HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

Matter No S309/2009

JOHN ALEXANDER'S CLUBS PTY LIMITED & ANOR APPELLANTS

AND

WHITE CITY TENNIS CLUB LIMITED RESPONDENT

Matter No S308/2009

WALKER CORPORATION PTY LIMITED APPELLANT

AND

WHITE CITY TENNIS CLUB LIMITED & ORS RESPONDENTS

John Alexander's Clubs Pty Limited v White City Tennis Club Limited
Walker Corporation Pty Limited v White City Tennis Club Limited
[2010] HCA 19
26 May 2010
S309/2009 & S308/2009

ORDER

Matter No S309/2009

1. *White City Tennis Club Ltd ("White City") have leave to file out of time its Second Notice of Contention.*

2. *The appeal be allowed with costs.*

3. *The following orders:*

   (a) *the orders of Tobias JA made on 6 April 2009;*

   (b) *Order 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales ("the Court of Appeal") made on 5 May 2009;*

(c) the orders of the Court of Appeal made on 3 June 2009, as amended on 23 July 2009;

(d) Order 7 of the orders of the Court of Appeal made on 10 June 2009; and

(e) Orders 3 and 6 of the orders of the Court of Appeal made on 23 July 2009;

be set aside, and in lieu thereof:

(f) the appeal by White City to the Court of Appeal be dismissed with costs; and

(g) White City pay the costs of John Alexander's Clubs Pty Ltd and Poplar Holdings Pty Ltd of White City's Notice of Motion dated 5 June 2009.

Matter No S308/2009

1. Set aside so much of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 23 July 2009 as ordered Walker Corporation Pty Ltd ("Walker Corporation") to pay the costs of White City Tennis Club Ltd ("White City") of the Amended Notice of Motion of Walker Corporation (including the costs of the Notice of Motion which the Amended Notice of Motion superseded) and in lieu thereof order that:

White City pay Walker Corporation's costs of:

(a) Walker Corporation's appearance before Macfarlan JA on 10 June 2009; and

(b) Walker Corporation's costs of its Notice of Motion dated 11 June 2009 and its Amended Notice of Motion dated 22 June 2009.

2. White City pay Walker Corporation's costs of the appeal to this Court.

3. The appeal otherwise be dismissed.

On appeal from the Supreme Court of New South Wales

Representation

J M Ireland QC with J S Cooke for the appellants in S309/2009 and the second and third respondents in S308/2009 (instructed by Colin Biggers & Paisley Solicitors)

I M Jackman SC and J K Taylor for the appellant in S308/2009 (instructed by Mallesons Stephen Jaques)

N C Hutley SC with J R Clarke for the respondent in S309/2009 and the first respondent in S308/2009 (instructed by Kemp Strang Lawyers)

CATCHWORDS

John Alexander's Clubs Pty Limited v White City Tennis Club Limited
Walker Corporation Pty Limited v White City Tennis Club Limited

Equity – Fiduciary obligations – Where commercial parties entered into series of agreements – Relevance of contractual terms to existence of fiduciary relationship – Where memorandum of understanding required grantee of option to purchase land to exercise option in favour of another – Where later agreement superseded memorandum of understanding and contained no such requirement – Whether fiduciary obligations arose between parties.

Trusts – Constructive trust – Whether equitable fraud, unconscionable conduct or breach of fiduciary duty by grantee of option – Whether order to convey option land appropriate – Relevance of third party interests.

Procedure – Joinder of parties – Where constructive trust declared over land encumbered by equitable mortgage – Where party seeking constructive trust had notice of mortgage – Where mortgagee not a party – Whether mortgagee necessary party to action – Whether mortgagee entitled to be joined – Whether mortgagee entitled to have orders set aside – Whether mortgagee estopped.

Words and phrases – "fiduciary", "injurious to third parties", "necessary party".

Uniform Civil Procedure Rules 2005 (NSW), r 36.16.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. These appeals relate to a tennis club which had been conducting its activities on land which it did not own. It attempted to create a regime by which some members could participate in the activities of a new club on the same land after it was sold by its owner. At trial, the tennis club was denied any entitlement to the land. An appeal was allowed, and the club was declared to be the beneficiary of a constructive trust over the land. Those orders should be overturned and the orders of the trial judge restored.

2 The appeals are not without complexity. The background and the course of proceedings must be explained in some detail before the reasons for restoring the trial judge's orders are stated.

Appeal S309 of 2009: the JACS appeal

The background

3 *The origins of the appeals.* The origins of these appeals lie in the desire of New South Wales Tennis Association Ltd ("Tennis NSW") to sell some land it owned at 30 Alma Street, Paddington, a suburb of Sydney ("the White City Land"). As at 28 February 2005 the White City Land was about 4.448 hectares in area. On it stood tennis courts, centre court stands and a car park. The appeals concern a particular part of the White City Land known as "the Option Land". The Option Land, like the White City Land as a whole, is Torrens system land.

4 For many years, the White City Land had been best known as the site of tennis competitions in which leading international players participated. However, that activity moved to a new site at Homebush once the construction of facilities there for the 2000 Olympic Games was complete. It was that event which stimulated the desire of Tennis NSW to sell the White City Land. That desire had implications for a tennis club, White City Tennis Club Ltd ("the Club"), for another tennis club, Sydney Maccabi Tennis Club Ltd ("Maccabi"), for the Trustees of the Sydney Grammar School ("SGS") and for John Alexander's Clubs Pty Ltd ("JACS").

5 *The Club.* The Club is the respondent in one of the appeals ("the JACS appeal") and the first respondent in the other ("the Walker Corporation appeal"). From 1948 the Club had conducted the activities of a sporting club, particularly tennis activities, on part of the White City Land pursuant to a series of leases and licences. As at 28 February 2005, the relevant lease ("the Lease") ran until 2020. The leased area was the upper floor and part of the ground floor of the Northern Stand Building. That area had since 1970 been used as the Club's clubhouse.

Clause 18 of the Lease gave the Lessor, Tennis NSW, the right to terminate it on six months' notice if Tennis NSW required possession for the purposes of rebuilding, reconstructing or demolishing the Northern Stand Building. Clause 18 also provided that, if a further building were constructed and the Lessor intended it to be used as a social club, the Club would have a right of first refusal of a lease. As at 28 February 2005, the relevant licence permitted the Club to use certain tennis courts on the White City Land. The licence was granted on 29 June 2004 for one year from 1 July 2004 ("the First Licence"). The desire of Tennis NSW to sell the White City Land imperilled the future of the Club's activities at that site.

6 *Maccabi.* Although Maccabi's role in events began a little later than those of Tennis NSW, SGS, the Club and JACS, its interest lay in the fact that it had been conducting a tennis club on part of the White City Land, and it wished to go on doing so even if Tennis NSW sold the White City Land.

7 *SGS.* One of the preparatory schools operated by SGS and its playing fields are adjacent to the White City Land. The decision of Tennis NSW to sell the White City Land stimulated in SGS an interest in acquiring some of it for use as playing fields.

8 *JACS.* JACS is the first appellant in the JACS appeal and the second respondent in the Walker Corporation appeal. JACS was and is a company engaged in the business of developing sites for use by sporting clubs. Tennis NSW's desire to sell the White City Land created an opportunity for JACS to assist the Club in providing a place at which its members, or at least some of them, could continue to participate in tennis and other recreational activities.

9 *Pre 28 February 2005 dealings.* Lengthy negotiations between Tennis NSW, the Club, JACS and SGS took place in 2004. By 9 December 2004, Tennis NSW had resolved to sell by tender not just the Option Land but the whole of the White City Land. The closing date for tenders was eventually fixed as 15 April 2005.

10 *The Memorandum of Understanding.* On 28 February 2005 JACS and the Club entered a Memorandum of Understanding ("the MOU").

11 The MOU contemplated the creation of a club ("the New Club") for the conduct of tennis and other recreational activities on part of the White City Land. Clause 1.7 set out part of the background:

> "JACS has been negotiating with [Tennis NSW] for the purchase [of], or for the grant of an option to purchase, the Land by an entity to be established as hereinafter described and to be known as 'White City Holdings Limited' ('WCH'). [Tennis NSW] have advised JACS they now propose to offer the land for sale by tender ('the tender')."

The reference to "the Land" was a reference to "all or part [of] lot 3 in Deposited Plan 234605 in the Parish of Alexandria, County of Cumberland, and being the whole or part of the land in Folio Identifier 9/11680." Lot 3 comprised the whole of the White City Land. WCH was to be incorporated by JACS: cl 5.2(d). The shareholders of WCH were in due course to comprise "Foundation Members" – existing members of the Club who wished to become members of WCH – and members of the public who subscribed for shares: cl 5.2(h)-(l).

12 Despite the background described in cl 1.7, cl 1.8 made it clear that it was a third party, not JACS or WCH, which was to purchase the White City Land. Clause 1.8 provided:

> "JACS is negotiating with a third party ('the third party') with a view to entering into an agreement with the third party to include terms whereby:
>
> 1.8.1 the third party and JACS prepare and lodge the tender for the purchase of the Land which will provide for the Land to be purchased by the third party;
>
> 1.8.2 the third party grants to JACS on behalf of WCH an option to purchase part of the Land ('the option from the third party') within a period ('the option period')."

The "third party" in both cl 1.8 and cl 3.7 was SGS.

13 By cl 3.3 the Club agreed that it would not seek to buy the White City Land or any part of it until 31 July 2006.

14 By cl 3.7, JACS promised to seek to obtain an option to purchase the Land or part of it from Tennis NSW or SGS. If it succeeded, it promised by cl 3.7.1 to exercise the option on behalf of WCH upon WCH simultaneously granting to John Alexander's White City Club Pty Limited ("JAWCC"), which like WCH was a company to be formed by JACS, a 99 year lease of the relevant land and entering into an operating agreement. By cl 3.7.2 JACS promised to seek to

procure a further option exercisable by the Club if JACS were unable to exercise, or failed to exercise, the cl 3.7.1 option[1].

15 As the Club agreed in argument, the funding of the exercise by JACS on behalf of WCH of the option referred to in cl 3.7.1 was to come from the members of WCH.

16 The parties to the JACS appeal agreed that not all parts of the MOU were contractually binding. They differed about which parts were not binding, and although they agreed that cl 3.7 was binding, they differed about its construction.

17 *From the MOU to the Second White City Agreement.* The last day for lodging tenders to purchase the White City Land was 15 April 2005. On that day SGS lodged a tender. On the same day, SGS, Maccabi, JACS and the Club entered into the "First White City Agreement".

18 On 10 May 2005, four events occurred. First, Tennis NSW and SGS entered into a contract for sale of the White City Land. Secondly, an agreement ("the Second White City Agreement") was executed by the same four parties as executed the First White City Agreement. Thirdly, Tennis NSW, SGS and the Club entered into a Novation Deed of the First Licence from Tennis NSW to SGS. Clause 2 of the Deed provided that the novation was not to take effect until the completion of the contract of sale of the White City Land from Tennis NSW to SGS dated 10 May 2005. Fourthly, Tennis NSW and the Club entered into a Deed of Licence for a period of one year commencing on 1 July 2005 permitting the Club to use the tennis courts on the White City Land in return for a licence fee ("the Second Licence"). Clause 13 of the Second Licence provided that if Tennis NSW sold the White City Land to a third party, the Club was required to enter into a novation deed substantially in the form of the Novation Deed of the First Licence between Tennis NSW, SGS and the Club.

19 *The completion of the Tennis NSW-SGS contract and the Third White City Agreement.* There was a transfer of the White City Land from Tennis NSW to SGS on 30 June 2005. Part of the White City Land was immediately onsold by SGS to Maccabi ("the Maccabi Land"). Thereafter SGS and Maccabi owned the White City Land as tenants-in-common.

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1 Clause 3.7 is quoted, and its key expressions are explained, below at [47].

20 On 29 June 2005, the day before SGS and Maccabi acquired their interests in the White City Land, SGS, Maccabi, JACS and the Club entered into a further agreement ("the Third White City Agreement").

21 Clause 8 of the Third White City Agreement was headed "Option to JACS or its associated nominated entity (together referred to as 'JACS' in this section)" and provided:

> "8 Subject to Settlement, SGS and Maccabi ('Grantors') grant the following rights, referred to as the 'Option':
>
> a. to JACS an option to acquire the Option Land for the Option Amount (as defined below) payable solely by JACS, exercisable by JACS giving written notice to the Grantors and paying the Option Amount at any time from completion of the purchase of the Land until 30 June 2007, but
>
> b. if JACS does not exercise the Option within this period, the Grantors grant [the Club] an Option from 1 July to 30 September 2007, exercisable by [the Club] giving written notice to the Grantors and paying the Option Amount before 30 September 2007."

The "Option Amount" was defined by cl 9 as being $6.33m, subject to payment of additional amounts up to $400,000. It is notable that, unlike cl 3.7.1 of the MOU, cl 8 did not compel JACS to exercise the option "on behalf of WCH", and did not refer to any grant to JAWCC of a 99 year lease or to entry into an operating agreement.

22 Clauses 16 to 20 provided for the grant of a lease by SGS and Maccabi to the Club. The land leased comprised parts of the White City Land (including parts which the Club had not previously been entitled to occupy). The period was 1 July 2005 to 30 September 2007. This lease was to terminate earlier if JACS or the Club exercised the cl 8 option. Clause 21(a) provided that the Club "surrenders any rights it has, or would but for this agreement have had, in relation to the [White City] Land under the arrangements entered into between [Tennis NSW] and [the Club]". The combined effect of cll 16 to 20 was that the Club gained new rights over some areas of the White City Land, but also gave up its right under the Lease to occupy parts of the Northern Stand Building as a clubhouse until 2020.

