same manner. [51]
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[51] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T435-436 XXN.

Evidence of Mr Montalto

162. Mr Montalto gave evidence in chief as follows.
163. Mr Montalto arrived in Australia with his parents from Sicily when he was six. He attended primary school in North Melbourne and, subsequently, a few years at St Michael's, a Catholic school in North Melbourne. He was good at maths but hopeless at English. He quickly picked up speaking English, but had difficulty reading and writing English. He left school at 18½, having repeated year 10 at a private school in Geelong. He classified his writing and reading in English at 20 per cent.

164. In 1965, Mr Montalto went to work for his father at Floridia Cheese, a business started by his parents and named after the village that they came from in Sicily, where he did deliveries for some 10 years. Mr Montalto had trouble reading street names, or writing down the addresses and names of customers. He was able to look up street names with difficulty and give each address a number. He would then write that number on the relevant invoice and, by using the numbers, find the location that he had worked out from the *Melway*. Mr Montalto would not write the names on the invoices unless it was easy.
165. After about 10 years, he gave up deliveries and worked in the factory assisting his father. Mr Montalto then took over running the business when his parents retired and moved to a farm. In 1985, Mr Montalto purchased the business from his parents.
166. Mr Montalto has now handed part of the business down to his two sons, who are directors of the company. His two daughters also work in the business.^[52]

^[52] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T384–385 XN.

167. The Premier Bay land was purchased by Mr Montalto's father, Mauro, approximately 34 years ago, and it was subsequently purchased by Mr Montalto around four years later in about 1989, although his father continued to farm the land. Rob and Gina Webling worked the farm for Mr Montalto's father, and Mr Montalto has also relied on them to run the farm. Rob and Gina have lived on lot 2 since about 1990. Gina figures in Mr Montalto's dealings with DFG, mentioned above in relation to condition no 1, which will be dealt with later.
168. Currently, Mr Montalto farms about 200 to 300 head of cattle, 150 sheep, and 15 head of buffalo, for cheese.
169. Mr Montalto first became aware that developers were interested in the Donnybrook land about seven years ago when a neighbour of his, Mr Di Bella, told him of their interest. Mr Di Bella recounted a meeting regarding what could happen in the area, as well as an inspection trip that Mr Montalto said he had not been invited to.
170. Mr Montalto was told by Mr Di Bella of another trip coming up, and Mr Montalto asked Mr Di Bella to let him know so that he could come as well. Mr Di Bella informed Mr Montalto of the next trip in about September/October 2010. By car, Mr Di Bella and Mr Montalto followed a bus carrying other landowners in the area. The trip was organised by DFG. The trip inspected other DFG developments on the western side of Melbourne towards Werribee.
171. DFG provided information on what was involved with developments and what DFG could do with land. Mr Montalto met Mr Levinge, Bert Dennis, and Mr Dooling. Mr Montalto said that it was Mr Levinge and Mr Dooling who mainly did the talking.^[53]

Alleged conversation no 1

[53] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T388 XN.

172. Evidence of conversation no 1 relates to the alleged conversation of the quarry buffer zone with Peter Levinge and Terry Dooling.
173. Following the bus tour, there was a meeting at St Kilda Road towards the end of 2010. The parties agreed that the date of the meeting was 15 December 2010. Mr Montalto said that he was informed of the meeting by Mr Di Bella, and attended with Mr Di Bella. Both Delfin Homes and DFG gave presentations. Mr Levinge, Mr Dooling, and Bert Dennis were present from DFG,
174. Mr Levinge and Mr Dooling gave a presentation explaining how land was broken up, how many people would be effected, including departments, banks, water works, and all the different parties involved. Mr Montalto and the others attending were given a brochure, which Mr Montalto identified in the court book.[54]

[54] CB 114–156.

175. Mr Montalto took the brochure home, studied it, and noticed the map of the quarry buffer zone.[55] Mr Montalto noticed that the zone, delineated by a sort of oval line, fell over lot 1.[56] Mr Montalto said that the quarry was not mentioned at the meeting.

[55] CB 148.

[56] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T392 XN.

176. Although Mr Montalto said that he took the map home and noticed the circle, he said that, at first, he did not say anything to DFG about it, as he was not at the meeting as an invited guest. Mr Montalto eventually asked Mr Di Bella if the line could be explained. At the following meeting, which Mr Montalto thought was '[t]owards the September, towards the end of year '10,' Mr Di Bella then asked the presenters, on Mr Montalto's behalf, what the circle shown on the map was.[57] DFG explained that it was a quarry buffer, which meant that you could not build within 500 metres of a quarry area, and that the circle was the perimeter to identify the buffer

area. Mr Montalto said that Mr Levinge and Mr Dooling would have confirmed that to be the case.^[58] Nothing further was said about the buffer zone at what Mr Montalto referred to as the second meeting,

^[57] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T395 XN.

^[58] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T393 XN.

177. I assume this is Mr Montalto's evidence in support of DFG conversation no 1. Contrary to the pleading, the representative did not say that the land is not developable, although Mr Montalto did say that the representative of DFG said: 'you [couldn't] build within 500 metres of a quarry area.'^[59]

^[59] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T393 XN.

Response of Mr Levinge and Mr Dooling

178. Mr Levinge and Mr Dooling gave the following evidence relevant to the alleged conversation no 1.

179. Mr Levinge did not attend the bus tour on 8 November 2010, and does not know that Mr Montalto was not invited by DFG.^[60]

^[60] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T121–122 XXN.

180. As to the quarry buffer, Mr Levinge said that Boral had made an application for an extractive industries licence, but by December 2010, Mr Levinge understood that there had been no permit issued to undertake quarrying activity.^[61] Mr Levinge said there was a possibility that Boral were proposing to apply for a licence and that the land within the buffer zone could not be developed, but that there was no discussion of the quarry buffer at this presentation.^[62]

[\[61\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T99 XN.

[\[62\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T127–129 XXN.

181. Mr Levinge agreed that the quarry buffer shown on the map handed out at the 15 December 2010 presentation covers part of the Premier Bay land — lot 1 and part of lot 2. Mr Levinge said that it was not suggested by anyone from DFG that the land within the quarry buffer was not developable.[\[63\]](#) Mr Levinge said that the handout was not part of the presentation made to the landowners, but was a ‘leave behind’ for landowners.[\[64\]](#) At this stage, Mr Levinge agreed that the developable land was in a state of flux.[\[65\]](#)

[\[63\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T100, 101 XN.

[\[64\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T124 XXN.

[\[65\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T126 XXN.

182. Mr Levinge agreed that a quarry buffer had the potential to fundamentally affect the development.[\[66\]](#) Mr Levinge said that he did not say the land inside the buffer zone was not developable.[\[67\]](#) Mr Levinge said he cannot ever remember discussing the buffer zone with Mr Montalto.[\[68\]](#) Mr Levinge said there were no questions about the quarry buffer map.[\[69\]](#) Mr Levinge also noted that there was no discussion about the quarry buffer map affecting the Douglasses’ land.[\[70\]](#)

[\[66\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T130 XXN.

[\[67\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T128–129 XXN.

[\[68\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T129 XXN.

[\[69\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104 XN.

[\[70\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T105 XN.

183. Mr Dooling said that he recalled that Mr Montalto, the Douglasses, the Coralluzzos, Mr Mason, and representatives of Sladen — Mr Jeremiah and Mr Goldin — attended the Kooyong meeting on 10 December 2011. Mr Dooling could not recall if Mr Brown attended. Mr Dooling was asked, in relation to this meeting, if there was any discussion that lots 1, 2 and 3 would not all be offered into the development by Mr Montalto. Mr Dooling answered: ‘No.’[\[71\]](#).
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[\[71\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T253 XN.

184. Mr Brown recalled attending the Kooyong presentation. Mr Brown said that there was no discussion of Mr Montalto’s land specifically.[\[72\]](#).
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[\[72\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T772 XXN.

185. Mr Hay attended the first presentation and the Kooyong meeting. Mr Hay was taken to the map showing the quarry buffer and was asked whether there were any questions asked about any of the land not being developable. Mr Hay answered: ‘Not that I remember.’[\[73\]](#).
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[\[73\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T235 XN.

186. Mr Hay agreed that, at that meeting, it was possible that someone from the plaintiffs said to Mr Montalto that the quarry buffer meant the land under the buffer was not developable.[\[74\]](#).
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[\[74\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T241 XXN.

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187. Neither Mr Di Bella, nor any other person at the meeting, was called by Mr Montalto to give evidence in support of Mr Montalto's account of the meetings.

Mr Montalto's evidence continued

188. On the way home from the second meeting, Mr Montalto discussed the buffer zone with Mr Di Bella. He said to Mr Di Bella: 'That's why I've been left off, Lou, because of that quarry buffer. I'm at the end of the line. I'm no interest. So there's no point in me coming to the meetings.'^[75] Mr Montalto was referring to the fact that he had not been invited to the bus tour or the meetings by DFG, but had attended at Mr Di Bella's invite.

^[75] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T394 XN.

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189. Mr Montalto said that he thought that he had not been invited because of the buffer zone affecting his land, and that it was not developable because of the quarry buffer. He thought that there was a restriction over virtually half of his land which meant that it could not be developed. Mr Montalto said that Mr Levinge (backed by Mr Dooling) would have said that it was not developable.^[76]

^[76] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T394–395 XN.

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190. Mr Montalto went to a third meeting with Mr Di Bella, at the offices of Mr Hay, the real estate agent who had first introduced the idea of a development. Mr Montalto said that he was invited by Mr Di Bella. Mr Montalto recognised other landowners at the meeting. DFG were explaining what they wanted to do with the development, and how they would do a better job than other developers who had also been making presentations to the landowners. The quarry buffer zone was not discussed. Mr Montalto did not have any discussions with DFG about a quarry.
191. Mr Montalto knew that the land to the west of his was owned by Boral and that it was involved in quarrying activities.
192. Mr Montalto was asked whether he had subsequently formed a view that he wished to develop his land. Mr Montalto did not directly answer that question, but rather said that, at (possibly) the fourth presentation, where DFG spoke after Delfin, the landowners were told they had to make a choice. Mr Montalto addressed the meeting and recommended that the landowners vote for DFG

to proceed with the development, putting forward reasons for his recommendation. He referred to DFG being a family company and that they would find it easier to deal with DFG. I understood from his answer that he had decided to proceed with DFG.

193. After a few weeks, Mr Montalto had not heard anything, nor had his neighbour Mr Di Bella, concerning the development. Mr Montalto telephoned Mr Dooling and made inquiries as to what was happening with the development. Mr Montalto was told that DFG were getting papers ready to sign.
194. Mr Montalto invited DFG to come to his factory on Settlement Road, Thomastown, if they were ever going past, to fill him in on what was going on with his neighbours.^[77] Subsequently, in the early part of 2011, Mr Dooling and Mr Levinge, and possibly Bert Dennis, attended Mr Montalto's factory and told Mr Montalto that DFG were moving forward with the development. Subsequently, Mr Montalto made several phone calls to Mr Dooling or Mr Levinge to inquire how the matter was proceeding.

^[77] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T400 XN.

195. Around Easter 2011, Mr Montalto decided that he would enter into an agreement with DFG after discussing the matter with his accountant Mr Brown. Mr Montalto said that he and Mr Brown were like brothers. Mr Montalto said that he never excludes Mr Brown from business decisions, it was always an 'us sort of thing' when entering into new ventures. Mr Montalto recalled Mr Brown saying that, if Mr Montalto offered DFG the land, it could help Mr Montalto's future dramatically. Mr Montalto asked if Mr Brown thought that a joint venture would work; and Mr Brown said that a joint venture would work, and that it would be a straightforward thing.^[78]

^[78] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T403 XN.

196. Mr Brown advised Mr Montalto that he would require a solicitor. Mr Brown recommended Sladen, as it was represented in Geelong and Melbourne, and had done work for another landowner dealing with DFG. Mr Montalto required the solicitors to give advice on what Mr Montalto should look out for if he offered his land to be developed.^[79]

^[79] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T438 XN.

Alleged conversation no 6

197. Mr Montalto, with Mr Brown, met Mr Jeremiah, Mr Di Felice, and Mr Goldin, who were all part of his Sladen legal team. At the meeting, Mr Montalto said that he told them he had the property at Donnybrook Road, and that it comprised three lots. Mr Montalto told them of the meetings with DFG, and that he was thinking of giving DFG two lots to develop 'totalling approximately 500 acres, but 150 acres would not be in it.'^[80] Mr Montalto said he told his legal team that lot 1 was not viable for the development because of the quarry buffer. Mr Montalto asked them to put together something for him, and Mr Brown, to consider and said that he left it at that on that occasion, which I understood to mean that was all that was discussed.

^[80] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T439 XN.

198. About two to four weeks later, in about July 2011, Mr Montalto again met with solicitors from Sladen, in William Street, Melbourne. At the meeting, Mr Brown asked for further information on proceeding with the development, including information for tax purposes, which Mr Montalto would require.
199. Mr Montalto again met with Sladen, and Sladen provided him with some information. Mr Montalto said that the information 'was virtually outlining what could be done, what couldn't be done, and also my condition that lot 1 is not developable and only 500 acres^[81] was that would work [sic] ...'. Sladen also provided information on tax implications. Mr Montalto said that 'they just convinced us that they could do what they needed to and protect my interest.'^[82]

^[81] Being 202 hectares.

^[82] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T440 XN.

200. Mr Montalto was asked whether he mentioned lot 1 and what he was intending to do with lot 1. Mr Montalto said that: 'Lot 1 was separate because of the quarry buffer. That was explained to them virtually at the first meeting, and the other two lots, lots 2 and 3, is developable and it's for [DFG].'^[83]

^[83] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T441 XN.

201. Mr Montalto was taken to a file note of Sladen dated 29 September 2011, which noted: 'We to advise Montalto in relation to the Contractual arrangements.'^[84] Mr Montalto said that this accorded with his recollection of what was discussed when he retained Sladen.

^[84] CB 216.

202. Mr Montalto said that when he did retain Sladen, he told them that he was proposing to offer lots 2 and 3 to DFG, because lot 1 was not developable, and that he would retain lot 1 as a farm for many years to come.
203. Mr Montalto said that he told the solicitors of conditions upon which he would enter into an agreement with DFG.
204. Mr Montalto said he told Sladen that he had a tenant on lot 2, and that the tenant would have to be looked after and respected, as they had a life tenancy on the farm given to them by his father, before his involvement with the property. Mr Montalto said that the tenant had the option of moving to lot 1, because there was a dwelling on lot 1.
205. Mr Montalto said he told Sladen that, in the development of lots 2 and 3, the family name be respected as much as possible.^[85] He said that, because lot 1 was not developable, he wanted the right to name the hill on lot 1 as 'Montalto Hill,' preserving the name for the benefit of his father.^[86] Mr Montalto said that he wanted to farm lot 1 and be free to borrow money using lot 1 as security; Mr Montalto wanted to 'do whatever he want [sic], [have a] free right to sell lot 1.'^[87] For the purpose of daily cash flow, if nothing was happening on the land in developments, and there was no money coming to him, Mr Montalto said he also asked for a small portion of the land to be able to be sold out of the development (of lots 2 and 3).^[88] Mr Montalto said: 'So there's two clauses of free right to sell that I asked for.'^[89]
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^[85] Similar to condition 5 alleged in the SFACC; see [30].

^[86] Not pleaded as one of the five conditions.

^[87] Similar to pleaded conditions 2 and 4(a) alleged in the SFACC.

[\[88\]](#) Similar to pleaded condition 4(b) alleged in the SFACC.

[\[89\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T442 XN.

206. Mr Montalto was then asked, by Mr Anderson, the following question:[\[90\]](#)

MR ANDERSON: What you are just referring to in your evidence, the two clauses with the free right to sell, to which lots did that relate to?

MR MONTALTO: That is only lot 1, because that is separate. I've got no reason to have any conditions on lot 2 or 3 if that's going to be developed. I can't control that. I only need sort of cash flow. I need to ensure cash flow.

[\[90\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T442 XN.

207. Mr Montalto said that, after he told the solicitors this, they made a note and said: 'That's okay.' Mr Montalto continued: 'They would acknowledge my request, my wishes, and they would be incorporated. That's all I've asked.'[\[91\]](#)

[\[91\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T442 XN.

208. Mr Montalto said that he further asked that lot 1 be incorporated in the overall drawings, the overall feasibility, so that lot 1 'whether I sell if I needed to sell or whether I added it to the development in years to come, it would be blended in, that it was designed by the one person and not an added-on feature on the one property. I want my whole block eventually one day to look the same, designed by the one.'[\[92\]](#) Mr Montalto said that Sladen said: 'there's no problems with that.'[\[93\]](#)

[\[92\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T443 XN.

209. Mr Montalto said that is what he instructed Sladen to offer DFG, 'that there were those pretty well five wishes that I wanted.' [94]
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[94] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T443 XN.

210. I assume therefore that this is Mr Montalto's evidence in support of his alleged conversation no 6.

Response of Mr Jeremiah, Mr Di Felice, and Mr Brown

211. Mr Jeremiah, Mr Di Felice, and Mr Brown gave the following evidence relevant to the alleged conversation no 6,
212. Mr Brown first contacted Mr Jeremiah on 29 September 2011. [95] Mr Jeremiah was asked by Mr Brown to provide assistance to Mr Montalto in relation to the proposed development generally, and with respect to the documentation and advice in relation to how that might proceed. [96]
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[95] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1015 XN.

[96] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1016 XN.

213. Mr Brown phoned Mr Jeremiah on 4 October 2011. It was discussed that Mr Montalto was unsure how to proceed and that he might, at that time, prefer to sell to a third party. Mr Jeremiah said that Mr Brown also raised a concern about landowners and who might be involved in the project. Mr Brown conveyed that Mr Montalto's land was the most valuable in relation to what was being proposed. Following this phone call, Mr Jeremiah agreed to meet with Hall & Wilcox to discuss the proposed arrangements. [97]
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[97] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1017 XN.

214. Mr Jeremiah was asked if Mr Brown identified the land that Mr Montalto was considering selling. Mr Jeremiah said: 'Not specific identification, but there were parcels of land which were between Mr Montalto's land and the railway line.'^[98]

^[98] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1017 XN.

215. On 5 October 2011, Mr Jeremiah attended two meetings at Hall & Wilcox. Mr Jeremiah said that, at the first meeting, DFG's conditions for the development, and the need for PSP approval to occur earlier were discussed. Mr Jeremiah recalls asking when the land was acquired, and that there were to be follow-up conversations concerning land tax, but has no recollection of discussion concerning specific parcels of land at that point in time.^[99]

^[99] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1021 XN.

216. Mr Jeremiah said that Mr Montalto provided advice and instructions as to his understanding of the value of his land, and what he might receive out of the development; Mr Montalto mentioned a bank valuation that he had obtained. Mr Jeremiah said that the following figures were noted: \$40 million to \$60 million, as the bank market valuation of Premier Bay's land; and cash flow valuations of plus or minus \$300 million, as an end position from the sale of Premier Bay's land of 3,300-odd lots at \$300,000 per lot.^[100]

^[100] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1023-1024 XN.

217. Mr Jeremiah was asked about the Kooyong presentation and whether there was any discussion about the land that Premier Bay was putting in the development. Mr Jeremiah said: '... no discussion other than the land that Mr Montalto was to contribute or to place in the proposed arrangement was other than shown on any plans. There wasn't any discussion about that, no.'^[101]

[\[101\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1029 XXN.

218. Mr Anderson suggested to Mr Jeremiah that Mr Montalto was contemplating lots 2 and 3 to go into the development with DFG. Mr Jeremiah said: 'I didn't understand that at all, no.'[\[102\]](#) Further, he said that: '... As I understood it, lots 1, 2 and 3 until we met in 2016.'[\[103\]](#)
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[\[102\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1058 XXN.

[\[103\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1059 XXN.

219. In relation to the quarry buffer, and the suggestion that Mr Montalto told Mr Jeremiah that, because of the quarry buffer, he could not develop lot 1 and that he was going to continue to farm lot 1, Mr Jeremiah said that Mr Montalto 'was to continue to farm lot 1 in any event. That's a question from a land tax perspective potentially, but not that he did not wish to sell lot 1 at all, no.'[\[104\]](#)
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[\[104\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1058 XXN.

220. Mr Jeremiah said that, at one stage, a query had been raised about the quarry and the timing of when the land could be developed.[\[105\]](#) The following exchange occurred:[\[106\]](#)
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[\[105\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1059 XXN.

[\[106\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1060 XXN.

MR ANDERSON: Immediately west of lot 1, correct. That was owned by Boral; do you recall that?

MR JEREMIAH: Well, owned by a large company.

MR ANDERSON: You understood it was contemplated to undertake a quarry?

MR JEREMIAH: Yes.

MR ANDERSON: You knew that. Did you understand that if that was to occur, then that would affect the amount of land that was developable?

MR JEREMIAH: Developable.

MR ANDERSON: And there was discussion about that, wasn't there?

MR JEREMIAH: Yes.

MR ANDERSON: And how that would affect the size of the developable area, make it smaller?

MR JEREMIAH: Yes.

221. Mr Jeremiah said that he did not recall Mr Montalto discussing with him that lot 1 could not be developed because of the quarry buffer.[\[107\]](#)

[\[107\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1062 XXN.

222. Mr Di Felice became involved with the events that are the subject of this proceeding in late 2011, and was brought into the matter by Mr Jeremiah. Mr Di Felice did not attend the meetings at Hall & Wilcox in October 2011. Mr Di Felice said that he was just initially briefed with some information, and background, about the status of the matter, and received a draft development agreement on 22 December 2011.

Alleged conversation no 5

223. Mr Montalto said that, on 19 December 2011, he and Mr Brown attended a further meeting with DFG at the Kooyong Tennis Club. Mr Montalto identified pages that he saw at the presentation.[\[108\]](#)

[\[108\]](#) CB 248–262.

224. Mr Levinge, Mr Dooling, and Bert Dennis attended, along with other property owners, the Douglasses, Ian Martin, and Tony Coralluzzo. Mr Montalto said that Mr Jeremiah and, possibly, Mr Di Felice were also present. DFG put forward their final proposal. Mr Jeremiah addressed the meeting on tax issues.
225. The quarry buffer was not discussed at this presentation.^[109] Nor was Premier Bay's land specifically discussed.^[110] The parties were given time to consider DFG's proposal.

^[109] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T447 XN.

^[110] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T447 XN.

226. A couple of months after the Kooyong meeting, Mr Montalto met with Mr Brown to decide where they were going with DFG. He said that he told Mr Brown that he had decided to offer DFG lots 2 and 3 because they were developable. This evidence may relate to the alleged conversation no 5, although in that conversation Mr Montalto alleges he told Mr Brown the five conditions. If this constitutes conversation no 5, then it falls well short of the alleged conversation.

Alleged conversations no 2 and no 3

227. Alleged conversations no 2 and 3 concern discussions of the five conditions with Mr Levinge and Mr Dooling.
228. Subsequently, around March 2012, Mr Montalto contacted DFG and asked them to come and see him. Mr Levinge and Mr Dooling met with Mr Montalto. They discussed the provision of services (such as gas, water, and electricity) to the Douglasses' land north of Premier Bay's land. They discussed how the services to the Douglasses' land would have to come from west to east along Donnybrook Road, and then up north along Merriang Road, if they did not have Mr Montalto's land to pass over. Mr Montalto said to Mr Levinge and Mr Dooling: 'Would you be interested — would it be entertainable for you to include my two lots of 500 acres [in the development] because lot 1 is not developable because of a buffer zone...?' Mr Montalto says that they said it could work and that they would be interested.^[111]

^[111] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T451 XN.

229. Mr Montalto said to them that they should go away and ensure it would work, and then come back and tell him if DFG would definitely be interested in the 500 acres.^[112]

[\[112\]](#) As noted above, around 202 hectares.

230. A week to 10 days later, DFG came back, and Mr Montalto said to them: ‘... if you’re interested in the 500 acres, lot 2 and lot 3 ... I’ll take you there ... and inspect the property.’[\[113\]](#)
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[\[113\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T451 XN.

231. About a week later, Mr Montalto took Mr Levinge and Mr Dooling to the top of the hill on lot 1, where they could see all the neighbouring land. He took them to the house on lot 2, and the sheds and the ruins of a bluestone house from the days of Ned Kelly. Mr Montalto recalls that he told them he was going to take the bluestone, and (one or the other) said that the stone was more valuable where it was as a ruin. They then returned to Mr Montalto’s factory at Settlement Road, Thomastown. At the factory, Mr Montalto said that if they wanted the land, they should come back and talk to him, and he would give them his conditions.[\[114\]](#)
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[\[114\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T452–453 XN.

232. Mr Montalto said that he told them his five conditions. First, that he was happy to farm lot 1 because the quarry buffer there meant it could not be ‘done.’[\[115\]](#) By ‘done,’ I assume that Mr Montalto meant developed. Mr Montalto said that he was happy to farm for years to come and that, beyond his days, his grandkids would have the option to do what they want with lot 1. Secondly, he said that before DFG entered lot 2, they had to respect Gina Webling and her husband, the tenant, who has a life tenancy. Mr Montalto said that he made it clear that the tenants have to be respected and looked after, and transferred to lot 2.
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[\[115\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T453 XN.

233. Mr Montalto said Mr Levinge said that they would not want to live there because of the dust from the development: ‘They’d be best to move.’^[116] Mr Montalto said that he said: ‘Okay. The option is there, lot 1, because that’s separate. So you have got lot 2 and lot 3 to develop.’^[117]
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^[116] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T453 XN.

^[117] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T453 XN.

234. Mr Montalto said that he wanted the Montalto name to be incorporated ‘100 times over,’ and for the development to ‘respect the Montalto name.’ Mr Montalto said that the Montalto name should be preserved on the hill on lot 1.^[118]
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^[118] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T454 XN.

235. Mr Montalto said: ‘With lot 1, because it’s not developable and you’re not going to do anything with it and we can’t do anything with it, I would appreciate it if you incorporate it in your drawings, and I will pay the cost of whatever drawings that you allow, if you can’t carry it in the consortium.’^[119] Mr Montalto said that ‘they’ were agreeable to that.^[120]
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^[119] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T454 XN.

^[120] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T454 XN.

236. In the final written submissions of Premier Bay and Mr Montalto, the condition that lot 1 not be included in the land to be developed, but that it only be included in the initial concept stage of the development, was described as the Critical Condition.^[121] The submissions contend that Mr Montalto told DFG about the five conditions including the Critical Condition,
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237. During his evidence, however, Mr Montalto went beyond saying that he informed DFG of the Critical Condition, but that Mr Levinge and Mr Dooling were 'agreeable' to the Critical Condition. [122] The allegation that Mr Levinge and Mr Dooling were agreeable to the Critical Condition was not pleaded. The failure to plead the agreement raises doubts as to the accuracy of Mr Montalto's evidence.
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[122] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T454 XN.

238. Mr Montalto said he told DFG that he wanted to 'reserve the right to free sell a small parcel of land for cash flow out of your development. I ask you — if I'm short of money, I ask you that I need some money. If you can help me, you help me. If you can't, I've got no options. I need land to sell. Otherwise I'll have lot 1, but that is an insurance factor. That is for large money. I'll have that there and sit there for a large sum of money for my business. That's an insurance.' [123] Mr Montalto said that DFG would have first option to buy lot 1 if he sold it.
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[123] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T454 XN.

239. As for the small parcel of land, Mr Montalto said that it is only petty cash sort of money — 20 blocks, 10 blocks. He said: 'I'm in business and if I'm short of money, I need \$1 million, it's not \$100, it's \$1 million or \$2 million, it would be with their approval to say, "[Mr Montalto], you can sell stage 7. [124] You can have the corner, you can have this one or you can have that one. We will buy it off you, whichever way." If I need money, where do I go?' [125]
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[124] A reference to the proposed staging of the development, as shown on various maps.

[125] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T455 XN.

240. Mr Montalto says that Mr Levinge and Mr Dooling said: ‘that could work, that would work,’ and one of them made notes of it.^[126] When asked if Mr Levinge made a note of this meeting, Mr Montalto replied that he made notes at every meeting. Mr Montalto described Mr Levinge’s notebook as a large, yellow notebook with steel coils on it. He said that he thought Mr Dooling had a similar notebook, but smaller.^[127]

^[126] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T455 XN.

^[127] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T455–456 XN.

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241. Mr Levinge produced his notebooks, which matched Mr Montalto’s description. Mr Dooling’s were not produced as they had been disposed of when he retired.^[128] Premier Bay and Mr Montalto were unable to point to any note that purports to record this meeting.

^[128] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T459 XN.

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242. Premier Bay pointed to a note of ‘2/3’ made on a hand drawn map showing the development land. It was suggested to Mr Levinge that this was a reference to Mr Montalto telling Mr Levinge that he wanted to put two out of his three lots into the development.
243. I assume that this is Mr Montalto’s evidence in support of conversation no 3. Alternately, it may be the conversation referred to in alleged conversation no 2. The conversation in which Mr Montalto alleges saying that he was ‘happy to farm lot 1’ was alleged conversation no 2.
244. In any event, the evidence did not entirely support either of alleged conversation no 2 or no 3.

Response of Mr Dooling and Mr Levinge

245. Mr Dooling and Mr Levinge gave the following evidence relevant to the alleged conversations no 2 and no 3.
246. Mr Levinge said that he did not recall a discussion where Mr Montalto offered lots 2 and 3 as the lots to be subject to the development agreement.^[129] He does not recall Mr Montalto saying ‘I’m happy to farm lot 1 for another 30 and 40 years seeing as it’s not developable’, in reference to the quarry buffer.^[130]

[\[129\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104 XN.

[\[130\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104 XN.

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247. Mr Levinge said that Mr Montalto never said: 'I want lot 1 included in the concept plans, but it's not part of the development, but I want it included in the plan so it can be added in years to come after the quarry is gone.'[\[131\]](#)

[\[131\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T105 XN.

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248. Mr Levinge said that Mr Montalto said he wanted to have lot 1 unencumbered and free to sell at any time, in case he needed to raise finance for his cheese manufacturing.[\[132\]](#)

[\[132\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T159 XXN.

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249. Mr Levinge said that Mr Montalto did not say that he would enter into a development agreement with the plaintiff on five preconditions.[\[133\]](#) His five conditions were never preconditions to the development agreement.[\[134\]](#) Mr Levinge was asked on cross examination:[\[135\]](#)

MR ANDERSON: I suggest to you at the end of this discussion that Mr Montalto had with you and Mr Dooling, you said words to the effect that you thought you 'could work with the proposal, Tom,' or you thought you 'could work with that, Tom,' and you agreed to the five conditions that I've just put to you?

MR LEVINGE: No.

[\[133\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T105–106 (XN), T188 (XXN).

[\[134\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T188 XXN.

[\[135\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T161 XXN.

250. Mr Levinge denied that Mr Montalto had discussed relocating the tenant on lot 2 (Gina Webling) in 2011. Mr Levinge said that they discussed the caretaker in the double-storey house on lot 1.[\[136\]](#) Mr Levinge said that he only became aware of Gina Webling in 2016, and that Mr Montalto told him, in 2016, that Gina Webling had to be relocated.[\[137\]](#)
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[\[136\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T157 XXN.

[\[137\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T157–158, T188 XXN.

251. Mr Levinge said that he first recalled discussing the Montalto name to be used on the development in mid-2016.[\[138\]](#)
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[\[138\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T160 XXN.

252. Mr Levinge agreed that Mr Montalto said he would grant DFG the first option to buy lot 1, in the event that he decided to sell it in future.[\[139\]](#) However, he said that this idea was not as attractive to DFG.[\[140\]](#)
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[\[139\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T161 XXN.

[\[140\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T161 XXN.

253. Mr Levinge agreed that farming was discussed with Mr Montalto, and that Mr Montalto would have wanted to continue his farming operations while DFG began the development over part of the land. However, because of how the development was staged, Mr Levinge said that Mr Montalto could have relocated to lot 3 or lot 1.^[141]

^[141] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T150 XXN.

254. Mr Levinge said that services were discussed, but that such discussions were not that lots 2 and 3 would be used.^[142] In relation to the services, Mr Levinge said that it was discussed that:^[143]

^[142] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T155 XXN.

^[143] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T113 XN.

MR LEVINGE: ... [T]here's a need for a servicing corridor to be established by way of an easement, and we've had discussions with landowners fairly constantly around the provision of what would be required, what funding would be required and how that would be funded.

MR PETERS: You said you had discussions with landowners. Can you recall any discussions with Mr Montalto about that service corridor?

MR LEVINGE: Yes.

MR PETERS: After April 2013?

MR LEVINGE: Yes.

MR PETERS: What was the nature of those discussions?

MR LEVINGE: That we would be required to take a portion of the front of his land frontage to Donnybrook Road. That would be required as part of the overall services corridor.

MR PETERS: Which land frontage? Looking at the land, there's lot 1, lot 2, lot 3?

MR LEVINGE: Initially lots 1 and 2, and then at a time in the future we would then need some access through lot 3.

255. Mr Levinge agreed that Mr Montalto said he wanted lot 1 to be part of the initial concept plan, but he did not agree that Mr Montalto had said this in relation to the buffer zone.^[144] It was part of the negotiations for lot 1 to be included in the concept plans and not the development in 2011–2012. ^[145] Mr Levinge said: ‘We’d had discussions during our negotiations and at all times we had said that all the land is in.’^[146]

^[144] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T156–157 XXN.

^[145] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T187 XXN.

^[146] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T186, T189 XXN.

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256. Mr Levinge said that Mr Montalto agreed to put lot 1 into the development.^[147] Mr Levinge said that he never agreed not to include lot 1 in the development, nor that lot 1 would be kept separate.^[148]

^[147] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T157 XXN.

^[148] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T150, T158, T161–162 XXN.

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257. Mr Levinge said that Mr Montalto first raised concerns in September/October 2016 that the agreement did not reflect what he understood the agreement to mean. Mr Montalto told Mr Levinge that he understood lot 1 was to be included in the initial concept plans.^[149]

^[149] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T187 XXN.

258. Mr Levinge was asked about the notation '2/3' made in his notebooks:[150]

[150] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T827–828 XXN.

MR ANDERSON: ... Do you see the reference — there's the Boral land which you have identified in, if I can call it, the rectangle in the middle?

MR LEVINGE: Yes.

MR ANDERSON: Do you see the reference under that circle '2/3'?

MR LEVINGE: Yes.

MR ANDERSON: I suggest to you that's a reference to [Mr] Montalto's land being two lots of three lots. What do you say to that?

MR LEVINGE: No.

MR ANDERSON: But that would be consistent, would it not, if you go to D1, with the consent for the time stamping data to be in relation to [Mr] Montalto's land. If you go to the second page of D1, the property is the two parcels located between the grid references. You would agree with that?

MR LEVINGE: No, I don't. The references to the figures are for lot yields in thousands of lots.

MR ANDERSON: I suggest to you that in fact the '2/3' is a reference to having two lots out of three lots of Mr Montalto's land. What do you say to that?

MR LEVINGE: I do not agree.

Mr Montalto's evidence continued

259. Mr Montalto gave evidence of the presentation to the family on 19 October 2012, which is recorded in the Montalto Family Review Meeting document.[151] Mr Montalto said that Mr Levinge, Mr Dooling, and Bert Dennis were there, and that there could have been someone else present as well.[152] Mr Montalto said that his four children were present.

[151] CB 446.

260. This meeting is not the subject of any pleaded conversations.

261. Mr Montalto was taken to an ownership plan that showed lots 1, 2 and 3 encompassed by a red line that was designated as the PSP area. Mr Montalto said, however, that at the meeting there was discussion that lot 1 was not developable, and lots 2 and 3 were developable.[153]

262. Mr Montalto was asked whether there was any discussion about the quarry buffer; Mr Montalto said that there 'possibly was because of the quarry buffer affecting lot 1' ... '[i]n the sense that it's not developable and I was only issuing lot 2 and 3.'[154]

263. I find that it is unlikely that such discussions did take place at this time, as DFG already knew in July 2012 that the Boral land was being sold to Mirvac.[155]

264. When asked, whether he said at that meeting, what the offer was that Mr Montalto had put to DFG, Mr Montalto replied yes, and said that '[i]t was discussed on the day that they put forward that it was lots 2 and 3, because lot 1 was a buffer which can't be developed, and my children clearly understood that, that I would have to continue to farm lot 1, because I needed them to understand why I'm farming lot 1 and why I'm only giving lot 2 and 3, and that had to come from them.'[156] I assume Mr Montalto was indicating it would be up to his children to have lot 1 developed as he proposed farming it for the foreseeable future.

265. Premier Bay and Mr Montalto did not seek to call his children to confirm these discussions. It was not pleaded as an occasion when DFG were informed that lot 1 was to be excluded.
266. I briefly note that Mr Slattery asked Mauro what, at the time of signing the agreements for this development, his understanding was as to which lots were included in the development. Mauro answered: 'lot 2 and 3'. [157] Mauro did not give evidence as to how this understanding came about.
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267. In his pleadings, Mauro Montalto states that he did not know which lots were part of the development agreement. [158]
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268. Mr Montalto said that, from October 2012 until the signing of the documents in March and April 2013, Sladen and Mr Brown did not sit down with him and do a page turn of the development agreement.
269. Mr Montalto said that Mr Brown informed him that he had received a copy of the development agreement prior to signing in early March 2013, and that Mr Montalto had said to Mr Brown: 'As long as all the clauses are in there and you're happy with it, it'll be okay.' [159] Mr Montalto said that Mr Brown needed him to sign it as approval for the final draft to be drawn up. [160]
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270. Further on, Mr Montalto was asked whether — at the time that he signed a copy of the development agreement — Mr Brown had taken him to any particular clauses in the development agreement. Mr Montalto said: ‘No, sir, he didn’t have to. I asked him, “Are you happy with that? You’ve read it. Are you happy with it? If you’re happy with it, my clauses are there, I’m happy to sign.” It was his responsibility.’^[161]

^[161] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T470 XN.

271. By ‘his clauses’ I assume that Mr Montalto was referring to the five conditions.

272. Mr Montalto was asked what his belief was when he signed the copy of the development agreement, in relation to the land that was subject to the development agreement. Mr Montalto said: ‘My belief was that I’m to farm lot 1, I’ve got no choice because of the quarry buffer, and lot 2 and 3 is the developable land that I was issuing and signing for.’^[162]

^[162] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T471 XN.

273. As discussed below, I am not satisfied that this was Mr Montalto’s belief at the time that he signed the development agreement. I find that he did know that lot 1 was to be developed,

274. Mr Montalto was asked how he received a copy of the development agreement. He said that he got it through Mr Brown. He said that Sladen was notified that all correspondence to him was to go via Mr Brown.^[163]

^[163] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T471 XN.

275. Mr Montalto said that he did not read the development agreement or the CUT documents, and doubted that he could have.^[164] Mr Montalto denied reading the definition of ‘Land’ in the development agreement prior to settlement.^[165] He denied being shown ‘schedule 1 land’ before signing the agreement.^[166]

[\[164\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T472 XN.

[\[165\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T474 XN.

[\[166\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T474 XN.

276. On cross-examination, Mr Montalto agreed with Mr Senathirajah that the land, the subject of the development agreement, is to be found in the first schedule, which describes the land as lots 1, 2 and 3;[\[167\]](#) however, Mr Montalto disagreed that the land (in this respect) was the subject of the development agreement, but rather was being referred to as ‘a whole concept’, and was ‘not all in the development.’[\[168\]](#) Mr Montalto said:[\[169\]](#)

It’s mentioned there as lot 1, 2 and 3, all my land, but then in there somewhere the development agreement is the developable land which is the agreement between us lot 2 and 3.

[\[167\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T651 XXN.

[\[168\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T652 XXN.

[\[169\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T653 XXN.

Alleged conversation no 4

277. Turning to the signing meeting on 10 April 2013, Mr Montalto said that those in attendance included Mr Brown, Mr Di Felice,[\[170\]](#) Mauro, Mr Levinge, Mr Dooling, Bert Dennis, Mr Hart, and Tony and Jenny Coralluzzo. He said that the boardroom table was some four and a half metres long, and that everyone was seated around the table in small groups. Mr Montalto said that those present would have been able to hear what was being said by others.[\[171\]](#)
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[170] Mr Montalto noted that the pleadings are incorrect where they mention 'Mr Jeremiah' being in attendance, and that any such references should be read as referring to 'Mr Di Felice.'

[171] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T474-476 XN.

278. Mr Montalto said that he was standing near Mr Brown and Mr Di Felice. He said that he started to step out of the room, but then Mr Di Felice said to him: 'These are your papers, [Mr Montalto], here to sign.' Mr Montalto said he replied: 'Hang on a moment, I'll be right back. As long as you've my special clauses in there and the right to sell, we'll be right.' [172] Mr Montalto said that he left the room and returned. Mr Di Felice then said: 'Yes, your conditions are here,' and 'we more or less got down to signing.' [173]

[172] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T475 XN.

[173] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T475 XN.

279. Mr Montalto was asked what he said after Mr Di Felice said the above statement. In response, Mr Montalto said: [174]

'If it's there, I'm happy with that. I'm happy to sign. Colin, are you happy I sign?' [Mr Brown] said, 'Yes, I'm happy.' I said, 'Well, come around and sign with me.' He said, 'I don't need to.' I said, 'Yes, you're a witness. You and I have put this together and it's correct, it's all right. You're more prouder than what I am. You should be more prouder than me to have achieved it.'

[174] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T475-476 XN.

280. Mr Montalto said that his conversation with Mr Di Felice was within earshot of those members of DFG present at the meeting, and that they would have heard it, as they were only two or three feet apart. [175] Mr Montalto said that Mr Brown would also have heard the conversation with Mr Di Felice.

281. This is the evidence in support of conversation no 4. The reference to Mr Jeremiah in the allegations is a mistaken reference to Mr Di Felice.
282. The pleaded conversation alleges that Mr Montalto asked if he had the free right to sell, asking if 'lot 1 is separate?' And that Mr Di Felice replied: 'Yes you have the free right to sell; it's here,' and gestured towards the development agreement.
283. Mr Montalto's evidence, however, was that Mr Di Felice said: 'Yes, your conditions are here', in response to Mr Montalto saying: '[a]s long as you've got my special clauses in there and the right to sell, we'll be right.' [176]

284. I understood 'special clauses' to be a reference to the five conditions.
285. There was no evidence of Mr Montalto asking: 'and lot 1 is separate?' Mr Montalto did not give evidence of Mr Di Felice saying he had the free right to sell.
286. The pleading makes no allegation that Mr Brown heard conversation no 4, nor that any duty owed by Mr Brown arose by reason of conversation no 4; although, in this evidence, Mr Brown is included in those who heard the conversation between Mr Di Felice and Mr Montalto.

Response of Mr Levinge, Mr Dooling, Mr Di Felice (and Mr Brown)

287. In relation to alleged conversation no 4, Mr Levinge, Mr Dooling, Mr Di Felice (and Mr Brown) gave the following evidence.
288. In respect of the pleaded conversation between Mr Montalto and Mr Jeremiah, the following exchange occurred: [177]

MR PETERS: Let me ask you this. Was Mr Jeremiah present at the 10 April meeting?

MR LEVINGE: No.

MR PETERS: I have to ask you this even though you've said he wasn't present. Did you hear Mr Jeremiah say to Mr Montalto, 'Yes, you have the free right to sell. It's here,' and he gestured towards the development agreement?

MR LEVINGE: No.

MR PETERS: Did you think Mr Montalto was under any mistake as to the land covered by the development agreement?

MR LEVINGE: No.

[\[177\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T111 XN.

289. Mr Levinge did not hear the conversation between Mr Di Felice and Mr Montalto at the 10 April 2013 meeting, as pleaded.
290. Mr Anderson asked Mr Levinge about the 10 April 2013 signing meeting. Mr Levinge said that he was out of earshot of the conversation between Mr Di Felice and Mr Montalto, and that he would not have heard everything that they said.[\[178\]](#) Mr Levinge agreed. Mr Anderson asked Mr Levinge the following questions:[\[179\]](#)

[\[178\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T182 XXN.

[\[179\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T182 XXN.

MR ANDERSON: Did you ever hear Mr [] Montalto ask Mr Di Felice or the lawyer at Sladens in relation to the documents, 'Is it all right'??

MR LEVINGE: No.

MR ANDERSON: Did you ever hear him say, 'As long as you've got all my conditions in there, have I got a free right to sell?' Did you ever hear him say that to Mr Di Felice?

MR LEVINGE: No.

MR ANDERSON: And did you ever hear him say, 'Is lot 1 separate'??

MR LEVINGE: No.

MR ANDERSON: It may have been said, but you may not have heard it?

MR LEVINGE: Correct.

MR ANDERSON: Did you hear Mr Di Felice say to Mr [] Montalto, gesturing to the documents, 'Yes, [Mr Montalto], it's all in here'?

MR LEVINGE: No.

MR ANDERSON: 'All in there,' rather. Never heard that?

MR LEVINGE: No.

291. Mr Dooling said that he recalled the meeting where the CUT agreements were executed. Mr Dooling was asked whether he recalled any discussion, at that meeting, to the effect that lot 1 was to be separate and not part of the development agreement. Mr Dooling said: 'No'.[\[180\]](#).

[\[180\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T254–255 XN.

292. Mr Dooling said that he would not have heard all that was said between Mr Montalto and Mr Di Felice, and agreed that he was not paying particular attention to what Mr Di Felice and Mr Montalto were doing or saying.[\[181\]](#).

[\[181\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T299 XXN.

293. Mr Anderson asked:[\[182\]](#)

[\[182\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T300–301 XXN.

MR ANDERSON: So it's fair to say that on that day, Mr Dooling, you didn't hear [Mr] Montalto say to Victor Di Felice, 'Is lot 1 separate?' Did you hear him say that?

MR DOOLING: No.

MR ANDERSON: You didn't hear him say to Mr Di Felice, 'Have I got all my conditions in there? Have I got a free right to sell?' Did you hear him say that?

MR DOOLING: No.

MR ANDERSON: And you didn't hear him say, 'Is lot 1 separate'?

MR DOOLING: No.

...

MR ANDERSON: I put it to you that [Mr] Montalto said on this day to Victor Di Felice, 'Is it all right to sign the documents,' and then he asked, 'Have I got all my conditions there? Have I got a free right to sale?' He said that, did he not?

MR DOOLING: He certainly didn't in my hearing.

MR ANDERSON: And then he asked Mr Di Felice, 'Is lot 1 separate?' He said that, did he not?

MR DOOLING: Not in my hearing.

MR ANDERSON: And then Mr Di Felice, gesturing towards the pile of documents to be signed, said words to the effect, 'Yes, [Mr Montalto]. It's all there.' He said that, did he not, Mr Di Felice?

MR DOOLING: Not in my hearing.

294. Mr Brown says that, to his knowledge, Mr Montalto did not tell his lawyers of those five conditions in late 2011, or in early 2012. When asked if Mr Montalto told his lawyers of the five conditions at the signing ceremony in 13 April 2013, Mr Brown said: 'No.' [\[183\]](#).

[\[183\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

295. At the signing meeting, Mr Brown said that he was seated about four to five seats away from Mr Montalto; everyone was sitting,
296. Mr Brown said that he did not hear Mr Montalto say words to the effect that lot 1 was separately treated in the development agreement, nor that he asked whether the development agreement contained a free right to sell. [\[184\]](#).

[\[184\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T712 XN.

297. Mr Brown recalled hearing Mr Di Felice say to Mr Montalto: 'It's in the agreement' (although Mr Brown said that he thought it was uttered by Mr Jeremiah, who was not at the meeting).^[185] Mr Brown did not hear Mr Montalto ask Mr Di Felice whether his conditions, and his special clauses, were in the agreement.^[186]
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^[185] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T788 XXN.

^[186] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T788–789 XXN.

Mr Montalto's evidence continued

298. Mr Montalto was asked whether he would have signed if he did not have his free right of sale and his conditions were not in the development agreement. Mr Montalto said that he would not have signed. He said that he would have been giving DFG authority to develop his land and that he would have had 'no comeback on it.'^[187] Mr Montalto explained that he uses the properties for mortgaging to borrow money from time to time. He said: 'I've gone above my sort of daily borrowings and I needed the farm as borrowing, large capital. Now, if I — by me giving the farm away, I'm unable to mortgage the farm with the bank any longer.'^[188]
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^[187] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T476–477 XN.

^[188] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T477 XN.

299. Mr Montalto was asked what he needed to raise capital for. He said that he had bought a property in Whittlesea for \$7 million, which his parents had owned, and had also purchased a couple of machines for the factory business that cost over \$4 million — and that he had borrowed above his borrowing facilities. He said that he had used a couple of small properties as security, but in recent years had used the farm for mortgage purposes; however, now he was unable to use the farm because of the development, as DFG required a 'clear right, a clear, mortgage free property.'^[189]
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^[189] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) 477–478 XN.

300. Mr Montalto was asked what his belief was, prior to the signing ceremony on 10 April 2013, as to which lots were going to be developed. Mr Montalto said he believed that only lots 2 and 3 were in the development.^[190] He was asked what was his state of mind as to lot 1. Mr Montalto said that 'lot 1 is a farm' and that it was 'to stay clear and stay a farm, because it's undevelopable.'^[191] Mr Montalto was asked what his state of mind was as to whether or not a quarry buffer existed. Mr Montalto said: '[a] quarry buffer is there, and it's restricting lot 1 of [sic] being developable.'^[192]

^[190] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T478 XN.

^[191] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T478 XN.

^[192] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T478 XN.

Alleged conversation no 5

301. Mr Montalto gave no evidence in chief in support of the alleged conversation no 5, which concerns discussions of the five conditions with Mr Brown. However, in cross-examination by Mr Senathirajah, it was put to him that Mr Montalto did not tell Mr Brown that his offer to DFG was subject to the five conditions. Mr Montalto replied: 'No, sir.'^[193] Mr Montalto said that 'Colin Brown knew from day one' of the five conditions.^[194] It was put to Mr Montalto that he never told his lawyers or Mr Brown of the five conditions. Mr Montalto answered: 'You are incorrect, sir.'^[195] Mr Montalto said that he told Mr Brown on three separate occasions of the five conditions.^[196] Only one occasion is pleaded, and was not referred to by Mr Montalto in his evidence in chief.

^[193] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T628 XXN.

^[194] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T641, T660 XXN.

^[195] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T645 XXN.

^[196] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T659–660 XXN.

