



No. M140 of 2013

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

On appeal from THE Full Court of the Federal Court of Australia

BETWEEN:

STEPHEN JAMES HOWARD

Appellant

and

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

Respondent

RESPONDENT'S CHRONOLOGY

Part I:

It is certified that this Chronology is in a form suitable for publication on the internet.

Part II:

Item	Date	Event	Reference
First Phase: commencement of the Kingston Links Golf Course venture			
1.	Prior to 1999	Richard Bucknall (Bucknall) had been engaged by Kevin Donovan's (Donovan) company, Solette Pty Ltd (Solette) to assist Donovan to find a suitable investment in the golf industry.	Reasons for judgment of Jessup J [6], [11] Warren J [7], [8]
2.	January 1999	The investment concept settled upon involved acquiring a golf course, leasing it to an anchor tenant, and selling the leased course to an end-purchaser all on the same day (although, prior to 12 April 1999 the construction of a golf course was an also option). The proposal involved the end-purchaser utilizing both equity and debt funding, and included the facilitation of finance for the purchaser, on the security of the long-term lease. The facilitators of the transaction would, on the day the transactions were settled, make a profit equal to the difference between the price paid to them by the end-purchaser and the price paid by them to the existing owner of the golf course (the day-one profit). Initially, the proposal to acquire and on-sell a golf course was that of Donovan and/or Solette and had nothing to do with Disctronics Limited (Disctronics).	Jessup [4], [5], [11], [12], [15], [25] Full Court [6(a)] Warren [7], [8]

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Item	Date	Event	Reference
		Donovan, the Appellant and Michael Quinert (Quinert) were directors of Disctronics, which was ultimately controlled by Donovan.	
3.	January and February 1999	Bucknall identified Spotless Services Australia Limited (Spotless) as a potential golf course lessee.	Jessup [11] Warren [8], [9]
4.	April 1999	Donovan and Bucknall identified Kingston Links Golf Course (KLGC) as a potential acquisition (Bucknall had mentioned KLGC earlier in January 1999).	Jessup [12] Warren [8]
5.	April 1999	From about this time Donovan had in mind that as an alternative to on-selling the golf course to a willing third-party investor, Disctronics might purchase the leased course if the equity required was within its financial capacity. Donovan shared this view with the Appellant and Quinert.	Jessup [15]
6.	April 1999	Christopher Edmonds (Edmonds) and Peter Cahill (Cahill) were engaged as consultants by Donovan, at that stage to be paid by fees. Edmonds was to deal with the financing of the investment and Cahill was to negotiate the acquisition of a suitable property.	Jessup [13] Warren [10]-[14]
7.	May – June 1999	By at least mid-May 1999, Quinert and the Appellant joined Donovan at his invitation as members of a consortium (original consortium) to acquire and on-sell a golf course. Cahill and Edmonds remained consultants at that time.	Jessup [13] Warren [15]-[19], [24]
8.	30 June 1999	During June 1999 Cahill, Donovan and Bucknall conducted negotiations with the owner of the KLGC. On 30 June 1999 Spotless made an initial offer to the original consortium to lease KLGC for \$960,000 per annum.	Jessup [14] Warren [20]-[23]
9.	30 June 1999	In its income tax return, Disctronics recorded a loss of \$0.5 million. Accumulated losses for the Disctronics consolidated accounting group were in the region of \$122 million and \$136 million for Disctronics as a standalone entity.	Jessup [10]
10.	2 July 1999	Instead of receiving fees as consultants, Edmonds and Cahill sought to share in the day-one profit from the KLGC project. At that time, they were not aware of Donovan's idea that Disctronics might be the end purchaser of KLGC.	Jessup [16]-[17] Warren [25]-[27]
11.	6 July 1999	Edmonds, with indicative figures, proposed that all six - the Appellant, Donovan, Quinert, Bucknall, Edmonds and Cahill - should be participants in the KLGC project, each to share equally in the day one profit. Disctronics was not suggested as a possible participant to share in the day-one profit. Donovan then informed Edmonds in passing that if	Jessup [17], [18], [56] Warren J [27]-[30], [180]

