

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

CIV 2012 of 2015

B E T W E E N :

ANGAS SECURITIES LIMITED (ACN 091 942 728) Plaintiff

and

CARDIFF CAPITAL PTY LTD (ACN 106 071 659) First Defendant

**AMENDED FURTHER REVISED FINAL SUBSTITUTED STATEMENT OF CLAIM
PURSUANT TO ORD 21 R 3**

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c/- Solomon Brothers
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The Parties

1. The Plaintiff (“**Angas**”) was at all material times a company capable of suing and being sued in its own corporate name and style.
2. The First Defendant (“**the Trustee**”):
 - 2.1. Was at all material times a company capable of suing and being sued in its own corporate name and style.
 - 2.2. Had as its directors:
 - 2.2.1. Paul Stephen McCarthy (“**McCarthy**”) from 20 February 2008 to date; and
 - 2.2.2. Matthew John Hower (“**Hower**”) from 11 September 2003 to 20 July 2015.
 - 2.3. Operated under the company name of “*Cardiff Capital Pty Ltd*” from 16 September 2008 to date.

Other Protagonists

4. Craig Malcolm Jolly (“**Jolly**”) was at all material times:
 - 4.1. A director of CM Jolly Pty Ltd ACN 060 070 493 (“**CMJ**”).
 - 4.2. A director of Waikiki Asset Pty Ltd ACN 142 822 526 (“**Waikiki**”).
5. At all material times:
 - 5.1. CMJ was:
 - 5.1.1. The trustee of the Wakaha Property Trust.
 - 5.1.2. An investment vehicle connected with Jolly and his family.
 - 5.2. Waikiki was:
 - 5.2.1. The trustee of the CMJ Property Trust.
 - 5.2.2. An investment vehicle connected with Jolly and his family.
 - 5.3. Valentine Falls Estate Pty Ltd ACN 125 612 348 (“**VFE**”) was the registered proprietor of certain land located at Kununurra, Western Australia (“**Valentine Falls Estate**”).
 - 5.4. GIC Hectorville Pty Ltd ACN 131 607 682 (“**GIC**”) was the registered proprietor of certain land located at Hectorville, South Australia (“**the Hectorville Property**”).

- 5.5. Green 136 – 138 Pty Ltd ACN 120 851 336 (“**Green**”) was the registered proprietor of certain land located at Joondanna, Western Australia (“**the Joondanna Property**”).
- 5.6. Garden Estate Hackham Pty Ltd ACN 139 883 177 (“**GEH**”) was the registered proprietor of certain land located at Hackham, South Australia (“**the Hackham Property**”).

The Trusts

6. From time to time, and under a series of arrangements as pleaded in paragraphs [6] to [8] herein, a number of trusts (“**the Trusts**”) were established by advancing funds to the Trustee which in turn were advanced by the Trustee to certain entities and with the Trustee holding those funds on trust and upon those funds being loaned by the Trustee, the rights of repayment and securities for repayment were held on trust.

Particulars

- (a) An advance by CMJ to the Trustee which was then loaned by the Trustee to VFE as pleaded in paragraphs [9] to [12] herein (“**the VFE Trust**”).
- (b) An advance by CMJ to the Trustee which was then loaned by the Trustee to GIC as pleaded in paragraphs [19] to [21] and [24] herein (“**the GIC Trust**”).
- (c) An advance by CMJ to the Trustee which was then loaned by the Trustee to Green as pleaded in paragraphs [31] to [33] and [36] herein (“**the Green Trust**”).
- (d) An advance by Waikiki to the Trustee which was then loaned by the Trustee to GEH as pleaded in paragraphs [43] to [45] and [47] herein (“**the GEH Trust**”).
7. Each of the Trusts had characteristics as follows:
- 7.1. They were established under written instruments (“**the Instruments**”) provided by the Trustee to CMJ and/or Waikiki as follows:
- 7.1.1. In the case of the VFE Trust an investment proposal document described as a “*Finance Proposal*” and dated 8 April 2009 (“**the VFE Trust Instrument**”).
- 7.1.2. In the case of the GIC Trust an investment proposal document described as a “*Finance Proposal*” and dated 20 July 2009 (“**the GIC Trust Instrument**”).
- 7.1.3. In the case of the Green Trust an investment proposal document described as a “*Finance Proposal*” and dated 15 February 2010 (“**the Green Trust Instrument**”).

- 8.6. A duty to act gratuitously unless otherwise stated in the terms of the Instruments and, without informed consent, to avoid conflict or a real or substantial possibility of conflict with the interests of CMJ and/or Waikiki (“**the No Benefit Duty**”).

VFE Trust

The VFE Trust Arrangement

9. On or around 8 April 2009, the VFE Trust was established under the terms of the VFE Trust Instrument which were to the following effect:
- 9.1. CMJ would advance an amount of \$4,000,000 to the Trustee which would be held on trust for the benefit of CMJ (“**the VFE Funds**”).
- 9.2. The Trustee would then lend the VFE Funds to VFE, for and on behalf of CMJ, to assist VFE with the development of Valentine Falls Estate under a loan facility between the Trustee as lender and VFE as borrower (“**the VFE Facility**”).
- 9.3. The VFE Facility would have the following structure:
- 9.3.1. The amount of the advance under the VFE Facility would be \$4,000,000.
- 9.3.2. The VFE Facility would be for a term of 12 months.
- 9.3.3. An amount of \$2,000,000 would be advanced by the Trustee to VFE on settlement of the loan provided that VFE had achieved \$10,000,000 in pre-sales of allotments in the Valentine Falls Estate to the satisfaction of the Trustee.
- 9.3.4. A further amount of \$2,000,000 would be advanced by the Trustee to VFE only when VFE had achieved presales of allotments in the Valentines Falls Estate in the amount of \$13,450,000.00.
- 9.3.5. The VFE Facility would accrue interest:
- 9.3.5.1. At a higher rate of interest of 28% per annum.
- 9.3.5.2. At a lower rate of interest of 20% per annum.
- 9.3.6. Interest would be paid on expiry of the VFE Facility.
- 9.3.7. Guarantees would be procured from Bradley John Higgins and Dale James Champion for satisfaction of liabilities under the VFE Facility (“**the VFE Guarantees**”).

