Milatos & Anor v Clayton Utz [2007] NTSC 44

PARTIES:	GEORGE MILATOS COLLEEN MILATOS v CLAYTON UTZ
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	194/2002 (20219346)
DELIVERED:	20 September 2007
HEARING DATES:	31 October 2006 – 21 December 2006 and 5 March 2007 – 19 April 2007
WRITTEN SUBMISSIONS RECEIVED:	Plaintiffs: 13 June 2006 Defendant: 12 June 2006 Plaintiffs in reply: 16 July 2007 Defendant in reply: 2 July 2007
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

1st and 2nd Plaintiff:	J Reeves QC and P McIntyre
Defendant:	M Maurice QC and R Bruxner

Solicitors:

1st and 2nd Plaintiff:	Geoff James
Defendant:	Paul Maher

Judgment category classification:	C
Judgment ID Number:	tho200702
Number of pages:	249

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Milatos & Anor v Clayton Utz [2007] NTSC 44
No. 194 of 2002 (20219346)

BETWEEN:

GEORGE MILATOS
First Plaintiff
COLLEEN MILATOS
Second Plaintiff

AND:

CLAYTON UTZ
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 20 September 2007)

[1] This is a claim by the plaintiffs against the defendant for damages. The plaintiffs assert that the defendant, who acted as their solicitor, failed to provide adequate legal advice concerning the purchase of a property, namely, Section 152 Hundred of Howard, now known as the Lake Bennett Wilderness Resort. The plaintiffs complain that the defendant failed to give adequate legal advice concerning the existence of certain recreational easements. In particular, the plaintiffs claim the defendant failed to advise that the recreational easements gave the easement holders the right to use the whole of Section 152 for recreational purposes and/or that the plaintiffs

may not be able to construct buildings, or other improvements on Section 152, without first obtaining the consent of the easement holders and that it would be imprudent for them to proceed with the project at Lake Bennett.

[2] The claim is made pursuant to the Consumer Affairs and Fair Trading Act 1990 (NT) for an alleged breach of s 42 of that Act and also pursuant to the Trade Practices Act 1974 (Cth) for an alleged breach of s 52 of that Act.

[3] The plaintiffs further claim for breach of fiduciary duty. The plaintiffs assert Mr Riley, a partner with the defendant company, intentionally failed to make a full and frank disclosure in that he realised by 7 April 1998 that the easements were recreational easements affecting the whole of the subject land purchased by the plaintiffs and completely inconsistent with building on that land. The claim is based on the assertion that Mr Riley did not advise the plaintiffs of his discovery or tell them that the advice he had given earlier, as to the effect of the easements, was incorrect. Mr Riley did not suggest that in those circumstances the plaintiffs should seek independent legal advice.

[4] The plaintiffs' claim:

(1) Equitable relief and compensation; and

(2) Damages pursuant to s 91 and/or s 95 of the Consumer Affairs and Fair Trading Act and/or damages pursuant to s 82 and/or s 87 of the Trade Practices Act.

[5] The Lake Bennett Wilderness Resort consists of a man made lake and surrounds, located approximately seven kilometres off the Stuart Highway 80 kilometres south of Darwin.

[6] I shall commence with setting out some of the formal findings relevant to the litigation between the parties.

1. In the defence to the plaintiffs' statement of claim, the defendant joined two third parties namely James Nairn and Company Pty Ltd as the first third party and the Northern Territory of Australia as the second third party. During the course of the hearing, the defendant settled its action with respect to each of the third parties.

2. On 25 January 2007, terms of settlement between the defendant, the first third party and the second third party, were filed. This concluded the proceedings between the defendant and the first third party.

3. On 30 March 2007, the court recorded a minute of consent orders between the defendant and the second third party which concluded the proceedings between the defendant and the second third party.

4. Thereafter the hearing proceeded solely between the plaintiffs and the defendant.

5. In March 1996 the property known as Lake Bennett was owned by Nazime Pty Ltd (ACN 009 634 137) ("Nazime"). The directors of this company were David Shoobridge and his wife Elizabeth Shoobridge.

6. On 10 May 1996, Anadyr Pty Ltd (ACN 009 624 462) ("Anadyr") signed an option agreement to purchase the project property being Section 152 Hundred of Howard from Nazime. The property was subject to recreational easements in favour of the surrounding lots.

7. Anadyr was a company owned by George Milatos and his brother Michael Milatos. Pauline Milatos, Michael's wife, became a director on 23 October 1998. At that time, George Milatos ceased to be a director, however, he still maintained 60% of the shares (Exhibit P6).

8. In October 1996 the option agreement was transferred to City Developments Pty Ltd (ACN 009 638 733) ("City Developments").

9. City Developments was a company duly incorporated according to law.

10. A discretionary trust known as the "Lake Bennett Trust" ("the trust") was established by Deed of Settlement executed on 2 October 1996 between Anadyr Pty Ltd as trustee and Raymond Oak Grimshaw as settlor.
Under and by virtue of the Deed, City Developments was a beneficiary and Mr George Milatos named as the principal of the trust.
By Deed of Variation dated 23 October 1996, the trust deed was varied so as to exclude City Developments as a beneficiary (Trust Deed and Variation are annexure ML3 to Mr Lewis' report, Exhibit D214).
Subsequent discussions took place and correspondence was exchanged between Ray Grimshaw, Guy Riley and George Milatos (copies of which can be found in Exhibit P5) making it clear that City Developments was

now acting as trustee for the trust. The Lake Bennett Trust financial statements for the years 1996-2002 (inclusive) reflect City Developments acts as trustee for the trust (Exhibit P199).

11. The plaintiffs were the persons who exercised all of the powers and duties of management of City Developments. They were its only directors at the relevant time.

12. Between March 1996 and May 2002 the plaintiffs, who were the directors of City Developments, worked to develop Lake Bennett as a tourist resort. This included arranging finance for further development, liaising with government authorities and various interested persons, building accommodation, upgrading the resort, marketing the resort as a tourist destination and selling the units built around the foreshore. The work that was carried out will be set out in more detail hereunder.

13. Australian Transportable Homes Pty Ltd (ACN 065 856 359) ("Australian Transportable Homes") is an entity of which George Milatos was the managing director. It was established by George Milatos for the purpose of building houses at premises in Berrimah, which houses could be transported to remote communities and placed on site. Australian Transportable Homes ceased to operate in February 2002.

14. The plaintiffs had, at all relevant times, differing roles in the development of Lake Bennett. George Milatos, as director of Australian Transportable Homes, constructed buildings which were subsequently

transported to Lake Bennett and placed on various lots around the foreshore. Mr Milatos was responsible for all the legal and financial dealings associated with the development of the property. Colleen Milatos (now Mrs Colleen Cambronero) managed the resort, assisted in furnishing and decorating the units once they were built and developed the gardens around the resort. As manager of the resort, Colleen Milatos built it up as a tourist attraction providing restaurant and other facilities to tourists and those who lived in the units or cabins adjacent to the resort or around the foreshore of the lake. Colleen Milatos marketed the resort and established networks with various tour operators.

15. Between 1996-97, Section 152 Hundred of Howard was subdivided into Section 245 the lake and Section 244 the surrounding foreshore. Registration of the subdivision occurred on 3 February 1997. The land was still subject to recreational easements in favour of the surrounding lots.

16. On 24 March 1997, contracts for sale of Sections 244 and 245 by Nazime to City Developments were exchanged. The purchase price was $630,000 with a mortgage back to Nazime. Settlement of this purchase was effected on 16 April 1997.

17. On 29 August 2001, the Court of Appeal of the Supreme Court of the Northern Territory, confirmed that the recreational easements over

Section 152, now Sections 244 and 245, in favour of surrounding lots, were good in law.

18. By December 2001, City Developments was indebted to the ANZ Bank in the sum of approximately $2.6 million.

19. Between December 2000 and May 2002, the ANZ Bank communicated their concerns about the indebtedness to the Bank and sought the debt be either refinanced or repaid. Attempts were made by agents to find a buyer for Lake Bennett at the price of $2.5 million. No sale eventuated.

20. In April 2002 the Lake Bennett Wilderness Resort Pty Ltd was incorporated for the purpose of acquiring the resort business from City Developments. Michael Milatos, is a director of this company. Michael and Pauline Milatos are the two shareholders in the company.

21. In May 2002 Section 245 (the lake and the resort) was sold to Lake Bennett Wilderness Resort Pty Ltd for $500,000 with the monies remitted on 10 May 2002 as follows:

    (i) $466,539.79 in reduction of “the trusts” ANZ Bank FDA accounts; and

    (ii) $ 53,460.21 in reduction of “the trusts” bank overdraft.

22. As a result, the ANZ Bank released its mortgage security on the resort title, being Section 245, but retained its mortgage security over the unit title condominium development area, Section 244.

23. In November 2002, based upon the application filed in September 2002 by Coomalie Community Government Council ("Coomalie Council"), City Developments was placed into liquidation.

24. As at the date of liquidation, the total amount of the debts subject to proofs in the liquidation amounted to $2,947,306.

25. The defendant was at all relevant times a partnership of legal practitioners that carried on the professional practice of solicitors under the business name "Clayton Utz" registered pursuant to Business Name Registration 6221B and is named as defendant pursuant to s 27 of the Business Names Act 1996 (NT).

26. Nicholas Mitaros and Guy Andrew Riley were legal practitioners who were partners in the firm of Clayton Utz at the time of the acts and omissions alleged against them in the statement of claim.

History of Lake Bennett 1983 - 1996

[7] On 15 February 1983, the then proprietor of the property known as Section 69 Hundred of Howard, subdivided the section into 21 parcels of land. This consisted of Section 152 containing an area of approximately 146 hectares including 65 hectares of water surface, being Lake Bennett, together with 81 hectares of dry land around the foreshore of the lake. The remaining 20 lots were designated Sections 91 to 110 inclusive. They ranged in size from 11 hectares to 44 hectares.

[8] Three of these 20 lots were sold prior to 14 October 1987.

[9] On 14 October 1987, the proprietor sold Section 152 and the remaining 17 lots to Nazime, a company owned and operated by David and Elizabeth Shoobridge.

[10] Between 14 October 1987 and May 1996, Nazime occupied Section 152 for the purpose of carrying on the business of a commercial camp ground, a shop and similar enterprises. Lake Bennett was used by its customers as a recreational facility.

[11] On 10 May 1996, Nazime entered into an option agreement with Anadyr to purchase Section 152 Hundred of Howard (Exhibit P5 Vol 3 pp43-52). By May 1996, Nazime had sold 11 of the surrounding lots ("the sold lots") and retained lots 95, 97, 99, 100, 108 & 110 ("the retained lots").

The Easements

[12] As at May 1996, there were registered, in respect of Section 152 Hundred of Howard, and in favour of Sections 93, 94, 96, 101, 102, 103, 104, 105, 106, 107 and 108, easements styled "recreational easements". There were a total of 11 sections which had the benefit of the recreational easements.

[13] These recreational easements were in writing and registered on the title to Section 152. In substance they conferred on the sold lots rights to enter upon and use Section 152 for recreational purposes.

[14] In early 1996, the plaintiffs began various enquiries as to the viability of purchasing and developing Section 152 (referred to as Lake Bennett) from Nazime. The proposed development to be established was a residential holiday village and resort.

[15] By reason of the nature of the recreational easements and the provisions of the Real Property Act 1996 (NT), the Unit Titles Act 1976 (NT) and the Real Property (Unit Titles) Act 1976 (NT), there existed the following impediments to the development of Lake Bennett. These impediments were:

- The consent of the easement holders was a necessary legal pre-requisite to the construction of any buildings or other improvements on Section 152.

- The written consent of the easement holders was a necessary legal pre-requisite of registration of any further easements on the title to Section 152.

- The written consent of the easement holders was a necessary legal pre-requisite of any subdivision of Section 152 under general law.

- The written consent of the easement holders was a necessary legal pre-requisite of approval by the Attorney-General of any disclosure statement for any subdivision of, or of any part of, Section 152 by way of condominium development proposal under the Unit Titles Act.

- The written consent of the easement holders was a necessary legal pre-requisite of the registration on the title to Section 152, or on any part thereof, of such a disclosure statement.

- Following any such registration of an approved disclosure statement for a condominium development, the written consent of the easement holders was a necessary legal pre-requisite of the registration of a units plan authorised by any such disclosure statement.

- The written consent of the easement holders was a necessary legal pre-requisite of approval for, and registration of, any alteration or variation of any registered disclosure statement relating to, or to part of, Section 152.

- Constructing buildings or other improvements on Section 152, or part thereof, was a necessary legal pre-requisite of the plaintiffs being entitled to carry out a unit title subdivision on Section 152, or any part thereof.

- The written consent of the easement holders was a necessary legal pre-requisite of any subdivision of, or of any part of, Section 152 pursuant to the Unit Titles Act.

- No provision existed in law to enable any officer of government to dispense with any of the above required consents.

- By reason of each and all of the foregoing, any one or more of the easement holders possessed an effective power of veto on the whole, or

any element, of the project exercisable and re-exercisable, at any stage of the progress of the project.

History of George and Colleen Milatos prior to 1996

[16] George Milatos was born on 3 November 1951 at Kalymnos in Greece. In 1963 his father, who was a stonemason, left Kalymnos and came to Australia. George and other members of his family followed and arrived in Darwin about Christmas in 1964. Before coming to Australia, George had completed primary school, one year of high school and served for approximately four months as an apprentice painter.

[17] On arriving in Darwin he attended night classes to learn English. At that time he was between 13 and 14 years of age. He worked as an apprentice painter. At the age of 17 he started his own business as a painter. He learnt to speak English by mixing with English speaking people. He does have some difficulties with the English language but is conversant in that language. His business developed and he became the largest painting contractor in Darwin. By 1970 he was already doing some small building jobs. In that year he won a job to build four units in Stuart Park and subsequently another four or five units in Alawa. He had launched his career as Milatos Constructions Pty Ltd ("Milatos Constructions").

[18] Exhibit P6A is a series of 139 photographs of projects undertaken by Milatos Constructions over the subsequent years. In the two years after he completed the units in Alawa he constructed about 40 private houses.

[19] In 1971 Mr Milatos met his future wife Colleen. They married in 1973. The shares in Milatos Constructions were held 50% by him and 50% by his father. In 1983 he bought his father's share of the company and his brother Michael Milatos came into the business. They continued together as Milatos Constructions until the early 1990s. In 1973 he incorporated a subsidiary into the company called Winnellie Joinery which built kitchens and wardrobes for their construction company. By 1974 nearly all of his business was government contracts. These included the pre-school at Moil, executive flats in Fannie Bay for the Reserve Bank, houses for the Commonwealth Housing Commission and the Department of Transport and Works. He also did work for private individuals including Savvas Motors on the corner of Daly and Smith Street.

[20] By December 1994 the company had built between 200-300 houses. In the period immediately before the cyclone in December 1974, the company's annual turnover was approximately $5-$7 million.

[21] At the date of the cyclone in December 1974, Colleen was expecting their first child and was subsequently evacuated to Brisbane. From February 1975 to September 1975, Mr Milatos was involved in the construction and clean up work in Darwin. He built 40 houses in about 20 weeks. From that time, up to about 1980, he built between 100 and 200 homes every year. These were almost exclusively government contracts. In 1976 Mr Milatos had established a business called Territory Timber and Hardware. This business imported timber, which was mainly frames for elevated houses, that

were on sold to Milatos Constructions and other builders. Mr Milatos sold his interest in Territory Timber and Hardware in 1979 to a Perth based business. In 1977 he commenced building the Nightcliff Sports Complex. This included a 16 lane indoor bowling alley, eight squash courts, a restaurant, a crèche facility, snack bar and offices. This is shown in photographs MP13-MP15 which forms part of Exhibit P6A. The facility opened in September/October 1977.

[22] The second stage involved the first roller skating rink American style disco. In addition there were two health studios, a hairdressing salon and a sportsman's bar. This stage opened about mid July 1978. This project cost approximately $2 million. Finance was obtained through Westpac and subsequently from Tricontinental which was associated with the State Bank of Victoria.

[23] In 1979-80, Mr Milatos purchased a property next to the sports complex and built the Phoenix Hotel, a semi resort style hotel which opened in late 1980. A photograph of this project is MP9 in Exhibit P6A. The complex contained 60 rooms, a restaurant for 120 people, conference facilities for 70-80 people and associated other facilities. The whole project cost $1.7-$1.8 million. It was originally financed through the development corporation, a government initiated body, and then refinanced with Tricontinental. During this time Mr Milatos had also incorporated two other businesses, Winnellie Windows and Winnellie Steelworks. They were closed down in the early 1980s because it became cheaper to engage external subcontractors.

[24] Other projects undertaken by Mr Milatos included the NT News premises in Mitchell Street (MP11) and the family residence in Allen Street, Fannie Bay (MP62). He continued to build government houses up until the mid 1980s when this work ceased. Between 1981-84, Mr Milatos built three major roller skating rinks in Perth. They were sold in 1984-85. Mr Milatos described some of the other building developments with which Milatos Constructions were involved during the early 1980s. These included staff quarters for Barclay Constructions, 20 houses in the Northlakes Estate which were leased out to the armed forces, over 400 units and townhouses for the Northern Territory Housing Commission in Nightcliff, Palmerston and Wanguri and quarters for airmen at the RAAF Base. Photographs MP67-MP79 depict various housing commission projects completed during the early 1980s.

[25] In about July 1985 the company commenced building Enterprise House. The building consisted of 30 car parking bays, and above that two floors of approximately 1300 square metres per floor (MP16 and MP17). This project cost approximately $1.7 million. Again finance was obtained through Tricontinental (tp 322).

[26] In 1986, Milatos Constructions was involved in building a cinema complex at Casuarina and commenced to build the Harbour View Plaza. The approximate cost of construction of the Harbour View Plaza was $10 million. It consisted of a multi storey building with an underground carpark and approximately 5000-6000 square metres of area for lease. The

greater part of it was leased to the Northern Territory Government. It was completed in November 1987. This was their first high rise construction. Mr Milatos described some of the other projects he looked into including the Bayview Estate and a hotel in The Gardens. The latter project became very controversial and attracted protest meetings and other conflict situations, some of which Colleen Milatos was confronted with. Mr Milatos abandoned this project.

[27] In 1989 Tricontinental and the parent company, The State Bank of Victoria, went into liquidation. Tricontinental called in their loan to Milatos Constructions. George and Colleen Milatos were involved in attempting to refinance the loan or alternatively to sell the building. Mr Milatos, and his solicitor Nicholas Mitaros, travelled overseas in an effort to raise money to salvage the project. These efforts were to no avail. Milatos Constructions was placed in liquidation in about mid 1992. George and Michael Milatos were forced to sell their personal homes and other assets to pay the debts. The two families were forced to share their parents home.

[28] George Milatos borrowed money from his father and commenced building a property at Bayview. He was involved in building five town houses at Stoddart Drive, Bayview, two were sold and three were retained (MP95). Mr Milatos gave evidence of other building projects at Bayview that he constructed. Within a few months of this time Mr Milatos started up the company called Australian Transportable Homes. He established a yard at Berrimah where houses were constructed and subsequently transported to

remote localities around Darwin, MP19 and MP26 are two photos which are examples of the buildings constructed by Australian Transportable Homes.

