IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL JURISDICTION
COMMERCIAL LIST
GENERAL DIVISION

Not Restricted

Case No. CI-07-04283

PACD PTY LTD
(ACN 079 129 114) — Plaintiff

and

CHRISTOPHER DIMITRIOU — Second Plaintiff

v

DEPAS PTY LTD
(ACN 007 367 786) — Defendant

JUDGE:	HIS HONOUR JUDGE SHELTON
WHERE HELD:	Melbourne
DATE OF HEARING:	12-14, 17-20 and 24 November 2008
DATE OF JUDGMENT:	19 March 2009
CASE MAY BE CITED AS:	PACD Pty Ltd and Dimitriou v Depas Pty Ltd
MEDIUM NEUTRAL CITATION:	[2009] VCC 0552

REASONS FOR JUDGMENT

Catchwords: Existence of joint venture agreement – post-contractual conduct – s.118 *Transfer of Land Act* 1958 – *Goldstraw and Goldstraw* (2006) V ConvR 54-712 – *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Brambles Holdings Ltd v Bathurst City Cou*ncil (2001) 53 NSWLR 153; *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106; *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr R G Craig	Noble Lawyers
For the Defendant	Mr P W Lithgow	Neil McPhee & Associates

HIS HONOUR:

1 This proceeding concerns a two-unit development at 4 Judith Street, Carnegie ("the property").

2 The second plaintiff is the sole shareholder and director of the first plaintiff. Anthony De Pasquale ("De Pasquale") is a shareholder and director of the defendant. They met each other in 2003. They had sons playing in the same junior football team who also went to the same school. A friendship developed between the second plaintiff and De Pasquale and their families mixed socially and even went away on holidays together.

3 The main issue for my determination in this proceeding is whether there was a joint venture agreement or partnership ("the alleged agreement") made in or about January 2005 with respect to the development of the property between the second plaintiff and De Pasquale through their companies, namely the first plaintiff and the defendant, and if so, the consequences of this. The defendant denies any such relationship existed. Unfortunately, there is a dearth of documentation in relation to the alleged agreement.

4 The plaintiffs allege in their Second Further Amended Statement of Claim dated 12 November 2008 that there were terms of the alleged agreement as follows:

> "(a) the property would be purchased for development as a joint venture
>
> (b) funds would be borrowed to construct two units on the property;
>
> (c) two units would be constructed on the property;
>
> (d) the net proceeds of sale of the properties and all profits, after repayment of borrowing costs and agent's commission, would be shared between the Plaintiffs and the Defendant.

5 It is also alleged that there were further terms of the alleged agreement:

> "(a) the Defendant would ensure that the units to be constructed on the property would be constructed in accordance with the building and planning permits;

> (b) the Defendant would not take steps to sell or to sell the units until they were fully completed with all relevant occupancy and town planning certificates."

6 It is not in issue that the onus is on the plaintiffs to satisfy me that it is more probable than not that the alleged agreement existed. As to the meaning of "joint venture", in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, at 10, Mason, Brennan and Deane JJ stated:

> "The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture (or, under Scots' law, 'adventure') will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a 'joint venture' and what should more properly be seen as no more than a simple contractual relationship may, on occasion, be blurred."

7 The second plaintiff had been a registered builder and had been a bankrupt. De Pasquale was building a family home in Glenvale Road, Glen Iris. The builder they engaged went into liquidation about September 2004. De Pasquale and his wife then engaged the plaintiffs, on account of the second plaintiff's building expertise, to supervise the completion of the erection of their home. He was to co-ordinate trades people and also do some work as a carpenter. Between September 2004 and September 2005 he was paid approximately $414,000 for his efforts. There was no written contract between the first plaintiff and the De Pasquales in respect of the services he was providing.

8 The second plaintiff had been involved in property developments in the City of Glen Eira. De Pasquale worked in sales and marketing for a property developer in the western suburbs of Melbourne. It is not in issue that towards the end of 2004, the second plaintiff and De Pasquale discussed on several occasions the possibility of their both becoming involved in a development, drawing on the second plaintiff's experience in the City of Glen Eira and De

Pasquale's marketing expertise.