- 9.3.8. Repayment of the VFE Facility would be secured by a second mortgage behind National Australia Bank registered on the title to the Valentine Falls Estate (“**the VFE Securities**”).
- 9.4. The Trustee would not advance the VFE Funds to VFE unless and to its satisfaction:
 - 9.4.1. In the case of the initial amount of \$2,000,000, VFE had secured a total of \$10,000,000 in pre-sales of allotments of land in the Valentine Falls Estate.
 - 9.4.2. In the case of the further amount of \$2,000,000, VFE had secured a total amount of \$13,450,000 in pre-sales of allotments of land in the Valentine Falls Estate.
- 9.5. The Trustee would hold the benefit of the VFE Guarantees and the VFE Securities including rights of repayment of funds loaned by the Trustee to VFE on trust for the benefit of CMJ.
- 9.6. Twelve (12) months following the advance by CMJ to the Trustee of the VFE Funds, the VFE Trust would vest and the Trustee would realise the corpus of the VFE Trust and distribute it to CMJ by taking steps to
 - 9.6.1. To the extent that the VFE Funds had not been loaned by the Trustee, or loaned by the Trustee and subsequently repaid by or recovered from VFE, pay those moneys to CMJ; and/or
 - 9.6.2. To the extent that the VFE Funds had been loaned by the Trustee but not repaid by or recovered from VFE:
 - 9.6.2.1. Realise the VFE Securities and pay any moneys to CMJ; and
 - 9.6.2.2. Enforce the VFE Guarantees and pay any moneys to CMJ; or
 - 9.6.2.3. Alternatively, assign the Trustee’s rights under the VFE Securities and the VFE Guarantees to CMJ.
10. The VFE Trust Instrument was:
 - 10.1. Provided by Hower and McCarthy to Jolly on or around 8 April 2009.
 - 10.2. Executed by Jolly for and on behalf of CMJ and by McCarthy for and on behalf of the Trustee on or around 8 April 2009.
11. On or around 15 April 2009:
 - 11.1. CMJ advanced the VFE Funds to the Trustee.

- 11.2. The Trustee executed an Acknowledgement of Trust wherein the Trustee acknowledged that it held the VFE Funds on trust for the benefit of CMJ.

Breaches of the VFE Trust

12. The Trustee breached the Trust Duties by:
 - 12.1. Lending the VFE Funds to VFE in circumstances where:
 - 12.1.1. VFE had failed to secure a total of \$10,000,000 in pre-sales of allotments of land in the Valentine Falls Estate.
 - 12.1.2. VFE had failed to secure a total amount of \$13,450,000 in pre-sales of allotments of land in the Valentine Falls Estate.
 - 12.1.3. Of the VFE Funds, only an amount of \$1 million was loaned to VFE for the development of the Valentines Falls Estate and the balance was retained by the Trustee and used for other purposes known by the Trustee but not otherwise disclosed to CMJ.
 - 12.2. Failing to realise and distribute the corpus of the VFE Trust on or after 15 April 2010, being when the investment term expired and the VFE Trust was fixed.
 - 12.3. In the premises of the matters pleaded in paragraphs [9.6.2.1] and [9.6.2.2] herein, failing to enforce the VFE Guarantees or VFE Securities on or after 15 April 2010.
 - 12.4. Failing to provide any accounting to CMJ for the:
 - 12.4.1. Disbursal of the VFE Funds, or any of them.
 - 12.4.2. The receipt by the Trustee of any moneys paid by VFE to the Trustee.
 - 12.5. Providing the VFE Funds, that where KWS had registered mortgage K458684 on the title to the Valentine Falls Estate on 11 January 2008, which mortgage secured repayment of moneys owed to KWS which, as at January 2021, were an amount in the order of \$1,145,930.44 in priority to the VFE Securities.
 - 12.6. In the alternative to the breaches pleaded in paragraphs [12.2] and [12.3] and in the premises of the pleading at paragraph [9.6.2.3], failing to assign the Trustee's rights under the VFE Securities and the VFE Guarantees to CMJ.
13. The conduct of the Trustee:
 - 13.1. As pleaded in paragraph [12.1] herein was a breach of:

- 13.1.1. The Investment Duty;
 - 13.1.2. The Management Duty; or
 - 13.1.3. The Preservation Duty.
- 13.2. As pleaded in paragraph [12.2] herein was a breach of:
- 13.2.1. The Investment Duty;
 - 13.2.2. The Management Duty; or
 - 13.2.3. The Preservation Duty.
- 13.3. As pleaded in paragraph [12.3] herein was a breach of:
- 13.3.1. The Investment Duty;
 - 13.3.2. The Management Duty; or
 - 13.3.3. The Preservation Duty.
- 13.4. As pleaded in paragraph [12.4] herein was a breach of:
- 13.4.1. The Records Duty; or
 - 13.4.2. The Management Duty.
- 13.5. As pleaded in paragraph [12.5] was a breach of:
- 13.5.1. The No Profit Duty;
 - 13.5.2. The Management Duty;
 - 13.5.3. The Investment Duty;
 - 13.5.4. The Preservation Duty; or
 - 13.5.5. The No Benefit Duty.
- 13.6. As pleaded in the alternative in paragraph [12.6] herein was a breach of:
- 13.6.1. The Investment Duty; and/or
 - 13.6.2. The Management Duty.

14. Had the Trustee discharged the Trust Duties:
 - 14.1. CMJ would not have advanced the VFE Funds to the Trustee.
 - 14.2. Alternatively, the Trustee:
 - 14.2.1. Would not have loaned the VFE Funds to VFE and would have returned them to CMJ on or before 15 April 2010.
 - 14.2.2. Would have recovered the corpus of the VFE Trust in part or in whole.
15. The breach of the Trust Duties has caused CMJ loss and damage as follows:
 - 15.1. Loss of the VFE Funds in part or in whole.
 - 15.2. Interest on the VFE Funds.
 - 15.3. Recovery costs.