Response of Mr Brown

302. In response to this allegation, Mr Brown says that he first became aware of Mr Montalto's five conditions when he saw the documents for this court case.^[197] He said that Mr Montalto did not tell him of the five conditions at any time.^[198]

^[197] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

^[198] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

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303. As discussed above, Mr Brown says that, to his knowledge, Mr Montalto did not tell his lawyers of those five conditions in late 2011, early 2012, or at the signing ceremony in April 2013.^[199]

^[199] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

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304. Mr Brown said that he could not specifically recall Mr Montalto saying that he was thinking of offering two lots of land, lots 2 and 3, because lot 1 was not viable because of the quarry buffer. Mr Brown said that he believes he would have recalled it if that was said, because it would have been a 'major change to what [he] perceived was happening.'^[200] Mr Brown did not recall Mr Montalto telling him that he was contemplating offering two lots of approximately 500 acres; or that 150 acres would not be in the development, being lot 1, which Mr Montalto would farm, because it was not developable.^[201] Mr Brown said that Mr Montalto was advised that he had to continue farming lot 1 for capital gains tax purposes.^[202]

^[200] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T756 XXN.

^[201] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T756 XXN.

^[202] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T757 XXN.

305. Mr Brown said that Mr Montalto told him Gina Webling had to be relocated from lot 2, but that he never said she was to be moved to lot 1.^[203] Mr Brown said that he would have remembered if Mr Montalto had said that, because he ‘believe[s] that would have rung a loud bell because it would have changed the whole nature of what [he] perceived was going to happen.’^[204]

^[203] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T756–757 XXN.

^[204] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T757 XXN.

306. Mr Brown said that Mr Montalto did not tell him that he wanted to have a free right of sale over lot 1, and be able to sell a small portion of lots 2 and 3, in case he ever needed cash for his business or for some other reason.^[205] Mr Brown said that this would be a major change to what was being discussed and that: ‘[i]t didn’t happen.’^[206]

^[205] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T757–758 XXN.

^[206] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T758 XXN.

Evidence of Mr Montalto continued

307. Mr Montalto said that, after the signing, he attended many meetings where DFG gave him an update on the development. He said that he attended the PSP panel hearing in June 2016.^[207] He said that this was the final approval stage. Mr Montalto said that he sat with Mr Di Bella, behind Mr Levinge. He said that street names for the development were discussed. Mr Montalto said that he had been waiting for street names with the Montalto name. Mr Levinge told him the names were not up to DFG, but were for the council to decide. Mr Montalto said that he was ‘shocked,’ and said to Mr Levinge: ‘Here I am, for three years plus been saying Montalto name a hundred times over, Montalto Hill, [] and you wait for today.’^[208]

^[207] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T479 XN.

[\[208\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T480 XN (square brackets indicate omission of a punctuation typo).

308. Mr Montalto said that, at the meeting, reference was made to ‘MMCS’ on the Premier Bay land, which he later discovered was a reference to a major contamination site on lot 2; specifically, a sheep dip.[\[209\]](#)

[\[209\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T480–481 XN.

309. Mr Montalto said that he ‘was a bit offended because they’ve got to the point of MMSC, a major contamination site on Montalto’s property, when if they had have asked me, “Tom, we weren’t aware. We just became aware of the sheep dip,” you know, it could have been phased down so it’s not so major or whatever. At that point it was high tension for me.’[\[210\]](#)

[\[210\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T481–482 XN.

310. Mr Montalto felt that he could not raise his concerns at the PSP. Mr Montalto said that he was under pressure and unhappy when he attended the next meeting with DFG, in about July 2016. Mr Montalto said that it was apparent that he ‘wasn’t a happy fellow’, and Mr Levinge said: ‘[Mr Montalto], it’s obvious you’re not happy. We’ll discuss it. We’ll have some discussions later. You’ve got issues you want to discuss.’ Mr Montalto said that he responded: “Definitely I’ve got issues, big issues we need to discuss. I want to know where we’re standing,” I said, “with all these issues.” I said, “Plus I’ve brought a circular that I want to know what is going on.”[\[211\]](#)

[\[211\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T482 XN.

311. The circular was a paper listing his concerns. Mr Montalto said that the meeting could have been in September, as per the date on the note. Mr Montalto said that Tony Coralluzzo, David Douglas, Bert Dennis, Bert's son on hook-up from Brisbane, and all DFG's other managers and town planners, were present at the meeting.

312. Mr Montalto listed his concerns as follows.^[212]

^[212] CB 624.

WOODSTOCK REDEVELOPMENT — MATTERS OF CONCERNS — [MR]
MONTALTO

I. LOT I

- * My request for Lot I to be left out but also incorporated in the plans
- * Lot I was to be free of EMCUMBRANCES, CAVEATS AND NOTICES

2. NAMING OF STREETS AND HILL

- * The Montalto name to be extended as much as possible with street names
Eg Montalto Blvd, Circuit, Street

The Hill — Renamed to Montalto Hill

3. DEVELOPMENT OF THE HILL

- * Why the Hill is allocated as a Park and not being developed.

4. RELOCATION OF EXISTING TENANTS AND EXISTING AND FUTURE FARMING BUILDING

- * Gina was to be looked after and relocated with sufficient time — now time frame is 12 months or less.

Relocation of my existing and future buildings/sheds ect [sic] have been left to the last minute.

5. THE CONSORTIUM

- The decision to enter into the development was to help my neighbours, not to share so much with my neighbours and to wait. I feel that I have been misled and not informed enough of the development planning of allocations of services such as commercial sites and likes.
- Given the opportunity of what sites are on my land and not on the land
- Discussions of locations and size of buildings eg: Major shopping centres
- Neighbours have 2 major shopping centres, I have 1 medium shopping centre, community centre.
- Preference of school allocations eg Private, Catholic, State schools
- The Consortium agreement not specified clearly eg Breakdown & Percentages
- The overall development expenses was understood as being part of your 25%, my understanding now is that it's the 1st expense before dividends.
- My options if I want to sell — to exit at any time,
 - options to be able to sell at any time.
- Fencing should not be taken out of the Consortium.
- Explanation of what is paid by the Consortium.

313. Mr Montalto said that he dictated the note to Gina, who typed it up. Mr Montalto said that he asked Gina to type up the note because:[\[213\]](#)

I was unhappy from the outcome of the PSP and all the — what I understood, I felt that there was a lot of explaining to me, and I just wanted to clear the air and know what was going on, and what happened to my requests of simple verbal conditions that I gave them and they made notes of, and I wasn't asking for much in this deal, except pretty well what was here. You know, when I wrote this and dictated this, I was still under pressure, sort of thing, why, why, why this all happened.

[\[213\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T483 XN.

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314. Mr Montalto was asked what he was not happy about, and what he said at the meeting. Mr Montalto said:[\[214\]](#)

What I wasn't happy about was the way the PSP, just leading to it, something just wasn't right with Peter, you know? Something made me nervous and going to that there were these issues, simple issues, the names, and they tell me after so long it's the council. Why not tell me six years ago? I could go to the council. Could have went there 12 months before or whatever. Being offended by what was my dad's property, now my property, MMSC, you know, a minor thing, I felt a minor thing. Why not bring it up to me? Why not mention it to me? I could have told you it hasn't been used for 60 years and you just put a note "Unused for 60 years", people can refer to it. But I wasn't made aware of it. And other little things that came about. I just wasn't totally convinced that things were right anymore.

[\[214\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T484-485 XN.

315. Mr Montalto was taken to the first item on his list of concerns; his request that lot 1 be left out, but also incorporated in the plans:[\[215\]](#)

MR ANDERSON: The first item on what you handed out, item 1, 'Lot 1, my request for lot 1 to be left out but also incorporated in the plans'?

MR MONTALTO: The consortium planning, the overall feature plan, you know. What's the right word? Feature plan, yes, overall feature plan, you know.

MR ANDERSON: What did you say at the meeting to Dennis Family Corporation about lot 1?

MR MONTALTO: I said to them, 'Lot 1 was not developable, is not developable.' I said, 'We've never discussed it. Why is it in? It appears that you've put it in.' [Mr Levinge] said, '[Mr Montalto], we're in the position we obtain land. We don't give land back.' 'What do you mean by that, you don't give land back? I'm not asking you to give me land back. You've got lot 2 and 3. Lot 1 is separate. Nothing to do with it. I've always said the right to sell it. For the last three years you've offered to buy it, you've offered. You've told me you'll find me the buyer. Why do I need you to find me the buyer? I'll find my own buyer at auction.' You know, it was just issues that came up wasn't stacking, wasn't correct.

[\[215\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T485 XN.

316. Mr Montalto was taken to the second item, 'Naming of streets and hill,' and was asked what he said about that at this meeting:[216]

MR MONTALTO: I said, 'The naming of the streets, you've never mentioned up to the day of the PSP there in town that it's up to the council. Why didn't you tell me 12 months ago? I could have been making a list and submitted it to council. I know everybody at the council. Everybody knows me. I wouldn't have had a difficulty with council. You could have told me long before.' It never happened. No communication, sir.

MR ANDERSON: Did you get a response from anyone from Dennis Family Corporation as to what you just said?

MR MONTALTO: No, not really.

[216] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T485-486 XN.

317. Mr Montalto was asked what was said about the third item, 'Development of the hill':[217]

MR MONTALTO: Well, the development of the hill is at a later date I want the hill to be named in their drawings, in the concept of it all, to ensure that that hill is named today and not missed out tomorrow in years to come.

MR ANDERSON: What did you want it named as?

MR MONTALTO: I wanted it named Montalto Hill. I won't accept anything else, Your Honour, on that hill. No way.

[217] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T486 XN.

318. Mr Montalto was asked what he said about the fourth item, the 'Relocation of existing tenants and existing and future farming buildings':[218]

MR MONTALTO: I said, 'Up 'til now you've only just come ahead of the PSP,' and just ahead of the PSP, Your Honour, they brought a plan and rejigged the future development of lot 2 and I said, 'What are you talking about? You can't do this.' I said, 'If you're going to come in to lot 2 and change back to lot 2 from lot 3 and you're coming right up this far, you're imposing up to the tenant and all my farm implements.' I said, 'How can that happen? I'm supposed to farm it.' 'Oh, we didn't realise it.' You know, they just didn't stop to think that the tenant's there and all the farm equipment, the farm shedding to continue farming there. I had to bring it to their attention. But then I just went quiet because it was just ahead of the PSP. I don't want to distract what's happening at the PSP because I got the understanding that it's a very important occasion.

MR ANDERSON: Was there discussion about the tenant, Gina Webling, at this meeting?

MR MONTALTO: Yes, the discussion was made. I said, 'You haven't thought of any of this and before you can come in you have to tell me what you want to do. You have to think of the tenant. You have to think of all my farming equipment. You have to think of everything.'

MR ANDERSON: When you say to come in, to come in to what land?

MR MONTALTO: To come in to lot 2. There's only the one gate. That's on lot 2, Your Honour.

[218] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T486–487 XN.

319. Mr Montalto was asked what he said about item 5, the consortium:[219]

MR MONTALTO: Yes, with the consortium I learnt that it was what they put together. It was a case of you must have a consortium. It hasn't been explained properly, but from digging up information I realised that the consortium is that they charge everything to the consortium. The consortium pays for this, the consortium pays for that. Instead it's not a consortium, it's an individual through a consortium entity that suits them to charge everything out through a consortium. I said, 'What's a consortium for? You might as well charge me direct, charge the others direct.'

[219] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T487 XN.

320. Mr Montalto was asked if he raised any other concerns at the meeting:[220]

MR ANDERSON: Was there anything else that you can recall, any other items that you discussed on that day with Dennis Family Corporation?

MR MONTALTO: No, on that day it was pretty well just this list here. I think it was before this one that we had another briefing. No, at the moment I don't recall, Your Honour.

[220] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T487 XN.

321. This evidence is revealing in many ways. First, the statement by Mr Montalto that lot 1 was never discussed with DFG. As set out above, Mr Montalto says: 'Lot 1 was not developable, is not developable.' Mr Montalto said: 'We've never discussed it. Why is it in? It appears that you've put it in.'
322. This evidence is contrary to the alleged conversations no 1, no 2, and no 3, wherein Mr Montalto alleges having held discussions with both Mr Levinge and Mr Dooling concerning lot 1; and conversation no 4, in which Mr Montalto alleges that Mr Levinge and Mr Dooling overheard discussions concerning lot 1. In each of these alleged conversations, he says that he expressly addressed lot 1. Mr Montalto also gave evidence that Mr Levinge and Mr Dooling agreed that lot 1 would not be included in the development.
323. Further, at no stage in the list of concerns, or in his oral evidence regarding the list of concerns, did Mr Montalto say that he told DFG that lot 1 was not to be included in the development agreement for development. His complaint at the meeting was to ask why lot 1 had been included, given that it is not developable. One would have expected that if he had agreed with DFG that lot 1 was not to be included in the development, then he would have addressed that fundamental issue at great length, or at least made a request to the effect that DFG take it out of the development, as had been agreed. He makes no reference to any agreement not to include lot 1 in the development.
324. It is also difficult to understand his concern surrounding the hill on lot 1 not being fully developed in light of his allegations that lot 1 was not to be developed or included in the development. The hill is in lot 1. Mr Montalto said that his concern related to the naming of the hill in the concept plans. However, his own contemporaneous note of what was discussed refers to his concern that the hill was to be a 'park and not being developed.' [221]

[221] CB 624.

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325. Mr Montalto makes reference to having concerns with ‘simple issues’ and other ‘little things,’ not to the very subject matter of the development agreement, which is what the inclusion of lot 1 amounts to. Mr Montalto does not refer to the five conditions which, he says, that he expressly informed Mr Levinge and Mr Dooling of around the end of 2011 and the beginning of 2012.
326. Mr Montalto also mentions that his concern for the relocation of Gina Webling has arisen as a consequence of DFG altering the plans for the development of lot 2, just ahead of the PSP. This evidence does not support his allegation that the five conditions, which deal with relocating Gina Webling, were raised in 2011 or 2012.
327. His list of concerns also reveals that Mr Montalto was concerned about matters that affected his existing use of the farm, such as the storage of his farming equipment, about the tenant and about the consortium, naming rights and such like. Yet the allegations in the counterclaim made by Mr Montalto concern fundamental aspects of the agreement. Mr Montalto himself refers to the exclusion of lot 1 as a ‘critical condition.’ These fundamental concerns were not raised in the list of concerns, contrary to what one would expect.
328. Mr Montalto’s list of concerns, coupled with the denials of Mr Levinge, Mr Dooling, Mr Brown, Mr Jeremiah, Mr Di Felice, and in addition the notes taken by Mr Goldin of Sladens (who was not called), raises real concerns as to the truthfulness of Mr Montalto’s evidence of the six representations.
329. Mr Montalto said that, after the 8 September 2016 meeting, eight or nine representatives of DFG came out to the Premier Bay farm. They told Mr Montalto that they wished to discuss the relocation of the tenant and the farm equipment. Mr Montalto was asked whether they had discussed lot 1 at this meeting. Mr Montalto did not answer the question, but said: ‘Lot 1 at that meeting, we went to lot 1 because lot 1 is the free site and that’s where everything is to be re-established’,^[222] referring to the tenant, farming equipment, sheds, and machinery.
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^[222] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T488 XN.

330. I have discussed above, witness in relation to the conversations that Mr Montalto alleges took place. I now set out the evidence of Mr Montalto’s advisors and other relevant witnesses in more detail below. In doing so, it is necessary to repeat, in part, the denials made in relation to Mr Montalto’s evidence.

Evidence of Mr Stephen Hay

331. DFG called Mr Hay. Mr Hay is a director of Northside Land Sales, a real estate company specialising in broad hectare and land sales.

332. Mr Hay said that he had known Mr Montalto for a long time. Mr Hay's father knew Mr Montalto's father, and Mr Hay had seen Mr Montalto around the area at local markets and the like.
333. Through his business, Mr Hay has been involved with bringing landowners together to form large parcels of land, which would have more merit collectively, in terms of getting rezoning approval for residential use. Mr Hay would get planners and engineers to assist.
334. In relation to the Donnybrook development, Mr Hay said that he began the above planning background process around 2006 to 2008.
335. Mr Hay said that he had discussions with Mr Montalto from 2008 to 2009 about the opportunity of working with large developers if all the neighbouring landowners worked together.
336. Mr Hay gave evidence of setting up landowners' presentations around the end of 2010: the first was of a presentation with Delfin; [223] the second was with DFG, [224] at which Mr Montalto was present. Mr Hay saw the map indicating the quarry buffer in the handout given to the landowners at the presentation. Mr Hay said that he did not recall any questions being asked about any of the land not being developable. [225] Mr Hay was asked the following by Ms O'Gorman, on behalf of Premier Bay and Mr Montalto: [226]

[223] A handout provided at the presentation is Exhibit P12.

[224] CB 114.

[225] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T235 XN.

[226] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T241 XXN.

MS O'GORMAN: Is it possible that at that meeting someone from the plaintiffs said to Mr Montalto that the quarry buffer meant that the land under the buffer was not developable? Is that possible?

MR HAY: Yes, it is possible.

MS O'GORMAN: That they said that at the meeting that you were in attendance at at the end of 2010?

MR HAY: It doesn't make sense to me why they would say it, but they could have said it.

MS O’GORMAN: You don’t have a good recollection of that meeting, is that fair to say?

MR HAY: I have a very good recollection of it, but it doesn’t make sense because I’d consulted a planner and I knew all about the quarry buffer and that was shared with all the landowners.

MS O’GORMAN: But is it possible that the plaintiffs’ understanding was such that what they said to Mr Montalto on that day was that the quarry buffer meant that the land was not developable?

MR HAY: The quarry buffer has to be removed in a zoning process, and that would happen going from farming zoning to a residential zoning. It would automatically be lifted. That’s why I know I had the meetings with the quarry, because otherwise I would have been wasting time and effort in getting this up for rezoning if we didn’t address that issue.

337. Mr Hay was asked whether, at the presentation where the map showing the quarry buffer was provided to landowners,^[227] Mr Montalto queried what that oblong shape shown on the map meant. Mr Hay answered:^[228]

^[227] CB 148.

^[228] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T238–239 XXN.

MR HAY: Yes. I’d met with the quarry people prior to that meeting. So, yes, I was able to inform them.

MS O’GORMAN: But at the presentation did you inform [Mr Montalto] about what that quarry buffer meant?

MR HAY: I was quite specific about it, yes.

MS O’GORMAN: What did you say to Mr Montalto about it?

MR HAY: That we had met with the quarry people and the quarry buffer was not going to have a negative effect because they were also looking at selling their property if they didn’t go into this agreement with the landowners. So they weren’t going to work against them. They were going to work with them.

MS O’GORMAN: This meeting, your evidence is, occurred at the end of 2010; is that correct?

MR HAY: Yes.

MS O’GORMAN: Do you recall when you met with the quarry people to discuss their intentions about selling the land?

MR HAY: I think it was around 2009.

MS O’GORMAN: Did you tell the plaintiffs at the end of — in 2009 that the quarry people, who were Boral, intended to sell their land?

MR HAY: Yes, I would have told them that they were either going to be part of the rezoning or sell themselves, yes.

MS O’GORMAN: If I suggested to you that the time at which you discovered that Boral intended to sell their land was in fact July 2011 rather than 2009, what would you say to that?

MR HAY: No, I wouldn’t think that was right because I had a feeling Greg Wood from Tract and I met with someone. BMD had done a joint venture with them, at the back of my dad’s property at Hasten Valley, and I was pretty sure we met with that party, and that was roughly about 2009. 2011 is when they started getting serious because we got support from the government about the rezoning.

338. Mr Hay said that, after this presentation, there were some meetings, a bus tour, and then the Kooyong presentation about a year later. Mr Hay said that there were two bus tours: one with Delfin and one with DFG. Mr Hay thought that Mr Montalto attended both bus tours. Mr Hay was asked if he recalled that Mr Montalto attended the DFG bus tour at Mr Di Bella’s invitation. Mr Hay answered: ‘No.’ [\[229\]](#).

[\[229\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T237 XXN.

339. Mr Hay was asked if he recalled, around this time or any other time, any statements by Mr Montalto that lot 1 of his land was not to be included in any development. Mr Hay answered: ‘No, no.’ [\[230\]](#).

[\[230\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T235 XN.

340. After 2011, until the present time, Mr Hay has attended monthly meetings with the landowners and DFG, where project updates were provided, and Greg Bursill would run through all the tasks and what DFG were doing. Mr Hay was asked:[231]

MS O’GORMAN: And at none of those monthly meetings was [Mr Montalto] ever told by the plaintiffs that the quarry buffer was no longer an issue in respect of his land; that’s correct, isn’t it?

MR HAY: No, there’s actually — I would say there’s — probably what — there would be minutes where that was one of the issues that had to be lifted. So it was one of those works in progress, one of the things like solving servicing. That was just an issue that would have had to be addressed.

[231] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T243 XXN.

341. In relation to the Premier Bay land specifically, Mr Hay gave examples of matters that would have been discussed at the monthly meetings, such as setbacks off a creek, not being able to build residential developments above a build line on the top of the hill on lot 1, and that there would be a need for larger lots on the hill.[232]

[232] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T248–249 RXN.

342. Mr Hay attended the 10 April 2013 signing ceremony at the Floridia Cheese factory. Mr Hay was asked if he recalled any discussion of lot 1 not being part of the land that Mr Montalto was going to put into the development. Mr Hay answered: ‘No.’[233] The statements that are pleaded by Mr Montalto and Premier Bay, as having been made at this meeting, were put to Mr Hay. Mr Hay said that he was not involved in any of those conversations.[234] Mr Hay was asked about discussions concerning lot 1:[235]

MS O’GORMAN: Do you have any recollection of one of Mr Montalto’s solicitors gesturing towards the development agreement and saying, ‘Yes, Tom, it’s all there’?

MR HAY: No, I don’t remember that.

MS O'GORMAN: But it is possible that Mr Montalto discussed with his solicitors and with the plaintiffs the fact that lot 1 was separate from lots 2 and 3 at that meeting, isn't it?

MR HAY: It's possible.

[233] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T236 XXN.

[234] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T245–246 XXN.

[235] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T246 XXN.

343. And further: [236]

MR TSALANIDIS: ... Do you recall at that meeting anyone making a statement that lot 1 was excluded from the development?

MR HAY: No.

[236] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T247 XXN.

344. Mr Hay said that he was aware that Mr Montalto had made enquiries for the sale of lot 1. Mr Hay said that after the development documents were signed, he was contacted by an agent who had an interested party; Mr Hay said that he was a bit shocked by this. [237]

[237] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T248 XXN.

345. I had no reason to doubt the evidence of Mr Hay. I found that he gave his answers honestly and openly.

Evidence of Mr Levinge

346. As mentioned above, Mr Levinge is and was, at all material times, the chief executive officer of DFG. Mr Levinge gave the following evidence.

347. Mr Levinge first met Mr Montalto at Mr Hay's office on 15 December 2010, where DFG were giving a presentation on developing land in the Donnybrook area. Mr Montalto, David Douglas, Mr Di Bella, and other landowners in the area were present. Mr Levinge, Bert Dennis, and Grant Dennis, gave the presentation.^[238]

^[238] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T99 XN.

348. The presentation was made using a slide projector. Those in attendance were also given a document. Mr Levinge said that the quarry map was part of the document handed to the landowners. At that time, in December 2010, Mr Levinge knew that an application had been made for an extractive industries licence, but he understood that no permit had been issued to undertake quarry activities.

349. It was put to Mr Levinge that someone from DFG had said, in his presence at the meeting, that the land within the quarry buffer was not developable. He replied: 'No ... Didn't happen.'^[239]

^[239] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T100 XN (this is the allegation made in respect of Conversation No 1).

350. After this meeting, Mr Levinge recalled another presentation being given to Mr Montalto and members of his family at Mr Montalto's premises in Settlement Road. Mr Levinge said that it was essentially the same presentation that was given in December 2010 at Mr Hay's offices. Mr Levinge was asked if there was any discussion about the quarry buffer map or the land not being developable. Mr Levinge said: 'No'.^[240]

^[240] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T101 XN.

351. Mr Levinge said that they thereafter had ‘catch-up meetings from time to time,’ and that DFG had discussions with Mr Montalto ‘on an ongoing basis over late 2011 into 2012.’^[241]

^[241] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T101, T103 XN.

352. Mr Levinge attended a further presentation at the Kooyong Tennis Club. He recalled that those present included Mr Montalto and Mr Brown, Mr Douglas and Liz Douglas, the Coralluzzos, Mason family representatives, and Mr Jeremiah and Mr Goldin from Sladen. Mr Levinge said that there were no questions about the quarry buffer map or about the quarry buffer map affecting any of the land (alleged conversation no 1).^[242]

^[242] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104 XN.

353. It was put to Mr Levinge that, at a meeting with Mr Dooling and himself, sometime around the end of 2011 and the beginning of 2012, Mr Montalto offered lots 2 and 3 to DFG as lots to be subject to a development agreement. Mr Levinge that said he could not recall Mr Montalto doing that (alleged conversation no 2).^[243]

^[243] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104 XN.

354. Mr Levinge was asked if he recalled Mr Montalto saying, in respect of lot 1, words to the effect that: “I’m happy to farm lot 1 for another 30 and 40 years seeing as it’s not developable,” referring to the quarry buffer?’ Mr Levinge said: ‘No, I don’t’^[244] (alleged conversation no 2(a)).

^[244] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104 XN.

355. Mr Levinge said that he did not recall Mr Montalto saying: 'If you take what I'm offering, I've given you twice what you have now' (alleged conversation no 2(b)).[\[245\]](#).

[\[245\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T104–T105 XN.

356. Mr Levinge said there was no discussion of the quarry buffer map affecting the Douglasses' land, which is immediately to the north of the Premier Bay land.[\[246\]](#).

[\[246\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T105 XN.

357. Mr Levinge denied that Mr Montalto said to him: 'I want lot 1 included in the concept plans, but it's not part of the development, but I want it included in the plan so it can be added in years to come after the quarry is gone' (alleged conversation no 2(c)).[\[247\]](#) Mr Levinge also said that there was no quarry on the land at that time.[\[248\]](#).

[\[247\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T 105 XN.

[\[248\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T105 XN.

358. It was also put to Mr Levinge that, around the end of 2011 or the beginning of 2012, Mr Montalto said to him each of his five preconditions to entering into the development agreement. Each was put to Mr Levinge and, in each case, he denied Mr Montalto said the condition (alleged conversation no 3).[\[249\]](#).

[\[249\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T105–106 XN.

359. Mr Levinge recalled a meeting in July 2012, which was held at the Settlement Road offices of Mr Montalto. Mr Montalto, Mr Brown, Mr Di Felice, Mr Dooling, Mr Hart (DFG's solicitor), and Mr Levinge were present at the meeting. Mr Levinge said that the meeting went through the development agreement, and that any issues held by Mr Montalto or the 'Premier Bay team' were raised during the meeting. Mr Brown raised GST and the effect of the flow of funds from the development, particularly around the application of the margin scheme. There were some questions around the borrowings, and the structure of the borrowings. Mr Levinge said that DFG explained the structure around any existing borrowings that were on titles of land that would be needed for security. There was discussion about cash flow and the matching of funds to the tax liabilities of the landowners. Mr Hay's project creation fee was discussed. Mr Levinge recalled that they requested the project creation fee be removed from the development agreement.^[250]

^[250] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T107 XN.

360. Mr Levinge again met with the Montalto family at the Settlement Road offices, on 19 October 2012, to update the family (Mr Montalto, Mauro, Lisa Montalto, and Mr Brown) on the progress of the development agreement and the work that DFG were doing to advance the land for planning approval. Mr Levinge said that there was no discussion about lot 1 not being developable, nor about whether lot 1 was developable. Mr Levinge said a document providing an estimate of the costs of the development^[251] was provided to the Montalto family and was used for the purposes of cash flow modelling.^[252]

^[251] CB 459.

^[252] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T108 XN.

361. Turning to the signing of the development agreement on 10 April 2013, Mr Levinge said that DFG signed the agreement at the Settlement Road offices on 10 April 2013. Mr Levinge said that Premier Bay had already signed the agreement, and that it had been held in escrow by Mr Hart.^[253] A development agreement with the Coralluzzos was signed, and the suite of documents representing the CUT arrangements were also signed.

^[253] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T109 XN.

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362. Mr Levinge denied that Mr Montalto or Mauro executed the development agreement at the meeting on 10 April 2013.
363. Mr Levinge said that, as well as himself, Mr Montalto, Mr Brown, Tony and Jenny Coralluzzo, their lawyer Peter Davis, Mr Di Felice, Bert Dennis, Mr Dooling, and Mr Hart were present at the 10 April 2013 meeting.
364. Mr Levinge expressly denied that, within the hearing distance of himself, Mr Montalto spoke to his solicitor from Sladen and asked: 'Have I got the free right to sell?' and 'Lot 1 is separate?' (alleged conversation no 4(a)).[\[254\]](#)

[\[254\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T110–T111 XN.

365. Mr Levinge expressly denied that he heard Mr Jeremiah (who he said was not present) say to Mr Montalto, 'Yes, you have the free right to sell. It's here,' and that he gestured towards the development agreement.[\[255\]](#)

[\[255\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T111 XN.

366. In relation to the guarantee and indemnity signed by Mauro, Mr Levinge said that Mauro did not ask why he had to give a guarantee and indemnity at the meeting.[\[256\]](#) Mr Levinge denied saying that the guarantee was just a precaution in case something happened to Mr Montalto, and also denied saying words to the effect of: '[i]t's not as though we're going to take your house or anything.'[\[257\]](#)

[\[256\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T110 XN.

[\[257\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T110 XN.

367. After the development agreement was executed, DFG held monthly update meetings with each of the landowners involved to keep them abreast of the progress DFG were making with the development; issues such as the resolution of servicing, infrastructure provisions, maximising the developable area, and the planning approval process were discussed.
368. Mr Levinge gave evidence that services such as sewerage and water would be coming along Donnybrook Road, to the west of Premier Bay's land. Mr Levinge explained that the services would be put into a reservation that ran parallel with Donnybrook Road, and there was a need to establish a servicing corridor by way of an easement over a portion of the land of the landowners' frontage to Donnybrook Road.
369. Mr Levinge said that discussions with the landowners about establishing the easement were held 'fairly constantly.'^[258] Mr Levinge said the easement would initially pass over the frontage of lot 1 and lot 2, and then at a time in the future through lot 3, and that this was discussed with Mr Montalto. Mr Levinge said that there were maps at the meetings relating to the service corridor, and said that the maps did not show that lot 1 was not developable.^[259]

^[258] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T113 XN.

^[259] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T113 XN.

370. Mr Levinge was taken to a landowners' report for February 2016.^[260] It contained many plans showing details of the development, including showing lot 1 as developed and a road traversing the Mirvac development to the west, across lot 1 and onto lot 2, called Hayes Hill Boulevard. Mr Levinge said that the report was part of a monthly update provided to landowners, and said that this particular report updated owners in detail on the progress of the development.^[261]

^[260] Exhibit P4.

^[261] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T113 XN.

371. Mr Levinge said that, at this meeting or at any other meeting up to February 2016, Mr Montalto did not say lot 1 was not developable.^[262]
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372. Mr Levinge attended day 11 of Panels Victoria on the PSP prepared by the Metropolitan Planning Authority in June 2016, where Panels Victoria heard submissions on the PSP, and were to make recommendations to the Metropolitan Planning Authority. In this instance, Panels Victoria endorsed the precinct plan and, following some minor amendments by the Municipal Planning Authority, went to the Minister for planning approval (who has since approved the plan), which would result in the rezoning of the land.
373. All of Premier Bay's land fell within the PSP. On that day, DFG were represented by Mr Stuart Morris QC. Present were Mr Montalto and other landowners, who were encouraged by DFG to attend. Mr Levinge said that Mr Montalto sat behind him with Mr Di Bella.
374. Mr Levinge said he was present at the meeting on 8 September 2016, where Mr Montalto raised his 'matters of concern' document. The meeting was held at Mr Montalto's office. Mr Elder, solicitor, was present, assisting Mr Montalto. Mr Levinge said that the others present were Ms Levinge, Ms Tran-Bursill, and Greg Bursill. Ms Tran-Bursill prepared a note of the meeting. [263] Mr Levinge said that the notes were accurate. [264]
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[263] Exhibit Pro.

[264] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T117 XN.

375. The note included the following about lot 1: [265]

Lot 1

- TM (Mr Montalto): I want to retain lot 1 free from encumbrances. PL (Mr Levinge): per my email, when we apply for bank funding we'll endeavour to raise funds against lots 2 and 3 only. PL explained per initial convo/email re APN. TM noted his emails have not come through for some days, he has not received PL's email re bank funding, he will go back to find and read it.
- TM okay to move existing securities from lot 3, he thinks NAB will cooperate. Mr Montalto aware of the FFR caveat over properties per DA.

- TM: since the PSP I've woken up to how my land is not free to sell, like a lease, I can't sell without DFG. I want lot 1 to be left out and free of encumbrances. PL: you're free to sell any of your properties at any time but our DA goes with the land.

[265] Exhibit P10.

376. It is relevant to observe that Mr Montalto is not recorded as asserting that he had agreed with DFG that lot 1 would not be included in the development, but that it would only be included in the concept plans. Rather, he says that he wants lot 1 to be left out, free of encumbrances.
377. The note confirms, consistently with Mr Montalto's list of complaints, that at the meeting, he did not contend that he and DFG had agreed that the development agreement would include the five preconditions, including that lot 1 was not to be included in the development.
378. The file note of the meeting covered four further areas of concern for Mr Montalto, with discussions recorded as follows:

Naming

- TM not happy that he has to obtain permission from Council for adoption of names, thought he could name streets and the Hill; as he wished, TM also not happy re commercial sites esp the fact that his neighbours have larger shops. Feels he has no control over where things go and the fact it's not his but Council's decision. PL: let's deal with the naming issues.
- GB (Mr Bursill): re names on PSP, these have no legal status, they are only proposed names and a process has to be undertaken before the names are officially accepted. We need to put submissions in to Council and the VPA. Council will apply their policy and there is no guarantee our names will be accepted, We'll need naming suggestions from the Montalto family in the coming weeks so that we can proceed with submissions.
- TM: wants DFG to make an application to Council for 'Montalto Hill.' TM wants DFG to provide him with a map so that he can consider street names. PL noted Council will not accept commercial names eg Floridaia.
- TO DO: GB will provide TM with a street plan and TM will provide naming suggestions.

Development of the Hill

- GB: the Hill is not a park. State Gov has corridor plan, approved by Cabinet, which has large areas protected for hill tops throughout Vic designed as

significant areas for protection from development. DFG made submissions to reduce the hill top area but the Govt didn't budge, protection of the hill is embedded in the corridor plan and will be very hard to remove. VPA will not move the urban growth boundary, so as to protect hill tops. We went through a 3 year process to get maximum development potential around the hill, that's the best we can do in terms of outcome given the policy constraints.

- TM: this issue has only come to my attention the last few days [sic], since the PSP, I've compared my situation with the neighbour's and they are developing their hill (in Hume). GB: I've worked on the PSP for that property, it was a different paradigm back then, a different Council. It was easier then but over time it's become harder as the regulations become more stringent.

Relocation of existing tenants & future farming building

- TM: this is all happening quite quickly and I need time to collect things, relocate sheds etc.
- PL: you have well over 12 months to move. We'll need a bit more time to remove asbestos etc and it needs to be done in accordance with Council regs. GB: we have to do a clean-up before we get permits, progressive clean up being negotiated and Council has an ex-EPA officer who's currently on leave so we're working on getting a negotiated outcome. Ashley (DFG). is a contamination scientists, he's working on discussions with Council and as assessment. First time we saw requirement was in November, we're doing standard assessments, there are so many issues on foot.
- TM wants detailed communications on this issues. He only found out when reading the PSP. TM thinks contamination on sheep dip would be low key issue, it hasn't been used for 40 years.
- PL: all farms being developed have issues, the clean-up can be done in stages if Council agrees, hopefully this will be a standard issue to be dealt with, without major disruptions. TM: felt as if he were walking around 'blindfolded' but now he knows the only issue is with the pit so he's not worried anymore. He's comfortable with prelim decontamination works.
- PL: re farm buildings, we'll progressively build the new buildings and you can move your stuff from the old building to new in the next 12 months. Moving is a development cost picked up by the Montalto land. TM wants to clarify re costs borne by consortium (next point in agenda).
- TM: Gina will be looking for a new property, has been offered one and TM is negotiating w [sic] vendor today. He'll 'stay cool' for a week or two, 'if it can happen good, I don't want to drown her.' If the purchase works out, we won't need to do anything. 'We can work on moving everything forward but re Gina just hold fire for a week or two.'
- PL talked about plans for DFH to build a house for Gina if she want to go down that path.

- TM mentioned he has a new iPad, his emails should come through that.

Consortium

- TM wanted to know what the CUT pays for, eg removal cots?
- PL: cost of individual development of each landowner's land is borne by the land owner individually. The \$2M planning costs will be recoverable from individual landowners on a percentage of sales proceeds. The consortium does not share costs, it's only an equalisation mechanism, so it benefits others when TM's land is developed and TM gets it back when the others are developed.
- TM: I've put myself on the line to help my neighbours, wasn't aware I would be bound for years. I thought the consortium would bear costs of development. My understanding of it then was the reverse to how you explain it works now. I thought the CUT was only to cover shortfalls. TM indicated he didn't want to be part of the CUT and will discuss with other owners to dissolve it. But in the next breath he said he was 'okay with bearing costs individually, so, good! If I don't need the hay shed, I save \$10K.'
- TM: If my neighbours went on their own, it would have taken them much longer. TM believes he 'allowed' the development to come and so should have seen some appreciation from his neighbours. Suggested his neighbours were beholden/indebted to him. If DFG adopted an alternative development sequence it would cost a lot more and TM wants to talk to his neighbours to discuss disbursement of cost savings. PL: do you want me to call and let them know? TM: yes, they can bring their lawyers to a CUT meeting and I'll bring mine.
- TM discussed his falling out with Colin Brown (PL: how did he explain the CUT to you, I thought he was your accountant for 40 years). TM: Colin Brown stopped talking to me. What happened, was it because you gave him a discount on his house? PL: yes, we gave him a discount, out of respect for you! TM related a story re fencing his cows, 'you don't know if the grass is greener on the other side,' inferring Colin Brown may have strayed / been paid by DFG. PL did not take the bait.
- PL: you need to call a CUT meeting, we're not a party so will not attend but happy to provide a meeting space if needed.
- Re fencing, Mirvac put in place a new fence on western boundary, TM said Douglasses are remiss in letting Mr Montalto know when his cows have escaped. PL: make sure you discuss this at the CUT meeting. PL suggested meeting be organised by TM following Sept landowners meeting.
- TM: confirmed he does not want to stop works.
- TM: Lou Farinotti at Holding Redlich is a family friend and TM wanted his to advise but he went into hospital and Rob Jeremiah handled the agreement, TM would have wanted Lou to look at the agreements, his daughters now work at

Holding Redlich. There are 'elements of doubt' he needs to clarify, eg whether Mr Montalto is free to sell.

- PL: 'free to sell with the contract that goes with the land' is the position as we understand it. PL said Mr Montalto needs to get his own advice. PL thought Victor Di Felice would have given Mr Montalto expert advice. WE (Mr Elder) said he didn't know Victor. PL spoke re lawyers acting for other landowners (John Young, Madgwicks etc). TM said he preferred to use Lou F, but he's just has a heart attack.

The meeting wrapped up with PL suggesting we meet fortnightly to talk through details of the project. 'If you've got questions Mr Montalto, we have to be here to answer them.'

NB: this is a summary of notes taken by ATB and BL, 2 sets of original handwritten notes are also kept on file.

379. The complaints of Mr Montalto, discussed at the 8 September 2016 meeting, relate to details of the development and disagreements with Mr Montalto's neighbours, such as other landowners having shopping centres on their land whereas Mr Montalto did not. It seems to me that when he studied the development in detail, Mr Montalto thought that he was being unfairly treated compared with other landowners.
380. One would have thought that, if Mr Montalto believed the facts to be as he pleaded and as he gave evidence, then the fundamental complaint would be that lot 1 was not to be included in the land to be developed.
381. Mr Levinge referred to another meeting held on 13 October 2016, at which Mr Montalto, Mr Elder, Mr Levinge, Mr Bursill, Ms Levinge, and Ms Tran-Bursill attended. Ms Tran-Bursill again prepared a record of the meeting, copied below.^[266] Mr Levinge said that the notes are an accurate record of the meeting.^[267]

^[266] Exhibit P11.

^[267] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T117 XN.

DENNIS FAMILY

FILE NOTE:

CONFIDENTIAL & PRIVILEGED

Author: Anna Tran-Bursill

Event: Meeting with Mr Montalto at Floridaia

Attendees: Mr Montalto (TM), Will Elder of Phillip Wilkins (WE), Peter Levinge (PL), Greg Bursill (GB), Bonnie Levinge (BL), Anna Tran-Bursill (ATB)

Date: 10:30am – 12:30pm, 13 October 2016

Meeting was structured around attached Agenda.

Item 1 - Infrastructure costs. apportionment

- PL: net cost for the sewerage Infrastructure will be around \$250 per lot, that's for the asset from Koukoura Dr to the railway line. On our current est. the total works are likely to cost \$11.7M with \$10.6M being reimbursed by YVW. Mirvac will pay 50% of net cost after reimbursement. Net cost to DFG will be approx. \$725K to be borne by Peppercorn Hill and Donnybrae, this is apportioned based on title area. Note these are estimates only, we are currently going to tender.
- Tom [TM] not happy about 'freekick' to Di Bella and Monteleone. GB explained there were formerly mechanisms for Infrastructure cost sharing but these no longer apply, govt deemed too complex to administer. It's no longer possible to force Di Bella and Monteleone to contribute towards the asset.
- GB explained how the compulsory acquisition process would work for YVW to obtain easements over the service corridor along Donnybrook Rd for construction of the sewer over Di Bella and Monteleone land. YVW will soon be serving notice to these owners to acquire the easement. A compensation process will follow. YVW will estimate the change in value of the land to be acquired and if less than 10% they will acquire as of right. As soon as the acquisition is triggered we will get our contractors and consultants onto the easement land to commence construction. There will be a 50m open cut., they will only bore when needed since it's in everyone's interest to minimise costs and most costs are borne by YVW so they will be keen to minimise boring where possible. Every active developer will be contributing: Peppercorn H, Donnybrae, Mirvac. For developers the costs are essentially bring forward costs since most of the construction costs are paid for by YVW.
- TM: accepts he bears the bring forward costs along Donnybrook Rd with other active developers. But what happens if Di Bella and Monteleone come along after the asset is built and tries to plug in without contributing? GB explained how infrastructure deed process works: Once the 450 mark triggers construction of the main sewer, say down Darebin Creek, YVW will then enter into a deed with the developer, who then enters into cost share agreements with other developers to work out a fair contribution. There are many different factors at play which force developers to cut deals, each in their best interest. Contributions are usually made only if landowners are developing in unison, timing is everything. If the other landowner is happy to wait 10 years then that's his choice and it's a different story.

· TM: OK, but I want to know if Coralluzzo and Douglas will contribute. GB: Douglas won't come on for a long time, we don't think there'll be a contribution from them because It's a natural subdivision sewer, part of the. subdivision stage works. Yes they'll feed Into the main sewer but we're talking about 8 years from now. Also we're talking about small net costs, whereas the deeper main sewer is more costly. PL: understand it's unpalatable for you Mr Montalto, and the Di Bella and Monteleone free kick is much more unpalatable. TM: \$700K doesn't sound like much but it's money. PL: yes, but it gets. you in and it gets you developing. GB: this happens a lot all over the place, when someone doesn't need the infrastructure, they don't contribute, it's all about timing and self-interest.

· TM: I got into this project to help my neighbours, but they're not putting anything towards it, I'm footing costs. If Douglas wants to wait, let him wait, if I don't build he'll wait 17 years! I understand with the main (sewer) line we're getting reimbursed and it's a benefit and I'm ok with that, but the others are free-riding. I wanted to ride this out too but I got into this to help Douglasses at the back, and now I'm wearing the extra costs, a dollar here and there...

· PL: I understand your point, but you'll need to discuss this with the CUT members.

· TM: I went to see Rob Jeremiah, he said we need to sit down and look at all these aspects to resolve this.

· PL: I suggest you call a meeting of the CUT members, let us know what you decide to do and we'll get on with it.

· TM: I'm not clear on how the mechanism for buying back commercial land works. PL: we can get back to you regarding the mechanism, we'll take that on notice.

· TM and WE confirmed Rob Jeremiah (Sladens) has explained the various mechanisms under the DA and CUT around subscription sum, net residual, development and project management fees. WE said Rob's explanations were consistent with those given by PL In earlier discussions.

· TM: all these bits and pieces are complicated, but essentially anything you spend on my land Is charged to me? PL: that's right, but our outcomes are aligned. If you like we can set out all the significant costs items and you can get Santo involved in the process, we want to get to a point where 'you're comfortable and our outcomes are aligned. WE: keeping in mind Tom [TM] does not want to be seen as a land developer. TM: yes but I'm picking up the costs. PL: noted, but we're aligned in terms of the outcome. If you do things on the cheap you won't get good prices, we know this from experience. We can show you how the big developers do It and we're happy to take you and your family and advisors on the road to see other developments, you can see how it's done and what Peppercorn Hill might look like. It all depends on how involved you want to be and we're happy to work with you.

Item 1 - Commercial properties

- GB: the exhibited plans had an Aldi-type shop but we ended up with a 4000sqm supermarket on your land and you have a third of the total retail. The main difference with Coralluzzo is he has DDS, otherwise you're generally equal. We understand from our retail experts that it will be about 10 or 11 years before the first supermarket will be viable (10,000 residents). Mirvac's supermarket is closer to Donnybrook Rd, the expert evidence at the panel hearing was that theirs will be the first supermarket to get going. Once we get up to the north in about 11 years' time, we'll get enough in the catchment area to be viable. PL: it's 10 years to get the catchment and then another 10 years to become cash flow positive, it's a long term investment Mr Montalto (using Manor Lakes as an example). so-even if your supermarket was the first to go, it wouldn't be cash flow positive for 20 years. GB; probably more like 16 years to become viable, since we would need another development to take off. Ultimately it will work well but it will take a long time. DDS will be more like 20 years to get viable (needs 40,000 residents absolute minimum). DDS's are now a lot weaker, K-Marts are really the only ones working well.
- PL: supermarkets net \$370/sqm rent and DDS's (eg K Mart) only \$160/sqm. You say 'they get all the land' but Mr Montalto, the highest and best use is still residential. TM: It's a legit point...now I'm getting more info.
- GB: developers used to make planning decisions but now it's government. Decisions are made in closed rooms, the Authority hears our submissions and we make best endeavours to push hard for our landowners, we got you the supermarket Tom. PL: and your grandchildren will have grandchildren before it's cashflow positive! DDS may never be viable. The highest and best use will still be residential Mr Montalto. TM: okay move on.

Item 1 - Civil works fencing

- BL: we're getting castings for stock appropriate fencing per your request at our last meeting. TM: the usual temporary fencing (modular panels) won't do and I'm happy to pay a bit extra to hold my cattle in, so when the sewer works are done I can use the 50m buffer to graze my cattle. BL to request project team to quote on permanent cyclone fencing.

Item 1 - Farm access etc

- PL: we can renovate the double storey for \$100K or we can relocate Gina and build her a house. TM: I don't want to spend if I don't need to. Will talk to Rob Jeremiah about the tax side of things, farming deductions etc.. I'll let you know in a fortnight what I want to spend on.
- BL: OK but we're going to sever the road access for construction to start in March/April and we'll need to apply for an alternative access permit, which could take months. TM: okay then, you can apply for the permit. [TM agreed on proposed access route for permit as shown on plans]. TM: so Gina has 12

months? PL: 1 July 2017. GB: when civil works start it will all be fenced off and you won't be able to drive through site, OHS etc.

- TM: If we build a house for Gina who pays? Who will own it? PL: we'll take that on notice and get back to you.
- BL presented TM with a proposed alternate access road to the double storey house and new sheds I yards. TM accepted the map and agreed to access point coming off Donnybrook Rd. The location of the track on the property can be amended if required. GB/BL to advise planning team to submit permit application for access point of Donnybrook Rd.
- Re renovations to the double storey: TM will decide in the next couple of weeks if DFC is to carry out works. TM agreed that DFC would start 'putting a plan together' (PL) for the renovation of the double storey house.
- Re cattle yards: TM will work towards finalising next couple of weeks.
- Re bore: TM won't need anything fancy, a small electric pump will do. The water quality is good but it can change a bit from time to time. Approximately 49m deep, power from the shearing shed.
- Re Mirvac: GB discussed possible acquisition of a triangle on Mr Montalto's land to construct a permanent drainage asset to service Mirvac's development. Mirvac has not approached DFG formally so we're assuming they are going with a temporary asset for now. If the permanent asset is required Melb Water may compulsorily acquire, there will be a valuation which we can dispute, we'll help Tom [TM] with the process when we cross that bridge.
- TM shifted conversation towards his current issue with Sladens. TM says he wasn't told about a potential conflict when Sladens took instructions from a prospective purchaser for his McKimmies Rd land. The Sladens partner, when she found out that TM had an appointment with R Jeremiah on a separate matter, intervened and tried to cancel the appointment. TM extremely upset and cancelled the sale, but TM still using R Jeremiah for tax advice. WE indicated he has been attending briefings at Sladens with Mr Montalto.

Item 2 - Valuation cash flow update

- PL: CBRE are doing bank valuations on lots 2 and 3 (possibly 1 as well), and also for Martins land. We should get CBRE's valuations back in a week's time or thereabouts.
- PL took TM and WE through the valuation flowchart and processes we need to go through before we can provide numbers to APN or other valuers. Complicated process due to the interconnectedness between Tom's [TM's] land, the CUT and other landowner DAs. We'll need numbers for all 3 landowners (revenue projections, cost estimates, value of future retail/school /community centre). This work is under way and should be done by late Nov.

· PL/AT: We'll need written authorisation from CUT members to allow us to incorporate information under the CUT and other landowner DA's into our cashflows, and for this to be disclosed to APN or other valuers. PL: Separately, we'll need to prepare NDAs for signing. APN. Plus if Tom is disclosing to his real estate agents, we'll need a stiff NDA to be signed by the agents), they will need to indemnify DFG for any loss. I don't trust any of them and we are disclosing our and our landowners' sensitive commercial information and IP. We'll also need Tom to Indemnify us under the NDA if the agents cause loss to DFG or our landowners. WE: quantum in dollar terms? PL: potentially hundreds of millions.