23 Clause 42 of the Third White City Agreement provided:

> "[The Club] and JACS agree that their MOU dated 28 February 2005 … continue[s] in accordance with [its] terms and each agrees to carry out its obligations under this agreement in accordance with [the MOU]."

24 Clause 43 provided in part:

> "To the extent of any inconsistency between this agreement and any other agreement between any of the parties, this agreement will prevail, unless specifically stated."

25 The First White City Agreement dated 15 April 2005 and the Second White City Agreement dated 10 May 2005 did not contain provisions equivalent to cll 42 and 43 of the Third White City Agreement. Further, the First White City Agreement and the Second White City Agreement contained different terms in relation to the lease of the relevant parts of the White City Land pending any exercise of the options. Under those two Agreements, JACS was to be the tenant under a two year lease. But under the Third White City Agreement, the Club was to enjoy the leasehold rights described above.

26 On 30 June 2005, SGS, Maccabi and the Club entered into a Deed novating the First Licence and the Second Licence to reflect the fact that SGS and Maccabi had become owners of the White City Land. On the same day, SGS, Maccabi and the Club entered into a Deed of Variation of the Lease and First and Second Licences pursuant to which the Club leased part of the Northern Stand Building and was permitted to use the tennis courts on the White City Land. The new rights which the Third White City Agreement had assured to the Club were confirmed in that Deed.

27 *Purported termination of MOU.* Disputes arose within the membership of the Club, and also between the Club and JACS. On 12 April 2006, JACS served on the Club a Notice of Termination of the MOU, on the supposed ground that the Club had evinced an intention not to be bound by the MOU and had repudiated it.

28 *The exercise of the option over the Option Land by Poplar.* JACS nominated Poplar Holdings Pty Ltd ("Poplar") as its associated nominated entity to exercise the option granted under cl 8(a) of the Third White City Agreement. Poplar is the second appellant in the JACS appeal and the third respondent in the Walker Corporation appeal. Poplar exercised that option on 27 June 2007 at a cost of $6.73m pursuant to cll 8 and 9 of the Third White City Agreement.

Poplar later became registered as proprietor of the Option Land. Poplar obtained the funds necessary to exercise the option from a loan granted by Walker Corporation Pty Ltd ("Walker Corporation"). Walker Corporation is the appellant in the Walker Corporation appeal. The loan was secured by, amongst other things, an unregistered mortgage over the Option Land, and a charge over Poplar's assets, which included the Option Land.

The Club's claims at trial

29 The nomination of Poplar by JACS to exercise the option on 27 June 2007 did not come as a surprise to the Club: on the same day it commenced proceedings in the Equity Division of the Supreme Court of New South Wales. The contentions of the Club which are still live are that the conduct of JACS was a breach of a fiduciary duty owed to the Club to hold the Option Land, if it exercised the cl 8(a) option, on behalf of the Club; or an equitable fraud; or unconscionable or unconscientious conduct[2]. The Club alleged that this breach or fraud or conduct deprived the Club of its opportunity to exercise the cl 8(b) option and caused it to lose an opportunity to acquire the Option Land. It claimed equitable compensation or an account of profits in its Further Amended Statement of Claim, but the only relief pressed in the Court of Appeal of the Supreme Court of New South Wales and in this Court was a claim for a constructive trust over the Option Land on terms that it pay Poplar its costs of acquiring the land from SGS and Maccabi, namely $6.73m.

The trial judge

30 The trial judge (Young CJ in Eq) dismissed the proceedings[3]. The principal grounds on which he did so and which are still in issue were as follows. He found that there was no fiduciary duty: the Club was not afflicted by any special vulnerability, it had not relied on JACS to protect its interests, those running it were experienced in business and advised by independent solicitors, and it had equality of bargaining power with JACS. He found that the Club had indicated that it was not prepared to perform the MOU, and that JACS had

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2 On the use of these expressions, see *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [11]-[14], 72-73 [42]-[43] and 110 [165]; [2003] HCA 18.

3 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225.

validly terminated the MOU on 12 April 2006. He found that, even if fiduciary duties had arisen out of the MOU, its valid termination terminated those duties. He found that there was no equitable fraud or unconscionable conduct: he distinguished the authorities on which the Club relied, and held that after the MOU had been terminated on 12 April 2006, JACS was at liberty to proceed as it had. And he noted that the Club had failed to do equity in not offering to compensate Poplar for more than the exercise price of $6.73m.

The Court of Appeal's first judgment

31 The Court of Appeal (Macfarlan JA, Giles and Basten JJA concurring) allowed an appeal by the Club[4]. It delivered two judgments. In the first, delivered on 3 June 2009, the Court of Appeal declared that Poplar held its interest in the Option Land on a constructive trust for the Club, and ordered Poplar to transfer the Option Land to the Club upon the Club paying $6.73m. The Court of Appeal found that it would be unconscionable for Poplar to deny the Club any entitlement to an interest in the Option Land. This conclusion turned on three points. The first point was that "the MOU impliedly prohibited JACS exercising the option on its own behalf."[5] The second point was that if JACS (rather than Poplar) had acquired the Option Land, "it would have done so in circumstances where the option had been acquired by JACS by reason of the [Club's] involvement in the White City [Agreements] and the [Club's] undertaking, given by those agreements, to surrender its existing rights to a long term lease over part of the [Club] House and licences to use the tennis courts."[6] The third point was that Poplar could not be in a better position than JACS, that a "personal equity" was available against Poplar to defeat its claim to indefeasible title by reason of its registration, and that s 42 of the *Real Property Act* 1900 (NSW) ("the RP Act") did not entitle it to hold the land free from the Club's unregistered interest under a constructive trust[7]. That third point is not now in issue.

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4 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86.

5 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 99 [63].

6 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 100 [63].

7 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 108 [102].

32 Although the Court of Appeal did not see it as necessary for its conclusion that JACS had behaved unconscionably to decide whether there was a fiduciary relationship, it did hold that there was such a relationship[8].

33 The Court of Appeal criticised the method by which the trial judge concluded that the MOU had been validly terminated. But it did not see that issue as crucial, and it did not overturn the trial judge's conclusion[9].

34 Finally, the Court of Appeal declined to remit to the Equity Division the question whether a condition should be imposed on the constructive trust that the Club pay a just allowance for the value of the skill, expertise and expenses of Poplar[10].

The Court of Appeal's second judgment

35 On 10 June 2009, Macfarlan JA extended until further order an injunction preventing the Registrar-General of New South Wales from registering an interest over Poplar's interest in the Option Land. That injunction was originally granted by Tobias JA on 6 April 2009 and extended on 5 May 2009 to protect the Club's position pending payment by the Club of the $6.73m and the transfer to it of the Option Land. On 10 June 2009, counsel for Walker Corporation foreshadowed the filing of a Notice of Motion seeking orders that Walker Corporation be joined as third respondent to the appeal and that arrangements be made to protect Walker Corporation's entitlement as holder of an unregistered mortgage over the Option Land granted on 26 June 2007. Walker Corporation then filed a Notice of Motion on 11 June 2009. An Amended Notice of Motion filed on 22 June 2009 sought orders that Walker Corporation be joined as third respondent in the appeal; that a condition that the Club give security for its undertaking as to damages in relation to the injunction granted on 6 April 2009 be imposed; and that the Court of Appeal's declaration of a constructive trust and

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8 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 104-106 [83]-[91].

9 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 108-109 [103]-[109].

10 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 110-111 [112]-[114].

its order that the Option Land be conveyed to the Club be set aside. Alternatively, it sought, in effect, a declaration that the constructive trust was without prejudice to Walker Corporation's interest being declared in separate proceedings to have priority. The matter was dealt with on the papers. The Amended Notice of Motion was dismissed on 23 July 2009[11].

The nature of the Club's claims

36 A striking feature of the Club's position is that it is not now suing in contract for breach of any express or implied term in the MOU, the Third White City Agreement or any other contract. It did originally plead a breach of the Third White City Agreement, but did not pursue the allegation at trial. Its claims are now only non-contractual.

37 Another striking feature is that the Club's claims have an all-or-nothing character. Despite its knowledge that JACS (or a nominee) was going to acquire the Option Land, as Poplar did on 27 June 2007 – for it threatened the present proceedings well before the option was exercised – it did not try to force JACS to return to what it regarded as a lawful course by seeking a negative interlocutory injunction. The Club wants the whole of the Option Land, subject only to the condition of paying the price Poplar paid: it rejects any attempt at finding some route to a just apportionment of the gains made and losses suffered by the parties in their dealings. Thus it is not now claiming equitable compensation for what it may have lost. It is not now claiming an account of profits. And it is opposing any recognition of a claim by JACS or Poplar for just allowances. Although the Court of Appeal refused to remit this claim to the Equity Division for various procedural and substantive reasons, the trial judge said that "Poplar has almost certainly suffered far more detriment than merely payment of the option fee including its own conveyancing costs"[12], and JACS must have suffered detriment also. In relation to the one condition the Club does submit to – payment of $6.73m – it makes no allowance for Poplar's losses in the period between 27 June 2007, when Poplar paid SGS and Maccabi the $6.73m, and the future date when the Club will pay that sum to Poplar: it is not offering to pay interest or make any other arrangement to compensate Poplar for the declining value of money.

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11 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112.

12 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [112].

38 Further, the constructive trust which the Club sought and which the Court of Appeal declared to exist is in substance an order that the Club replace Poplar on the Register. That order was made on 3 June 2009 without consideration of what impact it might have on other persons interested, such as Walker Corporation, which claims to have an unregistered mortgage of which the Club had notice.

39 Nor is the Club completely faithful to the primary document on which it relies as the source of its rights – the MOU. Although cl 3.7.1 of the MOU contemplated that when JACS exercised the option on behalf of WCH there would be a 99 year lease in favour of JAWCC and entry into an operating agreement, the Club does not accept that any equivalent regime should apply if it succeeds in defending its claim for a constructive trust.

40 Further, parts of the Club's argument tended to suggest that JACS had, to its own purely selfish advantage, disrupted a plan to give the Club's members rights to play tennis on the White City Land of a kind they had long enjoyed. That suggestion overlooks the following facts. Brian Carpenter, a former President of the Club, formed the White City Lawn Tennis Club ("WCLTC") in March 2008. On 1 April 2008, Poplar signed a licence agreement with WCLTC giving its members rights to use tennis courts and a clubhouse area on the Option Land. That licence agreement also provided that Poplar would take reasonable steps to provide the first 400 members of WCLTC with an option either to take up membership of the new facilities to be constructed by Poplar on the Option Land or to take up shares in the entity which will issue the prospectus to raise funds for the redevelopment of the site at a discount of 40 percent off the offer price for such shares. Following the execution of that licence, in May 2008 WCLTC offered all members of the Club membership in WCLTC. As at 23 October 2008, WCLTC had approximately 104 members of which approximately 90 were also at that time, or had previously been, members of the Club. JACS submitted that this evidence showed that it had not behaved fraudulently, unconscionably, or in breach of fiduciary duty. These matters of fact, on which the submission rests, were specifically accepted by the Club. The submission itself was not answered by the Club.

41 The position established by the Court of Appeal reflects success in a very ambitious claim on the part of the Club. So ambitious a claim calls for close scrutiny.

The Court of Appeal's reasoning: the joint venture question

42 It is convenient to begin the scrutiny by dealing with a point which, while not decisive, raises a doubt about the Court of Appeal's reasoning. The Court of Appeal's reasons for judgment commence with three paragraphs summarising the nature of the case and the conclusion reached. In those paragraphs the Court of Appeal described the relationship between JACS and the Club as that of joint venturers. It did so seven times: three times it called them "joint venturers", three times it called the MOU a "joint venture agreement", and once it referred to "the joint venture"[13]. Later, in a key part of its reasons, the Court of Appeal said that JACS acquired the option to buy the Option Land "in the course of giving effect to the MOU, with the assistance of the [Club]." It continued[14]:

> "Having had that assistance in acquiring the opportunity to purchase the property upon the basis that the property would be used for the purposes of the *joint venture* and, failing that, made available to the [Club], it would have been unconscionable for JACS to claim the property for its own use and benefit, whether or not JACS had terminated the MOU." (emphasis added)

Yet cl 7.1 of the MOU provided: "Nothing in this MOU shall be taken to constitute the Parties as partners or as joint venturers *for any purpose whatsoever*." Despite the words to which emphasis has been added, the Court of Appeal said: "notwithstanding [cl 7.1], the arrangements clearly constituted some type of 'joint venture' of the parties, if that term is used in its broadest sense"[15]. The Court of Appeal also pointed out that a proposal by JACS more than a year before the MOU "used the term 'joint venture'" in that it contemplated that the parties would enter into a "Joint Venture agreement"[16]. The Court of

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13 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 88 [4]-[6].

14 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 102-103 [75].

15 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 91 [26].

16 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 89 [11] and 92 [26].

Appeal continued: "What followed in the dealings of the parties did not render that description [that is, 'joint venture'] no longer applicable."[17]

43 It may well have been loose language of the kind to which the Court of Appeal referred, made in a selling document more than a year before the MOU, which stimulated the parties into clarifying the position by agreeing to include cl 7.1 in the MOU. The same is true of the statement in another document of that kind around that time that JACS would "partner with" the Club.