9 The second plaintiff stated that as the idea of him and De Pasquale jointly being involved in a development grew towards the end of 2004, he offered to find a property and to develop a concept for it, finalising design and obtaining town planning approval which he was confident he could obtain in a fairly short period. Although a registered builder was to be engaged, the first plaintiff stated that he was adamant that he wanted to manage the building aspect of the development. He stated that his involvement in managing the building operations was "a deal breaker". He stated that it was agreed at all times that profits and liabilities were to be shared equally. The second plaintiff stated that he told De Pasquale that he thought it appropriate to offer Frank Romeo ("Romeo"), his solicitor, whom he had known since the late 1990s and with whom he had been involved in another development, a share in any project. He states that De Pasquale accepted this.

10 The first plaintiff's wife stated that she could recall occasions at their home in Caulfield when her husband and De Pasquale would be sitting in front of the first plaintiff's computer looking at a spreadsheet and talking about the property. She stated that she and the first plaintiff and De Pasquale and his wife "constantly" spoke about the development of the property in early 2005. Mr Lithgow, who appeared for the defendant, submitted that this evidence was questionable given that the second plaintiff, in evidence, did not mention his wife's presence at his conversations with De Pasquale. Nor was her presence on such occasions mentioned by the plaintiffs in the Supreme Court proceedings, of which I say more presently.

11 Generally I found the second plaintiff a more convincing historian than De Pasquale, who had a poor recollection of events.

12 Mark Staples, estate agent employed by Biggin & Scott, Carnegie, gave evidence that he brought the property to the second plaintiff's attention in

December 2004. He was aware of the second plaintiff's interest in property development in the area and thought the property would be well suited to a two-unit development. He stated that he showed a number of properties to the first plaintiff and De Pasquale together, and that his understanding was that they would be working together on various property developments. His evidence is generally supportive of the second plaintiff's version of events.

13 The second plaintiff stated in evidence that in pursuance of what he and De Pasquale had discussed, he inspected the property in late December or early January 2005, thought it could be suitable for the proposed two-unit development and immediately commenced preparing concept drawings. He telephoned De Pasquale who was in Queensland on holidays, and told him of the property which he felt would be very suitable for their needs. De Pasquale told him to purchase it. De Pasquale gave evidence to similar effect. Accordingly the second plaintiff, by Contract of Sale dated 5 January 2005, purchased the property for the sum of $410,000. Settlement was to occur on 5 April 2005. The Contract of Sale contained a nominee clause. The second plaintiff paid a deposit of $25,000 on 6 January 2005. On the same day the second plaintiff had the vendor sign a Consent, which he had prepared, which enabled the plaintiffs to apply for town planning approval and a building permit for the property.

14 It is common ground that De Pasquale returned from Queensland on 11 January 2005 and attended shortly thereafter at the second plaintiff's Caulfield home. The second plaintiff states that at this meeting he showed De Pasquale the preliminary drawings he had prepared. He states that it was also agreed that they would each make enquiries regarding the obtaining of finance for the project. De Pasquale denied this.

15 De Pasquale states that on 12 January or 13 January 2005, he reimbursed the second plaintiff the sum of $25,000 deposit paid on the property. The second plaintiff stated that he thought that he was repaid the sum of $25,000

when settlement of the purchase of the property took place on 5 April 2005, although in an affidavit sworn 6 July 2006 in the Supreme Court proceedings he deposed that the sum of $25,000 was repaid prior to settlement from a temporary loan facility organised by De Pasquale. At the conclusion of final addresses, Mr Lithgow produced a bank statement of the defendant showing a debit of $25,000 to its account on 13 January 2005. Mr Lithgow submitted that this tended to support De Pasquale's evidence as to when the sum of $25,000 deposit was repaid. However, as Mr Craig, who appeared for the plaintiffs pointed out, there was no evidence before me that the sum of $25,000 was paid to one or other of the plaintiffs. The plaintiffs and the defendant were at the time involved in the Glenvale Road project and the payment may have been in relation to it. In the circumstances, I am unable to make a finding that sum of $25,000 was paid by the defendant to one or other of the plaintiffs on 13 January 2005. In any event, the issue of when the sum of $25,000 was repaid to the plaintiffs is only relevant as to credit.