· TM: Rob Jeremiah and I spoke about Lot 1 being separate from the others and reserving my right to on-sell Lot 1. If you start in Feb on Lot 2, you'll have work for 4-5 years. If I then decide I don't want to develop Lot 3, I don't have this option because the CUT agreement ties me to you. I want each Lot to be on its own. If I want to sell the whole farm, can I sell? PL: you're free to sell but the land will be sold with an encumbrance, for lack of a better word, being our Development Agreement. TM: this has got out of hand because I'm not free to sell, we're attached whether we like it or not! PL: we've always said you're free to sell but our DA goes with the land. TM: I thought I'd just have to pay you for your work. PL: no Tom, we're not in business of paying millions to enhance our partners' land, and then be paid a service fee like a contractor. The whole premise for us coming to you was to bring forward the development, to do this we had to aggregate a group of owners working together and this resulted in a significant uplift of your land *today* and not in 7 or 8 years. We are entitled to a share of the uplift. Part and parcel of the arrangement was that if you sell, we get to partner with the new land owners. Equally *we* can't sell to say Stockland, if they come to us and say you've done such a great job we'll take over thanks, or to a Chinese developer for that matter. TM: I guess I'll have to sit down with Rob Jeremiah and get his advice, to have a clearer understanding... PL: you own your land and always will, if you sell we get to work with the new owner. TM: now I understand I can't have a simple sale, I can't just go to auction... PL: that's right. TM: I'm going to tell Rob Jeremiah to prioritise this, it's more important than McKimmies Rd. If I get Montalto Hill [as a location name] then maybe...I'd want the highest bidder to buy... PL: we have an interest in the land Tom [TM]. TM: yes, while we get along, but how to split if we don't? PL: that's how lawyers get rich Tom. TM: I got involved to help everybody and now I'm paying and everybody is benefitting, they just join on. PL: the CUT says you'll get a benefit when they develop their land.

· TM queried why the GAIC costs schedule shows different amounts for his land vs Coralluzzo/Delma land (Montalto \$181K/lot, Coralluzzo \$191K/lot and Delma \$161K/lot). GB explained GAIC fees are a flat fee spread across the land area, so where the lot mix is denser, the fees are lower and where there are larger lots, the fees are higher on a per lot basis. For Montalto the GAIC fees are arrived at by taking out the Darebin Creek and Hill areas, then divided by the number of lots. The Coralluzzo lots are larger so the GAIC charge is higher.

- PL: we'll get back to you with the process for valuation so you can get Rob Jeremiah to advise and we'll go from there. WE: okay. PL: we'll also send you the bank valuations, you won't like the numbers. Santo will need to be across all this. We've done the same thing with Davis and Ashbury landowners. We understand you're frustrated but hopefully you'll be happier when you understand the process better.

Item 3 - Mortgages

- PL: we have received an indicative proposal from NAB. As we said we'd do, Lot 1 is unencumbered for bank funding purposes and Lots 2 and 3 will get us to the \$80M mark on bank valuation so we should be right. There is an existing NAB facility on Lot 3 which can probably stay, hopefully this will make life easier for you.
- Brief mention of funding for construction of the sewer- WE confirmed he received DFG mortgage documents from ABL.
- TM: Ok, that ties me up for the whole of Lots 2 and 3, I realise that, but not happy the CUT will be sharing my money for Lot 2 yet they're not contributing. PL: well you won't be contributing when it's their turn to develop their land later. They'll have costs on their projects that you won't have to worry about. TM: then that's a reason to get out of the CUT. PL: that's an issue for you and the CUT members. Recalled Bert's thoughts were, Yes, Montalto is the first to go but you'll get the benefit of the arrangements down the track. TM: I did it to secure the benefit for my children, so they can't get into dispute, and Coralluzzo did the same, I don't want to create problems for the next generation. I have to keep looking at the issues, ask questions... PL: understood.
- PL: we're happy with progress re NAB, where we are at and their indicative rates. Their State Manager Mark Power will deal with this and you'll meet him. He doesn't have any other landowner relationships. As you know unless we get funding it's all academic.

Item 4 - Street/landmark naming

- TM needs another couple of weeks to come to a conclusion, some family members are overseas and some are unwell. He has been speaking to someone in the 'department of names' about prospects. BL: the issue has now become extremely urgent. We need names for at least a couple of streets, otherwise we won't get planning approval, TM: will revert asap.

Item 5 - CUT

- We have covered this issue. TM asked If the CUT were disbanded tomorrow would it affect DFC? ATB: the CUT does not affect the rights/obligations of DFG under the DA with Tom.

Item 6 - House & farm relocation

- This Issue was covered under Item 1.

Item 7 - Project accounts

- PL: Our monthly reports have covered planning and development issues. If you want financials we are happy to work with Santo, he can come and look at our books anytime and we can provide reports in any formats you/Santo want. Note WE mindful that Tom is not a developer.

Item 8 - DELWP offsets

- GB: we need a standard DELWP form signed by the landowner to apply for staged payments of offset costs. TM, receiving the prepared form: I'll get John [Macmillan] to look at, he's away until next week. GB: please get the form back to us end of next week, there'll be a lot of this type of admin paperwork on the way.

Item 9 - Road construction

- BL: we just wanted to let you know that within the same construction footprint for the sewer we will also start constructing a road to access the property, around February. BL gave Tom [TM] the road construction plans for his info. TM accepted the map and acknowledged the road construction footprint.

Item 10 - Farm clean up etc

- TM was informed our clean up contractors will need to start Monday week (24 October), there will be trucks, excavators, they will dig out the sheep dip and take away asbestos etc. They will then test the soil and if tests come back negative they will fill the holes and leave. If further tests are required - they will leave the holes and keep working towards getting the site clean per Council's processes. TM: okay.
- BL: Tardis will also be coming out to work on their dig for archaeological artefacts, there will be 4 to 8 vehicles, a portaloos, they may be there 4-5 weeks. We'll let you have dates. TM: okay.

Item 11 - Other business

- GB: last point, yesterday I had a discussion with the Catholic schools people, they are keen to acquire but not too early, about 8 years from now maybe. They generally get on board once there are roads, services etc. We'll keep talking to them every 6 months. They may be interested in having a parish/aged care facility as well, up to iha, but we don't have to agree, we won't transact if the value is not agreed.
- At this point WE indicated he thought we had covered all issues and was okay for the meeting to wrap up. But TM wasn't finished. He continued circling back on the points made earlier In the meeting:

- o TM: I just want Lot 1 totally free but It's tied. If I decide to on-sell I haven't got the ability, I'll need to sit down with Rob Jeremiah and walk through my options.
- o TM: Re CUT, everything on my land is my cost, I need to sit down with Douglasses and Coralluzzo and look at our avenues. PL: yes I'll leave It up to you guys to have that discussion. TM: I'll organise a meeting here and they can bring their accountants and lawyers, sort It out and see where it ends up.
- o TM: I'll need to identify what's written in the contracts and talk to Rob and get John to look at the situation, I want to know how I can break for lot 1. PL: we're not breaking lot 1 Tom. You'll need to make sure you're getting good legal advice, but I can say now, it's not on our agenda that we proceed without lot 1. TM: what if I want to keep farming on lot 1 for 40 years? PL: we're not going to answer a hypothetical. You'll need to come back to us with a suggestion and we can look at it. We are in the business of development, we're not a project manager. TM: I want to be in agreement before we turn earth. My Dad taught me to argue 100 times before, not after, if we're going to have a dispute I want it to be before and not after. I want things to be clear and simple. PL: Hopefully it will be clear, but it won't be simple Tom.
- Agreed items going forward:
 - o TM will organise a CUT meeting
 - o PL will advise re valuation process and next steps from DFC' perspective, in preparation for TM to discuss options with RJ
 - o TM will seek legal and tax advice and revert re his position.

The meeting ended at approx. 12:30pm.

NB: this is a summary of notes taken by ATB and BL, 2 sets of original handwritten notes are also kept on file.

382. The notes are lengthy. They include a discussion about lot 1. It is useful to set out again that Mr Montalto is recorded as saying: 'Rob Jeremiah and I spoke about lot 1 being separate from the others and reserving my rights to on-sell lot 1. ... If I want to sell the whole farm, can I sell? PL: you're free to sell but the land will be sold with an encumbrance, for lack of a better word, being our development agreement. ... TM ... I want to know how I can break for Lot 1. PL: we're not breaking Lot 1 Mr Montalto. You'll need to make sure you're getting good legal advice, but I can say now, it's not on our agenda to proceed without Lot 1. TM what if I want to keep farming on Lot 1 for 40 years? PL: we're not going to answer a hypothetical. You'll need to come back to us with a suggestion and we can look at it.'

383. Mr Montalto denied that the notes were an accurate record of what was said.[\[268\]](#)

[268] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T523–529 XXN.

384. Again, it is relevant to note from the file note, that Mr Montalto does not contend that he agreed with DFG that lot 1 would not be included in the development and would only be included in the concept plan. Although I note that, in cross-examination, Mr Montalto said that he thought he could sell lot 1 after paying DFG for their work.[269]
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[269] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T526 XXN.

385. Mr Levinge was taken to a plan entitled, 'Phasing Peppercorn Hill PEPPERCORN HILL.' [270] Mr Levinge explained that the development was planned to be carried out in stages and that, primarily, lot 2 would be developed first, which would ultimately require drainage infrastructure to be built on lot 3. DFG would then progress to developing the Coralluzzos' land, lot 3 of the Premier Bay land, the Delma land, and lot 1. Mr Levinge explained that the infrastructure services would require a corridor to be used on the south boundary of lot 1, where access would be required in the early stages of the development, lot 1 would also be required for drainage as part of commencement of the lot 2 development, and for the neighbouring Mirvac development,
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[270] CB 688.

386. At the conclusion of Mr Levinge's evidence in chief, Mr Peters announced that he and Mr Anderson had agreed that DFG have incurred substantial sums (in the millions of dollars) on the development, on the assumption it includes lot 1.

Cross-examination of Mr Levinge

387. Under cross-examination, Mr Levinge said that, in 2010, he did not discuss with Mr Montalto whether he would put his land into the development.[271] Mr Anderson suggested that this was because lot 1 was not developable. Mr Levinge denied this.[272] Mr Levinge denied ever having a discussion with Mr Montalto about the buffer zone.[273]
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[\[271\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T128 XXN.

[\[272\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T128 XXN.

[\[273\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T128–129 XXN.

388. Mr Levinge confirmed that the quarry buffer map was part of a ‘leave behind’ for the landowners, from the December 2010 presentation. Mr Levinge said that it was not part of the presentation.[\[274\]](#) Mr Levinge said that there was no discussion of the quarry buffer at the presentation of 15 December 2010.[\[275\]](#) Mr Levinge said that it was a possibility, at this time, that Boral would apply for a licence to extract minerals from the Boral land site.[\[276\]](#)
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[\[274\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T124 XXN.

[\[275\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T127 XXN.

[\[276\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T127–128 XXN.

389. Mr Levinge said that, over the next few months, he had ascertained from Boral that it did not intend to apply for a quarry permit on its land and that it proposed to sell it.[\[277\]](#) As has been discussed, the land was purchased by Mirvac. Mr Levinge said that he did not speak to Mr Montalto about Boral or his discussions with Boral. Mr Levinge agreed that, as at December 2010, DFG did not know whether the land that fell within the potential buffer zone could or could not be developed;[\[278\]](#) however, Mr Levinge said that he did not meet with Mr Montalto in 2010.[\[279\]](#)
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[\[277\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T170 XXN.

[\[278\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T130 XXN.

[\[279\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T129 XXN.

390. After Mr Montalto signed the exclusivity and confidentiality agreement, on 6 July 2011, Mr Levinge sent an email dated 7 July 2011 to members of DFG discussing the Donnybrook development. The email attached a copy of a map and stated that: ‘a map of the area is attached. Please ignore quarry buffer outline. Boral conceded in a recent meeting with Grant and I, that they would not be looking to quarry but use it as leverage to obtain a quarry permit for another site.’^[280]

^[280] Exhibit P2.

391. Premier Bay and Mr Montalto contend that DFG knew, at the time they executed the development agreement, that Mr Montalto understood, that under the terms of the development agreement, lot 1 was not to be developed. It is submitted that the Court should make that finding for either of two alternative reasons. First, that Mr Levinge gave evidence that Mr Montalto told him of his ‘critical condition;’^[281] namely, that lot 1 be included in the development, and be subject to the development agreement only to the extent that lot 1 would be included in the initial concept stage of the development. As is set out above, this is said to be one of Mr Montalto’s five preconditions.^[282]

^[281] The first and second defendants refer to: Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T156–T157; T158; T187 XXN.

^[282] First and Second Defendants’ Written Outline of Submissions dated 21 November 2017 [6(k)].

392. Secondly, Premier Bay and Mr Montalto submit that, at the meeting on 10 April 2013, DFG must have heard Mr Montalto say to Mr Di Felice: ‘As long as you’ve got my special clauses in there and the right to sell, we’ll be right.’ It is also contended that, like Mr Brown, DFG must also have heard Mr Di Felice reply: ‘It’s in the agreement.’^[283]

^[283] First and Second Defendants’ Written Outline of Submissions dated 21 November 2017 [6(k)].

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393. Further, Premier Bay and Mr Montalto contend that Mr Levinge admitted that Mr Montalto had said to him, words to the effect that, lot 1 was to be included in the preliminary concept stage.
394. It is necessary to set out the transcript of this cross examination of Mr Levinge, as it puts a different construction on what was said to that suggested on behalf of Mr Montalto.[\[284\]](#)
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[\[284\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T155–T162 XXN.

MR ANDERSON: Mr Montalto at this time, you knew that he believed as at the end of 2011 that the buffer zone still applied to lot 1; you knew that was his state of mind, didn't you?

MR LEVINGE: I don't know what Mr Montalto believed.

MR ANDERSON: He discussed it with you, didn't he?

MR LEVINGE: Not with me.

MR ANDERSON: I suggest you did in these conversations, he said to you, 'Lot 1 is not developable because of the buffer. I'll put in lots 2 and 3 to the development and I'll farm lot 1'?

MR LEVINGE: No.

MR ANDERSON: And he said, 'I'll farm lot 1 for the next 30 or 40 years'?

MR LEVINGE: No.

MR ANDERSON: He did say, though, that what he wanted was lot 1 to be part of the initial concept plan; do you recall him saying that?

MR LEVINGE: Yes.

MR ANDERSON: Because what he didn't want to find is that down the track if the buffer zone was removed that all the planning process would have to be gone through for lot 1 and lot 1 only; he wanted to avoid that, didn't he?

MR LEVINGE: Nothing in relation to the buffer zone.

MR ANDERSON: He told you that he wanted lot 1 in the initial concept plan; he told you that, didn't he?

MR LEVINGE: In a roundabout way.

MR ANDERSON: He's not a planning expert like you, is he?

MR LEVINGE: I'm not a planning expert.

MR ANDERSON: You are an experienced developer. How many billions of dollars of land have you developed, Mr Levinge?

MR LEVINGE: I have no idea.

MR ANDERSON: More than one billion?

MR LEVINGE: One million?

MR ANDERSON: One billion?

MR LEVINGE: Probably not, no.

MR ANDERSON: More than half a billion?

MR LEVINGE: Yes.

MR ANDERSON: Sounds like you are pretty experienced in property development. You knew that Mr Montalto wasn't experienced in the way in which a subdivision of this magnitude would be undertaken; you knew that?

MR LEVINGE: Yes.

MR ANDERSON: You also knew as at the end of 2011 that he believed that lot 1 could not be developed?

MR LEVINGE: No, I did not.

MR ANDERSON: Because of what he said to you?

MR LEVINGE: He did not say that.

MR ANDERSON: And he did say to you, and you agree as I understand your evidence, 'We are going to include lot 1 as part of the initial concept plan'?

MR LEVINGE: Yes.

MR ANDERSON: He never agreed to put lot 1 into the development to be developed along with lots 2 and 3, did he?

MR LEVINGE: Yes, he did.

MR ANDERSON: What he said to you at these meetings is that he would offer lots 2 and 3 into the development on five conditions, I suggest to you?

MR LEVINGE: No.

MR ANDERSON: He never said it to you?

MR LEVINGE: Never.

MR ANDERSON: I suggest to you he discussed with you relocating the tenant on lot 2, Ms Webling?

MR LEVINGE: No.

MR ANDERSON: Never discussed at all?

MR LEVINGE: No.

MR ANDERSON: Did he ever discuss the tenant on lot 2 with you?

MR LEVINGE: He discussed the caretaker in the double-storey house on lot 1.

MR ANDERSON: I suggest to you he discussed with you Ms Webling, who manages the farm for him?

MR LEVINGE: Not with me.

MR ANDERSON: Not with you?

MR LEVINGE: No.

MR ANDERSON: Do you know who Ms Webling is?

MR LEVINGE: I do now.

MR ANDERSON: And where does she reside, as you understand?

MR LEVINGE: She resides on lot 2.

MR ANDERSON: And what he discussed is, 'We're going to have to relocate Ms Webling from lot 2 to lot 1 when you develop lot 2.' That's what he discussed with you?

MR LEVINGE: At what time is that?

MR ANDERSON: This is the end of 2011?

MR LEVINGE: No.

MR ANDERSON: Because he told you that Ms Webling had and her family had managed the farm for not only Mr Montalto but also for his father; he told you that, didn't he?

MR LEVINGE: Not at that time, no.

MR ANDERSON: He subsequently told you?

MR LEVINGE: Yes, he did.

MR ANDERSON: He subsequently told you, did he, how important it was to him that Ms Webling's interests be looked after and that she be relocated to lot 1?

MR LEVINGE: Yes, in 2016.

MR ANDERSON: I suggest to you he told you at the end of 2011?

MR LEVINGE: No.

MR ANDERSON: He also told you that he intended to farm lot 1, continue to farm lot 1 for the next 30 to 40 years?

MR LEVINGE: No.

MR ANDERSON: And you have agreed with me that he said that he wanted lot 1 included in the preliminary concept plan; you agree with that?

MR LEVINGE: Yes.

MR ANDERSON: He told you that, and you agreed to that?

MR LEVINGE: No, we didn't.

MR ANDERSON: You didn't agree to that?

MR LEVINGE: Not as a concept — not to be left out of the development plan. Not to be left out of the development agreement.

MR ANDERSON: I suggest to you that he said he was happy to have it in there as preliminary drawings in the concept plans but not for any other purpose?

MR LEVINGE: We never agreed to not include lot 1 in the development agreement.

...

LUNCHEON ADJOURNMENT

...

MR ANDERSON: Mr Levinge, just prior to the break for the luncheon adjournment I was asking you about a number of conditions, I suggest, that Mr Montalto put to you as being conditions on which he offered to put in lots 2 and 3 into the development agreement. Do you recall me asking you questions along those lines?

MR LEVINGE: Yes.

MR ANDERSON: I want to ask you about some other conditions he put to you, I suggest. He also discussed with you and said that he would offer to put lots 2 and 3 into the development agreement on the condition that he retained a right of sale in relation to lot 1 and that he could sell that unencumbered at any time he wished. Do you recall him discussing that with you?

MR LEVINGE: Yes.

MR ANDERSON: He told you that he wanted the ability to be able to have lot 1 unencumbered and free to sell at any time should he choose in case he needed to raise finance for his cheese manufacturing business; do you recall that?

MR LEVINGE: Yes.

MR ANDERSON: And he said to you he also wanted to have the ability to sell a small parcel of land in lots 2 and 3 which were part of the development; do you recall that?

MR LEVINGE: No.

MR ANDERSON: You don't. I suggest to you he did say that he wanted to have that ability to sell a small parcel of land in relation to lots 2 and 3. Do you reject that or you can't recall?

MR LEVINGE: I reject that.

MR ANDERSON: But you didn't take any notes of these discussions you had with Mr Montalto, did you?

MR LEVINGE: No.

MR ANDERSON: So the evidence you are giving is based on your best recollection to His Honour; correct?

MR LEVINGE: Yes

...

MR ANDERSON: Mr Montalto also said to you that he wanted the Montalto name used in relation to the hill on lot 1 and as many other streets as possible in the development; is that right?

MR LEVINGE: No.

MR ANDERSON: I suggest to you he said he wanted the name in the Montalto Hill used — sorry, I put that badly. He wanted the use of the name Montalto used in the concept plans for the hill for lot 1. That's what he asked of you, is it not?

MR LEVINGE: No.

MR ANDERSON: And he said that he wanted his family to be remembered as having been connected with the land, including the hill, and that's why he wanted the name Montalto used as often as possible; do you recall that?

MR LEVINGE: No.

MR ANDERSON: You don't recall any discussion at all about using the Montalto name; is that correct?

MR LEVINGE: Not until mid-2016.

MR ANDERSON: So your evidence to His Honour is at no time prior to that did Mr Montalto ever discuss with you using the Montalto name?

MR LEVINGE: No. That's correct.

...

MR ANDERSON: I suggest to you at the end of this discussion that Mr Montalto had with you and Mr Dooling, you said words to the effect that you thought you 'could work with the proposal, Tom,' or you thought you 'could work with that, Tom,' and you agreed to the five conditions that I've just put to you?

MR LEVINGE: No.

MR ANDERSON: All right. Do you agree with me that at all times lot 1 was to be treated separately from lots 2 and 3?

MR LEVINGE: No.

MR ANDERSON: I suggest to you that at all times it was to be treated separately. You disagree with that?

MR LEVINGE: Yes.

MR ANDERSON: And it was going to be treated separately for a number of reasons, including the fact that Mr Montalto was going to farm the land. That's why it had to be treated separately to lots 2 and 3. That's correct, isn't it?

MR LEVINGE: No.

395. The further evidence that Premier Bay and Mr Montalto rely on appears at Transcript 187, and concerns the meeting that Mr Levinge attended in September 2016, when Mr Montalto raised his concerns about the development agreement and naming rights.

396. The relevant evidence of what took place at that meeting in September 2016 was as follows:[\[285\]](#)

MR ANDERSON: He raised with you, 'My request for lot 1 to be left out but also incorporated in the plans'?

MR LEVINGE: Yes.

MR ANDERSON: This was the issue that he had raised with you at the end of 2011 and the start of 2012. He was happy for lot 1 to be included for the purpose of the concept plan, but not to be included in the development. That's what he raised with you, wasn't it?

MR LEVINGE: That was part of the negotiations.

MR ANDERSON: And he said, 'If you agree to leaving lot 1 out save for the initial concept plan and agree to my five conditions, I'll put lots 2 and 3 in'?

MR LEVINGE: No.

[285] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T187 XXN.

397. In my opinion, Mr Levinge's evidence did not support Mr Montalto's case that he believed lot 1 was not included in the development agreement to be developed. The evidence of Mr Levinge contradicts Mr Montalto's evidence that Mr Levinge agreed that lot 1 would be excluded from the land to be developed and be included only in the concept plan for planning purposes.
398. The evidence set out above merely confirms the complaint that Mr Montalto made in September 2016; it does not support the contention that, in late 2011 or early 2012, DFG understood that Mr Montalto believed that lot 1 was not to be included in the land to be developed, but was only to be included in the initial concept plans. Further, the evidence does not support Mr Montalto's evidence that Mr Levinge agreed to Mr Montalto's offer to only put lots 2 and 3 into the development, and to include lot 1 in the concept plans only.
399. Mr Levinge was cross-examined about what he had heard at the signing meeting, on 10 April 2013, at Mr Montalto's office. As mentioned above, this is the alternate basis on which Premier Bay and Mr Montalto contend that the Court should find that DFG understood that Mr Montalto mistakenly believed that, under the terms of the development agreement, lot 1 was not to be developed.[286]

[286] First and Second Defendants' Written Outline of Submissions, 21 November 2017 [6(k)].

400. As this evidence is critical to Premier Bay and Mr Montalto's case, I will set out the exchange in full. After discussing who was present at the meeting, Mr Levinge was asked:[287]

[287] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T181-183 XXN.

MR ANDERSON: But you don't have a precise recollection of where everyone was sitting?

MR LEVINGE: No.

MR ANDERSON: So I suggest to you that you were not privy to all of the discussion that was taking place between Mr [] Montalto and Mr Di Felice?

MR LEVINGE: Correct.

MR ANDERSON: You didn't hear what they were talking about because you were further down the table; correct?

MR LEVINGE: Correct.

MR ANDERSON: And similarly your function of being there was really to sign off what in your mind was a done deal; would you agree with that?

MR LEVINGE: Yes.

MR ANDERSON: And it was a matter of really — it was more PR for you than anything else?

MR LEVINGE: No, it was the execution of documents.

MR ANDERSON: At this meeting you don't recall the precise words that were spoken by anyone, do you?

MR LEVINGE: No.

MR ANDERSON: And there's no file note that you've had access to that would assist your recollection in giving your evidence here today about that?

MR LEVINGE: No.

MR ANDERSON: So there's things that may have occurred and been said that you don't recall; correct?

MR LEVINGE: Yes.

MR ANDERSON: Because we're talking about something that happened many years or a number of years ago, 10 April 2013, aren't we?

MR LEVINGE: Correct.

MR ANDERSON: And even doing the best as you can, you may be mistaken about your recollection; would you agree with that?

MR LEVINGE: With some minor facts, yes.

MR ANDERSON: I want to suggest to you that you can't recall the actual words that [Mr] Montalto spoke to Mr Di Felice at this meeting; do you agree with that?

MR LEVINGE: Correct. As you said, I was out of earshot.

MR ANDERSON: In fact, being out of earshot, you really don't know what Mr Montalto said to Mr Di Felice, do you?

MR LEVINGE: Correct.

MR ANDERSON: Can I ask you this, please. As I understand your evidence, your evidence is you did not hear anything of what Mr [] Montalto was saying to Mr Di Felice; is that your evidence?

MR LEVINGE: My evidence is that I would not have heard everything that they said. I may have heard some things.

MR ANDERSON: Did you ever hear Mr [] Montalto ask Mr Di Felice or the lawyer at Sladens in relation to the documents, 'Is it all right?'?

MR LEVINGE: No.

MR ANDERSON: Did you ever hear him say, 'As long as you've got all my conditions in there, have I got a free right to sell?' Did you ever hear him say that to Mr Di Felice?

MR LEVINGE: No.

MR ANDERSON: And did you ever hear him say, 'Is lot I separate?'?

MR LEVINGE: No.

MR ANDERSON: It may have been said, but you may not have heard it?

MR LEVINGE: Correct.

MR ANDERSON: Did you hear Mr Di Felice say to Mr [] Montalto, gesturing to the documents, 'Yes, [Mr Montalto], it's all in here'?

MR LEVINGE: No.

MR ANDERSON: 'All in there,' rather. Never heard that?

MR LEVINGE: No.

MR ANDERSON: But it may have happened; you just didn't hear that part of the conversation?

MR LEVINGE: Correct.

MR ANDERSON: Is there a chance that you may have forgotten what was said?

MR LEVINGE: I don't think so.

MR ANDERSON: I suggest to you, Mr Levinge, the words I just attributed to Montalto saying to Mr Di Felice was in fact said. What do you say to that?

401. If that be the evidence concerning the knowledge of Mr Levinge, then, on that basis, I am not able to find that, by virtue of Mr Levinge's knowledge, DFG were aware that Mr Montalto understood that, under the terms of the development agreement, lot 1 was not to be developed.
402. At a later stage in the trial, Mr Levinge was recalled for cross-examination following his production of his notebooks. It will be recalled that Mr Montalto said that Mr Levinge and Mr Dooling had made a note of the agreement they reached with Mr Montalto that lot 1 was not to be developed, and that it would be included in the concept plans at Mr Montalto's expense.
403. Mr Levinge identified a book that contained his notes for the period, March 2011 to May 2012.^[288] Mr Levinge was taken to a diagram of the development land that he had drawn in his notebook and, in particular, to a notation '2/3' near the Premier Bay land. It was put to Mr Levinge that '2/3' was a reference to having two of three lots of Mr Montalto's land. Mr Levinge said that he did not agree, and that the notation related to lot-yields in thousands of lots.^[289] On re-examination, Mr Levinge was taken to other notations on the page, for example '6/6.5,' which he said was a lot yield estimation, and further figures relating to the Boral land that he said were lot yields.

^[288] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T825 XXN.

^[289] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T827–828 XXN.

404. I am satisfied that the figures relate to lot-yields and that the notations made by Mr Levinge did not seek to record any discussion that Mr Montalto was only contributing two of his three lots to be developed.
405. I found Mr Levinge to be an honest witness. I have no reason to doubt the evidence he gave. I thought he was frank and to the point. He readily conceded facts and did not seek to obfuscate.

Evidence of Mr Dooling

406. As mentioned above, Mr Dooling is the other officer of DFG that Premier Bay and Mr Montalto allege was informed by Mr Montalto of the matters alleged in conversations no 1, no 2, and no 3.
407. Mr Dooling worked for DFG since 1987 until his retirement. Between June 2007 and October 2015, he was an acquisitions manager involved in sourcing properties for development and liaising with landowners whom DFG had deals with or proposed to make deals with.^[290] Mr Dooling retired in October 2015.

408. Mr Dooling first met Mr Montalto on the bus tour, discussed above, in 2010. Mr Dooling said that he created the map and drew the line on it showing the quarry buffer, which was contained in the handout given to the landowners at the presentation of 15 December 2010.[\[291\]](#) Mr Dooling did not attend that presentation. Mr Dooling did not believe that he and Mr Montalto had discussed the map with the quarry buffer.

[\[291\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T252 XN; CB 148.

409. Mr Dooling said that he had a discussion with Mr Montalto about the issue of the potential quarry in 2011; that Mr Montalto knew that Boral had one of the properties in the area and that it was no longer earmarked for a quarry, and therefore Boral was looking for potential partners to develop the property. Mr Dooling was asked what he said (presumably in response), and replied that he agreed with Mr Montalto.[\[292\]](#)

[\[292\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T252–253 XN.

410. Mr Dooling recalled the presentation at the Kooyong Tennis Club, which Mr Montalto attended. Mr Dooling said that there was no discussion that lots 1, 2, and 3 would not all be offered into the development by Mr Montalto.[\[293\]](#)

[\[293\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T253 XN.

411. Mr Dooling denied ever having any discussion with Mr Montalto regarding lot 1 not being part of the development and only part of a concept plan.[\[294\]](#)

[\[294\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T253 XN.

412. Mr Dooling was asked about the meeting at the Settlement Road premises, at which Mr Montalto and his legal adviser were present, and where the draft development agreement was reviewed. Mr Dooling denied that there was any discussion at that meeting regarding lot I not being included in the development agreement.[\[295\]](#)

[\[295\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T254 XN.

413. Mr Dooling was asked about the meeting on 10 April 2013, at Settlement Road, wherein the CUT documents were executed. Mr Dooling said that he could not recall any discussion at the meeting to the effect that lot I was to be separate and not part of the development.[\[296\]](#)

[\[296\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T254–255 XN.

Cross-examination of Mr Dooling

414. Mr Dooling was taken to the presentation on 15 December 2010 (at Mr Hay’s office), at which Mr Dooling was not present, and asked about the quarry buffer map (shown on CB 148) contained in the brochure. Mr Dooling said that he drew the quarry buffer line on the map, because he had thought that it was a relevant matter to bring to the attention of the landowners; however, by the time of the presentation, the quarry buffer was no longer a ‘live issue.’ Mr Dooling said that he withdrew this page from the slide presentation, because two days prior to the meeting, he had been advised that there was no buffer, there was no quarry, and there was no application for a licence to quarry; nor had any such licence been issued.[\[297\]](#)

[\[297\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T257 XXN.

415. Mr Dooling said that they did not have time to remove the slide from the brochure, as it was being printed by a third party, and was to be delivered directly to Kooyong. Mr Dooling informed Mr Levinge by e-mail that the quarry was not an issue. Mr Dooling assumed that there was still the

potential for a licence to be applied for.^[298] Mr Dooling denied, however, that he knew that Boral was actively considering applying for an extractive licence.^[299] Mr Dooling denied, however, that a buffer zone existed. Mr Dooling agreed that it was in DFG's interest that Boral did not apply for such a licence.^[300] He agreed that he put it on the map as there was still potential for Boral to apply for an extractive licence.^[301]

^[298] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T264 XXN.

^[299] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T269 XXN.

^[300] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T269 XXN.

^[301] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T270 XXN.

416. Mr Dooling denied ever having a discussion with Mr Montalto about the buffer zone.^[302] Mr Dooling stated that '[t]here was no buffer zone. At this particular point in time you could develop the whole land.'^[303]

^[302] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T271 XXN.

^[303] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T270 XXN.

417. Mr Dooling said that he had a discussion with Mr Montalto about Boral having the capacity or the ability to apply for an extractive licence, during the course of meetings in 2011, and said that he discussed the fact that Boral had decided no longer to pursue operating a quarry on the site with Mr Montalto.^[304]

^[304] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T286 XXN.

418. Mr Dooling said that he inspected the Boral land, when Boral was putting together a proposal to sell its land, and took a tour of the Boral land with a view to buying it in late 2011/early 2012. Mr Dooling said that, at that time, he was led to believe that the quarry was no longer proceeding and 'in fact Mr Montalto was fully aware of all that was happening on the land. He was more aware about the landowners in that area than I was. He was that sort of gentleman.'^[305]

^[305] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T271 XXN.

419. Mr Dooling said he was present at the Kooyong Tennis Club presentation. He said that he was sure there was no question asked about the Boral quarry buffer zone.^[306] Mr Dooling did not recall Mr Montalto asking a specific question at that meeting. He did recall observing Mr Montalto having discussions with Mr Levinge at the presentation.^[307]

^[306] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T273 XXN.

^[307] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T273 XXN.

420. Mr Dooling denied ever being present at a meeting between Mr Levinge and Mr Montalto where Boral's use of its land as a quarry was ever discussed.^[308] Mr Dooling denied ever being present at a meeting between Mr Levinge and Mr Montalto where the effect of Boral operating a quarry, as to how it would affect the development, was discussed.^[309] I assume this is the meeting alleged in conversation no 1,

^[308] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T274 XXN.

^[309] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T274 XXN.

421. Mr Dooling denied being present at a meeting, at the end of 2011 or the beginning of 2012, between Mr Montalto and Mr Levinge, where Mr Montalto said that he would agree to put lots 2 and 3 into the development. I assume this is the alleged conversation no 2,

422. Mr Dooling denied ever being present at a meeting between Mr Levinge and Mr Montalto, when Mr Montalto outlined five conditions that he had for putting lots 2 and 3 into the development.^[310] Mr Dooling denied ever being at a meeting where Mr Montalto said that he wanted to farm lot 1 for the next 30 to 40 years.^[311] I assume this is the alleged conversation no 1(a).
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^[310] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T275 XXN.

^[311] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T275–276 XXN.

423. Mr Dooling denied ever being present at a meeting between Mr Levinge and Mr Montalto, where Mr Montalto said to Mr Levinge that he wanted lot 1 included in the preliminary drawings for the concept plan of the overall.
424. Mr Dooling denied ever being present at a meeting between Mr Levinge and Mr Montalto, where Mr Montalto said that he wanted the free right of sale in relation to lot 1, whereby lot 1 would be unencumbered and without any reference to DFG, and that he also wanted the ability to sell a small parcel of land in lots 2 and 3.
425. Mr Dooling denied ever being present at any meeting between Mr Levinge and Mr Montalto, where Mr Montalto said that he wanted the Montalto name used on the hill on lot 1.
426. Mr Dooling denied that he had ever been present when any of those five matters, which had been put to him, were ever discussed at any meeting between Mr Levinge and Mr Montalto.^[312]
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^[312] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T276 XXN.

427. Mr Dooling said those five conditions were never discussed at a separate meeting between himself and Mr Montalto.^[313] Mr Dooling denied that, at all times, he knew that Mr Montalto wanted to farm lot 1 and that lot 1 was not going to be part of the development agreement.^[314]
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^[313] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T276 XXN.

^[314] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T276–277 XXN.

428. Mr Dooling was asked about communicating with Mr Brown. Mr Dooling said that this was done at Mr Montalto's direction. Mr Dooling denied that Mr Montalto told him to send documents to Mr Brown as he did not read them. Mr Dooling said that he did not receive instructions to send all documents and correspondence to Mr Brown. Mr Dooling said that he would send documents to Mr Brown if Mr Montalto asked him to.^[315] Mr Dooling was asked several questions relating to documents sent to Mr Brown. Mr Dooling denied being aware that Mr Montalto could not read.^[316] He said that, in many instances, Mr Montalto would have been sent a document and then Mr Montalto would ask Mr Dooling to send a copy to Mr Brown. Mr Dooling denied that he had been told that Mr Montalto could not read the documents.^[317]

^[315] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T288 XXN.

^[316] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T289, 293 XXN.

^[317] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T294 XXN.

429. Mr Dooling was asked about the meeting of 10 April 2013, and whether he had heard Mr Montalto say to Mr Di Felice: 'Is lot 1 separate?'; 'Have I got all my conditions there? Have I got a free right to sale?' Mr Dooling said that Mr Montalto did not say those things in his hearing.^[318] It was put to Mr Dooling that Mr Di Felice, gesturing towards the pile of documents to be signed, said words to the effect: 'Yes, [Mr Montalto]. It's all there.' Mr Dooling responded: 'Not in my hearing'^[319] (conversation no 5).

^[318] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T301 XXN.

^[319] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T301 XXN.

430. Mr Dooling denied that he knew, that Mr Montalto was mistaken in thinking that the development agreement dealt only with lots 2 and 3, or that Mr Montalto believed lot 1 was not

developable. Mr Dooling strongly resisted any suggestion that DFG knew that Mr Montalto was labouring under any misapprehension about the development. Mr Dooling said: 'We are not in the business of being dishonest with people.'^[320]

^[320] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T303 XXN.

431. Mr Dooling was also adamant that Mr Montalto already knew that Boral was no longer going to pursue the quarry as at 2011.^[321]

^[321] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T305–306 XXN.

432. I found Mr Dooling to be an honest and reliable witness. I found there was no reason to doubt his evidence.

Evidence of Anthony Coralluzzo

433. DFG called Mr Coralluzzo. As already mentioned, he too has land on Donnybrook Road and has signed a development agreement with DFG. The Coralluzzos are also parties to the CUT agreements with Premier Bay.

434. Mr Coralluzzo said that Mr Montalto has never said to him that lot 1 is not part of the development.^[322]

^[322] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T322 XN.

435. Mr Coralluzzo agreed that the development of his land was a once in a lifetime opportunity, and that he and his family expected to make millions of dollars from the eventual sales. Mr Coralluzzo agreed that he did not want the development to be derailed by Mr Montalto and the proceeding.^[323]

^[323] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T324 XXN.

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436. Under cross-examination, Mr Coralluzzo agreed he was at the signing meeting on 10 April 2013. He did not hear the conversation between Mr Di Felice and Mr Montalto as alleged by Mr Montalto.
437. Mr Coralluzzo was asked about Gina Webling. Mr Coralluzzo said that he had suggested to Mr Montalto that Gina be moved from lot 2 to lot 1. Mr Coralluzzo was asked if this was because he knew that Mr Montalto was going to continue to farm lot 1. Mr Coralluzzo answered: 'It might have been so, but I'm not sure about that one.'^[324]
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^[324] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T329 XXN.

Evidence of Colin Brown

438. I have already discussed Mr Brown's rejection of Mr Montalto's evidence in relation to the alleged conversations, but for the sake of completeness, it is useful to deal with his evidence in full, here.
439. Mr Brown, a retired accountant, is a long-time trusted adviser to Mr Montalto. Mr Brown started providing accountancy services to Mr Montalto's father in the 1970s and, later that decade, began advising Mr Montalto and continued to do so whilst employed at various accounting firms. From around 2010, Mr Brown was employed by Crowe Horwath. Mr Brown 'semi-retired' in 2007 when he turned 60, and then retired about five years ago.^[325]
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^[325] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T797 RXN.

440. During this time, Mr Brown continued to provide accounting and tax advice to Mr Montalto.
441. Mr Brown agreed that Mr Montalto had been very dependent upon him for many years in conducting his business affairs, but disagreed that he had provided services to Mr Montalto in the nature of assisting with transactions and things like buying land, procuring finance, and refinancing or increasing loans.^[326]
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^[326] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T722 XXN.

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442. Mr Brown confirmed that Mr Montalto's preferred method of communication was oral. Mr Brown said that, at no time in the 40 years that Mr Brown had known Mr Montalto, had Mr Montalto told, or indicated to Mr Brown, that Mr Montalto had a reading disability, nor that he wanted or needed documents read out because of a reading disability.^[327]
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^[327] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T712–713 XN.

443. Mr Brown said that prior to 2011, he could not recall attending meetings between Mr Montalto and third parties, in order to explain things to Mr Montalto, and that it was not common practice to do so. Mr Brown said that he could not recall Mr Montalto ever asking him to read something to him,^[328] but that it could have happened.^[329] Mr Brown said that throughout his involvement with Mr Montalto, he and Mr Montalto would usually meet only once every three to six months to prepare financial statements.^[330] Mr Brown explained that there were more regular meetings and involvement with the DFG development, as this was a major event in Mr Montalto's financial career.^[331] As far as Mr Brown could recall, in the past, all contracts had been completed and were binding by the time he was called upon to advise on any transaction.^[332]
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^[328] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T724–725 XXN.

^[329] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T739–740 XXN.

^[330] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T725 XXN.

^[331] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T725–726 XXN.

^[332] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T722–724 XXN.

444. Mr Brown said that he had reviewed file notes and other written evidence for the purposes of refreshing his memory before giving evidence and conceded that, without having done so, he would have a limited recollection of what occurred six years ago.^[333]

^[333] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T720–721 XXN.

445. Mr Brown says that Mr Montalto told him, in mid-2011, that he had decided to enter into an arrangement with DFG relating to the property that Mr Brown recognised as the Donnybrook farm.^[334] Mr Brown said that this land was made up of three titles, and he understood that Mr Montalto was referring to all three titles.

^[334] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T697 XN.

446. Mr Brown says that Mr Montalto asked him to assist with the project by looking at the taxation aspects of the structure of the project, and to act as a ‘conduit for people to contact, either [Mr Montalto] to contact for things he was concerned about or someone else if they were concerned they could contact me as a central point, and if anything I was concerned about I could bring it up as an issue to discuss with Tom,’ and to help Mr Montalto to ‘understand what was going on.’^[335]

^[335] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

447. By way of example, Mr Brown explained that he was to assist Mr Montalto with understanding the proposed new structure of operating a contract of this nature through sharing of cash flow. Mr Brown could not think of any other examples.^[336]

^[336] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T703 XN.

448. Mr Brown denied that Mr Montalto needed his assistance to negotiate the development agreement, or to read and explain documents.^[337] Mr Brown said that he believed his role was not to receive all emails, but to see the emails and manage where they should be going; once received, Mr Brown would discuss with Mr Montalto or forward to the appropriate person.^[338]

^[337] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T726 XXN.

^[338] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T737–738 XXN.

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449. Mr Brown gave evidence that he was not involved in negotiating the terms of the development agreement and was not asked by Mr Montalto to advise him about the terms, drafting, or execution of the development agreement. Mr Brown said that, if Mr Montalto had asked him to perform such a role, he would have said ‘No,’ as ‘I’m not a legal minded person, and my firm wouldn’t allow me to do it anyway.’^[339] Mr Brown said that any instructions Mr Montalto provided, or any instructions or comments provided by Sladens for Mr Montalto would have been passed on by Mr Brown.^[340]

^[339] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T703 XN.

^[340] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T710–711 XN.

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450. Mr Brown recommended Mr Jeremiah to act for Mr Montalto. Mr Brown introduced the matter to Mr Jeremiah in a telephone conversation.^[341] Thereafter, they arranged to meet together with Mr Montalto, Mr Duonis, Mr Di Felice, representatives of DFG, and Hall & Wilcox (solicitors for DFG).^[342] Two meetings took place on 5 October 2017.

^[341] CB 216; Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T704–705 XN.

^[342] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T704 XN.

451. Mr Brown recalled attending the Kooyong presentation. Mr Brown said that there was no discussion of Mr Montalto's land specifically.^[343] Mr Brown agreed that he spoke to Mr Montalto after this meeting.^[344] Mr Brown recalled that Mr Montalto was frustrated that nothing seemed to be happening with the development.^[345]

^[343] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T771–772 XXN.

^[344] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T773 XXN.

^[345] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T773 XXN.

452. Mr Brown said that the copy of the agreement,^[346] which he received in March or April 2012, was the first instance of him seeing a copy of the draft agreement.^[347]

^[346] CB 306 (the draft agreement was attached to an email from Mr Di Felice of 16 March 2012; CB 304).

^[347] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T708 XN.

453. On 3 April 2012, Mr Brown said that there was a meeting with him, Mr Duonis, Mr Jeremiah, Mr Di Felice, and Mr Montalto. Mr Brown said that the purpose of the meeting was to explain the suggested changes and amendments to the development agreement to Mr Montalto.^[348]

^[348] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T709–710 XN.

454. Mr Brown recalled the process of amending the development agreement as one that went back and forth quite often, and that all instructions from Mr Montalto were communicated to Sladen or Mr Duonis.^[349]

[349] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T718 XXN.

455. Mr Brown agreed that at no time did he ever read the amendments and the commentaries in the box on the side of a draft of the development agreement, and then explain that to Mr Montalto.[350] Mr Brown said that he never went through the development agreement with Mr Montalto.[351]
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[350] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T775 XXN.

[351] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T776 XXN.

456. Mr Brown was asked whether he ever brought the issue of 'developable area' to Mr Montalto's attention. Mr Brown said that the definition of 'developable area' was something that was changing all the time, or what was known to be the developable area was changeable. He said that the draft version of the agreement, in which the issue was raised as 'critical,' was the subject of a meeting soon after where it was explained to Mr Montalto, but not by him. Possibly it was explained by Mr Duonis, but Mr Brown was partially retired at this time.[352]
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[352] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T780 XXN.

457. Mr Brown denied that he said to Mr Montalto that he should sign a copy of the development agreement before 10 April 2013, 'as confirmation for the lawyers that the signing ceremony scheduled for 10 April 2013 would proceed.'[353]
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[353] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T711 XXN.

458. Mr Brown said that, prior to the meeting of 10 April 2013, he knew nothing of the development agreement being signed and held in escrow.^[354]

^[354] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T719 XXN.

459. Mr Brown said he had no knowledge of a meeting at Settlement Road, in April 2012, between Mr Montalto, Mr Levinge, and Mr Dooling.^[355]

^[355] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T774 XXN.

460. At the signing meeting on 10 April 2013, Mr Brown said he was seated about four to five seats away from Mr Montalto; everyone was sitting. Mr Brown recalled hearing Mr Montalto's lawyer say to Mr Montalto: 'It's in the agreement' (Mr Brown said that he thought it was Mr Jeremiah (who was not at the meeting), who said this).^[356] Mr Brown did not hear Mr Montalto ask Mr Di Felice whether his conditions, his special clauses, were in the agreement.^[357]

^[356] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T787–788 XXN.

^[357] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T788–789 XXN.

461. Mr Brown denied saying to Mr Montalto, words to the effect, that lot 1 was separately treated in the development agreement. Mr Brown also denied that Mr Montalto asked him whether the development agreement contained a free right to sell.^[358]

^[358] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T712 XN.

462. Mr Brown says that he first became aware of Mr Montalto's request that lot 1 be left out of the development in May 2017, when Holding Redlich, Mr Montalto's current solicitors, phoned him to discuss what Mr Montalto had identified as a problem with the contract with DFG.^[359]

^[359] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T698 XN.

463. Mr Brown says that he first became aware of Mr Montalto's five conditions when he saw the documents for this court case.^[360] He said that Mr Montalto did not tell him of the five conditions at any time and,^[361] to his knowledge, Mr Montalto did not tell his lawyers of those five conditions in late 2011, early 2012, or at the signing ceremony of 13 April 2013.^[362]

^[360] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

^[361] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

^[362] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T702 XN.

464. As mentioned above, Mr Brown said he could not specifically recall Mr Montalto saying that he was thinking of offering two lots of land, lots 2 and 3, as lot 1 was not viable because of the quarry buffer. Mr Brown believed that he would have recalled it if that was said, because it would have been a major change to what he perceived was happening.^[363] Similarly, Mr Brown did not recall Mr Montalto telling him that he was contemplating offering two lots of approximately 500 acres; or that 150 acres would not be in the development, being lot 1, which Mr Montalto would farm, because it was not developable.^[364] Mr Brown said that Mr Montalto was advised that he had to continue farming lot 1 for capital gains tax purposes.^[365]

^[363] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T756 XXN.

^[364] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T756 XXN.

^[365] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T757 XXN.

465. Mr Brown said that Mr Montalto told him Gina Webling had to be relocated from lot 2, but that he never said she was to be moved to lot 1.^[366] Mr Brown said he would have remembered if Mr Montalto had said that, because he ‘believe[s] that would have rung a loud bell because it would have changed the whole nature of what [he] perceived was going to happen.’^[367]

^[366] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T756–757 XXN.

^[367] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T757 XXN.

466. Mr Brown said that Mr Montalto did not tell him that he wanted to have a free right of sale over lot 1, and be able to sell a small portion of lots 2 and 3, in case he ever needed cash for his business or for some other reason.^[368] Mr Brown said that this would be a major change to what was being discussed and that ‘[i]t didn’t happen.’^[369]

^[368] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T757–758 XXN.

^[369] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T758 XXN.

467. Mr Brown was asked about the addition of Delma — the entity associated with the Douglasses’ land — to the agreement, and to the CUT agreements, which occurred in July 2014 and required an alteration to the number of units that each landowner had subscribed for. Mr Brown was taken to his email to Mr Di Felice discussing the proposal for the addition of Delma, where Mr Brown said:^[370] ‘Victor, all looks okay to me. Allowing for the fact that you have Premier Bay in mind, I have spoken with [Mr Montalto] and Terry Dooling about developable area and we prefer issue of new units method.’ Mr Brown said that he believed that the further issue of units to Delma was intended to reflect the net developable area put into the consortium unit trust by each party.^[371]

^[370] Exhibit P20.

[371] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T715 XXN.