44 The expression "joint venture" is no doubt a vague one, capable of a range of applications, but it is often used to bolster a conclusion that a fiduciary relationship exists. The Court of Appeal, however, correctly said[18]:

> "Describing the arrangements as a 'joint venture' does not however have any particular legal consequences. The rights and obligations of the parties remain to be determined by examination of the detail of what they have agreed and done."

This makes it difficult to understand why references to "joint venture" were so frequent in the Court of Appeal's statement of the nature of the case, in the statement of its conclusion, and in a key part of its substantive reasoning. That is particularly so since the Club at the trial disavowed the existence of any joint venture.

The Court of Appeal's reasoning: the construction of cl 3.7 and the Third White City Agreement

45 There were two critical elements in the Court of Appeal's reasoning. The first rested on a construction of cl 3.7.1 of the MOU to the effect that if JACS obtained and exercised an option over the Option Land, it would do so only on

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17 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 92 [26].

18 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 92 [27]. See also the reasons of Blanchard J in *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 3 NZLR 169 at 187 [31] and Edelman, "When Do Fiduciary Duties Arise?", (2010) 126 *Law Quarterly Review* 302 at 310, n 64.

behalf of WCH, not on its own behalf[19]. The second was that JACS only obtained the option under cl 8(a) of the Third White City Agreement by reason of the Club's participation in that Agreement, which required the Club to agree to surrender its rights over the Option Land to make the grant of the option possible.

46 It is desirable to deal now with the construction point. At the outset it must be noted that the Club rested, and continues to rest, its case on an arrangement or understanding to be derived only from written agreements – not on conversations or understandings outside them. That case depends on an analysis of the MOU and the Third White City Agreement in particular.

47 Clause 3.7 of the MOU provided:

> "JACS agrees that it will seek to obtain an option to purchase the Land or part of it from [Tennis NSW] or the third party and in the event it obtains the option from [Tennis NSW] or the third party referred to in Clause 1.8 herein or any right to purchase the Land or any part of it then:
>
> 3.7.1 in the event JACS exercises the option from [Tennis NSW] or the third party that it will exercise the option on behalf of WCH, upon WCH simultaneously granting to JAWCC a 99 year lease of the land [and] entering into the operating agreement referred to in clause 6.1(e) herein;
>
> 3.7.2 JACS will seek to procure in favour of [the Club] a further option to purchase the Land or part of it exercisable by [the Club] within 90 days of expiry of the Option Period in the event JACS is unable to or fails to exercise the option from [Tennis NSW] or the third party in accordance with its terms[;]
>
> 3.7.3 in the event [the Club] is unable to procure the further option referred to in Clause 3.7.2 herein and JACS has not exercised the option from [Tennis NSW] or the third party 30 days prior to the expiration of the Option Period, then upon [the Club] giving written notice to JACS that [the Club] requires JACS to exercise the option on behalf of [the

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19 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 98 [53].

> Club], that JACS will proceed to exercise the option from [Tennis NSW] or the third party on behalf of [the Club]."

It is clear that the word "and" should be inserted between "land" and "entering" in cl 3.7.1, although it does not appear in the text. JAWCC was to be the principal operating company for the project, and was to enter into an Entitlements Agreement with the New Club to enable the New Club to conduct the traditional activities of the Club. The "Operating Agreement" was defined as the agreement between WCH and JACS specifying the rights and responsibilities of JAWCC for the management of the New Club: cl 2.1.

48 JACS concentrated on the requirement in cl 3.7.1 that if JACS acquired and exercised an option it would do so on behalf of WCH. It submitted that that requirement was entirely conditional. It would only arise if the balance of cl 3.7.1 were fulfilled, namely a simultaneous grant to JAWCC of a 99 year lease, and simultaneous entry into the Operating Agreement. JACS accepted that the MOU made it responsible for bringing WCH into existence and drafting the 99 year lease and the Operating Agreement. But it submitted that the Club had not complained about JACS's failure to bring WCH and JAWCC into existence or to prepare the 99 year lease and the Operating Agreement, there had been no real attempt to explore the reasons for that failure at trial, and nothing was said on the subject in the Third White City Agreement.

49 The Club, for its part, did not rely on a term to be implied into the MOU. The Club argued that JACS's construction of the express language of cl 3.7 was wrong. It said that the words "the option from … the third party" in the opening part of cl 3.7 and in cl 3.7.1 constituted a defined expression. The expression was said to be defined in cl 1.8.2: "the third party grants to JACS on behalf of WCH an option to purchase part of the Land ('the option from the third party')". The Club submitted and the Court of Appeal accepted[20] that the acquired option could only be used for the benefit of WCH, independently of satisfaction of the conditions in cl 3.7.1. That reasoning is unsound. It gives too much weight to the definition, and too little weight to the operative words of cl 3.7.1. The duty to exercise the option on behalf of WCH derives from cl 3.7.1, not cl 1.8.2. The word "simultaneously" emphasises the necessary link between the duty to exercise the option on behalf of WCH and the entry into the 99 year lease and the Operating Agreement. The Club's submission does not deal with the

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20 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 97-98 [51]-[53].

interdependence between the events described in cl 3.7.1. Clause 3.7 was silent about what duties JACS would have in the event that at the time the option was to be exercised it was not possible to enter the 99 year lease and the Operating Agreement. It follows that JACS's procurement of Poplar to exercise the cl 8 option was not a contractual breach of the MOU.

50 The Third White City Agreement, in contrast to the MOU, contained no stipulation about the 99 year lease and the Operating Agreement, and no stipulation that the option be exercised only "on behalf of WCH". Nor was there any replacement stipulation that the option be exercised only on behalf of the Club. The fact that cl 3.7.1 obliged JACS to do something as part of a bargain which would give a 99 year lease in favour of JAWCC and entry into the Operating Agreement said nothing about what it was permitted to do as part of a bargain which did not give a 99 year lease in favour of JAWCC or entry into the Operating Agreement, but instead gave the Club rights of occupation under a lease until 30 September 2007. While the Club and JACS agreed in cl 42 of the Third White City Agreement that the MOU continued, cl 43 provided that, to the extent of any inconsistency between the Third White City Agreement and any other agreement, the Third White City Agreement was to prevail. In these major respects, there were clear inconsistencies. Clause 3.7 had to give way, and cl 8 had to prevail.

51 The Court of Appeal said that "a constructive trust may … be imposed to give effect to contractual intentions where the basis for finding an express or resulting trust is not present."[21] The Court of Appeal also said that *if* "JACS had exercised the option purportedly on its own behalf and for its own benefit while the MOU was on foot, JACS would have been in breach of … cl 3.7"[22]. The Club never pleaded or otherwise alleged any breach of cl 3.7, or indeed of any other express or implied term of the MOU. Had there been any threat to commit such a breach, it could have been quickly restrained in advance by the grant of an interlocutory injunction, since well before 27 June 2007 JACS made it plain that it would exercise the option with finance provided by a third party.

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21 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 100 [65].

22 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 99 [63]; see also at 98 [53].

52 These problems reveal a key flaw in the Court of Appeal's reasoning. The reasoning assumed that the series of different agreements with contractual elements into which the parties entered should be treated as a unity taking shape entirely from the MOU. The Court of Appeal's statement that JACS would have been in breach of cl 3.7.1[23] would only be true if the conditions stated in cl 3.7.1 had been satisfied. But it does not follow that the same outcome flows from JACS's procurement of Poplar to exercise the option which SGS and Maccabi granted it under cl 8(a) of the Third White City Agreement. There was no limitation in cl 8(a) corresponding to the limitation in cl 3.7.1 concerning WCH. Nor did the cl 3.7.1 conditions exist in cl 8(a). The Court of Appeal's reasoning overlooks the fluidity and speed of the parties' dealings in the six weeks from the MOU on 28 February 2005 (between only JACS and the Club) to the First White City Agreement (between JACS, the Club, SGS and Maccabi) on 15 April 2005.

53 Once JACS attempted to fulfil its obligations under cl 3.7 to "seek to obtain an option to purchase" the White City Land (or part of it) from third parties like Tennis NSW or SGS, it was entirely possible that the earlier arrangements between JACS and the Club would have to be modified. So it proved in the First White City Agreement. Clause 8(a) granted JACS an option to acquire the Option Land, but there was no reference to WCH or the cl 3.7.1 conditions. The Club agreed to surrender its rights in relation to the White City Land (cl 21). JACS was granted a two year lease over the Option Land (cl 16). There was no reference to the continuation of the MOU.

54 Three weeks after the First White City Agreement, on 10 May 2005, the same four parties entered the Second White City Agreement. Again cl 8 did not refer to WCH or the cl 3.7.1 conditions. Again the Club surrendered its rights (cl 21). Again JACS was granted a two year lease (cl 16). Again there was no reference to a continuation of the MOU.

55 Seven weeks after the Second White City Agreement, on 29 June 2005, the same four parties entered the Third White City Agreement. Again cl 8 did not refer to WCH or the cl 3.7.1 conditions. Again the Club surrendered its rights. But now JACS received no lease – only the Club did. And cll 42 and 43, terminating the MOU to the extent of any inconsistency, and causing cl 8 to prevail over cl 3.7.1, were introduced.

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23 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 99-100 [63]-[64].

56 It is true, as the Club submitted, that Poplar's exercise of the cl 8 option was not expressly permitted by the MOU. The question is whether that event amounted to equitable fraud, unconscionable conduct or breach of fiduciary duty. The Club's case that that question be affirmatively answered faces a fundamental difficulty. The obligation imposed on JACS by cl 3.7.1 was conditional upon two events which never happened. Clause 3.7.1 was in turn cancelled and replaced by a quite different scheme which evolved through the White City Agreements until it reached its final form in the Third White City Agreement. Those three Agreements were agreed to by the Club. The Club did not allege that its consent was brought about by any mistake, misrepresentation, undue influence, duress, overbearing of the will, unequal bargaining power or concealment. Those who decided that the Club should consent were experienced in business and legally advised. This fundamental difficulty makes it hard to see why the Option Land should be held on constructive trust for the Club. It is a fundamental difficulty which none of the Club's submissions overcame.

57 It is a difficulty which the Court of Appeal attempted to overcome by treating cl 3.7 as being, or as analogous to, a contract for valuable consideration to assign property which was not wholly executory. The problem is that JACS's promise to seek an option, and, if it exercised it, to do so on behalf of WCH, was, contrary to the Court of Appeal's view[24], conditional on the simultaneous grant of a 99 year lease to JAWCC, and entry into the Operating Agreement. These cl 3.7.1 conditions were not satisfied, and cl 3.7.1 was eventually cancelled by reason of cl 43 of the Third White City Agreement. The Court of Appeal drew an analogy with *Carson v Wood*[25]. JACS submitted and the Club did not deny that that case was not cited to the Court of Appeal by the Club. But that case is distinguishable: there was no relevant condition corresponding, for example, to the 99 year lease condition. And, unlike this case, it was a case involving a corporate joint venture or partnership.

58 Two other authorities on which the Court of Appeal relied may also be distinguished. One was *Chan v Zacharia*[26], dealing with the content of fiduciary duties between partners after the partnership ended. Here there is no partnership,

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24 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 101 [70].

25 (1994) 34 NSWLR 9.

26 (1984) 154 CLR 178; [1984] HCA 36.

and the Court of Appeal did not see the existence of a fiduciary relationship as crucial to its reasoning[27]. The other was *Baumgartner v Baumgartner*[28], dealing with the property rights of de facto spouses after their relationship ended. The constantly fluctuating business relationships of JACS and the Club in relation to future events, particularly after it became necessary for them to deal with SGS and Maccabi, are quite different.

The Court of Appeal's reasoning: did JACS get its option because of the Club's agreement to surrender its rights?

59 The second critical element in the Court of Appeal's reasoning endeavoured to sidestep the fundamental difficulty created by cl 3.7. The Court reasoned that while, under cl 3.7 of the MOU, JACS could only exercise the option "on behalf of WCH", and while those words did not appear in cl 8(a) of the Third White City Agreement, JACS only received the cl 8(a) option by reason of the Club's surrender of its Lease and Licences in cl 21. Thus the Court of Appeal said[29]:

> "the option had been acquired by JACS *by reason of* the [Club's] involvement in the White City [Agreements] and *the [Club's] undertaking*, given by those agreements, *to surrender its existing rights* to a long term lease over part of the [Club] House and licences to use the tennis courts." (emphasis added)

And later the Court of Appeal said[30]:

> "what is critical is that it was *the [Club's] participation, in particular by surrendering its existing rights, which enabled JACS to obtain the option.* That participation was *procured* by a promise to exercise the option, if at all, for the benefit of the joint project and, if the project did not proceed, to

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27 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 100 [64] and 104 [83].

28 (1987) 164 CLR 137; [1987] HCA 59.

29 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 100 [63].

30 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 104 [80]. See also at 88 [5], 103-104 [79] and 105 [89].

> allow the [Club] to acquire the [Option Land] for itself. It would in the circumstances have been unconscionable for JACS to disregard that promise by exercising the option for its own benefit." (emphasis added)

60 Similarly, the Club submitted that there was a causal relationship between its agreement to surrender rights and the grant of an option to JACS. It submitted that "the only reason JACS was able to obtain the option and be involved in the joint Project at all" was the agreement by the Club to surrender its "valuable rights in relation to the property".

61 This reasoning departs from a finding of the trial judge. He said[31]:

> "It is clear that the [Club] did suffer a detriment in [the Third White City Agreement]. It had a lease terminating in 2020 over a club house and it had licences to use the tennis courts, both of which it surrendered as of 30 September 2007. However, it was bound to do that whether the option was exercised by anybody or not. The only way in which people in different interests to the [Club] and [JACS] would carry on negotiations and grant an option, was if this occurred. Accordingly, although there is a detriment, it is not something that flows from the [Club] to [JACS] and was really a condition precedent in a collateral transaction."