16 The second plaintiff stated that in January 2005, he prepared a spreadsheet on his computer showing the potential return to the parties under the alleged agreement. He gave evidence that De Pasquale looked at this spreadsheet at his home on the computer over his shoulder as he explained the document to him. De Pasquale denied that this occurred. The second plaintiff could not recall whether he gave De Pasquale a copy of this spreadsheet. It was common ground that similar spreadsheets had been prepared for the Glenvale road project. De Pasquale denied ever receiving any spreadsheets in relation to the property. However, he did in fact make discovery of a similar spreadsheet which the second plaintiff stated that he produced in April 2005. The second plaintiff gave evidence that the April 2005 spreadsheet was an updated version of the January 2005 spreadsheet. Significantly, it had a column headed "Partner's Equity", which suggests the existence of the alleged agreement. De Pasquale stated in evidence that he had never seen this spreadsheet before but gave no satisfactory explanation as to why it was

in his papers. This obviously goes to De Pasquale's credit.

17 The second plaintiff stated that both before the purchase of the property and afterwards he and De Pasquale discussed and agreed that any out-of-pocket expenses would be borne by the party incurring them, who would then be reimbursed when the loan facility had been established.

18 Meanwhile, according to the second plaintiff, De Pasquale was able to obtain a better rate of interest for funding of the development through National Australia Bank Limited ("NAB") than the second plaintiff was able to obtain through his contacts. It is not in issue that the second plaintiff and De Pasquale decided to use NAB to finance the project.

19 The second plaintiff stated that NAB wanted current financial information from him. He states he indicated to De Pasquale that he could not provide this by early February as requested by NAB since he had not even finalised his accounts for the financial year ending June 2002. He stated that De Pasquale indicated that he discussed this with NAB which indicated that it would still provide the finance but that the property must be registered in the name of the defendant. The second plaintiff stated that he was agreeable to this. He "had done deals on a handshake before" and trusted De Pasquale.

20 The second plaintiff suggested to De Pasquale that Romeo should act for them on the purchase of the property. De Pasquale agreed. Accordingly, a meeting was held at the office of Romeo & Associates, Glenhuntly, on 2 February 2005. Its purpose was to complete the documentation nominating the defendant as the purchaser of the property. Present at the meeting were the second plaintiff, De Pasquale, and Romeo, by then a consultant to Romeo & Associates. Romeo stated that the meeting lasted approximately three quarters of an hour.

21 The second plaintiff stated that at this meeting he offered Romeo a one-third interest in the development and that this was done in the presence of De

Pasquale. Romeo confirmed that this occurred. He further stated that a similar offer had been made by the second plaintiff to him twice in December and that he had declined on each occasion. He felt that there was not enough profit in the development for three people. Romeo states that at the meeting he was told that the second plaintiff and De Pasquale had purchased the property so that they could develop it by the erection of two units. Romeo stated that he was clear that the offer to participate in the venture was made by De Pasquale also. He stated that he was told by the second plaintiff and De Pasquale that the defendant was being nominated as purchaser because NAB, with whom De Pasquale had an association, was able to offer a more favourable lending rate than the second plaintiff was able to obtain. By contrast, De Pasquale stated that the defendant was nominated as purchaser of the property because it in fact was the sole purchaser.

22 Romeo conceded that there was no mention on his file of a joint venture or partnership. Romeo acted on the settlement with his account being forwarded to De Pasquale and the first defendant, not the plaintiffs. He had never acted for De Pasquale before. He stated the fact that the file was only in the name of Depas and De Pasquale did not mean that he was not acting for the plaintiffs also and he regarded himself as doing so. Romeo was queried as to why he had opened his file in the name of the defendant and De Pasquale when, as he said, he was acting for the first plaintiff as well. He explained that this was to accord with the conveyancing computer package which he had.

23 Strangely, Romeo did not advise the second plaintiff, who had previously been his client, to take steps to protect his interest in the property by, for example, lodging a caveat. Nor did he suggest that the arrangement between the plaintiffs and the defendant be documented. He stated that it was a short time later that he suggested to the second plaintiff the possibility of some documentation confirming their arrangement. The second plaintiff replied that he trusted De Pasquale just as he had trusted Romeo on their joint venture in

the past which was not documented.