468. Mr Brown said that, from 4 November 2011, he could not recall whether Sladen often sent emails to ask his opinion on certain matters in relation to the development agreement, or to request that he seek Mr Montalto's instructions or explain matters to him. Mr Brown conceded that it could have happened.[372]
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[372] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T741 XXN.

469. Mr Brown did not recall DFG asking him to get Mr Montalto's instructions.[373] Mr Brown did not believe that DFG expected him to facilitate the development between Mr Montalto and DFG.[374]
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[373] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T742 XXN.

[374] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T743 XXN.

470. Mr Brown said that it was not part of Crowe Horwath's retainer to ensure that Mr Montalto knew, comprehended, or understood the contents of any documents that he signed.[375] Mr Brown agreed that he never said this to Mr Montalto.[376] Mr Brown said that the retainer, and his role in relation to the development agreement, was limited to the same work he had been doing with Mr Montalto over the last 10 to 15 years.[377]
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[375] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T745 XXN.

[376] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T750 XXN.

471. Mr Brown denied that Mr Montalto asked his opinion as to whether the development was a good idea in April 2011. Mr Brown said that it was discussed several times going forward.[378] Mr Brown said that the first time a cash flow was presented by DFG was months after such a conversation had taken place.[379]
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[378] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T752 XXN.

[379] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T753 XXN.

472. Mr Brown was asked whether he told Mr Jeremiah that he had general authority to make decisions about the proposed development on behalf of Mr Montalto. Mr Brown said that the reference to him having authority to give approval[380] was merely for one proposal regarding the structural part of the agreement.[381]
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[380] (at CB 236).

[381] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T707 XN; (CB 237).

473. Mr Brown denied that he gave an instruction to Sladen/Mr Jeremiah, authorising Sladen to make decisions on Mr Montalto's behalf, and upon which Mr Brown put no limitation.[382]
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[382] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T764 XXN.

474. Mr Anderson suggested that Sladen would call Mr Brown to discuss certain matters, because he had authority to act on Mr Montalto's behalf. Mr Brown said that he thought such calls may have

been made by way of courtesy.^[383] Mr Brown said that he told Sladen, a number of times, that ‘we’ll need to speak to Mr Montalto’ and get his instructions.^[384] Mr Brown said that Sladen could not get instructions from him on legal matters.^[385]

^[383] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T760 XXN.

^[384] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T761 XXN.

^[385] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T763 XXN.

475. Mr Brown was asked about a house that Geelong DFG built for him in Barwon Heads.^[386] Mr Brown said that DFG indicated that it was a cheap house, but he did not ask for a discount. Mr Brown said that DFG were competing against another quote he had received.^[387]
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^[386] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T790–791 XXN.

^[387] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T791 XXN.

476. It was suggested to Mr Brown that the reason he had received a discount was because it was repayment for the favours that he had done for DFG in this transaction, and to acknowledge the contribution that he had made in enabling DFG to get what they wanted out of the deal with Mr Montalto. Mr Brown said that it was ‘not the way [he] felt it at the time,’ and that ‘[i]t didn’t even enter [his] mind.’^[388]
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^[388] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T793–794 XXN.

477. I found Mr Brown to be an honest witness. Regrettably, Mr Brown’s recollection of events had faded. I gained the impression that, since his retirement, Mr Brown has not placed any priority on recalling or reminiscing over events that happened whilst he was in practice as an accountant.,,

478. Mr Duonis was called by Crowe Horwath. Mr Duonis is a chartered accountant and works for Crowe Horwath Accountants in the role of a specialist tax adviser. Mr Duonis was asked by Mr Brown to provide specialist tax advisory input into the transaction involving Premier Bay and Mr Montalto.
479. Mr Duonis first became involved in this matter on Mr Montalto's behalf, a few days prior to the 5 October 2011 meetings at Hall & Wilcox. Mr Duonis said that his interest was in advising Mr Montalto and Premier Bay of the 'tax consequences of the transaction and [how] those matters could bear on the timing of the tax event.'^[389]

^[389] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T805 XN.

480. Mr Duonis prepared a file note from the 5 October 2011 meeting,^[390] which he felt captured everything of importance discussed, but which he agreed did not purport to capture everything said.^[391] Mr Duonis knew little about the Donnybrook development prior to attending the meeting on 5 October 2011.^[392] In terms of the land that was being offered for the development, Mr Duonis recalled being told of the location of the land and the rough size, but said that there was no precise identification 'in terms of maps and of the like.'^[393] Mr Duonis did not think that he would know what Mr Montalto meant if he had made reference to 'my developable land'.^[394]

^[390] CB 221.

^[391] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T815 XXN.

^[392] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T813 XXN.

^[393] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T815 XXN.

^[394] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T818 XXN.

481. Mr Duonis' note mentioned that: '[t]he trust owns approx. 259 hectares of farm land in Donny Brook [sic] (outer northern suburbs of Melbourne).'

[395] Mr Duonis explained that this as a reference to the land owned in Premier Bay, which he understood was to be the subject of the development agreement with DFG.

[396]

[395] CB 221.

[396] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T801 XN.

482. The file note recorded: 'Montalto (in principle) wants to proceed.'

[397] Mr Duonis said that his recollection is that Mr Montalto seemed content with the basic proposal and that he wanted to proceed, in principle, with the development agreement, although there were some points that had to be negotiated.

[398]

[397] CB 223.

[398] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T802–803 XN.

483. Mr Duonis was asked if Mr Montalto said he wanted lot 1 to be treated separately from lots 2 and 3, and that lot 1 was not to be developed as he would continue to farm lot 1. Mr Duonis answered, 'Not to my recollection,' and that he thought it most probable that if it had been said, that he would have noted it in the file note.

[399]

[399] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T804 XN.

484. Mr Duonis was asked if Mr Montalto, or anybody else, had identified any of the five conditions at the second meeting on 5 October 2011. Mr Duonis answered: 'To my recollection, no ... [t]o the extent that I would have detected it would have been a deal-breaking matter, I most likely would have file noted in my opinion.'

[400]

[\[400\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T805 XN.

485. Mr Duonis said that he was certainly not aware of Mr Montalto's reading disability, and that Mr Montalto never told him that Mr Montalto wanted or needed documents to be read out in order for him to understand the contents.[\[401\]](#) In his dealings with Mr Montalto, nothing caused Mr Duonis to wonder whether Mr Montalto had a reading disability.[\[402\]](#)
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[\[401\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T805 XN.

[\[402\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T805–806 XN.

486. Mr Duonis recalled the 16 March 2012 email that Mr Di Felice had forwarded to Mr Brown, attaching the 'Amended development agreement,' but could not recall whether he spoke to Mr Goldin over the phone, or not, to discuss the development agreement and the email of 16 March.[\[403\]](#)
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[\[403\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T808 XXN; CB 304.

487. In response to a question regarding whether he had a discussion with Mr Brown or Mr Montalto about the facts of 16 March, and the proposed amendments, Mr Duonis said: 'No, not at all.'[\[404\]](#)
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[\[404\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T809 XXN.

488. Mr Duonis was taken to an invoice of Crowe Horwath with the entry, 'Discussions and consultations, Alex Duonis,' on 29 March 2012 and 24 May 2012, with time recorded as one and a half hours, and the description of work as 'Review of amendments to development

agreement'. Mr Duonis said his recollection of this entry was that he was sent an amended version of the development agreement and was asked to look over it from a tax perspective. Mr Duonis' concern was income tax, GST, land tax, those sort of issues; as such, he would have given very cursory interest, if at all, to key areas of negotiations that might have changed.^[405]

^[405] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T809–810 XXN.

489. Mr Duonis said that he was concerned with the tax implications of the development and agreed that, at that stage, to determine the tax liability, he was not at all concerned with the amount of land that Premier Bay was contributing to the development, as the same tax outcomes and advice would have been given irrespective of the land size.^[406] However, Mr Duonis said that it would have been relevant to his advice if lot I was not to be included, in the sense that any tax advice given would have referred to those lots being subdivided and sold. But the broad tax answer may have been the same, whether there were three lots or two lots.^[407]

^[406] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T814 XXN.

^[407] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T814–815 XXN.

490. Mr Duonis said that it was not his role to explain to Mr Montalto that he could not use his land as security.^[408]

^[408] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T818 XXN.

Evidence of David Hart

491. Mr Hart was called by DFG. Mr Hart is a lawyer for DHP Lawyers, and has been engaged by DFG to provide professional services in drafting development agreements for a number of their developments. Mr Hart drafted the development agreements for the Donnybrook area Woodstock development for the various landowners,

492. Mr Hart first sent a draft development agreement to Sladen on 22 December 2011. Thereafter, various marked-up versions were exchanged with Mr Di Felice, and then a meeting was held on 19 July 2012 at the Settlement Road premises, in order to discuss outstanding issues with Mr Dooling, Mr Levinge, Mr Di Felice, Mr Brown, Mr Montalto, and on and off, Mauro.^[409] Mr Hart made notes of the meeting.^[410] Mr Hart said that his communications with Premier Bay were solely with Mr Di Felice, and that there were no other meetings that he attended, other than 19 July 2012.^[411]

^[409] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T832 XN.

^[410] Exhibit P21; Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T833 XN.

^[411] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T839 XXN.

493. At the 19 July 2012 meeting, Mr Hart said that there was detailed debate about the terms of the development agreement. Mr Hart said that he was not suggesting that Mauro contributed to this debate.^[412] Mr Hart did not agree that Mauro may not have been present for the meeting.^[413] Mr Hart agreed that his file note and minutes of the meeting did not mention Mauro.^[414] Mr Hart denied that Mauro was not present at the meeting.^[415]

^[412] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T853 XXN.

^[413] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T854 XXN.

^[414] Exhibit P21; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T855 XXN. Exhibit 3D-4, is minutes of a meeting with the date 20 July 2012. Mr Hart confirmed that it related to the meeting held on 19 July 2012: Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T858 XXN.

^[415] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T858 XXN.

494. Mr Hart was shown a Harwood Andrews file note [\[416\]](#) for the 19 July meeting which also did not refer to Mauro being present. Mr Hart said that this did not cause him to doubt his unaided recollection that Mauro was present. [\[417\]](#) Mr Hart was shown a Harwood Andrews invoice [\[418\]](#) for the meeting which did not mention Mauro attended.

[\[416\]](#) CB 44I.

[\[417\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T856 XXN.

[\[418\]](#) Exhibit 3D-3 (attached to email of 26 September 2012).

495. It was suggested that Mr Hart's recollection that Mauro had attended 'on and off' was incorrect. Mr Hart said: 'No.' [\[419\]](#) Mr Slattery suggested that it was not possible for Mr Hart's recollection to be correct in circumstances where three documents do not record Mauro as being present. Mr Hart disagreed. [\[420\]](#)

[\[419\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T857 XXN.

[\[420\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T859 XXN.

496. Mr Hart was asked about the 22 March 2013 email discussing escrow arrangements. Mr Hart confirmed that his understanding of the terms of the arrangement was as set out in Mr Di Felice's reply email of 25 March 2013. [\[421\]](#) Mr Hart agreed that in relation to the escrow arrangement, his client's concern was getting Premier Bay signed up as soon as possible. [\[422\]](#)

[\[421\]](#) CB 480; Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T835 XXN.

[\[422\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T84I XXN.

497. Mr Hart said that a set of development agreements that had been executed by Premier Bay and its guarantors arrived at his office on 2 April 2013.^[423] He was not sure who had sent the development agreements to his office; the email correspondence^[424] suggested that it was not Sladen.^[425]

^[423] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T835 XN. Exhibits P22 and P23.

^[424] Exhibit 4D-2.

^[425] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T867 RXN.

498. Mr Hart thereafter arranged for the meeting on 10 April 2013. Mr Hart took the unsigned CUT documents, the unsigned development agreements for the Coralluzzos' land, and the development agreements signed by Premier Bay, of which there were at least three copies,

499. At the signing meeting of 10 April 2013, Mr Hart agreed that he did not recall what was said by each person, and that he was not able to hear what each person said. Mr Hart said he would have heard some of what was discussed between Mr Di Felice and Mr Montalto, but could not recall anything specific.^[426] Mr Hart did not recall any discussion about the terms of the Premier Bay development agreement at this meeting. Mr Hart recalled that the CUT documents were executed and, thereafter, Mr Hart had DFG execute the development agreement for Premier Bay.^[427]

^[426] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T844 XXN.

^[427] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T838–839 XN.

500. Mr Hart agreed that he could not see which document, specifically, Mr Montalto or Mauro were executing at the meeting, and agreed that there were numerous contracts, and that he did not keep a log of documents.^[428] Mr Hart said that it was not possible that they were executing a copy of the development agreement.^[429]

[\[428\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T845, T848 XXN.

[\[429\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T845–846 XXN;
Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863 XXN.

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501. Mr Hart said that, to his knowledge, the only copies of the Premier Bay development agreement at the 10 April 2013 meeting were the ones that he had brought along, which he had been holding in escrow, and which had already been signed by Premier Bay, Mr Montalto and Mauro.[\[430\]](#)

[\[430\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T868 RXN.

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502. Mr Hart said that he did not know that Sladen was not acting for Mauro in his personal capacity. Mr Hart agreed that Sladen did not actually confirm it was acting for the directors of Premier Bay.[\[431\]](#)

[\[431\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T851–852 XXN.

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503. Mr Hart agreed that Mauro came into the signing meeting on 10 April 2013 merely to sign the documents relevant to him.[\[432\]](#) Mr Hart could not recall how many documents there were for Mauro to sign. Mr Hart said that he did not recall, and denied that he briefly told Mauro what the documents were and that he had to sign them.[\[433\]](#) Mr Hart said that Mr Di Felice showed Mauro where to sign.[\[434\]](#)

[\[432\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T862 XXN.

[\[433\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T862–863 XXN.

[\[434\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T862–863 XXN.

504. Mr Hart did not recall telling Mauro that he had to give a personal guarantee.^[435] Mr Hart did not recall hearing Mr Levinge tell Mauro, words to the effect, that the guarantee was just a precaution to make sure that, if anything happened to Mr Montalto, Mauro would sign the necessary documents and/or that: ‘it’s not as though we are going to take your house or anything.’^[436]

^[435] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863 XXN.

^[436] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863–864 XXN.

505. Mr Hart said that he considered it appropriate for Mauro to provide a guarantee because ‘[u]pon receiving instructions I conducted a company search of Premier Bay and there were two directors, and in accordance with what I would consider to be good commercial drafting practice I included a guarantee of the owners’ obligations by the directors of the company, and those were the two directors.’^[437]

^[437] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T869 RXN.

Evidence of Mauro Montalto

506. Mauro did not call any witnesses other than himself.

507. Mauro agreed that he was appointed a director of Premier Bay on 28 August 1997 and that, as a director, he had signed minutes and financial statements. Mauro was cross-examined about The Montalto Family Trust, of which Premier Bay is the trustee, established 24 May 1991.^[438] Mr Montalto’s children are included as general beneficiaries of the trust.

^[438] Exhibit P26.

508. Mauro became aware of the Donnybrook proposed development in 2001 or 2002. His father called Mauro and his siblings to his office, told them about Dennis Family Homes, and that they wanted to speak to Mr Montalto about the property at Donnybrook. At that time, he did not know that the Donnybrook land was owned by Premier Bay. He thought that it was owned by his father and that it was used for farming.
509. Mauro first met with representatives of DFG at Floridia Cheese when they gave a presentation on the proposed development. Bert Dennis, Mr Levinge, and Mr Dooling represented DFG. Mauro again met with Mr Levinge and Mr Dooling of DFG at Floridia Cheese with his father, his siblings, and his brother-in-law. Subsequently, Mauro was asked to go to DFG's head office. Mauro's father wanted Mauro to be involved in the development. At that time, there were no contracts. There were general discussions about putting the parcel of land together and trying to get all the title owners together. At the end of the meeting, he felt that it was outside his area. He felt that he wanted to focus on the factory. Mauro told his father that he should find someone else, as it was not his game.
510. Mauro was not given a copy of the development agreement at any of these meetings. Mauro does not recall any discussion about him having to provide a personal guarantee at any of these meetings. Mauro was not involved in negotiating any of the terms of the development agreement, and he was not present when the terms were negotiated with DFG.
511. Mauro said that he was not present at a meeting in July 2012, at Floridia Cheese, attended by Mr Hart, Mr Dooling, Mr Levinge, his father, Mr Brown, and Mr Di Felice at which specific clauses of the development agreement were discussed.
512. Mauro was asked whether he was present at a meeting with representatives of DFG at which various agreements were signed. He said: 'Yes. Well, not really. Well, I was for the signing.'^[439] Mauro was called in after the meeting at Floridia Cheese had already commenced. Mauro could not recall in which month the meeting occurred. He was informed that it was April 2013.

^[439] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T882 XN.

513. Mauro was not present at the start of the meeting. When he walked into the meeting, he observed that the contractual folders were open and that everybody was already seated and talking. Mauro had come out of production. Mauro recalled those present as Mr Brown, the solicitor working with Mr Brown from Crowe Horwath (or Day Nielson, as he believed at the time), Mr Montalto, Mr Levinge, Mr Dooling, and the solicitor for DFG.
514. Mauro said that, basically, when he entered the room, everyone was already seated and engaged in general chat. He said hello. He sat next to the lawyer representing DFG, who said: 'Okay, are you ready to do this?' Mauro replied: 'Yes, okay.' Following which, Mauro said: 'Then basically he would — there was three to four sections from what I can remember. Basically he discussed each section. So he spent — he just gave me an outline of what it was. He asked me if I was happy.'^[440]

[\[440\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863 XN.

515. Mauro remembered Peter Levinge giving a presentation regarding the property returns from the development. Mauro recalled the figure of \$350 million (Mr Peters used the figure, \$353 million, rather than \$350 million, which was mentioned by Mauro). Mauro was taken to a document prepared by DFG, as part of a presentation to the Montalto family on 19 October 2012, which provided a range of figures one of which was \$342,654,000, which Mauro recalled seeing as being close to \$350 million. Mauro said that he got figure from a figure that Peter Levinge had written on the whiteboard, rather than seeing it on a piece of paper or on a slide.[\[441\]](#)
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[\[441\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T908 XXN.

516. Mauro claimed to have a good memory of what he signed on 10 April 2013. He said that he signed three documents: the consortium agreement, the development agreement, and a guarantee. Mauro was quite sure about that, although not 100 per cent.[\[442\]](#)
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[\[442\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T911 XXN.

517. Mauro was taken to an email from Mr Hart to Mr Di Felice, copied to Mr Levinge and Mr Dooling, dated 2 April 2013, with attachments that included the development agreement stating that it had been received in that day's mail.[\[443\]](#) Mauro agreed that his signature was on the signing clause. Mauro did not recall how he came to sign the document. He said it could be the document that he signed two to three weeks before (presumably the 10 April 2013 meeting). He agreed that he signed it before 2 April 2013,
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[\[443\]](#) Exhibit P23.

518. Mauro said that he signed the guarantee document on the day they brought the final paperwork. He believed it was different to the development agreement attached to the email of 2 April 2013. Mauro was taken to page 31 of the development agreement, which had his signature as guarantor. Mauro was asked if that was the separate guarantee document. He replied he did not know.
519. It was put to Mauro that he had no idea when he signed the guarantee document. Mauro said it was about two or three weeks before.^[444] It was not clear if he meant two or three weeks before 2 April 2013 (the date of the email), or 10 April 2013 (the date of the meeting at Florida Cheese),

^[444] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T912 XXN.

520. As to whether lot I was included in the development or not, Mauro said that he did not know whether lot I was in or out.^[445]

^[445] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T924 XXN.

521. I discuss my findings below regarding Mauro's evidence.

Evidence of Victor Di Felice

522. Mr Di Felice is a director and principal of Sladen; his area of practice is property generally, focusing on property development in particular. At the time of his involvement in Mr Montalto's matter, Mr Di Felice had 10 years' experience in the area of property development.
523. Mr Di Felice became involved with the events, the subject of this proceeding, in late 2011, and was brought into the matter by Mr Jeremiah. Initially, Mr Di Felice said he was initially briefed with some information and background, about the status of the matter, and received a draft development agreement on 22 December 2011, which he reviewed in the New Year.
524. Mr Di Felice said: 'The review of the document entailed a review of all of the terms of the document from start to finish, based on the information that I had at the time and also based on typically what I had seen in this type of document in the past, and that was by way of making amendments to the documents where I thought that amendments were warranted, making comments in the margin of the document either for information or as commenting on those amendments.'^[446]

525. On 7 March 2012, Mr Di Felice received a letter from DHP Lawyers attaching a proposed exclusivity and confidentiality deed. Mr Di Felice did not recall reviewing that deed. On 16 March 2012, Mr Di Felice emailed Mr Brown,[447] forwarding the development agreement; his comments on the development agreement; and his comments in relation to other documents, either attached, or which would be relevant in the future drafting, negotiation, and structuring of the development.[448]
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[447] CB 304.

[448] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T935 XN.

526. Mr Di Felice thereafter said he was waiting to hear back from Premier Bay, and was informed by Mr Goldin that he had been contacted by Mr Montalto's accountants, Crowe Horwath.[449]
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[449] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T937 XN.

527. Later, in early April, Mr Di Felice recalls meeting with Mr Montalto and Mr Brown at Sladen's offices, where the amendments and comments to the development agreement were discussed, and where all comments Mr Di Felice had made were reviewed. Mr Di Felice took a file note of the meeting.[450] Mr Di Felice recalled focusing on certain issues, such as 'how existing security that was — that the land was being used for would be dealt with ...'. Mr Di Felice was concerned that each of the landowners should have sufficient funds to satisfy their obligations under the development agreements.[451] The draft development agreement was then sent to Mr Hart with comments.[452] Mr Hart sent back comments on 24 April 2012.[453] Mr Di Felice believed that he reviewed the proposed amendments and asked Mr Goldin to arrange a meeting to discuss amendments with Premier Bay. Mr Goldin sent a letter to Mr Brown to arrange a telephone conference, and confirmed to Mr Di Felice that this had been done by email dated 23 May 2012.[454]
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[450] CB 361.

[\[451\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T938 XN.

[\[452\]](#) CB 363; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T939–940 XN.

[\[453\]](#) CB 404.

[\[454\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T940–941 XN.

528. In Mr Hart’s comments, he requested a detailed explanation of the current claim and court proceeding by Carmela Montalto, and had noted that caveats had been lodged on the titles to the Premier Bay land. Mr Di Felice said he discussed the issue with Mr Brown and Mr Montalto in a telephone conference on 24 May 2012. Mr Di Felice said that he was told that the claim was nearly at its completion and was due to be heard in August or September. It was discussed that nothing would be executed in terms of the development, until the claim had been resolved.[\[455\]](#)

[\[455\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T942 XN.

529. Following the telephone conference, on 2 June 2012, Mr Di Felice sent an email to Mr Hart.

530. On 7 June 2012, Mr Hart sent Mr Di Felice an executed copy of the exclusivity and confidentiality deed. Mr Di Felice believed that it was being sent to Sladen, because they were acting for Premier Bay who were a party to the document, and who had received an unsigned version some months earlier, as noted above, which was not reviewed by Sladen.[\[456\]](#)

[\[456\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T943 XN.

531. Mr Di Felice said that, in July, there was a meeting at the client’s Florida Cheese premises to discuss progressing the finalisation of the development deed. Mr Di Felice made a handwritten note of the meeting.[\[457\]](#) Mr Di Felice said that Mr Levinge was also present, although this was

not reflected in the note.^[458] Mr Di Felice said the meeting was to review the most recent version of amendments.^[459]

^[457] CB 441.

^[458] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T943 XN.

^[459] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T944 XN.

532. After the meeting, Mr Di Felice said that for some time there were still amendments to be made to the development agreement, so amendments went back and forth until it was ultimately finalised.^[460]

^[460] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T945 XN.

533. Mr Di Felice received an email from Mr Brown on 28 September 2012^[461] attaching title searches for each lot which showed caveats^[462] were no longer registered or lodged against those titles.^[463]

^[461] CB 443–CB 445.

^[462] Referred to at CB 442–446.

^[463] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T945 XN.

534. Mr Di Felice said that Mr Hart raised the idea of having the Premier Bay development agreement held in escrow. Mr Di Felice recalled a meeting with himself, Mr Jeremiah, Mr Goldin, Mr Montalto, and Mr Brown where the meaning/operation of escrow was discussed. Mr Di Felice

said that he thought Mr Jeremiah discussed what escrow meant, namely, that it was the execution by Premier Bay of the development agreement, so that they could be held by the developer; the intent being that the developer could then say to other landowners: '[o]ne of the other landowners has already signed up. You're holding things up, effectively.'

[464] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T948 XN.

535. On 8 March 2013, Mr Hart sent Mr Di Felice an email regarding the developable area and Delma. [465] Mr Di Felice said, on receipt of the email, that he forwarded it to Mr Brown [466] noting the proposed developable area, and its being critical for the consortium documents because the proportion of developable area effectively determined the entitlements of each landowner. [467] Mr Di Felice said that the reference to the area being 208 hectares for Premier Bay, is the developable area, not of gross land area; and that 208 hectares 'essentially must include the three lots because it is greater than the gross area of lots 2 and 3.' [468] Referring to his e-mail to Mr Brown, Mr Di Felice stated that he advised him that the areas 'were different to by [sic] it being less, but different to the areas that had previously been expected would be the area for the Premier Bay land,' and further that Mr Montalto and Mr Brown would 'need[] to consider whether or what impact that would have ultimately on the return that they were projecting to potentially receive.' [469]
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[465] CB 475.

[466] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T949, L16 XN. See also CB 477: an e-mail from Mr Di Felice to Mr Brown dated 13/3/17, reproducing Mr Hart's comments regarding the developable area, and also includes comments from Mr Di Felice suggesting that Mr Brown/Mr Montalto consider whether it might affect 'the total projected return from being involved in the consortium'.

[467] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T949 XN.

[468] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T949 XN.

[469] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T950 XN.

536. Mr Di Felice said that the meeting of 10 April 2013 was effectively for the execution and collection of documents.[\[470\]](#)

[\[470\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T953 XN.

537. Mr Di Felice did not recall who brought the development agreement to the meeting, but it was at the meeting.[\[471\]](#) Mr Di Felice said that he could not recall Mr Brown asking any question about the contents of the development agreement. Mr Di Felice did not recall being asked any questions by Mr Montalto or Mr Brown concerning the contents of the development agreement.[\[472\]](#)

[\[472\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T954 XN.

538. Mr Di Felice agreed that he could not recall explaining the terms of the proposed development agreement, as sent through by Mr Hart, to either Mr Brown or Mr Montalto prior to 16 March 2012.[\[473\]](#)

[\[473\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T955 XN.

539. In response to questions regarding whether Sladen was acting for Mr Montalto as well as Premier Bay, Mr Di Felice said that he considered that Sladen was 'acting for Premier Bay,' and did so on receipt of instructions from Mr Brown and Mr Montalto.[\[474\]](#) Mr Di Felice said that both Mr Brown and Mr Montalto asked that Sladen act on instructions from Mr Brown. Mr Di Felice stated that Mr Montalto said: 'Deal with Colin.'[\[475\]](#) Mr Di Felice said that he could not recall being told to send all communications to Mr Brown.[\[476\]](#) Mr Di Felice said that, in late 2011, Mr Jeremiah told him that Mr Brown had full authority to deal on behalf of Mr Montalto and Premier Bay.[\[477\]](#)

[\[474\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T957-8 XXN.

[\[475\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T958 XXN.

[\[476\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T959 XXN.

[\[477\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T959 XXN.

540. Mr Anderson asked Mr Di Felice if he did not think it was appropriate to deal directly with Mr Montalto in relation to these matters. Mr Di Felice said that he could not recall, but that Sladen was told to go through Mr Brown.[\[478\]](#) Mr Di Felice disagreed that, in the circumstances, it would have been appropriate to contact Mr Montalto directly on matters of substance.[\[479\]](#)

[\[478\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T962 XXN.

[\[479\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T962 XXN.

541. Mr Di Felice was not aware of ever obtaining a written authority to deal with Mr Brown. Mr Di Felice said that he dealt with Mr Brown, partly because of Mr Jeremiah's instructions, but also because of Mr Montalto's instructions to '[d]eal with Colin', and as conveyed during a meeting in which '[Mr Montalto] was telling [Mr Di Felice and others] of his long relationship with Colin Brown as a trusted adviser for 40-something years.'[\[480\]](#)

[\[480\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T963, T958 XXN.

542. Mr Di Felice said that he could not recall meeting with Mr Montalto between 12 October 2011 and 22 December 2011 (when he received the first draft of the development agreement) and believed that, in this time, it was probably true that he never personally sought Mr Montalto's instructions.[\[481\]](#) Mr Di Felice did not recall ever meeting Mr Montalto alone.[\[482\]](#)

[\[481\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T965 XXN.

[\[482\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T967 XXN.

543. Mr Anderson asked Mr Di Felice if he had ever had a discussion with Mr Montalto concerning which of the three lots he was putting into the development. Mr Di Felice answered, 'Not that I recall,' and added 'other than reviewing the development agreement with him and Colin.'[\[483\]](#) Further, Mr Di Felice said that he 'believed it was all of the land,' and could not recall whether he had assumed that, stating: '[a]ll of the information [on our files that related to plans, maps, lot yield analysis that related to the whole of the land] that we had at that stage related to all of the land.'[\[484\]](#).
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[\[483\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T968 XXN.

[\[484\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T969 XXN.

544. Mr Anderson asked Mr Di Felice if he recalled a discussion about a quarry buffer. Mr Di Felice answered: 'No.'[\[485\]](#).
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[\[485\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T971 XXN.

545. Mr Di Felice said that he first met Mr Montalto in early April 2012.[\[486\]](#) Mr Di Felice agreed that he reviewed the draft development agreement, which he had received from Mr Hart, in light of the instructions that he had received from Mr Jeremiah, as well as the notes that Mr Jeremiah had made at previous meetings.[\[487\]](#).
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[\[486\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T973 XXN.

[\[487\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T973–974 XXN.

546. Mr Di Felice said that he could not recall whether or not he had reviewed the exclusivity and confidentiality deed. He did not recall speaking to Mr Montalto about it. Mr Di Felice forwarded a copy to Mr Brown, but did not recall speaking to him about it.[\[488\]](#).

[\[488\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T974 XXN.

547. Mr Di Felice did not believe that he gave any advice to Mr Montalto about executing the deed.[\[489\]](#)

[\[489\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T975 XXN.

548. Mr Anderson suggested that Mr Di Felice had had no discussion with Mr Montalto where the definition of 'land' was raised. Mr Di Felice answered: 'The definition, no. Although in meetings post sending this out there were plans where we had meetings where we were discussing issues such as yield, who the landowners were that were involved in the consortium, et cetera, where there were plans that indicated clearly the Montalto land, Premier Bay land.'[\[490\]](#) Mr Anderson suggested that Mr Di Felice did not go to the definition of 'land' in schedule 1. Mr Di Felice said that he could not recall, other than reviewing the whole of the agreement.[\[491\]](#).

[\[490\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T981 XXN.

[\[491\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T982 XXN.

549. Mr Di Felice said there were file notes of a meeting where they discussed escrow arrangements, and where they discussed a number of landowners that were involved. He could not recall the date of the meeting. Mr Di Felice said that, in July, there was also a meeting with Mr Montalto in Thomastown (this would be the 19 July 2012 meeting)[\[492\]](#) at Settlement Road, with Mr Hart, Mr Dooling, Mr Montalto, Mr Brown, and possibly Peter Levinge. Mr Di Felice said that he recalled that at the meeting, the latest version of the development agreement, that he had sent to Mr Hart, was discussed. Mr Di Felice took a file note of the meeting. He said that he would have recorded

the significant matters discussed in relation to the development agreement to the extent that they required amendment to the agreement.^[493]

^[492] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T987 XXN.

^[493] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T987–988 XXN.

550. Mr Di Felice was taken to an email dated 8 March 2013, to Mr Hart, in which Mr Di Felice said: ‘Thanks David. One of the gaps we had was Developable Area, so I will now confirm that with our client. There remains some missing information. I will finalise a list and send to you.’^[494] Thereafter, Mr Di Felice sent the email to Mr Brown dated 13 March 2013.^[495] Mr Di Felice said that it was discussed directly with Mr Montalto ‘ultimately in the meeting that we had post this, as part of the lot yield discussion.’^[496] Mr Di Felice could not recall the date of the meeting, but said that it was when they discussed the escrow arrangements.
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^[494] CB 475; Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T989 XXN.

^[495] CB 477.

^[496] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T990 XXN.

551. Mr Anderson suggested that Mr Di Felice never discussed, at any time, the land that Mr Montalto was prepared to put into the development agreement. Mr Di Felice disagreed.^[497] Mr Anderson suggested that Mr Di Felice always assumed that all of Mr Montalto’s land was going into the agreement. Mr Di Felice responded that he ‘always believed that it was all of his land, and we did have the discussion about the land.’^[498] Mr Anderson suggested that by the time he got the file from Mr Jeremiah and became involved with the file, that Mr Di Felice assumed it was all of the land because Mr Jeremiah had not told him anything different. Mr Di Felice agreed and said: ‘[I]t was subsequently discussed with plans at meetings and yield, direction of development, et cetera, as to what the land was. But it was not referred to as lot 1. It was the whole of the land.’^[499]
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^[497] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T990 XXN.

[\[498\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T990 XXN.

[\[499\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T991 XXN.

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552. Mr Di Felice said that there was a general discussion about farming, but not in relation to any particular part of the land. He added that: ‘all the land was to be continued to be farmed for as long as possible for, if no other reason, land tax.’[\[500\]](#)

[\[500\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T991 XXN.

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553. Mr Di Felice said that he was not present when Mr Montalto and Mauro signed the development agreement, prior to the 10 April 2013 meeting, and that he was not supervising the escrow process.[\[501\]](#)

[\[501\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T993 XXN.

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554. At the signing ceremony of 10 April 2013, Mr Di Felice said that he could not recall all who attended, but he did recall that he attended as well as Mr Montalto, Mauro, Mr Hart, Mr Levinge and the Coralluzzos. Mr Di Felice said that there was, effectively, a signing of the consortium documents that he had delivered to Mr Hart earlier. Mr Di Felice said he could not recall if Mauro came in for a short time and left, or not.[\[502\]](#) Mr Anderson suggested to Mr Di Felice that he said to Mr Montalto said words to the effect that his documents were here to sign and Mr Montalto responded: ‘Hang on a moment.’ Mr Anderson continued, saying: ‘[Mr Montalto] had to duck out of the conference room and on his way he said, “I’ll be right back. As long as you’ve got my special clauses in there and the right to sell, we’ll be all right.”’ Mr Anderson then asked Mr Di Felice if he recalled such statements, to which Mr Di Felice responded: ‘No, I don’t recall him saying anything like that.’[\[503\]](#) Mr Anderson suggested to Mr Di Felice that Mr Montalto ‘came back into the room and you said to him, “Yes, your conditions are here.”’ Mr Di Felice answered: ‘No, it’s not what I said to him.’ Mr Anderson then asked whether Mr Di Felice could have said: ‘It’s in the agreement, [Mr Montalto].’ Mr Di Felice said: ‘No.’[\[504\]](#) Mr Di Felice said that he recalled no discussion in relation to the contents of the documents at this meeting.[\[505\]](#)

[\[502\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T996 XXN.

[\[503\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T997 XXN.

[\[504\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T997–998 XXN.

[\[505\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T998 XXN.

555. Mr Anderson suggested to Mr Di Felice that Mr Montalto did ask Mr Di Felice whether his conditions were in the agreement. Mr Di Felice disagreed.[\[506\]](#)

[\[506\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T998 XXN.

556. Mr Di Felice said that the development agreement was executed as a deed.[\[507\]](#)

[\[507\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T999 XXN.

Evidence of Robert Jeremiah

557. As mentioned above in the discussion of Mr Montalto's evidence, Mr Jeremiah is a principal of Sladen. Mr Brown first contacted Mr Jeremiah on 29 September 2011 regarding Mr Montalto's matter.[\[508\]](#) Mr Jeremiah was asked by Mr Brown to provide assistance to Mr Montalto in relation to the development or proposed development of his land, both generally, and in relation to the documentation and advice concerning how that might proceed.[\[509\]](#)

[\[508\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1015 XN.

558. There was a further phone call from Mr Brown to Mr Jeremiah on 4 October 2011. It was discussed that Mr Montalto was unsure how to proceed, and that he might at that time have preferred to sell to a third party. There were concerns about landowners and who might or might not be involved in the project, and that Mr Montalto's land was the most valuable land in relation to what was proposed. Mr Jeremiah then agreed to meet with Hall & Wilcox in relation to the proposed arrangements.[510]

[510] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1016–1017 XN.

559. Mr Jeremiah was asked if Mr Brown had identified the land that Mr Montalto was considering selling. Mr Jeremiah said: 'Not specific identification, but there were parcels of land which were between Mr Montalto's land and the railway line.'[511]

[511] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1017 XN.

560. Mr Jeremiah addressed the October 2011 meeting at Hall & Wilcox. He said that they discussed DFG's conditions, and the need for PSP approval to occur earlier. Mr Jeremiah asked when the land was acquired, but he had no specific recollection of any discussion of parcels of land at that point in time. He said that there were to be follow-up conversations concerning land tax.[512]

[512] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1020–1022 XN.

561. Mr Jeremiah said that Mr Montalto 'provided advice and instructions as to his understanding of the value of the land ... and what Mr Montalto's land was and comprised and what in the end he may or may not receive out of this was something that — he certainly instructed us as to these valuations and these figures that are referred to in the notes. ... There's a figure of \$40 - \$60 million as the bank market valuation of his land and then cash flow valuations of plus or minus

300 million, and that's on the basis as an end position from the sale of ... 3,300-odd lots at plus or minus which I believe will be 300,000 per year.'

[513]

[513] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1023–1024 XN.

562. Mr Jeremiah was asked about his recollection of the conversation that he had had with Mr Brown, during a telephone call on 4 November 2011, in relation to which he noted: 'No need for approval from [Mr Montalto]. Colin authorised to make decisions on [Mr Montalto's] behalf. Also forward to Alex' (meaning Mr Duonis). Mr Jeremiah said: 'My recollection of the conversation, that's precisely as I have noted there, that my understanding was that notwithstanding that we were not to be precluded in any way from talking to Mr Montalto, but basically or in essence our instructions were to come from Colin Brown. He had been advising Mr Montalto for many, many years and he was his confidante and on that basis we were informed that we were to take instructions from him without necessarily referring back to [Mr Montalto].'
- [514]
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[514] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1024–1025 XN.

563. Mr Senathirajah asked, effectively, if Mr Brown was merely saying that he had authority in relation to the specific proposal discussed in the email. Mr Jeremiah said that was correct in relation to this authority. Mr Senathirajah noted that Mr Jeremiah had not given any evidence prior to that point about any other authority held by Mr Brown, in response to which Mr Jeremiah said that was because 'I haven't been asked the question, no.'
- [515]
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[515] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1040–1041 XXN.

564. Mr Senathirajah asked if it was Mr Montalto who had told Mr Jeremiah to deal with Mr Brown. Mr Jeremiah said: 'Yes.'
- [516]
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[516] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1041 XXN.

565. Mr Jeremiah was asked about the Kooyong presentation and whether there were any discussions about the land that Premier Bay was putting into the development. Mr Jeremiah said: ‘Only that the land was that — no discussion other than the land that Mr Montalto was to contribute or to place in the proposed arrangement was other than shown on any plans. There wasn’t any discussion about that, no.’^[517]

^[517] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1029 XN.

566. Mr Jeremiah was taken to an undated file note of a meeting by Mr Tsalanidis.^[518] Mr Jeremiah said that, from looking at Mr Goldin’s notes, he recalled that he was at the meeting and that he explained to Mr Montalto what ‘in escrow’ meant.^[519]

^[518] CB 689–691.

^[519] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1031 XN.

567. In October 2016, Mr Montalto attended Sladen’s offices with Mr Wilkins of Phillips & Wilkins with a ‘young fellow,’ who Mr Jeremiah believed was called Mr Yuncken. At this meeting, Mr Jeremiah said that Mr Montalto said:^[520]

That he would like lot 1 to be included. He had understood that it wasn’t to be necessarily included, but he would like it to be included, but he would also like the flexibility to take it out if he wished to, so that he wasn’t necessarily bound and that had always been his understanding of the position as what he had put at that meeting at that time, and then [Mr Jeremiah] made comments about that to him in relation to the agreement. ... [T]here was one other thing that he mentioned. That was the concern he had was in relation to names of roads, et cetera, that he understood that the Montalto family name might be included in names and that was something that he was concerned about.

^[520] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1034 XN.

568. Mr Peters asked Mr Jeremiah whether, in his experience, it was common practice to require the directors of such a corporation to give a personal guarantee. Mr Jeremiah answered: 'It's fundamental. In fact if it wasn't, I would have thought there would be some concern about that from the other party.'^[521]

^[521] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1035 XXN.

569. Mr Anderson asked Mr Jeremiah in cross-examination: 'And there was no discussion at this meeting of 5 October 2011 of what parcel of land Mr Montalto was contemplating putting into the development, was there?' Mr Jeremiah replied: 'Not to my recollection, no.'^[522]

^[522] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1048 XXN. See also Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1050 XXN.

570. Mr Montalto was not present at the meeting of 12 October 2011.^[523] Mr Jeremiah was asked: 'at this meeting ... on 12 October 2011 there was no discussion of what, if any, land Mr Montalto and Premier Bay would put into the development; do you agree with that?' Mr Jeremiah answered: 'There wasn't at that point, but there had been earlier indications given. ... '^[524]

^[523] CB 229.

^[524] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1051 XXN.

571. Mr Jeremiah said: 'All our communication was through Mr Brown and that was to be the case, as in email communication.'^[525] Mr Brown had given that instruction and that was confirmed a couple of times, orally, by Mr Montalto.^[526]

[\[525\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1052 XXN.

[\[526\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1052 XXN.

572. Mr Jeremiah said that he thought, but could not be specific, that he was at the Kooyong meeting to give a presentation at the invitation of DFG; an arrangement made through Mr James of Hall & Wilcox, DFG's legal advisers.[\[527\]](#)
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[\[527\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1056 XXN.

573. Mr Jeremiah said that he may have been consulted on the terms of the development agreement from a commercial perspective, but that it was Mr Di Felice's responsibility to liaise with Mr Brown about the detail of the development agreement and the CUT agreements.[\[528\]](#)
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[\[528\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1057 XXN.

574. Mr Anderson suggested to Mr Jeremiah, that Mr Montalto had told Mr Jeremiah that, because of the quarry buffer, he could not develop lot 1 and he was going to continue to farm lot 1. Mr Jeremiah answered: 'He was to continue to farm lot 1 in any event. That's a question from a land tax perspective potentially, but not that he did not wish to sell lot 1 at all, no.'[\[529\]](#)
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[\[529\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1058 XXN.

575. Mr Anderson suggested to Mr Jeremiah that Mr Montalto was contemplating putting lots 2 and 3 into the development with DFG at that time. Mr Jeremiah said: 'I didn't understand that at all, no.'[\[530\]](#) He added: 'As I understood it, lots 1, 2 and 3 until we met in 2016.'[\[531\]](#)
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[\[530\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1058 XXN.

[\[531\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1059 XXN.

576. In relation to the quarry buffer, Mr Jeremiah said: ‘The quarry was mentioned at one stage about causing — well, there was a quarry there and a query about the timing that could be developed, the quarry land.’[\[532\]](#) The following exchange occurred:[\[533\]](#)

[\[532\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1059 XXN.

[\[533\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1060 XXN.

MR ANDERSON: Immediately west of lot 1, correct. That was owned by Boral; do you recall that?

MR JEREMIAH: Well, owned by a large company.

MR ANDERSON: You understood it was contemplated to undertake a quarry?

MR JEREMIAH: Yes.

MR ANDERSON: You knew that. Did you understand that if that was to occur, then that would affect the amount of land that was developable?

MR JEREMIAH: Developable.

MR ANDERSON: And there was discussion about that, wasn’t there?

MR JEREMIAH: Yes.

MR ANDERSON: And how that would affect the size of the developable area, make it smaller?

MR JEREMIAH: Yes.

577. On the other hand, Mr Jeremiah also said he did not recall Mr Montalto discussing that lot 1 could not be developed because of the quarry buffer.[\[534\]](#)

[\[534\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1062 XXN.

578. Mr Jeremiah was asked if he recalled any discussion with Mr Montalto regarding his conditions for putting lots 2 and 3 into the development. Mr Jeremiah said: ‘The conditions to be satisfied were not in relation to lots 2 and 3. The conditions were in relation to, at that point in time, who else was continuing and who else would go into this project.’[\[535\]](#).

[\[535\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1060 XXN.

579. Mr Jeremiah said that he recalled discussions concerning the tenant of lot 2 having to be relocated, and it was ‘probably correct’ that she was to be relocated to lot 1.[\[536\]](#).

[\[536\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1060–1061 XXN.

580. Mr Jeremiah could not specifically recall Mr Montalto saying he wanted lot 1 included as part of the initial concept plan.[\[537\]](#).

[\[537\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1061 XXN.

581. Mr Anderson asked Mr Jeremiah if Mr Montalto ever said to him that he wanted to retain lot 1, separately, so that he had a free right of sale over it.[\[538\]](#) Mr Jeremiah said: ‘No.’[\[539\]](#).

[\[538\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1061 XXN.

[\[539\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1061 XXN.

582. Mr Jeremiah said: ‘There was a question about security issues over parcels of land from a borrowing perspective, in the light of the potential length of the project.’^[540]

^[540] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1061 XXN.

583. Mr Jeremiah said that he probably would have received the first draft of the development agreement sent by Mr Hart. He did not discuss it with Mr Montalto; he did discuss it with Mr Brown.^[541]

^[541] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1063 XXN.

584. Mr Jeremiah did not believe that he provided advice to Mr Montalto or Mr Brown about the confidentiality and exclusivity deed.^[542] Mr Jeremiah agreed that he did not discuss the proposed amendment to the development agreement in clause 1.16 (which said, ‘Developable Area means [to be discussed]’)^[543] with Colin Brown, but may have discussed it with Mr Di Felice.^[544] Mr Anderson asked Mr Jeremiah if he had left it to Mr Di Felice to discuss the developable area with Mr Montalto. Mr Jeremiah said: ‘Yes, but it was always understood what that was.’^[545] Adding, ‘[w]ell, yes, if it was anything left to explain, because it had already been determined a lot earlier than that.’^[546]

^[542] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1064 XXN.

^[543] CB 310; Development Agreement (draft) clause 1.16.

^[544] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1065 XXN.

^[545] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1066 XXN.

585. I found Mr Jeremiah to be a most impressive witness. He spoke openly and honestly. I accept his evidence fully.

Did Mr Montalto know lot 1 was included in the development?

586. Premier Bay and Mr Montalto's defence and counterclaim is based on several contentions, as set out below. The case was conducted on the basis that Premier Bay's knowledge was Mr Montalto's knowledge. Henceforth, in referring to Mr Montalto's knowledge, I am also including the knowledge of Premier Bay.

587. First, Premier Bay and Mr Montalto allege that at the time the development agreement was executed, Mr Montalto had no knowledge that the development agreement defined land to include lot 1, as well as lots 2 and 3. Secondly, it is alleged that Mr Montalto had no knowledge that the development agreement applied to lot 1 in any way, other than to the extent that it provided for the formulation of an initial concept design for a hypothetical future development that would include lot 1.

588. Thirdly, Premier Bay and Mr Montalto allege that, at the time they executed the development agreement, they were of the mistaken belief that the development agreement contained Mr Montalto's five pre-conditions (special clauses), including the critical condition concerning lot 1, as set out above.

589. The particulars given in support of these allegations include the six alleged representations. The particulars are as follows. [547]

[547] Second Further Amended Defence and Counterclaim dated 1 November 2017, (SFADAC) particulars to paragraph 7.

(ai) At a meeting with Peter Levinge, Bert Dennis, Terry Dooling and Mr Montalto sometime around the end of 2010:

(A) the Plaintiffs gave to Mr Montalto a brochure that contained at page 34 a map that showed a quarry buffer impacting on Lot 1;

(B) one of the representatives of the Plaintiffs said to Mr Montalto, in response to his question about the quarry buffer, words to the effect that 'the blue line is a buffer because of the quarry permit next door, and that land is not developable'.

(a ii) At no time after the meeting referred to in paragraph (ai) above did any representative of the Plaintiff, or any other person, explain to Mr Montalto that the

quarry buffer no longer had an impact on Lot 1 and that Lot 1 was now developable land.

(i) At initial meetings held with Terry Dooling and Peter Levinge from the plaintiffs, which were held sometime around the end of 2011 and the beginning of 2012, Mr Montalto offered Lots 2 and 3 to the plaintiffs as lots to be subject to a development agreement, and said in respect of Lot 1 words to the effect that:

(A) 'I'm happy to farm Lot 1 for another 30 years or 40 years, seeing as it's not developable', referring to the quarry buffer that impacted Lot 1 from the neighbouring property and prevented Lot 1 from being developed.

(B) 'If you take what I'm offering, I've given you twice what you have now' meaning that the land comprising Lots 2 and 3 was approximately double the land that other adjoining landowners had, at the time of the conversation, offered to the plaintiffs for development (ie, the land owned by the Douglas's that was immediately to the north of Lots 1, 2 and 3).

(C) 'I want Lot 1 included in the concept plans, but it is not part of the development. But I want it included in the plans so it can be added in years to come, after the quarry has gone.'

(ii) At a further meeting with Terry Dooling and Peter Levinge from the plaintiffs, which was held sometime around the end of 2011 and the beginning of 2012, Mr Montalto told the plaintiffs that he would enter into a development agreement with the plaintiffs on the following five preconditions (the Five Conditions) namely that:

(A) Gina Webling, who was (and is) a tenant residing in a house on Lot 2, needed to be relocated to the house on Lot 1, and if Lot 1 was to be developed at a future date, and if, at that time, it was not appropriate for Gina to remain in the house on Lot 1 (with land), Gina would need to be relocated elsewhere (with land);

(B) In the event that Lots 2 and 3 were developed, Mr Montalto would continue to farm Lot 1, as Lot 1 was not developable due to the quarry buffer from the neighbouring property which impacted upon it and prevented it from being developed;

(C) Lot 1 was to be included in the preliminary drawings for the conceptual design phase of the development, but only so that it was part of the formulation of an initial concept design for the hypothetical future development of Lot 1. Mr Montalto stated that he wanted to see how it could look as part of an overall development, as he did not like to go back and add things on in the future, but that by being included in the concept sketches Lot 1 was not included in the development.