The Court of Appeal recorded that the trial judge's finding about the insistence of SGS and Maccabi on surrender of the Lease and Licences was not challenged before it. Nor was it challenged in this Court. That finding is fatal to this second critical aspect of the Club's case. It involves two key points.

62 The first key point correctly made by the trial judge was that on 30 June 2005, Tennis NSW had transferred the White City Land to SGS, and SGS had in turn transferred part of it to Maccabi. Before 30 June, SGS wanted its part of the White City Land to be unencumbered. Maccabi wanted to end up with its part of the White City Land also unencumbered – for some of the rights surrendered by the Club existed over the Maccabi Land rather than the Option Land. Apart from the provision in cl 18 of the Lease that it was terminable on six months' notice in certain circumstances, it was not to expire until 2020. The "detriment" of terminating the Lease was not required by the MOU, to which SGS and Maccabi were not parties. But when they became parties to the Third White City

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31 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [94].

Agreement, it is not surprising that they stipulated for the "detriment" of its termination. Indeed they had done so as early as 15 April 2005, in the First White City Agreement. As Mr James Allardice, then a director of the Club, noted in his report to various other officers of the Club circulated on 4 November 2005, SGS "would not have proceeded with the partnership purchase with [the Club] holding a long term lease over [SGS's] head." That desire of SGS and Maccabi to clear their titles was the crucial matter, not something JACS was pressing. If the Club disliked that outcome sufficiently, it could have relied on its rights under the Lease, including its rights under cl 18[32], and declined to agree to the Third White City Agreement.

63 The second key point made by the trial judge was that the agreement by the Club to surrender its rights under the Lease was independent of all questions about options. This point is correct. It may be expanded as follows. The questions whether JACS should be granted an option up to 30 June 2007, whether any option it was granted was exercisable on its behalf or only on behalf of someone else, and whether the Club should be granted an option exercisable in the period 1 July 2007 to 30 September 2007 were all questions entirely independent of whether the sale of the White City Land by Tennis NSW to SGS should be free of the Club's Lease. There is no evidence and no finding that JACS put pressure on the Club to agree to surrender its rights under the Lease and for JACS to receive an option capable of being exercised unconditionally. The agreement to surrender the Lease was necessary if the sale of the land by Tennis NSW to SGS was to take place. But that does not justify the Court of Appeal's conclusion.

The earlier authorities

64 The Court of Appeal saw the proposition that JACS acquired its option by reason of agreement by the Club to surrender its rights as a means of bringing the Club's case within certain earlier authorities. In these cases plaintiffs had abandoned their rights to purchase properties in reliance on particular promises or assurances by defendants.

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32 See above at [5].

65 Thus the Court of Appeal relied on *Avondale Printers & Stationers Ltd v Haggie*[33]. The Court of Appeal said[34]:

> "In that case, the plaintiff abandoned its rights to purchase a property in reliance on the promises of the defendants that they would invest in the development and would grant the plaintiff an option to purchase at the end of 2 years. It was held that the defendants' denial of the common intention of the parties amounted to equitable fraud and that the appropriate remedy was a constructive trust. Mahon J said that the key to the case with which he was concerned lay in the question 'whether the transferor would have parted with his property but for the oral undertaking of the transferee' … In the present case, there was a surrender of rights by the [Club] which was of similar effect and which would not have occurred but for [JACS's] promise to exercise any option it obtained 'on behalf of WCH'."

The Court of Appeal went on[35]:

> "what is critical is that it was the [Club's] participation, in particular by surrendering its existing rights, which enabled JACS to obtain the option. That participation was procured by a promise to exercise the option, if at all, for the benefit of the joint project and, if the project did not proceed, to allow the [Club] to acquire the [Option Land] for itself."

66 In this Court JACS challenged the Court of Appeal's reasoning. First, it said that the Club's purported surrender of rights under the Lease was not contemporaneous with the MOU or conditional in any way upon it. Secondly, it said that the Club's purported surrender of rights occurred in the context of gaining additional rights from SGS and Maccabi under the Third White City Agreement. Thirdly, it said that there was no testimonial or other evidence which could support the inference that the alleged surrender of rights would not have occurred but for the MOU. Fourthly, it said that in contrast to *Avondale Printers & Stationers Ltd v Haggie*, the present case was one in which there was

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33 [1979] 2 NZLR 124.

34 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 103 [78].

35 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 104 [80].

no demonstrated relationship between the conduct of JACS and the course taken by the Club in relation to giving up its Lease rights.

67 These criticisms are sound. The facts of *Avondale Printers & Stationers Ltd v Haggie* were correctly summarised by the Court of Appeal[36]. There is no analogy between them and a promise on 28 February 2005 by JACS to the Club that if JACS obtained an option it would, on certain conditions, exercise it on behalf of WCH, followed four months later by the Club's agreement to surrender the Lease in the Third White City Agreement, to which there were two further parties, and which granted an unconditional option to JACS followed by another option to the Club. There is no demonstrated connection between the grant of the unconditional option to JACS and the agreement to surrender its rights by the Club.

68 JACS's criticisms invalidate the analogy which the Court of Appeal drew[37] with *Pallant v Morgan*[38]. They also prevent any analogy being drawn with *Banner Homes Group Plc v Luff Developments Ltd*[39], as the Club sought to do in this Court. In these cases, JACS submitted, rival purchasers for a particular property agreed that one would not enter into negotiations. Each case turned on a finding that the non-acquiring party had acted upon a firm arrangement to stay out of the market. No such finding was made and no such finding would have been sustainable in the present case. Rather, the Club negotiated its own alternative option exercisable in the event that JACS did not proceed. These submissions are correct. The trial judge quoted[40] Chadwick LJ's summary of the English position thus[41]:

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36 See above at [65].

37 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 102-103 [74]-[75].

38 [1953] Ch 43.

39 [2000] Ch 372.

40 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [98].

41 *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372 at 398.

> "It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ('the acquiring party') will take steps to acquire the relevant property; and that, if he does so, the other party ('the non-acquiring party') will obtain some interest in that property. Further, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding."

This is difficult to apply to JACS's promise in cl 3.7.1 to acquire property on certain conditions followed by its acquisition of the option in cl 8(a) of the Third White City Agreement and the Club's acquisition of its option in cl 8(b). The agreement of JACS and the Club to cl 8 of the Third White City Agreement was an agreement that the cl 3.7 regime was no longer to prevail. The trial judge said[42]:

> "for this equity, one needs to look at the understanding or arrangement made between the parties which kept the plaintiff out of the market. We just do not know what the details of the underlying arrangements were. There can be speculation that neither party felt that it could proceed without involvement by another party. It is not a situation where there were necessarily two competing bidders and one decided not to bid on an understanding with the other."

The Court of Appeal criticised the trial judge for saying this. The Court of Appeal said there were no further "details of the underlying arrangements" which "needed to be known."[43] But if the Club were not to be held to cl 8(a) of the Third White City Agreement, it can only have been because of some "underlying arrangements" distinct from the regime in cl 3.7 of the MOU, which was mutually abandoned by the parties in cl 8 of the Third White City Agreement. As noted above[44], the Club did not rely on any arrangements beyond the terms of the MOU and the Third White City Agreement.

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42 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [99].

43 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 102 [75].

44 See at [46].

69 There is an additional problem with the Club's reliance on *Pallant v Morgan* and *Banner Homes Group Plc v Luff Developments Ltd*. They are cases where the parties' agreement that one of them should buy property for the advantage of both operated as an inducement to the other not to bid against the buyer[45]. Here there is no general agreement or inducement of that kind. There was an agreement that JACS would exercise an option on behalf of WCH if, simultaneously, two conditions were satisfied. There was silence, both in the MOU and the Third White City Agreement, on what would happen if the option were exercised without those conditions being satisfied. But there was no inducement to the Club not to seek from SGS and Maccabi the two options which JACS obtained in cl 8, one for itself, one for the Club.

70 The Club also relied on *Cobbe v Yeoman's Row Management Ltd*[46]. This is not a good precedent for the declaration of a constructive trust in the present case. The House of Lords refused to grant that remedy. Instead it ordered relief by way of quantum meruit, which was not sought here. And it did so after rejecting a claim for proprietary estoppel, which was not made here.

71 The Club endeavoured to sidestep these difficulties by advancing a submission which went beyond the Court of Appeal's reasoning. It was:

> "[The Club], to the knowledge of JACS, surrendered its then existing rights over the White City [Land], in reliance on the completion of the Project by JACS … To [JACS's] knowledge, this step meant that [the Club] was relying on fulfilment of the Project for its members to obtain the purpose for which the Club was formed and operated, so that either the clause 8(a) option would be exercised for the benefit of WCH, and in turn

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45 See Megarry J's discussion in *Holiday Inns Inc v Broadhead* unreported, 19 December 1969, quoted in *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372 at 391 ("is thereby induced to refrain from attempting to acquire the property").

46 [2008] 1 WLR 1752 at 1766 [24] and 1769-1772 [30]-[37]; [2008] 4 All ER 713 at 728-729 and 732-735. See Getzler, "Quantum Meruit, Estoppel, and the Primacy of Contract", (2009) 125 *Law Quarterly Review* 196; McFarlane and Robertson, "Apocalypse Averted: Proprietary Estoppel in the House of Lords", (2009) 125 *Law Quarterly Review* 535; Thomas and Hudson, *The Law of Trusts*, 2nd ed (2010) at [28.11]-[28.22].

the members of [the Club], or [the Club] would be entitled to exercise its own option under clause 8(b)."

72 A reference was given to part of the Court of Appeal's reasons for judgment quoted above[47]. That passage does not support the submission. The submission seeks to characterise the case as falling into the *Pallant v Morgan* line of cases. The evidence will not permit this. The submission would only be sound if cl 8(a) expressly required the option to be exercised "for the benefit of WCH".

73 The Club submitted that the *Pallant v Morgan* line of cases "stand[s] broadly" for the proposition that if there is an arrangement which deals with the acquisition of property but which fails to address, by reason of its uncertainty, deficiency or unenforceability, an eventuality which is contrary to a central tenet of the arrangement, and this failure results in the conferral on one party or its nominee of an opportunity to perform an act in its self-interest and acquire the property contrary to that tenet, that act, in denying to the other party the opportunity which it obtained as a result of the arrangement, is unconscionable. First, the cases do not support this proposition. They depend on something more than uncertainty, deficiency or unenforceability. Secondly, the factual prerequisites to the proposition are absent in the present case in several respects.

74 The critical integers in the Court of Appeal's conclusion that JACS's behaviour was unconscionable, then, related to the alleged breach of cl 3.7 and the surrender by the Club of its rights pursuant to cl 21 of the Third White City Agreement. Each was intrinsically flawed. Each operated at a high "level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large."[48]

Flaws in constructive trust

75 JACS submitted that the Court of Appeal erred when, in deciding that a constructive trust was the appropriate remedy, it failed to take into account a crucial factor – the impact of such a trust upon the then existing rights of third

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47 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 99-100 [63]; see at [31] and [59].

48 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 324 [20] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; [2003] HCA 57.

parties, here the unregistered mortgage over the Option Land held by Walker Corporation. That submission is correct for reasons more conveniently examined in dealing with the Walker Corporation appeal[49].

76 An aspect of the Club's constructive trust case in this Court is that, at least once JACS had acquired the cl 8(a) option, JACS owed a fiduciary duty to the Club corresponding with the duty it owed under cl 3.7.1, and this underpinned the constructive trust. If so, why were that duty and that constructive trust not conditional on WCH simultaneously granting to JAWCC a 99 year lease and entering into the Operating Agreement? The Club's defence of the constructive trust seeks to brush aside the non-existence of WCH and the non-fulfilment of the conditions on which JACS's exercise of the option depended. This is a curious outcome in a court of equity.

77 It is now necessary to turn to the fiduciary relationship question.

The Court of Appeal's reasoning: fiduciary relationship

78 The Court of Appeal did not see the existence of a fiduciary relationship as necessary for its conclusion that a constructive trust be imposed. But it did conclude that JACS was bound by a fiduciary duty owed to the Club to exercise the option granted by cl 8(a) of the Third White City Agreement in a particular way.

79 However, in this Court the Club appeared to place primary emphasis upon the constructive trust in its favour as the appropriate remedy for breach of a fiduciary duty owed to it by JACS.

80 The Court of Appeal said[50]:

> "By contractually agreeing to a provision in terms of cl 3.7.1, the [Club] was relevantly placing itself in the hands of JACS. From that point on it had to trust that JACS would exercise any such option 'on behalf of WCH', as it said it would. It relied on [JACS's] commitment to do so by surrendering its rights in respect of the White City [Land]. It was

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49 See below at [126]-[130].

50 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 105 [87].

> vulnerable to abuse of that commitment by JACS as such abuse might lead to the loss to the [Club] of the opportunity to acquire a valuable property and the opportunity to continue on the White City [Land] an activity it had been conducting there for over 55 years."

The Court of Appeal also said[51]:

> "In light of the terms of the MOU and the assistance provided by the [Club] after the MOU to procure the option for JACS, including by surrender of the [Club's] existing rights, the option was one which the [Club] was entitled to expect would not be exercised by JACS in its own interests."

81 The Club's submission, which the Court of Appeal accepted, rests heavily on the twin ideas of vulnerability and reliance: the Club was relying on JACS to exercise the cl 8(a) option only on behalf of WCH or not at all, and was vulnerable to JACS not doing so.