VFE Negligence

16. Further, or in the alternative to the matters pleaded in paragraphs [12] to [15] herein:
 - 16.1. By virtue of the matters pleaded in paragraph [11] herein, the Trustee owed CMJ a duty of care to invest the VFE Funds and thereafter administer the corpus of the VFE Trust with all care, skill and diligence.
 - 16.2. The Trustee breached its duty of care to CMJ by engaging in the conduct pleaded in paragraph [12.1] herein.
17. Had the Trustee discharged its duty of care to CMJ as pleaded in paragraph [16] herein, the Trustee:
 - 17.1. Would not have loaned the VFE Funds to VFE and would have returned them to CMJ on or before 15 April 2010.
 - 17.2. Alternatively, would have recovered the VFE Funds in part or in whole.
18. The breach of the duty of care owed by the Trustee to CMJ has caused CMJ loss and damage as follows:
 - 18.1. Loss of the VFE Funds in part or in whole.
 - 18.2. Interest on the VFE Funds.
 - 18.3. Recovery costs.

GIC Trust

The GIC Trust Arrangement

19. On or around 20 July 2009, the GIC Trust was established under the terms of the GIC Trust Instrument which were to the following effect:
 - 19.1. CMJ would advance an amount of \$3,560,000 to the Trustee, which would be held on trust for the benefit of CMJ (“**the GIC Funds**”).
 - 19.2. The Trustee would then lend the GIC Funds to GIC on behalf of CMJ under a loan facility between the Trustee as lender and GIC as borrower to assist GIC to purchase the Hectorville Property (“**the GIC Facility**”).
 - 19.3. The GIC Facility would have the following structure:
 - 19.3.1. The amount of the advance under the GIC Facility would be \$3,560,000.
 - 19.3.2. The GIC Facility would be for a term of 12 months.
 - 19.3.3. The GIC Facility would accrue interest:
 - 19.3.3.1. At a higher rate of interest of 29% per annum.
 - 19.3.3.2. At a lower rate of interest of 25% per annum.
 - 19.3.4. Interest was to be paid on expiry of the GIC Facility.
 - 19.3.5. Security would be provided to the Trustee for satisfaction of liabilities under the GIC Facility (“**the GIC Securities**”) which included the following:
 - 19.3.5.1. A registered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5152 Folio 476 to be granted by GIC Hectorville Pty Ltd.
 - 19.3.5.2. A registered second mortgage over the whole of the land comprised in Lot 1 and Lot 2 in Certificate of Title Register Book Volume 1524 Folio 896 to be granted by GIC Chapman Road Pty Ltd in its own right and for and on behalf of the CIC Chapman Road Unit Trust.
 - 19.3.5.3. A registered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5985 Folio 243 to be granted by Michael Vidale.
 - 19.3.5.4. A registered second mortgage over the whole of the land comprised in Certificate of Title Register

Book Volume 5453 Folio 946 to be granted by Paola Lisa Vidale.

- 19.3.5.5. A registered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5302 Folio 19 to be granted by GIC 172 Hutt Street Pty Ltd.
- 19.3.5.6. A registered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5302 Folio 101 to be granted by GIC 195 Hutt Street Pty Ltd.
- 19.3.5.7. A registered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5685 Folio 860 to be granted by Paola Lisa Vidale.
- 19.3.5.8. A registered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5817 Folio 105 to be granted by Vidale Developments Pty Ltd in its own right and trustee for the Vidale Developments Trust.
- 19.3.5.9. Debenture charges over all of the assets and undertakings of:
 - (a) GIC Hectorville Pty Ltd in its own right and as trustee for the GIC Hectorville Unit Trust.
 - (b) GIC Chapman Road Pty Ltd in its own right and as trustee for the GIC Chapman Road Unit Trust.
 - (c) GIC 172 Hutt Street Pty Ltd.
 - (d) GIC 195 Hutt Street Pty Ltd.
 - (e) GIC Australia Pty Ltd.
 - (f) Vidale Developments Pty Ltd in its own right and as trustee for the Vidale Developments Trust.
- 19.3.6. Guarantees would be procured from Michael Vidale GIC Chapman Road Pty Ltd, GIC Australia in its own right and as trustee for the GIC Hectorville Unit Trust and Vidale Developments Pty Ltd in its own right and its capacity as the trustee for the Vidale Developments Trust for satisfaction of liabilities under the GIC Facility (“**the GIC Guarantees**”).

- 19.3.7. Repayment of the GIC Facility would be secured by a second registered mortgage behind Bank of Western Australia (“**Bankwest**”) registered on the title to the Hectorville Property.
- 19.4. The Trustee would hold the benefit of the GIC Guarantees and the GIC Securities including rights of repayment of funds advanced by the Trustee to GIC on trust for the benefit of CMJ.
- 19.5. Twelve (12) months following the advance by CMJ to the Trustee of the GIC Funds, the GIC Trust would vest and the Trustee would realise the corpus of the GIC Trust and distribute it to CMJ. by taking steps to:
 - 19.5.1. To the extent that the GIC Funds had not been loaned by the Trustee, or loaned by the Trustee and subsequently repaid by or recovered from GIC, pay those moneys to CMJ; and/or
 - 19.5.2. To the extent that the GIC Funds had been loaned by the Trustee but not repaid by or recovered from GIC:
 - 19.5.2.1. Realise the GIC Securities and pay any moneys to CMJ; and
 - 19.5.2.2. Enforce the GIC Guarantees and pay any moneys to CMJ; or
 - 19.5.2.3. Alternatively, assign the Trustee’s rights under the GIC Securities and the GIC Guarantees to CMJ.
- 20. The GIC Trust Instrument was:
 - 20.1. Provided by Hower and McCarthy to Jolly on or around 20 July 2009.
 - 20.2. Executed by Jolly for and on behalf of CMJ and by McCarthy for and on behalf of the Trustee on or around 20 July 2009.
- 21. On or around 20 July 2009, CMJ advanced the GIC Funds to the Trustee.
- 22. The Trustee made payments to a total of \$5,100,000 to CMJ in respect of the GIC Trust as follows:
 - 22.1. In the amount of \$800,000 on or around 1 July 2011.
 - 22.2. In the amount of \$2,400,000 on or around 15 April 2013.
 - 22.3. In the amount of \$1,900,000 on or around 15 April 2014.
- 23. In or around November 2014:
 - 23.1. The Hectorville Property was sold for an amount in the order of \$16,200,000.