[29] About 1994-95, Mr Milatos commenced looking at the possibility of developing a project at Manton Dam. He decided against this because of the many regulatory requirements that affected the property. Following this Mr Milatos turned to look at the potential for development at Lake Bennett.

[30] During the early years of their marriage, Colleen Milatos was engaged in caring for their three sons. In 1987 Colleen Milatos obtained a certificate as a real estate agents representative. She obtained employment in this capacity. In about 1988-89 Colleen Milatos set up her own business under the name Commercial and General Realty. Following the merger with another business it later became known as Nova National Realty. The business operated from the ground floor of the Harbour View Plaza which had been constructed by Milatos Constructions. Colleen Milatos was very involved in the efforts to salvage the company, Milatos Constructions, following the collapse of their financiers.

[31] Some years prior to this, approximately 1986-87, Colleen Milatos had taken their children on a camping trip to Lake Bennett. She had told her husband about her experience there. She was subsequently in favour of developing Lake Bennett, particularly as she believed there was no government involvement in the property and they could acquire freehold land. Details of later relevant events in their history, and their respective roles in the

development of Lake Bennett, are given under the headings relating to the history of Lake Bennett.

History of Lake Bennett 1996

[32] In January 1996 George Milatos was approached by David Shoobridge, who had a property known as Lake Bennett for sale. Mr Milatos visited Lake Bennett. He drove around and took a dinghy ride around the lake. He was informed by Mr Shoobridge that the road was public and there were 6 to 8 metre easements around either side of the road. Mr Shoobridge informed him the boundaries were between 5 to 100 metres from the waters edge. He advised Mr Milatos that he had given 11 people legal access to the lake and explained there were other properties that adjoined his property.

Mr Shoobridge offered Mr Milatos Sections 95, 101, 103, 104, 106, 108, 110 and 152. Section 152 was later divided into Sections 245 and 244.

Mr Milatos indicated that he was only interested in Section 152, the lake and its shores. Exhibit P4 contains a number of maps, diagrams and photographs. Document 3 is titled “Lake Bennett Topography”, the marks with yellow highlighter are dry land. The fourth document in that exhibit shows Lake Bennett, Section 244 is the land around the foreshore and Section 245 is the lake. Mr Shoobridge provided Mr Milatos with a number of documents concerning Lake Bennett which are Exhibit P7. This included the background to the location of Lake Bennett together with possible development, prior sales and details of Section 152 with existing improvement. Mr Milatos asked Mr Shoobridge for a 90 day option.

Mr Shoobridge promised to get back to him if he agreed to give Mr Milatos an option.

[33] Prior to seeking legal advice, Mr Milatos, on his own evidence, states he consulted Kevin Dodd at Earl James and Associates, licensed surveyors. Mr Milatos gave evidence that on 5 February 1996 he wrote to Mr Dodd regarding his plans for Lake Bennett as a residential and resort development (Exhibit D37). In that letter, Mr Milatos sought advice from Mr Dodd as to how he could best achieve his goal.

[34] On 5 March 1996, Mr Dodd of Earl James & Associates wrote a letter to Mr Milatos in which he proffered advice on a number of matters. This letter is Exhibit D38. The most pertinent matters addressed by Mr Dodd concerning the proposed development of Lake Bennett, were as follows:

- That a number of adjoining sections have a registered recreational easement over Section 152 which contains the actual lake.
- These easements allow each of the sections to enjoy the use of the lake.
- That to make Nazime's other properties more attractive it may be an advantage to also grant them recreational easements over Section 152.

[35] Mr Dodd then outlined two possible options. He described the first and simplest option to involve carrying out a unit title subdivision on one or more of the properties owned by Nazime. He then referred to the

construction of one and two bedroom units and the factors to take into consideration if this option were to proceed.

[36] Option 2 involved using the Estate Development section (Part IVB) of the Unit Titles Act. He then explained the requirements if this option were to proceed. The letter concluded as follows (Exhibit D38 p3):

> "Whichever option, or combination of both, you decide upon, all of the resultant lots or units will still have the right to use the lake by virtue of the recreational easements.
>
> The number of units you eventually build would depend upon the number of unit titles you choose to create.
>
> The two options we have outlined would both achieve your desired result. That is, to be able to break up the subject properties into more saleable parcels.
>
> A combination of the two options gives you the mechanism to construct units, or sell parcels that have the potential to be unit titled.
>
> The project certainly needs to be discussed in more detail when you have arrived at a decision on which course of action you wish to pursue.
>
> When you have made that decision we can discuss the planning implications and the likely fees associated with each process.
>
> Again, thank you for giving us the opportunity to participate in this project."

[37] In March 1996, Mr Milatos commissioned Craig Tarbottom who prepared schematic drawings of cabins Mr Milatos proposed to build around the foreshore (Exhibit P8).

[38] On 25 March 1996, Mr Milatos consulted Nicholas Mitaros, then a managing partner in the legal firm of Clayton Utz. Mr Milatos gave evidence he took

with him plans and computer drawings prepared by his architectural draftsman, Mr Tarbottom (Exhibit P8) and also the documents that Mr Shoobridge gave him (Exhibit P7). Mr Milatos gave Mr Mitaros an outline of his plans for the block, including his proposal to build small air-conditioned waterfront cabins as weekenders. He spoke of his ideas about building a resort type development with a golf course. Mr Milatos advised Mr Mitaros that his initial plans were to build 16 cabins on the northern side, if he was successful in selling these then he would build on the eastern side. Mr Milatos stated he wanted Mr Mitaros to prepare a 90 day option to allow the "due diligent checks" to be done and sort out all the legal issues. Mr Milatos advised Mr Mitaros he would be requiring him to later work on a sale agreement and to act for him on the conveyance of the various units. Mr Milatos did not specifically ask that a title search of the land be done. There was no discussion between them at this meeting concerning the recreational easements. The volumes that make up Exhibit P5 are the plaintiffs' copy of the Clayton Utz file in this matter.

[39] From the evidence of Mr Milatos and the Clayton Utz file, Mr Mitaros was to prepare an option to purchase agreement. This was to enable Mr Milatos to carry out a test of the market for cabins. Cabins were to be installed and offered for sale, with the cooperation of the vendor, Nazime. The option to purchase would be exercised if there was a favourable market response. Mr Mitaros was to prepare standard cabin sales contracts and do the conveyancing of cabins if the option was exercised. Provisions were also

made for Mr Mitaros to stage a unit title development. In addition Mr Mitaros was to draw an investor-lender agreement to enable Mr Milatos to raise working capital loans.

[40] On 26 March 1996, Mr Mitaros obtained a title search of Section 152. He did not order a search of the 11 recreational easements that were registered on the land. There is no evidence he read these easements. On the same date Mr Mitaros opened a file under the name "Milatos, George re Lake Bennett Proposal".

[41] Mr Mitaros prepared the option agreement which Mr Milatos collected from the receptionist at Clayton Utz on or about 8 April 1996. The nominated purchaser was Anadyr.

[42] Volume 3 of Exhibit P5 includes copies of a number of discovered documents from the Clayton Utz file. Pages 1-3 is a file note headed "Milatos - 25.3.96. Lot 152 - Lake Title". There are a number of notations including the following: "Total feasibility study to construct 100-150 bungalows strata titled units around waters edge of lake". At the foot of page 1 and at the top of page 2 appears the following notation "plus 1 commercial block (eight hectare block-shop and sporting facilities) complete feasibility in 90 days".

[43] On 22 April 1996, Mr Milatos wrote a letter to Mr Shoobridge, copy of which is Exhibit P39. In this letter, Mr Milatos agrees to the "granting of legal recreational access to the other lots (95, 97, 99, 100, 108 and 110) as

per your requirements …". He further agreed to the subdivision of those lots on certain conditions. Mr Milatos stated that no payments of monthly interest would be made during the investigation period. Reference was then made to the purchase price of $630,000. Mr Milatos indicated that his company was not prepared to make full payment at the time of exercising the option to purchase. Mr Milatos then put forward various alternate proposals for payment of the purchase price that involved utilising financial assistance for the project from Mr Shoobridge. This letter was forwarded by Mr Milatos without input from Mr Mitaros. There is no evidence Mr Milatos consulted Mr Mitaros before forwarding the letter. There is a copy of this letter discovered on the plaintiffs' copy of the Clayton Utz file (Exhibit P5 Vol 3 pp17-18).

[44] On 23 April 1996, Mr Shoobridge replied to Mr Milatos' letter of 22 April 1996, copy of which is at Exhibit P5 Vol 3 pp20-21. Mr Shoobridge confirmed a number of matters:

- Nazime grants to Anadyr the exclusive right of investigation into the project for a period of 120 days.

- In the event of Anadyr deciding to exercise its option during the investigation period, then certain arrangements for payment would apply which included an option to pay the full purchase price by a certain date or alternately with Nazime holding a first mortgage over the land with a

time limit for payment in full and interest to be paid on the amount of the mortgage.

- There were other conditions relating to payment of the purchase price and the rights of Nazime to be able to continue to trade and an acknowledgement as to the speculative nature of the project.

[45] On 7 May 1996, Morgan Buckley, as solicitors for Nazime, forwarded a letter to Clayton Utz, copy of which is at Exhibit P5 Vol 3 pp24-25. This letter confirms the purchase price for the Lake Bennett property as $630,000 and sets out how, and over what period, this amount should be paid. The final clause under the heading "Terms of the agreement" is as follows: (Exhibit P5 Vol 3 p25)

> "6. Upon transfer of the title of the Lake Bennett Lot to Anadyr Pty Ltd, Anadyr Pty Ltd shall grant to Nazime Pty Ltd recreational easements in respect of each of the Lots at Lake Bennett of which Nazime Pty Ltd remains the owner in similar terms to other recreational easements currently registered over the Lake."

[46] Mr Milatos spoke by telephone with Mr Mitaros following receipt of this letter. In this telephone call Mr Milatos instructed Mr Mitaros to grant the easements to Nazime as promised. Mr Milatos' main concern was that Mr Shoobridge, on behalf of Nazime, would not subdivide the lots to less than eight hectares in area. Mr Milatos gave evidence that at the time of this conversation, his understanding of the easements were that they gave access to the lake. Mr Mitaros did not explain to Mr Milatos exactly what the recreational easements meant.

[47] During the course of the discussion between Mr Mitaros and Mr Milatos concerning the recreational easements, Mr Milatos asked Mr Mitaros "How can they hurt me?". The advice given by Mr Mitaros was that the recreational easements could not substantially affect Mr Milatos or his development so long as they were restricted to benefiting properties in excess of eight hectares in area.

[48] On 10 May 1996, the option agreement (document headed "Deed"), between Mr Shoobridge on behalf of Nazime and Mr Milatos on behalf of Anadyr, was exchanged. Copy of this deed appears at Exhibit P5 Vol 3 pp43-52. The recital to the deed included the following:

> "Anadyr desires to investigate the financial viability of undertaking on the Lake Bennett lot an integrated weekend tourist concept which includes up to 150 strata titled bungalows and an associated commercial precinct ("the Development")."

[49] Provision 5F of that deed reads as follows:

> "F. Upon transfer of the title of the Lake Bennett Lot to Anadyr Pty Ltd, Anadyr Pty Ltd shall grant to Nazime Pty Ltd recreational easements in respect of each of the Lots at Lake Bennett of which Nazime Pty Ltd remains the owner (provided such Lots are not less than 8 hectares in area) in similar terms to other recreational easements currently registered over the Lake."

[50] In this option agreement, there was a 230 day option period (as amended). The purchase price was to be $630,000. The purchase price was to be paid as follows (Exhibit P5 Vol 3 pp 44-45):

> "(i) the amount owing to the Commonwealth Development Bank by Nazime Pty Ltd to be paid as monies become available from

the sale of the first 30 strata titled bungalows constructed by Anadyr Pty Ltd;

(ii) the balance to be paid as monies become available from the sale of the second 30 strata titled bungalows constructed by Anadyr Pty Ltd.

Provided that notwithstanding anything contained in 5B(i) and (ii), the whole of the purchase price shall be paid to Nazime Pty Ltd in full on or before 2 years from the date of exercise of the option."

[51] The option contained a number of other provisions concerning the financial arrangements between Nazime and Anadyr including a clause which provided that Anadyr would grant a first mortgage over the land to Nazime once the loan to the Commonwealth Bank had been paid in full to provide security for the sum of $230,000. Nazime was allowed to continue to trade from the current facilities at Lake Bennett until such time as the development construction phase required closure of same.

[52] Mr Milatos attended to the exchange of the option agreement himself. On 21 May 1996, he forwarded a letter to Mr Mitaros (Exhibit P5 Vol 3 pp53-54) advising him inter alia:

"We have exchanged contracts with Nazime Pty Ltd.

In addition we have finalised the layout of the commercial area, and identified the most suitable areas upon which we will construct the bungalows.

At present we are developing 6 different designs of floor plans, together with computer generated elevations and visuals of the whole project.

I have had some discussion today with John Carrierre re Strata Titling and Body Corporate issues. At this state (sic) the most sensible approach will be to create a separate title comprising the shop/ restaurant/sporting activity areas. This title, together with the

> proposed approximate 100 bungalow titles, will have the lake as a common property.
>
> An exclusive invitation will be extended to 7 people, offering them the opportunity to purchase one of our larger bungalows for the sum of $100,000.00 each. In return they will receive unencumbered Strata Title upon completion of the unit, and a pledge of repayment of the whole $100,000.00 within 4 years. ie $50,000.00 by the end of the second year, and the balance of $50,000.00 by the end of year 4.
>
> It is proposed that the money raised from these 7 extraordinary sales will be utilised to initially pay out Nazime's existing debt to the Commonwealth Development Bank, and to gain control of the title. The surplus monies will be spent on the site works and services eg water, sewer, electricity, environmental necessities, landscaping etc for the first 30 sites."

[53] On 6 June 1996, Mr Mitaros forwarded a letter to Mr Milatos in which Mr Mitaros noted that Mr Milatos had arranged directly with Nazime for the execution and exchange of documentation in respect of the Lake Bennett proposal.

[54] Enclosed with this letter was an account for services provided to the end of May 1996. This account included a disbursement in the sum of $27 for a land titles search. Copy of this letter and the account are at Exhibit P5 Vol 3 pp55-56.

[55] At pp57-58 of Exhibit P5 Vol 3, is a copy of a letter from Mr Milatos to Mr Mitaros dated 6 June 1996 in which Mr Milatos offers Mr Mitaros an opportunity to become a private investor in the Lake Bennett development. Mr Milatos also outlined his plans to raise and expend the funds he received. He asked Mr Mitaros to draw up a contract of sale so they could start

signing up purchasers and a contract document for those who choose to become initial investors.

[56] In June 1996, Mr Milatos attended a meeting which included Kevin Dodd and Phil Timney. The strata title development proposed for Lake Bennett was discussed. It is Mr Milatos' understanding that Mr Timney stated that the development did not require the consent of the easement holders as it did not block access to the lake.

[57] On 11 June 1996, Mr Timney forwarded a fax addressed to "Mr George Mitaros" (presumably meaning Mr George Milatos) attaching copy of a letter from Mr Timney to Mr Dodd noting Mr Dodd's advice that the Planning Authority had no problems with the proposed development (Exhibit D44). Mr Timney also stated that from a registration point of view he could see no difficulties with the proposal as put forward "subject of course to the normal consents". He also noted the body corporate will need to make an application for re-subdivision relating to the creation of more units.

[58] In his evidence under cross examination, Mr Milatos stated that the meeting referred to above, and the subsequent letter, had set his mind at rest in regards to the issue of needing the consent of other land owners to the development, and that he did not ask Mr Mitaros for advice on this issue.

[59] On 4 July 1996, Mr Mitaros noted in the Clayton Utz file that he had received instructions from Mr Milatos regarding documentation for the

investors providing working capital, that Mr Milatos needed 20 sales for it to go ahead and the requirement for a prudency clause (Exhibit P5 Vol 3 p61).

[60] On 9 July 1996, Mr Milatos wrote to Mr Mitaros advising the names of four people who wished to proceed to contract on the $100,000 investment proposition (Exhibit P5 Vol 3 p64). Also on that date, Mr Mitaros prepared a draft agreement for the initial seven investors (Exhibit P5 Vol 3 p63).

[61] On 18 July 1996, Mr Mitaros took instructions from Mr Milatos concerning a model standard contract of sale for the cabins. On the same date Mr Mitaros finalised a model standard contract of sale for the conveyance of cabins and provided this to Mr Milatos (Exhibit P5 Vol 3 pp79-80).

[62] Late in July 1996, George and Colleen Milatos conducted an open day at Lake Bennett. Mr Mitaros attended the open day. He advised Mr Milatos he would not invest in the project. Mr Mitaros was asked to draw up deeds of loan agreement for those who had expressed interest in purchasing units. Seven orders were taken on that date.

[63] On 1 August 1996, Mr Mitaros forwarded a letter to Mr Milatos noting that Mr Milatos had collected four of the loan deeds and also the standard contract for purchase of units at Lake Bennett by members of the general public. Enclosed was an account for professional services to the end of July 1996. Copy of the letter and statement of account are at Exhibit P5 Vol 3 pp120-121.

[64] Mr Milatos gave evidence that by August 1996 at least four or five purchasers for the units had signed up. Mr Milatos gave further evidence he had been approached by Mr Shoobridge in August 1996 about selling an access easement to "one of the Scarton brothers for $5,000". Mr Milatos met with Mr Shoobridge who provided him with a copy of the easement he was trying to sell. Mr Milatos instructed his secretary to forward this to Mr Mitaros and ask him whether there were any legal issues regarding this. The deed had a clause to be signed by Anadyr that reads as follows:

> "Anadyr Pty Ltd being the holder of option to purchase Section 152 Hundred of Howard from Nazime Pty Ltd hereby consents to Nazime Pty Ltd proceeding with the grant of a recreational easement over Lake Bennett to Andre and Rinaldo Scarton, as detailed in the attached deed."

[65] Clause 1 of the conditions of the deed, refers to the owner of the land receiving the benefit of the easement (called the grantee) and all bona fide non paying guests of the grantee from time to time as authorised by him having the right to enter the land burdened by the easement for private recreational purposes (Exhibit P5 Vol 3 p133).

[66] On 19 August 1996, Mr Milatos forwarded a facsimile to Mr Mitaros including the proposed deed between Nazime and Andre and Rinaldo Scarton ("the Scartons") granting an easement and seeking Mr Mitaros' advice (Exhibit P5 Vol 3 p129).

[67] On 19 August 1996, Bishop Collins wrote a letter to Mr Milatos (Exhibit D45) on behalf of the Catholic Diocese who owned Section 107 at Lake

Bennett. Bishop Collins raised concerns about the development at Lake Bennett and asked Mr Milatos to clarify the details of how he proposed to allow access between the units to the lake, for the benefit of the owners of blocks back from the lake.