(D) Premier Bay was to retain 'a free right of sale' in respect of:

(1) Lot 1 (ie, free of any obligation to the plaintiffs) so that it could be sold as farm land, to a developer as a potential development site, or to anyone Premier Bay chose; and

(2) a small parcel of land on Lots 2 and 3 if it was necessary for Premier Bay or Mr Montalto to raise funds at a future date; and

(E) The Montalto name would be used in relation to the development of Lots 2 and 3, and, in particular, in respect of street names.

(iii) At the April 2013 Meeting pleaded below at paragraph 7A, and immediately before Mr Montalto executed the Development Agreement:

(A) Mr Montalto said to Sladens, being the firm of lawyers whom Premier Bay and Mr Montalto engaged to advise them in the negotiation with the Plaintiffs, drafting and execution of the Development Agreement, in the presence, and within the hearing distance, of Burt Dennis, Peter Levinge, Terry Dooling and Greg Bursill, 'have I got the free right to sell?' and 'Lot 1 is separate?';

(B) Rob Jeremiah of Sladens said to Mr Montalto, 'yes you have the free right to sell, it's here' and he gestured towards the Development Agreement;

(C) No person took Mr Montalto through the pages of the Development Agreement, or any other agreement, in order to explain to Mr Montalto the meaning of its terms, or otherwise drew any term of the Development Agreement to Mr Montalto's attention.

(iv) At no time prior to their execution of the Development Agreement did:

(A) Any representative of any of the plaintiffs;

(B) Any representative of Sladens;

(C) Colin Brown, or Crowe Horwath, being the accountancy firm of which Colin Brown was a partner, being the accountant who Premier Bay and Mr Montalto engaged to:

(1) advise them in the negotiation with the Plaintiffs, drafting and execution of the Development Agreement; and/or

(2) instruct Sladens on their behalf, and to convey to Premier Bay and Mr Montalto the advice received from Sladens, as to the negotiation with the Plaintiffs, drafting and execution of the Development Agreement;

inform Premier Bay or Mr Montalto that:

(A) the Development Agreement defined 'Land' to include Lot 1, as well as Lots 2 and 3;

(B) the Development Agreement applied to Lot 1 in any way other than to the development of Lot 1 by way only of the formulation of an initial concept design for a hypothetical development that would include Lot 1;

(C) their belief pleaded above in paragraph 7(c)(ii) was mistaken.

590. The particulars support the contention of Mr Montalto's lack of knowledge and Mr Montalto's belief.

591. It is pleaded that:^[548]

Sometime around the end of 2011, and at a meeting held at Premier Bay's offices at 327 Settlement Road, Thomastown, Mr Montalto advised Colin Brown of the Five Conditions that Premier Bay and Mr Montalto had to them entering into a development agreement with the plaintiffs, which Mr Montalto had previously explained to the representatives of the Plaintiffs as set out at paragraph (ii) to the particulars to paragraph 7 above.

Sometime around the end of 2011 or the beginning of 2012, and at a meeting held at Sladens' offices on William Street, Melbourne, which was either the first or second meeting that Mr Montalto attended at Sladens' offices for the purpose of providing instructions to Sladens and for the purpose of receiving advice concerning the Sladens Retainer, Mr Montalto explained the Five Conditions to Sladens, in the presence of Colin Brown.

...

At the April 2013 Meeting pleaded above at paragraph 7A, the Transaction Documents were produced to the defendants for the first time.

^[548] SFADAC [30], [31], and [36].

592. The conversations are also relied on to establish the knowledge of DFG, the solicitors, and the accountant of Mr Montalto's knowledge and mistaken belief. As discussed above, Mr Montalto also gave evidence that he did not know that the development included lot 1, and of his mistaken belief about the application of the development agreement. Mr Montalto gave evidence of reaching an agreement with DFG that lot 1 was excluded from the development, however, no such agreement was pleaded.

593. For the following reasons, I am not satisfied that, at the time Premier Bay and Mr Montalto executed the development agreement, Mr Montalto had no knowledge as alleged, and that Mr Montalto held the mistaken belief as alleged.
594. On the contrary, I am satisfied that, at the time Mr Montalto executed the development agreement, he did know that the development agreement defined 'land' to include lot 1 as well as lots 2 and 3, and he did have knowledge that the development agreement applied to lot 1 in the same way as it applied to lots 2 and 3.
595. I am also satisfied that, at the time, Mr Montalto was not under any mistaken belief about the application of the development agreement.
596. There are several reasons why I have come to this conclusion.

Evidence that lot 1 is included

597. Mr Senathirajah took Mr Montalto to the development agreement. Mr Montalto agreed that the land, the subject of the development agreement, is described (in the development agreement) as lots 1, 2 and 3.^[549] Mr Montalto said:^[550]

It's mentioned there as lot 1, 2 and 3, all my land, but then in there somewhere the development agreement is the developable land which is the agreement between us lot 2 and 3.

^[549] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T651–652 XXN.

^[550] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T653 XXN.

598. Mr Montalto was shown documents and maps, before he signed the development agreement, which showed that lot 1 was included in the land to be developed. For example, on a plan, it was shown that Hays Boulevard ran across lot 1 and that subdivision housing lots straddled the boundary between lots 2 and 1, which would have indicated to Mr Montalto that the proposed developed necessarily included lot 1. Mr Montalto explained that he thought these were only part of the concept plans for lot 1. I do not accept this as credible.
599. The CUT agreements have also been formulated on the basis that the land being contributed by Mr Montalto was 263.76 hectares in total, of which there were 208 hectares of net developable area. As discussed above, this necessarily includes lot 1. Mr Montalto does not claim any relief in respect of the CUT documents. As has been discussed, the CUT documents allow for an allocation of funds to the members of the consortium as they are realised through land sales.

600. It was put to Mr Montalto that he had knowledge that the CUT documents related to lot 1, in response to which Mr Montalto gave the following evidence:[551]

[551] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T573 XXN.

MR PETERS: Another factor that suggests you understood lot 1 was included was you signed the consortium unit trust documents referring to lots 1, 2 and 3; do you agree?

MR MONTALTO: But that's my whole property.

MR PETERS: And you accept that the consortium unit trust interests, the interests of you, Coralluzzo, Douglas, were calculated by reference to the developable area which each landowner brought to the trust arrangement?

MR MONTALTO: Of lot 2 and 3, not as well as lot 1.

MR PETERS: We went through documents - - -?

MR MONTALTO: Who worked it out? I didn't work it out.

...

MR PETERS: We went through those documents a little while ago and they referred to lots 1, 2, and 3, don't they?

MR MONTALTO: But lot 1 is only there as a concept.

601. It is evidence from Mr Di Felice's correspondence with Mr Brown that Mr Montalto expected a 'higher [developable] area' and that this was an issue that Mr Di Felice wanted Mr Montalto to be aware of. If Mr Montalto expected a higher developable area, he must have assumed that lot 1 was to be developed.
602. Further, the service corridor that is to run along Donnybrook Road traversed lot 1 and was essential to the whole subdivision. The service corridor was discussed with Mr Montalto. Mr Montalto understood that his taking part in the development was of assistance to his neighbours, as services and access could be provided to their land. In these circumstances, it is difficult to accept that Mr Montalto believed these plans were only part of the concept stage.
603. Mr Montalto signed confidentiality agreements and an irrevocable authority for lots 1, 2 and 3.
604. The exclusivity and confidentiality agreement contains a page titled, 'our offer,'[552] which contained no mention of Mr Montalto's five conditions.[553] Mr Montalto received advice from Mr Farinotti on the confidentiality and exclusivity agreement.
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[\[552\]](#) CB 198.

[\[553\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T551-2 XXN.

605. Mr Montalto was asked on cross-examination:[\[554\]](#)

[\[554\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T544, T568, T569 XXN.

MR PETERS: That's a letter involving an extension of the exclusivity and confidentiality deed. Is that signed by you?

MR MONTALTO: That's my signature, yes.

MR PETERS: And you know that related to lots 1, 2 and 3, the whole of your land?

MR MONTALTO: The whole property, yes.

MR PETERS: I just want to suggest to you it looks to me like Dennis Family Homes thinks that lot 1 is going to be included in the development?

MR MONTALTO: They know what's going to come tomorrow. I don't. They've never made it known to me.

MR PETERS: They are assuming that lot 1 is developable, are they not?

MR MONTALTO: I don't know why. We've had different discussions.

...

MR PETERS: Can I hand to you this document. ... It is headed 'Irrevocable authority', dated 1 July 2014.[\[555\]](#) Can you see that you and Mauro have signed that as directors of Premier Bay on the next page?

[\[555\]](#) Exhibit P19.

MR MONTALTO: Yes.

...

MR PETERS: Do you see capital A, 'Premier Bay ... Has entered into an agreement with Dennis ... For the purposes of development of the land'; do you see that?

MR MONTALTO: Yes.

MR PETERS: And that includes lots 1, 2 and 3?

MR MONTALTO: It doesn't say 1, 2 and 3 there.

MR PETERS: It says 'Certificate of title volume 9764 folios 099,' that's lot 1, isn't it?

MR MONTALTO: I don't think so. That would be 1145 Donnybrook Road, the whole parcel.

MR PETERS: The whole parcel?

MR MONTALTO: Yes.

606. The cash flow estimates prepared by DFG were prepared based on the three lots being part of the development. These were shown to Mr Montalto and the Montalto family. Mr Montalto said:[\[556\]](#)

MR PETERS: I want to suggest it was clear to you because they were giving you a document showing your return from lots 1, 2 and 3?

MR MONTALTO: They were giving me a return on the whole of my title if it was a whole, which it wasn't a whole. It was a concept. So that was included as a concept. It was never on the table, sir.

[\[556\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T556-557 XXN.

607. Mr Montalto's case relies on his belief that his land fell within a quarry buffer that meant it was undevelopable. Mr Montalto was unable to explain why such a quarry buffer was not a concern for his neighbours; as for lot 2, which would also have been affected by the quarry buffer, as shown on the map Mr Montalto pointed to in support of his claimed belief, Mr Montalto said that he thought it would not be a difficult task to have the buffer moved off lot 2.
608. In relation to the quarry that Mr Montalto said was the reason for his belief that lot 1 was not developable, during examination in chief, Mr Montalto gave the following evidence:[\[557\]](#)

MR ANDERSON: What was your state of mind as to whether or not a quarry buffer existed [prior to 10 April 2013]?

MR MONTALTO: A quarry buffer is there and it's restricting lot 1 of being developable.

[557] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T478 XN.

609. On cross-examination, Mr Montalto gave the following evidence:[558]

[558] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T518 XXN.

MR PETERS: There was never a quarry on next door, was there?

MR MONTALTO: No, there was a permit, though. There was a permit that had just elapsed and they were trying to reissue that permit, regain, refile that permit.

MR PETERS: Who was?

MR MONTALTO: The quarry people that owned it.

MR PETERS: The quarry people sold it?

MR MONTALTO: When did they sell it?

MR PETERS: You tell me?

MR MONTALTO: You tell me. I don't know.

MR PETERS: You know Olivine, the developments right next to yours?

MR MONTALTO: Olivine, that's the policeman — no, Olivine is that estate now, yes, next door.

MR PETERS: And when did you first learn the estate next door was being developed?

MR MONTALTO: When?

MR PETERS: Yes. How long ago? How many years ago?

MR MONTALTO: Only recently. The last couple of years. They have come up ahead of us.

MR PETERS: Last couple of years?

MR MONTALTO: Yes.

MR PETERS: Back in 2013?

MR MONTALTO: No, not really, no. Not at that time.

MR PETERS: Okay. All right?

MR MONTALTO: That was still a quarry permit.

MR PETERS: You have known for a couple of years that lot 1 is developable, haven't you?

MR MONTALTO: No.

MR PETERS: If you had known for the last couple of years - - -?

MR MONTALTO: Couple of years since Mirvac bought and made into common knowledge. Okay, it will change. Okay, just because they bought it doesn't mean they have got a permit straight away.

...

610. Despite Delma joining the CUT agreements, and subscribing to units on the basis of the land offered for development, Mr Montalto gave the following evidence:[\[559\]](#)

MR PETERS: Delma joined the consortium in July 2014, didn't it?

MR MONTALTO: I think so.

MR PETERS: And its land was affected by the quarry buffer map; is that your evidence?

MR MONTALTO: The top area was, the top corner, yes.

MR PETERS: But it still tipped all its land into the development?

MR MONTALTO: I don't know what proportion, Your Honour. I never checked their proportion.

[\[559\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T573 XXN.

611. It is difficult to believe that, being a business man who is good with numbers, Mr Montalto did not pay any attention to the figures in the CUT documents as these directly impact on Premier Bay's cash flow.

612. Mr Montalto also denied that Mr Hay told him of his discussions with Boral in 2010.^[560]

MR PETERS: I want to put to you that both Mr Hay and Mr Dooling told you in 2010 that there was no quarry proceeding on the Boral land?

MR MONTALTO: No. Never had discussions with Mr Hays, only Mr Dooling.

^[560] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T573 XXN.

613. The evidence of Mr Hay and Mr Dooling concerning discussions with Mr Montalto about the quarry, and the Boral land, is consistent with the contemporaneous documents; the sale of the Boral land to Mirvac in November 2012 (which Mr Montalto had known about for at least a couple of years); and the fact that DFG have progressed the development and spent significant sums in relation to land falling inside the quarry buffer zone.

614. I accept the evidence of Mr Dooling and Mr Hay on this matter. I do not accept the evidence of Mr Montalto.

615. The allocation and reallocation of units in the CUT that took place on Delma joining the development was based on the 'Land' of Premier Bay comprising lot 1, lot 2 and lot 3.

616. The CUT agreements were varied by an executed Deed of Variation, signed by Mr Montalto.^[561] Mr Montalto also signed:^[562]

- (i) the Minutes of the Meeting of Unitholders of the Woodstock Consortium Trust;
- (ii) the Minutes of the Meeting of Directors of Woodstock Consortium Pty Ltd;
- (iii) the Minutes of the Meeting of Shareholders of Woodstock Consortium Pty Ltd; and
- (iv) the further Minutes of the Meeting of Directors of Woodstock Consortium Pty Ltd.

^[561] Exhibit P1 [30], [31]. See CB 608–613.

617. Each of the above documents signed by Mr Montalto on 1 July 2014, in relation to the amendment of the CUT agreements, show that Premier Bay's land is lots 1, 2 and 3. [563]
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[563] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T714–715 XXN; Exhibit P20.

618. I am satisfied that Mr Montalto knew the substance of the CUT agreements and knew that they were based on lots 1, 2 and 3 being developed.

Contradicting witness evidence

619. First, Mr Levinge, Mr Dooling, Mr Brown, Mr Jeremiah, Mr Di Felice, Mr Hart, Mr Duonis, and Mr Hay each denied hearing Mr Montalto say any of the alleged conversations or anything similar. In each case, I found that they gave their evidence truthfully. Their evidence is corroborated by contemporaneous documents, email chains, and file notes. As mentioned previously, I am satisfied that Mr Montalto did not say any of the alleged conversations 1 to 6, or anything to like effect, to any of the persons alleged to have heard them.
620. Evidence was given that each of the matters alleged by Mr Montalto and Premier Bay would have drastically or fundamentally changed the nature of the agreement in the minds of Mr Montalto's advisors. It is inherently unlikely that the accountants or solicitors would not have responded to Mr Montalto's requests, or otherwise addressed the matters raised, if the matters had in fact been drawn to their attention.
621. I would go so far as to say it is virtually inconceivable that his professional advisors would not have responded with questions of Mr Montalto, if he had said any of the alleged six conversations to them or anything similar.
622. The very conduct of the accountants and the solicitors demonstrates to me that they were not told of the matters that Mr Montalto alleges.
623. The allegations of Premier Bay and Mr Montalto that sometime around the end of 2011 or the beginning of 2012, and at a meeting held at the offices of Sladen, Mr Montalto explained the five conditions to his lawyers, in the presence of Mr Brown, were denied by all those present, except for Mr Montalto.

624. After hearing the evidence of Mr Jeremiah and Mr Di Felice, I do not accept they would have ignored Mr Montalto's express instructions when there was no reason for them not to carry out his instructions and act in his best interests.
625. I find that there was no reason why Mr Brown would not have followed Mr Montalto's instructions, especially on the very subject matter of the development agreement. Mr Brown had reliably acted for Mr Montalto for 40 years. I do not accept that Mr Brown was motivated to mislead Mr Montalto and not to follow his instructions because of a discount he received from DFG for his house. The suggestion is ludicrous.
626. Mr Brown gave evidence that, ordinarily, Mr Montalto would carry out all initial investigations and negotiations himself before entering into business deals, and would only approach Mr Brown at a later date, after the deal had been done. This evidence was contrary to Mr Montalto's evidence that he relied on Mr Brown at every step of the way and was dependent on Mr Brown.
627. Mr Brown gave evidence that, the first time he became aware of the five conditions was when he saw the documents prepared for this proceeding. I accept this evidence.

Reliance on Mr Montalto's evidence

628. I am not prepared to accept Mr Montalto's evidence on the relevant issues in this case, unless it is corroborated or against his interest. I do so for several reasons set out below.
629. Mr Montalto's complaints were inconsistent with his pleaded case about his knowledge and beliefs at the time the development agreement was executed by Premier Bay and himself in early 2013.
630. As I have detailed above, Mr Montalto's own evidence of the conversations did not fit the pleadings. By way of example, Mr Montalto did not give any evidence of a conversation concerning lot 1 at the 10 April 2013 meeting, as is pleaded.^[564]

^[564] SFADAC [7] ((iii) of the particulars).

631. Mr Montalto did not give evidence in relation to the initial discussions that he alleges he had with Mr Levinge and Mr Dooling, at the end of 2011 to the beginning of 2012, as is pleaded.^[565] On Mr Montalto's evidence, the only relevant conversations could have taken place 'well into March, early April 2012.'^[566]

^[565] Pled at SFADAC [7] ((i) of the particulars).

632. Mr Montalto's evidence in chief, in relation to the further discussions at the end 2011 to the beginning 2012, was as follows:[567]

[567] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T453–455 XN.

MR ANDERSON: And what was that, Mr Montalto?

MR MONTALTO: That was pretty well the five conditions that I have specified which is, 'Lot 1 I'm happy to farm because you've got a buffer there and it can't be done; anything else can be done.' They made that clear to me from day one virtually and it can't go anywhere. 'I'm happy to farm lot 1 for years to come. Beyond my days my grandkids will have the option to do what they want.' Secondly I said, 'Before you enter from lot 2 you have to respect Gina Webling, the tenant. They have a life tenancy. They have to be respected and they have to be looked after and transferred to lot 2. They have the option to stay there if it's possible or move to lot 2.' Peter told me, 'With machines, all the dust et cetera, she wouldn't want to live here. They wouldn't want to live here. They'd be best to move.' I said, 'Okay. The option is there, lot 1, because that's separate. So you have got lot 2 and lot 3 to develop. All I want is to look after Gina because I don't want to be responsible to move her or anything else. That's your responsibility. Anything you want to know about the farm et cetera, Weblings, they are the ones that know.'

MR ANDERSON: What else did you tell them?

MR MONTALTO: Then I told them, 'The only things that I want is I'll happily farm lot 1, you look after Gina, then I need the names, the Montalto name, you incorporate the Montalto name 100 times over, don't tell me how and how you do it or how you don't do it, as many times over as possible, respect the Montalto name.' I said, 'With lot 1, because it's not developable and you're not going to do anything with it and we can't do anything with it, I would appreciate it if you incorporate it in your drawings, and I will pay the cost of whatever drawings that you allow, if you can't carry it in the consortium,' I said, 'in the company. Any time you give me a bill, I will pay for that.'

MR ANDERSON: Yes. What else?

MR MONTALTO: They were agreeable to that. Then I said, 'The Montalto name on the hill, you need to preserve it now because I don't want somebody later to name the hill and I lose the name in the developments of doing it now.' Then I said, 'I reserve the right to free sell a small parcel of land for cash flow out of your development. I

ask you — if I'm short of money, I ask you that I need some money. If you can help me, you help me. If you can't, I've got no options. I need land to sell. Otherwise I'll have lot 1, but that is an insurance factor. That is for large money. I'll have that there and sit there for a large sum of money for my business. That's an insurance. That suits me very fine, to work it that way. If I ever have to sell it I will sell it, if I'm forced to sell it, giving you the option because you are drawing it, you are involved in the drawings of it and you'll have first option, otherwise I free sell.'

MR ANDERSON: You mentioned in your evidence the small parcel of land. Where was that to come from?

MR MONTALTO: The small parcel of land is only petty cash sort of money; 20 blocks, 10 blocks. If I need \$1 million — I'm in business and if I'm short of money, I need \$1 million, it's not \$100, it's \$1 million or 2 million, it would be with their approval to say, '[Mr Montalto], you can sell stage 7. You can have the corner, you can have this one or you can have that one. We will buy it off you, whichever way.' If I need money, where do I go?

MR ANDERSON: Were there any other conditions that you had?

MR MONTALTO: No, that was about it; pretty well five conditions, I think.

MR ANDERSON: And what did Mr Levinge or Mr Dooling say to you after you told them your conditions?

MR MONTALTO: They said that could work, that would work. He made points of it in his diary and left it at that. I said, 'All right, you be sure of it and let me know.'

633. These conditions, which Mr Montalto stated were outlined to DFG during this meeting, do not correspond with the allegations that took place 'sometime at the end of 2011 and the beginning of 2012,' as is pleaded.[\[568\]](#)

[\[568\]](#) SFADAC, [7] ((ii) of the particulars).

634. Paragraph (ii)(A) of the particulars refers to it being a condition that Gina Webling be relocated to the house on lot 1 while, in his evidence, Mr Montalto stated that the condition required Gina Webling to be moved to lot 2. Mr Montalto's evidence is that Mr Levinge suggested that, because of the dust, the Weblings would want to move, and Mr Montalto said lot 1 is an 'option'.
635. Paragraph (ii)(C) of the particulars pleads that, it was a condition that 'lot 1 was to be included in the preliminary drawings for the conceptual design phase of the development, but only so it was part of the formulation of an initial concept design for the hypothetical future development of lot

1.’ Mr Montalto’s evidence of what he said at the meeting was that, he ‘would appreciate it if you incorporate it in your drawings, and I will pay the cost of whatever drawings that you allow, if you can’t carry it in the consortium.’

636. Paragraph (ii)(E) of the particulars alleges that it was a condition that the Montalto name be used in relation to the street names in the development of lot 2 and lot 3; however, Mr Montalto’s evidence only referred to the need to use the Montalto name on the hill (with that hill being located on lot 1).

637. Mr Montalto’s evidence in relation to what was purportedly said, at the Montalto family review meeting on 19 October 2012, was not pleaded. Mr Montalto gave evidence that there was possibly a discussion about the quarry buffer ‘because of the quarry buffer affecting lot 1.’^[569] Mr Montalto said that:^[570]

It was discussed on the day that they put forward that it was lots 2 and 3, because lot 1 has a buffer which can’t be developed, and my children clearly understood that, and I would have to continue to farm lot 1, because I needed them to understand why I am farming lot 1 and why I’m only giving lot 2 and 3, and that had to come from them.

^[569] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T463 XN.

^[570] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T468 XN.

638. As discussed below, Mauro was in attendance at this meeting. In his pleadings, Mauro said that he was not aware of which lots were part of the development agreement. This seems to contradict Mr Montalto’s evidence that the above discussion took place, as it would tend to suggest that Mauro would have a basis for believing that only lots 2 and 3 were subject to the development agreement.

639. Mr Montalto agreed that, at the September 2016 meeting, he complained that the hill on lot 1 was not being developed fully. This seems inconsistent with the claim that that he did not want lot 1 to be included in the development, and with his evidence that DFG had agreed that lot 1 was not to be included in the land to be developed. Mr Montalto explained that, in making this complaint, he was referring only to the development of lot 1 as set out in the concept plans. I do not accept this evidence.

640. The pleadings of Premier Bay and Mr Montalto allege that: ‘no person took Mr Montalto through the pages of the development agreement, or any other agreement, in order to explain to Mr Montalto the meaning of its terms, or otherwise drew any term of the development agreement to Mr Montalto’s attention,’^[571] and that ‘[a]t the April 2013 meeting [pleaded at paragraph 7A], the

transaction documents [including the development agreement] were produced to the defendants for the first time.’^[572] Mr Montalto agreed in cross-examination that he had received the development agreement earlier than 10 April 2013, and that he met with his lawyers:^[573]

^[571] SFADAC, particulars to paragraph 7 [(iiiC)].

^[572] SFADAC [36]. See also SFADAC [37(b)], [37(c)(i)], [37(c)(ii)], [38(c)].

^[573] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T653–654 XXN.

MR SENATHIRAJAH: ... So on 16 March Colin gets an email with these documents [development agreement]?

MR MONTALTO: Yes.

MR SENATHIRAJAH: He then, between 16 March and 3 April, discusses them with you, gives you a copy?

MR MONTALTO: Yes.

MR SENATHIRAJAH: And then you meet on 3 April with Mr Di Felice - - -?

MR MONTALTO: What year?

MR SENATHIRAJAH: At Harwood Andrews’ offices?

MR MONTALTO: Yes.

MR SENATHIRAJAH: With Mr Brown. Do you remember that meeting?

MR MONTALTO: What year, sir?

MR SENATHIRAJAH: 2012?

MR MONTALTO: 2012?

MR SENATHIRAJAH: Yes. So within two weeks or so of this email of 16 March?

MR MONTALTO: We could have went there, yes.

MR SENATHIRAJAH: In fact you did go there?

MR MONTALTO: Okay, yes.

641. Mr Di Felice gave evidence that, at this meeting, the amendments that he had suggested to the development agreement were discussed with Mr Brown and Mr Montalto. Mr Montalto said, of the above meeting with Mr Di Felice:[574]

MR SENATHIRAJAH: At this meeting, as I said, you were taken through the draft development agreement. That doesn't ring any bells?

MR MONTALTO: No.

MR SENATHIRAJAH: Mr Di Felice also took you through the changes that he recommended be made to this agreement in your favour?

MR MONTALTO: Were they made?

...

MR MONTALTO: I don't recall, sir. No, no, he didn't. No.

[574] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T655 XXN.

642. When asked whether Mr Brown took him to any particular clauses in the development agreement, Mr Montalto's evidence was that: '... he didn't have to. I asked him, "Are you happy with that? You've read it. Are you happy with it? If you're happy with it, my clauses are there, I'm happy to sign." It was his responsibility.' [575]

[575] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T470 XN.

643. This evidence is at odds with his complaint inferred in the pleading that: 'At no time before the April 2013 meeting did ... Crowe Horwath (a) read to Mr Montalto, or explain to Mr Montalto the effect of, each term of the development agreement ...' [576]

[576] SFADAC [39].

644. Mr Montalto sought to portray that he was taken advantage of and let down by his advisors; not only those against whom he has brought counterclaims, but also his current and past lawyers.
645. I formed the clear view that Mr Montalto is intelligent, sharp, and fully understands his business dealings. I do not accept that he has been let down by his advisors, including his current and past lawyers.
646. Mr Montalto's pleaded case was that Mr Brown ought to have been aware that Mr Montalto had a reading disability from his long dealings with Mr Montalto and his observations of Mr Montalto's reading difficulties. In cross-examination, Mr Montalto gave evidence that he told Mr Brown of his reading difficulties. This was a remarkable allegation to make when it was not opened or pleaded. If true, it would have been front and centre in the case against Mr Brown.
647. Mr Montalto explained that this failure was because in preparing his case, Mr Montalto's lawyers failed to ask Mr Montalto if he had ever told Mr Brown of his reading disability.[\[577\]](#)

[\[577\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T663, T664, T667 XXN.

MR SENATHIRAJAH: Did you at any stage tell Colin Brown that you had a reading disability?

MR MONTALTO: Yes, I did, Your Honour. Years ago. Colin's known all along.

MR SENATHIRAJAH: You told him?

MR MONTALTO: Yes.

MR SENATHIRAJAH: You said in words?

MR MONTALTO: In words years ago, yes.

MR SENATHIRAJAH: To the effect, 'Colin, I have a reading disability'?

MR MONTALTO: Yes. Colin is aware.

MR SENATHIRAJAH: Did you tell your lawyers that in this case?

MR MONTALTO: Not really. My lawyers are aware of it, yes.

...

MR SENATHIRAJAH: I'm asking you whether the lawyers that are here representing you in this case, did you tell them that you had told Mr Brown that you had a reading disability?

MR MONTALTO: They have not asked me that question, so I have not told them.

MR SENATHIRAJAH: They have pleaded on your behalf, Mr Montalto - - -?

MR MONTALTO: Yes.

MR SENATHIRAJAH: That Mr Brown - - -?

MR MONTALTO: Is aware.

MR SENATHIRAJAH: Is aware?

MR MONTALTO: Yes.

MR SENATHIRAJAH: They have not said that you told him?

MR MONTALTO: I have not been asked when did I tell him and how did he know.

MR SENATHIRAJAH: So your lawyers never asked you about - - -?

MR MONTALTO: Sorry?

MR SENATHIRAJAH: Your lawyers sitting here never asked you about the circumstances in which you claim Mr Brown knows that you have a reading disability; is that your answer to His Honour?

MR MONTALTO: Sorry, I lost it. Come again, please.

MR SENATHIRAJAH: Is it your evidence - - -?

MR MONTALTO: Evidence, yes.

MR SENATHIRAJAH: That your lawyers never asked you about the circumstances in which you claim Mr Brown knows that you have a reading disability?

[OBJECTION]

...

MR SENATHIRAJAH: The question to you is is it your evidence - - -?

MR MONTALTO: Yes.

MR SENATHIRAJAH: That your lawyers representing you in this case - - -?

MR MONTALTO: My lawyers, yes.

MR SENATHIRAJAH: Never asked you to describe the circumstances in which you say Mr Brown came to know of your reading disability?

MR MONTALTO: At this point, no.

648. In light of Crowe Horwath's denial of any knowledge of a special disability, it is difficult to accept that his lawyers overlooked these details. I do not accept that Mr Montalto told Mr Brown of his special disability,
649. In explaining the discrepancy in his pleading, where he initially thought it was Mr Jeremiah who was present at the 10 April 2013 meeting, and then saying that it was Mr Di Felice, Mr Montalto said:[578]

MR PETERS: When you spoke to your lawyers in June of this year to give them instructions about who said what, you didn't mention Mr Di Felice speaking to you on 10 April 2003?

MR MONTALTO: *I mightn't have been asked. ...*

[578] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T561 XXN (emphasis added).

650. In the proceedings brought in the name of Mr Montalto's mother, against Mr Montalto, the statement of claim alleged that Mr Montalto's parents could not read English, and a similar point was raised (as in this case) that they had signed documents in the mistaken belief as to what they provided; it was alleged against Mr Montalto that he read the relevant documents in English and translated them into Italian for his parents. In the defence to that proceeding, it was admitted 'that Mauro [Mr Montalto's father] and Carmela [Mr Montalto's mother] did from time to time ask Tommaso to read, translate or explain simple documents to them.' When this pleading was put to him as an admission that he could read English, he claimed that this was another instance where his lawyers had made a mistake.[579]

[579] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T678 XXN.

651. Parts of Mr Montalto's evidence is contradicted by contemporaneous documents. As is noted above, Mr Montalto signed multiple confidentiality agreements and an irrevocable authority for lots 1, 2 and 3.[580]

[580] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T568–569, T570 XXN; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T923 XXN; Exhibit P19; see also Exhibit P2.

652. The allocation and reallocation of units in the CUT, which took place on Delma joining the development, was based on the ‘land’ of Premier Bay comprising lots 1, 2 and 3.[581]

[581] Exhibit P1 [30], [31], [32]. CB 608–613.

653. Each of the documents signed by Mr Montalto on 1 July 2014, in relation to amendment of the CUT documents, show that Premier Bay’s land was lots 1, 2 and 3.[582]

[582] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T714–715 XXN; see also Exhibit P20.

654. The defence in the earlier proceedings brought in the name of Mr Montalto’s mother stated that: ‘Tommaso had no ability to read, comprehend and explain legal documents by reason of the fact that he had limited education himself, having completed schooling to year 8 only.’ In this proceeding, Mr Montalto said: ‘Number 8 is a mistake. Year 10 I went.’[583] Mr Montalto was asked about the use of ‘legal documents’ in the pleading:[584]

[583] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T681 XXN.

[584] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T681 XXN.

MR SENATHIRAJAH: But it only says you can’t explain legal documents; do you see that?

MR MONTALTO: Legal documents, yes.

MR SENATHIRAJAH: But it doesn't say you can't read — your evidence to His Honour, as I understood it, is you can't read any documents because you are only at grade 3 level?

MR MONTALTO: Documents, any documents I don't read, no, sir.

MR SENATHIRAJAH: In this document it only says legal documents; do you see that?

MR MONTALTO: In general documents.

MR SENATHIRAJAH: I put to you that the reason why that answer is confined to legal documents is because you can read, translate and understand simple English documents; do you accept that?

MR MONTALTO: Simple — if they are simple, yes.

MR SENATHIRAJAH: Including emails of the type I took you to this afternoon from Mr Di Felice?

MR MONTALTO: No, sir.

655. Mr Montalto's case is also inconsistent with the document he had Gina Webling prepare in 2016 which, as noted above, does not include a discussion of the five conditions, as pleaded at paragraph (ii) of the particulars to paragraph 7 of the SAFAC. Matters that are mentioned are not included in his pleaded case, such as the naming of the hill on lot 1 and the assigned use of the hill as a park. These matters are also inconsistent with a belief that lot 1 was not to be included in the area subject to development.
656. At the first meeting in September 2016, where Mr Montalto complained about the development agreement, Mr Montalto did not contend that he had laid down five conditions which he believed were to be in the development agreement, and which were not.
657. Mr Montalto raised concerns regarding the relocation of Gina; however, the comments made do not fully support the claim that her relocation was a precondition to the agreement.
658. The complaints that Mr Montalto made in September and October 2016, as detailed by Mr Montalto in his evidence and in the file notes of the meetings, do not support his case. The minutes of the meetings, at which the complaints were made, do not contain any suggestion that he had at any time agreed with DFG that lot 1 would not be included in the land to be developed, contrary to his evidence, where he said that Mr Levinge and Mr Dooling expressly told him that they were agreeable to his proposal that lot 1 be excluded from the land to be developed.
659. If DFG were agreeable to his proposal that lot 1 not be included as land to be developed, then one would have expected this agreement to have been front and centre of his case. His pleaded case, however, is based on DFG being aware of Mr Montalto's mistaken belief that lot 1 was not being included in the land to be developed — a different case entirely.

660. Mr Montalto gave evidence that notes were made by Sladen of his requests and conditions, yet the file notes of these meetings contain no reference to the five conditions. Mr Montalto also said that Mr Levinge made notes of Mr Montalto's requests in his notebooks. No notes were able to be pointed to which referred to the requests that he allegedly made.

661. Mr Montalto's claim^[585] that the first time he saw the development agreement was at the meeting of 10 April 2013 is not plausible given that executed copies of the development agreement were sent by courier to Mr Hart's office, and arrived on 2 April 2013. This claim is in direct contrast to Mr Hart's evidence and the contemporaneous documents, including a scan of the executed development agreement that Mr Hart sent to Mr Di Felice, once he had received the same.

^[585] SFADAC [36].

662. Mr Montalto maintained his denial that 'escrow' had ever been explained to him,^[586] despite file notes of meetings noting discussions of escrow, and the evidence of Mr Di Felice and Mr Jeremiah.

^[586] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T615–616 XXN.

663. Mr Montalto's evidence of specific discussions and the sequence of events was unreliable. Despite stating that he had no memory of certain events, Mr Montalto denied that he could not recall everything that took place:^[587]

^[587] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T631, T632, T634 XXN.

MR SENATHIRAJAH: I put to you that your memory of what was said in various meetings is unreliable?

MR MONTALTO: No, sir, I don't agree with you.

MR SENATHIRAJAH: You understand these are meetings that were taking place in 2011 and 2012. That's five and six years ago?

MR MONTALTO: Yes.

MR SENATHIRAJAH: I'm putting to you your memory of what was discussed at those meetings is unreliable?

MR MONTALTO: No, sir, you are wrong.

MR SENATHIRAJAH: You didn't take notes of any of these meetings, did you?

MR MONTALTO: No, I never took notes, no.

MR SENATHIRAJAH: But you are telling His Honour now that, five and six years afterwards, you have a reliable memory of what was said in those meetings; is that a truthful answer?

MR MONTALTO: I remember that I was only listening to what their proposals were, right up to December Kooyong meeting. Nothing else.

MR SENATHIRAJAH: The evidence will show that's just not right. Can I take you to an example. That is the 5 October meeting?

MR MONTALTO: 5 October, what year?

MR SENATHIRAJAH: 2011?

MR MONTALTO: Yes.

MR SENATHIRAJAH: You have already given an answer to a question from Mr Tsalanidis yesterday that you don't remember the meetings that took place on that day at all. Do you remember giving that evidence yesterday?

MR MONTALTO: I don't recall it, no. I don't recall that meeting, yes.

MR SENATHIRAJAH: And so isn't that an example of where your memory is proven to be unreliable?

MR MONTALTO: Well, you expect me to remember every day of the year for the last 10 years?

MR SENATHIRAJAH: That's my point, Mr Montalto?

MR MONTALTO: All right. If you raised what was discussed, et cetera, I can revise my memory.

...

MR SENATHIRAJAH: Yes, a meeting on 5 October 2011?

MR MONTALTO: I don't recall it unless you give me the purpose of the meeting.

MR SENATHIRAJAH: As you sit there, both yesterday and today, you don't recall that meeting, do you?

MR MONTALTO: I don't recall that meeting.

...

MR SENATHIRAJAH: The first meeting with Rob Jeremiah?

MR MONTALTO: No. No, sir.

MR SENATHIRAJAH: So you don't remember?

MR MONTALTO: No. You are trying to confuse the dates here, sir.

MR SENATHIRAJAH: No, I'm not confusing. I'm putting it to you straight out. This is the first meeting that you were having with Mr Jeremiah after you had retained Harwood Andrews to be your solicitors for this transaction?

MR MONTALTO: First meeting after?

MR SENATHIRAJAH: Yes, and there were no previous meetings in any form with Mr Jeremiah before then?

MR MONTALTO: No, you are wrong. No, sir.

MR SENATHIRAJAH: You are going off your memory, are you?

MR MONTALTO: We had several meetings, at least three meetings, before I initially instructed Colin to - - -

MR SENATHIRAJAH: This is my point, Mr Montalto. You don't have any real recollection now of when meetings take place and the sequence in which meetings take place?

MR MONTALTO: I've got a reasonable memory, sir.

MR SENATHIRAJAH: So, if I was to establish that this was the first meeting and that the other meetings took place after that, would you accept that that would show that your memory is unreliable, Mr Montalto?

MR MONTALTO: No, I won't accept it, sir.

664. It is submitted, on Mr Montalto's behalf, that where Mr Montalto did not have specific memory of an event, he answered accordingly. The evidence does not support this submission, for example, Mr Montalto does not give evidence that he cannot recall a telephone conference taking place or the content of what was discussed, rather Mr Montalto denies that a telephone conference ever took place.^[588]

^[588] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T601 XXN.

665. Mr Montalto's evidence was that there was a meeting with Mr Levinge and Mr Dooling 'well into March, early April 2012' when they visited him at the Floridia Cheese factory.^[589] Mr Montalto claimed Mr Levinge and Mr Dooling said they would be interested in lots 2 and 3. Mr Montalto said that he gave Mr Levinge and Mr Dooling time to go away and think about what he had proposed, and then come back, which he said that they did '[a] week later, 10 days later' at which time he said: 'Okay, if you're interested in the 500 acres, lot 2 and 3 ... I'll take you there, we'll make time, we'll go there and inspect the property. I'll show you the property and you can see the property before you make up whether you go any further.'^[590]

^[589] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T449–451 XN.

^[590] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T451–452 XN.

666. Mr Montalto claimed that he only decided, in March 2012, to offer lots 2 and 3 for development, yet a draft agreement was sent by Mr Hart to Mr Di Felice on 22 December 2011.^[591]

^[591] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T629 XXN.

MR SENATHIRAJAH: Mr Hart is sending a draft of the development agreement to your lawyers for their comment and review because by that time you had agreed that Dennis Family Homes was going to develop your properties?

MR MONTALTO: No, sir. No.

MR SENATHIRAJAH: Because you can understand why that would make no sense?

MR MONTALTO: 22 December, that's the Kooyong meeting, three days before Christmas.

MR SENATHIRAJAH: No, after the Kooyong meeting?

MR MONTALTO: The following December?

MR SENATHIRAJAH: No, the same year, a number of days afterwards, a few days afterwards?

MR MONTALTO: Yes?

MR SENATHIRAJAH: He's sending it to your lawyer?

MR MONTALTO: A couple of days after the 22nd?

MR SENATHIRAJAH: The actual day it was sent was 22 December 2011, and I'm putting to you that he's sending it — it's a fact. It's a fact that it was sent - - -?

MR MONTALTO: Without my knowledge. I don't know.

MR SENATHIRAJAH: No, I'm telling you it was with your knowledge because the reason why Dennis Family Homes' lawyer was sending it was because you had agreed with Dennis Family Homes - - -?

MR MONTALTO: No.

667. After Mr Di Felice had reviewed the document, it was forwarded to Mr Montalto on 19 March 2012. It is possible that it was this event that Mr Montalto had confused with his acceptance of proceeding with the proposed development.
668. Mr Montalto was not prepared to admit even non-contentious points. For example, Mr Montalto denied that a fee payable to Mr Hay was ever discussed, that he had met Mr Hay prior to the 2010 presentations, or that the compulsory acquisition of land for services had been discussed. Mr Montalto denied having a telephone conference with Mr Brown and Mr Di Felice. Whilst the content of the telephone conference is a controversial issue, it seems very clear, in light of the documentary evidence, that a telephone conference occurred.[\[592\]](#)

MR TSALANIDIS: Does that assist you in recollecting being in a telephone conference meeting with Mr Di Felice discussing - - -?

MR MONTALTO: No way, sir. No, no.

MR TSALANIDIS: The development agreement with you and Colin Brown?

MR MONTALTO: No, not by phone. No.

[\[592\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T601 XXN.

669. Mr Montalto initially denied ever being involved in other proceedings.[\[593\]](#)

MR TSALANIDIS: ... He put to you, 'You've been in litigation before, haven't you?' You said, 'No, I'm not understanding what you're trying to say to me.' He said, 'I'll do it the slow way. You've been sued or you've sued other people in the Supreme Court before?' You said, 'I never sued anybody.'?

MR MONTALTO: Yes.

MR TSALANIDIS: And he said, 'Just been sued?' You said, 'I was not sued. I was part of a family dispute which was my younger brother suing my parents for promises not kept where I had to protect myself and provide proof of all my ownership' et cetera?

MR MONTALTO: Yes.

MR TSALANIDIS: Mr Peters then put to you from line 28, 'Weren't you also sued by your mother over the land, the farm at 1145 Donnybrook Road? Didn't your mother, Carmela, sue you'?

MR MONTALTO: I said it was indirectly. It was my brother who sued me. But I had to agree that it was in the name of my mother.

[593] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T605–606 XXN.

670. Mr Montalto gave the following evidence:[594]

[594] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T511, 520, 521, 524 XXN.

MR PETERS: ... Under point 5 you say, 'The decision to enter into the development was to help my neighbours, not to share so much with my neighbours and to wait.' Do you see that?

MR MONTALTO: Yes.

...

MR PETERS: Did you say — I'm looking at the second last dot point — 'I've put myself on the line to help my neighbours. Wasn't aware I would be bound for years. I thought the consortium would bear costs of development.' Did you say something like that?

MR MONTALTO: Possibly, yes.

...

MR PETERS: Did you also say, 'If my neighbours went on their own it would have taken them much longer'? Did you say that?

MR MONTALTO: I don't recall.

...

MR PETERS: ... Did you say to this meeting that you got into this project to help your neighbours?

MR MONTALTO: To help the neighbours, the district, yes.

671. He then made the following denial:[\[595\]](#)

MR TSALANIDIS: ... Do you recall being told that it would be important for the landowners to work together as a group to allow this development to move faster?

MR MONTALTO: No, sir. No.

[\[595\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T581 XXN.

672. Mr Montalto denied that an email chain showed the correct version of events:[\[596\]](#)

MR PETERS: Mr Montalto, Alex Tighe sent you the withdrawal of the caveats. You then forwarded the withdrawal of the caveats to Colin Brown?

MR MONTALTO: No, sir. No way. You're wrong.

[\[596\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T507 XXN.

673. Mr Montalto denied being interested in the cash flow estimates, stating that they were a matter for Mr Brown. Mr Montalto was asked:[\[597\]](#)

MR PETERS: You didn't care how much you were going to earn?

MR MONTALTO: No.

MR PETERS: No?

MR MONTALTO: Not until it starts to happen. I've got no money in my hands until it starts to happen, sir. So then at the end whatever I get, I get.

...

MR PETERS: It's a separate document that was handed to you at the meeting. Do you recall Mr Dooling handing you that document or Mr Levinge?

MR MONTALTO: No, he would have handed this to Colin Brown, being the figures, nothing to do with me. It would be for Colin Brown.

674. The file notes for the September 2016 meeting, which Mr Montalto denies are accurate, make reference to Mr Montalto saying that he had a friend in Hume who had a hill developed. Mr Montalto was asked about this:[598]

MR PETERS: Did you have a neighbour who was developing a hill as part of a development in Hume?

MR MONTALTO: No.

MR PETERS: Did you work on a precinct structure plan for your neighbour's hill in Hume?

MR MONTALTO: No.

MR PETERS: Did you know that Dennis Family had done some work for one of your neighbours for a precinct structure plan in Hume?

MR MONTALTO: No, sir. In Hume you are referring to Broadmeadows, close to Donnybrook?

MR PETERS: Yes?

MR MONTALTO: No.

MR PETERS: Did you know anybody who was developing a hill?

MR MONTALTO: No.

675. At times, Mr Montalto was unresponsive or he sought only to restate his case and not answer the questions asked.
676. For example, Mr Montalto agreed that he could read maps, and then would not confirm that a map showing the development of lot 1, in fact showed that lot 1 was being developed, for the purposes of the map.[\[599\]](#)

[\[599\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T499–501 XXN.

MR PETERS: But you can read a map, can't you?

MR MONTALTO: A map I can read. I can look at it and I know where my land is.

MR PETERS: Tell me where your land is on the document that you've got in front of you. It's document number 7 in the bottom right-hand corner. Can you see your land?

MR MONTALTO: Yes, my whole land is that whole square of yellow, boxed in by yellow.

MR PETERS: Do you see the roads running through your whole land? For instance, there's Hayes Hill Boulevard going around Hayes Hill?

MR MONTALTO: Yes, Hayes Hill.

MR PETERS: Did you want that to have a Montalto name, did you?

MR MONTALTO: That's correct, yes.

MR PETERS: But it's going through lot 1, Hayes Hill Boulevard; do you see that?

MR MONTALTO: Yes.

MR PETERS: So I want to suggest to you that when you got this document it was pretty clear that lot 1 was going to be developed?

MR MONTALTO: No, that's part of the concept. You have to draw the road. The main road you have to draw.

MR PETERS: But the road can't stop at lot 1 and start again at lot 2, can it?

MR MONTALTO: They've just built blocks at Geelong that you are aware of, I've got four roads into my swimming pool which are blocked, stopped. So why they proceed in these roads? Why do these have to go through?

MR PETERS: It's part of the PSP process, isn't it?

MR MONTALTO: No, not on lot 1.

MR PETERS: Look at the map. I'm giving you the opportunity. You just said the road doesn't go through lot 1. Just look at the map and you will see Hayes Hill Boulevard cuts straight through it to the north of the hill?

MR MONTALTO: But these are all drawings of future, not just for today. These are drawings for the future as well.

MR PETERS: But this is a plan by the Metropolitan Planning Authority, the MPA; do you see that?

MR MONTALTO: Okay, but - - -

MR PETERS: It says at the bottom of the page, 'Copyright Metropolitan Planning Authority 2014'?

MR MONTALTO: But are you trying to tell me the law is that the government can just come and take my land now?

MR PETERS: No, listen to my question carefully?

MR MONTALTO: Well, then they're not proceeding.

MR PETERS: We will get through this a lot more quickly if you just listen to my question?

MR MONTALTO: Explain it to me, please.

MR PETERS: You got this map in 2014, didn't you?

MR MONTALTO: Possibly.

MR PETERS: And it looks like the Metropolitan Planning Authority assumes there will be a road through lot 1, doesn't it?

MR MONTALTO: Okay. Yes.

MR PETERS: If you go to page 9?

MR MONTALTO: Yes.

MR PETERS: This is another map you've discovered. ... Do you see page 9? There's another Metropolitan Planning Authority map?

MR MONTALTO: Mm-hm.

MR PETERS: And it's colour-coded for what goes where?

MR MONTALTO: Yes.

MR PETERS: And can you see your land there?

MR MONTALTO: Yes, it's not shown — it's just shown as general, yes.

MR PETERS: What do you mean it just shows general?

MR MONTALTO: Just shaded all the same, the whole page is the same.

MR PETERS: No, it's not. There's green and there's yellow and there's light brown hatching, isn't there?

MR MONTALTO: Yes, but there's also lot 1 there with my hill which is not developable.

MR PETERS: But that's the very point that I raise it with you, because it looks like the Metropolitan Planning Authority thinks it's developable?

MR MONTALTO: Eventually, yes.

MR PETERS: Not eventually?

MR MONTALTO: Not today.

MR PETERS: This is a map dated 'Copyright Metropolitan Planning Authority 2015' [sic]?

MR MONTALTO: They plan years in advance.

MR PETERS: Why didn't you, when you got this map, say, 'Hey, why are they putting a road through lot 1?' Why didn't you say that to anyone?

MR MONTALTO: Because no one's crossing my fence. No one is going to come in my property.

677. One of the points being made to Mr Montalto is that the PSP showed that in order for the roads either side of lot 1 to be useful, lot 1 needed to be developed. Mr Montalto's response did not seem plausible. I am not satisfied that Mr Montalto did not understand that lot 1 needed to be developed to enable the relevant road that crossed lot 1 to be used by the adjoining developments, and I am not satisfied that this would not have been clear to him at the time of the PSP.