- 23.2. An amount in the order of \$9,000,000 was remitted to Bankwest to discharge the first registered mortgage over the Hectorville Property.
- 23.3. To discharge the second registered mortgage over the Hectorville Property, an amount of \$6,050,000 was remitted to the Trustee (“**the Hectorville Proceeds**”).
- 23.4. The balance owing to the Trustee under the GIC Facility was rolled over by the Trustee into other projects promoted by Michael Vidale or projects related to Michael Vidale:

Particulars

- (a) Further particulars will be provided following disclosure.

Breaches of the GIC Trust

- 24. The Trustee breached the Trust Duties by:
 - 24.1. Failing to realise and distribute the corpus of the GIC Trust on or after 20 July 2010, being when the investment term expired and the GIC Trust was fixed.
 - 24.2. Lending funds to GIC on terms inconsistent with the structure for the GIC Facility as set out in the GIC Trust Instrument:

Particulars

- (a) The amount of the advance by the Trustee to GIC under the GIC Facility was \$4,450,000 and not \$3,560,000 as disclosed in the GIC Trust Instrument.
 - (b) The Trustee charged GIC an application fee of \$187,000 under the GIC Facility which was not disclosed in the GIC Trust Instrument.
 - (c) The Trustee charged GIC a risk fee of \$950,000 and not \$300,000 under the GIC Facility as disclosed in the GIC Trust Instrument.
 - (d) The Trustee included a “*debt to equity concept*” under the GIC Facility when no such concept was disclosed in the GIC Trust Instrument.
- 24.3. In the premises of the matters pleaded in paragraphs [19.5.2.1] and [19.5.2.2] herein, failing to take any or all reasonable steps to recover the GIC Funds by enforcing the GIC Guarantees and the GIC Securities to the extent they were proffered.
 - 24.4. Failing to remit the Hectorville Proceeds to CMJ or any of them in part payment of the amount due and owing under the GIC Facility.

- 24.5. On or around 29 June 2012:
 - 24.5.1. Assigning part of the value of its mortgage security over the Hectorville Property for \$1,500,000 to CPW Funds Management Pty Ltd (“**the CPW Assignment**”).
 - 24.5.2. Failing to remit to CMJ any of the proceeds of the CPW Assignment.
- 24.6. Lending to GIC under the GIC Facility on terms more prejudicial to GIC than those contained in the GIC Trust Instrument which increased the risk of loss of the GIC Funds and accrued but unpaid interest.
- 24.7. Failing to provide any accounting to CMJ for the:
 - 24.7.1. Disbursal of the GIC Funds or any of them.
 - 24.7.2. The receipt by the Trustee of any moneys paid by GIC to Trustee including but not limited to:
 - 24.7.2.1. An application fee of \$187,000 paid by GIC to Trustee on or around 20 July 2009.
 - 24.7.2.2. The Hectorville Proceeds.
 - 24.7.3. The proceeds of the CPW Assignment.
- 24.8. Making the advance to GIC where:
 - 24.8.1. [formatting preserved]:
 - 24.8.1.1. The Trustee would be advancing \$4,450,000 to GIC and not the \$3,560,000 disclosed in the GIC Trust Instrument.
 - 24.8.1.2. The Trustee would be charging an application fee to GIC in the amount of \$187,000 and receiving that on settlement on the loan to its own account.
 - 24.8.1.3. The Trustee would be including a “*debt to equity concept*” under the GIC Facility when no such concept was disclosed in the GIC Trust Instrument.
 - 24.8.1.4. The Trustee would be charging GIC a risk fee of \$950,000 and not \$300,000 as disclosed in the GIC Trust Instrument.
 - 24.8.1.5. The Trustee would charge GIC a higher rate of interest under the GIC Facility in the amount of 35% per annum and a lower rate of interest under the GIC Facility in the amount of 24% per annum,

when the GIC Trust Instrument provided for rates of 29% per annum and 25% per annum respectively.

- 24.8.2. The Trustee received an application fee from GIC in the amount of \$187,000 on or around 20 July 2009.
- 24.9. In the alternative to the breaches pleaded in paragraphs [24.1] and [24.3] and in the premises of the pleading at paragraph [19.5.2.3], failing to assign the Trustee's rights under the GIC Securities and the GIC Guarantees to CMJ.
- 25. The conduct of the Trustee:
 - 25.1. As pleaded in paragraph [24.1] herein was a breach of:
 - 25.1.1. The Investment Duty;
 - 25.1.2. The Management Duty; and
 - 25.1.3. The Preservation Duty.
 - 25.2. As pleaded in paragraph [24.2] herein was a breach of:
 - 25.2.1. The Investment Duty;
 - 25.2.2. The Management Duty;
 - 25.2.3. The Records Duty;
 - 25.2.4. The No Profit Duty; or
 - 25.2.5. The No Benefit Duty.
 - 25.3. As pleaded in paragraph [24.3] herein was a breach of:
 - 25.3.1. The Investment Duty;
 - 25.3.2. The Management Duty; or
 - 25.3.3. The Preservation Duty.
 - 25.4. As pleaded in paragraph [24.4] herein was a breach of:
 - 25.4.1. The Investment Duty;
 - 25.4.2. The Management Duty;
 - 25.4.3. The Records Duty;
 - 25.4.4. The No Profit Duty; or