[68] On 20 August 1996, Mr Mitaros prepared a letter to Janet Terry of Morgan Buckley, solicitors for the Scartons. In this letter (Exhibit P5 Vol 3), Mr Mitaros stated as follows:

> "We advise that whilst our client has no difficulty with the principle of Mr and Mrs Scarton (sic) having access to Lake Bennett for non-exclusive recreational purposes our client is however concerned that the formal registration of an easement at this time could impede its overall plans in respect of the proposed development. Accordingly our client is prepared to undertake to guarantee Mr and Mrs Scarton (sic) access to the Lake in the spirit of your draft Deed but requires the comfort at this stage of having the flexibility to require the access route to the Lake to be changed at a later date in light of our client's development plans."

[69] On 2 September 1996, the Coomalie Council wrote to the manager of Nazime raising concerns about the development at Lake Bennett including the possible limiting of the guaranteed access to the lake (Exhibit D51).

[70] Included in Exhibit D51 is a copy of a letter in reply by Mr Milatos dated 3 September 1996. In addressing the numerous concerns that had been raised, Mr Milatos stated inter alia:

> "#2. The new development will only use approximately 30% or less of the Lake shore, leaving quite adequate access for the existing landowners. …"

[71] Mr Milatos gave evidence concerning a meeting he had with the easement holders, the Coomalie Council and Mr Shoobridge. He stated that at this meeting, concerns were raised with him about the development blocking access to the lake. It is Mr Milatos' evidence that at that meeting he agreed to give the easement holders a 10 metre easement corridor in front of each of their blocks of land to ensure they would continue to have access to the lake. Mr Milatos gave further evidence that two days later he informed Mr Mitaros by telephone of this meeting.

[72] On 9 September 1996, Mr Milatos wrote to Mr Mitaros asking for advice about an interest expressed by Power and Water in Lake Bennett. The following day Mr Mitaros advised Mr Milatos verbally about the authority of Power and Water over the lake (Exhibit P5 Vol 3 pp136-144).

[73] On 11 September 1996, Earl James & Associates lodged an application to the Minister, on behalf of Nazime and City Developments, for approval to subdivide Section 152 into two separate parcels. This was to create two separate parcels with individual titles respectively for:

1) the lake together with the resort site as one title to become known as Section 245; and

2) for the land comprising the site for the proposed unit title subdivision for holiday cabins to become known as Section 244.

[74] On 12 September 1996, Mr Mitaros received instructions from Mr Milatos that Mr Milatos intended to exercise the option and was awaiting approval from the vendor's bank.

[75] On 14 September 1996, Mr Mitaros handed the Clayton Utz file in this matter over to Guy Riley who was then a solicitor and partner in the firm of Clayton Utz. Mr Riley had commenced working for Phillip and Mitaros in 1992. This firm later merged into Clayton Utz. Mr Riley's work was mainly commercial, conveyancing, leases and business sales. He had not previously been involved in the registration of a units plan. When Mr Riley received the file from Mr Mitaros, he made an assumption that Mr Mitaros had already given Mr Milatos competent and proper advice about the easements.

[76] On 17 September 1996, Mr Riley made a file note (Exhibit P5 Vol 4 p148) concerning financial arrangements to be made relevant to the option agreement and noting that Mr Milatos did not have finance confirmed but was looking to exercise the option.

[77] On 18 September 1996, Mr Riley received a letter from Ray Grimshaw, accountant for Mr Milatos, advising of the establishment of a discretionary trust and stating the names of the entities in respect of the Lake Bennett development (Exhibit P5 Vol 4 pp149-150). Mr Riley subsequently prepared the trust deed in accordance with these instructions.

[78] On 19 September 1996, Mr Milatos forwarded a letter to Bill Martin, one of the easement holders, a copy of which is Exhibit D52. In this letter he confirms his verbal promise made at the meeting of 3 September 1996 that:

> "… in the event of any development taking place in the future in front of respective blocks, we guarantee that an area of land no less than 10m width will be left available in front of each block so that you may access Lake Bennett for personal recreational purposes.
>
> This includes the right to use your canoes and non power boats on the Lake".

[79] On 7 October 1996, Mr Riley telephoned Pam Waudby, secretary to Mr Milatos (Exhibit P5 Vol 4 p155), seeking advice as to when the option was exercised. Mr Riley also had a telephone conversation with Mr Milatos (Exhibit P5 Vol 4 p154) regarding the exercise of the option. Mr Milatos advised Mr Riley that he had purported to exercise the option. Mr Riley discovered that Mr Milatos had served notice of the exercise of the option on Nazime's bank and not on Nazime. Mr Riley advised Mr Milatos that was not a proper exercise of the option and that notice had to be given to Nazime. There was also discussion with Mr Milatos about the date of execution of the option as Mr Riley wanted to make sure that the trust deed was dated before the exercise of the option because they were buying the land in their capacity as trustee.

[80] Mr Milatos gave evidence under cross examination that on 9 October 1996 he had a meeting at the Land Titles Office with Mr Timney, Mr Dodd,

Ms Fleay and Mr Buckle. At this meeting Mr Milatos provided documents regarding the subdivision.

[81] On 7 October 1996, Mr Milatos took possession of Lake Bennett. Work commenced on the services for 16 cabins. Mr Riley gave evidence that he was not aware that Mr Milatos had taken possession to the exclusion of Mr Shoobridge. He further stated that Mr Milatos did not ask him for advice relating to taking possession or preparing a licence agreement between Mr Milatos and Mr Shoobridge. Mr Milatos gave evidence in cross examination that Anadyr sold Enterprise House which it owned. The holding in Anadyr was split 60/40 between George and Michael Milatos. The whole of the proceeds of the sale of Enterprise House being $263,000 was put into Lake Bennett, including Michael Milatos' share of the proceeds. This was done by way of an unwritten agreement between George and Michael Milatos.

[82] In October 1996, Colleen Milatos commenced working in the gardens around the resort. She and George moved into a house about one month later to live at Lake Bennett. In 1997 buildings were renovated into a commercial centre.

[83] On 16 October 1996, Mr Mitaros was due back in the office. Mr Riley handed the file back to Mr Mitaros but Mr Mitaros said that Mr Riley could keep the file. Mr Riley and Mr Mitaros did not have any other discussion about the history of the file at this time.

[84] On 18 October 1996, Mr Riley spoke with Mr Milatos and Mr Grimshaw who both advised him “it is going to be City Developments not Anadyr”. Mr Grimshaw advised Mr Riley to “prepare a Deed getting rid of City Developments as a beneficiary. Because at present under the terms of the trust it is disqualified from acting as trustee. He will arrange for the appointment of the City Developments as trustee” – see Exhibit P5 Vol 4 pp157-158.

[85] On 23 October 1996, Mr Riley wrote a letter to Mr Milatos with respect to the change of name from Anadyr to City Developments and gave advice concerning his understanding that the option had not been formally exercised, the liability for payment of stamp duty and the questionable validity of contracts when the vendor purporting to sell does not own the land (Exhibit P5 Vol 4 pp160-161). He further advised that one step that must be completed before the exercise of the option, was the change of trustee and before the trustee could be changed it was necessary to vary the terms of the Trust Deed to exclude City Developments as a beneficiary. Mr Riley then provided further advice about the ramifications of disclosing the Trust (Lake Bennett Trust) to prospective purchasers.

[86] On 4 November 1996, Mr Shoobridge on behalf of Nazime wrote a letter to Mr Milatos, City Developments (Exhibit D77). This letter referred to discussions on 31 October 1996 regarding purchase arrangements of Lake Bennett under the deed of agreement dated 10 May 1996.

[87] This letter set out the detailed arrangements to be entered into for payment of the purchase price, that Nazime would cease trading at Lake Bennett on 7 October 1996 to allow redevelopment to commence and concluded with the statement that the foregoing was subject to a further legal agreement being entered into.

[88] On 14 November 1996, a development permit was issued with respect to Section 152 on behalf of the Minister for Lands, Planning and Environment. This permit noted that consent was granted pursuant to Section 52(1)(a)(i) of the Planning Act 1994 (NT) for the purpose of creating two lots, subject to the conditions in the schedule and for the reasons set out in the attached statement of reasons. The two lots referred to were Lot A the foreshore and Lot B the lake. Condition 6 in the Schedule of Conditions provided that (Exhibit D54):

> "A recreation easement over Lot B in favour of Lot A is to be provided and existing recreation easements relating to Section 152 Hundred of Howard are to be preserved over both Lots A and B."

[89] Mr Milatos gave evidence that in November 1996 he told the Scartons he would not sell them the part of the lake directly in front of Sections 92 and 93. An interim development control order applied to the Lake Bennett area. Mr Mitaros referred Mr Milatos to Annette McKenzie (within Clayton Utz) to deal with this issue. Mr Milatos gave evidence that he dealt with Mr Riley concerning the option agreement and the re-signing of the option agreement. Mr Riley advised Mr Milatos that stamp duty was payable

within 30 days of the option agreement being signed. Mr Milatos was not in a position to pay the stamp duty. Mr Riley provided Mr Milatos with assistance to delay signing of the option agreement. Subsequently Mr Riley wrote to the stamp duties office on behalf of Mr Milatos in an effort to avoid payment for a double transfer of property.

[90] Mr Milatos gave evidence that in December 1996 the final option agreement was signed as extended by himself and Mr Shoobridge. He gave evidence under cross examination that he did not have the money to finance this and raised $300,000 from other investors to finance the project. Following the subdivision of Section 152 into two lots, Mr Milatos did have a discussion with Mr Riley concerning the easements, but only in relation to granting access to the lake.

[91] On 8 November 1996, there are file notes on the Clayton Utz file (Exhibit P5 Vol 4 pp167-168) concerning problems that had arisen because of the interim development control orders and that there was nothing Mr Milatos could do about this.

[92] During this time Mr Riley was preparing contracts for orders that had been taken for cabins at Lake Bennett.

[93] Mr Milatos gave detailed evidence concerning his expenditure on the property in December 1996, which included eight cabins purchased from Australian Transportable Homes at a cost of $35,000-$45,000 per cabin. The cost of transportation and installation of footings was $5,000-$6,000 per

building and other costs included landscaping, reticulation costs, agents' commission and legal fees. By Christmas 1996, Mr Milatos had completed services for 16 cabins including sewerage, septic tanks, pumps, electrical reticulation, water and a service road which finally estimated at $9,000 per unit with a connection of approximately $2,000 per unit and incidentals including surveyor's fees. By this time Mr Milatos, through his company City Developments, had also expended several hundred thousand dollars on Lake Bennett. He did not have security of title. The amount of $300,000 was raised from investors and the sum of $400,000 was from his own funds including money he received through the sale of Enterprise House by Anadyr.

[94] On 12 December 1996, there was a grant of easement to the Scartons in respect of Section 92. This grant of easement to Section 92 was registered on 18 December 1996 (Exhibit P5 Vol 4). Mr Riley was not aware at this time that Mr Quinn, in the office of Clayton Utz, was acting on behalf of the Scartons.

[95] On 17 December 1996, Mr Riley prepared a form of notice for the exercise of the option to purchase Section 152 as contained in the agreement dated 10 May 1996 (Exhibit P5 Vol 4). On the same date, City Developments gave to the vendor, Nazime, notice of exercising the option to purchase Section 152.

[96] On 20 December 1996, a development permit issued by the Minister for Lands, Planning and Environment pursuant to s 52(1)(a)(i) of the Planning Act, for the purpose of building 90 holiday bungalows in eight stages on Lot A (which was to become Section 244) subject to the condition in the schedule and for the reasons set out in the statement of reasons (Exhibit D55). This permit was necessary to enable Mr Milatos to submit a disclosure statement under the Unit Titles Act to enable City Developments to carry out a condominium development of Section 244 to achieve the sale of cabins in stages under the Unit Titles Act. On the same date a disclosure statement was prepared by City Developments in the name of and executed by Nazime (Exhibit P55).

[97] On 23 December 1996, Mr Dodd from Earl James & Associates, forwarded a facsimile to Mr Milatos concerning the reluctance of Coomalie Council to grant approval to the two lot subdivision because suitable access ways to the two properties have not been constructed. Mr Dodd suggested options to overcome the problem (Exhibit D76).

[98] Mr Milatos completed construction of the first eight cabins and instructed his surveyor to apply for title.

[99] On 30 December 1996, Mr Milatos replied to Mr Dodd advising that he had written to the Coomalie Council outlining certain guarantees and instructing Mr Dodd to lodge the subdivision plan with the Registrar-General, the plan for strata titling and the disclosure statement forthwith, on the basis that

approval from the Commonwealth Development Bank would be forthcoming within the next few days (Exhibit D76).

History of Lake Bennett 1997

[100] During December 1996 and January 1997, Mr Riley corresponded with the stamp duties office concerning stamp duty ramifications with respect to the Lake Bennett development (Exhibit P5 Vol 4 pp177-178, 180-182).

[101] On 10 January 1997, there was a variation to the development permit issued on 20 December 1996 with an additional condition requiring compliance with the disclosure statement (Exhibit D55).

[102] On 15 January 1997, Mr Dodd signed an application for a condominium development on Section 244.

[103] On 23 January 1997, Mr Milatos' surveyor completed and submitted for approval the proposed units plan 97/26 for the first eight cabins and the subsequent issue of titles.

[104] On 30 January 1997, there was a further variation to the development permit DPM 96/0048B for the purpose of 80 holiday bungalows in 19 stages (Exhibit D55).

[105] On 3 February 1997, the subdivision of Section 152 into Sections 244 and 245 was registered.

[106] On 5 February 1997, Mr Dodd wrote to Mr Milatos advising him about "some of the possible shortfalls of taking the condominium development path" (Exhibit D53).

[107] On 11 February 1997, Nazime granted recreational easement 369268 to Section 244 for the benefit of purchasers in unit plan 97/26 in substantially similar terms to the form of the original recreational easements in accordance with the subdivision approval.

[108] On 17 February 1997, Mr Riley received a letter (Exhibit P5 Vol 4 p183) from Morgan Buckley, solicitors for Nazime. The letter enclosed a contract of sale for Sections 244 and 245 Lake Bennett. This letter noted that Mr Milatos had been in possession of Section 152 and had been carrying out development works for some considerable time. The letter noted Mr Milatos had been paying, by way of licence fee, the interest payments due on the loan Nazime had from the Commonwealth Development Bank. The letter advised that the contract for sale contained the provisions as set out in the letter from Mr Shoobridge to Mr Milatos dated 4 November 1996. Mr Riley gave evidence he believed the draft contract he was sent by Morgan Buckley contained a condition requiring the grant of the recreational easements to the vendor. Mr Riley agreed in cross examination that at this time he could have taken the whole thing back to the start but that the difficulty was that Mr Milatos was completely committed and he needed the settlement to go through as quickly as possible so that the money would come in.

[109] On 20 February 1997, Mr Riley faxed the contract of sale to Mr Milatos who instructed Mr Riley to check his recreational rights and make sure that it was limited to Mr Shoobridge and his family. Mr Riley was not aware until later in February 1997 of the meeting Mr Milatos had held with the easement holders on 3 September 1996 or the proposal to grant 10 metre wide access strips to each of the easement holders.

[110] On 21 February 1997, Mr Riley obtained a copy of one of the recreational easements. Mr Riley read it on 24 February 1997 and requested a copy of Waterworks Licence 363 referred to therein. Copy of the easement received is at Exhibit P5 Vol 4 pp193-194. It is the easement in respect of Section 103, registered easement Land Titles Office number 307087 and reads as follows at p194:

> "CONDITIONS
>
> 1. The owner of the land receiving the benefit of the easement (hereinafter called "the Purchaser") and all persons from time to time authorised by him shall have the right to enter upon and use the land burdened by the easement (hereinafter called "the Vendor's land") for recreational purposes PROVIDED THAT the lake situated on the Vendor's land (hereinafter called "the lake") shall be used only for such recreational purposes as are permitted by the terms of the Waterworks Licence No. 363 issued under the control of the Waters Act reserving nevertheless to the Vendor its employees agents and all persons from time to time authorised by it in common with the Purchaser and all persons from time to time authorised by him and all other persons having the like right free and uninterrupted passage across and use of the Vendor's land.
>
> 2. The Purchaser shall have the right to leave a boat on the said lake for use by the Purchaser and such persons as may be authorised by him.

3. The Purchaser for himself and his successors in title covenants with the Vendor and its successors in title that the Purchaser and his successors in title will not do or suffer anything to be done upon the Vendor's land whereby the lake and its retaining wall may be damaged or polluted or the use of the lake either by the Vendor its employees agents and all persons from time to time authorised by it or by any other person with a like right to use the lake may be prejudicially interfered with."

[111] On 26 February 1997, Mr Riley forwarded a letter to Morgan Buckley (Exhibit P5 Vol 4 pp205-206) concerning the proposed contract for sale. He stated inter alia (p206):

"The recreation licence also needs further thought. Our client wants to be assured that the recreation licence is given for private purposes only. Were it not for the fact that the Vendor is a company we would ask that it be restricted to Mr Shoobridge and his immediate family and guests.

We understand that the original easements did not have a plan attached to them, although the purposes of those easements were to give the owners of the land receiving the benefit of the easements the right to use the lake and the right to gain access to the lake over that part of the grantor's land between the grantee's land and the lake.

Obviously, with the land being subdivided and sold off we are not in a position to guarantee your client unfettered access over section 245.

The easement will have to be given over the nearest common property.

Our client also wants to prevent the mooring of boats on the lake.

We also query the sections in special condition 2 that your client owns. Our searches from March 1996 indicated it had no interest in either section 98 or 107 but owned section 110.

Some arrangement will also need to be made for the discharge of the existing easements over the residential titles issued upon the subdivision of section 245. It would seem to the writer to be better to discharge them over 245 (and 244 as well where the grantee's land is not adjacent to 244 and is not gaining access to the lake through 244) and granting new easements are defined corridors in front of the

> various sections as the development is completed and the access areas identified."

There is no reference in this letter to the easements creating an impediment to building on the land at Lake Bennett.

[112] Exhibit P5 Vol 4 pp203-204 contains Mr Riley's notes of a conversation he had with Mr Milatos on 27 February 1997 concerning the impending settlement of the purchase of Lake Bennett and the sale of the first eight cabins for which contracts had been signed. There was a discussion about the contract of sale attached to the letter from Morgan Buckley. There is reference to the recreational easements and the granting of easements adjacent to the block of land (minimum 10 metres). There is no reference to any advice about the true effect of the easements or that they were an impediment to building on the land at Lake Bennett.