24 By contrast, De Pasquale stated that at the meeting on 2 February 2005 he offered an interest in the development of the property to the second plaintiff and Romeo. He stated he felt somewhat indebted to the second plaintiff who had found the property for him. He confirmed that Romeo said that there would not be enough profit in the venture for three people. He also stated that the second plaintiff said that he would have to speak to his financiers and get his accounts in order and that he would then tell De Pasquale whether he was interested in the venture. De Pasquale stated that to be involved in the joint venture the plaintiffs needed to provide funds and the second plaintiff told him that the plaintiffs could not provide the necessary funds. The second plaintiff stated that in late January 2005 he told De Pasquale that his finance broker was able to obtain funding for 100 per cent of the project and that De Pasquale likewise advised him that NAB was able to provide 100 per cent funding but at a lower rate. De Pasquale stated that he subsequently borrowed the sum of $200,000 from his parents to fund the completion of the development of the property. Romeo confirmed that it was possible to borrow 100 per cent of the cost of a project provided appropriate security was provided. I further note that the second plaintiff and his wife, on 23 September 2005, were able to drawdown the sum of $90,000 on a loan secured by a mortgage over their Inverloch property which suggests that being able to provide further funding for the development of the property was not a problem for the plaintiffs. I further note that on 18 July 2005, the plaintiffs obtained a loan of $336,000 over a property at 44 Elimatta Road, Carnegie which they were developing.

25 I accept the second plaintiff's version of what occurred at the meeting on 2 February 2005, supported as it is by the evidence of Romeo, rather than that of De Pasquale.

26 Consistently with his version of events, the second plaintiff states that

immediately after the meeting with Romeo on 2 February 2005, he and De Pasquale had a discussion in which each indicated that they were quite pleased that there was only going to be a two-way split on the development of the property.

27 In determining whether the alleged agreement was made in or about January 2005, post contractual conduct is admissible on the question of whether a contract was formed, as distinct from what the contract means: see *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, at 163 and 164, per Heydon JA. I therefore turn to consider what occurred after the meeting with Romeo on 2 February 2005.

28 The second plaintiff's wife gave evidence that on 5 April 2005 she received from the defendant a copy of a letter addressed to it by NAB confirming the disbursement of funds at settlement and the balance of the funds available. De Pasquale stated that this letter was forwarded to the first plaintiff to enable him to apply for finance so that he could become involved in a joint venture for the property. Significantly, this was not put to the second plaintiff in cross-examination. This seems to me a somewhat unlikely explanation since finance from NAB was already in place for the development of the property. It appears far more likely to me that the letter was forwarded to the first plaintiff because of the existence of the alleged agreement.

29 The second plaintiff gave evidence that after the meeting on 2 February 2005, he attended to a number of matters in respect of the development of the property. He prepared working plans and attended to town planning issues. He arranged a meeting of neighbours of the property at his Caulfield home on 2 March 2005 to enable the neighbours to view plans for the proposed development and to raise any concerns. The letter convening the meeting was on the letterhead of the first plaintiff. The clear tone of the letter was that the first plaintiff was developing the property and there was no suggestion that it was acting on behalf of the defendant. The second plaintiff prepared town

planning drawings, obtained town planning approval and prepared a short draft specification. He discussed matters with Yellow Mango Advertising, to whom he was introduced by De Pasquale. The second plaintiff's wife stated that she, too, was involved in discussions with Yellow Mango Advertising and with the printing of a brochure to be used by Mark Staples to market the property. He engaged engineers for the project. He liaised with a designer with respect to external finishes for the two units. He stated that he spent in excess of 100 hours on the proposed development of the property. This, of course, is consistent with the existence of the alleged agreement. De Pasquale stated that on a number of occasions he offered to pay the second plaintiff for his efforts but that the second plaintiff stated that he was obtaining good financial reward on the Glenvale Road project and from working for De Pasquale's parents at Werribee and did not want payment. I find this explanation quite implausible and am of the view that the second plaintiff's involvement was rather because of the existence of the alleged agreement. The first plaintiff put in a claim for its out-of-pocket expenses of $14,958.85 in early July 2005 and was paid promptly by the defendant. This is consistent with the evidence of the second plaintiff as to how it was agreed that out-of-pocket expenses would be reimbursed.

30 De Pasquale introduced the second plaintiff to Leo Bordin ("Bordin") of P3 Construction Pty Ltd ("P3"). P3 had carried out works for De Pasquale's employer in the western suburbs. The second plaintiff said that he had several discussions with Bordin and that De Pasquale was present at some of these. The second plaintiff prepared a building contract between P3 as builder and the first plaintiff and the defendant as owner. It was dated 15 April 2005 and signed by him. The contract price was stated to be $370,000.00 with works to be completed in 180 days. The second plaintiff stated that he told De Pasquale over the phone that he had signed the contract. He stated that De Pasquale was to sign the contract later on behalf of the defendant but this was never done. Bordin stated that this contract, which was entered into

showing the first plaintiff and the defendant as owners, for the erection of two units on the property, was not meant to be a binding contract but was entered into rather to enable the plaintiffs to apply for finance. De Pasquale gave evidence to similar effect. De Pasquale stated that he had not given the second plaintiff authority to sign the contract on behalf of the defendant and that it was never suggested to him that it was a binding contract. The second plaintiff stated rather that it was intended to be a binding contract for the erection of the two units on the property. I find Bordin's and De Pasquale's version of events somewhat implausible given that in the contract the lending body was stated to be NAB and funds had already been advanced by it on 5 April 2005 to enable settlement of the purchase of the property to take place. The total facility was for the sum of $632,000.00.