- 25.4.5. The No Benefit Duty.
- 25.5. As pleaded in paragraph [24.5] herein was a breach of:
 - 25.5.1. The Investment Duty;
 - 25.5.2. The Management Duty;
 - 25.5.3. The Records Duty;
 - 25.5.4. The No Profit Duty; or
 - 25.5.5. The No Benefit Duty.
- 25.6. As pleaded in paragraph [24.6] herein was a breach of:
 - 25.6.1. The Investment Duty;
 - 25.6.2. The Management Duty; or
 - 25.6.3. The Preservation Duty.
- 25.7. As pleaded in paragraph [24.7] herein was a breach of:
 - 25.7.1. The Records Duty; or
 - 25.7.2. The Management Duty.
- 25.8. As was a breach of:
 - 25.8.1. The No Profit Duty;
 - 25.8.2. The Management Duty;
 - 25.8.3. The Investment Duty;
 - 25.8.4. The Preservation Duty; or
 - 25.8.5. The No Benefit Duty.
- 25.9. As pleaded in the alternative in paragraph [24.9] herein was a breach of:
 - 25.9.1. The Investment Duty; and/or
 - 25.9.2. The Management Duty.
- 26. Had the Trustee discharged the Trust Duties:
 - 26.1. CMJ would not have advanced the GIC Funds to the Trustee.

- 26.2. Alternatively, the Trustee:
 - 26.2.1. Would not have loaned the GIC Funds to GIC and would have returned them to CMJ on or before 20 July 2010.
 - 26.2.2. Would have recovered the corpus of the GIC Trust in part or in whole.

27. The breach of the Trust Duties has caused CMJ loss and damage as follows:

- 27.1. Loss of the GIC Funds in part or in whole.
- 27.2. Interest on the GIC Funds.
- 27.3. Recovery costs.

GIC Negligence

28. Further, or alternative to the matters pleaded in paragraphs [24] to [27] herein:

- 28.1. By virtue of the matters pleaded in paragraph [21] herein, the Trustee owed CMJ a duty of care to invest the GIC Funds and thereafter administer the corpus of the GIC Trust with all care, skill and diligence.
- 28.2. The Trustee breached its duty of care to CMJ by engaging in the conduct pleaded in paragraphs [24.2] and [24.6] herein.

29. Had the Trustee discharged its duty of care to CMJ as pleaded in paragraph [28] herein, the Trustee:

- 29.1. Would not have loaned the GIC Funds to GIC and would have returned them to CMJ on or before 20 July 2010.
- 29.2. Alternatively, would have recovered the GIC Funds in part or in whole.

30. The breach of the duty of care owed by the Trustee to CMJ has caused CMJ loss and damage as follows:

- 30.1. Loss of the GIC Funds in part or in whole.
- 30.2. Interest on the GIC Funds.
- 30.3. Costs.

Green Trust

The Green Trust Arrangement

31. On around 15 February 2010, the Green Trust was established under the terms of the Green Trust Instrument which were to the following effect:

- 31.1. CMJ would advance an amount of \$680,000 to the Trustee which would be held on trust for the benefit of CMJ (“**the Green Funds**”).
- 31.2. The Trustee would then lend the Green Funds to Green, for and on behalf of CMJ, to assist Green in the refinance and development of the Joondanna Property under a loan facility between the Trustee as lender and Green as borrower (“**the Green Facility**”).
- 31.3. The Green Facility would have the following structure:
 - 31.3.1. The amount of the advance under the Green Facility would be \$680,000.
 - 31.3.2. The Green Facility would be for a term of 6 months.
 - 31.3.3. The Green Facility would accrue interest at the rate of 20% per annum.
 - 31.3.4. Guarantees would be procured from WJ Ellement, P A Laws, Neil Robert, Dianne Elizabeth Jones, Michelle Helene McIntosh, Victoria Ann Carbone, Brett Shane Gibbings (“**Gibbings**”) and Norman Bryan Woolhouse (“**Woolhouse**”) (“**the Green Guarantees**”).
 - 31.3.5. Repayment of the Green Facility would be secured by a second mortgage behind Angas registered on the title to the Joondanna Property (“**the Green Securities**”).
- 31.4. The Trustee would hold the benefit of the Green Guarantees and the Green Securities including rights of repayment of funds loaned by the Trustee to Green on trust for the benefit of CMJ.
- 31.5. Six (6) months following the advance by CMJ to the Trustee of the Green Funds, the Green Trust would vest and the Trustee would realise the corpus of the Green Trust and distribute it to CMJ. by taking steps to:
 - 31.5.1. To the extent that the Green Funds had not been loaned by the Trustee, or loaned by the Trustee and subsequently repaid by or recovered from Green, pay those moneys to CMJ; and/or
 - 31.5.2. To the extent that the Green Funds had been loaned by the Trustee but not repaid by or recovered from Green:
 - 31.5.2.1. Realise the Green Securities and pay any moneys to CMJ; and
 - 31.5.2.2. Enforce the Green Guarantees and pay any moneys to CMJ; or

31.5.2.3. Alternatively, assign the Trustee's rights under the Green Securities and the Green Guarantees to CMJ.

32. The Green Trust Instrument was:
- 32.1. Provided by Hower and McCarthy to Jolly on or around 15 February 2010.
 - 32.2. Executed by Jolly for and on behalf of CMJ and by McCarthy for and on behalf of the Trustee on or around 15 February 2010.
33. On or around 11 June 2010, CMJ advanced the Green Funds to the Trustee.
34. On or around 23 June 2012, the Trustee received an amount from Angas of \$329,715.13 following mortgagee sale of the last of certain of the allotments comprising the Joondanna Property ("**the Green Property Sales**").
35. The Trustee made payments of \$238,000 to CMJ from time to time as follows:
- 35.1. In the amount of \$150,000 on or around 15 April 2013.
 - 35.2. In the amount of \$88,000 on or around 15 April 2014.