[113] On 28 February 1997, Mr Riley had a meeting with Janet Terry of Morgan Buckley (Exhibit P5 Vol 4 p201). Mr Riley believed at this time that the easements were a potential problem because the rights which people enjoyed over the land were not specified to defined corridors and therefore any building development works upon those lands were arguably inconsistent with the rights of the easement holders. Mr Riley was under the misapprehension that the easement holders rights over the land areas were access rights and that they had the right to pass and repass freely over the land for the purpose of exercising their recreation rights over the lake. Mr Riley agreed in cross examination that his reading of the easements was

wrong. His initial concern had been the complete lack of a plan specifying the easement area. His belief was that the easements could apply to the whole of the land which in turn led to his concern that any building on the land could incur the risk of impeding the access rights granted. Mr Riley gave evidence that he had a conversation with Mr Milatos and told him that the unspecified easements were inconsistent with Mr Milatos' ability to develop the land. There is no file note on the Clayton Utz file concerning this conversation. The advice is not contained in a letter from Mr Riley to Mr Milatos and there is no record of such conversation in the time cost records. Mr Riley gave evidence he believed it was at this time Mr Milatos told him about the meeting with the easement holders and assured Mr Riley it was not a problem as Mr Milatos had agreed to give them 10 metre access strips.

[114] Mr Riley did agree in cross examination that after he had read one of the easements he arranged to have Mr Milatos committed to a purchase where these easements presented a risk for the development that was to follow the purchase. Mr Riley gave evidence that at that time he felt Mr Milatos was culpable for actually commencing a development under an option agreement. Mr Riley agreed in cross examination that this was his approach all through 1997 and that this was the wrong approach. Throughout 1997, Mr Riley's approach had been that Mr Milatos was foolish to have commenced building before the option was exercised. Mr Riley stated he considered he was

managing a commercial risk. He agreed that because there was a legal risk it had the potential to impact upon the commercial aspect of the deal.

[115] In February 1997, Colleen and George Milatos sold unit 3/51 Stoddart Drive, Bayview Haven to raise working capital for the Lake Bennett project and moved to live permanently at Lake Bennett. From this date, Colleen Milatos took over management of the resort supervising renovations and preparing for the opening of the resort. Mr Milatos stated in cross examination that the unit sold for $234,375. From this amount, $150,000 was paid to the ANZ Bank residential loan and the balance put into the Lake Bennett development.

[116] Mr Milatos gave evidence that during January and February of 1997, Mr Dodd prepared the disclosure statement. Mr Milatos states during this time he commenced services for the resort building including sewerage installations, septic tanks, electrical reticulation, which cost approximately $150,000. He gave further evidence that he had discussions with Mr Riley concerning the easements registered on the title for Section 244. There was a meeting between Mr Riley, Mr Dodd and Mr Milatos.

[117] On 3 March 1997, the units plan was registered by the Registrar-General for Section 244.

[118] On 3 March 1997, Mr Milatos wrote to Mr Riley (Exhibit P5 Vol 4 p207). In this letter the first three paragraphs read as follows:

> "As you know there are 15 easements registered against Title 152, the Lake.
>
> These easements are general personal recreational easements and as we thought, are over the whole of the land of 152. At the same time these easements do not impede or prevent any development.
>
> The Titles Office agrees that this is messy and prefers to find a solution. The best solution it appears is to issue a 10m easement over Sections 244 and 245 somewhere in front of each of those 15 lots to whom recreational easements have been previously granted".

[119] The letter goes on to refer to the meeting Mr Milatos had with the easement holders in September 1996. At that meeting Mr Milatos had promised to give them all a 10 metre personal recreational easement in front of each of their blocks of land. Mr Milatos developed that proposal further in this letter and sought Mr Riley's advice about the legal terms that should be used in seeking an extinguishment of the present easement and granting a new private easement of 10 metres in front of each block. He then made reference in the letter to his inclination to proceed to obtain the first eight titles immediately from the Land Titles Office, proceed to settlement with the purchasers and deal with each individual purchaser who may raise the issue of the easement registered on their title.

[120] On 3 March 1997, Mr Milatos forwarded a facsimile to Esanda Finance ("Esanda") proposing that Esanda take over the mortgage on Section 244 (Exhibit D60). He attached a copy of his letter to Mr Riley of the same date.

[121] On 3 March 1997, there was a meeting between Mr Milatos, Mr Riley and Mr Dodd. Mr Riley had earlier spoken with Ms Waudby who advised Mr Riley that because of Mr Milatos' difficult financial circumstances, settlements had to go through as quickly as possible. A file note of this meeting prepared by Mr Riley is at Exhibit P5 Vol 4 pp209-210. The file note records there was a discussion between them about the easements and notes the agreed solution. Mr Riley was to prepare a letter to the various easement holders proposing an exchange of their existing easements for a more specific easement delineating, a 10 metre access strip in each case. Mr Riley gave evidence that at this meeting the purpose was to give advice to Mr Milatos that these easements exist and the effect of them, that they should have been dealt with before the exercise of the option and that Mr Milatos should have been told about them before. Mr Riley gave evidence under cross examination that throughout 1997 he still believed it was his client's foolishness in developing the land before acquiring titles to the property rather than any omission on the part of the lawyers that was the cause of the problem.

[122] Under cross examination Mr Riley agrees that there is no mention in his file note of 3 March 1997 that he advised Mr Milatos of the threat to development of the land or indeed any constraints on building on the land. Mr Riley agreed that he realised that Mr Milatos had exercised the option and he had been given an opportunity to get out of the contract attached to the option by the vendor's solicitors. Mr Riley gave evidence that he had

carefully explained all of this to Mr Milatos at the meeting on 3 March 1997 and that Mr Milatos had instructed him to go ahead as he subsequently did. Mr Riley agrees there is no reference to this advice in the file note of 3 March 1997. Nor was there any letter to Mr Milatos stating this advice.

[123] Mr Riley gave evidence that it was obvious to him from their meeting on 3 March 1997 that Mr Mitaros had not given any advice to Mr Milatos about the easements. Mr Milatos' knowledge of the easements appeared to stem from his discussions with the easement holders and Mr Shoobridge.

[124] Mr Riley agreed that at that time, Clause 1.3 in the cabin contracts (Exhibit P5 Vol 3 p118) would have enabled City Developments a way out of the contract as it was made conditional upon the issue of titles. It is Mr Riley's evidence that his concern at the time was whether or not Mr Milatos was bound by the other contract, not the cabin contracts.

[125] Following the registration of the units plan of subdivision on 3 March 1997, Mr Riley had a conversation with Mr Milatos regarding some of the individual sales of units.

[126] On 5 March 1997, Mr Riley drafted two letters, one to the owners adjacent to Section 244 (Exhibit P5 Vol 4 pp212-213) and one to the owners adjacent to Section 245 (Exhibit P5 Vol 4 pp214-215).

[127] The first draft letter explained the need to specify where the owners could cross over Sections 244 and 245 to get to the lake, as the present easements

did not define this. Enclosed were documents to be signed by the land owners. These included an extinguishment of their present easement, a replacement easement and a second easement to grant the land owner a right of access over eight 10 metre corridors across Section 244. The concluding two paragraphs read as follows (Exhibit P5 Vol 4 p213):

> "Your rights in respect of the Lake remain unchanged. All these documents do is define the areas in which you, as an owner, may gain access to the Lake.
>
> There is some urgency involved in this exercise as we need to define the access areas so that your easement does not appear on the titles to the new residential allotments".

[128] The second draft was in similar terms with appropriate adjustment for the owners of property adjacent to Section 245 (Exhibit P5 Vol 4 pp214-215). Mr Riley agreed in cross examination that the whole focus of these letters was about access, there was no mention of any restraint to the development.

[129] A facsimile from Mr Milatos' secretary dated, 5 March 1997, was forwarded to Mr Riley indicating the draft letters were fine, sending a list of easement holders and arranging to pick up the letters by 9.00am the following day (Exhibit P5 Vol 4 pp217-219). These letters were dated 6 March 1997. Copies of the letter which were forwarded to some of the easement holders, appear at Exhibit P5 Vol 4 pp221-226. Conditions appear at pp227-228. The conditions were attached to the letters that were sent.

[130] Two replies to these letters were received on 11 March 1997 and appear at pp268-273. The Catholic Church rejected the proposal and a reply on behalf

of Mr Nash sought to have an amendment to the position of the right of way. On 11 March 1997, Mr Riley made a note in the file (Exhibit P5 Vol 4 p267) about a discussion with Mr Milatos about these two letters. There was no note recognising or advising that the recreational easements were an impediment to building.

[131] On 6 March 1997, Mr Milatos wrote to Mr Riley listing the first seven units to be sold. Mr Riley was to act for him on the conveyances. Mr Milatos stressed the urgency for settlement. Mr Riley gave evidence that Mr Milatos was desperate for money at this time.

[132] During the course of the next few days, Mr Riley had contact with a number of the easement holders and also with the solicitors for the vendor concerning the contract of sale.

[133] Mr Riley gave evidence that on 19 March 1997 he first sighted the executed copy of the option deed and the notice of the exercise of the option.

[134] On 20 March 1997, Cridlands forwarded a letter to Mr Riley on behalf of their clients, Andre and Rinaldo Scarton, regarding Sections 92 and 93 Hundred of Howard (Lake Bennett). This letter was in response to the letter from Clayton Utz dated 6 March 1997. Copy of this letter appears at Exhibit P5 Vol 4 pp291-293. The letter rejects the proposal put forward by Clayton Utz in respect of the easements and stated that the Scartons intended to assert their rights to use the area to the full extent permitted

under the existing registered easements. This letter makes very clear the broad extent of the easements. Paragraphs 2-4 of the letter read as follows:

> "As you will be aware, in 1993 a recreation easement (registered number 283686) was granted over Section 152 (which comprised the whole of Lake Bennett and its surrounds) to benefit, inter alia, our clients allotment being Section 93. In 1996 a further easement in substantially the same terms was granted (registered number 366439) to benefit our clients' allotment being Section 92.
>
> The easements clearly grant to our clients free, full and unrestricted access to any and all parts of Section 152.
>
> Your client has now subdivided Section 152 into two separate parcels, Section 244 and 245. Section 245 comprises the lake area, and Section 244 has been further subdivided by the registration of Units Plan No. 97/26 upon which your client has commenced construction of a number of condominiums. The registered easements in favour of our clients are noted over the title to and burden Sections 244 and 245. The easement for Section 93 has been inadvertently omitted from the title for Section 244 but the easement is clearly noted on the Units Plan, and we are in the process of having the omission remedied".

[135] The letter then proceeds to express concerns about lack of notice and consultation in respect of the development of the property and the Registrar-General permitting registration of the subdivision plan and units plan contrary to the provisions of the Real Property Act and the Unit Titles Act. Two paragraphs of the letter (Exhibit P5 Vol 4 pp292-293) read as follows:

> "Neither your client nor any purchaser of properties within the subdivision have any right to block off or otherwise restrict our clients from using any part of that area for any recreational purpose they see fit. In this regard we are instructed that the erection of the structures on section 244 substantially impinges on our clients' ability to exercise their rights under the registered easements.
>
> Your client is hereby on notice that any further development works in the vicinity are undertaken at its risk and our client reserves its rights to the fullest extent permitted by law in respect of both action

> in respect of the existing development and any future or further development occurring."

[136] Mr Milatos gave evidence that he spoke with Mr Riley who assured him that the easements would not limit, control, stop or prevent development on the land. Mr Milatos further stated that Mr Riley informed him that as long as Mr Milatos did not block the easement holders' access to the lake he had nothing to worry about. His evidence is that Mr Riley told him the letter from Cridlands did not require a response and that no legal action should be taken as the easements were only about access.

[137] Mr Riley, in his evidence, substantially confirmed this was the advice he had given to Mr Milatos. He agreed in cross examination that he should have picked up on the fact they were asserting recreation rights over the land and he had failed to do this. He agreed that the contents of this letter was "the highest level of threat to the development". Mr Riley's evidence is that he did not understand it this way as he still thought nothing had changed from his earlier belief. Mr Riley agreed that this was another point at which Mr Milatos could have reconsidered entering the contract and proceeding with the development. Mr Riley stated it is his belief the outcome would have been no different. Mr Riley continued to negotiate with the solicitors for Nazime with respect to the proposed contract of sale which was to replace the option agreement.

[138] Mr Riley agreed in cross examination that Mr Milatos should have been given advice at the very outset that the easements prevented Mr Milatos building on the land.

[139] On 24 March 1997, City Developments exchanged contracts with Nazime for the purchase of Sections 244 and 245 for $630,000. Mr Riley agreed to the final form of the contract. A copy of the contract is included in Exhibit P5 Vol 4. It does not have a page number but appears to have been inserted between p304 and p308. Mr Riley attended on the exchange of contracts with the solicitor for the vendor. Mr Riley had also personally attended upon Colleen Milatos to sign the contract of sale. He had recommended to George and Colleen Milatos that they sign the contract.

[140] During the latter part of March 1997, Mr Riley acted on settlements of units as they were being sold.

[141] On 27 March 1997, Mr Riley forwarded a transfer to solicitors for Nazime to sign with respect to the "balance of the land". The transfer was forwarded under cover of letter from Clayton Utz (Exhibit P5 Vol 4 pp320-321).

[142] On 1 April 1997, Mr Milatos forwarded a facsimile to Mr Timney, the Registrar-General, expressing surprise that the strata title units, when issued, carried registration of the recreational easements on them. He asked if there was a way these easements could be registered only against Sections 244 and 245 and not on the strata title units (Exhibit D56).

[143] On 1 April 1997, Mr Riley had a telephone conversation with the Registrar-General. A file note of this appears at Exhibit P5 Vol 4 p325. The telephone conversation was about the issue of the titles and whether the easement holders should have been asked for their consent. Mr Riley gave evidence this was the first time, so far as he was aware, that the consent issue had been raised. However, it was now a fait accompli. There was a further discussion about a partial release of an easement.

[144] On 3 April 1997 (Exhibit D57), Mr Timney responded to the facsimile from Mr Milatos. In this letter Mr Timney advised that the rights of the easement holders could not be removed without their consent. Mr Timney advised that any variation to the form or area of the easements would need to be negotiated between the owners of the land in Sections 244 and 245 and the owners of the lakeside blocks which enjoy the benefit of the easement.

[145] Mr Riley gave evidence that early in April he had spoken with Mr Milatos regarding the conversation with the Registrar-General. Mr Riley told Mr Milatos that he had "got away with it" and as long as he did not try to change his disclosure statement it did not matter.

[146] On 4 and 8 April 1997, the sale of a further three cabins was completed and the proceeds paid into the bank for Nazime.

[147] On 11 April 1997, Mr Timney advised Mr Milatos that he had received a similar letter from Cridlands acting on behalf of the Scartons, asserting a

right on behalf of the Scartons, to free, full and unrestricted access to Section 152.

[148] On 3 April 1997, Mr Riley had a conversation with Mr Milatos regarding the proceeds from Unit 6 and the fact no titles had issued. Mr Riley advised that the solicitor for the vendor, Nazime, wanted the second mortgage in favour of Nazime, easements and encumbrances sorted out before they would authorise the release of titles.

[149] On 3 April 1997, Mr Timney wrote to Mr Milatos concerning the easements being carried forward and advised that such easements would remain and continue into the future unless there was a joint application to remove them (Exhibit P5 Vol 4 p336).

[150] Mr Milatos gave evidence that by April 1997 approximately eight cabins had been installed with services provided to a further eight cabin sites. He stated contracts had been signed and exchanged. Mr Milatos stated a loan of $500,000 was approved by the ANZ Bank. Renovations on the resort commenced, including the warehouse, restaurant, bar, shop and convenience store. About 18 caravan sites were created and improvements made to the sewerage and water system.

[151] On 16 April 1997, the settlement for the sale of Lake Bennett from Nazime to City Developments, being purchase of Sections 244 and 245, was effected.

[152] The titles were transferred to City Developments subject to mortgage No. 373402 in favour of Nazime registered against the title to Section 244 to secure payment to Nazime of the unpaid balance of purchase price being $630,000 less sums paid to Nazime's bank to discharge its mortgage.

[153] In the latter half of April 1997, Mr Milatos expended a further $200,000 on the development of Section 244. This further development was known to Mr Riley who acted on the conveyance of a further three cabins (Exhibit P10). During this period, Mr Riley assisted Colleen and George Milatos to execute and finalise an ANZ Bank loan to City Developments in the sum of $500,000. Mr Riley was aware this was to finance developments at the resort. City Developments subsequently expended approximately $650,000 refurbishing and expanding the resort. This was known to Mr Riley. The money came from the ANZ Bank loan of $500,000 and general funds.

[154] On 24 April 1997, Mr Timney wrote to various easement holders advising that because of indefeasibility of title the subdivisions and subsequent registration could not be undone.

[155] On 5 May 1997, Mr Riley wrote a file note (Exhibit P5 Vol 4 pp434-435). This details the research Mr Riley had undertaken with respect to the easements. The second paragraph on p435 reads as follows:

> "The real concern is not the subdivision of the land, but the development of the land following the subdivision. The neighbouring owners all have valid easements which they can still

exercise to get to the lake. The problems are likely to arise when George builds a house across someones access track."

[156] Mr Riley concluded that building of itself is not necessarily "contrary to people's access rights". He went on to conclude that for practical purposes there should be no problem, provided the easement holders had convenient access to the lake.

[157] Mr Riley gave evidence that the hand written amendments endorsed on the file were made by him some years later at a time when Clayton Utz was no longer acting for City Developments.

[158] On 6 May 1997, Mr Riley wrote to Mr Milatos. A copy of this letter is the last document in Exhibit P5 Vol 4. The letter concerns the sale of various units, the development and the account from Clayton Utz. Page 2 of this letter from paragraphs 4-7 states as follows:

> "We think you have made a wise decision in deciding to dispense with the concept of 10 metre corridors for section 244. What needs to be done there is to have the access easements discharged over the future stages.
>
> We note that when this problem originally arose, you and Kevin Dodd were both of the view that rather than discharge the easements over the areas which were going to be developed you would discharge the easements entirely and give new easements over the common property and the lake. We take the view that the cost of doing this is prohibitive. Because we cannot force owners to give up their easement rights, we believe that those owners who are reasonable will see the sense of giving up their rights over the areas being developed (so long as they are still guaranteed the access to and use of the lake) and those who are unreasonable are not going to co-operate no matter how you approach the problem.
>
> We therefore believe that we should do the best that we can to get rid of as many easements as possible over the development areas, and

> leave the risk of having to deal with owners like the Scartons to your purchasers.
>
> As far as the Scartons and others are concerned we believe that the most prudent course that you can adopt is not to obstruct them in gaining access to the lake."

[159] The letter proceeded to give further advice as to what may be the attitude of the Registrar-General in the future, in that he may seek the consent of the easement holders before approving further development or alterations. Paragraph 4 on p3 of the letter then reads:

> "The only other suggestion which we can make in relation to tidying up this easement problem is that once future stages have been completed and City Developments is not dependant upon borrowed funds, maybe you can negotiate with the easements holders and compensate them for the loss of their unfettered access rights. This is not a step that we would suggest that you rush into. If the development proceeds in an orderly manner of the next two years without anybody taking any steps to exercise their access rights by walking through someone's front door or by seeking an injunction to stop future development, then we would suggest that matters be left as they are. After all, with the exception of the rights over 245, once the development has been completed it will not be your problem."