Item	Date	Event	Reference
		<p>the amount of equity which a prospective purchaser would be required to inject fell within the range of about \$1m-\$1.5m, Disctronics may provide that equity. Prior to about 6 July 1999, the identity of Disctronics as a possible purchaser was not known by Edmonds and Cahill.</p> <p>Later on the same day, Edmonds provided further financial scenarios to Donovan. One scenario required equity of \$1.44m be injected by the end-purchaser.</p>	
12.	7 July 1999	Donovan confirmed to Edmonds that Disctronics would likely acquire KLGc if \$1.44m in equity were required to be injected. Edmonds said that it was unlikely the transaction could be effected with that amount of equity.	Jessup [18] Warren [29]
13.	10 July 1999	Edmonds prepared a further financial scenario which contemplated, among other things, a land purchase price of \$8.4m and a sale price to the end-purchaser of \$10.1m. The assumptions in this scenario resulted in an indicated equity requirement for the end purchaser of \$2.4m and debt of \$7.7m (together making up the \$10.1m sale price to the end purchaser). The day-one profit in this scenario was to be split equally between the six individual participants but not Disctronics, which was not mentioned in the scenario.	Jessup [20] Memorandum dated 10 July 1999, Exhibit 27 Warren [29]-[31]
14.	10 July 1999	Donovan, Quinert and the Appellant, as directors of Disctronics, had reached the point of favouring Disctronics as end-purchaser. A lower price would be more favourable for any end purchaser (including Disctronics), but disadvantageous to the joint-venturers as it would reduce their prospective day-one profit share.	Jessup [21]
15.	11 July 1999	Edmonds told Quinert that "Donovan was trying to make the KLGc project available as an investment for Disctronics" and that it would be better for it to just sell the golf course rather than hold on to it.	Jessup [22] Warren [31]
Second phase: contingent opportunity for Disctronics			
16.	12 July 1999	The Appellant, Donovan and Quinert met in London. Donovan told Quinert and Howard that one of his objectives was to make the KLGc project available as an investment opportunity for Disctronics, provided that it could achieve the equity requirement. Donovan thought the company could afford up to \$1.5m, mostly from redeeming insurance bonds. The Appellant and Quinert agreed with Donovan.	Jessup [23] Full Court [6(b)] Warren [32]
17.	13-15 July 1999	On the morning of 13 or 14 July, the Disctronics Board (comprised wholly of the Appellant, Donovan, Quinert and David Mackie (Mackie)) met informally.	Jessup [24]-[27], [52], [56], [76]

Item	Date	Event	Reference
		<p>Mackie was not a participant in the KLGC project.</p> <p>The project was described to Mackie and he expressed no objection to Disctronics pursuing it. Disctronics made no formal resolution to acquire KLGC (or any golf course). There are no contemporaneous company records or minutes of the discussion or the informal resolution.</p> <p>However, the Litigation Agreement executed on 15 June 2001 (discussed further below) recorded the meeting in its recitals A and B as follows:</p> <p><i>A. The directors were formerly members of a joint venture to acquire the Kingston Links Golf Course (KLGC) with others namely Christopher Edmonds (CT) [sic], Peter Cahill (PC) and Richard Bucknall (RB) to package an approved tenant and KLGC to an investor (the joint venture). The joint venturers agreed that the investor would be either a third party or DL;</i></p> <p><i>B. On or about 14.07.99 in London meetings of DL [Disctronics], the directors [Donovan, Quinert and Howard] agreed that if the equity requirement to acquire KLGC [Kingston Links Golf Course] was less than AUD\$1.5m then the directors would seek to have DL become the investor equity participant and purchaser of KLGC (the "Option"). The directors further agreed that if DL exercised its Option then the directors would rebate to DL any entitlement (whether on revenue or capital account) they may have as a consequence of their participation in the joint venture.</i></p>	<p>Full Court [6(c)]</p> <p>Warren [35], [36], [134]</p> <p>Litigation Agreement of 15 June 2001, Exhibit S (which records the 'London Agreement')</p> <p>Minutes of Meeting of Disctronics of 13, 14 and 15 July 1999, Exhibit 1</p>
18.	14-19 July 1999	<p>Negotiations between the Appellant, Donovan, Quinert, Bucknall, Edmonds and Cahill continued about fees and profit sharing for the participants in the project. Edmonds and Cahill were concerned about their profit share from the project if Disctronics was to become involved as the end-purchaser.</p> <p>As part of these negotiations, Edmonds proposed that he and Cahill leave the project and take the KLGC property purchase opportunity with them, but that Donovan, the Appellant, Bucknall and Quinert would retain the relationship with Spotless. Donovan, Quinert and the Appellant subsequently formulated a compromise proposal which was put to Edmonds. A number of negotiations were then held about the project, profit sharing and fee arrangements.</p>	<p>Jessup [26]-[30]</p> <p>Full Court [6(d)]</p> <p>Warren [33]-[40]</p> <p>Philips JA [15]-[17]</p>
19.	20 July 1999	<p>Donovan, Quinert, Bucknall, Cahill and Edmonds participated in a telephone conference which resulted in the formation of a joint venture on that day. The six members of the joint venture (called 'the team' in the minutes of this meeting) were these five persons plus the Appellant, who subsequently accepted the minutes of the meeting. Disctronics was not a</p>	<p>Jessup [31], [56]</p> <p>Full Court [6(d) and (e)]</p> <p>Warren [41]-[43], [46], [131], [132]</p>