31 The second plaintiff stated that he had considerable difficulty in establishing contact with Bordin. The second plaintiff's phone records were produced which showed that he had attempted to contact Bordin on his mobile phone on a number of occasions. This is consistent with the second plaintiff's version of events. The second plaintiff and De Pasquale found P3's attitude and degree of interest unsatisfactory and decided not to proceed with P3.

32 The defendant then entered into a contract dated 31 August 2005 with a contact of De Pasquale, Stylecraft Builders ("Stylecraft") for it to erect two units on the property for the sum of $420,200.00, after having received a quotation originally of $440,000.00. The contract with Stylecraft provided for commencement on 19 September 2005 and completion, as with the earlier contract with P3, within 180 days. The second plaintiff stated that he checked out the pricing of Stylecraft and produced a spreadsheet showing this and indicated to De Pasquale that in his view, it was a reasonable price. Thus the second plaintiff was still involved with the development of the property and providing services for no fee, again consistent with the existence of the alleged agreement. De Pasquale denied ever seeing this spreadsheet.

33 I find it surprising that the second plaintiff did not insist that he and/or the first plaintiff be parties to the contract with Stylecraft. It is strange that after the problems encountered with P3 which was recommended by De Pasquale, the second plaintiff did not wish to be more involved in the appointment of a further builder recommended by him. It appears that all dealings with Stylecraft were with De Pasquale and not the second plaintiff. In evidence, Mario Ciaverella of Stylecraft stated that he first saw the second plaintiff at Court in these proceedings. Apparently Ciaverella was overseas when contract works commenced. The second plaintiff states that he went to the property when excavation work was being carried out by an excavation sub-contractor. Also present was a Stylecraft apprentice. The second plaintiff stated that he told them that they were excavating at the wrong level, as shown on contract drawings, and this was accepted. Again, this is consistent with the existence of the alleged agreement.

34 It was common ground that from about the end of July 2005, the relationship between the second plaintiff and De Pasquale was deteriorating. It appears that this was caused by misunderstandings over the costing of the Glenvale Road works, allegations by tradesmen in this project that they were not paid and defects in the works, as well as problems with works being carried out for De Pasquale's parents by the plaintiffs. It is not in dispute that in early September 2005, De Pasquale accused the second plaintiff of lying and threatened to strike him. In early October 2005, there was a heated discussion between the plaintiff and De Pasquale in which De Pasquale, according to the plaintiff, made threats to report him to the Building Control Commission. At this meeting, the second plaintiff mentioned the development at the property. It is common ground that the defendant said words to the second plaintiff to the effect that if he stepped foot on the property he would "punch his fucking lights out". The second plaintiff stated that he took this threat seriously, since De Pasquale had qualifications in martial arts, was physically bigger than he and he felt intimidated.

35 The second plaintiff stated that he contacted Romeo for advice upon his dispute with De Pasquale. Romeo stated that he told the second plaintiff that he could not act for him since he had also acted for De Pasquale and the defendant with respect to the purchase of the property and that the second plaintiff would need to obtain independent legal advice. He told him that if he had concerns he should lodge a caveat. Both the second plaintiff and Romeo were vague as to when this advice was given.

36 The next step taken by the plaintiffs was to lodge a caveat on the title of the property on 2 May 2006. In this caveat the plaintiffs claimed an estate in fee simple "as beneficial owner pursuant to an implied trust". The second plaintiff stated that he obtained this wording from Romeo's conveyancing clerk. In the course of the hearing, I expressed surprise that the second plaintiff, who was experienced in business matters, did not assert his rights until May 2006. Mr Craig, who appeared for the plaintiff, answered this criticism in a number of ways.