[160] The letter again urged Mr Milatos to amicably resolve as many of the easements as he could. In cross examination Mr Riley agreed that he was wrong when he gave the following advice in his letter (p3 par 1):

> "… Once the approval has been granted and titles have been issued, the conversion of titles to future stages to unit titles does not require anyones consent. …"

[161] Mr Milatos gave evidence that in June 1997, Mr Timney informed him that complaints had been made to the Ombudsman's office regarding the registration of the disclosure statement and units plan of subdivision without

the consent of the easement holders. During June and July 1997, a further four cabins at Lake Bennett were completed.

[162] On 3 July 1997, Mr Riley wrote to the Attorney-General. It is Mr Riley's evidence that at this time he still believed the effect of the easements was that the adjacent owners could walk through the developed units. Copy of this letter appears at Exhibit P5 Vol 5 pp449-452. On p2 of this letter Mr Riley states as follows:

> "At Lake Bennett, a related problem has arisen in relation to the easements which have been granted over the land which has been developed. In order to save costs, the previous owner gave neighbouring owners the right to use the lake in common with others, and the right to have access over its land for the purpose of getting to and from the lake.
>
> Unfortunately no effort was made to define where access could be gained over the land. We now have access easements which arguably mean that the adjacent owners can walk through the developed units.
>
> Under the Real Property Act we cannot modify or remove an easement without the cooperation of the person in whose favour that easement has been granted.
>
> Our client has offered the easement holders access over all of the common property and requested that they remove their easements over all of the unit titles and the titles to future stages. Some have agreed, most have ignored its request and some have flatly refused.
>
> Even though our client's development will not prevent the neighbouring land owners from gaining access to the lake or in any way restrict their rights in respect of the lake, if they will not agree to the extinguishment of the easements over the unit titles, there is nothing that our client or the unit owners can do about it."

[163] The letter sought certain amendments to the relevant legislation and drew attention to the problems that arise where the holder of an easement does not agree to modify or cancel an easement where the right granted under the

easement is no longer being used or fully used. A copy of this letter was sent to Mr Milatos on 4 July 1997. A reply to this letter was received by Mr Riley from the Attorney-General on 26 September 1997. The Attorney-General advised that he would have his department undertake a review of the Unit Titles Act and he would consider their submission (Exhibit P5 Vol 5 p479).

[164] On 17 July 1997, Mr Riley completed settlement of two further cabins on behalf of Mr Milatos.

[165] During August 1997, Mr Timney advised Mr Milatos that he did not have to be concerned about the complaint to the Ombudsman as the Ombudsman did not have jurisdiction over the Registrar-General.

[166] On 6 September 1997, the renovated resort area at Lake Bennett was officially opened by the Attorney-General, Shane Stone. Mr Riley was an official guest at the opening.

[167] In 1997 and 1998, Colleen Milatos won awards from the Keep Australia Beautiful Council for the best tourist facility in the Northern Territory (Exhibit P186).

[168] From August 1997, Colleen Milatos was managing and organising staff, running the resort and marketing the resort. When necessary she would also do the cleaning and the cooking. She continued to maintain the gardens around the resort. She prepared brochures for the local market and became

involved in networking with local operators and others in the tourism industry to promote the resort. She then progressively marketed throughout Australia and actively pursued coach operators and many others in the tourism business. They were eventually successful in putting in a bitumen road with the help of the Coomalie Council and the Northern Territory Government. Mr Milatos had built 12 garden wing rooms and they were able to attract the tour bus market. The last lot of rooms were completed in 1999. Colleen Milatos was also successful in marketing the resort for conferences. The expectation was that the cabin sales would support the resort. George Milatos handled all the legal and financial aspects including obtaining bank loans for the business.

[169] By October 1997 services for a further 44 units had been completed.

[170] On 16 October 1997, the plaintiffs sold the property at 39 Stoddart Drive, Bayview for $273,728. An amount of $201,578 went to pay out the ANZ residential investment property loan. Construction costs totalled $100,000. Maximum profit from the project was $65,000.

[171] During October, November and December 1997, Mr Milatos was in dispute with the Coomalie Council concerning the rates. There is correspondence from Mr Riley to Mr Milatos on this (Exhibit P5 Vol 5 pp480-491). In November 1997 another four cabins were completed.

[172] Under cross examination, Mr Riley agreed that in his letter to Mr Milatos dated 5 November 1997 (Exhibit P5 Vol 5 p487), he had gone into detail

about whether or not rates were payable in respect of the units that had been completed. He agreed he had written letters of advice dealing with stamp duty, rates, financing and canoe hire agreement but no letter of advice about the fundamental issue relating to the development which was the effect of the recreational easements.

[173] The units plan for stage 3 of the development was approved and registered resulting in the issue of titles for cabins 1, 2, 15 and 16.

[174] On 22 December 1997, Mr Milatos forwarded a letter to Esanda advising that sales had slowed and requesting $200,000 for working capital as a considerable amount had been spent on the resort.

History of Lake Bennett 1998

[175] On 13 January 1998, Mr Milatos sent an application to the Registrar-General to vary the disclosure statement to remove the requirement that the condominium development be carried out on Section 244 in stages (Exhibit D61). The Registrar-General replied to this application on 17 January 1998 with suggested amendments (Exhibit D62). Mr Milatos submitted the amended application on 19 January 1998 (Exhibit D63) asking that the cabins be constructed in any order that the developer chooses.

[176] At pp498-499 of Vol 5 Exhibit P5 is a Clayton Utz file note dated 16 January 1997 (presumably this should be 1998) outlining the financial difficulties Mr Milatos was experiencing and containing a recommendation

to Mr Milatos that he change his disclosure statement to enable him to complete units individually, rather than in groups of four, as a more attractive option to potential purchasers.

[177] On 15 January 1998 the sale of a further two cabins were settled by Mr Riley.

[178] On 27 January 1998 the Attorney-General forwarded a letter to Mr Milatos advising him the variation to the disclosure statement had been approved subject to the receipt by the Registrar-General of the consents required from the proprietors of units in the completed stages (Exhibit D64). Because of the time required to obtain these written consents the variation was not registered until 3 July 1998.

[179] A document titled "Plaintiffs Particulars of Paragraph 95 of Further Amended Consolidated Statement of Claim" was tendered (Exhibit D65). Paragraph 69 of that document reads as follows:

> "On 13 March 1998, or thereabouts, the First Plaintiff had a telephone conversation with Mr Timney that included words to the following effect:
>
> > The First Plaintiff said: 'Phil, I hope everything is going well in Canberra but it's not going very well here. I have just come out of a meeting with Gail Fleay. She had a lawyer there and Darcy Buckle. They told me that I cannot get any more titles in the development without the consent of the easement holders. What is going on? Is there anything I can do about that?
> >
> > Mr Timney said: 'I don't believe that. You have not done anything to affect those easements. They still have access.

It's about the easement holders' complaints obviously. It would not have happened if I was there. My boss told me to ignore the Ombudsman. That is what I did. There was no problem right up to the day I left at the end of January.'

The First Plaintiff said: 'Well I've got a big problem now. They won't give me titles for eight bungalows that I have finished and pre-sold. This will ruin me. I can't get the consent of seventeen people. It would never happen. Phil, you assured me that the consent of those people was not required. How can they do this to me now by changing the requirements?'

Mr Timney said: 'It is obviously the pressure from the Ombudsman. I would fix it for you if I was there but I am not in the chair anymore and I won't be back for at least six months. I think the only thing you can do is go political. Go and see the Minister.'"

[180] Part of a document referred to as "Particulars of Statement of Claim" against Clayton Utz was tendered Exhibit D67. Paragraphs 109-112 inclusive read as follows:

"109 On 10 March 1998, Mr Riley and the First Plaintiff attended a meeting to confer with the Registrar-General concerning a proposed airspace easement to be granted in favour of parts of Section 244 over parts of Section 245 at which meeting the Registrar-General's legal advisor was present and who said words to the following effect:

The legal advisor said: 'The Registrar-General cannot accept further Stages of the Units Plan without the consent of all people having a registered interest in the land.'

The Registrar-General said words to the effect 'This means that, on the present state of things, you won't be able to get titles for your next Stage unless you get the consent of all the easement holders.'

The First Plaintiff said: 'You can't do that. We're almost two years into this project and at all times we were promised by Phil Timney that we did not need the consent

of the very people you are talking about. This project has a huge potential but it also has huge exposure. We are out almost $2M right now. If you go ahead with this, I will sue. That is all I can do. How can you expect me to accept this. You have issued 16 titles without the consent of those people. Their consent was never on the table. Phil Timney said he did not need their consent because they are not affected. We have committed ourselves believing that you have the authority to tell us that. How can you change it now? This will be a big claim. We will start on it today. You have registered the Disclosure Statement, given us a variation of it, issued 16 titles and now you say you should not have? How can that stand?'

Mrs Flea[h]y said: 'I am just doing my job. That will be the position from now on.'

Mr Riley said: "As you can see, my client is rightly very angry. Can we explore whether there is any way to solve this problem without litigation? Can we discuss your opinion Michael?'

110. On 10 March 1998, Mr Riley and the First Plaintiff had a conversation at Mr Riley's office, subsequent to the meeting with the Registrar-General, and had a conversation that included words to the following effect:

The First Plaintiff said: 'Where the hell does this leave us? This will break me. How can they change the rules in the middle of the job? I will have to sue them.'

Mr Riley said: 'Unfortunately, I think they are right. I will try to follow up with Michael Grant. It's possible that won't be his final comment but I think it will be.'

The First Plaintiff said: 'But I can still sue them.'

Mr Riley said: 'Yes, the RG has done the wrong thing. They were right to change their mind but then you've got a very good case. I think you would win hands down. We should talk to a good barrister as soon as possible. I believe Judith Kelly would be the best one to talk to. They have done the wrong thing by you. We should see her and we should look at other solutions.'

The First Plaintiff said: 'What else is there?'

Mr Riley said: 'Well I think we could get the Registrar-General to exercise her discretion under a Section of the Act that relates to hardship. This is a classic case of hardship.'

The First Plaintiff said: 'How do we do that?'

Mr Riley said: 'Well, we will have to put a case to her. Surely they will listen. They have caused the hardship. I will get something up and put it in as soon as possible.'

I said: 'What if it doesn't work?'

Mr Riley said: 'Well I think it's time to get the politicians involved. The law just isn't right for a developer. I have heard about another example like this. All the tenants at Lend Lease's Casuarina shops gave Lend Lease trouble on something similar. Lend Lease needed their consent for something and quite a few of them wouldn't give it unless their back rent was cancelled. Surely we can persuade the Minister to change the law. It's not just us. The Lend Lease case is a good example. I will put up a submission to the Minister. Do you know Shane Stone personally? If you do you should go and see him and talk to him.'

The First Plaintiff said: 'I will do that as soon as I'm finished here.'

111 On 12 March 1998, Mr Riley telephoned the First Plaintiff and said words to this effect: 'I have spoken to Michael Grant. He is not changing that advice. They definitely won't consider hardship either.'

112 On 13 March 1998, the First Plaintiff telephoned Mr Riley and had a conversation with him in words to the following effect:

The First Plaintiff said: 'Guy, I caught Shane Stone at the airport last night. Without even saying anything to him he said to me 'I know why you are chasing me. Hold back any legal proceedings. We are going to change the legislation'. So, that looks a bit better. We will be held up but at least something is going to happen.'

Mr Riley replied: 'That is a relief. Look, it might take several months to get a change of legislation through but it is the best way to go.'

> The First Plaintiff said: 'When do you think it will go through? I cannot afford any delay. I have got to get those titles through and get some money in. My Esanda debt is running at just under a million and the eight (8) bungalows were supposed to pay for that'
>
> Mr Riley said: 'I can imagine that you are worried sick. We must get on to the political side as soon as possible and make sure that they do the legislation like Stone has promised. They need to be told what is required or it could [get] bogged down forever with the general review of the law on property'.
>
> The First Plaintiff said: 'Can you do that for me? Tell them what is needed.'
>
> Mr Riley said: 'Yes I will get on to them after I have had a think about what is needed.'"

[181] On 10 March 1998, immediately following the meeting at the Registrar-General's office, Mr Milatos gave evidence that he and Mr Riley had a discussion at Mr Riley's office. He stated that Mr Riley said words to the effect, "We've fucked up. You've got every right to sue us". Mr Milatos said to Mr Riley, words to the effect that, he "didn't sue his friends".

[182] Mr Riley agreed in evidence that at some stage Mr Milatos had said to him that he did not sue his friends, but he was unsure of when that discussion took place. Mr Riley further stated that he does not believe he would have used the expression "fucked up", but that it was possible Mr Milatos may have thought he was culpable.

[183] Mr Riley gave evidence concerning the meeting that was held on 10 March 1998, subsequently referred to as "the wise men meeting". He gave evidence they were able to resolve the encroachment issue with the

verandahs of the units. At that meeting Michael Grant had expressed the opinion that the consent of the easement holders was required at every stage of the unit development.

[184] Under cross examination Mr Riley gave evidence that what he was essentially told at this meeting was that Mr Milatos could not get any titles issued for future stages without the consent of all interested parties including the easement holders. He agreed that if Mr Grant was correct, then that was devastating for the development. Shortly after this meeting, Mr Riley concluded that Mr Grant was right on this consent issue. Mr Riley gave evidence in cross examination that he knew the Scartons in particular would not consent to any further titles being issued or any further development occurring. Mr Riley stated he did not believe he was responsible for the position that had been reached. Also in cross examination Mr Riley gave evidence that in relation to the consent issue he knew Mr Mitaros was instructed at the start that it was a unit development and at one stage he was instructed to address the consent issue in relation to unit titles in so far as it applied, prior to unit title development.

[185] On 11 March 1998, Mr Riley made a file note concerning the meeting that had taken place on 10 March 1998 at the office of the Registrar-General (Exhibit P5 Vol 5 pp513-517). Included in the file note at p 517, par 3 are the words “We have all proceeded on the basis of practice rather than the strict letter of the law and we are now faced with having to find a solution

because the practice was wrong and the law enables easement holders to prevent what we want to do".

[186] On 17 March 1998, Mr Riley forwarded a letter to the Registrar-General on behalf of Mr Milatos (Exhibit P5 Vol 5 pp520-524). In this letter, Mr Riley asks the Registrar-General to exercise her discretion "under s 247 of the Real Property Act to accept George Milatos' plans for the issue of subsequent titles in the development without the need for strict compliance with the requirements of s 7 of the Real Property (Unit Titles) Act, and in particular the requirement that the consent of all those with a registered interest in the land be obtained". Paragraphs 5, 6 and 7 of this letter reads as follows:

> "City Developments' decision to exercise the option to purchase the land was based upon the developer and its surveyor's knowledge of the working of the Unit Titles Act. If it had been anticipated by George Milatos that he needed the consent of the easement holders he either would not have exercised the option without first getting their consent in writing or else would have insisted upon the vendor obtaining all of the necessary consents as a condition of the contract.
>
> After the registration of the Units Plan for the final stage the issue of easement holders consents was raised but our client was told that that was only relevant to the first units plan and those consents (and the Minister's endorsement) were not needed upon the completion of subsequent stages. Titles were later issued to our client upon the completion of stages 2 and 3 without the consent of the easement holders.
>
> We are instructed that since the completion of the first stage, City Developments has put in infrastructure at a cost of over $1,000,000.00 to support the 44 planned units in stages 4 to 14, of which 8 units (stages 4 and 5) have now been built".

[187] Mr Riley then proceeded to detail the financial hardship Mr Milatos was now experiencing and that stopping the development would be financially disastrous. Paragraphs 10, 11 and 12 of the letter reads as follows:

> "Quite frankly I think your previous practice of insisting upon the consent of those adversely affected is a sensible one, and one which should be enshrined in the legislation. I see no need for an easement holder to have to consent to any subdivision, but it defies logic to have registered interest holders to have to repeatedly consent to the issue of titles upon the completion of each subsequent stage in an estate or condominium development.
>
> I understand from speaking to Michael Grant that he has concerns over the extent of the discretion granted to you under section 247. Whilst clearly its focus is upon informal documents it not only refers to those documents which are not in the prescribed form, but also those which are not otherwise in accordance with the provisions of the Act.
>
> The Real Property (Unit Titles) Act is incorporated into the Real Property Act by virtue of section 4(1). Therefore a failure to meet the requirements of the Real Property (Unit Titles) Act is within the ambit of section 247".

[188] On 27 March 1998, the Registrar-General replied to this request stating that the exercise of a discretion in this way would be ultra vires (Exhibit P5 Vol 5 p533). The request was refused on 31 March 1998. Mr Riley wrote to the Attorney-General, Mr Stone on 31 March 1998, urging a change to the law to dispense with the need for consent of the registration of subsequent stage unit plans (Exhibit P5 Vol 5 pp537-539).

[189] On 31 March 1998, Mr Riley forwarded a facsimile to the Attorney-General setting out the background to the problems at Lake Bennett and urging a legislative solution being an urgent amendment to specific provisions in the

Real Property Act and the Real Property (Unit Titles) Act (Exhibit P5 Vol 5 pp537-539).

[190] On 1 April 1998, Mr Milatos wrote to the Attorney-General (Exhibit D68). This letter outlines the difficulties the easements were creating for the development at Lake Bennett. Paragraphs 7-9 of the letter reads:

> "The point to all this is that the Registrar General knew even before titles were issued for the first stage that registered easement holders were on the title and he decided obviously that the project did not have any impact whatsoever on the easement holders and using his own initiative issued the titles, for which I applaud him and I believe was the right decision.
>
> At the end of the day there has to be legislation that is fair and depicts common sense. The power of veto that these easement holders have in technical terms brings the very question before you, does City Developments really own the land or do the easement holders own the land?
>
> Yesterday we were given a letter from the Registrar General saying that he cannot issue any titles unless they are endorsed by you, the Minister and by every **easement** holder over the land including the units we have sold up to date and approval from every financial institution which has lend money to various owners of the units. This is without doubt an unbelievably impossible task."

[191] Mr Milatos gave evidence that on 1 April 1998 he spoke with Mr Riley who informed him that the easements were for recreational purposes over the whole of the property and the more people Mr Milatos could convince, to convert the easements to recreational easements over the lake and access easements over the property, the better.

[192] On 3 April 1998, Mr Milatos and Mr Riley attended a meeting with Judith Kelly of counsel. No copy of the recreational easements was available at that meeting (Exhibit D237 p2 par 6).

[193] On 7 April 1998, Mr Riley wrote a file note on the Clayton Utz file. This file note is headed "Lake Bennett Development Possible - Negligence Claim". In this file note which was tendered as Exhibit P1 and Exhibit P5 Vol 5 pp545-549, Mr Riley sets out a history of the matter since Mr Milatos first consulted Mr Mitaros. The first page of this file note reads as follows:

> "George Milatos came and saw Nick at some stage in 1996. It is apparent that Nick secured for George an option over the Lake Bennett land. That option agreement was signed on 10 May 1996. It is also apparent to me that no real advice was given to George at that stage as it was only an option agreement.
>
> Nick also prepared a standard 'off the plan' purchase contract for George to use. That was not done in the nature of a put option and didn't reflect the fact that at the time George did not own the land.
>
> By September George was looking at exercising his option. Nick was away for a month and I inherited the file.
>
> As is often the case, when you take over someone else's file you assume that certain things have been done before you take over. I falsely assumed that all the proper investigations had been done into the property and George was fully aware of the terms of the contract and knew what he was getting for his money. It is apparent to me now that nothing much had been done other than give George a standard contract and his option and that before he exercised that option he needed to be given legal advice as to what he was getting for his money.
>
> By the time I had anything to do with it, George was subdividing the land and was building the first unit. There was never any question of if George would exercise the option, it was only a question of when."