Item	Date	Event	Reference
		<p>member of the joint venture.</p> <p>Those minutes record, among other matters, that the sourcing of equity funding would be further addressed only after the purchase price of the property and details of the lease arrangements were known. The minutes do not record Disctronics by name as a possible equity provider. Under the item 'Proposed Funding Table' they express the contingency of 'whether or not the equity provider(s) form part of our team'.</p>	<p>Philips JA [12], [16]</p> <p>Minutes of Meeting regarding KLGC dated 20 July 1999, Exhibit 3</p>
20.	By early August 1999	<p>The members of the joint venture were in possession of the two key parameters by reference to which they could plot their future; the price at which KLGC was available for purchase and the annual rental which was likely to be paid by Spotless.</p>	<p>Jessup [34]</p> <p>Full Court [6(f)]</p> <p>Warren [44]-[45], [47]</p> <p>Philips JA [19]</p> <p>Letter dated 29 July 1999, Exhibit AA, p.E751 (SJH-7)</p> <p>Letter dated 21 July 1999, Exhibit AA, p.E696 (SJH-6)</p>
21.	3 August 1999	<p>Edmonds made a new proposal to Quinert (and his other co-venturers) about how the project should be undertaken. Edmonds put two scenarios.</p> <p>The first, described as 'External Equity' provided for acquisition by an arm's length end-purchaser for \$12.22m. The equity required was \$2.585m. A 'day-one profit' of \$1.5m was to be split equally amongst the six joint venturers.</p> <p>The second , described as 'Equity Participation by Each Team Member' was a new proposal with 'the six team members retaining ownership of the facility'. It proposed that the six joint venturers acquire KLGC for \$8.3 million and lease it to Spotless rather than immediately on-selling to an end-purchaser. Under this scenario equity of \$760,000 would be required; however, there would be no day-one profit in consequence of the retention of ownership.</p>	<p>Jessup [35]-[36]</p> <p>Warren [48]</p> <p>Philips JA [20]-[21]</p> <p>Memorandum dated 3 August 1999, Exhibits O, P and Q.</p>
22.	3 August 1999	<p>Donovan and Quinert discussed the new Edmonds proposal and agreed to reject it. Donovan told Quinert to tell Edmonds that Disctronics would take up its "entitlement" given that an equity injection of less than \$800,000 was required.</p> <p>(As seen below, Warren J held that Disctronics had no such "entitlement").</p>	<p>Jessup [37]</p> <p>Warren J [49]</p> <p>Philips JA [22]</p>