678. Mr Montalto denied that the caveats that had been lodged by his mother were an issue to him.[\[60\]](#)

MR TSALANIDIS: And this related to an issue concerning Carmela Montalto and the caveats that had been lodged. Do you see the reference in the second line, 'Noting

that you have considered it appropriate to include provisions of this nature, we request that you provide a detailed explanation of the current claim by Carmela Montalto noted by the caveats lodged on the titles to the land? That had been raised as a concern by Mr David Hart in this letter. Do you recall at the phone teleconference meeting that issue being discussed, what was happening with the caveats that your mother had lodged? ...

MR MONTALTO: No, sir, I don't. No, I don't agree.

MR TSALANIDIS: You knew, Mr Montalto, that that was an issue, didn't you, about the caveats and that being a block on the land, didn't you?

MR MONTALTO: There was no involvement with Dennis Homes, what was happening with my private case, sir.

MR TSALANIDIS: I haven't asked about Dennis Homes. I have asked about you. You knew that the caveats were an issue, didn't you?

MR MONTALTO: They were no issue to me, sir, no.

[\[600\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T601-602 XXN.

679. This does not seem like a plausible response. Mr Montalto is familiar with the notion of using land as security to raise funds, thus he must have appreciated that the caveats over Lots 1, 2, and 3 would be an issue. The evidence below, as well as being inconsistent, is a further example of Mr Montalto seeking to restate his case:[\[601\]](#)

[\[601\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T476-477 XN.

MR ANDERSON: Mr Montalto, if Mr Di Felice had told you that you didn't have a free right of sale and your conditions weren't in the agreement, the development agreement, what would you have done?

MR MONTALTO: I wouldn't have signed, Your Honour. I would have held back and asked why. I wouldn't have signed.

MR ANDERSON: And why would you have adopted that position?

MR MONTALTO: Your Honour, I was signing or supposed to be signing my — everything I own, in a sense. Once I signed that, I was giving them authority to develop my land and I'd have no comeback on it. If it wasn't right, I wouldn't be signing.

MR ANDERSON: What do you mean by 'no comeback', Mr Montalto?

MR MONTALTO: I use the property — I use properties for mortgaging to borrow money from time to time. Now, I've got in the last eight years, I've gone above my sort of daily borrowings and I needed the farm as borrowing, large capital. Now, if I — by me giving the farm away, I'm unable to mortgage the farm with the bank any longer.

MR ANDERSON: When you say 'the farm', which lot are you referring to?

MR MONTALTO: Lots 2 and 3, because lot 1 is continuously farmed and as a farm it's got no — you know, it's only got normal value. Lot 2 and 3 being developable would have a better value.

680. Mr Montalto's own evidence was inconsistent. Under cross-examination, Mr Montalto obfuscated, asked questions rather than providing answers, and gave answers that were inconsistent and unhelpful.
681. For example, Mr Montalto sought to convey that he was a reluctant participant in the proposed development. He said that DFG had not invited him to be part of the development, and that he had only attended the initial bus tour and early presentations at the invitation of Mr Di Bella. However, it was apparent from Mr Montalto's evidence that he was active in pursuing the development; he gave evidence of calling Mr Levinge and Mr Dooling on several occasions, in the early stages, to discuss the progress of the development; he invited Mr Levinge and Mr Dooling to take a tour of his property; DFG gave a presentation to the Montalto family during the time of the presentations that Mr Montalto says he was not invited to.^[602]

^[602] Transcript of hearing, Re Premier Bay Pty Ltd (2 November 2017) T401–403 XN.

MR ANDERSON: So after that meeting when they dropped in at Settlement Road did you have a further meeting sometime after?

MR MONTALTO: From that meeting, because I had made the direct connection then more so in talking with them directly and being more up front, personal straight with them, we stayed in touch and I tried to stay in touch with Lou Di Bella, because he was a retired real estate agent now and doing the farming, so he's got more free time to run around, and stay in the information circle with Lou. 'Nothing's happening. Nothing's happening.' I would ask them. It was the opposite. They're getting somewhere.

MR ANDERSON: When you say you asked them, did you ring them up, telephone calls?

MR MONTALTO: I would ring them, you know, 'What's happening? Has anybody signed up?' 'No, it's only in the process of still talking.'

MR ANDERSON: And who did you speak to when you rang Dennis Corporation?

MR MONTALTO: Peter Levinge or Terry, whoever was in, either one or the other.

MR ANDERSON: These telephone calls and discussions you are giving evidence now, how frequently did they happen in the early part of 2011?

MR MONTALTO: Probably early 2011, or it wasn't that early. It would have been up around Easter time, March or April by then, because time was passing.

MR ANDERSON: How often would you be speaking to Dennis Corporation?

MR MONTALTO: From there, once we made connection, we started to — every couple of weeks they were going past or you're coming past, just keep me up to date, which they did.

MR ANDERSON: And they would always meet at the factory?

MR MONTALTO: At Settlement Road, Thomastown, yes.

MR ANDERSON: Did you ever go to the farm with Dennis Corporation?

MR MONTALTO: No, I went to the farm — that's a later date.

MR ANDERSON: When did you decide that you were going to contemplate entering into the agreement with Dennis Family Corporation?

MR MONTALTO: I decided probably well after Easter or there around at that time, after Easter that I spoke with Colin. I sat with Colin, my accountant. I said, 'Colin,' because my accountant was aware of these meanings that I was going to and I was telling him about what they were discussing, I said, 'These people aren't getting anywhere. They have told me that they are signing people up, but they aren't.' I said, 'I've had discussions with them.' I had had previous discussions talking to Colin with Peter Levinge and Terry Dooling over the phone, and then also in presence, that they were talking to David Douglas and Ian Martin, they were the two main people. I said, 'But they are the two main people at opposite ends. I can understand you signing up Ian Martin. How are you going to service Douglasses at the back of me?'

MR ANDERSON: Just pausing for a moment?

MR MONTALTO: Yes.

MR ANDERSON: You were giving evidence about having spoken to Colin Brown?

MR MONTALTO: Yes.

MR ANDERSON: Is the evidence you have just given - - -?

MR MONTALTO: This is what I had given to Colin.

MR ANDERSON: This is what you were telling to Colin?

MR MONTALTO: Colin Brown, yes. I was just informing Colin, 'They are not getting anywhere, but they have got an opportunity down here and an opportunity here. But this one is not going to work.'

MR ANDERSON: Which one is that one?

MR MONTALTO: That was the Douglasses at the north of me.

MR ANDERSON: What else did you tell Mr Brown at that time about Easter 2011?

MR MONTALTO: I said, 'What do you think if we were' — I say 'if we', because Colin and I, we spoke, you know, like brothers. I never exclude — you know, it's always us sort of thing. 'If we were to offer them the land.' He said, 'If you did that, it could help your future dramatically.' I said, 'Fair enough. Would you think it would work, being a joint venture as they do, because I don't like companies?' He said, 'That would work. That's a straightforward — a joint venture would be a straightforward thing.' So we left it at that. I said, 'All right. We'll see what happens. Just let time pass and see what happens.' And that was the end of that.

682. Mr Montalto again gave inconsistent evidence in relation to Mr Brown. Mr Montalto said:[\[603\]](#)

[\[603\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T658–659 XXN.

MR SENATHIRAJAH: And yet now you are telling His Honour that despite him having provided this loyal, dedicated service of 40 years; right?

MR MONTALTO: Yes.

MR SENATHIRAJAH: You agree with me?

MR MONTALTO: Yes.

MR SENATHIRAJAH: For 40 years as far as you are concerned?

MR MONTALTO: Yes.

MR SENATHIRAJAH: He has provided loyal, dedicated, competent service; correct?

MR MONTALTO: Yes.

MR SENATHIRAJAH: But now you are telling His Honour that on at least three separate occasions he failed to carry out a very simple instruction, that is to tell Harwood Andrews that you had five conditions to your entry into the development agreement; isn't that your case?

MR MONTALTO: No, we both expressed those conditions.

MR SENATHIRAJAH: But your complaint against him — Mr Montalto, you have sued Colin Brown's firm?

MR MONTALTO: Yes.

MR SENATHIRAJAH: You understand that, don't you?

MR MONTALTO: Yes.

MR SENATHIRAJAH: You agree?

MR MONTALTO: Yes, okay, yes.

MR SENATHIRAJAH: And you sued them on the basis that they failed to carry out — that is Mr Brown on three separate occasions at least failed to carry out your instructions that there were five conditions to the development agreement?

MR MONTALTO: Yes.

MR SENATHIRAJAH: That's your complaint, isn't it?

MR MONTALTO: Yes.

MR SENATHIRAJAH: And I put to you that that is simply not true?

MR MONTALTO: No, you are incorrect.

683. Mr Montalto's evidence on the discussions that took place on this point was also inconsistent.^[604] For example, Mr Montalto was taken to Mr Duonis' file notes of the 5 October 2011 meeting:

^[604] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T639, T640 XXN.

MR SENATHIRAJAH: Nowhere will you find a reference to lot 1 being treated differently from lots 2 and 3; do you agree with me?

MR MONTALTO: If it wasn't specified, it wouldn't have come up, sir.

MR SENATHIRAJAH: So do you agree at this meeting you didn't say that lot 1 was to be treated differently to lots 2 and 3?

MR MONTALTO: It wasn't necessary to state it, no. It was quoting the one property.

MR SENATHIRAJAH: And do you accept that at this meeting that your five conditions, that wasn't raised?

MR MONTALTO: They possibly weren't raised, yes.

...

MR SENATHIRAJAH: The first meeting after you have agreed in principle to go with Dennis Family Homes, isn't this the point at which you say, 'These are my absolute conditions for any agreement: 1, lot 1 is not included now; 2, I've got my five preconditions'? Isn't this where you are going to say it?

MR MONTALTO: It was all common knowledge. Was it necessary to bring it up?

684. Shortly after, Mr Montalto was asked:[\[605\]](#)

[\[605\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T640, T642–643, T644 XXN.

MR SENATHIRAJAH: All right. And I put to you that you didn't raise those conditions at this [5 October 2011] meeting; yes?

Mr Montalto: No, you're wrong, sir.

...

MR SENATHIRAJAH: And then what was discussed was that you wanted certain commercial contractual protections; do you see that, the third bullet point?

MR MONTALTO: That was my five points.

MR SENATHIRAJAH: You say that was your five points?

MR MONTALTO: That would have been my five points possibly, a break-up of my five points.

MR SENATHIRAJAH: So you agree with me that this is the meeting at which you would have told your lawyers and Mr Brown that these are the five conditions; correct?

MR MONTALTO: If the occasion rose to be mentioned, they were stated.

MR SENATHIRAJAH: Mr Montalto, this is a meeting — as I said — first time you are meeting with your lawyers after you have agreed to retain them, and they are going through what you want, what commercial protections you want?

MR MONTALTO: No, sir.

MR SENATHIRAJAH: Do you understand?

MR MONTALTO: No, I'm not following you. I'm not following you.

MR SENATHIRAJAH: I'm putting to you, Mr Montalto, this is a meeting, as we said, first meeting with your lawyers after they have agreed to act for you; yes?

MR MONTALTO: Yes.

MR SENATHIRAJAH: You follow me?

MR MONTALTO: Yes.

MR SENATHIRAJAH: And you are now in the private meeting with them, and they are being told about what contractual protections you want; okay?

MR MONTALTO: Yes.

MR SENATHIRAJAH: Isn't that when you are going to say to them, 'The contractual protections I want are my five conditions'?

MR MONTALTO: Yes.

MR SENATHIRAJAH: Do you agree?

MR MONTALTO: The contractual requirements I need is my safety.

MR SENATHIRAJAH: Yes?

MR MONTALTO: Okay, that's what the legal people have to protect me from, yes.

MR SENATHIRAJAH: Yes, the protections you want?

MR MONTALTO: Yes.

MR SENATHIRAJAH: This is where you are going to say, 'I want my' - - -?

MR MONTALTO: Other than that is the five conditions.

MR SENATHIRAJAH: Yes?

MR MONTALTO: Yes.

MR SENATHIRAJAH: What I'm putting to you is that you did not raise those five conditions here?

MR MONTALTO: If it wasn't necessary, I possibly didn't, sir.

...

MR SENATHIRAJAH: This was the meeting you told them what you wanted?

MR MONTALTO: Okay, yes.

MR SENATHIRAJAH: And the things you told them were, one, exit rights. If all landowners do not execute mirror contracts within 12 months, deal was off. That was one thing. The second thing you said was, if planning permits are not secured within three years, no deal. The third thing you say is there's got to be an agreed end date. They are the three things you have said?

MR MONTALTO: No, I'm unaware of those conditions because I don't know what has to go into contracts.

685. Further examples of this can be found throughout the transcript.[\[606\]](#)

MR TSALANIDIS: And they were sued because your mother alleged that the land had been purchased by your mother and father in the first instance?

MR MONTALTO: My mum alleged the day she gave me birth, from there on, my whole life. So where did that come from? What's that got to do with it?

[\[606\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T604–605 XXN.

686. For example:[\[607\]](#)

[\[607\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T627 XXN.

MR SENATHIRAJAH: And I put to you that in that offer that's at page 198 and following you will find no mention of your five conditions; do you agree with me?

MR MONTALTO: Possibly, yes.

MR SENATHIRAJAH: Do you agree with me?

MR MONTALTO: Yes, okay, I agree, yes.

MR SENATHIRAJAH: And you will find no mention that lot 1 was not to be treated in the same fashion as lots 2 and 3; do you agree?

MR MONTALTO: No, sir, I don't agree because it's not correct.

MR SENATHIRAJAH: Where in that document, Mr Montalto, commencing at page 198 do you say to His Honour there's any reference to lot 1 being treated separately from lots 2 and 3?

MR MONTALTO: It's referred to as a whole property.

MR SENATHIRAJAH: Mr Montalto, I have asked you a question?

MR MONTALTO: Yes.

MR SENATHIRAJAH: In that offer is there any mention that lot 1 was to be treated differently from lots 2 and 3?

MR MONTALTO: I guess there isn't. If you're telling me it's not, it's not. Otherwise I've got to look at it again. No.

MR SENATHIRAJAH: Have a look. I want you to tell His Honour where in that document you say there's any mention of lot 1 being treated - - -?

MR MONTALTO: My property is referred to as a whole, sir.

MR SENATHIRAJAH: So you accept my proposition? You agree that that document commencing at page 198, which is titled 'Our offer', does not contain any reference to lot 1 being treated separately from lots 2 and 3?

MR MONTALTO: All right, yes, I accept that. Yes, okay.

687. A further example:[\[608\]](#)

MR SENATHIRAJAH: And I put to you that that was what was discussed at that meeting, how your property was going to be developed and the structure of the agreement?

MR MONTALTO: No, sir.

MR SENATHIRAJAH: You don't agree with that. In those discussions it was discussed that the total area of your Donnybrook farm which was to be developed was 259 hectares?

MR MONTALTO: No, sir. It was two lots. That's the total area. Not the developable area.

688. Further example:[\[609\]](#)

MR SENATHIRAJAH: I put it to you that you did read that and you understood from that sentence that if you had any queries, if you didn't understand anything about the documents attached, you should speak to Mr Di Felice?

MR MONTALTO: No, sir. No. We employed two opinions.

689. Further example:[\[610\]](#)

MR SENATHIRAJAH: Is it also your evidence that you told Colin Brown that you needed him to read out to you the development agreement and other agreements in order to be able to understand them?

MR MONTALTO: He would summarise and tell me - - -

MR SENATHIRAJAH: Mr Montalto, this will go much faster if you just answer my question?

MR MONTALTO: Yes.

MR SENATHIRAJAH: Did you tell — do you understand?

MR MONTALTO: Yes.

MR SENATHIRAJAH: Tell Colin Brown that he needed to read out to you the development agreement and other related agreements in order for you to understand them?

MR MONTALTO: Yes, he's aware of that, yes.

MR SENATHIRAJAH: So you told him that?

MR MONTALTO: He's aware of that, yes.

MR SENATHIRAJAH: No, Mr Montalto, would you just answer my question? Did you tell him: yes or no?

MR MONTALTO: Yes, he's aware of that, yes.

MR SENATHIRAJAH: And when do you say you told him that?

MR MONTALTO: It's been the whole history.

690. Mr Montalto denied that he received any advice before executing the confidentiality and exclusivity arrangements, despite Mr Farinotti having written to Mr Montalto, advising that Mr Montalto should not the sign the confidentiality and exclusivity deed, unless he was in principle satisfied with the deal offered by DFG. Mr Montalto said that he did not accept this advice.^[611]

MR PETERS: I want to suggest to you it's lots 1, 2 and 3. Go down to the next paragraph, 'What, however, is clear is that if you enter into the deed you are really saying you accept the commercial basis being put forward by Dennis.' That's what Mr Farinotti told you, wasn't it?

MR MONTALTO: He said that. That was for us to read and absorb. But it's incorrect.

^[611] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T540 XXN.

691. He was again questioned on this point:^[612]

^[612] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T623–624, T625.

MR SENATHIRAJAH: I'll read it out: 'The developer's offer of 15 December 2010 which is attached as schedule B to all owners and interested parties listed in schedule A, who are then referred to as owners and interested parties, for the development of the land' — do you see that?

MR MONTALTO: Yes.

MR SENATHIRAJAH: '... has been accepted by the owners.' So by signing this you had accepted their offer; correct?

MR MONTALTO: No, sir. I signed the confidentiality agreement. Silence.

MR SENATHIRAJAH: And in doing that, by signing it, you were accepting Dennis Family Homes' offer, weren't you?

MR MONTALTO: No, I wasn't. No.

MR SENATHIRAJAH: I have just read out to you that that's what it says?

MR MONTALTO: Well, it's incorrectly — it hasn't been explained to me, that.

MR SENATHIRAJAH: You got some advice from Holding Redlich before you signed this, didn't you, Mr Montalto?

MR MONTALTO: No, sir.

MR SENATHIRAJAH: You didn't get any advice; is that your honest answer?

MR MONTALTO: No, I had advice.

MR SENATHIRAJAH: Yes?

MR MONTALTO: But didn't follow up on it, Colin didn't follow up on that advice. We never followed up.

MR SENATHIRAJAH: Don't worry about following it up. You got advice from Holding Redlich which said, 'If you sign the confidentiality and exclusivity deed you are in effect accepting the offer from Dennis Family Homes.' You were told that, weren't you?

MR MONTALTO: It wasn't explained, no.

MR SENATHIRAJAH: Are you saying you weren't told that?

MR MONTALTO: Yes, I'm saying that, yes.

MR SENATHIRAJAH: And you are sure about that?

MR MONTALTO: Yes.

...

MR SENATHIRAJAH: This is your lawyer telling you before you have signed it that by signing the exclusivity and confidentiality deed you will be taken to have accepted Dennis Family Homes' offer?

MR MONTALTO: No, this was not — this did not go any further. No, sir. Okay? Because at the bottom he says, 'Please give me a ring.' I never rang

him. We discussed it with Colin. And, sir, you brought this one up. What about the other half? This is only half.

692. Mr Montalto denied that he was aware that the development was to be a staged development:[613]

[613] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T504, T505 XXN.

MR PETERS: I want to suggest to you you thought this map[614] was so important you kept a copy of it?

[614] Exhibit P17.

MR MONTALTO: I've got copies of everything.

MR PETERS: Yes, and you talked about this sort of phasing or staging of developments at the project control meetings, didn't you?

MR MONTALTO: No.

MR PETERS: Never?

MR MONTALTO: Never.

...

MR PETERS: Is there any problem with agreeing with me that this map shows lot 1 being developed as part of phase 4 or stage 4 and also as part of phase 5 or stage 5?

MR MONTALTO: No, I can't agree with you, sir.

MR PETERS: No, I'm just asking you whether you agree that's what the map shows?

MR MONTALTO: The map can show whatever it wants.

MR PETERS: It's not an answer to my question. You have to say yes or no?

MR MONTALTO: I'm not aware until now that you're pointing it out, okay?

MR PETERS: But you saw this at the panel hearing, you say, for the first time?

MR MONTALTO: At the panel hearing?

MR PETERS: Yes?

MR MONTALTO: No, at the panel hearing there was nothing about time factors dividing this.

Failure to call witnesses

693. Mr Montalto did not call any witnesses to confirm what he had said on any occasion which would have suggested he had a mistaken belief that lot 1 was not included in the land to be developed. Such evidence could have been led as direct evidence of his state of mind, or for the purpose of establishing Mr Montalto's state of mind.
694. In *AusNet Electricity Services*, [615] I considered the failure of a party to call certain evidence, including witnesses, and set out the relevant principles as follows: [616].

[615] *AusNet Electricity Services Pty Ltd (Formerly SPI Electricity Pty Ltd) v Liesfield* [2014] VSC 474 ('*AusNet Electricity Services*').

[616] *AusNet Electricity Services* [121]–[123], [125]–[130] (citations omitted).

- 121 The principles were recently examined by the High Court in *Australian Securities and Investments Commission v Hellicar*. ASIC brought civil penalty proceedings against several directors of the parent company of the James Hardie group of companies. The company had established a foundation purportedly to meet the asbestos claims of former employees and customers of its products. The directors sent an announcement to the ASX that contained misleading statements about the sufficiency of the foundation to meet the payments on the asbestos claims against the group.
- 122 ASIC alleged that the directors had approved a draft statement to the ASX in a board meeting that was not materially different to the one sent to the ASX. ASIC alleged that several directors had breached their duties to the company by not advising the board that the announcement was misleading. ASIC tendered the minutes of the meeting as part of their case to establish that the board approved of the announcement. The directors claimed that the minutes recording the approval of the announcement were false. The trial judge found that the board had approved the announcement. The Court of Appeal allowed an appeal on the basis that ASIC owed a duty of fairness to the defendants and breached that duty by not calling the solicitor who prepared the board minutes. The Court of Appeal had found that by failing to do so, the cogency of ASIC's case was diminished and was not to have been proven.

123 The High Court allowed the appeal, finding that the failure to call the solicitor raised no inference that he would have given evidence adverse to ASIC's case. The plurality, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, said:

The Court of Appeal concluded that ASIC's failure to call Mr Robb had 'consequences for the cogency of ASIC's case'. By this the Court of Appeal meant that the cogency of ASIC's proof was diminished.

Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the *absence* of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC.

Lord Mansfield's dictum in *Blatch v Archer* that '[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted' is not to be understood as countenancing any departure from any of these rules. Indeed, in *Blatch v Archer* itself, Lord Mansfield concluded that the maxim was not engaged for 'it would have been very improper to have called' the person whose account of events was not available to the court.

This Court's decision in *Jones v Dunkel* is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used ... [T]he Court held 'that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence'.

The Court of Appeal concluded that ASIC's not calling Mr Robb founded an inference that his evidence 'would not have assisted the ASIC case'. There was no basis for drawing any inference that Mr Robb would have given evidence *adverse* to ASIC's case ...

...

125 In *G v H*, Brennan and McHugh JJ stated:

When a court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had

to that party's ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response.

126 In *Ho v Powell*, Hodgson JA stated:

In deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision.

...

In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so.

127 In *Shalhoub v Buchanan*, Campbell J stated:

Failure of a party who bears an onus of proof to call an available witness who could cast light on some matter in dispute can be taken into account in deciding whether that onus is discharged, in circumstances where such evidence as has been called does not itself clearly discharge the onus. This is an application of Lord Mansfield's maxim.

128 In *Whitlam v Australian Securities and Investments Commission*, Hodgson, Ipp and Tobias JJA stated:

The principle in *Briginshaw* calls attention to the requirement that a party seeking a finding of serious misconduct produce adequate material to enable a court to reach a comfortable satisfaction on such a serious matter. Although this is not the same as the obligation of the Crown to call available evidence in a criminal prosecution, we think it is fair to say that a person seeking such a finding does need to be diligent in calling available evidence, so that the court is not left to rely on uncertain inferences.

129 In *Cook's Construction Pty Ltd v Brown*, Hodgson JA stated, in an *ex tempore* judgment:

Where a party has to prove something and *prima facie* has available evidence that would directly deal with the question, a court will be very hesitant in drawing an inference in that party's favour from indirect and second-hand evidence, when the party doesn't call the direct evidence that *prima facie* it could have called, at least unless some explanation is given, or the circumstances themselves provide an explanation.

130 This last statement has particular relevance in this case, where the appellant relied on hearsay evidence, failed to call the Chair and two other identified members of the sub-committee to give evidence, and failed to lead evidence from Mr Drew on the purpose of the sub-committee for the Chair's request.

695. This discussion is relevant to the facts here. Mr Montalto did not call witnesses to corroborate his story.
696. No explanation was given for the failure to call Mr Di Bella, who Mr Montalto said raised the question about the quarry buffer at a presentation.
697. Mr Montalto did not call any member of his family to give any evidence, howsoever remotely, to support his case about his mistaken beliefs or lack of knowledge that lot 1 was included in the land to be developed under the development agreement. Mr Montalto gave evidence of relevant conversations that took place at the family review meeting, yet did not call anyone else present to support his claims.
698. Mr Montalto did not call his solicitor, Mr Farinotti, who advised him of the exclusivity and confidentiality agreement.
699. Mr Farinotti was present when Premier Bay and Mr Montalto executed the development agreement that was to be held in escrow, and which was subsequently delivered to Mr Hart's office. Mr Montalto did not call any solicitors from Wilkins and McMillan to support any aspect of his case, although Mr Wilkins attended Sladen in October 2016. Mr Elder was not called, despite attending the September 2016 meeting. This is so, even though Mr Montalto denied that the file notes of the meeting were an accurate record of what was discussed.
700. Mr Montalto received advice from Wilkins and McMillan lawyers; Barry Wilkins, John McMillan, and Mr Elder. Mr Montalto was asked about Mr Elder:[\[617\]](#)

MR PETERS: And you took Mr Will Elder out with you?

MR MONTALTO: I took Will as a secretary to come, take notes of what we discussed, and then to be able to explain — from what we discuss to be able to explain to me what is actually in the contracts, okay.

MR PETERS: How is Will? Is he in good health?

MR MONTALTO: I think so.

MR PETERS: When did you last speak with him?

MR MONTALTO: Last Monday week, about 10 days ago, just popped in and said hello, signed some documents.

[\[617\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T513–14 XXN.

701. Mr Montalto was asked about his involvement with Mr McMillan:[\[618\]](#)

MR PETERS: You also said you were aware that Dennis Family Homes had lodged caveats over all three properties?

MR MONTALTO: Yes.

MR PETERS: You didn't make a complaint that a caveat had been lodged over lot 1 only, did you?

MR MONTALTO: I made a complaint — I discussed that with John Macmillan, my solicitor, at the time.

MR PETERS: All right. How is Mr Macmillan? Is he about?

MR MONTALTO: He's quite good, yes, I believe.

[\[618\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T515 XXN.

702. Mr Montalto received tax advice from Mr Devine of counsel, although this was denied by Mr Montalto.[\[619\]](#)

MR PETERS: Wasn't it about this time you're getting advice from Mr Devine QC about tax implications for all of your land?

MR MONTALTO: Nothing to do with me. That's on Colin's department, sir.

[\[619\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T554 XXN.

703. Mr Montalto was asked about Gina:[\[620\]](#)

MR PETERS: Can Gina come along and tell us? Is Gina around? Is she still on the farm?

MR MONTALTO: Yes, she's still on the farm.

MR PETERS: When did you last speak to her?

MR MONTALTO: 10 o'clock last night.

704. Following paragraph cited by:

Flash Lighting Company Ltd v Australia Kunqian International Energy Co Pty Ltd (No 3)
(22 November 2018) (Robson J)

721. In *Re Premier Bay Pty Ltd*, [443] I took into account the failure of the plaintiff to call witnesses that could have supported its case. I said: [444].

The failure of Mr Montalto to call evidence that could have supported his case, in the absence of any explanation for such absences, cannot be overlooked. In my opinion, in those circumstances, when viewing his evidence, I am entitled to give less weight to evidence that could have been supported by witnesses whom he failed to call. To repeat the words of Lord Mansfield in *Blatch v Archer*, as cited in the High Court case of *ASIC v Hellicar*:

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

via
[444] *Re Premier Bay* [2018] VSC 168, [704].

The failure of Mr Montalto to call evidence that could have supported his case, in the absence of any explanation for such absences, cannot be overlooked. In my opinion, in those circumstances, when viewing his evidence, I am entitled to give less weight to evidence that could have been supported by witnesses whom he failed to call. To repeat the words of Lord Mansfield in *Blatch v Archer*, as cited in the High Court case of *ASIC v Hellicar*: [621].

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[621] *Blatch v Archer* (1774) 1 Cowp 63, 65; 98 ER 969, 970, as cited in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 412 [166].

Should the contract be rectified?

705. Mr Montalto's alleged unilateral mistake, without more, will not be a ground for rectification or for refusing specific performance to DFG. [622]. Some implication of DFG in the mistake is necessary, [623], such as DFG's knowledge of the mistake (actual knowledge may not be required, [624]) and unconscionable conduct.

[622] See, eg, *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (CA) 277 (Stuart-Smith LJ) (with whom Evans and Farquharson LJ agreed) ('Cooper') ('where only one party is mistaken as to the meaning of a contract, rectification is not ordinarily appropriate').

[623] See *Leibler v Air New Zealand Ltd (No 2)* [1999] 1 VR 1 (CA) 14 [36] (Kenny JA) (with whom Winneke P and Phillips JA were in substantial agreement) ('Leibler').

[624] See *Cooper* (argument that defendant must have actual knowledge rejected) (see David Mossop, 'Rectification for Unilateral Mistake' (1996) 10 *Journal of Contract Law* 259); *Thor Navigation Inc v Ingosstrakh Insurance Co Ltd* [2005] 1 Lloyd's Rep 547 [57] (Gloster J) ('Thor Navigation') (wilful blindness, or a wilful and reckless decision not to make reasonable inquiries). See also *Budget Stationery Supplies Pty Ltd v National Australia Bank Ltd* (1996) 7 BPR 97,606 (NSWSC) (Santow J), affirmed *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365 (NSWCA) (on the present state of the authorities; person must know of the other's mistake); *Leibler*, 14 [36], 24 [62] (Kenny JA) (with whom Winneke P and Phillips JA were in substantial agreement) (question left open).

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706. Rectification may be available where one party to a contract knows that an instrument contains a mistake in its favour but does nothing to correct it; the party with knowledge will be precluded from resisting rectification on the ground that the mistake was unilateral and not common. Whether the mistake must operate to the benefit of the unmistaken party, or merely prejudice the mistaken party, is unclear. [625]. A party's right to rectification derives from the fact that the conduct of the other party is such that it would be inequitable for them to object to the rectification of the document. The conduct of the party who is not mistaken must therefore be unconscionable or involve actual, constructive, or equitable fraud. [626]. Russell LJ, in the English Court of Appeal, said that: 'If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction?' [627].

[625] See *Leibler*, 14 [36] (Kenny JA) (with whom Winneke P and Phillips JA were in substantial agreement).

[626] *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* (2015) 47 WAR 547, 580 [175] (Buss JA) (with McLure P and Newnes JA agreeing). Mere knowledge of the mistake and the failure to do anything about it will not suffice: *XCB Pty Ltd v Creative Brands Pty Ltd* [2005] VSC 424 [10] (Whelan J) ('XCB').

[627] *Riverlate Properties Ltd v Paul* [1975] Ch 133 (CA) 141 (Russell LJ).

707. The English courts have expressed the view that cases of unilateral mistake require evidence of 'sharp practice' by the non-mistaken party; [628] for example, intending the mistaken party to make the mistake, or consciously intended to deceive the mistaken party. [629] However, in *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd*, [630] it was found not necessary to show sharp practice:

- there had been a common intention as to what the instrument should provide;
- the mistaken party mistakenly believed that it gave effect to that common intention;
- it did not do so because of a slip by the mistaken party;
- the non-mistaken party did not draw this to the mistaken party's attention; and
- the mistake would benefit the defendant or be detrimental to the plaintiff.

[628] *Ibid*, 140 (Russell LJ). See also *Commerce Consolidated Pty Ltd v Johnstone* [1976] VR 724 (Full Ct); *Leighton v Parton* [1976] 1 NZLR 165; *Cooper*, 292 (Evans LJ) (with whom Farquharson LJ agreed) (dishonest and disgraceful conduct established).

[629] See *Cooper*, 280, 281, 282 (Stuart-Smith LJ) (with whom Evans and Farquharson LJ agreed) (reference to diverting the other party's attention from the contract; to false and misleading statements; to misrepresentation and to creating a 'smokescreen' in relation to the matter which became contentious). See also *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA (The 'Olympic Pride')* [1980] 2 Lloyd's Rep 67, 72 (Mustill J) ('*The Olympic Pride*'). Contrast *Thor Navigation* [61] (Gloster J) (no 'smokescreen' and no unconscionable conduct).

[630] *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505.

708. In *Earl v Hector Whaling Ltd*, Holroyd Pearce LJ stated that: [631] ‘It is obvious that when parties put their hands to an agreement, it will take convincing evidence to show that the agreement does not contain the intended bargain ... there must be enough weight in the evidence to outweigh the inherent probability that they meant what they wrote.’ Adding that, ‘[i]t is a question of fact and degree what weight of evidence is needed to overcome that inherent probability, and to establish that, contrary to it, the parties did not mean what they wrote.’ [632].

[631] *Earl v Hector Whaling Ltd* [1961] 1 Lloyd’s Rep 459, 468 (Holroyd Pearce LJ).

[632] See *Earl v Hector Whaling Ltd* [1961] 1 Lloyd’s Rep 459, 468 (Holroyd Pearce LJ).

709. However, the onus of proving that an instrument assented to differs from the form it was meant to take, is a heavy one, usually [633] requiring ‘clear and convincing evidence.’ [634].

[633] *The Olympic Pride*, 72 (Mustill J) (‘heavy burden’). Expressions such as ‘irrefragable’, ‘beyond all reasonable doubt’, ‘very strong proof,’ and ‘clear proof’ have also been used. For examples of the epithets used in the cases, see *Fowler v Fowler* (1859) 4 De G & J 250, 264–5; 45 ER 97, 103; *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410, 433; *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54, 64; *Slee v Warke* (1949) 86 CLR 271, 281 (the Court); *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, 349; *Pukallus v Cameron* (1982) 180 CLR 447, 452 (Wilson J) (with whom Gibbs CJ and Murphy J agreed); *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429, 431.

[634] See American Law Institute, *Restatement of the Law Second, Contracts 2d* (1979) § 155, Comment c. See also *Commercial Union Assurance Co Plc v Sun Alliance Insurance Group Plc* [1992] 1 Lloyd’s Rep 475, 482 (Steyn J) (clear and convincing proof); *Thor Navigation* [51] (Gloster J) (convincing evidence).

710. DFG submitted that the claim for rectification should fail for the following reasons:

- (a) Premier Bay and Mr Montalto were not operating under a unilateral mistake of the type pleaded at paragraph 7(c)(ii) of the SFADAC.
- (b) DFG had no knowledge of any mistake.

- (c) The rights of third parties would be prejudiced if this was to occur.
- (d) The form of rectification does not reflect the alleged 'mistake.'

711. DFG submit that the principles which govern an application for rectification of a contract on the ground of unilateral mistake were outlined by Kenny JA in *Leibler* as follows: [\[635\]](#).

If (1) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and (2) the other party, B, knows of the omission and that it is due to a mistake on A's part; and (3) lets A remain under the misapprehension and concludes the agreement on the mistaken basis in circumstances where equity would require B to take some step or steps, depending on those circumstances, to bring the mistake to A's attention; then (4) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention.

[\[635\]](#) [\[1999\] 1 VR 1, 14 \[36\]](#).

712. The Court looks to the parties' 'actual intentions, viewed objectively from their words or actions.' [\[636\]](#). Furthermore, the purpose of rectification 'is to make a written instrument "conform to the true agreement of the parties where the writing by common mistake [or here unilateral mistake] fails to express that agreement accurately."' [\[637\]](#). The relevant time is at the time of execution of the written instrument. [\[638\]](#).

[\[636\]](#) *Simic v New South Wales Land and Housing Corporation* (2016) 91 ALJR 108, 127 [\[104\]](#) (Gageler, Nettle and Gordon JJ) (*Simic*).

[\[637\]](#) See *ibid*, 127 [\[103\]](#) (Gageler, Nettle and Gordon JJ) (and cases cited therein).

[\[638\]](#) *Ibid*. See also *Leibler*, 27 [\[70\]](#) (Kenny JA).

713. In circumstances where the parties have engaged in protracted negotiations, in which they have been assisted by solicitors, ‘the executed document will be taken to represent their real intentions and a court will not reach a contrary conclusion unless satisfied by’ the necessary convincing proof. [\[639\]](#)

[\[639\]](#) *Leibler*, 19 [49] (Kenny JA) (with Winneke P and Phillips JA at 5 [10] agreeing); *XCB* [\[7\]](#) (Whelan J).

714. Further, there must be ‘convincing proof’ of the mistake and ‘that the mistake made was precisely the one identified ... for the purposes of their claim for rectification.’ [\[640\]](#)

[\[640\]](#) *Leibler*, 15 [38] (Kenny JA) (with Winneke P and Phillips JA at 5 [10] agreeing).

715. Mr Montalto’s case is that he believed that lot 1 was not developable, as it fell within a buffer zone for a quarry located next to lot 1. Mr Montalto says that, after attending several presentations, in about March 2012, he informed Mr Levinge and Mr Dooling that he was prepared to join the project. He said that he was prepared to put up lots 2 and 3 for development, but not lot 1 as it was not developable, and therefore he proposed to farm lot 1 for years to come. Mr Montalto says that he asked Mr Levinge and Mr Dooling for lot 1 to be included in the planning/concept stage, at Mr Montalto’s cost. Mr Montalto says that Mr Levinge and Mr Dooling accepted his offer on these terms.

716. Rectification for unilateral mistake requires ‘special circumstances.’ [\[641\]](#) Mr Montalto’s special disability is his reading disability. It is pleaded that:

[\[641\]](#) See *Simic*, [127 \[103\]](#) (Gageler, Nettle and Gordon JJ) (and cases cited therein). See also *Leibler*, 27 [68] (see also [70]) (Kenny JA).

27 At all material times, Mr Montalto was suffering under a special disability in that he cannot read and comprehend anything other than basic English text (Special Disability).

Mr Montalto is almost illiterate and cannot read or comprehend anything other than basic English text. Mr Montalto does not have the ability to read or comprehend legal documents such as the Development Agreement. Mr Montalto relies upon other persons reading documents to him to enable him to understand and comprehend the content of the document and, in the absence of assistance, Mr Montalto cannot read and comprehend anything other than basic English text.

28 By reason of Mr Montalto's Special Disability, Mr Montalto is dependent upon other persons reading documents to him to enable him to understand and comprehend the content of the documents.

29 At all material times, Colin Brown, and therefore Crowe Horwarth, knew, or ought to have known, of Mr Montalto's Special Disability.

717. I am not satisfied of Mr Montalto's claim that he relied on others to read documents and that he does not read anything.

718. The mistake made must precisely be the one identified for the purposes of the claim for rectification.^[642] The mistake is pleaded by Mr Montalto and Premier Bay as being that, at the time that Premier Bay and Mr Montalto executed the development agreement, they:

^[642] *Leibler*, 15 [38] (Kenny JA) (Winneke P and Phillips JA at 5 [10] agreeing).

(i) had no knowledge that the Development Agreement:

- (A) defined 'land' to include lot 1, as well as lots 2 and 3;
- (B) applied to lot 1 in any way, other than to the development of lot 1 to the extent that it provided for the formulation of an initial concept design for a hypothetical future development that would include lot 1;

(ii) were of the mistaken belief that the development agreement:

- (A) applied to lot 1 only to the extent that it provided for the formulation of an initial concept design for a hypothetical future development that would include lot 1;
- (B) applied to lots 2 and 3 to the extent that it provided a 'free right of sale' to Premier Bay (ie, free of any obligation to the plaintiffs), should it become necessary for Premier Bay to sell a small parcel of the land comprising lots 2 or 3 at a future date to any third party; and

(C) did not apply to lot 1 to the extent that it:

- (1) provided for the development of the land comprising lot 1;
- (2) limited Premier Bay's 'free right of sale' of lot 1 unencumbered to any third party.

719. The inclusion of lot 1 in the joint venture between Premier Bay and DFG goes to the core of the development agreement. The description of the land was not an incidental or mechanical term. The land to be developed was the very subject matter of the development.
720. Mr Montalto says that his entry into the project was conditional on five conditions. First, that lot 1 would not be included in the development and that lot 1 would be included in the concept plan only. Secondly, that Gina would be rehoused on lot 1. Thirdly, that Mr Montalto would have the free right of sale of lot 1, but that DFG would have first option to buy. Fourthly, that the Montalto name would be incorporated as much as possible into the development, and that the hill on lot 1 would be named after his father. Fifthly, that a small parcel of land in lots 2 and 3 would be available for Mr Montalto to sell if he needed cash. It is not part of the pleaded claim for rectification that Mr Montalto entered into the development agreement on the mistaken belief that the agreement contained these five conditions.
721. Mr Montalto says that he told his lawyers, his accountants, and DFG that lot 1 was not to be included in the development, and that he was prepared to put in lots 2 and 3 subject to the five conditions. Mr Montalto gave evidence that DFG agreed with the conditions.
722. Mr Montalto pleads that at the formal signing of the development agreement, on 10 April 2013, he expressly asked his lawyers whether lot 1 was separate, within the hearing of DFG.
723. Mr Montalto says that, at the formal signing of the development agreement on 10 April 2013, he expressly asked his lawyers whether lot 1 was separate and whether the five conditions had been included in the development agreement, and was told by his lawyers that it was all there and that lot 1 was separate.
724. The lawyer present at this signing meeting was Mr Di Felice. However, Mr Di Felice was not cross-examined about the five conditions.^[643]

^[643] Outline of Closing Submissions of Fourth Defendant by First Counterclaim, 21 November 2017 [23].

725. If Mr Montalto's version is correct, then DFG would have included lot 1 in the development despite expressly being told it was not to be included. Secondly, his own lawyers would have gone against his express instructions and included lot 1 in the development. Thirdly, his trusted

advisers would have failed to ensure Mr Montalto's instructions were carried out or failed to inform Mr Montalto of the substance of the agreement. Further, his own lawyers would have expressly lied to him at the meeting of 10 April 2013, within the hearing of DFG.

726. Mr Montalto's evidence of the conversations alleged to have taken place on 10 April 2013 could not be said to have alerted DFG to Mr Montalto's alleged mistaken belief. The evidence shows that the development agreement was signed by Mr Montalto and Mauro as a deed, prior to the 10 April 2013 meeting, in the presence of Mr Farinotti and Mr Brown.
727. As mentioned earlier, it is highly implausible that Mr Brown, whom Mr Montalto described as having given over 40 years of competent service, would have on multiple occasions failed to carry out express instructions. It is difficult to accept that, if Mr Montalto had expressly agreed with DFG that he was not putting lot I into the joint venture, and had expressly instructed his accountants and lawyers that lot I was not to be included, that the development agreement would then have included lot I, contrary to Mr Montalto's express instructions. The express denials by Mr Levinge, Mr Dooling, Mr Brown, Mr Jeremiah, and Mr Di Felice that Mr Montalto ever said, or suggested, that lot I was to be excluded from the development presents a formidable case for Mr Montalto to overcome.
728. I accept that Mr Brown lacked a meaningful recollection of material events and conversations that had taken place at the relevant time.^[644] I am not satisfied that Mr Brown was acting to deceive Mr Montalto. I am not satisfied that Mr Brown gave false evidence in denying Mr Montalto's version of events.

^[644] Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T709–T711 XN; T717, T721 XXN.

729. I am not satisfied that Mr Levinge or Mr Dooling gave false evidence. Nor am I satisfied that Mr Di Felice or Mr Jeremiah had incorrectly recalled what had been discussed, or had given false evidence in denying Mr Montalto's version of the events.
730. Mr Montalto has not satisfied me that the evidence of Mr Levinge, Mr Dooling, Mr Hart, Mr Brown, Mr Duonis, Mr Di Felice, or Mr Jeremiah is false.
731. Mr Montalto owns a significant amount of property. He is experienced in the purchase and mortgaging of land. In his business dealings, Mr Montalto arranged financing with banks and carried on the cheese factory business.
732. I accept that Mr Montalto was upset and cross when he saw that the Montalto name was not included in the development as he had hoped. He was also upset with the allegation that his farm was contaminated. He was also concerned that his neighbours, who had joined the development, were not contributing what he thought was their fair share of the costs that he was bearing, such as a services trench and the non-development of the hill.

733. I accept Mr Montalto is disappointed at the restrictions on his ability to raise capital using lot 1, and, in view of DFG stating they would attempt to only use lots 2 and 3 to raise security, he had thought he would have a greater ability to do so.
734. It is submitted on behalf of Mr Montalto that the Court should not find that Mr Montalto had a selective memory or deliberately failed to recall important events. Instead, the Court should find that Mr Montalto's memory is simply not good, in the sense that Mr Montalto has a poor memory of the dates on which events occurred.
735. Further, it is submitted that the Court has reason to prefer the evidence of Mr Montalto over oral evidence from any of the other parties; and in view of the absence of any record of a conversation in which any of DFG, Sladen, or Crowe Horwarth explained to Mr Montalto:
- (a) the way in which the development agreement would apply to each of his lots; or
 - (b) the extent to which the development agreement would apply to Premier Bay's land
- the Court should be very slow to find that any of DFG, Sladen, or Crowe Horwarth had a conversation with Mr Montalto, the effect of which is not recorded in any contemporaneous note.
736. That being so, Mr Montalto's case is that he told each of DFG, Sladen, or Crowe Horwarth of his five conditions, and of his critical condition. There is no record of any such discussions in any contemporaneous notes, including the contemporaneous note prepared by Mr Montalto.
737. The fact that I am not satisfied that he had any of the conversations that he alleges he had with Mr Levinge, Mr Dooling, Mr Brown, Mr Jeremiah, and Mr Di Felice — which go to the heart of his case — must carry with it the implication that I should be reluctant to accept any of his evidence unless it is corroborated or is against his interests.
738. I am satisfied that Mr Montalto knew and understood that lot 1 was included in the development. Mr Montalto has sought to convey that his knowledge and beliefs were contrary to the knowledge and beliefs that he, in fact, held about the inclusion of lot 1 in the development, at the time that he and Premier Bay executed the development agreement.
739. I am not satisfied that the development agreement with Premier Bay was entered into under a mistaken belief, as contended by Mr Montalto.
740. I am therefore not satisfied that DFG knew of such a mistaken belief.
741. Further, and in the alternative, as mentioned above, the CUT documents are also formulated on the basis that lot 1 is included in the development; ie, on the basis that the land being contributed by Mr Montalto was 263.76 hectares in total, of which there were 208 hectares of net developable area, in circumstances where the total land area of lots 2 and 3 is 202.75 hectares (ie, 79.73 + 123 hectares).[\[645\]](#) The developable area was revisited due to the inclusion of the Delma land.[\[646\]](#) T

he units were recalculated so that the percentage interests in the CUT reflected the net developable area of each party (ie, Premier Bay, approximately 60.1 per cent; the Coralluzzos, approximately 11.2 per cent; and Delma, approximately 28.5 per cent).

[645] See CB 459, 654; *Transcript of hearing, Re Premier Bay Pty Ltd* (9 November 2017) T555–557 XXN.

[646] See Exhibit P20. See *Transcript of hearing, Re Premier Bay Pty Ltd* (10 November 2017) T714–715 XXN.

742. Premier Bay and Mr Montalto do not seek rectification of the CUT documents, and have not explained how the CUT agreements would operate if the development agreement were rectified. The Coralluzzos and Delma are not parties to the present proceeding. Without rectification of the CUT agreements, the Coralluzzos and Delma would be disadvantaged as interest-free loans would be made to the unitholder nominated by Premier Bay (ie, MCRD as trustee for the Montalto Donnybrook Trust) in excess of the actual land contributed. [647]
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[647] See cls 5.2.3, 5.3.4 of the CUT Deed regarding interest-free loans to unitholders (CB 562).

743. Rectification of the development agreement would be a cause of prejudice to the parties to the CUT agreements. Rectification will be refused where the rights of innocent third parties will be prejudiced. [648]
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[648] See, eg, *CMG Equity Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* (2008) 65 ACSR 650, 657 [26] (Finkelstein J).

744. Premier Bay and Mr Montalto were represented by accountants and lawyers, and received professional accounting and legal advice throughout the almost 18 months of negotiations that preceded the signing of the development agreement (and the CUT agreements). Solicitors have the authority to conduct negotiations on behalf of their clients as to the terms of a contract between parties. [649] The evidence showed that Premier Bay and Mr Montalto's advisers:

[649] *Pianta v National Finance & Trustees* (1964) 180 CLR 146; *Pavlovic v Universal Music Australia Pty Ltd* (2015) 90 NSWLR 605, 628 [137] (Beazley JA) (Bathurst CJ at 607 [1] and Meagher JA 633 [162] agreeing).

- (a) were themselves not aware of Premier Bay and Mr Montalto's purported mistake or the five conditions; and
- (b) did not tell the plaintiffs of these matters.

Accepting as Mr Montalto said, that Mr Brown was authorised to act in negotiating the development agreement on Premier Bay's behalf, this would have consequences for the doctrine of mistake.

745. Mr Brown was not under a mistaken belief that lot 1 was not included in the contract,
746. An added difficulty is that Premier Bay and Mr Montalto were legally represented. Mr Montalto's lawyers also believed that lot 1 was to be included in the agreement,
747. Finally, the plaintiffs have submitted that the claim for rectification — ie, to delete lot 1 from the development agreement — does not reflect the alleged mistake made by Mr Montalto. Mr Montalto's evidence reveals that he did not want lot 1 deleted from the development agreement. Instead, his actual intention was that lot 1 was to be included in the development agreement, incorporated in the drawings, and that Mr Montalto would pay the costs of said drawings.[650] There was also to be an option granted over lot 1 of it were to be sold, in favour of DFG, who would 'have first option, otherwise I free sell.'[651]

[650] See Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T454 XN.

[651] Ibid.