82 Here the contracts to which JACS and the Club were parties are important in assessing whether JACS was bound by a fiduciary duty in relation to its exercise of the cl 8(a) option. The MOU obliged JACS to obtain an option, and exercise it in a certain way and on certain conditions. Before the First White City Agreement, JACS had not been able to obtain an option to buy part of the White City Land. By that Agreement, and the Second and Third White City Agreements, it obtained an option, and the Club obtained an additional option after the JACS option expired. The Club, as party to the Third White City Agreement, consented to the unconditional nature of JACS's option. The Club could have bargained for more precision in cl 8, using its ability to refuse to agree to surrender the Lease. It apparently did not. The Club was not relying on representations by JACS. It was not overborne by some greater strength possessed by JACS. It was not depending on JACS to carry out dealings of which the Club was necessarily ignorant. It was not trusting JACS to do anything. What JACS and the Club did in relation to the Third White City Agreement and the exercise of JACS's option under cl 8(a), they did consulting their own interests, with knowledge of what the other was doing. The trial judge

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51 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 105 [89].

examined correspondence between the Club and JACS in late March and early April 2005, and characterised it thus[52]:

> "far from the [Club] leaving everything to [JACS] …, [the Club] considers that the arrangement was that the parties would work out the bid strategy together, a situation that Mr Alexander appears to have accepted. Furthermore, the [Club] was threatening that unless something [happened] by 4 April 2005, it would take immediate action to do something else. This implies that at all material times it considered that it was free to take such action."

And the trial judge recorded his "strong impression that instead of there being an arrangement whereby the [Club] entrusted JACS to act on its behalf, the [Club] was going to act on its own behalf unless JACS complied with its demand."[53]

83 The only vulnerability of the Club was that which any contracting party has to breach by another. The only reliance was that which any contracting party has on performance by another. If JACS committed any breach of contract, it was quite open about it. If the Club could have established that JACS was in breach of contract, it had an ample array of contractual remedies to protect itself. It chose not to do so. It spoke of the difficulty of a social club giving an undertaking as to damages, and of the inutility of damages to a social club which wishes to continue its past activities in a new guise on the same site. It also said that monetary remedies against impecunious companies like JACS and Poplar were worthless. These factors do not justify converting the contractual relationship between JACS and the Club into a fiduciary relationship.

The Club's arguments in this Court for a fiduciary relationship

84 In this Court the Club went beyond the Court of Appeal's approach. It sought leave to rely on a Second Notice of Contention in relation to its fiduciary relationship case. That leave should be granted.

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52 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [38].

53 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [39].

85 The Club relied on *Hospital Products Ltd v United States Surgical Corporation*[54]. The Club contended that, analogously with the reasoning of Mason J in that case, the MOU constituted an undertaking by JACS to acquire property on the Club's behalf and hold it for interested parties.

86 The parties accepted that the relevant principles regarding the existence of a fiduciary relationship which does not fall within an established category, and the incidents of such a relationship, are those stated by Mason J in that case. This is so notwithstanding that Mason J was in dissent. Gibbs CJ, Wilson, Deane and Dawson JJ each decided that the relationship between Hospital Products International Pty Ltd ("HPI"), controlled by Mr Blackman, and the first respondent ("USSC") rested purely in contract between USSC as manufacturer and HPI as Australian distributor and was not supplemented by any fiduciary relationship.

87 Mason J began his treatment of the issue whether HPI was a fiduciary by identifying the critical feature of what may be called the accepted traditional categories of fiduciary relationship – trustee-beneficiary, agent-principal, solicitor-client, employee-employer, director-company, and partners *inter se*. That critical feature was "that the fiduciary undertakes or agrees to act *for or on behalf of* or *in the interests of* another person in the exercise of a *power* or *discretion* which will affect the interests of that other person in a legal or practical sense."[55] From this power or discretion comes the duty to exercise it in the interests of the person to whom it is owed[56].

88 Justice Lehane, writing extra-judicially, made two points relevant to the present question. The first point is that phrases such as "for or on behalf of" (and "in the interests of") another person must be understood in a reasonably strict sense, lest the criterion they formulate become circular[57]. No doubt undertaking to act in this way is inherent in the position of trustee administering a trust, director participating in the control and management of a company, partner acting in the conduct of the partnership business and employee acting in the

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54 (1984) 156 CLR 41; [1984] HCA 64.

55 (1984) 156 CLR 41 at 96-97 (emphasis added).

56 (1984) 156 CLR 41 at 97.

57 Lehane, "Fiduciaries in a Commercial Context", in Finn (ed), *Essays in Equity*, (1985) 95 at 101.

course of the business of the employer, for example. Further, such an undertaking may be found in the facts of a particular case. So, in *Boardman v Phipps*[58] the issue which divided the House of Lords was whether the acquisition of the shares in contention, by Mr Boardman and the other defendant, fell within the scope of the transactions for which they had been engaged on behalf of the trustees of the deceased estate. Again, the contractual joint venture involving the use of architectural plans contributed by one party, which was considered in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*[59], also had fiduciary characteristics.

89 But, as Justice Lehane asked[60]:

> "[W]hen is a contractual stipulation inserted for the benefit of one party (even if offered by the other party) an undertaking to act for or on behalf of that party and therefore to act, in relation to the contract, solely in the interests of that party? When does an offer to enter into a contract proposed by one party as a deal which will benefit the other (as well as himself) become such an undertaking by the former to the latter?"

90 That leads to Justice Lehane's second point. This is that the reason why commercial transactions falling outside the accepted traditional categories of fiduciary relationship often do not give rise to fiduciary duties is not that they are "commercial" in nature, but that they do not meet the criteria for characterisation as fiduciary in nature[61]. The point is illustrated in the *Hospital Products* case by Deane J's treatment of the distributorship contract between USSC and Mr Blackman's company as follows[62]:

> "The express term of the contract in the present case requiring the distributor to use its 'best efforts' to build up the market for, and distribute,

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58 [1967] 2 AC 46.

59 (2006) 229 CLR 577 at 584 [15], 613 [124], 628 [156]; [2006] HCA 55.

60 Lehane, "Fiduciaries in a Commercial Context", in Finn (ed), *Essays in Equity*, (1985) 95 at 100.

61 Lehane, "Fiduciaries in a Commercial Context", in Finn (ed), *Essays in Equity*, (1985) 95 at 104.

62 (1984) 156 CLR 41 at 122-123.

> the products in Australia 'to the common benefit' of both manufacturer and distributor did not, of itself, impose a general fiduciary duty on the distributor to seek no profit or benefit for itself or to disregard its own interests where they conflicted with the manufacturer's. In the context of the term precluding the distributor from dealing in any competing product, the reference to 'the common benefit' was no more than a reflection of the commercial fact that, while the distributorship subsisted, it was in the interests of both manufacturer and distributor that, consistently with ordinary economic restraints on pricing, the market for the manufacturer's product in the relevant area be maximized."

91 In the *Hospital Products* case, Mason J spoke in terms consistent with the later discussion of the case by Justice Lehane, and added an important statement of principle which, JACS correctly submitted, governs the present appeal. His Honour said of cases where contract provides the foundation for a fiduciary relationship[63]:

> "In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

92 The terms of the contract include not only those expressed, but those implied, particularly those implied pursuant to the principles in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[64]. In the *Hospital Products* case, all members of this Court disagreed with the primary judge's finding of an implied term that HPI do nothing inimical to the market in Australia for the surgical stapling products of USSC[65]. They did so on the ground that it went beyond what was necessary to give the contract business efficacy. Where a term

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63 (1984) 156 CLR 41 at 97. See also Keane, "The 2009 W A Lee Lecture in Equity: The conscience of equity", (2010) 84 *Australian Law Journal* 92 at 98-101.

64 (1982) 149 CLR 337 at 352-355; [1982] HCA 24.

65 (1984) 156 CLR 41 at 63-67 per Gibbs CJ, 95-96 per Mason J, 117-118 per Wilson J, 121-122 per Deane J and 138-141 per Dawson J.

to like effect as the suggested fiduciary obligation cannot be implied, it will be very difficult to superimpose the suggested fiduciary obligation upon that limited contract. The Club here eschewed any attempt to imply a term into the MOU to the effect of the fiduciary obligation for which it contended.

93 Further, the limited fiduciary obligation found by Mason J in the *Hospital Products* case sprang from USSC having entrusted the distributor with the protection, promotion and custodianship of its product goodwill in Australia. This created USSC's vulnerability to the distributor's abuse of its position[66]. Mason J's characterisation cannot be transposed to the relationship between the Club and JACS. USSC was a remote principal lacking the capacity to observe what was happening half the world away. Mr Blackman and his company were the only persons in contact with the Australian market. They were in a position to take every opportunity to enrich themselves at USSC's expense. Mason J summarised the relevant opportunities open to Mr Blackman thus[67]:

> "(1) the distributorship would enable him to know or become known to purchasers of USSC's products in Australia, without labouring under the handicap of being a competitor;
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> (2) the distributorship would enable him to establish surreptitiously a manufacturing capacity;
>
> (3) he would be able to obtain finance from USSC and other sources;
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> (4) he would be able to reduce the promotion and sale of USSC's products before terminating the distributorship and satisfy outstanding orders with products containing Australian-made components; and
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> (5) he could supply his own products to existing customers who might readily believe that he was acting with the authority of USSC."

In contrast, the Club was in constant contact with JACS, and in close contact with SGS and Maccabi. All parties were operating in a small part of Sydney. The Club was in an excellent position to observe the changing scene and protect its interests. Even if JACS was in a position to deal secretly or misleadingly with

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66 (1984) 156 CLR 41 at 101.

67 (1984) 156 CLR 41 at 87-88.

SGS and Maccabi, it was not alleged to have done so. There was no entrustment or custodianship to be abused.

94 The Club advanced the following contentions. It did not matter whether the contention that cl 3.7 on its true construction created a contractual obligation on JACS never to exercise the option on its own behalf was correct[68]. Even if it were not correct, the MOU taken as a whole – including its annexures – constituted an arrangement, some parts of which were legally enforceable and some not. One term of the arrangement was that if JACS acquired an option in negotiations with SGS, it would be held for the benefit of WCH, or if that option were not exercised, the Club would have an option. And even if that term did not exist, leaving a lacuna in the arrangement, it would be filled by recognising fiduciary duties. The duties arose from JACS's promise to do something on behalf of others – gaining the option – which precluded JACS from making a personal gain. This was particularly the case where the option was to be exercised on behalf of WCH, which was in an especially vulnerable position since it did not exist. The Club stressed the proposition that cl 8(a) answers the description of cl 3.7.1, and cl 8(b) answers the description of cl 3.7.2.

95 But that proposition is seen to be unsound when cl 3.7 is read in the light of cl 1.8.2. Clause 1.8 stated that JACS was negotiating with a third party with a view to entering an agreement with the third party which was to include a term whereby the third party granted an option to JACS on behalf of WCH. Clause 8(a) granted an option to JACS, but said nothing about WCH. The Club submitted that that would have been a matter of no concern to SGS and Maccabi, the other parties to the White City Agreements. That is probably so, but it remains the case that cl 8 moves sharply away from cl 3.7.

A new construction argument: cll 3.7.2, 8(b) and 42

96 It is convenient at this point to deal with an argument of construction which the Court of Appeal did not employ but which was advanced by the Club in this Court. The Club submitted that:

(a) cl 42 of the Third White City Agreement provided that each of the Club and JACS "agrees to carry out its obligations under" the Third White City Agreement in accordance with the MOU;

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68 Discussed above at [45]-[50].

(b) the cl 3.7.2 option was to be procured by JACS in favour of the Club if "JACS is unable to or fails to exercise" the cl 3.7.1 option in accordance with its terms, and the same was true of the cl 8(b) option;

(c) therefore the cl 8(a) option could only be exercised by JACS on behalf of WCH.

97 If this submission were sound, it would make all of the other submissions of the Club unnecessary. One fallacy in the submission lies in step (c). It does not follow from the preceding steps. There is also a problem in step (a). It would have been much easier to achieve the effect attributed to cl 42 by the use of specific language in cl 8 corresponding with that of cl 3.7, than by the general words of cl 42. Another difficulty is that if the argument were correct, JACS's breach of duty would not primarily be a breach of fiduciary duty or an equitable fraud or an item of unconscionable conduct, but a breach of a contractual covenant – cl 8 of the Third White City Agreement. No allegation that the Third White City Agreement had been breached was persevered in at trial. And to impose a constructive trust for a breach of contract would be, if not an impossible step, at least a very unusual and extreme one.

Other potential difficulties in the fiduciary relationship case

98 In view of the fact that it is possible to allow the appeal for the reasons set out above, it is unnecessary to deal conclusively with certain other difficulties in the Club's position. They can be summarised thus.

99 The Club submitted that once JACS obtained the option under cl 8(a) of the Third White City Agreement, it could only exercise it "on behalf of WCH". If, by 30 June 2007, WCH had not come into existence, the Club's cl 8(b) option would spring into existence. The Club also submitted that the cl 8(a) option was a proprietary interest; it was held by JACS not on its own behalf, but on behalf of WCH, and, until that company was incorporated, "for and on behalf of the participants in the Project, including [the Club], whose members were intended to receive the benefits of the exercise of the option." It was also said to be held "for the benefit of [JACS] and [the Club] pursuant to the obligation on both parties to bring the Project to fruition". When JACS was not "acting in furtherance of the Project", it was required "to act not in its own interest, but in the interests of, and for or on behalf of, [the Club], in the exercise of a proprietary right". It was also submitted that "prior to the incorporation of WCH, JACS held the clause 8(a) option for and on behalf of [the Club], as representative of the members of [the Club] (because the members of WCH were

to include all such members of [the Club] who chose to take up membership of WCH)". JACS held the option on trust, and hence a fiduciary duty arose.