Item	Date	Event	Reference
23.	3 August 1999	Quinert caused Disctronics to acquire one ordinary share in Corwen Grange Pty Ltd as a nominee company to acquire the golf course	Jessup [39] Warren [55]
Third phase: rejection of Disctronics as equity provider by Edmonds and Cahill			
24.	4 August 1999	<p>Quinert advised Edmonds in writing on behalf of himself, Donovan and the Appellant, that Disctronics intended to exercise its entitlement to take on the acquisition of KLGC. In that memorandum, Quinert also advised that the transaction could procure a real and substantial profit and that "non-associated consortium members" would receive a return significantly greater than the agreed professional fees.</p> <p>Quinert's memorandum resulted in acrimonious discussions between the two contending sides. Edmonds and Cahill rejected Disctronics' asserted "entitlement" to acquire KLGC.</p> <p>(As seen below, Warren J found inter alia that: (1) Quinert's memorandum was no more than an attempt to re-negotiate with Edmonds and Cahill; (2) Edmonds and Cahill's rejection of Disctronics did not dissolve the joint venture, and was not a breach of obligations owed by them; and (3) the joint venture was terminated by other conduct of Edmonds and Cahill, in particular by their letter of 10 August 1999).</p>	<p>Jessup [38], [40], [71], [76]</p> <p>Full Court [6(g)]</p> <p>Warren [49]-[50], [165]-[166], [183]</p> <p>Philips JA [22]</p> <p>Memorandum dated 4 August 1999, Exhibit R</p>
25.	5 and 6 August 1999	The Appellant, Quinert and Edmonds held various discussions as to the position of Edmonds and Cahill. Edmonds and Cahill rejected Disctronics as equity provider because its imposition would impact the agreed profit share, and Edmonds was concerned that Donovan was allowing Disctronics to take over the transaction.	<p>Jessup [40]</p> <p>Warren [51]-[54], [56]-[59]</p> <p>Philips JA [23]</p>
26.	6 August 1999	The Appellant prepared a draft "fee agreement" to attempt to settle the dispute with Edmonds and Cahill over the attempt to introduce Disctronics as the equity provider. This draft fee agreement stipulated that subject to, among other things, Disctronics or a subsidiary acquiring KLGC for not more than \$8.688 million, Disctronics would remit transaction fees of \$150,000 to Edmonds and Cahill and a fee of \$100,000 to Bucknall.	<p>Jessup [43]</p> <p>Warren [57]</p> <p>Philips JA [23]</p> <p>Fee agreement dated 6 August 1999, Exhibit AA, p.E852 (SJH-10)</p>
27.	10 August 1999	Edmonds rejected the proposed "fee agreement" in writing and denied there was any such agreement. Edmonds stated that the deal had evolved into a joint venture between the six of them, and that the attempts by the Appellant, Donovan and Quinert to relegate him and Cahill (and Bucknall) from profit sharing principals to fee earning consultants in the project meant the joint venture was at an end.	<p>Jessup [44]</p> <p>Warren [59]-[60]</p> <p>Philips JA [24]</p>

Item	Date	Event	Reference
Appropriation of joint venture by Edmonds and Cahill (fourth phase)			
28.	10 August 1999	<p>Cahill informed the existing owner of KLGc that the joint venture was dissolved.</p> <p>Cahill contacted a third party, Michael Buxton (Buxton), and proposed that they, along with Edmonds, should participate in a competing joint venture to acquire KLGc.</p> <p>(As seen below, Warren J later found that the joint venture was dissolved on this date when Edmonds and Cahill took the KLGc opportunity for this new venture with Buxton, and that by that conduct, by not disclosing their intentions and by use of confidential information obtained during the life of the joint venture, Edmonds and Cahill were liable to the other four joint venturers for breach of duty).</p>	<p>Jessup [48], [58]</p> <p>Full Court [6(h)]</p> <p>Warren [64]-[67], [69]-[76], [165]-[166], [183]</p>
29.	11 August 1999	<p>Following receipt of notification that the joint venture had been "dissolved", the vendor of KLGc advised Cahill "that he would be delighted if Cahill considered the acquisition in his own right or with another party."</p> <p>Also on this date, Quinert wrote to Cahill requesting clarification of his position.</p>	<p>Jessup [48]</p> <p>Philips JA [25]</p> <p>Memorandum of the Appellant to Quinert dated 12 August 1999, Exhibit 34</p> <p>Letter dated 11 August 1999, Exhibit AA, p.882 (SJH-11)</p>
30.	12 August 1999	<p>The Appellant wrote to Edmonds rejecting Edmonds' letter of 10 August 1999. In this letter the Appellant accepted that a joint venture had been formed, and stated that the joint venturers had agreed that if equity of less than \$1.5 million was required to acquire KLGc then Disctronics could elect to acquire it, subject to satisfactory arrangements to reward Edmonds, Cahill and Bucknall for their endeavours.</p> <p>On the same day Cahill wrote back to Quinert stating that his position in respect of the KLGc project accorded with the statements in Edmonds' letter of 10 August 1999.</p> <p>Also on the same day Quinert wrote to Edmonds stating that Disctronics was pursuing its "right" to acquire KLGc.</p>	<p>Jessup [47]</p> <p>Warren [61]-[62]</p> <p>Philips JA [25]-[27]</p> <p>Letter dated 12 August 1999, Exhibit T</p> <p>Letter dated 12 August 1999, Exhibit AA, p.E916 (SJH-12)</p>
31.	13 August 1999	<p>Edmonds wrote to the Appellant refuting his claim in his letter of 12 August 1999 that there was an agreement that Disctronics could become purchaser.</p>	<p>Jessup [47]</p> <p>Warren [63]</p>
32.	19 August 1999	<p>Quinert made an offer on behalf of Disctronics to acquire KLGc from its then owner for \$8.688m.</p>	<p>Jessup [49]</p>