Breaches of the Green Trust

36. The Trustee breached the Trust Duties by:
- 36.1. In the premises of the matters pleaded in paragraphs [31.5.2.1] and [31.5.2.2] herein, failing to take any or all reasonable steps to recover the Green Funds by enforcing the Green Guarantees to the extent they were proffered.
 - 36.2. Failing to remit to CMJ the proceeds of the Green Property Sales or any of them.
 - 36.3. Lending to Green under the Green Facility on terms more prejudicial to Green than those contained in the Green Trust Instrument, which increased risk of loss of the Green Funds, the Green Exit Fee and accrued but unpaid interest.
 - 36.4. Failing to provide any accounting to CMJ for the:
 - 36.4.1. Disbursal of the Green Funds or any of them.
 - 36.4.2. Receipt by the Trustee of any moneys paid by Green to the Trustee including, but not limited to, the proceeds from the Green Property Sales.
 - 36.5. Failing to realise and distribute the corpus of the Green Trust on or after 11 December 2010, being when the investment term expired and the Green Trust was fixed.

- 36.6. Causing the Green Funds to be loaned to Green other than for the purpose disclosed as pleaded in paragraph [31.2] herein, namely to refinance liabilities and/or debt of Gibbings and Woolhouse owed to St.George Bank.
 - 36.7. Making the advance to Green where:
 - 36.7.1. [formatting preserved]:
 - 36.7.1.1. The Trustee would be advancing an amount of \$880,000 to Green and not \$680,000.
 - 36.7.1.2. The Trustee would charge Green a higher rate of interest under the Green Facility in the amount of 35% per annum and a lower rate of interest under the Green Facility in the amount of 24% per annum, when the Green Trust Instrument provided for a rate of 20% per annum.
 - 36.7.1.3. The Trustee would be charging Green an exit fee of \$264,000.00 and not \$136,000 as disclosed in the Green Trust Instrument.
 - 36.8. In the alternative to the breaches pleaded in paragraphs [36.1] and [36.5] and in the premises of the pleading at paragraph [31.5.2.3], failing to assign the Trustee's rights under the Green Securities and the Green Guarantees to CMJ.
37. The conduct of the Trustee:
- 37.1. As pleaded in paragraph [36.1] herein was a breach of:
 - 37.1.1. The Investment Duty;
 - 37.1.2. The Management Duty; or
 - 37.1.3. The Preservation Duty.
 - 37.2. As pleaded in paragraph [36.2] herein was a breach of:
 - 37.2.1. The Investment Duty;
 - 37.2.2. The Management Duty;
 - 37.2.3. The Preservation Duty;
 - 37.2.4. The No Profit Duty; or
 - 37.2.5. The No Benefit Duty.

- 37.3. As pleaded in paragraph [36.3] herein was a breach of:
- 37.3.1. The Investment Duty;
 - 37.3.2. The Management Duty; or
 - 37.3.3. The Preservation Duty.
- 37.4. As pleaded in paragraph [36.4] herein was a breach of:
- 37.4.1. The Records Duty; or
 - 37.4.2. The Management Duty.
- 37.5. As pleaded in paragraph [36.5] herein was a breach of:
- 37.5.1. The Investment Duty;
 - 37.5.2. The Management Duty; or
 - 37.5.3. The Preservation Duty.
- 37.6. As pleaded in paragraph [36.6] herein was a breach of:
- 37.6.1. The Investment Duty;
 - 37.6.2. The Management Duty;
 - 37.6.3. The Records Duty;
 - 37.6.4. The No Profit Duty; or
 - 37.6.5. The No Benefit Duty.
- 37.7. As was a breach of:
- 37.7.1. The No Profit Duty;
 - 37.7.2. The Management Duty;
 - 37.7.3. The Investment Duty;
 - 37.7.4. The Preservation Duty; or
 - 37.7.5. The No Benefit Duty.

- 37.8. As pleaded in the alternative in paragraph [36.8] herein was a breach of:
- 37.8.1. The Investment Duty; and/or
 - 37.8.2. The Management Duty.
38. Had the Trustee discharged the Trust Duties:
- 38.1. CMJ would not have advanced the Green Funds to the Trustee.
 - 38.2. Alternatively, the Trustee:
 - 38.2.1. Would not have loaned the Green Funds to Green and would have returned them to CMJ on or before 11 December 2010.
 - 38.2.2. Would have recovered the corpus of the Green Trust in part or in whole.
39. The breach of the Trust Duties has caused CMJ loss and damage as follows:
- 39.1. Loss of the Green Funds in part or in whole.
 - 39.2. Interest on the Green Funds.
 - 39.3. Recovery costs.
- Green Negligence*
40. Further, or in the alternative to the matters pleaded in paragraphs [36] to [39] herein:
- 40.1. By virtue of the matters pleaded in paragraph [33] herein, the Trustee owed CMJ a duty of care to invest the Green Funds and thereafter administer the corpus of the Green Trust with all care, skill and diligence.
 - 40.2. The Trustee breached its duty of care to CMJ by engaging in the conduct pleaded in paragraphs [36.3] and [36.5] herein.
41. Had the Trustee discharged its duty of care to CMJ as pleaded in paragraph [40] herein, the Trustee:
- 41.1. Would not have loaned the Green Funds to Green and would have returned them to CMJ on or before 11 December 2012.
 - 41.2. Alternatively, would have recovered the Green Funds in part or in whole.
42. The breach of the duty of care owed by the Trustee to CMJ has caused CMJ loss and damage as follows:
- 42.1. Loss of the Green Funds in part or in whole.
 - 42.2. Interest on the Green Funds.