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748. The mere removal of lot 1 from the development agreement does not accord with the alleged actual intention. Instead, the Court would have to define the terms of the option, the amount to be paid for the drawings, and undertake the task of 'rewriting' the agreement between the parties to that extent,
749. Accordingly, I find that Premier Bay is not entitled to rectification of the contract,

750. As part of Sladen's retainer, Sladen is alleged to be obliged 'to ensure that Mr Montalto knew, comprehended and understood the content of any documents that he executed or procured [Premier Bay] to execute' and, alternatively, to ensure that the documents executed were in accordance with the instructions provided by Mr Montalto and captured each of the five conditions.^[652]

^[652] SFADAC [32].

751. Premier Bay and Mr Montalto claim that Sladen breached its retainer, and the duty of care that it owed to Premier Bay and Mr Montalto, by failing to explain to Mr Montalto that the development agreement defined 'land' in such a way that the agreement applied to lot 1; and secondly, or in the alternative, by failing to ensure that the development agreement gave effect to the critical condition, that lot 1 was not part of the development, by failing to carry out Mr Montalto's instructions or by failing to ask Mr Montalto for his instructions about lot 1.
752. Part of a lawyer's duty in a case such as this is to alert their client of any material risk, or of matters of commercial significance. As Dixon J observed, in *Dual Homes Pty Ltd v Moores Legal Pty Ltd*: ^[653]

What is required for the performance of this duty in the particular case depends upon the circumstances, including the scope of the retainer and the nature of the task entrusted to and undertaken by the solicitor.

^[653] (2016) 50 VR 129, 158 [119].

753. Mr Montalto's primary case is that he told his lawyers that lot 1 was not to be included. As it is, I have not found that Mr Montalto did tell his lawyers that lot 1 was not to be included.
754. In those circumstances, it is difficult to conceive of the alternative case, that if Mr Montalto's evidence is not to be accepted, Sladen still breached its duty of care by failing to ask for Mr Montalto's instructions. The alternative hypothesis must be that, had Mr Montalto's lawyers sat down with him prior to Mr Montalto signing the development agreement, and fully explained the terms of the development agreement to him, then Mr Montalto would have instructed his lawyers that lot 1 was to be excluded; this is so, even in light of the finding that I do not accept Mr Montalto's evidence that he did say lot 1 was to be excluded from the development. Mr Montalto's own evidence in this regard did not establish the allegation that they never told him:^[654]

MR PETERS: Sladens never queried the inclusion of lot 1 with you, did they?

MR MONTALTO: I don't recall.

[654] Transcript of hearing, *Re Premier Bay Pty Ltd* (2 November 2017) T575 XXN.

755. Putting aside any such difficulties, I find that Mr Montalto was informed that lot 1 was included for the following reasons,
756. Mr Di Felice reviewed the documents in detail with Mr Montalto, and certain matters were discussed which would have made clear to Mr Montalto that lot 1 was included in the development,
757. Mr Di Felice was asked whether he had discussed whether Lot 1 was to be included with Mr Montalto:[655]

MR ANDERSON: You did not. You assumed by the time you got the file and became involved in the file from Rob Jeremiah that it was all of the land because Mr Jeremiah hadn't told you anything different?

MR DI FELICE: That's correct, and it was subsequently discussed with plans at meetings and yield, direction of development, et cetera, as to what the land was. But it was not referred to as lot 1. It was the whole of the land.

[655] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T 991 XXN.

758. Mr Di Felice was asked about the definition of 'developable area' and about discussions regarding the CUT documents, to which this definition was relevant:[656]

[656] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T970-1, T980, 990, 999 XXN.

MR ANDERSON: ... You didn't discuss with Mr Montalto directly the definition of 'developable area', did you?

MR DI FELICE: I can't recall whether we discussed that.

MR ANDERSON: You would have made a note of it if you had, would you not?

MR DI FELICE: I don't recall. In reviewing the development agreement generally, we reviewed all of the comments I had made in it and the amendments.

...

MR ANDERSON: Is this where you sent an email on 13 March 2013 to Colin Brown and one of the matters you raised, if you look at the second last paragraph on that page, 477, is 'total developable area'; do you see that?

MR DI FELICE: Yes.

MR ANDERSON: So you are getting instructions from — sorry, you are sending this email to Colin Brown to get his instructions in relation to that issue; is that right?

MR DI FELICE: Yes.

MR ANDERSON: You didn't discuss it directly with Mr Montalto, did you?

MR DI FELICE: Ultimately in the meeting that we had post this, yes, we did, as part of the lot yield discussion.

...

MR ANDERSON: Did you ever sit down with Mr Montalto and do a page turn of the CUT documents with him?

MR DI FELICE: Yes, at the earlier meeting where we were discussing yield and other landowners that were involved, it was relevant particularly at that stage to discuss those documents.

759. Mr Di Felice was asked about a file note of a meeting at which he, Mr Goldin, Mr Jeremiah, Mr Brown, and Mr Montalto were in attendance:[\[657\]](#)

MR TSALANIDIS: What was discussed at that meeting?

MR DI FELICE: This was shortly prior to documents being finalised and arrangements being made for execution, and there were a number of issues that were discussed at the meeting. Going through them in no particular order, this is a meeting where there was a discussion in relation to generally the escrow arrangements, what is escrow, how does it work, why was it being proposed, all of those types of issues that we'd had initial discussions with David Hart in relation to, but we were actually having that discussion now with Colin Brown and [Mr] Montalto. Critically there was the issue of who the landowners were that were going to still go through with the consortium, because it had fluctuated somewhat over the long period of time of

negotiation. At this stage, being close to immediately prior to finalisation of the documents, there were only two landowners that were now proposed, being Premier Bay and Coralluzzo, and that's where my recollection of having the actual plans in front of us that showed that land, because it was in the context of a discussion about what that meant, having less land in total in the — less landowners in total in the CUT meant for the Premier Bay land, and I recall there being a particular reference to there's a higher return because proportionately Premier Bay was the much larger landowner. I recall making a comment of, 'Yes, but there's also a higher level of risk that comes with that by being the dominant owner in the consortium'" So there was discussion around that. There was discussion around the yield, the yield being the number of lots that could ultimately be developed from the Premier Bay land, and the figure was in the I think mid-3,000 lots. There was a reference to the exact figure that was mentioned in the notes, I believe.

MR TSALANIDIS: Do you know where that could be found?

MR DI FELICE: If you give me one moment. No, I can't seem to locate it now. I recall there being a discussion around the yield that was being proposed and that it was a higher yield than was initially expected, which was a positive result.

[657] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1006–1007 RXN; CB 689.

760. Mr Di Felice was asked about the meeting of 3 April 2012: [658]

MR ANDERSON: So your 3 April 2012 meeting dealt, I suggest to you, only with amendments, so the amendments in red. That's what you discussed with Mr Montalto and Mr Colin Brown on 3 April 2012; is that correct?

MR DI FELICE: No, we reviewed the whole agreement. I had the agreement with me.

MR ANDERSON: But you didn't do a page turn of the agreement, did you?

MR DI FELICE: If page turn means reviewing the agreement in itself - - -

MR ANDERSON: No. Page turn — do you understand my question? That means starting at page 1 and going through to the end of the draft agreement. Did you ever do that with Mr Montalto?

MR DI FELICE: I believe I had the agreement with me and reviewed the agreement.

[658] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T982 XXN.

761. Mr Di Felice gave evidence that the discussions concerning the development agreement included discussions of plans and maps which showed that all three lots were part of the development:[659]

MR ANDERSON: I suggest to you it would have been prudent to ask him as the solicitor acting, one of the solicitors acting for Premier Bay, 'What land is going to be part of the development?' It would have been a sensible question to ask, would it not?

MR DI FELICE: All of the information provided and the prior dealings in relation to the parties related to all of the land. I believed it related to all of the land.

MR ANDERSON: The information provided? The information provided to you was from Rob Jeremiah, was it not?

MR DI FELICE: There was other information on our files that related to plans, maps, lot yield analysis that related to the whole of the land.

[659] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T969 XXN.

762. Mr Montalto was aware that the planned service corridor would go through lots 1, 2, and 3:[660]

[660] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T516; T524 XXN.

MR PETERS: And you knew that the hill was embedded in a corridor plan by the government planning authorities?

MR MONTALTO: What do you mean 'embedded in the corridor plan'?

MR PETERS: You knew the hill was part of a corridor plan for - - -?

MR MONTALTO: That whole area is, but until you sell a property it doesn't get developed, does it?

...

MR PETERS: The main sewer line was across lot 1, wasn't it, and lot 2 and lot 3, the sewer along Donnybrook Road?

MR MONTALTO: Along Donnybrook Road, yes.

MR PETERS: And they needed to resume some of your land to fit the sewerage line in?

MR MONTALTO: Everybody's land.

763. In relation to this, Mr Di Felice gave evidence of discussions with Mr Montalto concerning the treatment of funds coming in from compensation payments for the compulsory acquisition of land:[661]

[661] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T983 XXN.

MR ANDERSON: Compulsory acquisition. So that was one of the matters you discussed with Mr Montalto?

MR DI FELICE: Yes.

MR ANDERSON: How did that find its way into the development agreement, the amendments you made?

MR DI FELICE: There is — would you like me to refer to the agreement?

MR ANDERSON: If you are able, yes?

MR DI FELICE: There are the issues there at clause 14. Sorry, I'm looking at the version that I sent to Mr Colin Brown.

MR ANDERSON: Clause 14?

MR DI FELICE: That relates to disbursement of non-sale proceeds.

MR ANDERSON: So you discussed that matter with Mr Montalto?

MR DI FELICE: Yes.

764. Mr Di Felice gave evidence that the discussions concerning the removal of caveats made it evident to him that lot 1 was included in the agreement. Mr Di Felice was asked:[662]

MR TSALANIDIS: Did you note anything in particular about the lots or the search?

MR DI FELICE: Firstly the fact that the caveats were no longer registered or lodged against those titles. So there was a note on there that there had been the withdrawal of caveats that had been lodged, and that related to all three lots; so that — because we'd had that earlier discussion on the status of the caveats and everything was effectively in a holding pattern until the caveats had been resolved, that it now achieved that.

[662] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T945–946 XN.

765. Mr Anderson asked Mr Di Felice if there was any discussion about which land was to be included in the agreement:[663]

MR ANDERSON: But after 22 December you never raised the issue again with Mr Montalto, did you? There was never any discussion about what land's in and what land's out other than, as you say, what's the developable area; correct?

MR DI FELICE: There's also the issue in relation to the caveats.

MR ANDERSON: Yes. But the caveat issue, the caveats were over three lots, were they not?

MR DI FELICE: Yes.

[663] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T971 XXN.

766. Mr Montalto himself gave evidence that he agreed that the draft development agreement referred to lots 1, 2 and 3, albeit as a concept in respect of lot 1.[664] As I have found, I do not accept that it was ever discussed that lot 1 was to be included only for the purposes of the initial concept plan. I am therefore unable to accept that Mr Montalto did not know lot 1 was included.

[664] Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T544 XXN; Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T592, T651, T652, T653 XXN.

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767. I accept the submissions of Premier Bay and Mr Montalto that there is no direct evidence of a conversation taking place in which Mr Montalto was told that the land to be developed was lot 1, lot 2 and lot 3. However, there is evidence that this was communicated to Mr Montalto by other means.
768. I now turn to the claim against Crowe Horwath.
769. Crowe Horwath was retained 'to provide ... general business advisory services' to Premier Bay and/or Mr Montalto.
770. Premier Bay and Mr Montalto's primary claim against Crowe Horwath is that they failed to carry out Mr Montalto's instructions. Alternatively Crowe Horwath failed to explain documents to Mr Montalto.
771. Premier Bay and Mr Montalto claim that, if the Court finds that Premier Bay and Mr Montalto entered the development agreement on a mistaken belief, and if the Court also finds in Premier Bay and Mr Montalto's favour, the following questions, then the Court should grant Premier Bay and Mr Montalto relief as against Crowe Horwath:
- (a) Was Crowe Horwath obliged, as part of its Conduit Responsibilities or as part of the Crowe Horwath Retainer, 'to ensure that Mr Montalto knew, comprehended and understood the content of any documents that he executed or procured [Premier Bay] to execute'? To determine this issue, the Court may (but need not) determine whether, as Mr Montalto's accountant and business adviser for more than 40 years, Mr Brown knew (actually or constructively) that Mr Montalto had the special disability.
 - (b) Did Mr Montalto inform Mr Brown (or inform Sladen in the presence of Mr Brown), sometime at the end of 2011, that the lot 1 critical condition was a precondition to Premier Bay and Mr Montalto entering into the development agreement?
 - (c) Had Premier Bay and Mr Montalto been aware that the mistaken belief was mistaken, would they have executed the development agreement? In particular, did Mr Brown ever inform Mr Montalto that the development agreement applied to lot 1 in any way, other than the development of lot 1 by way only of the formulation of an initial concept design for a hypothetical development that would include lot 1?
772. I have found that Premier Bay and Mr Montalto did not enter the development agreement on a mistaken belief.
773. I am not satisfied that Mr Montalto relied on Mr Brown in the manner and to the extent pleaded.
774. I am not satisfied that Mr Montalto did inform Mr Brown (or inform Sladen in the presence of Mr Brown), at the end of 2011, that the lot 1 critical condition was a precondition to Premier Bay and Mr Montalto entering into the development agreement.

775. As I have found that I do not accept Mr Montalto's evidence of the discussions that took place, I will not make any adverse findings against Sladen or Crowe Horwath based on hypothetical scenarios.
776. Accordingly, I reject Premier Bay and Mr Montalto's defence and dismiss their counterclaim.

The claim against Mauro

777. The facts set out above in relation to the entering into of the development agreement are relevant for the claims against Mauro, and to the claims Mauro makes in his defence and counterclaim.
778. Unfortunately it is necessary to repeat some of the evidence discussed in relation to the claim against Premier Bay and Mr Montalto, and their counterclaim, in dealing with the case against Mauro.
779. DFG allege that Mauro was, from 25 August 1997 to 4 March 2015, a director of Premier Bay. DFG allege that, on or about 10 April 2013, each of Premier Bay, Mr Montalto and Mauro, and DFG entered into the development agreement.
780. DFG allege that, relevantly, under the development agreement, Mauro covenanted to cause Premier Bay to:
- (a) at the request of DFG, do all things reasonably required by DFG to undertake the development including giving consents, signing applications, and entering into contracts, agreements, or arrangements as a 'development cost';
 - (b) not to take any action that would, or might, prevent or impede DFG from being able to undertake the development;
 - (c) grant to DFG, their employees, agents, contractors, consultants, advisors, and invitees a licence (in consideration of the agreement) to enter upon and occupy such parts of the land as may be required from time to time for DFG to undertake the development, provided that interference with Premier Bay's use of the land is to be avoided, where possible, in exercising the rights granted by subclause 8.5 of the development agreement.
781. DFG further allege that it was a term of the development agreement that, in order to secure Premier Bay's obligations pursuant to the development agreement, Mr Montalto and Mauro guarantee the obligations of Premier Bay (clause 30.1); and without limiting this clause [presumably clause 30], Mr Montalto and Mauro will keep DFG indemnified against any loss, costs, charges or expense that DFG may incur as a result of Premier Bay's default (clause 30.2).^[665]

^[665] Originating Process and Statement of Claim dated 25 May 2017, [8(k) and (l)].

782. DFG plead that the guarantee provided by Mr Montalto and Mauro is a continuing guarantee and indemnity, and shall not be released by any neglect or forbearance on DFG's part in enforcing any rights, or by any extension of time given to Premier Bay, or Mr Montalto or Mauro, for the performance or observance of any of the covenants and obligations or by any other act or thing which under the law of sureties would, but for the provisions of the development agreement, have the effect of releasing Premier Bay, Mr Montalto or Mauro.^[666]

^[666] Originating Process and Statement of Claim dated 25 May 2017 [8(m)].

783. DFG allege several breaches by Premier Bay of the development agreement, including that it has failed to recognise and give effect to the development agreement by asserting lot 1 is not to be the subject of the development, and by failing to execute certain documents as requested by DFG, which it is alleged are necessary and/or desirable to ensure the efficient and economical conduct of the development,^[667] including failing and/or refusing to execute or approve a mortgage of lot 2 and 3 in favour of DFG.

^[667] Originating Process and Statement of Claim, 25 May 2017 [9–11].

784. DFG allege that, by reason of these and other matters pleaded, DFG have and will continue to suffer loss and damage.

785. DFG plead that by reason of clauses 30.1 and 30.2 of the development agreement, Mr Montalto and Mauro are liable to indemnify DFG in relation to any loss and damage suffered by DFG as a consequence of the breaches by Premier Bay of the development agreement.

786. The relief sought against Mauro is a declaration that lot 1 forms part of the land subject to the development agreement, indemnity, costs, and such further or other order as the Court deems fit.

Mauro's defence and counterclaim

787. Mauro, by his defence, admits signing the development agreement both as a director and on his own behalf. He alleges that:

- (a) he was not involved in the negotiations of the development agreement;
- (b) he had not seen a copy of the development agreement prior to it being presented to him for signing at the meeting on 10 April 2013;

- (c) he did not have the opportunity to, and did not read the development agreement prior to signing it at the meeting on 10 April 2013;
- (d) he did not have the opportunity to, and did not obtain any independent advice prior to signing the development agreement;
- (e) his father, Mr Montalto, was the guiding mind of Premier Bay and exercised effective control over the business of Premier Bay;
- (f) he executed the development agreement at the request of his father, Mr Montalto, and because of the trust and confidence he reposed in Mr Montalto;
- (g) he was financially dependent on Mr Montalto, as a result of which Mr Montalto had special authority over him in relation to the making of business decisions.

788. Mauro gives particulars of his financial dependency including that he did not receive a salary or dividend from Premier Bay; his salary and occasional dividends paid by Floridia Cheese were determined by Mr Montalto; and that Mr Montalto pays the school fees for Mauro's children.

789. Mauro alleges that he did not understand at the time of executing the development agreement:

- (a) the purport and effect of the guarantee and indemnity contained in clause 30 of the development agreement;
- (b) which lots of land were and were not the subject of the development agreement;
- (c) he did not personally stand to gain financially from the development agreement.

790. Mauro alleged that by reason of these matters, when executing the development agreement in his personal capacity, Mauro was subject to the undue influence of his father, Mr Montalto, and accordingly did not execute the development agreement, in his personal capacity, independently and voluntarily.

791. Further, Mauro alleged that he was at a special disadvantage in executing the development agreement in his personal capacity, such that he was not able to make a worthwhile judgment as to whether it was in his best interests.

792. Further, Mauro alleged that DFG were aware, or ought to have been aware of the matters referred to in paragraphs 787, 790, and 791 above.

793. Mauro alleged that the conduct of DFG occurred in trade or commerce, and by reason of the matters pleaded, it is unconscionable for DFG to seek to enforce the development agreement against Mauro in his personal capacity, or alternatively, the personal guarantee and indemnity insofar as it relates to Mauro in his personal capacity.
794. Mauro pleads that insofar as the development agreement or the guarantee and indemnity relates to him in his personal capacity, they are voidable either in equity, or alternatively, pursuant to s 243 of the *Australian Consumer Law* as contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).
795. Mauro also makes a counterclaim, seeking a declaration pursuant to equity or s 243 of the *Australian Consumer Law*, that the development agreement or, alternatively, the guarantee and indemnity is void insofar as it relates to Mauro in his personal capacity. Under the counterclaim, Mauro relies on the allegations that he raises on the alleged unconscionable conduct of DFG.

Relevant principles of equity

796. The starting point of this discussion is the recognition of a person being bound by a contract that she or he signs. In *Wilton v Farnworth*, Latham CJ held: [668]

In the absence of fraud or some other ... special circumstances ... a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it.

[668] (1948) 76 CLR 646, 649. Quoted with approval in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 180 [43]. See also *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 403.

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797. The special circumstances referred to by Latham CJ include the equitable jurisdiction to set aside transactions procured by unconscionable conduct and undue influence. [669]

[669] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J) ('*Amadio*').

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798. Recently, in *Thorne v Kennedy*, a plurality of the High Court said: [670]

In *Allcard v Skinner*, [671] Lindley LJ said that ‘no Court has ever attempted to define undue influence’. One reason for the difficulty of defining undue influence is that the label ‘undue influence’ has been used to mean different things.[672] It has been used to include abuse of confidence, [673] misrepresentation, [674] , and the pressure which amounts to common law duress, [675] . Each of those concepts is better seen as distinct. Nevertheless, the boundaries, particularly between undue influence and duress, are blurred, [676] . One reason why there is no clear distinction is that undue influence can arise from widely different sources, [677] one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper, [678] .

[670] (2017) 91 ALJR 1260, 1269–70 [30] (*Thorne v Kennedy*) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[671] (1887) 36 Ch D 145, 183 .

[672] William Swadling, ‘Undue Influence: Lessons from America?’ in Charles Mitchell and William Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment—Critical and Comparative Essays* (Hart Publishing, 2013) 113.

[673] *Yerkey v Jones* (1939) 63 CLR 649, 675 .

[674] *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 820 [103] (Lord Hobhouse of Woodborough) (*Etridge (No 2)*).

[675] *Ibid* .

[676] *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 290 (Kiefel J) (Lindgren J agreeing).

[677] *Etridge (No 2)* , 794–95 [7] (Lord Nicholls of Birkenhead).

[678] American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) §15, comment a; Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University

799. The plurality continued, citing Story's *Commentaries on Equity Jurisprudence*; [679] 'a person can be subjected to undue influence where the effect of factors such as pressure is that the person "has no free will, but stands *in vinculis* [in chains]". [680] [Story] explained that "the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him".' [681].

[679] *Thorne v Kennedy*, 1270 [31].

[680] Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836) vol 1, 243.

[681] Ibid.

800. There are certain classes of relationship that give rise to a presumption of undue influence such as parent and child. [682]. Outside such recognised categories, the presumption can also be raised by proof that the history of a particular relationship involved one party occupying a similar position of ascendancy or influence, and the other a corresponding position of dependency and trust. [683]. In either case, the presumption is rebuttable by the other party establishing that the particular transaction or transfer, in its particular circumstances, was nevertheless the result of the weaker party's free will. [684].

[682] *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ) ('*Johnson v Buttress*').

[683] *Johnson v Buttress*, 134-5 (Dixon J); *Thorne v Kennedy*, 1271 [34] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[684] *Johnson v Buttress*, 123 (Latham CJ); *Thorne v Kennedy*, 1271 [34] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

801. Mason J (as he then was) in *Commonwealth Bank of Australia v Amadio* [685] explained the differences between the doctrines of undue influence and the doctrine of unconscionable conduct. The difference concerns the will of the innocent party. For unconscionable conduct, the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which the innocent party is placed, and of the other party unconscientiously taking advantage of that position. By contrast, for undue influence, the will of the innocent party is not independent and voluntary because it is overborne.

[685] (1983) 151 CLR 447, 461.

802. As discussed further below, Mauro only relied upon a claim in unconscionable conduct.

803. The principles of unconscionable conduct in equity can be summarised as follows:

- (a) A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage ‘which seriously affects the ability of [] innocent part[ies] to make a judgment as to [the innocent parties] own best interests.’ [686].
 - (b) The stronger party must have actual knowledge of the weaker party’s special disadvantage and constructive notice of a special disadvantage will not be sufficient. [687].
 - (c) The other party must also unconsciously take advantage of that special disadvantage and this requires ‘victimisation’, ‘unconscious conduct’, or ‘exploitation’ by the other party. [688].
 - (d) The taking of advantage must have been unconscientious in the circumstances.
 - (e) Even if a guarantor is shown to have been operating under a special disadvantage, the transaction will not be set aside if shown to be ‘fair, just and reasonable.’ [689].
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[686] *Amadio*, 462 (Mason J); *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 398 [6] (*Kakavas*); *Thorne v Kennedy*, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[687] *Kakavas*, 438 [155].

[688] *Kakavas*, 398 [6], 439–40 [161]; *Thorne v Kennedy*, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[689] *Amadio*, 474 (Mason J).

804. In *Kakavas v Crown Melbourne Ltd*, [690] the High Court identified the necessary elements to establish unconscionable dealings as follows: [691].

[690] (2013) 250 CLR 392.

[691] *Kakavas v Crown*, 424–5 [117]–[118].

117 The absence of a reasonable equality of bargaining power by reason of the special disability of one party to a transaction, while not decisive, is important given that the concern which engages the principle is to prevent victimisation of the weaker party by the stronger. That this is so can be seen from the following passage from the reasons of Deane J in *Amadio*: [692].

The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty (see *O'Rourke v Bolingbroke* [693]). The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: 'the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract' (see per Lord Hatherley, *O'Rourke v Bolingbroke* [694]; *Fry v Lane* [695]; *Blomley v Ryan* [696]).

The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are,

however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (see *Union Bank of Australia Ltd v Whitelaw* [697]; *Watkins v Combes* [698]; *Morrison v Coast Finance Ltd* [699]). Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. In *Blomley v Ryan* [700], Fullagar J listed some examples of such disability: ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary’. As Fullagar J remarked, the common characteristic of such adverse circumstances ‘seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other’.

118 Essential to the principle stated by both Mason J and Deane J in *Amadio* is that there should be an unconscientious taking advantage by one party of some disabling condition or circumstance that seriously affects the ability of the other party to make a rational judgment as to his or her own best interests. It may well be that an unconscientious taking of advantage will not always be manifest in a demonstrated inequality of bargaining power or in a demonstrated inadequacy in the consideration moving from the stronger party to the weaker; but the abiding rationale of the principle is to ensure that it is fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction.

[692] (1983) 151 CLR 447, 474–5.

[693] (1877) 2 App Cas 814, 822.

[694] (1877) 2 App Cas 814, 823.

[695] (1888) 40 Ch D 312, 322.

[696] (1956) 99 CLR 362, 428–9.

[697] [1906] VLR 711, 720.

[698] (1922) 30 CLR 180, 193–4.

[699] (1965) 55 DLR (2d) 710, 713.

[700] (1956) 99 CLR 362, 405.

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805. Mauro referred to the following statement of Deane J in *Louth v Diprose*, which describes the elements of the jurisdiction to set aside unconscionable transactions: [701].

It has long been established that the jurisdiction of courts of equity to relieve against unconscionable dealing extends generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or 'unconscionable' that that other party procure, accept or retain the benefit of, the disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.

[701] (1992) 175 CLR 621, 637.

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806. Mauro referred to three cases on the issue of special disadvantage. *In Bridgewater v Leahy*, [702] an elderly uncle who was extremely fond of his nephew, sold the property that both the uncle and the nephew farmed, to the nephew at a significantly under value. The uncle had four daughters and a wife who were the beneficiaries of his estate. The wife and daughters sought a declaration that the transfer of the farming land was induced by undue influence and/or unconscionable conduct,

[702] (1998) 194 CLR 457 (Gaudron, Gummow and Kirby JJ) (Gleeson CJ and Callinan J dissenting).

807. The High Court plurality held that the sale of the farming land by the uncle to his nephew at a significant undervalue was unconscionable, as the uncle was in a position of disadvantage which rendered him subject to exploitation by another, such that the benefit of an improvident disposition by the disadvantaged party may not in good conscience be retained.
808. A key factor in the case, was that the plurality found that the transaction was ‘grossly improvident.’ It was found that the uncle and the nephew met on unequal terms, and that the nephew took advantage of his position to obtain a benefit.
809. Mauro also relied on *Baburin v Baburin (No 2)*, [703] where the Full Court of the Supreme Court of Queensland dismissed an appeal from the decision of the trial judge. Mr and Mrs Baburin and their children owned a garage business that held a franchise for GMH motor vehicles. The business was transferred to a company that issued both voting and non-voting shares. After Mr Baburin died, all the voting shares were owned by his widow Mrs Baburin. Relevantly, the non-voting shares were owned by Mrs Baburin and two of her sons, Alex and Victor, who ran the business. Alex and Victor were concerned that, if Mrs Baburin died, her voting shares might be left to her son Leonard who, in 1968, when the disputed transaction took place, was about 21.

[703] [1991] 2 Qd R 240 (Demack, McPherson and Williams JJ).

810. The family accountant approached Mrs Baburin asking her to transfer her shares to Alex and Victor, because of their concerns about the voting shares. She agreed to sell the shares to Alex and Victor. There was no issue as to them being transferred at an under value.
811. The trial judge found that there was no undue influence exerted upon Mrs Baburin. On the other hand, he found that she was at a disadvantageous position as compared with Alex and Victor. He held that she had no real understanding of matters relating to business; she was accustomed to depending greatly on the advice of Victor, whom she trusted; and she was likely to be influenced by the accountant, whom she appeared to have trusted; and it was reasonable to infer that Alex and Victor were aware of these matters. His Honour held that it was fair to say that, even if her will in selling the voting shares was ultimately independent and voluntary, she was nevertheless persuaded to enter into the transaction, whereby she handed over control of the company to her two sons. It was held that there was unconscionable dealing where unconscientious advantage had been taken of an innocent party who, though not deprived of an independent and voluntary will, was unable to make a worthwhile judgment as to what was in her best interests.
812. Thirdly, Mauro referred to *Lopwell Pty Ltd v Clarke*. [704]. There, a well-educated couple, who had received legal advice not to enter into a most disadvantageous transaction recommended by their accountant, were able, nevertheless, to have the transaction set aside, on the grounds that the beneficiary had sufficient knowledge or suspicion of the couple’s special disability. The special disability was the couple’s trust in their accountant when, unbeknownst to them, he was advising them to enter into the transaction, for his own benefit. The transaction was extremely improvident, and involved them providing their farming properties as security for loans made to others.

[704] [2009] NSWCA 165 .

Mauro's evidence

813. Mauro is a cheesemaker at Floridia Cheese. He has a significant involvement in the day-to-day cheesemaking process, packaging, maintenance, managing staff, and the procurement of cheeses that need to be sourced, or purchased, for processing.[705] Mauro has been in this position for approximately 10–15 years.

[705] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T871 XN.

814. Mauro commenced working in approximately 1988 after he completed year 12 at school. Mauro did not achieve HSC. At HSC level, he did assignments rather than exams. After school, Mauro completed a sales management certificate, part-time, for two years.
815. Initially, after leaving school, he drove a delivery van for Floridia Cheese. After two years driving the van, he left to work at his grandparents' poultry farm, where he worked for about six years.[706] He later returned to Floridia Cheese, and subsequently became a director.[707]

[706] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T872 XN.

[707] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T873 XN.

816. At all times while working at Floridia, Mauro has reported to his father. In 2013, Mr Montalto ceased to be a director. Mauro and his brother Daneilli remained the two directors. Mauro kept Mr Montalto updated on day-to-day operations. If any significant money needed to be spent, Mauro would consult his father. Mauro said that as a director he did not want to be too disrespectful to his father in enforcing his title (presumably director). Mauro said that he reported to Mr Montalto because it was basically Mr Montalto's business.

817. Mauro said that he understood Mr Montalto ceased to be a director, because he had assets at risk if he remained a director, and that could jeopardise the business. Mr Montalto has 60 per cent of the shares in Florida Cheese, and Mauro and his siblings own the other 40 per cent, owning ten per cent each.[\[708\]](#).

[\[708\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T874 XN.

818. Mauro says, that in 2013, there were regularly differences of opinion between him and his father. Mauro says that his father would express his view, and then say something like, 'I haven't worked all these years so you can just go and do what you like.'[\[709\]](#) His father would usually get his way. Mauro said that if they wanted to upgrade some equipment, his father would want to know the costs and why they were doing it, what the outcome was going to achieve, et cetera. Mauro said his father got the final say.[\[710\]](#) When Mauro was asked why that was, he said it was a combination of not wanting to disrespect his father, who had worked very hard. He said that he would like a little bit of freedom, which he does not always get, and that he did not need conflict.

[\[709\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T875 XN.

[\[710\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T875 XN.

819. In 2013, Mauro was not responsible for dealing with the accounting and financial affairs of Florida Cheese, and was not required to review and approve lengthy legal contracts. Mauro said that he did not consider himself the CEO of Florida Cheese, nor did he refer to himself as such.[\[711\]](#).

[\[711\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T876 XN.

820. Mauro says his salary is determined by his father, as it is his business. Mauro's current salary is \$90,000 which he began to receive two years ago. Prior to that, his salary was \$55,000. Mr Montalto increased Mauro's salary. Mauro was asked how it came about that his salary was

raised. He said that he was annoyed at how the business was being run, and that he would have liked a little more freedom to try out better technology and upgrade equipment. Mauro said that he felt he was hitting his head against a brick wall, constantly arguing with his father, and that it was too complicated, too hard, and so he left the business for approximately four months. After which time, his brother asked him to come back to the business and try to resolve some issues, and said that his father would pay him \$90,000.^[712]

^[712] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T876–877 XN.

821. Mauro said that, in 2013, he and his siblings would occasionally receive dividends determined by his father. In addition to his salary and dividends, Mr Montalto paid for the school fees and child care of Mauro's children. Mauro had no other source of income.
822. Mauro did not recall when he became a director of Premier Bay. Mauro assumed that he ceased to be a director when he had arguments with his father and left the Floridia Cheese business. Mauro said that he did not do anything for Premier Bay. He did not participate in making decisions as to what Premier Bay did; it was his father who made those decisions. Mauro felt that he was only in the position of a director as a safety measure for his father, and that if something was to happen to Mr Montalto, that Mauro could act on his behalf.
823. He was asked to sign documents such as end-of-year financials.^[713] Mauro did not read the documents before he signed them, as he said that they were not his business; he was only doing what his father asked him to do.^[714]
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^[713] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T878 XN.

^[714] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T879 XN.

824. He became aware of the Donnybrook proposed development in 2011 or 2012. His father called Mauro and his siblings to the office, and told them of DFG, and that DFG wanted to speak to Mr Montalto about the property at Donnybrook. At that time, he did not know that the Donnybrook land was owned by Premier Bay. He had originally thought that Premier Bay only had two small factories. He thought that the farm was owned by his father and that it was used for farming.
825. Mauro first met with representatives of DFG at Floridia Cheese when they gave a presentation on the proposed development. Bert Dennis, Mr Levinge, and Mr Dooling represented DFG. Mauro met again with Mr Levinge and Mr Dooling at Floridia Cheese with his father and siblings, and

his brother-in-law. Subsequently, Mauro was asked to go to DFG's head office as Mr Montalto wanted Mauro to be involved in the development. At that time, there were no contracts.

826. Mauro said that, at the meeting, there was general discussion about putting the parcel of land together and trying to get all the title owners together. Mauro had never developed land before and, at the end of the meeting, he felt that it was outside his area and he would not know the first thing about it. The cheese business was quite demanding, and that is where he wanted to stay, to focus on the factory.^[715] Mauro told his father that he should find someone else (to be involved in the development), as it was not his game.^[716]

^[715] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T881–882 XN.

^[716] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T881 XN.

827. Mauro was not given a copy of the development agreement at any of these meetings. Mauro does not recall any discussion about him having to provide a personal guarantee at any of these meetings. Mauro was not involved in negotiating any of the terms of the development agreement, and he was not present when the terms were negotiated.
828. Mauro said that he was not present at a meeting in July 2012 at Floridia Cheese, which was attended by a lawyer for DFG (Mr Hart), Mr Dooling, Mr Levinge, his father, Mr Brown, and Mr Di Felice, at which specific clauses of the development agreement were discussed.
829. Mauro was asked whether he was present at a meeting with representatives of DFG at which various agreements were signed. He said 'Yes. Well, not really. Well, I was for the signing.'^[717] Mauro could not recall what month the meeting occurred. He was informed that it was April 2013.

^[717] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T882 XN.

830. Mauro said he was called in, after the meeting at Floridia Cheese had already commenced. When he walked into the meeting, he observed the contractual folders were opened and that everybody was already seated and talking generally. Mauro recalled those present as Mr Brown, the solicitor that worked with Mr Brown from Crowe Horwath (or Day Nielson), Mr Montalto, Mr Levinge, Mr Dooling, and the solicitor for DFG.
831. Mauro recalled that he entered the meeting and said hello. He sat next to the lawyer representing DFG, who said: 'Okay, are you ready to do this?' Mauro replied: 'Yes, okay.' Mauro

said that: ‘there was three to four sections from what I can remember. Basically he [the lawyer representing DFG] discussed each section. So he spent — he just gave me and outline of what it was. He asked me if I was happy.’^[718]

^[718] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T883 XN.

832. Mauro was asked if he recalled any discussion about the guarantee. Mauro said:^[719]

MAURO: When it come to the guarantee I sort of stopped and said — I looked at Mr Levinge and I’ve asked, ‘Why do I need to give a guarantee?’ Basically his response was, ‘Well, because you’re the director of Premier Bay, we need you to sign this in the event that if something should happen to your father you will obligate the agreement Premier Bay is going into with us.’ I then turned around and said, ‘Okay, so it’s not like you’ll take my house?’ He said, ‘No, no, we don’t need your house.’

MR SLATTERY: And who was that who said that to you?

MAURO: Mr Levinge.

MR SLATTERY: What did you do after he said that?

MAURO: I signed the agreement — the — I signed the — sorry, the guarantee.

^[719] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T884 XN.

833. At the time of signing those documents, Mauro said that his understanding of the guarantee was that he would be fulfilling the obligations of Premier Bay as the director, if required.^[720] Mauro understood those obligations to be signing off on any sales of property, ‘et cetera, et cetera,’ if his father was not available to fulfil his obligations.^[721]

^[720] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T884 XN.

^[721] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T884 XN.

834. Mauro said that he did not read the documents, which were signed at that meeting, prior to signing them.^[722] Mauro said that he had not read any development agreement with DFG prior to signing the development agreement. He said that he did not read it because he assumed that his father was on top of it, and had already reviewed them, and that the lawyer who was acting on his father's behalf had 'done the documents correctly.'

^[722] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T884–885 XN.

835. Mauro did not get any legal advice personally before signing any documents. Mauro said that he was relying on his father to have done that.^[723]

^[723] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T885 XN.

836. Mauro was aware that he was going to have to give a guarantee prior to the meeting, but not on a personal level. Mauro said:^[724]

... — the way I understood it is that it's only a guarantee because I was a director of Premier Bay and in the event that something should happen I have to fulfil my father's obligations. So that was the impression I got. He in no way said to me, 'It's a personal guarantee.' I did not — if I had have known it was a personal guarantee I would have stopped and questioned it further.

^[724] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T885 XN.

837. Mauro was asked whether, if he had known prior to signing documents at that meeting (the meeting of 10 April 2013), that DFG could sue him personally for any loss they suffered as a result of breach of the development agreement by Premier Bay and, for example, seek to recover loss against his home, what would he have done. Mauro replied: 'I certainly wouldn't have signed it.'^[725]

838. Although I discuss in detail, later, whether Mauro was subject to a special disadvantage, this evidence shifts the emphasis of his case to being misled or being under a misunderstanding, rather than being subject to unconscionable conduct.
839. He was at the meeting for, at most, 20 minutes. After signing the documents, he stayed three or four minutes, and then went back to the factory, as he was no longer required. The meeting continued when he left.
840. Mauro does not recall exactly which documents he signed at the meeting or what they were called. Mauro remembers signing four times.[726]
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841. Mauro was asked whether he recalled signing any documents relating to the development prior to that meeting. Mauro said:[727]

There was a document — two or three weeks previous to that my father called me into the office and said, ‘I need you to sign this,’ and I said, ‘Okay, what is it?’ He said, ‘In order for Dennis Family Homes to finalise the contracts and to come down with the contracts they need you to sign this, which is saying’ — ‘basically saying that we agree that we obligate’ — ‘we are guaranteeing or we are saying, “Yes, we will go into a contractual agreement with youse”.’

842. After he was told that, Mauro signed the document. Mauro did not read it or receive any legal advice before he signed it. Mauro says that he signed it because his father asked him to,

843. As discussed above, Mauro was asked what, at the time of signing, his understanding was as to which lots were included in the development. Mauro answered: 'lot 2 and 3'.^[728] This answer is inconsistent with his pleading, where he alleged that he did not know which lots were part of the development agreement.

^[728] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T886 XN.

844. Mauro said that he had no assets other his home, which he said was basically owned by the bank, and a 2007 Land Rover Discovery. Mauro is a director of Monti Investments Pty Ltd, a trustee of property purchased by his father on behalf of Mauro and his siblings. He is also a director of Tomassimo Investments, a trust that he has created for his children, which will receive the income from property purchased by Monti Investments. Mauro was also a director of Vannella Cheese,^[729] which was to be a joint cheesemaking venture under a new brand that ultimately did not work out.^[730] He was to provide the building and infrastructure, and the other director would supply equipment and their know-how.^[731]

^[729] 'Benella Cheese' is recorded, in error; see Exhibit P13, and Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T890–891 XN.

^[730] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T891 XN.

^[731] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T891 XN.

845. Mauro was cross-examined by Mr Peters for DFG. Mauro was asked about his managerial responsibilities at Floridia Cheese in dealing with staff and suppliers. Mauro agreed that he has arguments with his father and occasionally succeeds in those discussions. He agreed that he does not always accept what his father says. Mauro agreed that the business of Floridia Cheese has grown while he has been a director. He agreed sales have gone from \$15 million per annum in 2010 to \$30 million today. Mauro agreed that Floridia Cheese has an overdraft with NAB of half a million dollars, which has taken security over 'our houses.'

846. Mauro agreed he was appointed a director of Premier Bay on 28 August 1997, and that he has signed minutes and financial statements. Mauro Montalto was cross-examined about The Montalto Family Trust, a trust that Premier Bay is the trustee of, established 24 July 1991.^[732] Mr Montalto's children are included as general beneficiaries of the trust.

[732] Exhibit P26.

847. Mauro recalled DFG making a presentation to the family at Floridia Cheese about how much the land would sell for. It was put to Mauro that DFG gave him profit figures in the hundreds of millions. Mauro replied: 'Well, my figure was actually 350 million, to be exact.' [733] Mauro said that he got that figure from something that Mr Levinge had written on the whiteboard. [734] Mauro was aware that, as part of the consortium agreement, some of the money was eventually to be shared with the Coralluzzos and the Douglasses.

[733] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T904 XXN.

[734] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T908 XXN.

848. Mauro was taken to a document prepared by DFG as part of a presentation to the Montalto family on 19 October 2012, which gave a range of figures, one of which was \$342,654,000. Mauro recalled seeing that figure as being close to \$350 million.

849. Mauro said that the Montalto Donnybrook Trust, where 60 per cent of the money from the development was to be distributed, was never finalised (40 per cent was to go to a second trust). It was suggested to Mauro that the trust was finalised, and that the trust deed showed that he was a primary beneficiary, together with his three siblings. [735] He accepted this and said he assumed that he would receive money from the development. It was put to him as the reason why he had signed the development agreement. Mauro said: 'You could say yes.' [736] Mauro agreed that he had known that in 2013. [737]

[735] Exhibit P5.

[736] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T905–906 XXN.

[737] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T906 XXN.

850. Mauro was taken to the subscription deed between Premier Bay, the Coralluzzos, and Woodstock Consortium Pty Ltd, dated 10 April 2013, and agreed that he had signed as director secretary.^[738] Mauro could not recall if this was one of the documents that he had signed on 10 April 2013.

^[738] CB 542.

851. Mauro claimed to have a good memory of what had happened on 10 April 2013, although he said that he could not recall what he had signed on that day. He said that he had signed:^[739]

^[739] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T910–911 XXN.

MAURO: Consortium documents, the property documents, the Dennis contractual part and I think the guarantor. There was four parts, I believe.

MR PETERS: What was the Dennis contractual part?

MAURO: Their obligations.

MR PETERS: To develop the land?

MAURO: Yes.

MR PETERS: And then the guarantee part, was that a separate — what was that document?

MAURO: That was the final part of the document, of the agreement.

MR PETERS: Was it a separate guarantee?

MAURO: I believe it was.

MR PETERS: So you had to sign that as well?

MAURO: Yes.

MR PETERS: In a separate document?

MAURO: Yes.

MR PETERS: So there were at least three documents? There's the consortium documents?

MAURO: Yes.

MR PETERS: There's the Dennis development document?

MAURO: Yes.

MR PETERS: And then there's another document for your guarantee?

MAURO: Yes.

MR PETERS: Are you sure about that?

MAURO: I'm quite sure.

MR PETERS: Positive?

MAURO: Well, I wouldn't say 100 per cent.

852. Mauro was taken to an email from Mr Hart to Di Felice, dated 2 April 2013 (with copies to Mr Levinge and Mr Dooling, and with attachments that included the development agreement), which stated that the attachments had been received in 'today's mail.'^[740] Mauro agreed that his signature was on the signing clause. Mauro did not recall how he came to sign the document. He said that it could be the document that he had signed two to three weeks before (presumably meaning before the 10 April 2013 meeting). He agreed that he had signed it before 2 April 2013,

^[740] Exhibit P23; CB 482.

853. Mauro said that he signed the guarantee document on the day that they brought the final paperwork. He believed that it was different to the development agreement attached to the email of 2 April 2013. Mauro was taken to page 31 of the development agreement, which contained his signature as guarantor. Mauro was asked if that was the separate guarantee document. He replied he did not know.^[741]

^[741] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T912 XXN.

854. It was put to Mauro that he had no idea when he signed the guarantee document. Mauro said it was about 'two or three weeks before.'^[742] It is not clear whether he meant two or three weeks before 2 April 2013, being the date of the email, or 10 April 2013, the date of the meeting at Florida Cheese.

^[742] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T912 XXN.

855. At the time he signed the guarantee, Mauro said that he was with his father and possibly Mr Brown. Mauro was not able to identify the person who had witnessed his signature as guarantor. He said it was signed in the board room at Florida Cheese.

856. Mauro was taken to his original defence, where he pleaded that DFG did not explain the guarantee and indemnity contained in clause 30 of the development agreement, prior to Mauro signing the development agreement at the meeting. Mauro was asked 'did or didn't [DFG] explain [the guarantee].' Mauro said:^[743]

They didn't explain it as a personal guarantee. They just said, 'This is the guarantee. Because you are a director of Premier Bay we need a second signature so that Premier Bay will stand by their agreement.'

^[743] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T914 XXN.

857. Mauro was challenged on the fact that, in his first defence, he did not allege any discussion about the guarantee at the meeting on 10 April 2013, but in his amended defence, he alleges there was a discussion about it being just a precaution. It was put to him that his defence changed from alleging that the guarantee was not discussed, to the guarantee was discussed, but not properly explained. Mauro could not remember when he had first raised the change in defence with his lawyers.^[744]

^[744] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T918–919 XXN.

858. Mr Peters asked Mauro about the occasion when he signed the document attached to Mr Hart's email of 2 April 2013, in Mr Brown's and his father's presence. Mauro agreed that he could have asked to get an explanation of the document from a lawyer. It was put to him that he knew plenty of lawyers at the time, and that he knew Mr Farinotti of Holding Redlich. Mauro said: 'No, that was the first time I met him.' Mauro agreed that Mr Farinotti was present when he signed the development agreement with Mr Brown and his father. He was asked if he had talked to Mr Farinotti at all about the guarantee. Mauro replied: 'Not really, no.'^[745] Mauro said that Mr Farinotti was 'actually quite quiet.'^[746]

^[745] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T919 XXN.

^[746] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T919 XXN.

859. Mauro agreed that he could read documents. He agreed that he knew what a guarantee was. It was put to him that he did not have a conversation with Mr Levinge on 10 April 2013, and that he may be mistaken. Mauro said that he '[didn't] believe so.'^[747]

^[747] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T920 XXN.

860. Mauro said he understood that he had signed it on behalf of Premier Bay, but understood now that it binds him personally. Mauro agreed that he could have asked Mr Farinotti about it. Mauro agreed that he could have refused to sign the document if he had a real objection to it.^[748]

^[748] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T920 XXN.

861. As for the land to be included in the development, Mauro was asked:^[749]

MR PETERS: You didn't know how much of the farm was going to be developed, did you?

MAURO: I was under the impression two lots.

...

MR PETERS: And in paragraph 24 of that outline you say, 'Mauro did not know if the development included all the land owned by Premier Bay at Donnybrook'?

MAURO: I cannot confirm that lot 1 was in or out.

MR PETERS: You didn't know?

MAURO: I didn't know.,,

[749] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T923-924 XXN.

Evidence of other witnesses relevant to Mauro's case

862. Mr Hart recalled attending a meeting at Floridia Cheese on 19 July 2012 with Mr Levinge, Mr Dooling, Mr Di Felice, Mr Brown, Mr Montalto, and 'on and off Mr Mauro Montalto.' Mr Hart said that Mauro came in and out of the meeting.[750]

[750] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T832-833 XN.

863. At the signing meeting of 10 April 2013, Mr Hart agreed that he did not recall what was said by each person, and that he was not able to hear what each person said.[751]

[751] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T844 XXN.

864. Mr Hart said that no one had previously executed the CUT documents and that Mr Hart had given them to Mr Di Felice, who organised for them to be signed. Mr Hart agreed that he could not see which specific document Mr Montalto or Mauro were executing. Mr Hart said that it was not possible that they were executing a copy of the development agreement.[752] Mr Hart agreed that there were numerous contracts and that he did not keep a log of documents.[753]
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[752] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T845–846 XXN.

[753] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T848 XXN.

865. Mr Hart agreed that the development agreement is a relatively complex legal document,[754] and that the transaction documents were ‘sophisticated.’[755]

[754] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T976–T977 XXN.

[755] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T977 XXN.

866. Mr Hart said that he did not know that Sladen was not acting for Mauro in his personal capacity.[756] Mr Hart agreed that all he had been told was that Sladen was acting for Premier Bay. Sladen did not actually confirm that they were acting for the directors of Premier Bay.[757]

[756] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T850–851 XXN.

[757] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T851–852 XXN.

867. Mr Slattery asked Mr Hart about the 19 July 2012 meeting. Mr Hart agreed that this was a meeting at which there was detailed debate about the terms of the development agreement, but also agreed that he was not suggesting that Mauro contributed to this debate.[758] Mr Hart did not agree that Mauro may not have been present at the meeting.[759] Mr Hart agreed that his file note of the meeting did not mention Mauro Montalto.[760] Mr Hart was shown a Sladen file note[761] for the 19 July 2012 meeting which also did not refer to Mauro being present. Mr Hart said that this did not cause him to doubt his unaided recollection that Mauro was present.[762] Mr Hart was shown a Sladen invoice[763] for the meeting, which did not mention Mauro as having attended. It was suggested that Mr Hart’s recollection was incorrect, and that Mauro had attended ‘for part of that meeting’; Mr Hart said: ‘No.’[764]

[\[758\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T853 XXN.