37 Firstly, he submitted that even if a party brings a claim for breach of contract one day before the expiry of a limitation period does not mean that a court can infer that the party does not legitimately believe that there was such a contract. This might be so, but one would normally have expected the second plaintiff to assert his alleged rights before he did.

38 Secondly, Mr Craig submitted that my criticism of the delay did not take account of the possibility that there had been "without prejudice" communications in the interim. If there were such communications, evidence could have been given of them without disclosing their content.

39 Thirdly, Mr Craig submitted that the second plaintiff had endeavoured to obtain legal advice but was told by Romeo rightly that he could not act for him since he had acted for him and the defendant on the purchase of the property. He could easily have consulted another lawyer.

40 Fourthly, Mr Craig stressed that the second plaintiff was already involved in legal proceedings over Glenvale Road with De Pasquale in VCAT by December 2005, and was focussing upon these.

41 Finally, Mr Craig submitted that De Pasquale had brought his relationship with the second plaintiff to an end in an intimidating and physically threatening way and that he was reluctant to confront him. De Pasquale, who is of heavier build than the second plaintiff, showed a certain intensity in the witness box and I think there is some merit in this submission.

42 The defendant took steps to have the caveat removed from the title of the property. The matter was heard in the Supreme Court before Gillard J on 13 July 2006. Some six days earlier, on 7 July 2006, the second plaintiff, on the letterhead of PACD Pty Ltd, wrote to the private building surveyor engaged for the project, Samuel De Petro, advising that a neighbour of the property had approached him expressing concerns that the units were not built in accordance with approved plans and permits, and particularly that wall heights were higher than indicated on the plans which affected access of light, and the windows did not have translucent glass as required. The second plaintiff states in the letter that he attended at the property and found, firstly, that the neighbour had grounds for complaint and, secondly, that there were several respects in which the buildings erected on the property did not conform with plans approved by the City of Glen Eira. The second plaintiff sent a copy of this letter to the Planning Department at the City of Glen Eira. During the hearing, I expressed surprise that if the alleged agreement existed, a party to it would be unlikely to act as the second plaintiff had, since the forwarding of this letter to the building surveyor, and in particular to the City of Glen Eira, might well, as it in fact did, have the effect of slowing down the finalisation of the project. This conduct, together with the lodging of the caveat, might be seen as a vindictive action on the part of the second plaintiff. Strangely a copy of the letter was not forwarded to De Pasquale. Mr Craig submitted that

the plaintiff wrote the letter as he stated in it "as a party with a caveat interest over the property and responsible for representations made to council and other statutory authorities in obtaining the permit", and that he was wanting to protect his reputation with the City of Glen Eira, where he had carried out other developments and had developed a good relationship, and also to protect himself from potential litigation. I think there is some merit in Mr Craig's submissions.

43 Meanwhile, following the Supreme Court hearing on 13 July 2006 with respect to the removal of the caveat, on 2 August 2006, Gillard J delivered judgment ([2006] VSC 281.) He held that even if there were a joint venture or partnership between the plaintiffs and the defendant, the plaintiffs did not have a caveatable interest in the real estate at 4 Judith Street, and he ordered that the Registrar of Titles remove the caveat. In the judgment he stated, at paragraph 10, that:

> "Mr Romeo's evidence provides some support for the view that there was a joint development of the property involving Messrs De Pasquale and Dimitriou."

44 Unit 1 on the property sold for $595,000 and Unit 2 sold for $582,500, with settlement of both taking place on 8 March 2007.

45 As indicated, the plaintiffs claim that it was a term of the alleged agreement that the defendant would not sell the units on the property until they were fully completed. So far as it is suggested that such a term was agreed upon in or about January 2005, I note the evidence of Mark Staples that in mid 2005, he received instructions to market the units on the property off the plan. His firm, by then, Hocking Stuart Carnegie, was given an Exclusive Sale Authority for both units dated 4 June 2005. He stated that he undertook a marketing campaign and a board was erected at the property with an artist's sketch upon it showing what the completed units would look like. He stated that he reported to the second plaintiff and De Pasquale with respect to the progress of the marketing campaign, if anything more to the first plaintiff than to De

Pasquale. As mentioned, the first plaintiff's wife confirmed that brochures were prepared with the assistance of Yellow Mango Advertising in relation to the sale of the units on the property off the plan. All these matters are inconsistent with the alleged term having been agreed upon in or about January 2005. In the plaintiffs' Outline of Submissions to which Mr Craig spoke by way of a final address, he submitted that in or about August 2005, the second plaintiff and De Pasquale "agreed that the property should be sold in complete form, rather than 'off the plan' as had been previously agreed". He relied upon evidence given in chief by the second plaintiff at page 95 of the transcript:

> "We said 'let's finish it. We've got the funding in place, let's finish it and sell it as a finished product', unless, of course, somebody comes along and gives us a decent price on what we were budgeting."