42.3. Recovery Costs.

GEH Trust

The GEH Trust Arrangement

43. On or around 23 December 2010, the GEH Trust was established under the terms of the GEH Trust Instrument which were to the following effect:
- 43.1. Waikiki would advance an amount of \$2,700,000 to the Trustee which would be held on trust for the benefit of Waikiki (“**the GEH Funds**”).
- 43.2. The Trustee would then lend the GEH Funds to GEH on behalf of Waikiki under a loan facility between the Trustee as lender and GEH as borrower to assist GEH to refinance debt and pay interest on certain loan facilities (“**the GEH Facility**”).
- 43.3. The GEH Facility would have the following structure:
- 43.3.1. The amount of the advance under the GEH Facility would be \$2,700,000.
- 43.3.2. The GEH Facility would be for a term of 12 months.
- 43.3.3. The GEH Facility would accrue interest at the rate of 20% per annum.
- 43.3.4. GEH would be liable to the Trustee under the GEH Facility for a risk fee in the amount of \$250,000 on expiry of the GEH Facility.
- 43.3.5. Security would be provided to the Trustee for satisfaction of liabilities under the GEH Facility (“**the GEH Securities**”) which included the following:
- 43.3.5.1. A fourth registered mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5956 Folio 704 and Folio 705 to be granted by Garden Estate Hackham Pty Ltd in its own right and as trustee for the Garden Estate Hackham Trust.
- 43.3.5.2. A third registered mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 06397 Folio 339 to be granted by Annik Pty Ltd in its own right and as trustee for the Michalakas Family Trust.
- 43.3.5.3. An unregistered second mortgage over the whole of the land comprised in Certificate of Title

Register Book Volume 5063 Folio 756 to be granted by Jennifer Rota Michalakas.

- 43.3.5.4. An unregistered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5384 Folio 771 to be granted by James Michalakas.
- 43.3.5.5. An unregistered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5371 Folio 497 to be granted by James Michalakas.
- 43.3.5.6. An unregistered second mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5007 Folio 236 to be granted by James Michalakas.
- 43.3.5.7. An unregistered third mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5979 Folio 598 to be granted by Estate Land Holdings Pty Ltd in its own rights and as trustee for the Estate Land Holdings Trust.
- 43.3.5.8. An unregistered third mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5952 Folio 168, Folio 171, Folio 172 and Folio 164 to be granted by Fernleigh Gardens Estate Pty Ltd in its own right and as trustee for the Fernleigh Gardens Trust.
- 43.3.5.9. An unregistered third mortgage over the whole of the land comprised in Certificate of Title Register Book Volume 5974 Folio 332 to be granted by Garden Estate Christies Pty Ltd in its own right and as trustee of the Garden Estate Christies Downs Trust.
- 43.3.5.10. Debenture charges over all of the assets and undertakings of:
 - 43.3.5.10.1. Garden Estate Hackham Pty Ltd in its own right and as trustee for the Garden Estate Hackham Trust.
 - 43.3.5.10.2. Annik Pty Ltd in its own right and as trustee for the Michalakas Family Trust.
 - 43.3.5.10.3. Estate Land Holdings Pty Ltd in its own rights and as trustee for the Estate Land Holdings Trust.

- 43.3.5.10.4. Fernleigh Gardens Estate Pty Ltd in its own right and as trustee for the Fernleigh Gardens Trust.
- 43.3.5.10.5. Garden Estate Christies Pty Ltd in its own right and as trustee of the Garden Estate Christies Downs Trust.
- 43.3.6. Guarantees would be procured from James Michalakas, Rota Jennifer Michalakas, Estate Land Holdings Pty Ltd in its own rights and as trustee for the Estate Land Holdings Trust, Fernleigh Gardens Estate Pty Ltd in its own right and as trustee for the Fernleigh Gardens Trust, Annik Pty Ltd in its own right and as trustee for the Michalakas Family Trust and Garden Estate Christies Pty Ltd in its own right and as trustee of the Garden Estate Christies Downs Trust for satisfaction of liabilities under the GEH Facility (“**GEH Guarantees**”).
- 43.4. The Trustee would hold the benefit of the GEH Guarantees and the GEH Securities including rights of repayment of funds loaned by the Trustee to GEH on trust for the benefit of Waikiki.
- 43.5. Twelve (12) months following the advance by Waikiki to the Trustee of the GEH Funds, the GEH Trust would vest and the Trustee would realise the corpus of the GEH Trust and distribute it to Waikiki. by taking steps to:
 - 43.5.1. To the extent that the GEH Funds had not been loaned by the Trustee, or loaned by the Trustee and subsequently repaid by or recovered from GEH, pay those moneys to Waikiki; and/or
 - 43.5.2. To the extent that the GEH Funds had been loaned by the Trustee but not repaid by or recovered from GEH:
 - 43.5.2.1. Realise the GEH Securities and pay any moneys to Waikiki; and
 - 43.5.2.2. Enforce the GEH Guarantees and pay any moneys to Waikiki; or
 - 43.5.2.3. Alternatively, assign the Trustee’s rights under the GEH Securities and the GEH Guarantees to Waikiki.
- 44. The GEH Trust Instrument was:
 - 44.1. Provided by Hower and McCarthy to Jolly on or around 23 December 2010.

- 44.2. Executed by Jolly for and on behalf of Waikiki and by McCarthy for and on behalf of the Trustee on or around 23 December 2010.
45. On or around 23 December 2010, Waikiki advanced the GEH Funds to the Trustee.
46. The Trustee made payments to a total of \$940,960.78 to Waikiki from time to time as follows:
 - 46.1. In the amount of \$581,585.15 on or around 15 April 2011.
 - 46.2. In the amount of \$359,375.63 on or around 15 April 2012.

Breach of the GEH Trust

47. The Trustee breached the Trust Duties by:
 - 47.1. In the premises of the matters pleaded in paragraphs [43.5.2.1] and [43.5.2.2] herein, failing to take any or all reasonable steps to recover the GEH Funds by enforcing the GEH Guarantees and the GEH Securities to the extent they were proffered.
 - 47.2. Lending to GEH under the GEH Facility on terms more prejudicial to GEH than those contained in the GEH Trust Instrument, which increased the risk of loss of the GEH Funds and accrued but unpaid interest.
 - 47.3. Failing to provide any accounting to Waikiki for the:
 - 47.3.1. Disbursal of the GEH Funds or any of them.
 - 47.3.2. Receipt by the Trustee of any moneys paid by GEH to the Trustee including but not limited to the application fee of \$150,000 paid by GEH to the Trustee on or around 23 December 2010.
 - 47.4. Making the advance to GEH where:
 - 47.4.1. The Trustee would be advancing a further \$3,200,000 to GEH and not \$2,700,000.
 - 47.4.2. The Trustee would be charging an application fee to GEH in the amount of \$150,000 and receiving that amount to its benefit on settlement of the loan to be made by the Trustee to GEH.
 - 47.4.3. The Trustee would not be charging GEH an exit fee under the GEH Facility.
 - 47.4.4. GEH was indebted to the Trustee in the amount of at least \$798,000.