[194] Mr Riley then set out details of work he was involved in with respect to the development at Lake Bennett. He details what he previously understood the easements meant and notes that his earlier advice to Mr Milatos on this was incorrect. On p3 of the file note he states: "It therefore seems to me that any building upon the land is completely inconsistent with that recreation use right." The file note further states, commencing with the final paragraph on p4:

> "From a professional point of view my concern is two-fold. We have failed to adequately advise George of the ramifications of the recreational easements before he became committed to the project (and that was long before he exercised the option). On the one hand the extent of the recreation easements throws serious questions on the ability of George to develop his land, although I suspect that this will never become an issue because no one other than George's ????, was ever exercising recreation rights over the land in any event and so no one was going to object about the loss of rights which had never been exercised.
>
> The second aspect is that neither we nor the surveyors saw the need to get the consent of easement holders to the development. At no stage did I read Section 7 of the Real Property (Unit Titles) Act. Until recently I have had very little involvement in the registration of units plans. Generally it is a matter which is always dealt with by surveyors. I certainly 'understood' at the time that it wasn't necessary to get the consent of the easement holders. I am not sure where that understanding came from, whether it was past experience, whether Kevin Dodd simply told me that that was the fact, or whether I had spoken to the Registrar General about it. Suffice to say I did not see consent as an issue and I am sure that when George spoke to me about the limits these people were placing upon his development I advised him that there was some risk that they may take out an injunction to stop him from developing the land if he interfered with their recreation and access right, but that they could not prevent the issue of titles."

[195] Mr Riley gave evidence in cross examination that given the nature of the transaction he would have expected Mr Mitaros to advise Mr Milatos about

any problems with the title presented by the easements. He stated he would have expected Mr Mitaros to do a title search, obtain a copy of one of the easements, to read the easement and advise Mr Milatos not to proceed any further until the issue was addressed. Mr Riley stated he was embarrassed that he had got it wrong. He conceded that it was a situation where once he realised the full impact of the easements he should have written a comprehensive letter of advice and had a face to face meeting with Mr Milatos rather than advising him over the telephone.

[196] Mr Milatos gave evidence that during April or May 1998, he met with Ms Kelly to discuss suing the Northern Territory Government. On 20 May 1998 the Northern Territory Government had enacted the amendment to the Unit Titles Act. The date for commencement of the Act was 9 June 1998. The legislation did overcome the problem regarding the requirements to obtain consent from the easement holders before subsequent stage titles could issue. However, the legislation did not resolve all of the problems Mr Milatos had with the recreational easements at Lake Bennett. The legislation did not address the problem Mr Riley recognised and documented on 7 April 1998 that the easements were a bar to building on land at Lake Bennett. Mr Riley did not inform Mr Milatos of these circumstances nor make any record that Mr Milatos recognised those circumstances.

[197] On 8 April 1998, Mr Riley prepared a further file note which appears at Exhibit P5 Vol 5 pp550-551. This file note refers to drafting an advice to Mr Milatos to pass on to the Minister and suggesting various options with

respect to amending the legislation. This advice was apparently lost off the tape. Mr Riley noted the results of his research into the relevant legislation and what he had told Mr Milatos about the effects of this legislation. There is nothing in this file note to indicate Mr Riley had told Mr Milatos of his recent discovery as to the full impact of the recreational easements, how this could affect the future development at Lake Bennett or that Mr Milatos may have a potential claim for negligence against Clayton Utz.

[198] On 8 April 1998, Mr Riley forwarded a facsimile to Ms Kelly advising of the view he now held about the effect of the easements (Exhibit D237). He says he had "reiterated to George that this easement is a potential disaster and the more people he can convince to convert it to a recreational easement over the lake and an access easement over the land adjacent to their property, the better." Mr Riley had set out the background details in this letter and sought an opinion from Ms Kelly "as to whether it was possible to sue the Northern Territory Government for misrepresentation by a public servant as to his registration requirements, that was relied upon and which has caused economic loss." In cross examination Mr Riley agreed, after being presented with time sheet records of his telephone attendances upon Mr Milatos between 7 April and October 1998, there was insufficient time to have enabled him to explain the effect of the easements and give advice to Mr Milatos. Mr Riley also agreed that the time sheet records show two personal attendances on Mr Milatos on 9 June 1998. This was the first personal attendance since 7 April 1998. Mr Riley agreed that this is

inconsistent with the urgency of the situation. He agreed that there is no record of him giving Mr Milatos advice with respect to the easements in a face to face situation.

[199] Mr Milatos gave evidence that Mr Riley did not acquaint him with his revised understanding of the meaning of the easements. There was no written advice received from Ms Kelly.

[200] On 5 June 1998, Mr Milatos wrote to Mr Gronow, Director of Planning and Environment, seeking approval to vary the disclosure statement (Exhibit D75). This essentially involved reducing the sector which contains 44 residential units to 41 units and increasing the number of lots on the western side by three, still keeping the total number of 80 units as per the approval.

[201] On 11 June 1998, Mr Milatos wrote to the ANZ Bank (Exhibit D82). He pointed out in this letter that he had achieved 25 unit sales in 18 months on the residential estate varying from $73,000 to $163,000 per unit and stating that they would "require a mere 9 sales per annum to be able to repay a loan and interest without envisaging possible profit from the resort from years 2-5". Mr Milatos sought a loan of $260,000 which was the amount required to refurbish the resort and all the external works leaving the funding and commencement of construction for the 15 rooms to start within 60 days.

[202] Mr Milatos gave evidence that on 23 June 1998 he had a discussion with Jim Laouris, from the office of the Registrar-General, to discuss the

variation. Mr Laouris informed Mr Milatos that the changes proposed for the development outlined by Mr Milatos would require a second variation of the disclosure statement and that Mr Milatos would need to follow the same procedure as for the first variation.

[203] On 25 June 1998, Mr Milatos sent a facsimile to Mr Riley regarding the second variation he wanted to make and the need to approach the easement holders for their approval. Mr Milatos had drafted a letter and consent form to be sent to the easement holders and requested Mr Riley's feed back (Exhibit D83).

[204] On 29 June 1998, Mr Riley faxed another version of the consent form to Mr Milatos (Exhibit D84). In the covering letter, Mr Riley highlighted the fact that the consent was for three more units on the western side and three fewer on the eastern side. A consent form signed by City Developments dated 30 June 1998 is Exhibit D87. Mr Riley did not advise Mr Milatos that it would not be possible for Mr Milatos to vary the disclosure statement without the consent of the easement holders, nor did he communicate this to Mr Milatos in any other way.

[205] During June and July of 1998, services were installed on the western side of the lake for 23 sites.

[206] Mr Milatos gave evidence that in July 1998 titles issued for further cabins. His evidence is that there was a delay of 4-5 months due to the easement issue.

[207] On 3 July 1998 a variation to development permit was issued (Exhibit D85 DPM 96/0048D).

[208] On 16 July 1998, Mr Milatos forwarded a facsimile to Esanda regarding the proposed development and the progress with the sales of units. Attached was a copy of the purchase arrangements with Nazime and suggesting options to the ANZ Bank concerning the monies still owed to Nazime. The letter concludes with Mr Milatos outlining the healthy state of the borrowings from Esanda and advising that from now on he would be building houses as they were sold and there would be no need to build on speculation (Exhibit D86).

[209] On 29 July 1998, Mr Milatos forwarded a letter to the ANZ Bank setting out replies to the issues the ANZ Bank had raised in a letter dated 15 July 1998. The letter concluded with a summary of future development. He confirmed that City Developments had decided to restrict the number of units to 80 on Section 244 and that the plan was to build a first class resort on Section 245 and stated that he anticipated “the commercial facility will be exceptionally profitable within 3 years” (Exhibit D89).

[210] On 6 and 12 August 1998, Mr Riley acted on the settlement of a further three cabins.

[211] On 4 August 1998, Mr Milatos wrote to the ANZ Bank (Exhibit D90). In this letter he refers to the fact that between Esanda and the ANZ Bank, the existing loans amounted to $1,580,000. He also detailed new loans

amounting to $620,000 which were for services to 23 units on the western side $200,000, refurbishing of the main building, extending the camping area, basketball and tennis courts and a new irrigation system $200,000, working capital for the resort $50,000 and capitalisation of interest for one year $170,000. In addition he sought $400,000 for a “come and go” facility to be used exclusively on construction of new units as they are sold and unconditional contracts exchanged. He made reference to the building of a further 12 to 15 rooms for the resort in the next six months and his ideas for how this could be achieved.

[212] On 18 August 1998, Mr Milatos forwarded a letter to Mr Shoobridge stating he was unable to meet the original agreement, in regards to payments for the land, due to the difficulties associated with the easements and the fact that since December 1997 the only two new orders they had received was for units 31 and 32 and that they had been unable to obtain any titles until July 1998. Mr Milatos requested that Mr and Mrs Shoobridge forego the interest on the outstanding amount owed to them as Mr Milatos considered they should accept some responsibility for the problems with the easements and the effect on development (Exhibit D69).

[213] Throughout August and September 1998, Mr Riley provided legal services in relation to miscellaneous matters associated with the Lake Bennett project. On 23 August 1998, Mr Riley effected settlement on the sale of cabin 53.

[214] On 3 September 1998, Mr Milatos wrote to Esanda (Exhibit D91) explaining the liquidity problems being experienced by City Developments. In this letter Mr Milatos suggested his company retain 20% of the sales of the units to cover the costs outlined in the letter.

[215] On September 1998, as requested by Mr Milatos, Mr Riley prepared a pro forma contract for the sale of Lake Bennett units. This was forwarded to Mr Milatos along with a cover letter outlining the necessary steps to complete the contract (Exhibit P5 Vol 5 pp621-634).

[216] On 17 September 1998, Mr Milatos forwarded a letter to the Registrar-General formally applying to vary the disclosure statement (Exhibit D92). The formal application was to reduce the project from 90 units to 80 units, formalise site and lot layout for 23 units (formally stages 4 and 8) on the western side, reduce the number of lots on the eastern side from 44 to 41, introduce a new parkland in the middle and increase the number of lots on the western side from 20 to 23. The letter enclosed the consent to variation from the current residential land owners.

[217] On 21 September 1998, the settlement on the sale of a cabin was concluded by Mr Riley. Mr Riley concluded three further sales between 22 September 1998 and 2 October 1998.

[218] On 29 September 1998, Esanda forwarded a letter to City Developments (Exhibit D93). The offer included further financial accommodation of up to $130,000 for services on the western side of the lake. It was a condition of

the offer that Rider Hunt confirm the costings. During September 1998 there was correspondence between Morgan Buckley and Clayton Utz and between Clayton Utz and Mr Milatos concerning the encumbrances.

[219] On 15 October 1998, the Registrar-General wrote to Mr Milatos advising him that the application for variation to the disclosure statement would not be approved (Exhibit D71). The reason given being that the application did not comply with the requirements of the Unit Titles Act and because the proposed variation purported to subdivide common property for which title is already possessed by the body corporate. Registration required the consent of the easement holders. The letter advised Mr Milatos to seek legal advice before proceeding with the proposed variation. Mr Milatos did not forward this letter at any time to either the ANZ Bank or Esanda.
Mr Milatos discussed the Registrar-General's refusal with Mr Riley who made a note of the conversation.

[220] On 21 October 1998, Mr Riley informed Mr Milatos that the decision of the Registrar-General was correct (Exhibit P5 Vol 5 pp677-681). The letter states inter alia (pp679-80 par 6)

> "Unlike the last problem which you struck with the Real Property (Unit Titles) Act I do not believe that you would have any right of action against the Registrar General as a consequence of his refusal to register the variation of the disclosure statement. Prior to the previous Registrar General's refusal to accept the registration of the fourth and fifth stage plans without your obtaining the consent of all those with registered interests in your land, he assured you, me and your surveyor that he did not require the consent of interest holders to the registration of subsequent plans. His advice to me was along the lines that now that you had your "foot in the door" you could

> proceed with your stage development in accordance with your disclosure statement. However I recall clearly him saying to me that you could not vary your disclosure statement without the consent of all registered interest holders.
>
> You acted in reliance upon that assurance and subsequently suffered a loss as a consequence of the Registrar General deciding that he had been wrong and could not register subsequent stage plans without all necessary consents.
>
> In this case, although a precedent has been set by you being allowed to vary the disclosure statement once already without having to meet the requirements of sections 11, 26C and 26J, no assurance has been given to you which you are entitled to rely upon."

[221] Mr Riley referred to proposed changes to the unit title legislation and suggested Mr Milatos talk to his local member and to the Attorney-General and stress to them the inadequacies of the existing legislation and the importance of it being overhauled. Mr Riley advised that there was nothing he could do to assist. The letter stated "you cannot start building on the western shore until this issue has been resolved". The letter did not suggest that such advice had been given to Mr Milatos following 7 April 1998 or that at any time, Mr Milatos had been advised his building on the land infringed the rights of the easement holders to the extent that he should not build at all.

[222] On 23 October 1998, Mr Milatos wrote to the Attorney-General (Exhibit D94 and also Exhibit P5 Vol 5 pp692-695). Mr Milatos set out the history of the development at Lake Bennett and the difficulties he had encountered, including the Registrar-General's refusal to register the second variation to the disclosure statement. Mr Milatos urged the Attorney-

General to expedite the passing of the proposed amendments to the Unit Titles Act and asked the Attorney-General to waive the requirements of the Registrar-General and approve the variation to the disclosure statement. This letter had been drafted by Mr Milatos (Exhibit P5 Vol 5 pp684-686) and was forwarded to Mr Riley to check. Mr Riley agreed in cross examination that the content of this letter is inconsistent with the position that he set out in his file note of 7 April 1998. He agreed that this could have given Mr Milatos the impression his view was the same as it had been prior to April 1998. Mr Riley also conceded that in this letter he was assisting Mr Milatos to tell the Attorney-General the exact opposite of what his realisation was on 7 April 1998. He agreed this did not convey to the Attorney-General, via Mr Milatos, a truthful version of what he, Mr Riley, believed.

[223] During all this period, with the exception of the delay following "the wise men meeting" on 10 March 1998 and the development being brought to a standstill in October 1998, everything was proceeding as normal. Buildings were being built, cabins were being sold, money was borrowed. Mr Riley agreed in cross examination that he knew all of this was happening and at least from 7 April 1998 thought that any building on the land was inconsistent with the rights of the easement holders.

[224] On 26 November 1998, Mr Riley had a discussion with Michael Grant and the Registrar-General regarding the impasse that had been reached regarding

the second variation to the disclosure statement. Exhibit P5 Vol 6 pp712-713 is a file note Mr Riley made following the discussion.

[225] On 1 December 1998, Mr Riley forwarded a letter to the Registrar-General on Mr Milatos' instruction (Exhibit P5 Vol 6 pp724-725). This letter was essentially a follow up letter of the discussions that had taken place on 26 November 1998.

[226] On 9 December 1998, the Attorney-General forwarded a letter to Mr Milatos (Exhibit D73) advising he could not vary the disclosure statement under the existing legislation.

[227] On 15 December 1998, the Registrar-General wrote to Mr Riley (Exhibit P5 Vol 6 pp733-734). This letter confirms the refusal to approve the second variation to the disclosure statement and further advising inter alia as follows:

> "It seems to me that there are two ways in which the development may proceed.
>
> Firstly, the development could continue within the scope of the currently registered disclosure statement, in which case no further involvement of the easement holders is required.
>
> The alternative is to continue down the path of negotiating with all of the easement holders to obtain consent to the variation of the disclosure statement or the estate development (which will require planning approval). The difficulty with this approach is that if the negotiations with any of the easement holders are unsuccessful the matter will not have progressed any further.
>
> If the latter course of action is the preferred one, it will be necessary for your client to seek the consent of all of the easement holders including those not involved in the Ombudsman's complaint, so that formal negotiations can commence. I have attached for your

information a list of all registered easement holders current as at the date of this letter".

[228] On 16 December 1998, Mr Milatos wrote to the Registrar-General advising that he had drafted a letter to go to all registered easement holders together with consent forms seeking their consent as had been required by the Registrar-General. He asked the Registrar-General to provide an explanatory letter to the easement holders as to why their consent was not sought in the past and why their consent is now required (Exhibit D95).

[229] By late December 1998 another 12 cabins had been constructed on the eastern side.

History of Lake Bennett 1999

[230] During this year 15 cabins were sold and approximately another 10 cabins were built.

[231] On 18 January 1999, Mr Riley and Mr Milatos discussed the situation, Mr Riley focused on a legislative solution. Mr Riley did not advise Mr Milatos that construction on the eastern shore of the lake was also barred because of the effect of the easements.

[232] On 21 January 1999, Mr Milatos made an ex gratia claim on the Registrar-General seeking damages for his loss due to the refusal to issue titles for eight residential units between February and July 1998 (Exhibit D72). This letter states the loss claimed was $52,000 interest payable to the financier as

City Developments could not settle the properties because titles had not issued. Legal costs payable to Clayton Utz was in the sum of $7,500. Costs to City Developments in Mr Milatos' time attending meetings and correspondence on this issue being $30,000.

[233] On the same date, 21 January 1999, Mr Milatos forwarded a letter to the Attorney-General (Exhibit D74) outlining his difficulties associated with obtaining the consent of the easement holders, the benefit of the Lake Bennett development if it were allowed to proceed and seeking the Attorney-General's assistance.

[234] In January and early February 1999, three further cabin sales were settled by Mr Riley.

[235] On 2 February 1999, Mr Riley forwarded a facsimile to Mr Milatos outlining the history of some of the issues (Exhibit P5 Vol 6 pp752-757). In this document Mr Riley made the following statement (p753 par 5-8 inclusive):

> "The Real Property Act in relation to subdivisions, the Real Property (Unit Titles) Act in relation to the registration of unit plans and the Unit Titles Act in relation to the registration of disclosure statements and variations of disclosure statements all prescribe that the developer must obtain the consent of anyone who has an interest in the land. No distinction is made between dealings which prejudice that interest holder and dealings which do not, and no discretion is given to the Registrar General to accept the lodgment of a subdivision plan, units plan or disclosure statement without the consent of somebody who has an interest in the land even when that interest is not prejudiced.
>
> Even if we had been successful in rationalising the recreation easements so that the easement holders were given 10 metre access corridors over the land you would still face this problem. Your

development could be miles away from a right of way but if it is registered on your title you must get the easement holders' consent.

As it happens, they have recreation rights over the whole of the common property and therefore your variation of the disclosure statement does impact upon their rights (even though they may not be exercising those rights in respect of the area of land being developed).