100 If JACS held the option on trust, was the trust express? The language of cl 3.7 and cl 8 is not suggestive of any express trust. If it was an express trust, and WCH was the beneficiary after incorporation, who was the beneficiary before that time? The Club submitted that it was the beneficiary "as representative of" its members. In that respect the trust would be that type of resulting trust which arises when there has been an incomplete disposition of the beneficial interests. Alternatively, it may only be a trust for a non-charitable purpose – a creature of doubtful and limited validity. If the beneficiary of the trust was WCH, since the MOU obliged JACS to bring it into existence, was there an enforceable duty that it do so? The MOU taken as a whole is such that it is unlikely that a court would decree specific performance of any of its parts. These complications, which were briefly touched on by the trial judge[69], raise a problem which, as he said, "makes it less likely that there is … a fiduciary duty at all."

Conclusion on equitable fraud, unconscionable conduct and breach of fiduciary duty

101 Judge Learned Hand said: "in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves."[70] And where interpretations, strained or otherwise, will not help, assistance to those persons by a strained application of equitable ideas does not promote justice either. The Club's defence of the orders in the Court of Appeal creates an unacceptable amount of strain of these kinds.

Was the MOU validly terminated?

102 Since the constructive trust in favour of the Club depended on some equity inherent in the contractual obligations created by the MOU, JACS argued that a valid termination of the MOU would be fatal for the constructive trust. However, in neither the reasoning of the Court of Appeal, nor the submissions of the Club,

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69 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [42].

70 *James Baird Co v Gimbel Bros Inc* 64 F 2d 344 at 346 (2nd Circ Ct of Appeals, 1933) (delivering the judgment of himself, Judge Manton and Judge Swan).

was the issue of whether the MOU had been terminated decisive. Further, for reasons given above, even if it is assumed that the MOU remained on foot, there is no justification for imposing a constructive trust. Accordingly it is not necessary to consider whether the MOU was validly terminated.

103 However, it must be said that even if it were not validly terminated, the evidence bearing on that topic reveals that relations between JACS and the Club had become hostile by 27 June 2007. The case raises a question which need not be answered. Even if, to terminate a contract, there must be breach which an innocent party uses as the basis for termination, in what circumstances can the duties arising out of a fiduciary relationship come to an end if the relationship has broken down without being terminated formally by an innocent party?

104 It is desirable briefly to discuss the technique employed by the trial judge in deciding that the termination was valid.

The trial judge's technique in relation to the termination of the MOU

105 The trial judge, after setting out the Notice of Termination with particulars which JACS gave the Club on 12 April 2006, quoted the written submissions of JACS advanced to him (omitting evidentiary references). The trial judge then said[71]:

> "I cannot see any answer to those submissions, nor can I see where the plaintiff has provided any such answer. The real question is whether adding them all up they amount to a party indicating that it was not prepared to perform its contract."

He said that there was no doubt that the answer to the question was "Yes".

106 The Court of Appeal, after saying that it did not regard the question whether the MOU was validly terminated as crucial to the Club's claim for a constructive trust, continued[72]:

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71 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225 at [78].

72 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 108-109 [104]-[105].

> "Ordinarily, it would be appropriate … to nevertheless express … views as to the correctness of the primary judge's conclusion that the [Club] repudiated the MOU and in consequence JACS validly terminated that agreement. That is not appropriate in this case because of the absence of detailed consideration by the primary judge of matters relevant to the repudiation issue. His Honour's conclusion … was based upon an acceptance, without individual consideration, of some thirteen sub-paragraphs of [JACS's] submissions which his Honour set out. His conclusion that there had been a repudiation after 12 April 2006 was also founded upon an acceptance, again without individual consideration, of written submissions of JACS which his Honour set out.
>
> The submissions which his Honour accepted were expressed in general terms and, at times, in emotive language. Detailed consideration needed to be given to whether the matters relied upon were capable of constituting repudiatory conduct and, if they were, of the evidentiary foundation for them."

The Court of Appeal said the "need for detailed analysis" was illustrated by the first three of JACS's submissions quoted by the trial judge. The Court of Appeal quoted them and made some brief criticisms of them[73].

107 These criticisms themselves could not be described as "detailed consideration" or "detailed analysis". But that response is not enough. This rebuke by the Court of Appeal rests on a misunderstanding of what the trial judge did. Although sometimes the submissions of counsel are entirely correct, and can be accepted in terms, the danger of recording a bare acceptance of them is that the reader of the judgment may lack confidence about whether the mind of the responsible judge actually did assimilate and evaluate the competing points of view. But the trial judge did not just record a bare acceptance of JACS's submissions.

108 One thing he said was that the Club had not provided any answer to JACS's submissions – which were detailed, and supported by specific evidentiary references. His statement was true, for all the Club said was:

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73 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 109 [106]-[109].

> "(1) The evidence does not make good the alleged breaches relied on by JACS, rather the matters relied upon by JACS illuminate the conduct of JACS and its officers;
>
> (2) Neither [has JACS] established that any of the alleged breaches were fundamental, in the sense of going to the root of the MOU contract, and thereby entitled JACS to terminate;
>
> (3) Whilst a minority of the board of [the Club] (including the President), and a minority of the members, were against the Project with JACS, JACS cannot point to internal disagreements and disputes within [the Club], nor the conduct of one person towards JACS, as sufficient to show a breach by [the Club]".

These submissions did not join issue with JACS's submissions at the necessary level of detail.

109 Another thing the trial judge said was that in their totality, as distinct from being taken bit by bit, the items of behaviour on the part of the Club revealed it to be indicating a lack of preparedness to perform its contract. Whether or not the trial judge was correct in that conclusion – and the Court of Appeal did not say he was incorrect – in the circumstances his manner of expressing it was not open to criticism.

Just allowances

110 JACS contended that the Court of Appeal erred in failing to remit to the Equity Division JACS's claim for just allowances. It is understandable that those appearing for parties against whom breach of fiduciary duty is alleged do not wish to stress a claim for just allowances: this smacks too much of confession and only partial avoidance, and dilutes the righteous impression which those full-bloodedly denying a breach of fiduciary duty would wish to create. However, generally it is procedurally essential, tactically unpleasing though it may be, for a defendant who may have to rely on such a claim either to obtain an order for a separate trial of that issue or to call evidence on the claim which will permit whichever court has to deal with the issue to do so. Neither course was taken here.

Conclusion on the JACS appeal

111 The JACS appeal must be allowed. That and the other orders appear below[74].

Appeal S308 of 2009: the Walker Corporation appeal

The background

112 *The procedural background.* The unsuccessful attempt of Walker Corporation to set aside the constructive trust in the Court of Appeal has already been described[75].

113 *Walker Corporation's mortgage.* On 26 June 2007 a mortgage ("the Mortgage") over the Option Land was executed by Poplar in favour of Walker Corporation to secure advances of approximately $16m, repayable in June 2010.

114 The Mortgage was not immediately in registrable form but it is common ground that the intention was that it cover the Option Land. The Mortgage was enforceable by Walker Corporation by equitable remedies against Poplar as registered proprietor of the Option Land. The entitlement of Walker Corporation to registration, with what then would be the protection of the indefeasibility provisions of the RP Act, was liable to displacement in favour of a later claimant seeking registration if that claimant had the advantage conferred by s 43A of the RP Act. The text of s 43A is so drawn as to have given rise to notorious difficulties in construction[76]. However, it is now settled that the provision is directed to the protection before registration of an interest under a registrable instrument and confers upon the holder of that interest the same protection against notice of an earlier unregistered interest as that which is achieved by a purchaser who acquires the legal estate at common law[77]. By this means there is

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74 At [163]-[164].

75 Above at [35].

76 *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550 at 583-585; [1963] HCA 64.

77 *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments) Pty Ltd* (1976) 133 CLR 671 at 676; [1976] HCA 30; *Black v Garnock* (2007) 230 CLR 438 at 450 [33]; [2007] HCA 31.

introduced into the administration in New South Wales of the Torrens system an analogy to the doctrine of *bona fide* purchaser as a means of regulating priorities between competing claimants to registration of unregistered dealings.

115 If the Club were to assert a better claim to registration as unencumbered proprietor of the Option Land, pursuant to the declaration of constructive trust made by the Court of Appeal on 3 June 2009, this could be made good only if at that date the Club had no notice of the existence of the Mortgage. But there was evidence that it had such notice.

116 These circumstances had several important and related consequences for the litigation between the Club and JACS (and Poplar), to be developed in more detail below. The first was that Walker Corporation had become a necessary party to the proceeding and that it was, at its peril, the responsibility of the Club to see to the proper constitution of its suit. The second was that a remedial constructive trust which would seek to provide an unencumbered registered title for the Club to the Option Land would not be an available or appropriate remedy. The third was that, contrary to the stance which seems to have been taken by the Court of Appeal and was supported by the Club in this Court, the field for contention was not subsequent litigation of what is described as disputed priority between the Club and Walker Corporation; rather, the issue should have been whether that dispute was to be created in the first place by the decision, in the absence of Walker Corporation, to declare Poplar a constructive trustee for the Club. The fourth consequence, in more general terms, was to provide an example of the caution required in imposing a remedial constructive trust to ensure that the legitimate interests of third parties will not be adversely affected.

117 *Walker Corporation's charge.* On 26 June 2007, Poplar also created a floating charge ("the Charge") over its assets. As from 27 June, those assets included the Option Land. The Charge secured the same debt as the Mortgage. The Charge provided that it automatically became a fixed charge if Poplar allowed another "Encumbrance" (for example the constructive trust) to exist or arise. Hence the Charge became fixed at precisely the same time as the constructive trust arose.

118 *The time when the constructive trust arose.* The Court of Appeal's orders are unclear as to whether the constructive trust arose at the time the Court made the orders on 3 June 2009, or at some earlier time – for example, as the Club contended, the time when the option was exercised on 27 June 2007. While ordinarily the remedy of constructive trust would have been selected from a range of possible remedies, by the time the orders were made it was the only remedy sought. But whenever the constructive trust arose, the Club would not

have been able to obtain unencumbered registration of the transfer to it pursuant to the constructive trust unless it was taking for value and without notice of prior interests. It should be noted that the Mortgage was executed on 26 June 2007 and the option was exercised thereafter on 27 June 2007.

119 *Evidence of the Club's notice of the Mortgage and Charge.* There was evidence before the trial judge that the Club had notice of the Mortgage and the Charge. For example, before the trial judge, the Mortgage was in evidence; there was evidence of the Charge; and there was evidence of negotiations between Walker Corporation and JACS for the provision of finance to buy the Option Land which were known to the Club before 27 June 2007.

120 At the hearing before Tobias JA on 6 April 2009 which led to the grant of an interlocutory injunction to prevent Walker Corporation's mortgage being registered, evidence was tendered establishing the existence of the Mortgage, the Charge and the advance by Walker Corporation of the funds to enable exercise of the option.

121 There was before the Court of Appeal, in relation to Walker Corporation's Amended Notice of Motion dated 22 June 2009, the following additional evidence, some on information and belief only.

122 In early June 2007 the Managing Director of Walker Corporation told the President of the Club that the Club should operate on the basis that Walker Corporation was funding "Mr Alexander's company" to enable it to purchase the Option Land and that Walker Corporation was preparing to take security over the Option Land.

123 On 25 June 2007 the Managing Director of Walker Corporation was sent a copy of a letter from the Club's solicitors to JACS threatening the institution of proceedings to enforce contractual rights – "to ensure JACS complies with its obligations under the MOU." That letter did not refer to any application for a declaration that a constructive trust existed over or should be imposed on the Option Land, nor did it claim that JACS or Poplar owed the Club any fiduciary duty. The letter to JACS stated the intention of the Club's solicitors "to forward a copy of this letter to Walker Corporation who has been involved in recent discussion with representatives of JACS and our client."

124 The Club tendered no evidence to contradict Walker Corporation's evidence to the effect that, before Poplar acquired the Option Land, the Club knew that Walker Corporation was financing the purchase and would take security over the Option Land.

125 Walker Corporation tendered evidence that, if the Club had claimed that whoever acquired the Option Land would hold it on trust for the Club, it would not have proceeded to fund the acquisition. And it tendered evidence that no claim that either a trust or a fiduciary duty existed had been made to it by the Club. Walker Corporation also tendered evidence that, on settlement of the purchase of the Option Land, a solicitor representing the Club produced to the solicitor for SGS a withdrawal of a caveat claiming "[a] legal interest as a party granted an option to purchase the [Option Land]." That was a withdrawal of the only claim that the Club had ever made up to that time to a proprietary interest in the Option Land.

Walker Corporation's submission: *Giumelli v Giumelli*

126 Walker Corporation submitted that before deciding to declare the constructive trust the Court of Appeal ought to have borne in mind the impact that that course would have on Walker Corporation's unregistered mortgage, of which the Club had notice, and of which the Court of Appeal was or ought to have been aware. The submission was correct, for reasons given in the line of cases associated with *Giumelli v Giumelli*[78].