Item	Date	Event	Reference
		The existing owner did not reply to this offer. Quinert also wrote to Cahill regarding the dissolution of the joint venture.	Warren [77]-[79] Philips JA [28]
33.	27 August 1999	A company associated with Buxton (Emanbee Pty Ltd) made an offer to acquire KLGK for \$8.7m.	Jessup [50] Warren [69], [82]
34.	1 September 1999	Quinert wrote to Cahill on Disctronics' letterhead requesting, among other things, his withdrawal as a competitor, and threatened litigation. The existing owner of KLGK informed Bucknall that his company had resolved to accept the offer from Emanbee Pty Ltd.	Jessup [50] Warren J [83], [84]
35.	27 September 1999	Disctronics' annual report for the year ended 30 June 1999 was signed. It makes no reference to the KLGK project.	Annual report for Disctronics for the year ended 30 June 1999, Exhibit 5
36.	12 October 1999	Kingston Links Country Club Pty Ltd (KLCC) was registered, with Buxton, Edmonds and Cahill as directors.	Jessup [50] Warren [88]
37.	29 October 1999	KLCC executed a contract of sale with the owner of the land upon which the KLGK stood.	Jessup [50] Warren [88]
38.	8 December 1999	KLGK was leased to Spotless on 8 December 1999.	Jessup [50] Warren [88]
39.	14 December 1999	The transfer to KLCC of the title to the KLGK land was registered.	Jessup [50] Full Court [6(h)] Warren [88]
40.	5 October 2000	Disctronics' annual report for the year ended 30 June 2000 was signed. It makes no reference to the KLGK project.	Annual report of Disctronics for the year ended 30 June 2000, Exhibit 6.
41.	22 December 2000	Disctronics lodged a caveat over the land upon with KLGK stood, asserting the existence of a constructive trust in its favour.	Jessup [51] Full Court [6(i)] Warren [88] Philips JA [7]
42.	8 June 2001	KLCC commenced a proceeding against Disctronics to remove the caveat (the caveat proceeding).	Jessup [51] Full Court [6(i)]

Item	Date	Event	Reference
			Warren [91] Philips JA [8]
43.	15 June 2001	<p>Within a week the proceeding before Warren J (described below as 'the principal proceeding') was to commence.</p> <p>Donovan, the Appellant and Quinert (described as 'the directors') entered into an agreement (the Litigation Agreement) with Disctronics.</p> <p>By it the directors and each of them agreed, inter alia, to: '<i>...assign absolutely into and to the sole use of [Disctronics], any award of damages (whether our [sic] revenue or capital account), costs or interest made in their favour as a consequence of their participation in the joint venture or arising out of the proceedings and the ultimate outcome thereof... (clause 4).</i>'</p> <p>By the Litigation Agreement, Disctronics agreed inter alia:</p> <p>(1) to pay all legal fees and disbursements associated with the prosecution of proceedings in respect of the KLGc project (clause 1); and</p> <p>(2) indemnify the directors against payment of any orders for costs, howsoever arising, in favour of Edmonds, Cahill or others arising out of the prosecution of the proceedings or any damages they are found liable to pay to Edmonds, Cahill or others (clause 3).</p> <p>Separately, the Appellant, Donovan and Quinert agreed with Bucknall, that he would not be liable for legal fees or disbursements associated with prosecution of the proceeding or in relation to any damages or costs orders of any description in favour of Edmonds, Cahill or others (the Bucknall indemnity).</p> <p>By the Litigation Agreement, Disctronics also agreed inter alia to indemnify the directors for their obligations under the Bucknall indemnity (clause 3).</p>	Jessup [52], [98-99] Full Court [6(j)] Exhibit S
44.	26 June 2001	Disctronics, Donovan, Quinert, Bucknall and the Appellant (the plaintiffs) commenced a proceeding in the Supreme Court of Victoria (the principal proceeding), claiming primarily a declaration of a constructive trust over KLGc in favour of Disctronics, arising from a breach of fiduciary duties by Edmonds and Cahill.	Jessup [51], [60] Warren [91] Philips JA [8] Amended statement of claim dated 21 March 2002, Exhibit K (ADW-3)