When the issue first arose in relation to the registration of the subsequent unit plan stages I was advised by Michael Grant in the Attorney General's office that the Northern Territory was the only jurisdiction in Australia which required the consent of easement holders to the registration of subdivision plans. That makes sense because if the title is subdivided then the easement appears upon the new titles. It is the subsequent development of the land and not the actual subdivision of land which is likely to prejudice the easement holder."

[236] Mr Riley advised Mr Milatos that if he could not get the consent of the easement holders or convince the Attorney-General to legislate to remove the requirements to obtain their consents, then Mr Milatos would have only two choices:

1) revert to the original development.

2) wait till the Law of Property Bill is passed and make application to modify those easements whose holders refuse to give consent.

[237] Mr Riley agreed in cross examination that he was referring to the easement holders interests and how they were affected. He agreed that he did not state in this letter "that building on the land is completely inconsistent with the easement holders rights". It is the evidence of Mr Riley that he was hoping that Mr Milatos would be able to keep getting away with building on the land and that none of this would come to a head.

[238] Mr Milatos gave evidence that on 2 February 1999 he spent approximately two hours in consultation with John Waters QC.

[239] On 3 February 1999, Mr Riley attended a conference with Mr Waters QC who was provided with the background information and formally briefed to prepare an opinion.

[240] On 3 February 1999, Mr Milatos forwarded a letter to the Registrar-General (Exhibit D96). In this letter he advised the Registrar-General he had been unable to get the consent of the easement holders to the proposed variation to the development and that the development had come to a standstill. He further advised that if the matter cannot be resolved reasonably and quickly City Developments will be in breach of contract to deliver homes and many people will lose their jobs.

[241] On 11 February 1999 the Registrar-General wrote to Mr Milatos refuting his claims for monetary loss, informing him the variation to the disclosure statement cannot be approved and advising him about the proposed legislation and the effect of this legislation on the easement holders (Exhibit D97).

[242] On 16 February 1999, Mr Waters QC prepared an opinion for Mr Milatos (Exhibit D78). In his opinion Mr Waters QC clearly states that the proposed variation would need the consent of the easement holders and that the further progress of the development and viability of the current sales program were “clearly in major jeopardy”. There was further advice to the

effect that Mr Milatos could pursue the option of advocating for further legislative changes to allow the development to continue. He then stated it would be extraordinary if the Northern Territory Government would allow this because of an anticipated public backlash because the rights of easement holders were being affected without compensation. Mr Waters QC then went on to give advice as to the resolution of the matter. This advice was forwarded to Mr Riley on 17 February 1999 (Exhibit P5 Vol 6 p768).

[243] Mr Milatos gave evidence of a further meeting with Mr Waters QC on 18 February 1999. At this meeting Mr Milatos says he was told that the terms of the easement meant the easement holders had the right to carry out any "recreational activity" on the land, which would obstruct building or any other development. Mr Waters QC suggested forwarding a letter to each of the easement holders. Mr Riley was also present at this meeting.

[244] On 1 March 1999, Mr Riley made a file note of a conversation he had with the Registrar-General (Exhibit P5 Vol 6 pp810-812). In that conversation the effect of the legislation and the re-subdivision issues were discussed.

[245] On 3 March 1999, Mr Riley forwarded a letter to the Registrar-General questioning the construction of the Unit Titles Act (Exhibit P5 Vol 6 pp813-814).

[246] On 18 March 1999, George and Colleen Milatos sold the property at Gunbar Street for $220,000 which was the value of the land at the time of purchase. Also on 18 March 1999, Mr Riley sent Mr Milatos a facsimile with a draft of

Mr Waters' letter to the easement holders attached (Exhibits D79 and D80). This letter refers to Mr Waters' opinion that the concept of an "easement for recreational purposes is so vague and wide as to be legally unsustainable and would be struck down by the courts ….". The letter offered defined corridors within Section 244 to allow for passage to and from the lake and stating their rights upon the lake would not be affected. This attempt to "rationalise the easements" was sent to all the easement holders. However, the easement holders were not all prepared to negotiate. There was a considerable amount of correspondence from the various easement holders to Mr Riley. The issue in respect to the easements was not resolved.

[247] On 25 March 1999, the ANZ Bank wrote to Mr Milatos asking him to agree to pay for a new Colliers Jardine valuation (Exhibit D88). This was required for the Bank's consideration of the request by Mr Milatos to refinance the existing borrowings.

[248] On 26 March 1999, Mr Riley effected settlement of the sale of a further cabin.

[249] On 14 April 1999, Mr Milatos forwarded a letter to Mr Waters QC seeking a meeting and advising him that he would like to create a precedent and take legal action against two of the owners, Mr & Mrs Sullivan and the Scartons (Exhibit D98).

[250] The conference with Mr Waters QC took place on 19 April 1999.

Mr Milatos gave evidence that Mr Waters QC informed him there was

always a threat the easement holders may seek an injunction against him in order to protect their easement. Mr Waters QC suggested a test case should be launched to test the validity of the easements. Mr Milatos gave evidence that nothing he knew about the easements or the threat of court action deterred him from proceeding ahead with the development at this stage. Mr Riley was present at this conference and subsequently wrote a file note outlining the discussions that had taken place (Exhibit P5 Vol 6 pp1076-1077).

[251] On 22 April 1999, Mr Riley received a letter from Mr Waters QC which made reference to the conference that was held on 19 April 1999 and the proposed test case (Exhibit D238).

[252] On 23 April 1999, Mr Milatos wrote to Esanda (Exhibit D99). In this letter Mr Milatos outlines the finance requirements for Lake Bennett. He describes the work he has done, including work carried out on the western side. The letter makes it appear Mr Milatos was spending money providing services to blocks on the western side in accordance with the second variation before the variation had been approved. In addition to other finance Mr Milatos sought $115,000 to complete services to the remaining lots on the western side.

[253] In May 1999, Mr Milatos borrowed almost $1 million from the ANZ Bank to build 20 new rooms on the resort. City Developments level of debt rose to well over $2 million.

[254] On 27 May 1999, Mr Milatos wrote to Esanda (Exhibit D100) concerning the cost of building an extra 20 rooms on the resort in support of his application for finance. The construction of the 20 rooms was completed in October 1999. At no time did Mr Riley, or any other legal practitioner at Clayton Utz, advise Mr Milatos that building activities on the resort, i.e. on Section 245, required the consent of the recreational easement holders. In May 1999, Mr Riley concluded two further cabin sales.

[255] On 4 June 1999, a letter was forwarded to Mr Milatos from Mr Riley (Exhibit P5 Vol 6 p1141) concerning a complaint made to the Law Society by the Scartons. Mr Riley stated that it had been drawn to his attention that when the Scartons acquired their land and access easement from Nazime, a conveyancing clerk, who used to be in the employ of Clayton Utz, acted for them. He advised Mr Milatos that he could not act for City Developments in the proposed easement litigation because of the Scartons complaint to the Law Society. On 21 June 1999, Mr Riley wrote to the Law Society advising that Clayton Utz would no longer act for City Developments in the easement litigation. Mr Milatos made arrangements to forward his files to his new solicitors, De Silva Hebron (Exhibit P5 Vol 6 pp1143-1145).

[256] On 23 June 1999, Mr Milatos wrote to Mr Riley (Exhibit P5 Vol 6 p1147) raising concern about accounts received from Clayton Utz and complained about blunders and poor advice. Mr Riley replied to this letter on 1 July 1999 (Exhibit P5 Vol 6 pp1149-1151). In this letter Mr Riley acknowledged a fault on the part of Clayton Utz with respect to the “Shoobridge

encumbrances". He did say "if you think we have been negligent, you may have an action against Clayton Utz". He again urged Mr Milatos to "rationalise the easements". Mr Riley did discount the fees to preserve "their ongoing relationship". Mr Riley agreed in cross examination there is no statement in the letter about building on the land being completely inconsistent with the easements.

[257] Mr Riley advised that although he was in a conflict situation with respect to the easement litigation, he could continue to act in relation to the continuing conveyancing issues. He agreed this advice would have been given after receipt of the letter from Mr Milatos dated 23 June 1999.

[258] On 9 June 1999, Mr Milatos wrote to ANZ Business which had merged with Esanda seeking a further $104,000 to complete services to the remainder of the blocks on the western side (Exhibit D101). The letter further indicates that Mr Milatos anticipated settlement of six units before the end of July 1999.

[259] On 10 June 1999, Mr Milatos wrote to the Registrar-General noting the amendments to the Real Property (Unit Titles) Act and Unit Titles Act which he claimed had been passed in the legislative assembly. The legislation commenced on 9 June 1999. Mr Milatos again asked the Registrar-General to reconsider the application to vary the disclosure statement (Exhibit D102).

[260] On 17 June 1999, Mr Milatos forwarded a letter to ANZ Business with a breakdown of the construction costs for the 20 new rooms at Lake Bennett (Exhibit D103).

[261] During June 1999, Mr Riley acted on the settlement and sale of two further cabins.

[262] In July 1999 the finance was granted by ANZ Business for the building of the additional 20 rooms at Lake Bennett.

[263] On 1 July 1999, Mr Riley prepared a file note on the Clayton Utz file headed "Potential Negligence Claim - Lake Bennett" (Exhibit P5 Vol 6 pp1152-1156). Mr Riley outlines the history of the matter and his concerns of a possible claim against Clayton Utz. At paragraphs 6 and 7 on p1155 he states:

> "No one is threatening to sue us yet, but ultimately if this development goes belly up, I am sure someone will point the finger at us and say that we should have given George legal advice about the ramifications of these easements before he signed the option agreement, or the contract attached to the option agreement should have addressed the need for the vendor to tidy up the easements so that they wouldn't prevent us from developing the land. No one considered them until it was too late, and when we did consider them, because of the current practice of the Registrar General and assurances given to both us and to the client by the Registrar General, we didn't realise (or advise our client) on the full ramifications of those easements.
>
> I believe that George Milatos should not have been allowed to spend a cent on this property without someone explaining to him the potential of those easements to prevent the development of the land."

[264] Mr Riley agreed in cross examination that this was the first time he had conveyed in writing to anyone else in the firm the possibility of a negligence claim. He said before he prepared this memo addressed to "Dirk" he discussed the matter with Mr Mitaros. Mr Riley said he accepted the fundamental problem was that Mr Mitaros should have given the advice about the easements at the very start.

[265] On 5 July 1999, the Registrar-General wrote to Mr Milatos advising he would issue the titles notwithstanding the apparent discrepancy in the unit numbering on the western side. He further stated that if Mr Milatos was eventually successful in amending the disclosure statement it would be necessary to do a further renumbering exercise (Exhibit D104).

[266] On 5 July 1999, the Registrar-General forwarded a further letter to Mr Milatos advising him he had to again reject the application for variation to the disclosure statement on the basis that, in the absence of consent of the easement holders and the broad nature of the registered easements, it would be inappropriate to decide that the easement holders' interests are not affected and that it was a matter for the Court to decide (Exhibit D105).

[267] On 7 July 1999, Mr Milatos received a letter from the ANZ Bank offering to consolidate all the loans and bring the total facilities to $3,202,785.72 including $950,000 for resort expansion and $104,000 for services to the western side (Exhibit D81). One of the conditions of providing the facilities was that Rider Hunt provide an estimate of costs for each unit before

construction began and then payments were to be made against progress certificates issued by Rider Hunt. This arrangement had been in place since the beginning of the development. Another condition was that a minimum of one sale a month had to be achieved commencing from October 1999 through to April 2000 and further that a minimum of two sales per month to be achieved from May to September 2000. From unit sales, City Developments was to get 5% and the rest of the money was to go to the ANZ Bank. There were a number of other conditions of the loan.

[268] On 12 July 1999, George and Colleen Milatos signed an acceptance of the ANZ Bank offer of finance and a surety acknowledgment, both of which are included in Exhibit D81.

[269] On 12 July 1999, Mr Milatos forwarded a letter to the ANZ Bank seeking variations to the conditions attached to the loan offer and requested an additional 5% from the proceeds of the residential sales to enable City Developments to have an annual budget for advertising and marketing.

[270] Mr Milatos gave evidence that he had verbally informed the ANZ Bank that there were problems on the western side in obtaining approval for the new configuration of the sites. The refusal by the Registrar-General to approve the second variation to the disclosure statement, does not appear to have been conveyed to the ANZ Bank by Mr Milatos in a letter or any other formal documentation.

[271] On 20 July 1999, Mr Riley wrote to the Registrar-General (Exhibit P5 Vol 6 pp1161-1163) in response to a suggestion that the amendments to the legislation were designed specifically to accommodate Mr Milatos. At p1162 Mr Riley states, inter alia:

> "The suggestion that this change was made to solve the problems faced by George Milatos at Lake Bennett is preposterous."

[272] In this letter, Mr Riley outlines that there are other unit developments in Darwin that are also burdened by easements, which will benefit from the recent amendments.

[273] On 27 July 1999, Mr Milatos forwarded a letter to De Silva Hebron (Exhibit D46). This letter sets out background information concerning the issues surrounding the Lake Bennett development from Mr Milatos' perspective. Mr Milatos also states he believes there was a strong case for suing the Northern Territory Government and in particular the Registrar-General for negligence, misinformation and incompetence, which caused considerable financial loss to City Developments.

[274] On 3 August 1999, the sale of cabin 47 for $150,000 was settled by Mr Riley. On 4 August 1999, the sale of cabin 76 was settled by Mr Riley for $210,290. On 6 August 1999, the sale of cabin 28 for $145,000 was settled by Mr Riley.

[275] On 9 August 1999, Mr Milatos forwarded a letter as Director of City Developments to Clayton Utz complaining about the withholding of monies

for payment of their disputed fees. He informed Clayton Utz that they no longer acted on behalf of City Developments or Australian Transportable Homes and he would advise of his new legal representatives in due course (Exhibit P5 Vol 6 p1165). He requested the return of all files in all matters.

[276] On 23 August 1999, City Developments issued an originating motion in the Northern Territory Supreme Court to challenge the validity of the easements.

[277] Mr Milatos gave evidence that in September 1999 the sale of cabins all but stopped.

[278] On 21 September 1999 there is a file note on the Clayton Utz file (Exhibit P5 Vol 6 pp1167-1171) which details the background to the matter and the problem with the easements. The file note acknowledges Clayton Utz may be responsible for failing to give comprehensive advice at the time the option was entered into and/or to ensure that the contract obliged the previous owner to transfer title to the land without the easements. The file note also refers to the Registrar-General's role in allowing registration of the units plan without obtaining the consent of the easement holders and the actions of the developer for commencing work upon the land without seeking legal advice on the contract terms.

[279] It was noted that although no claim had been made against Clayton Utz, the potential was now greater. This was because Clayton Utz had been conflicted out of the court action against the neighbouring easement holders.

Secondly, it was noted the developer was disputing Clayton Utz accounts which largely relate to advice given and work carried out with respect to the easement problems.

[280] On 21 September 1999, Mr Milatos wrote to De Silva Hebron in response to a letter from Close and Carter referring to matters raised by Robert Nash, one of the easement holders. The letter details the Registrar-General's actions in registering the units plan of the subdivision and the first variation to the disclosure statement without the consent from the easement holders (Exhibit D126).

[281] On 26 September 1999, a directions hearing in the easement litigation was held in the Supreme Court. It was the subject of a substantial report on page 4 in the NT News on the following day (Exhibit P11).

[282] Mr Milatos gave evidence that in October 1999 he was given legal advice to await the outcome of the litigation against the easement holders before suing Clayton Utz.

[283] On 5 October 1999, Mr Milatos wrote to the Registrar-General advising him that all sales had been suspended.

[284] On 28 October 1999, Mr Milatos received a letter from Mr Mitaros asking Mr Milatos to pay $3,000 and sign a deed of release for the files to be forwarded to him (Exhibit P5 Vol 6 pp1172-1174). Mr Milatos gave

evidence that on advice from De Silva Hebron he did not sign the deed of release.

[285] On 16 November 1999, the sale of cabin 37 was settled.

[286] On 17 November 1999, Mr Milatos forwarded a letter to Mr Riley concerning an account of $12,000 and the $8,600 which had been held back contrary to his instructions (Exhibit P5 Vol 6 p1175). Mr Riley gave evidence that Clayton Utz claimed a lien over these monies held in the trust account.

[287] On 23 November 1999, the ANZ Bank wrote to Mr Milatos (Exhibit D108). This letter was a reminder concerning the provision of annual financial statements and the requirement to provide "actual versus budget" reports, the first of which was due on 12 December 1999.

[288] Mr Milatos gave evidence that by late 1999 onwards sales had dropped off significantly. By this time 40-42 cabins had been installed and servicing was in place for 80 units.

[289] Mr Milatos gave evidence that in December 1999 the opinion of Mr Waters QC was provided to the ANZ Bank.

[290] On 1 December 1999, Mr Milatos forwarded a letter to the ANZ Bank (Exhibit D109). The letter is headed "Re Lake Bennett Wilderness Resort Report July-October 1999". Mr Milatos detailed various matters that had occurred with respect to the development at Lake Bennett including

construction of the lake view rooms, the enlarged electrical mains, sewer and water mains, extension to the conference facilities and completion of a grandstand without either approval or financing from the Bank. The letter discusses the legal issues as Mr Milatos saw them at that time. He advised his intention to take legal proceedings against Clayton Utz and others and sought additional funds of $200,000 to complete the disabled persons room, shop front reception, legal fees and to cover losses of the operation between July 1999 to April 2000.

[291] On 9 December 1999, Mr Riley wrote to Mr Milatos amending the offer to $3,500 in full settlement of the account and submitted an amended indemnity deed (Exhibit P5 Vol 6 p1177-1179). De Silva Hebron responded on 20 December 1999 advising that the matter should await the outcome of the easement litigation (Exhibit P5 Vol 6 p1180).

[292] On 20 December 1999 the ANZ Bank responded to the letter of 1 December 1999 (Exhibit D110). On behalf of the ANZ Bank, Darren Meers indicated he was considering the request for further finance and requested a "budget versus actual" report covering the period from July 1999 to 20 December 1999 and going forward with the budget until the end of April 2000. Mr Milatos responded on the same date (Exhibit D111). Mr Milatos gave evidence that on 20 December 1999 unit 66 settled for $200,000.

[293] On 20 December 1999 the sale of cabin 65 was concluded for $170,000 and on 21 December 1999 the sale of cabin 49 was settled for $171,000.

History of Lake Bennett 2000

[294] During 1999/2000 the resort had a 3.5 star rating. The Darwin Symphony Orchestra played at the resort in 2000. Colleen Milatos developed packaging options with Australian Pacific Tours. As a consequence of the efforts of Colleen Milatos the Lake Bennett resort was accepted onto the Qantas reservation system and a number of outward bound style groups. In 2000 Colleen Milatos won the Chief Ministers Award for Tourism Excellence.

[295] Mr Milatos gave evidence that during the year 2000 it became clear the target of 15 units per year was not going to be reached. The ANZ Bank regarded this as a default and did not renew financial arrangements with City Developments. All sale proceeds then went to the Bank.