46 These words suggest to me that the plaintiffs were quite prepared to sell the units before completion if a satisfactory price could be obtained. I further note the evidence of De Pasquale that on previous developments he liked to pre-sell since this reduced risk.

47 In the circumstances, I have not been satisfied that there was any agreement that the units on the property would not be sold until they were fully completed.

48 The evidence of Staples that he dealt with both the second plaintiff and De Pasquale suggests the existence of the alleged agreement.

49 I have indicated in the course of this judgment what I see as strengths and weaknesses in both the plaintiffs' and the defendant's cases. I found the evidence of Romeo, which is generally supportive of the plaintiffs' position, of great assistance. In all the circumstances, I am satisfied, on the balance of probabilities, that the alleged agreement did exist, save for the term that the defendant would not sell the units on the property until they were fully completed. There were no submissions made to me as to whether the first

plaintiff, second plaintiff or both were the appropriate party to the joint venture agreement or partnership should I find that it existed. The first plaintiff is the alter ego of the second plaintiff. In the circumstances, I conclude that a joint venture or partnership agreement existed between the plaintiffs and the defendant.

Damages

50 I turn to consider the damages claimed by the plaintiff.

51 It is not in issue that if the joint venture or partnership existed, the plaintiffs are entitled to 50 per cent of the net profit. The defendant asserts that the net profit of the joint venture is $10,863.48. This sum was calculated by Mr Vito Bove of Bove & Associates, De Pasquale's accountant. Details have been provided of the manner in which this sum is calculated. Bove stated that in preparing the profit and loss statement for the development of the property, he had not seen any of the invoices relating to expenses incurred, nor made any enquiries to confirm that they related to the property. He relied rather upon information provided by De Pasquale's wife, who entered the relevant data into a computerised accounting system known as QuickBooks.

52 Included in expenses of the joint venture is the sum of $46,107.25 for legal fees. These expenses do not relate to construction costs nor sale of the units on the property. It appears that they relate rather to legal costs involved with the caveat proceedings, the present legal proceedings and perhaps other proceedings between the parties. Mr Clovis Bonner, chartered accountant, gave evidence that these legal fees are not properly regarded as expenses of the joint venture and I accept his evidence.

53 The sum of $3,990.91 paid to Susan Moran Interiors is claimed as an expense against the joint venture for "colour selection/interior selections". De Pasquale stated that he had never seen the invoices from Susan Moran Interiors and he was not able to say whether they related to the property or Glenvale Road. I

agree with Mr Craig's submissions that the sum of $3,990.91 should be added back to the net profit of the development.

54 I further agree with Mr Craig's submission that bank charges totalling $513.55 for which no supporting documentation was produced but which are claimed as an expense of the joint venture should be added to the net profit for the joint venture.

55 Further, Mr Craig, in a painstaking exercise, submitted that included in Bove's accounts as expenses of the joint venture is the sum of $60,050.13 which also appears on the Glenvale Road Home Loan statements, excluding the legal fees and bank charges not probably attributable to the property. Interest of $31,740.01 directly from the Glenvale Road Home Loan, he submitted, was also included as an expense on the joint venture accounts. This was all the interest charged to the Glenvale Road facility between 1 May 2005 and 31 January 2007. For that period the total expenses not referrable to Judith Street appearing on the Glenvale Road Home Loans was $723,373.39. Dividing the sum of $60,050.13 by the sum of this figure plus $723,373.39 gives 7.67 per cent. Bove, in evidence, indicated that this was the appropriate pro rata calculation to make. Mr Craig therefore submitted that 92.3 per cent of $31,740.01, namely $29,305.55 had been debited inappropriately to the joint venture and that this sum should be added to the joint venture profits. Mr Lithgow did not dispute Mr Craig's methodology nor calculations, and I accept Mr Craig's submission.