127 The evidence may not have been complete. It may not have been perfect in form. But there was sufficient evidence of the Club having notice in the record as it stood before 3 June 2009 to justify the matter being taken into account in deciding whether to declare a constructive trust[79]. Indeed the Court of Appeal in its first judgment seems to have been seised of it, because, leaving aside the evidence earlier called before Tobias JA, which may not have been within its immediate contemplation, in rejecting JACS's request for an order that its just allowances claim be remitted to the Equity Division, it referred to evidence revealing that Walker Corporation was Poplar's financier. The evidence

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78 (1999) 196 CLR 101 at 113-114 [10] and 125 [49]-[50]; [1999] HCA 10; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 584-585 [40]-[43]; [1998] HCA 59; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 172 [200]; [2007] HCA 22. See also *Muschinski v Dodds* (1985) 160 CLR 583 at 623; [1985] HCA 78, where Deane J would only have imposed a constructive trust from the date when the Court's reasons for judgment were published, "[l]est the legitimate claims of third parties be adversely affected".

79 See above at [119]-[120].

became ampler after 3 June and before the second judgment was delivered on 23 July: in particular, the evidence that Walker Corporation would not have proceeded had it known a trust was to be claimed over the Option Land.

128 A constructive trust ought not to be imposed if there are other orders capable of doing full justice. In its Further Amended Statement of Claim the Club sought equitable compensation and an account of profits. It abandoned those claims in the Court of Appeal. Counsel for the Club submitted that equitable compensation would not have been a just remedy on the ground that JACS and Poplar were without significant assets. But that possibility does not affect the remedy of account of profits. The Club submitted that the arrangements in place between Walker Corporation, JACS and Poplar precluded either JACS or Poplar making a profit out of the exercise of the option. That submission is contested by Walker Corporation. That submission must be controversial, since Tobias JA made a finding on 6 April 2009 which contradicts it. The resolution of this controversy is something which ought to have taken place in the courts below had the proceedings been properly constituted. If it is true, as the Club submits, that Walker Corporation is controlling the litigation and will make all the profits from the exercise of the option, it may be that an order for equitable compensation or an account of profits could have been made against it.

129 In any event, it is not a complete answer to Walker Corporation's reliance on *Giumelli v Giumelli* that remedies other than a constructive trust may lack practical utility because of the impecuniosity of those against whom they are sought. One point made in the *Giumelli v Giumelli* line of cases is that care must be taken to avoid granting equitable relief which goes beyond the necessities of the case. Another point in those cases is that third party interests must be borne in mind in deciding whether a constructive trust should be granted. That line of cases does not permit a constructive trust to be declared in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant.

130 On this ground alone, were it necessary to do so, it would be appropriate to allow the Walker Corporation appeal.

Walker Corporation's submission: joinder of necessary parties

131 Walker Corporation submitted that where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party,

the non-party is a necessary party and ought to be joined. That submission is correct[80]. The Court of Appeal's orders directly affected Walker Corporation. The majority of the Court of Appeal (Macfarlan JA, Giles JA concurring) erred when it held to the contrary[81].

132 In *News Ltd v Australian Rugby Football League Ltd* the Full Federal Court (Lockhart, von Doussa and Sackville JJ) said[82]:

> "Where the orders sought establish or recognise a proprietary or security interest in land, chattels or a monetary fund, all persons who have or claim an interest in the subject matter are necessary parties. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest."

133 The relief claimed and granted – a constructive trust and a transfer of the land subject to the trust to the Club so as to make the interest transferred indefeasible on registration – directly affects the interests of any other person, like Walker Corporation, claiming an interest in the land, because orders in the Club's favour would, to a corresponding extent, be detrimental to those other persons. The Court of Appeal majority then said: "The appeal has only resolved the issues which arose between [the Club] and [JACS]."[83] That would be true if only personal remedies had been granted; but the constructive trust, a proprietary remedy, was granted in a way which resolved issues against Walker Corporation through creating indefeasible proprietary rights without its being heard.

134 The Court of Appeal majority also erred in saying: "Walker Corporation's claim that it has an equitable interest in the land ranking in priority to that of the [Club] may be pursued by it in separate proceedings against the [Club]."[84]

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80 *Victoria v Sutton* (1998) 195 CLR 291 at 316-318 [76]-[81]; [1998] HCA 56; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 523-525.

81 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 119 [39].

82 (1996) 64 FCR 410 at 524-525.

83 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 119 [39].

84 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 119 [39].

Walker Corporation's claim was not merely that its equitable interest ranked in priority to the Club's interest in the Option Land. One of its claims was that the Club never had any interest in the Option Land at all and that no constructive trust should have been declared because of the existence of its equitable interest of which the Club had notice both before the option was exercised and before the Court of Appeal's declaration of constructive trust. Indeed, Walker Corporation was entitled to claim, if it wished, that the Club's substantive case was insufficiently strong to succeed at all, whatever the remedy available if it did succeed to any extent. Walker Corporation was entitled to call evidence against that substantive case. Even if it did not wish to do that, it was entitled to be heard on the weaknesses in the substantive case. Counsel for the Club criticised the lateness of Walker Corporation's submission about calling evidence, which was made on the second day of the appeal to this Court. It may have been late, but it is sound.

135 The Court of Appeal majority's belief that adequate protection of Walker Corporation's position would be achieved by pursuing its claim to an equitable interest in "separate proceedings" took no account of s 63 of the *Supreme Court Act* 1970 (NSW). Section 63 provides:

> "The [Supreme Court] shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

The question is not whether any problem arising in the original proceedings could be resolved in separate proceedings, but, as explained above, whether that problem should have been resolved in the original proceedings without the need for separate proceedings.

136 The Court of Appeal majority next said that, in the separate proceedings in which Walker Corporation could pursue its claim that its Mortgage ranked in priority to the Club's constructive trust, "it would be open to Walker Corporation to seek interim relief preserving the status quo pending final determination of its claim."[85] That supports the view, contrary to what the Court of Appeal majority

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85 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 119 [39].

initially said, that its orders directly affected Walker Corporation, for here the Court of Appeal majority recognised that an interlocutory injunction of a judge in another Division of the Supreme Court was necessary to stop Walker Corporation's rights being taken away from it. The wisdom of the rule, which is about to be dealt with, that a person directly affected by an order in proceedings to which that person was not party is entitled as of right to have it set aside is thus demonstrated: it is a more efficient course than having to institute separate proceedings calling for an interlocutory injunction and an undertaking as to damages.

Walker Corporation's submission: entitlement of non-party who should have been joined to have order set aside

137 Walker Corporation submitted that if a court makes an order affecting a person who should have been joined as a necessary party, while the order will not be a nullity, that person is entitled to have the order set aside, and is not limited merely to seeking the favourable exercise of a discretion, whether or not the person in question becomes a party. As a general proposition this submission is correct. The setting aside of the order "lays the ghost of the simulacrum of a trial, and leaves the field open for a real trial"[86].

138 In contrast, the Court of Appeal majority said[87]:

> "If there had been reason, for convenience rather than necessity, to have Walker Corporation's claim determined together with resolution of the disputes between the [Club] and [JACS and Poplar], it is far too late for Walker Corporation now to be joined. It was not a party at first instance, and its claim should not be entertained for the first time on appeal. Even as an applicant in the appeal, it failed to apply at an earlier time, apparently in the expectation that the outcome would not be the imposition of a constructive trust. That its expectation has been disappointed is not a reason for allowing it to participate."

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86 *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; [1944] HCA 5. See also at 590-591, and see *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 347-348 [132]-[134].

87 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 119-120 [40]. Basten JA's reasoning at 116 [23] is similar.

In this passage the Court of Appeal majority erred, not only in electing not to exercise a discretion in Walker Corporation's favour, but also in treating it as a matter of discretion at all and in treating the question of joinder, rather than the question of setting aside the orders, as decisive[88]. If there is any exception to the principle relied on (which it is unnecessary to decide in this case), it can have no application in the present circumstances, in which there was evidence that a plaintiff claiming a constructive trust over Torrens system land is cognisant of a mortgage which would be affected by its claim.

The Club's submission: estoppel

139 Chancery procedure, the influence of which is apparent in the modern Judicature systems, was concerned that all persons materially interested in the subject matter of a suit generally ought to be made parties so as to settle the controversy by binding those interested to the final decree[89]. There was some relaxation of the strict application of this rule by the adoption of procedures for representative parties[90] but this is not relevant to the situation in the present case.

140 In *News Ltd v Australian Rugby Football League Ltd*[91] Lockhart, von Doussa and Sackville JJ said:

> "Generally speaking, to permit [the party prosecuting the proceedings] to transfer to others who might be affected by the outcome of the proceedings the responsibility of deciding whether or not they should apply to be joined could be productive of uncertainty and inconvenience. At times, it could lead to the need to halt expensive litigation part-way through, because a third party insufficiently understood the proceedings, or, through impecuniosity or some other reason, was not adequately advised."

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88 *Grovenor v Permanent Trustee Co of NSW Ltd* (1966) 40 ALJR 329; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 525.

89 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 261 [13]; [1999] HCA 48.

90 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 261-262 [14].

91 (1996) 64 FCR 410 at 526. See also *Wentworth v Wentworth* (2000) 52 NSWLR 602 at 634 [160].

News Ltd v Australian Rugby Football League Ltd was a case where players who had not been joined in the proceedings but only informed of them were not debarred from attacking the orders made. There is no doubt that Walker Corporation was aware of the first proceedings, and it informed the Court of Appeal of that fact. Walker Corporation said there was a reasonable explanation for its delay in seeking to be joined. Whether or not that is so, it had no duty to seek to be joined, and its delay does not in this case call for explanation.

141 In oral argument counsel for the Club outlined a submission to the effect that the facts supported an exception to what would otherwise be the operation of the principles stated in *News Ltd v Australian Rugby Football League Ltd*. This was that Walker Corporation was estopped by its conduct in not earlier seeking joinder and that its conduct had created or contributed to the continuation of an assumption on the part of the Club that the suit had been sufficiently constituted without Walker Corporation.

142 In *Osborne v Smith*[92] Kitto J referred to the well-established principle of practice in probate suits whereby any person having an interest in the estate might intervene as of right and be made a party; a corollary was that if a person with such an interest, knowing of the suit, did not intervene but stood by, that party was bound by the result and not allowed to reopen it by further suit.

143 The principle explained in *Osborne v Smith* is not expressed in terms of estoppel by conduct as understood in the modern authorities. However, the Club relied upon cases, in particular the decision of the Privy Council in *Nana Ofori Atta II v Nana Abu Bonsra II*[93], and of the English Court of Appeal in *House of Spring Gardens Ltd v Waite*[94], where the probate practice has been so treated and extended into other areas of litigation.

144 It is unnecessary to consider further these authorities given the lack of the factual foundation alleged by the Club as necessary to make good its submissions. It has not been shown that Walker Corporation conducted,

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92 (1960) 105 CLR 153 at 158-159; [1960] HCA 89.

93 [1958] AC 95.

94 [1991] 1 QB 241. See also Spencer Bower and Handley, *Res Judicata*, 4th ed (2009), par 9.12; and *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 403, 456; [1973] HCA 59.

controlled or managed the proceedings or that Walker Corporation is the only party likely to gain from the proceedings. Nor has it been shown that the Club suffered detriment from the alleged conduct of Walker Corporation by being induced to believe that the suit was sufficiently constituted without Walker Corporation. A significant counter consideration is that the Club knew of Walker Corporation's claim to hold an unregistered mortgage over the Option Land, which the Club was seeking to overreach by the imposition of a constructive trust.

145 *The effect of the Uniform Civil Procedure Rules.* One aspect of Basten JA's reasoning in the Court of Appeal's second judgment, which the Club defended, was as follows[95].

(a) Subject to statutory exceptions, the Supreme Court has no power to set aside or vary orders once they have been entered.

(b) The orders of the Court of Appeal proposed in its first judgment were entered on 3 June 2009 because that is what the "court's computerised record system indicates" and r 36.11(2) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") provides: "Unless the court orders otherwise, a judgment or order is taken to be entered when it is recorded in the court's computerised court record system."

(c) Only orders (a)-(d) were entered on that date; however, the apparent failure to enter orders (e)-(g) was only an irregularity on which nothing turns.

(d) Orders (a)-(d) can only be varied pursuant to a Notice of Motion filed within 14 days of entry: UCPR, r 36.16(3A).

(e) The orders sought in Walker Corporation's Amended Notice of Motion dated 22 June 2009 that had not appeared in its original Notice of Motion dated 11 June 2009 (namely those seeking to set aside the declaration of a constructive trust and the order of transfer, together with alternative orders) were sought more than 14 days after the relevant orders were entered on 3 June 2009.

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95 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 113-114 [3]-[5] and 117 [27].

146 The majority did not share this point of view: its orders state that order 4 made on 3 June was entered on 12 June[96], and thus the majority disagrees with proposition (b). However, Basten JA's reasoning raises important questions.

147 One problem with proposition (b) is that it assumes that the orders were entered on 3 June, that is, the day they were made. Rule 36.11(2A) provides:

> "If the court directs that a judgment or order be entered forthwith, the judgment or order is taken to be entered:
>
> (a) when a document embodying the judgment or order is signed and sealed by a registrar, or
>
> (b) when the judgment or order is recorded as referred to in subrule (2),
>
> whichever first occurs."

There was no direction that the orders be entered forthwith.

148 Whatever "the court's computerised court record system" showed, there is a document in the record entitled "AMENDED JUDGMENT/ORDER". It purported to record a "JUDGMENT/ORDER" made or given on 3 June 2009, entered on 12 June 2009 and sealed on 10 September 2009. It recorded seven numbered orders corresponding to the orders lettered (a)-(g) proposed at the end of the reasons for judgment of the Court of Appeal published on 3 June 2009. The Club submitted that that document only came into existence after the Court of Appeal delivered its second judgment on 23 July 2009, the document could not have been before the Court of Appeal, the document was thus irrelevant, and the reference in the document to entry on 12 June 2009 was inconsistent with the computer printout shortly to be discussed. It is true that the document in its sealed form could not have been before the Court of Appeal. In an unsealed form, however, it may have been available before 23 July 2009. And, for reasons to be explained, it may have been more reliable than the computer printout.