[\[759\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T854 XXN.

[\[760\]](#) Exhibit P21; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T854–855 XXN.

[\[761\]](#) CB 44I.

[\[762\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T856 XXN.

[\[763\]](#) Exhibit 3D-3.

[\[764\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T857 XXN.

868. Mr Hart was taken to the minutes of a meeting of DFG.[\[765\]](#) The minutes did not mention that Mauro was present, Mr Hart denied that Mauro was not present at the meeting.[\[766\]](#) Mr Slattery suggested that it was not possible for Mr Hart's recollection to be correct, in the circumstances, given that the three documents put to him do not record Mauro as being present. Mr Hart disagreed.[\[767\]](#)

[\[765\]](#) Exhibit 3D-4. The minutes refer to a meeting on 20 July 2012; Mr Hart agreed that they referred to the meeting held 19 July 2012; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T858 XXN.

[\[766\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T858 XXN.

[\[767\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T859 XXN.

869. Mr Hart said that he was not sure who had sent the development agreements to his office on 2 April 2013 and agreed that, based on the email correspondence, [\[768\]](#) it did not appear to have been Sladen. [\[769\]](#)

[\[768\]](#) Exhibit 4D-2.

[\[769\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T867 XXN.

870. Mr Hart agreed that Mauro came to the signing meeting, on 10 April 2013, just to sign the documents relevant to him. [\[770\]](#) Mr Hart could not recall how many documents there were for Mauro to sign. Mr Hart said that he did not recall briefly telling Mauro what the documents were, and that he had to sign them. He denied that he had done so. [\[771\]](#) Mr Hart said that Mr Di Felice had shown Mauro where to sign. [\[772\]](#)

[\[770\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T862 XXN.

[\[771\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T862–863 XXN.

[\[772\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T862–863 XXN.

871. Mr Hart did not agree that new copies of the development agreement were signed by Mr Montalto and Mauro at this meeting. [\[773\]](#) Mr Hart said that, to his knowledge, the only copies of the Premier Bay development agreement at the 10 April 2013 meeting were the ones that he had brought along (already executed). [\[774\]](#)

[\[773\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863 XXN; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T868 (RXN).

[\[774\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T868–869 RXN.

872. Mr Hart did not recall telling Mauro that he had to give a personal guarantee.^[775] Mr Hart did not recall hearing Mr Levinge say to Mauro, words to the effect, that the guarantee was just a precaution to make sure that, if anything happened to Mr Montalto, Mauro would sign the necessary documents and/or that 'it's not as though we are going to take your house or anything.'^[776]

^[775] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863 XXN.

^[776] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T863–864 XXN.

873. Mr Hart said that he considered it appropriate for Mauro to provide a guarantee because: 'Upon receiving instructions I conducted a company search of Premier Bay and there were two directors, and in accordance with what I would consider to be good commercial drafting practice I included a guarantee of the owners' obligations by the directors of the company, and those were the two directors.'^[777]

^[777] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T869 RXN.

874. Mr Di Felice gave evidence of the meeting of 10 April 2013. Mr Di Felice said that Mr Hart brought the consortium documents that Mr Di Felice had delivered to his office some time previously. He said that the development agreement was at the meeting, but that he did not know who had brought it. Mr Di Felice did not recall what execution of the development agreement occurred or by whom.^[778]

^[778] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T953–954 XN.

875. Mr Slattery did not cross-examine Mr Di Felice, who was present at the meeting of 10 April 2013, even though it is alleged that Mr Levinge made observations to Mauro concerning the guarantee at this meeting.

876. Mr Peters asked Mr Jeremiah whether, in his experience, it was common practice to require the directors of such a corporation to give a personal guarantee. Mr Jeremiah answered: 'It's

fundamental. In fact if it wasn't, I would have thought there would be some concern about that from the other party.'

[779]

[779] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1035 XXN.

877. Mr Levinge gave evidence of the family presentation at which he recalled Mr Montalto, Mauro, Lisa Montalto, and Mr Brown were present. Mr Levinge believed that he had given, to the family, a document showing the proposed cash flow of the development.
- [780]
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[780] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T109 XN.

878. Mr Levinge gave evidence of the 10 April 2013 meeting. He said that Mr Montalto and Mauro signed the development agreement prior to the meeting on 10 April 2013. At the meeting on 10 April 2013, Mr Levinge said that the documents signed by Premier Bay and the Coralluzzos were the suite of documents that represent the CUT arrangement or consortium unit trust arrangement amongst the landowners.

879. Mr Levinge was asked if the following occurred at the 10 April 2013 meeting:
- [781]

MR PETERS: ... Did Mauro Montalto ask you why he had to give a guarantee and indemnity at that meeting?

MR LEVINGE: No.

MR PETERS: Did you say to Mauro that the guarantee was just a precaution in case something happened to [Mr Montalto], in which case the plaintiffs needed to be sure that Mauro would do the things required under the development agreement?

MR LEVINGE: No.

MR PETERS: And did you say to Mauro words to the effect that, 'It's not as though we're going to take your house or anything'?

MR LEVINGE: No.

[781] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T110 XN.

880. Mr Anderson took Mr Levinge to two copies of the development agreement,^[782] and suggested that the difference in the address shown on each copy meant that, in fact, Mr Montalto and Mauro signed the development agreement twice. Mr Levinge agreed that: 'It would appear so.'^[783] Mr Levinge agreed that Mr Montalto and Mauro appeared to have signed a copy of the development agreement at the signing meeting of 10 April 2013.^[784]

^[782] Exhibit D8 and CB 515.

^[783] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T184 XXN.

^[784] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T184–185 XXN.

881. Mr Slattery cross-examined Mr Levinge. Mr Levinge said that, prior to signing the development agreement, he had a few meetings that Mauro was involved in.^[785] He agreed that the vast majority of his interactions concerning the Premier Bay land, prior to signing the development, were with Mr Montalto and his advisers, Mr Brown and Sladen.

^[785] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T190 XXN.

882. Mr Levinge agreed that, apart from bumping into Mauro on occasion when visiting Mr Montalto, the only two occasions Mr Levinge and Mauro met prior to signing the development agreement, were two presentations to the family. He agreed that, at those presentations, which were 'relatively high-level,' he did not discuss the precise legal terms of the development agreement. Mr Levinge agreed that he did not negotiate the terms of the development agreement at either of those two meetings.^[786]

^[786] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T190 XXN.

883. Mr Levinge agreed that there was no talk of any owners' guarantee that Mr Montalto or Mauro would be required to sign at those two meetings.^[787] Mr Levinge agreed that, to the extent that he negotiated the development agreement, it was with Mr Montalto, Mr Brown, and Sladen.

^[787] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T191 XXN.

884. Mr Levinge agreed that, based on his interactions with the family members, Mr Montalto was the dominant family member when it came to matters of business, and that he was the only member of the family that he negotiated with.^[788]

^[788] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T191 XXN.

885. Mr Levinge agreed that he knew from his interactions with Mr Montalto, prior to signing the development agreement, that Mr Montalto was the 'primary member of the Montalto family' who had accumulated the assets, such as Floridia Cheese and the farm at Donnybrook. He agreed that he knew Mr Montalto was the person who would decide how those assets would be dealt with. He agreed that he clearly understood that Mr Montalto was the primary person making decisions in relation to whether the development was going to go ahead.^[789] Mr Levinge knew that if Mr Montalto agreed to it, the development was going to go ahead.^[790]

^[789] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T191 XXN.

^[790] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T192 XXN.

886. Mr Levinge agreed that, generally, he knew that Mauro would ask his father questions and defer to him in relation to matters regarding how the Floridia Cheese business was operating. Mr Levinge knew that Mauro worked in production or operations. Mr Levinge was asked whether he knew that Mauro was not an experienced businessman. He responded: 'Yes, not overly, yes.'^[791]

887. Mr Levinge was asked about the meeting of 10 April 2013. He said that it lasted about half an hour to 45 minutes. Mr Levinge agreed that his recollection of the meeting was not perfect. Mr Levinge said that he assumed Mauro was present during the whole of the signing meeting, but agreed that his recollection was not precise.[792] Mr Levinge did not dispute that Mauro came into the meeting for the purpose of signing certain documents, and then left the meeting. Nor did he dispute that, when Mauro came into the meeting, he was given a bundle of documents to sign,

[792] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T193 XXN.

888. Mr Levinge was asked whether his memory of the meeting had faded. He said: ‘Well, yes, to certain things.’[793] It was put to Mr Levinge, that Mr Hart gave Mauro a brief one or two sentence explanation of each document, and then showed him where to sign. He was asked if he recalled that; he said that he did not, adding: ‘I would find it strange that our lawyer would be advising someone on the other side.’[794]

[793] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T193 XXN.

[794] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T193 XXN.

889. The cross-examination critically continued as follows:[795]

[795] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T193–195 XXN.

MR SLATTERY: I want to suggest that he wasn’t so much advising as telling him what the documents were and where to sign?

MR LEVINGE: I can't recall that.

MR SLATTERY: You'd accept that it may have happened, it may not have happened; you just can't recall as you sit here now?

MR LEVINGE: I just can't recall exactly that.

MR SLATTERY: The development agreement contained a personal guarantee and indemnity for Mauro Montalto to sign, did it not?

MR LEVINGE: Yes.

MR SLATTERY: And the guarantee and indemnity was intended to strengthen Dennis Family Homes' position by creating financial consequences for Mauro if Premier Bay breached the development agreement?

MR LEVINGE: Yes.

MR SLATTERY: And you understood that to be the case at the time?

MR LEVINGE: Yes.

MR SLATTERY: And you understood, for example, that one of the consequences of the guarantee and indemnity was that if Premier Bay breached the development agreement, Dennis Family Homes could, for example, seek to recover any losses against Mauro's personal assets such as his house?

MR LEVINGE: Yes.

MR SLATTERY: I want to suggest to you that during that meeting Mr Hart, the lawyer for DHP, made reference when running through these documents for Mauro to sign to the personal guarantee. Do you have any recollection of that?

MR LEVINGE: No.

MR SLATTERY: And I want to suggest to you that, when he did, Mauro said or asked why the personal guarantee was needed; do you recall that?

MR LEVINGE: No, I don't.

MR SLATTERY: You accept that it is something that might have been said and you just now can't recall it as we sit here today?

MR LEVINGE: Yes, it could have been, but I don't remember it.

MR SLATTERY: I want to suggest to you that in response you said words to the effect that the guarantee was just a precaution to make sure that, if anything happened to Tom, that Mauro would sign the necessary documents?

MR LEVINGE: I have no recollection of saying that.

MR SLATTERY: But you accept it's something that you might have said?

MR LEVINGE: Extremely unlikely.

MR SLATTERY: But it is possible, you would agree?

MR LEVINGE: Everything is possible.

MR SLATTERY: And I put it to you that you said further to Mauro at that meeting, 'It's not as though we're going to take your house or anything'?

MR LEVINGE: No.

890. Mr Levinge agreed that he had never discussed the personal guarantee or indemnity with Mauro before the 10 April 2013 meeting. Mr Levinge agreed that he had no idea as to whether, or not, Mauro had received any independent legal advice in relation to that document.^[796] Mr Levinge assumed that he was being advised by Sladen. However, he agreed that he had not been told that.^[797]

^[796] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T195 XXN.

^[797] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T195 XXN.

891. Mr Levinge agreed that DFG were reimbursing Sladen's legal fees. Mr Levinge said that the invoices were not usually sent through him. Mr Levinge was shown an invoice from Sladen, addressed to Mr Montalto and Premier Bay. It was put to Mr Levinge that the invoice indicated to him, at the time, that Sladen were acting for Mr Montalto and Premier Bay. Mr Levinge said that it indicated to him that they were acting for Premier Bay. He agreed that there was nothing in the invoice which suggested that they were acting for Mauro.^[798]

^[798] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T196 XXN.

892. It was put to Mr Levinge that it was obvious, based on his interactions with the Montalto family and Mr Montalto in particular, that if Mr Montalto wanted Mauro to sign the development agreement, Mauro was going to sign the development agreement. Mr Levinge said that he could not really speak for what Mauro might or might not have done.^[799] Mr Slattery asked: 'But that would have been your expectation?' In reply, Mr Levinge said: 'Generally, yes, unless he had a real objection to it. But I wouldn't know that. I'm outside.'^[800]

[799] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T196–197 XXN.

[800] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T197 XXN.

893. I turn to the evidence of Mr Dooling.

894. Mr Dooling was asked about the 10 April 2013 signing meeting. He was asked if he recalled whether Mauro was present for part of the meeting, and not all of the time. Mr Dooling said that he was not sure; it was common for Mauro to come in and out of meetings that DFG were having with Mr Montalto, in order to go and run the factory, so he could have come in and out of the 10 April 2013 signing meeting. Mr Dooling said that he was certainly there to sign the documentation.[801]

[801] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T296–297 XXN.

895. Mr Dooling was asked if, prior to the meeting on 10 April 2013, he had any knowledge as to whether Mr Montalto and Mauro had actually signed the development agreement. Mr Dooling answered:[802]

I understood that the development agreement was being held in escrow by our solicitors. I'm not too sure if both [Mr Montalto] and Mauro had signed it. I think it's — if it's signed, I think Mauro would have only signed it as a guarantor and [Mr Montalto] would have signed it as the landowner and a guarantor.

[802] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T300 XXN.

896. On cross-examination by Mr Slattery, Mr Dooling agreed that he knew that Mauro was Mr Montalto's son.[803] Mr Dooling said that he had quite a bit of interaction with Mauro. He said that Mauro would pop in and out of meetings. He said that he agreed that Mauro was not there for full meetings, because Mr Montalto generally sent him out.[804]

[\[803\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T306 XXN.

[\[804\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T306 XXN.

897. Mr Dooling agreed that Mr Montalto was the dominant member of the family when it came to matters of business. Mr Dooling agreed that, to the extent that he was involved in negotiating the development agreement, he negotiated with Mr Montalto and his advisers; namely, Mr Brown and Sladen. He agreed that Mr Montalto ‘very much considered himself to be the person who had accumulated the assets such as the Donnybrook land.’ He agreed that he knew, and understood, that it was Mr Montalto who was going to decide how to deal with the assets, such as the Donnybrook land.[\[805\]](#)

[\[805\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T306–307 XXN.

898. Mr Dooling agreed that he understood that Mr Montalto was the primary person making the decisions in relation to whether the development proceeded in respect of the Premier Bay land.[\[806\]](#)

[\[806\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T307 XXN.

899. Mr Dooling agreed that the Florida Cheese business was run by Mr Montalto, and that Mauro reported to Mr Montalto. Mr Dooling knew that Mauro took his direction from Mr Montalto in relation to significant matters concerning that business.[\[807\]](#)

[\[807\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T307–308 XXN.

900. Mr Dooling was not sure of ‘which career Mauro worked’ in at Florida Cheese, but understood that Mauro was considered to be the CEO.^[808] Mr Montalto had told Mr Dooling recently (after the signing in 2013) that he had handed over the business to the boys.^[809]

^[808] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.

^[809] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.

901. It was put to Mr Dooling that, in 2013, he knew that Mauro was not an experienced business person. Mr Dooling said that he would ‘probably take [make] that call, yes.’^[810]

^[810] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.

902. Mr Dooling knew of the personal guarantee, and that it strengthened DFG’s position by creating a potential financial consequence for Mauro personally, if Premier Bay breached its obligations. He considered that it was of benefit to DFG.^[811]

^[811] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.

903. Mr Dooling agreed that he certainly did not personally discuss the personal guarantee and indemnity with Mauro, and that he had certainly not sent Mauro a copy of the development agreement.^[812]

^[812] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.

904. It was put to Mr Dooling that it was apparent to him, at the signing meeting in April 2013, that Mauro had not received any independent legal advice in relation to the personal guarantee and indemnity. Mr Dooling said that he could not make that call.^[813]

^[813] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308–309 XXN.

905. It was put to Mr Dooling that Mauro did not say anything in the signing meeting to indicate that he had received independent legal advice in relation to the guarantee and indemnity. Mr Dooling said that Mauro never said anything to indicate ‘that he hadn’t.’^[814] Mr Dooling agreed that he never asked Mauro whether he had received any independent legal advice in relation to the personal guarantee and indemnity.^[815] Mr Dooling denied that he knew that Sladen was not acting for Mauro in relation to the personal guarantee and indemnity.

^[814] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308–309 XXN.

^[815] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T309 XXN.

906. Mr Dooling agreed that he understood that Sladen was acting for Premier Bay.^[816]

^[816] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T309 XXN.

907. Mr Dooling agreed that it was obvious to him, based on his observations of the interaction between Mr Montalto and Mauro, that Mauro would sign the development agreement if Mr Montalto wanted him to do it.^[817]

^[817] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T309 XXN.

908. It was put to Mr Dooling that it was apparent to him 'that Mauro had little understanding of the detail of the development agreement when he signed it.'^[818] Mr Dooling responded: 'Probably, yes.'^[819] The cross-examination continued:^[820]

^[818] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T310 XXN.

^[819] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T310 XXN.

^[820] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T310 XXN.

MR SLATTERY: And I want to suggest to you that at the time of the signing meeting that you knew that Mauro didn't properly understand the way in which the personal guarantee and indemnity worked?

MR DOOLING: Can I just clarify something. I understood Mauro was in fact a director of Premier Bay at that time, and I would have thought his legal people acting on behalf of Premier Bay would have explained those things to Mauro.

MR SLATTERY: But by the legal people you are referring to Sladen Lawyers?

MR DOOLING: Sladens Lawyers, who were acting on behalf of Premier Bay.

MR SLATTERY: But you know that Mr Mauro Montalto was signing the personal guarantee and indemnity in his personal capacity, wasn't he?

MR DOOLING: Yes.

MR SLATTERY: And I want to suggest to you that you didn't know that Sladens were acting for him in his personal capacity, did you?

MR DOOLING: No, I didn't.

909. Mr Dooling agreed that he was present at the signing meeting of 10 April 2013, for the ceremony, as much as anything. He agreed that there were other people present who were more engaged in attending to the tasks that needed to be attended to. Mr Dooling was asked:^[821]

^[821] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T311-312 XXN.

MR SLATTERY: I want to suggest to you that at that meeting Mauro asked what the personal guarantee was for; do you recall him saying that?

MR DOOLING: No, I don't recall that.

MR SLATTERY: Do you accept that that might have been a comment that was made in a discussion that you weren't a party to?

MR DOOLING: I would not have a clue.

Mr Slattery: And I want to suggest to you that the answer that came from Mr Levinge was that the guarantee was just a precaution and to make sure that if anything happened to Tom that Mauro would sign the necessary documents; do you have any recollection of that being said in the meeting?

MR DOOLING: No, I don't recollect that being said.

MR SLATTERY: And I want to suggest to you that Mr Levinge said to Mauro, 'It's not as though we're going to take your house or anything.' Do you remember that statement being made?

MR DOOLING: No, I don't remember that statement being made.

MR SLATTERY: And I want to suggest to you that you knew at the time of the signing meeting that Mauro did not properly understand that one consequence of the personal guarantee and indemnity was that if Premier Bay breached its obligations he could be exposed to financial consequences including affecting his house, taking his house?

MR DOOLING: I would certainly know. If I have a finance on a car I would have a personal guarantee and I would know what that was. Mauro had a very expensive car and I'm sure he had a loan over that. There would have been a guarantee on that. Surely any guarantee is going to be — you know, you well understand that it was a financial commitment. I don't know.

MR SLATTERY: But you didn't know whether he had received any advice in relation to it?

MR DOOLING: Certainly, no, I didn't.

Closing submissions of Mauro

910. In his closing submissions, Mauro did not press his claim to have the guarantee and indemnity set aside on the separate and independent ground of undue influence. He does, however, rely upon the influence of his father, and his trust in his father, on matters of business as one of the elements of his special disadvantage for the purpose of the unconscionable conduct claim.
911. Mauro submits that he was suffering from a special disadvantage at the time of signing the development agreement containing the guarantee and indemnity. He says that special disadvantage was compromised of a combination of:

- (a) a lack of relevant business experience;
- (b) financial dependence upon and trust in his father [Mr Montalto] and the dominant influence of his father on matters concerning the family assets;
- (c) a lack of understanding in relation to the terms of the development agreement and the guarantee and indemnity which was contributed to by a misleading statement made by Mr Levinge of DFG as to the effect of the guarantee and indemnity at the signing meeting on 10 April 2013 (the signing meeting); and
- (d) a lack of advice and explanation in relation to the terms of the development agreement and the guarantee and indemnity in circumstances where advice and explanation were required.

912. Further, Mauro submits that the representatives of DFG, who were responsible for the development, had sufficient knowledge of these elements of special disadvantage.
913. Mauro submits that, although, as at 2013, he was an experienced cheese producer, and familiar with managing staff and procuring cheese products for the Floridia Cheese business, he was not an experienced businessman. Mauro says that he had no experience with property development and no business experience beyond cheese production and poultry farming. Mauro contends that he trusted, deferred to, and was dominated by his father, Mr Montalto, in relation to business matters.
914. Mauro argues that Mr Levinge, the person primarily responsible for the negotiation of the development agreement on behalf of DFG, knew that Mauro worked in a production or operations capacity at Floridia Cheese.^[822] He knew that Mauro deferred to Mr Montalto in relation to business matters.^[823] Mr Levinge and Mr Dooling admitted that they knew that Mauro was not an experienced businessman.^[824]

^[822] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T192 XXN.

^[823] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T192 XXN.

^[824] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T192 XXN; Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.

915. Mauro submits that the Court should find that his father, Mr Montalto, was the dominant member of the Montalto family on matters of business; that Mauro was dependent upon, trusted, and deferred to his father on matters of business; and that DFG were aware of those facts.
916. Mauro submits that the Court should find that Mauro was not involved in the negotiation of the development agreement; and that he did not have a proper understanding of the development agreement, and the guarantee and indemnity, at the time that he signed the documents giving effect to the development. In particular, it is submitted that the Court should find that Mauro did not understand that the guarantee and indemnity exposed him to a personal financial liability, in the event that Premier Bay breached its obligations under the development agreement; and that his belief in this regard was contributed to by a misleading statement made by Mr Levinge to him at the signing meeting to that effect.
917. Mauro submits that the development agreement is a complex legal document which required proper explanation from an independent legal adviser prior to Mauro signing it. Mauro contends that the evidence reveals that Mauro did not obtain such advice before signing the development agreement.^[825] Mauro concedes that, while it is true that Mauro had the opportunity to do so, he did not avail himself of it.^[826] However, Mauro submits that the representatives of DFG failed to make such enquiries as an honest and reasonable person would make as to whether or not Mauro had received such advice.

^[825] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T885, T886 XN.

^[826] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T919–920 XXN.

918. In the circumstances, Mauro submits that the representatives of DFG should have so enquired. This is particularly so, given their knowledge of his limited involvement in the negotiation of the development agreement, their knowledge that he was likely to enter into the development agreement if Mr Montalto determined that he should and, in the case of Mr Dooley, his knowledge that ‘Mauro had little understanding of the detail of the development agreement when he signed it.’^[827]

^[827] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T310 XXN.

Submissions of DFG

919. DFG submit that there is no basis to set aside the development agreement, or guarantee or indemnity, insofar as it relates to Mauro personally. DFG say that Mauro was not under any special disadvantage, and that DFG were not aware of any special disadvantage. DFG point to the following factors:

(a) Mauro was a director of Premier Bay for over 17 years and has been the director of five other companies.[\[828\]](#)

[\[828\]](#) Exhibit P13.

(b) Mauro is a director and co-owner of Floridia Cheese. In the 2016 financial year, the consolidated revenue of Floridia Cheese was over \$28,870,000 and the business had 88 employees.[\[829\]](#) Mauro is responsible for the day-to-day operations of the business and these responsibilities include the management of staff and sourcing the supplies for the business.[\[830\]](#) The sourcing of supplies requires him to negotiate with large suppliers such as Murray Goulburn and Weston Foods.[\[831\]](#)

[\[829\]](#) Exhibit P25.

[\[830\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T892 XXN.

[\[831\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T894 XXN.

(c) The business of Floridia Cheese has grown significantly while Mauro has been a director of the business and, in the last seven years, the business has doubled its sales.[\[832\]](#)

[\[832\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T896, T897, T899 XXN.

(d) Mauro regularly had arguments with Mr Montalto and did not always accept what Mr Montalto said.^[833]

^[833] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T895–T896 XXN; Transcript of hearing, *Re Premier Bay Pty Ltd* (9 November 2017) T494 XXN.

(e) In 2015, Mauro took a stand against Mr Montalto and left the business of Florida Cheese for a period of time, and then returned to the business because his brother asked him to.^[834]

^[834] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T896, T924 XXN.

(f) Mauro has had property investments and was capable of managing those investments, and dealing with real estate agents, without any difficulty.^[835]

^[835] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T903 XXN.

(g) Mauro was aware from presentations provided by DFG, prior to the signing of the development agreement, that Premier Bay stood to make around \$350,000,000 from the sale of its land.^[836] He knew that he was a beneficiary of the relevant trusts that would share in this sum.^[837]

^[836] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T904, T906, T908, T922–923 XXN.

[\[837\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017)
T902 XXN.

(h) Between March 2013 and 17 July 2013, Mauro was pursuing a new joint venture to create another cheese producing company, under a different brand.[\[838\]](#)

[\[838\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017)
T891 XN. See Exhibit P13.

(i) Mauro can read documents and knows what a guarantee is.[\[839\]](#) He was capable of refusing to sign the development agreement.[\[840\]](#)

[\[839\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017)
T920 XXN.

[\[840\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017)
T920 XXN.

(j) Mauro intended that he, his wife, and children would benefit from the development and said that is why he signed the development agreement.[\[841\]](#) He benefitted in two ways:

[\[841\]](#) Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017)
T905–906, T909 XXN; Exhibits P5 and P6.

(iii) Premier Bay held and continues to hold land as trustee for and on behalf of The Montalto Family Trust constituted by a trust deed,^[842] and Mauro is a 'General Beneficiary' of that trust.^[843]

^[842] Exhibit P26.

^[843] Agreed fact recorded at Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T973; Exhibit P26; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T901–902 XXN.

(iv) Mauro is a primary beneficiary of the Montalto Donnybrook Trust and he was aware that, as a beneficiary of that trust, he and his family stood to benefit from the development; and he knew this back in 2013.^[844]

(k) Mauro affirmed the documents, when Delma joined the Woodstock Consortium, by signing the 1 July 2014 amendments to the CUT documents.^[845]

(l) Mauro gave evidence that he does not want to stop the development because his family stands to have a share of \$350 million at some stage.^[846]

^[844] Exhibit P5; Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T905–906 XXN; Exhibit P27.

^[845] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T922 XXN.

^[846] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T922–923 XXN.

920. Mr Montalto was not cross-examined by Mauro's counsel to support the unconscionability defence. It was not put to Mr Montalto that he overbore Mauro's will and forced him to sign the development agreement as guarantor. DFG submitted that the Court should draw an inference that this was not done, because Mr Montalto would not support the allegation,

921. Further, DFG submitted that Mauro's recollection of the events of the 10 April 2013 meeting are contrary to his pleaded case,
922. His defence and description of the discussion that took place changed.^[847] In cross-examination, Mauro's evidence of the discussion was: 'They just said, "This is the guarantee. Because you are a director of Premier Bay we need a second signature so that Premier Bay will stand by their agreement."' ^[848] It is submitted by DFG that Mr Levinge's evidence should be preferred,

^[847] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T918–919 XXN.

^[848] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T914 XXN.

923. The development agreement was not signed at the 10 April 2013 meeting as alleged in the pleading.^[849] Mauro's evidence was vague as to the documents that he signed on 10 April 2013, and included a memory that the guarantee was in a separate document.^[850] Mauro gave evidence that he signed the development agreement some 2 to 3 weeks before 10 April 2013, at a separate meeting, at the Florida Cheese factory at which Mr Montalto, Mr Brown, and Mr Farinotti of Holding Redlich lawyers were present.^[851]

^[849] Amended Defence and Counterclaim of Third Defendant dated 2 November 2017, [7A].

^[850] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T910–911 XXN.

^[851] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T919 XXN.

924. In relation to this meeting, Mauro accepted that he could have asked Mr Farinotti for advice before signing, and that he could have refused to sign the document if he had a real objection to it.^[852] Mauro did not read the document, but said that he assumed that his father and 'the lawyer who was acting on my father's behalf had done them correctly.'^[853]

^[852] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T920 XXN.

925. DFG submitted that the above facts go against a finding in Mauro's favour. In any event, DFG submit that they had no knowledge of any undue influence or circumstances of 'special disability.' DFG rely on the following factors:

(a) On 17 October 2012, DFG met with Mauro and the Montalto family, and explained the benefits and expected returns from the development.[854]

[854] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T906–908 XXN. See also CB 460.

(b) Mauro was a director of Premier Bay and there is nothing unusual about a director signing a guarantee on behalf of the company.[855]

[855] See Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T869 RXN; Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T1035 XXN.

(c) Mr Levinge assumed that, as a director of Premier Bay, Mauro would be advised by Sladen.[856]

(d) It was not put that it was obvious or known to any representatives of DFG that Mr Montalto was exerting undue influence on Mauro.[857] Mr Levinge said that Mauro would generally sign an agreement if Mr Montalto asked him to do so 'unless he had a real objection to it.' [858]

(e) Mr Dooling said that it was obvious that the guarantee was a financial commitment,[859] and that he would have thought '[Mauro's] legal people acting on behalf of Premier Bay would have explained those things to Mauro.' [860] Mr Dooling did not know whether Mauro did or did not have legal advice.[861] He did know that Mr Montalto had 'handed over the business to the boys,' [862] and that Mauro was 'considered to be the CEO.' [863]

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- [856] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T195 XXN.
- [857] See, for example, Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T196–197 XXN.
- [858] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T196–197 XXN.
- [859] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T312 XXN.
- [860] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T310 XXN.
- [861] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T309 XXN.
- [862] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.
- [863] Transcript of hearing, *Re Premier Bay Pty Ltd* (1 November 2017) T308 XXN.
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Consideration of Mauro's evidence

926. As discussed previously, Mr Hart and Mr Di Felice agreed that the development agreement would be executed by Premier Bay and the directors, and then be held in escrow by Mr Hart pending finalisation of the development agreement with the Coralluzzos, and the execution of the CUT documents. Upon this being satisfied, Mr Hart was to release the development agreement from escrow for execution by DFG, to be dated on the date of execution by DFG.
927. The development agreement would not be deemed to be entered into until it had been fully executed and exchanged in accordance with the agreed process.
928. Mr Hart asked Mr Di Felice to get Premier Bay to execute the development agreement.[864] Mr Di Felice said that he was not aware that Mr Montalto and Mauro had executed the development agreement, but subsequently became aware that they had.[865] It appears that Premier Bay and the directors executed the development agreement around 22–28 March 2013. It was received by Mr Hart prior to sending his email of 2 April 2013 to Mr Di Felice.
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[864] Transcript of hearing, *Re Premier Bay Pty Ltd* (16 November 2017) T834 XN.

[865] Transcript of hearing, *Re Premier Bay Pty Ltd* (20 November 2017) T993 XXN.

929. The development agreement contain a provision for the directors to sign, on behalf of Premier Bay, as a deed. The signing clause said ‘signed by the said guarantor,’ and there was provision for Mr Montalto and Mauro to sign.[866]

[866] CB 516.

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930. DFG had previously stated, through Mr Hart, that DFG would not execute the development agreement with Premier Bay until the agreement with the Coralluzzos was made. The Coralluzzos signed the development agreement relating to their land at the 10 April 2013 meeting. I find that DFG signed the development agreement at that meeting. Accordingly, I find that the development agreement was concluded at the signing meeting on 10 April 2013.
931. Mauro said that the development agreement was signed by him on 10 April 2013. Mauro says that he signed four signatures. He claims that there was a discussion about the guarantee with Mr Levinge.
932. Mr Levinge denied having any conversation with Mauro about the guarantee in the development agreement on 10 April 2013. For the following reasons, I accept Mr Levinge’s evidence and find that Mauro’s recollection of the events of 10 April 2013 is mistaken.
933. Mauro concedes that he knew about the guarantee, and that he was guaranteeing Premier Bay’s obligations. On the other hand, he says that he did not know it applied to him if he ceased to be a director. Mauro said he understood that he would be fulfilling the obligations of Premier Bay; he understood those obligations to be that he would sign off on any sales of property, etcetera, if his father was not available to fulfil his obligations.[867] Mauro agreed that, before the meeting on 10 April 2013, he knew that he was giving a guarantee, but he did not know that it was given on a personal level.

[867] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T884 XN.

934. Mauro did not give any evidence of how he knew about the guarantee, or of how he came to the view that the guarantee only applied to him as a director, and not to him personally. His evidence was that he did not read the development agreement; I understood by this statement that he was conveying that he had not read any part of it. So how did he come to the view that it only applied to him as a director?
935. It is reasonable to infer that he acquired his understanding of the guarantee from Mr Brown, Mr Montalto, or Mr Farinotti, and that he asked some questions about what it was that he was guaranteeing, and what were Premier Bay's obligations. If he became aware of it in some other way, he did not give any evidence as to how he did so.
936. The development agreement was signed by Premier Bay, Mr Montalto, and Mauro before 2 April 2013. Mauro recalls signing a document around that time. Mauro recalls that Mr Brown, Mr Montalto, and Mr Farinotti were present when that document was signed.^[868] I have discussed, in relation to Mr Montalto's evidence, that Mr Farinotti advised Mr Montalto about signing the guarantee and indemnity given to DFG.

^[868] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T919 XXN.

937. The evidence suggests that, it is possible that a further copy of the development agreement may have been signed on 10 April 2013, in addition to the ones signed earlier and delivered to Mr Hart's office on 2 April 2013.

Influence of Mr Montalto

938. I accept that Mauro was not involved in negotiating the development agreement. I accept that Mr Montalto was the guiding mind of Premier Bay and exercised effective control over the business of Premier Bay. On the other hand, I find that Mr Montalto wanted to involve Mauro in the property development, and I do not accept that Mr Montalto would have compelled Mauro to sign the development agreement without satisfying Mauro's queries. Mauro said that he would not have signed it if he had known that the guarantee was a personal guarantee.
939. I accept that Mauro received significant financial benefits from his father, but I do not accept that Mauro was financially dependent such that Mr Montalto had special authority over him in relation to the making of business decisions. The evidence was to the contrary. Mr Montalto and Mauro argued over business decisions, and Mauro left his job at Florida Cheese due to disputes that he had with Mr Montalto. He was persuaded to return with a greater salary.
940. Mauro submits that his trust and deference to Mr Montalto, on matters of business, is particularly evident in relation to the business of Premier Bay. Mauro says that, in relation to the activities of Premier Bay and the development with DFG, it is clear from the evidence that Mr Montalto (not Mauro) was going to decide whether the development proceeded, and that Mauro was expected to (and would) do whatever Mr Montalto decided.

941. Prior to the proposed development, Premier Bay held the land as a trustee for the Montalto Family Trust. Mr Montalto effectively controlled that trust as the appointor. Mauro was not involved in running the farm.
942. I accept that a factor in Mauro executing the development agreement at the request of his father, Mr Montalto, was the trust and confidence that he reposed in Mr Montalto. I also find that Mauro would have been reassured by the presence of Mr Farinotti at the time that he signed the development agreement. More importantly, I find that Mauro would have been keen for the development to proceed so that the family could enjoy the fruits of the development, and that his signing the development agreement would assist in obtaining these fruits. I agree that Mauro would have been reassured to sign the guarantee as he knew that his father had signed, or would sign.

Failure to call witnesses

943. Mauro did not cross-examine Mr Montalto on matters in support of his case. It was not put to Mr Montalto that he exerted undue influence over Mauro in relation to the signing of the development agreement and the giving of a personal guarantee.
944. Further, it was not put to Mr Montalto that, when the development agreement was signed by the Premier Bay parties prior to 2 April 2013, he asked Mauro to sign a single sheet of paper for confirmation purposes. It was not put that Mauro did not have the opportunity to read the document before signing it. It was also not put to Mr Montalto that Mauro did not receive legal advice prior to signing.
945. Mauro gave evidence that Mr Brown was also present on this occasion. It was not put to Mr Brown that Mauro was not able to read the document, or that he did not receive legal advice prior to signing it.
946. Mauro failed to call Mr Farinotti. Mr Farinotti was not called to confirm that Mauro did not ask him any questions. He did not call him to explain why the circumstances may have prevented him from clarifying the nature of the guarantee (if that was the case). I can only assume that Mr Farinotti's evidence may not have assisted Mauro. The inference is open that Mr Farinotti was present to advise Mr Montalto and Mauro about the development agreement. I am more able to draw that inference as Mr Farinotti was not called.
947. I am not able to infer from his failure to call Mr Farinotti that something happened which Mauro says did not. [\[869\]](#) I am entitled, however, to take the failure to call Mr Farinotti into account in deciding whether to accept or reject Mauro's evidence. [\[870\]](#)

[\[869\]](#) *Jones v Dunkel* (1959) 101 CLR 298.

[\[870\]](#) *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969.

948. In relation to the 10 April 2013 signing meeting, Mauro did not call either of Mr and Mrs Coralluzzo to support his evidence. Mr Coralluzzo gave evidence of the 10 April 2013 meeting, but was not asked about any discussions between Mauro and Mr Levinge. Mr Montalto did not call the Coralluzzo's lawyer, who was present also at the signing meeting. I can only assume that their evidence would not have assisted Mauro Montalto. [871]

[871] *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345.

949. No explanation was given for the failure to call any witness.

Authorities

950. The legal authorities relevant to failing to calling a material witness have been discussed above in relation to Mr Montalto's case.

951. As noted above, 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' [872] And the failure of a party to call a witness, who may have knowledge of the true facts, can lead to an 'inference that his evidence "would not have assisted the [party's] case."' [873]

[872] *Blatch v Archer* (1774) 1 Cowp 63, 65; 98 ER 969, 970 (Lord Mansfield).

[873] *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 413 [168] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also, 432–3 [233] (Heydon J).

Credibility of witnesses

952. I found Mr Levinge to be an honest and forthright witness. I could not say the same for Mauro. I gained the distinct impression that he was seeking to downplay his obvious intelligence, and to display a level of ignorance which is incompatible with his successful running of a business that has 60 to 70 employees.

953. Mauro gives evidence of Mr Levinge advising Mauro about the guarantee. On the other hand, Mr Levinge denies having the alleged conversations about the guarantee. Mr Dooling did not hear Mr Levinge discuss the guarantee, nor did Mr Hart or Mr Di Felice.

954. I found no reason to disbelieve the evidence of Mr Dooling, Mr Hart, or Mr Levinge. I found Mr Dooling and Mr Levinge to be honest, direct, and frank. I was not so impressed with Mauro. I gained the impression that he was attempting to paint his father in a more dominant position than he, in fact, held.
955. I also take into account the change in Mauro's defence from alleging that he was not advised about the guarantee, to alleging that he was given the wrong advice about the guarantee by Mr Levinge. That is a major change.
956. Taking into account the above matters, and in the circumstances where Mauro bears the evidentiary burden of proof, I am not satisfied that Mauro did not receive legal advice about the guarantee.

Findings

957. I find that Mauro did not execute the guarantee on 10 April 2013 meeting. I find that the documents which he signed were the CUT documents.
958. I do not accept that he was not provided with a copy prior to the meeting of 10 April 2013. Mauro concedes that he signed the development agreement some two to three weeks earlier.
959. Those present, when he signed the guarantee, were his father, Mr Brown, and Mr Farinotti. Mauro makes no allegations about any of the people present in failing to advise him of the true nature of the guarantee.
960. I reject the allegation that Mauro did not have the opportunity to read the development agreement before signing it, when Mr Farinotti was present. There is no reason why Mauro could not read it, if he chose to do so. If he was not given the opportunity to read it, then that could have been confirmed by Mr Farinotti, who was present. But Mr Farinotti was not called to support Mauro's evidence.
961. I reject the allegation that Mauro did not have the opportunity to obtain independent legal advice. Mauro agreed that Mr Farinotti was present when he signed the guarantee in the development agreement. I have found that Mr Farinotti was present for the express purpose of advising the directors about the development agreement. Mauro agreed that he could have asked Mr Farinotti about the development agreement, but chose not to do so.
962. I do not accept that Mauro was told that the agreement was a draft. Mr Farinotti would have corrected that misapprehension. It is likely that, if Mauro had any qualms about the guarantee, then he would have raised them on the first occasion that he was asked to sign the development agreement.
963. I reject Mauro's evidence that Mr Montalto asked him to sign a single sheet as confirmation that DFG could proceed with preparing the final agreement. I find that Mauro Montalto signed a complete version of the development agreement.
964. Mauro knew and believed that the agreement had been checked by his father's solicitors. He was encouraged to sign it as his father was happy to do so. Mauro Montalto believed that the

agreement would be of benefit to him and his family. He knew that it contained a guarantee by him of the company's obligations.

965. The evidence suggests that it is possible that a further copy of the development agreement may have been signed on 10 April 2013. In any event, I consider that it is unlikely that Mauro would raise issues with Mr Levinge, that he could have raised with Mr Farinotti on the earlier occasion when he executed the development agreement.
966. On balance, I am not satisfied that Mr Levinge made the observations about the guarantee as alleged or at all. I accept Mr Levinge's evidence.
967. I accept that Mr Montalto was the dominant member of the Montalto family on matters of business. I also accept that, in the main, Mauro trusted and deferred to Mr Montalto on matters of business. I do not accept, however, that Mauro was dependent upon Mr Montalto on such matters. Mauro and his brother managed the day-to-day affairs of Florida Cheese. Mr Montalto was consulted on major financial matters, which is consistent with Mr Montalto being the majority shareholder. Mauro was not reluctant to debate these matters with his father, but as the ultimate owner, I accept that Mr Montalto usually had his way.

Consideration of the unconscientious defence

968. There are two issues that I must determine. Whether Mauro was at a special disadvantage vis-a-vis Mr Montalto in relation to Premier Bay's entry into the development agreement; and secondly, if he was, did DFG knowingly take advantage of his special disadvantage, such that it would be unconscientious for DFG to rely on the guarantee in the development agreement against Mauro.
969. I deal first with the alleged special disadvantage. As I have said above, I accept that Mauro was not involved in negotiating any of the terms of the development agreement. Mauro was not present when Sladen conferred with Mr Montalto about the terms of the development agreement.
970. Mauro said that he would not have signed the development agreement containing the guarantee if he had been aware that it applied to him personally, and not just as a director. Mauro was quite prepared to sign the guarantee as a director. He made no suggestion that he was overborne in that regard.
971. Mauro did not give any evidence to support the allegation that he signed the development agreement under the undue influence of his father. He said nothing about his father pressuring him to sign the development agreement. His complaint about his father's conduct, on the occasion when he signed the development agreement, is that his father misdescribed it as a draft. He does not complain that he was overborne or in a disadvantaged position. Despite his evidence that his father misdescribed the document, he makes no claim against him in these proceedings.
972. I can only draw the inference that he was quite happy to sign the development agreement, including the guarantee, as it enabled the family (including himself) to benefit financially. His complaint is as to the nature of the guarantee.
973. Mauro expected to receive something from the \$350 million that was anticipated to flow from the development. It seems likely that he would have been prepared to assist in ensuring that the deal went ahead. He gave no evidence to the contrary.

974. I am not satisfied that Mauro was at a special disadvantage when he signed the agreement in the presence of his father, and the solicitor, Mr Farinotti. The failure to call Mr Farinotti in the circumstances is striking,
975. Mauro, in his evidence, makes it clear that his main objection is his alleged misunderstanding of the extent of the guarantee. Accordingly, his case is that he signed under a misunderstanding as to its affect,
976. Mauro says that his misunderstanding was as a result of the statement made by Mr Levinge on 10 April 2013,
977. In the case before me, the transaction was not a grossly improvident transaction for Mauro. The transaction was going to generate significant financial benefits for him and his family. The requirement by DFG that the directors ensure that Premier Bay carry out its duties under the development agreement is an entirely reasonable term,
978. Under the guarantee and indemnity, Mauro remains responsible for Premier Bay's non-compliance, despite no longer being a director of Premier Bay and having no control of its conduct. Mauro has recourse against Premier Bay for any loss resulting from its non-compliance. It was not contested that any aspect of the guarantee would be unduly onerous on Mauro, now that he is not a director of Premier Bay. In the circumstances, I do not consider that it was improvident for Mauro to have given the guarantee as he did,
979. In view of the above, I am unable to reach a conclusion that Mauro was subject to a special disadvantage, such that his ability to make a judgment as to his own best interests was seriously affected. [\[874\]](#)

[\[874\]](#) *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J); *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 398 [6] ; *Thorne v Kennedy* (2017) 91 ALJR 1260, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

980. If my conclusion is wrong, then the question is whether the disability was sufficiently evident to DFG to make it unconscionable for DFG to procure, or accept, Mauro's assent and personal guarantee to the impugned transaction,
981. DFG were aware that Premier Bay had solicitors acting for it. DFG were not aware that the solicitors had not drawn the extent and nature of the guarantee contained in the development agreement to the directors' attention. There is no reason why they should have been aware of this deficiency,
982. DFG did not know that Mauro was able to obtain legal advice when he signed the agreement, but chose not to do so,

983. DFG were aware of Mr Montalto being the dominant mind in the conduct of Premier Bay. DFG were also aware that Mauro had been involved in meetings regarding the development. Mr Levinge thought that Mauro would have signed the development agreement if Mr Montalto had wanted him to, unless he had a real objection to it.^[875]

^[875] Transcript of hearing, *Re Premier Bay Pty Ltd* (31 October 2017) T197 XXN.

984. I find that the circumstances known to DFG would not have raised an awareness that Mauro was under a special disadvantage in relation to the execution of the development agreement. As mentioned above, there was nothing onerous or unfair in requesting Mauro to sign a guarantee, with his father, in support of the development, which was to bring such benefits to the family, and upon which compliance by Premier Bay was critical to the success of the development, both to DFG and to the other property owners.

985. I do not find anything unconscionable in DFG requiring Mauro to sign a guarantee as a director of Premier Bay. He gave evidence that he was able to read, take legal advice if he chose to do so, and could refuse to sign anything about which he had an objection.^[876]

^[876] Transcript of hearing, *Re Premier Bay Pty Ltd* (17 November 2017) T920 XXN.

986. Mauro said that his decision to enter into the development agreement was because he and his family would financially benefit from the development.

Conclusion

987. I find that Mauro has not made his defence or his counterclaim against DFG.

DFG's entitlement to relief

988. DFG seek:

- (a) A declaration that lot 1 forms part of the land, the subject of the development agreement.
- (b) An order requiring Premier Bay and Mr Montalto to perform their obligations, under clause 15 of the development agreement, to provide the second plaintiff (DF Developments) with a mortgage.^[877]

[877] In the form that appears at CB 656 to CB 687. There was no ‘Planning Approval’ (ie, Gazettal), within the meaning of clause 1.43 of the Development Agreement (CB 491), until after the trial had commenced: see Transcript of hearing, *Re Premier Bay Pty Ltd* (10 November 2017) T730 XXN.

989. Pursuant to clause 15 of the development agreement, Premier Bay agreed to grant a mortgage over the land to DFG to secure the performance of all its obligations to DFG, under or in connection with the development agreement.
990. DFG submit that the granting of the declaration is necessary and appropriate to resolve the real legal controversy between the parties, referring to *Fisher and Lightwood’s Law of Mortgage*, which notes that, because of the recognition that commercially speaking damages are not an adequate remedy for breach of a promise to give a mortgage, [878] the Court will ordinarily require specific performance of an agreement to provide a mortgage. [879].
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[878] *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584 (CA) 594–6 (Buckley LJ).

[879] See ELG Tyler, PW Young and Clyde Croft, *Fisher and Lightwood’s Law of Mortgage* (LexisNexis Butterworths, 3rd ed, 2014) 38–9. See also *Takemura v National Australia Bank Limited* [2003] NSWSC 339; (2003) NSW ConvR ¶56-056 [16]–[17] (Young CJ in Eq).

991. DFG submit that the approach, in relation to granting specific performance of an agreement to provide a mortgage, reflects the long accepted principle that damages at common law are an inadequate remedy in the context of contracts involving land. [880].
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[880] See, for example, *Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 146, 151 (Barwick CJ) (a case, like the current one, involving a developer); *ANZ Executors and Trustees Ltd v Humes Ltd* [1990] VR 615, 629–33 (Brooking J).

992. The failure to provide the mortgage is not a hypothetical breach. The obligation arose when the plaintiffs requested that the mortgage be granted after signing the development agreement.
993. DFG are entitled to the declaration and an order for specific performance as sought.

994. In the circumstances, I find that DFG may be entitled to damages caused by the defendants' failure to carry out their obligations when requested, if any. I will hear the parties on this issue.
995. I direct that DFG bring in minutes of orders that fully reflect the decisions which I have made. I will hear the parties on costs.

Cited by:

Flash Lighting Company Ltd v Australia Kunqian International Energy Co Pty Ltd (No 3) [2018] VSC 711 (22 November 2018) (Robson J)

721. In *Re Premier Bay Pty Ltd*, [443] I took into account the failure of the plaintiff to call witnesses that could have supported its case. I said: [444].

The failure of Mr Montalto to call evidence that could have supported his case, in the absence of any explanation for such absences, cannot be overlooked. In my opinion, in those circumstances, when viewing his evidence, I am entitled to give less weight to evidence that could have been supported by witnesses whom he failed to call. To repeat the words of Lord Mansfield in *Blatch v Archer*, as cited in the High Court case of *ASIC v Hellicar* :

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

via

[443] [2018] VSC 168, [693]–[704] ('*Re Premier Bay*').

Flash Lighting Company Ltd v Australia Kunqian International Energy Co Pty Ltd (No 3) [2018] VSC 711 (22 November 2018) (Robson J)

721. In *Re Premier Bay Pty Ltd*, [443] I took into account the failure of the plaintiff to call witnesses that could have supported its case. I said: [444].

The failure of Mr Montalto to call evidence that could have supported his case, in the absence of any explanation for such absences, cannot be overlooked. In my opinion, in those circumstances, when viewing his evidence, I am entitled to give less weight to evidence that could have been supported by witnesses whom he failed to call. To repeat the words of Lord Mansfield in *Blatch v Archer*, as cited in the High Court case of *ASIC v Hellicar* :

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

via

[444] *Re Premier Bay* [2018] VSC 168, [704].