- 47.4.5. The Trustee would be receiving prepaid interest of \$640,000 on settlement of the loan to be made by The Trustee to GEH.
 - 47.4.6. The purpose of the proposed loan to GEH was not limited to the refinance of debt and payment of interest but an increase in borrowings by GEH.
 - 47.4.7. The Trustee would charge GEH a higher rate of interest under the GEH Facility in the amount of 35% per annum and a lower rate of interest under the GIC Facility in the amount of 25% per annum, when the GEH Trust Instrument provided for a rate of 20% per annum.
 - 47.4.8. It received an application fee from GEH in the amount of \$150,000 on or around 23 December 2010.
 - 47.5. Failing to realise and distribute the corpus of the GEH Trust on or after 23 December 2011, being when the investment term expired and the GEH Trust was fixed.
 - 47.6. In the alternative to the breaches pleaded in paragraphs [47.1] and [47.5] and in the premises of the pleading at paragraph [43.5.2.3], failing to assign the Trustee's rights under the GEH Securities and the GEH Guarantees to Waikiki.
48. The conduct of the Trustee:
- 48.1. As pleaded in paragraph [47.1] herein was a breach of:
 - 48.1.1. The Investment Duty;
 - 48.1.2. The Management Duty; or
 - 48.1.3. The Preservation Duty.
 - 48.2. As pleaded in paragraph [47.2] herein was a breach of:
 - 48.2.1. The Investment Duty;
 - 48.2.2. The Management Duty;
 - 48.2.3. The Preservation Duty.
 - 48.3. As pleaded in paragraph [47.3] herein was a breach of:
 - 48.3.1. The Records Duty; or
 - 48.3.2. The Management Duty.
 - 48.4. As pleaded in paragraph [47.4] herein was a breach of:
 - 48.4.1. The No Profit Duty;

- 48.4.2. The Management Duty;
 - 48.4.3. The Investment Duty;
 - 48.4.4. The Preservation Duty; or
 - 48.4.5. The No Benefit Duty.
- 48.5. As was a breach of:
- 48.5.1. The Investment Duty;
 - 48.5.2. The Management Duty; or
 - 48.5.3. The Preservation Duty.
- 48.6. As pleaded in the alternative in paragraph [47.6] herein was a breach of:
- 48.6.1. The Investment Duty; and/or
 - 48.6.2. The Management Duty.
49. Had the Trustee discharged the Trust Duties:
- 49.1. Waikiki would not have advanced the GEH Funds to the Trustee.
 - 49.2. Alternatively, the Trustee:
 - 49.2.1. Would not have loaned the GEH Funds to GEH and would have returned them to Waikiki on or before 23 December 2011.
 - 49.2.2. Would have recovered the corpus of the GEH Trust in part or in whole.
50. The breach of the Trust Duties has caused Waikiki loss and damage as follows:
- 50.1. Loss of the GEH Funds in part or in whole.
 - 50.2. Interest on the GEH Funds.
 - 50.3. Recovery costs.
- GIC Negligence*
51. Further, or in the alternative to the matters pleaded in paragraphs [47] to [50] herein:

- 51.1. By virtue of the matters pleaded in paragraph [45] herein, the Trustee owed Waikiki a duty of care to invest the GEH Funds and thereafter administer the corpus of the GEH Trust with all care, skill and diligence.
- 51.2. The Trustee breached its duty of care to Waikiki by engaging in the conduct pleaded in paragraphs [47.2] herein.
- 52. Had the Trustee discharged its duty of care to Waikiki as pleaded in paragraph [51] herein, the Trustee:
 - 52.1. Would not have loaned the GEH Funds to GEH and would have returned them to Waikiki on or before 23 December 2011.
 - 52.2. Alternatively, would have recovered the GEH Funds in part or in whole.
- 53. The breach of the duty of care owed by the Trustee to Waikiki has caused Waikiki loss and damage as follows:
 - 53.1. Loss of the GEH Funds in part or in whole.
 - 53.2. Interest on the GEH Funds.
 - 53.3. Recovery costs.

Moneys Had and Received

- 54. Yet further or in the alternative to the matters pleaded in paragraphs [6] to [53] herein, Angas claims an amount being money payable by the Trustee to Angas:
 - 54.1. As follows:
 - 54.1.1. In the case of the CMJ:
 - 54.1.1.1. The VFE Funds.
 - 54.1.1.2. The GIC Funds.
 - 54.1.1.3. The Green Funds.
 - 54.1.2. In the case of Waikiki, the GEH Funds.
 - 54.2. As money had and received by the Trustee to the use of the Waikiki and CMJ that remains outstanding to Waikiki and CMJ despite demand for payment.
 - 54.3. Angas' claim as pleaded in this paragraph [54] is offset by the payments pleaded in paragraphs [22] and [35] herein.

Assignment

- 55. CMJ and Waikiki assigned (“**the Assignment**”) the whole of their right, title and interest in their claims against the Trustee in favour of Angas:

- 55.1. By Deed of Settlement and Release dated 26 September 2017 (“**DOSAR**”).
- 55.2. By Deed of Assignment dated 26 September 2017 (“**DOA**”).

AND ANGAS CLAIMS AS AGAINST THE TRUSTEE

- A. Judgment against the Trustee in an amount which is comprised of the corpora of the Trusts and interest accrued on the funds advanced to the Trustee, offset by the payments pleaded in paragraphs [22] and [35] herein, to be assessed by the Court.
- B. Equitable compensation from the Trustee.
- C. An account of profits from the Trustee.
- D. A declaration that the Trustee holds the GIC Securities, the GIC Guarantees, the GEH Securities and the GEH Guarantees on trust for the benefit of Angas.
- E. Interest.
- F. Costs.
- G. Any other order as this Honourable Court sees fit.

DATED the 17th day of June 2022

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B Renfrey

Solicitors for the Plaintiff