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96 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 121 [53].

149 Another problem with proposition (b) is that it refers to a computer printout not available to the parties[97]. The Club procured it and handed it up on the second last day of the appeal to this Court. In her reply, junior counsel for Walker Corporation pointed out that each page of the printout was headed:

> "THIS RECORD OF PROCESSING IS ISSUED FOR INFORMATION ONLY. IT SHOULD NOT BE RELIED UPON AS THE OFFICIAL RECORD OF THE COURT FILE."

It is unclear how the printout corresponds with "the court's computerised court record system" referred to in r 36.11(2). It does seem clear that this document was what proposition (b) was referring to in relation to what "the court's computerised court record system" revealed. That document records only four orders being made on 3 June 2009, and the last three of those orders are lettered (b)-(d). That document contains no reference to orders (e)-(g) and it was said that those orders "had not been included in the computer record" and "have never been included in the court's computerised court record system."[98] Junior counsel for Walker Corporation also pointed out that, although the document contained a list of dates on every page in the left hand column, it did not expressly say that the entry purportedly recorded was entered on that day; some of the dates were out of order; and there was no record dated 12 June 2009 of the signing and sealing of the orders which, according to the "AMENDED JUDGMENT/ORDER" document, were entered on 12 June 2009 and sealed on 10 September 2009. She further submitted that the "computerised record" in question should have been put to the parties for their comment, so that inquiries could have been made by them of the Registry with a view to finding out the particular date on which particular events actually happened. She also submitted that weight should not be placed on the computer record. Those submissions should be accepted.

150 In addition, she referred to s 14 of the *Civil Procedure Act* 2005 (NSW), which provided: "In relation to particular civil proceedings, the court may, by order, dispense with any requirement of rules of court if satisfied that it is appropriate to do so in the circumstances of the case." She submitted that, had

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97 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 113 [3].

98 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 113 [5].

Walker Corporation been given notice of the "computerised record", it could have applied to the Court of Appeal for dispensation from the limitations created by r 36.16 of the UCPR. Sub-rule (1) of that rule provides: "The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order." It is not necessary to determine the correctness of that submission, since there are several other reasons why the restriction in r 36.16(1) did not apply.

151 One is that, since the computerised record appears unreliable, it is safe to conclude that the orders were entered on 12 June 2009, and the Amended Notice of Motion was filed on 22 June 2009, within 14 days of 12 June 2009. Secondly, the order said in the document headed "AMENDED JUDGMENT/ORDER" to have been entered on 12 June 2009 was an instance of the court ordering "otherwise" within the meaning of r 36.11(2). Thirdly, of the seven orders appearing at the end of the Court of Appeal's reasons for judgment, only four appear in the computerised record. The process of creating the record was thus insufficiently complete to start the 14 day period in r 36.16(3A) running, even if the other deficiencies of the computerised record are overlooked.

152 It must be said that if the Club's submission that r 36.11(2) applies to the facts of this case is sound, the good sense of the rule is open to debate. It concerns an important question, for non-compliance with court orders can be contempt of court: it is important to know what orders have been made and when, and it is equally important to know within what period they can be set aside. The lapse of time between pronouncement and entry of orders also provides opportunity for the correction of error, an opportunity lost if the submissions by the Club are accepted. If the Club's submissions in relation to r 36.11(2) were correct, considerable injustice could be done to persons unaware that orders damaging their rights have been entered without their knowledge. The process of entry into the court's computerised system is a secret process independent of the acts of the parties and outside their knowledge.

153 *Further submissions of the Club.* The Club relied on r 6.23 of the UCPR, which provides: "Proceedings are not defeated merely because of the misjoinder or non-joinder of any person as a party to the proceedings." The Club also relied on r 6.24(1), which provides: "If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party." The Club characterised the appeal as an appeal from the decision of the Court of Appeal that Walker Corporation should not be joined as a party. However, Walker Corporation does not now seek to be joined, and it does not submit that the proceedings were defeated merely by its

non-joinder. The soundness or otherwise of its position does not depend either on its being a party or on the rules of court: it depends on matters of right affecting non-parties which rest on general law principles of natural justice[99].

The Club's submissions: the Court of Appeal orders avoid any injustice

154 The Club submitted that even if Walker Corporation's submissions up to this point were accepted, the orders of the Court of Appeal as they stood after the Court of Appeal's second judgment left it open to Walker Corporation to obtain the opinion of the Supreme Court of New South Wales in separate proceedings as to whether its claim had priority over the Club's constructive trust, and that hence those orders did not do injustice to Walker Corporation.

155 Before examining that submission, it is necessary to clarify some aspects of the Court of Appeal's orders. At the end of the reasons for judgment published on 3 June 2009, seven orders lettered (a)-(g) were proposed[100]. Virtually the same orders, but numbered 1-7, appeared in the formal order made on 3 June 2009, entered on 12 June 2009 and sealed on 10 September 2009. Order 3 of those orders made on 3 June 2009 and entered on 12 June 2009 was a declaration that Poplar "holds all of its right, title and interest in the land identified in Folio Identifier 2/1114604 on a constructive trust for the [Club]." That order was not changed on 23 July 2009. Order 4 made on 3 June 2009 and entered on 12 June 2009 was:

> "Order that upon the [Club] paying to [Poplar] the amount of $6.73 million on or before the date 3 months from the date of these orders, [Poplar] transfer all its rights, title and interest in the land contained in Folio Identifier 2/1114604 to the [Club]."

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99 *Victoria v Sutton* (1998) 195 CLR 291 at 316 [77].

100 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86 at 111 [115].

On 23 July the first three orders proposed by the majority of the Court of Appeal were[101]:

> "(1) Vary order (d) made on 3 June 2009 by deleting the words 'on or before the date 3 months from the date of these orders' and replacing them with the words 'as expeditiously as possible'.
>
> (2) Order that in the event that [Poplar] does not comply with order 4 as entered on 12 June 2009 and as subsequently varied, a registrar of the court is empowered to execute all documents and do all things as may be necessary to transfer to the [Club] [Poplar's] right, title and interest in the land contained in Folio Identifier 2/1114604.
>
> (3) Order that the words 'subject to any different order that may be made by the Supreme Court of New South Wales in any other proceedings to which the [Club] and [JACS and Poplar] are parties' be added to the end of order 1 made by Tobias JA on 6 April 2009, as subsequently extended."

156 The order described in order (1) of the Court of Appeal's orders proposed on 23 July 2009 as "order (d) made on 3 June 2009" is virtually identical with the order described in order (2) of those proposed orders as "order 4 as entered on 12 June 2009". The supposed subsequent variation referred to in order (2) was that to be effected by order (1). The reference in order (3) to "order 1 made by Tobias JA on 6 April 2009, as subsequently extended" was a reference to an order that originally took the form:

> "The Registrar-General of New South Wales be restrained from taking any steps to register or permit the registration of an interest over the interest of Poplar Holdings in the Property at Folio Identifier 2/1114604 until 5pm on 5 May 2009 or until further order of the Court."

It had been extended, the last time by Macfarlan JA on 10 June 2009 "until further order". In theory that meant that order 1 made by Tobias JA, as amended on 23 July 2009, could be discharged by the Supreme Court of New South Wales in other proceedings. But that left in place, immune from possible change, order 3 as made on 3 June 2009 and entered on 12 June 2009, and order 4 as made on

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101 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 121 [53].

3 June 2009, entered on 12 June 2009 and varied on 23 July 2009. In consequence, the Court of Appeal had closed off any possibility of challenging either the constructive trust declaration or the order that Poplar transfer its rights to the Club – that is, the orders which rested on an acceptance of the Club's substantive case.

157 Walker Corporation has been prejudiced in two ways by the orders made by the Court of Appeal.

158 First, the failure of the Court of Appeal to discharge the injunction on order 1 granted by Tobias JA on 6 April 2009 unless security for the undertaking for damages was provided has been prejudicial to Walker Corporation in the period 23 July 2009 until the day these appeals are decided. The injunction prevented it from exercising its rights to sell the Option Land under the Mortgage and the Charge. The injunction also prevented it from registering the Mortgage – a state of affairs which is against the public interest because it undermines the utility of the Register and public confidence in its utility. Originally, on 6 April 2009, Tobias JA declined to require an undertaking as to damages from the Club on the ground of its impecuniosity and because of the short duration then contemplated for the injunction – which has in fact operated ever since. When the Court of Appeal heard the appeal, the Court of Appeal did accept an undertaking as to damages, but it was not secured.

159 In the proceedings decided by the Court of Appeal on 23 July 2009, Walker Corporation applied to have the injunction dissolved unless the Club provided security for the undertaking as to damages. Basten JA did not deal with that application. Macfarlan and Giles JJA declined to do so on the ground that Walker Corporation was not a party to the proceedings, and they refused to order that it become a party[102]. Yet r 25.8 of the UCPR permits non-parties to receive the benefit of the usual undertaking as to damages.

160 The Club contends that it is not open to Walker Corporation to complain about the lack of security for the undertaking as to damages. It contends that no special leave was granted to raise the complaint; that, although the injunction granted by Tobias JA was interlocutory, since that granted by the Court of Appeal is final, there is no occasion for an undertaking as to damages; and that Walker Corporation had not established a *prima facie* case that its claim had

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102 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 120 [41].

priority over that of the Club. These submissions are unsound. The injunction as extended on 23 July 2009 was twice expressed to be until further order[103], its purpose was to maintain the status quo until other proceedings determined the rights of the parties, and an order restraining the Registrar-General from registering an interest in the Option Land is unlikely to be final. The material which Walker Corporation tendered in the Court of Appeal did establish a serious question to be tried. In any event it was for the Club, as the party seeking the grant and continuation of the injunction, to establish a serious question to be tried, not the person who might later rely on the undertaking as to damages. And the complaint about the undertaking is merely part of Walker Corporation's overall complaint about the unsatisfactory state of affairs created by the Court of Appeal's orders taken as a whole.

161 The second respect in which the Court of Appeal's orders fail to avoid injustice is as follows. The Court of Appeal first made a decision that the Club had a proprietary right. Then, some weeks later, it made a decision that in other proceedings there should be a determination of whether there was some other right having priority over the Club's proprietary right. That is unsatisfactory. As was pointed out earlier[104], the first decision binds Walker Corporation to the result of proceedings to which it was not a party – a result which it could have affected, by evidence or argument. Walker Corporation does not just want priority over an interest which it has to accept exists. It wants that interest to be held non-existent, and it was deprived of the opportunity of achieving that result under conditions in which all matters would have been disposed of in one proceeding, with all evidence called, all submissions made and all questions considered together. That type of prejudice cannot be overcome by future proceedings about priorities in which Walker Corporation will have no opportunity to contend that the constructive trust now competing against its claimed mortgage should never have been recognised and does not exist.

Orders on the Walker Corporation appeal

162 Given that the appeal by JACS has succeeded, there is no point in allowing the Walker Corporation appeal, because the relief claimed by Walker Corporation in its appeal assumes that the JACS appeal will be dismissed. The

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103 *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* (2009) 261 ALR 112 at 122 [53]. See also at 120 [44] ("any different order").

104 See above at [131]-[133].

consequence of allowing the JACS appeal is that the Court of Appeal orders which Walker Corporation wishes to have set aside will be set aside in the JACS appeal. But it should be stressed that if the JACS appeal had failed, the Walker Corporation appeal would have succeeded, and orders for a new trial would have been made. Despite the dismissal of its appeal, it was necessary for Walker Corporation to have brought it. Hence although the Walker Corporation appeal must be dismissed, the Club must pay Walker Corporation's costs in this Court and in the Court of Appeal.

Orders in S309 of 2009

163 The orders are:

1. White City Tennis Club Ltd ("White City") have leave to file out of time its Second Notice of Contention.

2. The appeal be allowed with costs.

3. The following orders:

   (a) The orders of Tobias JA made on 6 April 2009;

   (b) Order 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales ("the Court of Appeal") made on 5 May 2009;

   (c) The orders of the Court of Appeal made on 3 June 2009, as amended on 23 July 2009;

   (d) Order 7 of the orders of the Court of Appeal made on 10 June 2009; and

   (e) Orders 3 and 6 of the orders of the Court of Appeal made on 23 July 2009

   be set aside, and in lieu thereof:

   (f) The appeal by White City to the Court of Appeal be dismissed with costs; and

   (g) White City pay the costs of John Alexander's Clubs Pty Ltd and Poplar Holdings Pty Ltd of White City's Notice of Motion dated 5 June 2009.

Orders in S308 of 2009

164 The orders are:

1. Set aside so much of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 23 July 2009 as ordered Walker Corporation Pty Ltd ("Walker Corporation") to pay the costs of White City Tennis Club Ltd ("White City") of the Amended Notice of Motion of Walker Corporation (including the costs of the Notice of Motion which the Amended Notice of Motion superseded) and in lieu thereof order that:

   White City pay Walker Corporation's costs of:

   (a) Walker Corporation's appearance before Macfarlan JA on 10 June 2009; and

   (b) Walker Corporation's costs of its Notice of Motion dated 11 June 2009 and its Amended Notice of Motion dated 22 June 2009.

2. White City pay Walker Corporation's costs of the appeal to this Court.

3. The appeal otherwise be dismissed.