Item	Date	Event	Reference
			Further and better particulars of statement of claim dated 25 July 2001, Exhibit 33
45.	16 November 2001	KLCC entered into a contract for the sale of KLGC to a third party, Gauntlet Services Pty Ltd. The sale ultimately did not proceed to settlement.	Jessup [53] Warren [92]
46.	Mid 2002	KLGC was sold to another purchaser.	Jessup [53] Warren [93]
47.	23 October 2002	Warren J published Reasons for Judgment. Her Honour refused to declare a constructive trust, but awarded equitable compensation to the individual plaintiffs (but not Disctronics). Her Honour found, among other things, that: (a) A joint venture to acquire KLGC was formed on 20 July 1999 between the Appellant, Donovan, Quinert, Bucknall, Cahill and Edmonds; (b) Disctronics was not a member of the joint venture and therefore not entitled to equitable compensation, and KLGC was not held on constructive trust for Disctronics or for the joint venturers; (c) There was no agreement between Disctronics and the joint venturers or between the joint venturers themselves that Disctronics could, if it so chose, become the equity provider and purchaser of KLGC.	Jessup [54], [56], [59], [60] Warren [131]-[134], [165]-[166], [180], [183], [215]-[216]
48.	3 December 2002	Warren J made orders in relation to assessment of equitable compensation. The award was calculated globally as follows for the four individual plaintiffs: <i>four-sixths of the value of the golf course and, after the ascertainment of profits, an amount equivalent to four-sixths of the profit derived from the golf course. This component of the compensation is not the taking of an account in the strict sense, rather, an assessment of the opportunity that the plaintiffs lost</i>	Jessup [60]-[61] Warren [216]
49.	Late 2002	Appeals and cross appeals were filed in the principal proceeding and the caveat proceeding.	Jessup [64] Phillips JA [9]
50.	7 January 2004	Disctronics publishes its annual report for financial year ended 30 June 2003, signed by the Appellant as chairman, noting the assignment to Disctronics of the plaintiff directors' entitlement to damages, "subject to satisfactory resolution of appurtenant taxation issues".	Jessup [70], [104]
51.	22 February 2005	The Court of Appeal dismissed Edmonds' and Cahill's appeal in the principal proceeding, and allowed Disctronics' appeal in the caveat proceeding.	Jessup [66], [68] Phillips JA [94]-[97],

Item	Date	Event	Reference
		The appeal in the caveat proceeding did not overturn Warren J's decision that Disctronics had no caveatable interest in respect of KLGC, but rather found that Disctronics was not required under s 118 of the <i>Transfer of Land Act 1958 (Vic)</i> to pay compensation to KLCC in respect of the lodging of the caveat because, at the time of lodgement, it had 'reasonable cause' (within the meaning of that provision) to do so, albeit no enforceable right.	[101]-[102]
52.	30 June 2005 income year	<p>The compensation awarded by the Supreme Court was paid during the 30 June 2005 income year.</p> <p>At the start of the 30 June 2005 income year, Disctronics had significant accumulated tax and accounting losses.</p>	<p>Jessup [2], [9]</p> <p>Annual Report for the 30 June 2005 year for Disctronics (renamed Hedron Investments Ltd), Exhibit 11</p>

Dated 17 January 2014