56 The adjusted net profit for the joint venture is therefore:

$10,863.49
$46,107.25
$3,990.91
$513.55
$29,305.55
____
$90,780.75
=========

57 The plaintiffs' share of this net profit is 50 per cent, $45,390.38.

58 Mr Robert Lorich, who has thirty years' experience in the building industry and is principal of Buildspect & Co Pty Ltd, identified four significant areas where there was a failure to comply with the town planning drawings which were approved on 9 September 2005. This led to the building surveyor, De Petro, issuing building notices under the *Building Act* 1993 requiring various compliance steps to be taken. De Pasquale gave evidence that the four items resulted from instructions of his to the builder. Lorich gave evidence that the cost "as built" was $19,976.00 less than required by the town planning drawings. The plaintiffs are entitled to half of the notional reduced cost of building, $9,999.98.

59 The plaintiffs make a further claim for the sum of $14,217.40, being half of the additional interest paid on the loan facility for the property after 19 September 2006. This date is twelve months after the date provided in the Stylecraft contract for commencement. Although this contract, as mentioned, provided for completion within 180 days, De Pasquale stated that the expectation was that Stylecraft would complete its contract within twelve months. Mr Craig submitted that the completion date was extended beyond 19 September 2006 on account of the failure to comply with town planning requirements. He submitted that I should infer had the second plaintiff still been involved, this delay would not have occurred. I do not accept this submission. There is not, in my view, sufficient evidence before me to enable me to conclude that the failure to comply with town planning requirements alone caused the delay and that had the second plaintiff been involved, the Stylecraft contract would necessarily have been completed on or about 19 September 2006.

60 The plaintiffs further claim the sum of $27,925.00, being the difference in cost between what the units would have sold for if completed rather than being sold off the plan. As indicated, however, I have concluded that it was not a term of the joint venture agreement that the defendant would not sell the units

until completed. I disallow this head of damage.

61 Thus, the total sum to which the plaintiffs are entitled from the defendant pursuant to the joint venture agreement is:

$45,390.38
$9,988.00
____
$55,378.38
=========

The Defendant's Counterclaim

62 S.118 of the *Transfer of Land Act* 1958 provides:

> "Any person lodging with the Registrar without reasonable cause any caveat under this Act shall be liable to make to any person who sustains damage thereby such compensation as the Court deems just and orders."

63 Pursuant to this provision, the defendant claims damages under two heads. Firstly, it claims the sum of $57,737.40, being additional interest, bank and holding costs for the period between the original settlement date, 30 June 2006 and settlement date on the units on the property, 8 March 2007. Secondly, the defendant claims the difference between solicitor-client costs in connection with the Supreme Court proceedings with respect to the removal of the caveat of $52,939.87 and what it claims are party-party costs which were settled at $18,750.00, $34,189.87.

64 The onus is on the defendant to show that the plaintiffs lodged the caveat without reasonable cause: see *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106, at 107. In that case, Wootten J stated, at 108:

> "I think the foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an honest belief based on reasonable grounds that the caveator has such an interest."

65 The principles outlined by Wootten J were followed by Hayne J in *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589, at 600.

66 In early 2006, Romeo advised the second plaintiff to lodge a caveat. This advice must be looked at against the background of Romeo being present at the meeting on 2 February 2005. The second plaintiff, as is evident, believed that the agreement was in existence. He acted on legal advice: See *Bolton v Exell* [1993] ANZ Con R 29, a decision of the Western Australian Supreme Court, where it was held that this can be a relevant factor. There was a possible basis for the lodging of a caveat. In *Goldstraw and Goldstraw* (2006) V ConvR 54-712, Dodds-Streeton J stated, at paragraph 26:

> "An interest based on a constructive trust can form the basis of a caveat. Such an interest could arise in a wide variety of circumstances. Examples include part performance of an agreement for disposition of an interest in land, where parties have acquired land pursuant to a failed joint venture, where the claimant has made an indirect contribution to the purchase price of property to which another party takes title, or there is a common intention that a person will acquire an interest in a particular property to which another party holds legal title, and the person acts on that belief to his or her detriment, such that it would constitute a fraud to deny the interest intended to be acquired."

67 It seems clear to me from the first plaintiff's evidence, relevant parts of which are referred to above, that he did have an honest belief based on reasonable grounds that the plaintiffs had an interest in the property.

68 In the circumstances, the defendant has not satisfied me that the plaintiffs lodged the caveat without reasonable cause.

69 The counterclaim fails.

70 There will be judgment for the plaintiffs in the sum of $55,378.38.

71 I will hear from the parties on the question of interests and costs.

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