[296] On 14 January 2000, the ANZ Bank wrote to Mr Milatos (Exhibit D112). In this letter the ANZ Bank offered additional facilities with a number of conditions precedent. The total facilities amounted to $2,610,000. The additional facilities were accepted by Mr Milatos. The bank approved and loaned $35,000 in support of the easement litigation.

[297] On 31 January 2000, Mr Milatos wrote to De Silva Hebron (Exhibit D127) advising that City Developments wanted to issue legal proceedings against the Northern Territory Government and more particularly the Registrar-General and the Town Planning Authority for damage caused to City

Developments. The letter detailed the difficulties and obstructions Mr Milatos had met in the course of developing Lake Bennett.

[298] On 28 January 2000, the sale of cabin 55 for $162,000 was completed and on 28 February 2000 the sale of cabin 29 for $80,000 was completed.

[299] On 28 February 2000, Mr Milatos wrote to the ANZ Bank requesting permission to use funds approved for legal actions to cover the costs of the legal action regarding the validity of the easements and that the money received in recovering the legal costs in relation to the validity of the easements will be used to pursue the case for damages against the Northern Territory Government and Clayton Utz (Exhibit D118).

[300] Mr Milatos gave evidence that in March 2000 unit 75 sold and contracts had been entered into for the sale of unit 42.

[301] On 3 March 2000, Mr Milatos forwarded a letter to David Booth from Territory First National (Exhibit D40). In this letter Mr Milatos sought a comment from Mr Booth as to the lack of real estate sales at the Lake Bennett residential estate in the previous three to four months and seeking his ideas on how real estate sales could be resurrected.

[302] On 7 March 2000, Mr Booth replied (Exhibit D40). In his reply he stated the over supply of units in Darwin should not affect Lake Bennett. Mr Booth made various suggestions concerning further construction work at Lake Bennett and how and when to relaunch the marketing campaign.

[303] On 10 March 2000, the ANZ Bank forwarded a letter to City Developments confirming verbal advice provided on 9 March 2000, that the sales covenant contained in their letter of offer dated 7 July 1999 (Exhibit D81) had been breached and the lending facilities were now in default (Exhibit D116). The ANZ Bank stated the position would be reviewed again on 30 April 2000 stating they looked forward to an improvement in the sales rate of units over the next two months.

[304] On 16 and 17 March 2000, the trial of the easement litigation was heard in the Supreme Court.

[305] On 6 April 2000, Mr Milatos wrote to the ANZ Bank regarding the poor tracking of the resort and lack of residential sales, he attributed this to confusion about GST (Exhibit D40). The letter also refers to another project at Palmerston which City Developments had signed an option to purchase named “Pit Stop Straight Car Centre”.

[306] On 7 April 2000, Mr Riley wrote to De Silva Hebron confirming they were still holding the sum of $8,180 pending resolution of their claim against City Developments for costs (Exhibit P5 Vol 6 p1191).

[307] On 19 April 2000, Mr Milatos forwarded a letter to the Ombudsman setting out a number of grievances with respect to the Registrar-General and the Town Planning Authority. He made reference to the withdrawal of blocks on the western side until the Court dispute was resolved and made reference

to the bad publicity and biased reporting by the media as primary causes for the drop in sales (Exhibit D114).

[308] On 20 April 2000, Mr Milatos forwarded a letter to the ANZ Bank advising them of his dealings with the Ombudsman and a list of possible purchasers of units at Lake Bennett (Exhibit D113).

[309] Mr Milatos gave evidence that on 26 April 2000, unit 50 sold. He gave evidence that in May 2000 the sale of unit 75 was settled.

[310] On 2 May 2000, Mr Milatos wrote to the ANZ Bank concerning the "technical default" of the loan agreement (Exhibit D40). He listed a number of reasons for this including: general slow down of sales in the Northern Territory, the GST and the wet season weather. In this letter he also detailed the work and success with respect to the resort. Mr Milatos gave evidence in cross examination, that he later realised the reasons he had set out in this letter, were not the reasons for the slow down in sales.

[311] On 16 May 2000, Clayton Utz received a letter from De Silva Hebron (Exhibit P5 Vol 6 p1192) advising they had received instructions from Mr Milatos that Clayton Utz costs would not be paid and requesting a cheque in the sum of $8,180 pursuant to the provisions of the Legal Practitioners Act. Mr Riley gave evidence that this was a formal request to forward the monies Clayton Utz held in their trust account in respect of Mr Milatos. On the same date, Mr Riley wrote a memo to Mr Mitaros (Exhibit P5 Vol 6 p1193). Mr Riley queried whether they should let

Mr Milatos "get away with it by returning the money with no guarantee he would not sue or sue him and invite a counterclaim for professional negligence?" Mr Mitaros hand wrote a reply on the bottom of the memorandum of 28 May 2000 to the effect that they write off their fees and see what Mr Milatos does. He also queried whether the matter had been reported to their insurers.

[312] On 8 June 2000, Mr Riley responded to De Silva Hebron's letter dated 16 May 2000 (Exhibit P5 Vol 6 p1199). He asked "Is City Developments going to sue us?" The response then reads "If not, on a without prejudice basis, we advise that we are prepared to release the money to your client and write off our fees so long as your client signs a release in our favour". The facsimile then advised that if Mr Milatos intends to sue, Clayton Utz will retain their lien. Mr Riley reiterated his belief in this facsimile that Mr Milatos' predicament was of his own making in commencing subdivision and building work as soon as he secured an option without receiving advice from Clayton Utz as to the suitability of the land for a building project. The message goes on to note that there is no legal impediment to the completion of the development in accordance with the disclosure statement.

[313] Mr Riley gave evidence in cross examination that at this time he knew that Mr Milatos, or his company, was involved in easement litigation and agreed that it was litigation Mr Milatos should not have had to become involved with.

[314] On 9 June 2000, Mr Riley forwarded a memorandum to Mr Mitaros (Exhibit P5 Vol 6 p1201-1202). In this memo he stated he was not in a rush to give City Developments the money back. He then made reference to the attitude of the firm's insurers who essentially wanted Mr Milatos to sign a Deed of Release. He queried when the cause of action arose, nominating various times and referring to the actions of Mr Milatos in starting to build without advice from Clayton Utz or their knowledge, when he only held an option. Mr Riley stated at p1201 inter alia:

> "However if George is not going to sign a release, then the longer we muck around arguing about it, the more likely the Limitation Act is going to prevent George from taking any action against us in any event."

[315] In his cross examination Mr Riley gave evidence that he wished he had not said this in the memorandum.

[316] Mr Riley's evidence is he still believes Mr Milatos was responsible for a lot of his own losses.

[317] Mr Riley stated under cross examination that he agreed if Mr Mitaros had given the comprehensive advice about the effect of the easements, George and Colleen Milatos could have avoided the whole disaster (tp 2982).

[318] It is Mr Milatos' evidence that in June 2000 a contract was signed in regards to unit 79.

[319] On 2 June 2000, the Supreme Court of the Northern Territory delivered a decision with respect to the challenge to the validity of the easements. The

judgment refused to declare the easements invalid. An appeal against this decision was subsequently lodged.

[320] On 7 June 2000, Mr Milatos wrote to the ANZ Bank concerning the slump in the Darwin/Northern Territory property and construction market (Exhibit D40).

[321] On 13 June 2000, Mr Milatos forwarded a letter to the ANZ Bank in reference to reducing the price of the land and units in order to stimulate sales (Exhibit D40).

[322] On 20 June 2000, Mr Milatos wrote to the ANZ Bank regarding the decision of the Supreme Court in the easement litigation and the likely success of an appeal. He sought approval to proceed with the appeal. In this letter Mr Milatos advised he was considering a public float of the resort. He details the hard work of himself and his wife in the operation of the resort (Exhibit D117).

[323] On 29 June 2000, the ANZ Bank forwarded a letter to Mr Milatos (Exhibit D115) requesting outstanding interest payments and informing him that his performance obligations under the conditions of the loan were in breach. Mr Milatos was reminded that there was also a trading performance covenant to ensure trading performance of the resort be monitored against budgets and that the performance of the resort was well below revised forecasts and was therefore considered a performance failure of his obligations.

[324] On 5 July 2000, Mr Milatos wrote to prospective purchasers regarding the reduction in unit prices (Exhibit D40).

[325] Mr Milatos gave evidence that in September 2000, unit 42 settled for a reduced price as the purchasers expressed a reluctance due to the easements.

[326] On 11 September 2000, Mr Milatos forwarded a letter to the ANZ Bank in regards to a proposal to strata title the resort rooms and about the general flat state of the Darwin real estate market (Exhibit D40).

[327] On 28 September 2000, Mr Milatos wrote to the ANZ Bank about a technical default on the loan and the demand for interest payments, stating the lack of sales had nothing to do with the Lake Bennett project but rather with a problem in the market relating to interest rate hikes (Exhibit D40). He detailed prospects for future sales.

[328] In October 2000, the ANZ Bank gave City Developments the option of selling Lake Bennett to repay the debt. City Developments retained LJ Hooker. On 6 October 2000, TC Waters Pepper and Co Pty Ltd (LJ Hooker) wrote to City Developments which stated inter alia:

> "We are very excited by the prospect of being appointed to find a suitable purchaser/joint venture partner for you and believe that we have the skills, contacts and credibility to make this reality in the short term.
>
> We believe that with the current depressed state of the residential property market in the Top End and the unresolved legal issues relating to recreational easements, finding a suitable buyer for the residential estate will be a difficult task and not likely at the price you suggested in your letter to us of 3 October. We have no doubt

> that the price you suggested ($2,000,000) is well below the price which will be achieved in the medium to long term and feel that it would be a mistake to sacrifice this Estate in the current climate when a far more viable solution exists."

[329] In a further letter dated 17 October 2000, David Loy, from LJ Hooker, is suggested as the salesman who had experience in hospitality and tourism related projects. There was further correspondence summarising the attempts being made to sell the property. In a letter to City Developments dated 19 February 2001 Mr Loy stated inter alia:

> "Secondly, we are attempting to raise $2 million in way of a private mortgage over section 245, 'The Resort'. To date all indications are that we have a chance of doing this. As we have set the closing date at 28th February 2001 all letters of intent are in the progress of being sent to prospective parties asking them to put their commitment in writing.
>
> If both of those options do not come off I am still of the opinion that selling the Resort Lot, being section 245, is still the best prospect of achieving a sale.
>
> The reason for this is quite simple, while you have the recreation easements hovering over section 244, it will be difficult to sell the site for it's full value as a development site. A prudent developer would be seeking a large discount to deal with the matters of the easement".

[330] LJ Hooker continued to work on attempts to sell the resort until about June 2001 but were not successful.

[331] In his evidence (tp 1661) Mr Loy stated it may have been some six weeks after his firm was approached in October 2000 that his firm realised there was a major problem with marketing the development area (Section 244) being the easements. They then focused on the sale of the resort because

there were issues relating to Lake Bennett that were unclear. Subsequently, his firm ceased to market Lake Bennett rather than risk misleading any prospective purchasers.

[332] On 17 November 2000, Mr Milatos wrote to the ANZ Bank enclosing budget details, profit and loss, balance sheets and tax returns. He also stated the Darwin market was facing a crisis (Exhibit D40).

[333] Mr Milatos gave evidence that in December 2000 unit 41 settled.

[334] On 7 December 2000, a letter was forwarded to the ANZ Bank regarding City Developments' default on the loan, the inability to make interest payments and poor sales because of the general decline in the market due to the GST. The letter also outlines the reduction in prices of the land content in an effort to stimulate sales and a hope that the market would improve considerably by April-May 2001 (Exhibit D40).

[335] On 8 December 2000, Mr Milatos wrote to the ANZ Bank following a meeting which was held to discuss the conditions of the loan (Exhibit D120) and his proposed strategy to overcome the difficulties. The ANZ Bank replied to Mr Milatos stating that from that time onwards full settlement proceeds from unit sales were required by the ANZ Bank to go towards debt reduction (Exhibit D121). This letter also set out a number of conditions City Developments were to comply with and advised of the appointment of an investigative accountant as a consequence of the breach of the terms and conditions of the current loan facility.

[336] In cross examination, Mr Milatos stated that from this time onwards he was broke. Colleen Milatos had an income as manager of the resort. Mr Milatos was working for Australian Transportable Homes and doing small jobs for some other organisations.

[337] Late in 2000 the marital relationship between George and Colleen Milatos suffered a breakdown and the couple separated.

History Lake Bennett 2001

[338] George Milatos gave evidence that in January 2001 De Silva Hebron suggested that he sue Clayton Utz. Mr Milatos stated he disagreed as he could not see how Mr Mitaros could be at fault as he had never discussed the recreational easements with him. At this time Mr Milatos said he wanted to sue the Northern Territory Government. His evidence is that by this time he realised the recreational easements were an impediment to the development of the land at Lake Bennett.

[339] On 5 January 2001, Mr Milatos wrote to Denis Burke, in his capacity as Chief Minister and Attorney-General (Exhibit D119). Mr Milatos asked for Mr Burke's support in opening negotiations to avoid litigation against the Northern Territory Government and the Registrar-General. In this letter, Mr Milatos outlined the history of his problems in the Lake Bennett project and advised Mr Burke that the problems continued to cause considerable grief and financial loss.

[340] On 1 February 2001, De Silva Hebron on behalf of Mr Milatos filed a writ naming Guy Riley as the first defendant and Splinter Creek Pty Ltd (ACN 009 633 427) as the second defendant.

[341] In 2001 Colleen Milatos was one of the first persons in the Northern Territory to obtain accreditation for a resort.

[342] On 16 February 2001, Colleen Milatos wrote to the ANZ Bank (Exhibit D189). In this letter, she sets out the dire financial circumstances for the resort. The letter stated inter alia "As I write to you today, I do not have the capacity to pay wages next week". The letter goes on to give future bookings that have been made at the resort and the possibility of hosting two large conferences. The letter concludes by advising that in the absence of a commitment to fund the resort over the next six weeks, the resort would be forced to cease trading.

[343] On 7 June 2001, the ANZ Bank wrote to City Developments seeking actual income and expenditure details for the May 2001 period, together with actual income and expenditure for the first week of trading in June 2001 stating an assessment of the resort's performance is critical (Exhibit D123). On 7 June 2001, Mr Milatos wrote to the ANZ Bank setting out the current financial position of City Developments (Exhibit D124).

[344] On 8 June 2001, Mr Milatos wrote to the ANZ Bank concerning the suspension of work and stating that "all trust between us has gone" (Exhibit D122).

[345] During all of her time as manager of the resort, Colleen Milatos had been involved in the selling of the cabins and providing information to prospective purchasers. She was also involved in organising a club for the cabin owners, races on the lake and a Christmas and progressive cocktail party for all the bungalow owners.

[346] Colleen Milatos described some of the problems she had in dealing with the cabin owners. She had told them what she believed to be the truth with respect to the easements and other issues. She gave evidence that it was not until the first day of the hearing of these court proceedings that she realised what the real problem with the easements was and that what she had been telling the cabin owners was not correct. She had been assuring them that everything was alright and presenting a positive aspect for the sake of the business.

[347] On 11 June 2001, Mr Milatos wrote to the ANZ Bank in Adelaide (Exhibit D125) advising he had reduced the prices of units to the 1996 level. He requested a new overdraft limit as his cheques were bouncing. He stressed the need to keep the resort trading until they could sell. He referred to a proposal to have Kennedy McVann, real estate agents, auction the resort.

[348] On 29 August 2001, the Northern Territory Court of Appeal delivered its decision concerning the validity of the easements, upholding the decision at

first instance and confirming the easements were good in law. City Developments were ordered to pay costs of both hearings.

[349] On 31 August 2001, Mr Milatos applied for a five year extension of the completion date of the development under the disclosure statement (Exhibit P153). The Registrar-General replied on 14 September 2001 advising the easement holders would be given 21 days to consider their options. He proposed advising the easement holders their interests were not affected by the application for an extension of time.

[350] On 17 September 2001, the sale of cabin 42 for $130,000 was completed.

[351] During August and September 2001, Mr Milatos sought legal advice from Mr Geoff James. He subsequently transferred his files from De Silva Hebron.

[352] In December 2001, the project at Lake Bennett came to an end. On 21 December 2001, the Supreme Court granted an injunction on an application by the easement holders effectively preventing any further titles being issued at Lake Bennett. The judgment in favour of the Scartons was that without the consent of the easement holders, time for performance of the development could not be extended.

[353] On 31 December 2001, the time permitted by the disclosure statement for completion of the project expired.

[354] The easement holders applied to have City Developments wound up after obtaining a costs order with respect to the easement litigation. Mr Milatos arranged with Michael Milatos, for City Developments to obtain a loan to cover the costs order. The Coomalie Council continued the petition to wind up the company. The latest date for completion of the development was 31 December 2001. Mr Milatos tried to have this extended. The Registrar-General was unable to grant approval for an extension because of the injunction.

History Lake Bennett 2002

[355] In March 2002, a marketing submission in respect of the Lake Bennett Resort was prepared by real estate agents, Knight Frank (Northern Territory) to assist the ANZ Bank with respect to the default debt of City Developments (Exhibit P157). The report details the improvements built on the land, the existence of the lake and other facilities, the operating figures for the resort, the existence of the recreational easements and assessed the market value as between $350,000 and $450,000 (if a purchaser could be found). The report stated inter alia (Exhibit P157):

> "In order to enhance the value of the offering Lake Bennett Wilderness Resort we recommend that an independent arbitrator be appointed to speak to the recreational easements holders objecting to further development around Lake Bennett. The outcome of these discussions would give a clear indication as to future potential of the resort situated on Section 245 and issues effecting Section 244".

[356] The report made a number of recommendations concerning the importance of resolving the issues affecting the recreational easement holders.

[357] Colleen Milatos gave evidence as to the number of reports she was required to prepare for the ANZ Bank during the latter part of 2001 and the early part of 2002. On 26 February 2002, she applied for planning approval to build a conference facility at the resort. The plans were not approved. She became an expert in exchanging accommodation for advertising. It was her wish to continue operating and expanding the resort. She continued working very long hours every day. During 2002, Colleen Milatos was awarded the Brolga Award for Tourism Excellence for the resort. The two Brolga Award certificates are Exhibit P187.

[358] On 18 February 2002, a facsimile was sent by the ANZ Bank to George and Colleen Milatos attaching a letter addressed to Peter McVann of Knight Frank (NT). This attached letter to be signed by City Developments was an authority to Mr McVann so he could prepare a submission to initiate a marketing campaign and sell the resort, Section 245 Hundred of Howard (Exhibit D128).

[359] On 20 February 2002, Mr Milatos wrote to Mr McVann listing Section 245 at Lake Bennett with Mr McVann's company for sale. He advised Mr McVann that any improvements to the resort, including future extensions, will require the consent of the recreational easement holders (Exhibit D129).

[360] In March 2002, City Developments' debt to the ANZ Bank including interest was approximately $2.4 million (Exhibit P210).

[361] On 19 March 2002, Mr Milatos had a meeting with Mr Meers from the ANZ Bank and Michael Milatos regarding the sale of the resort to Michael Milatos. At this time George Milatos entered into a private arrangement with Michael Milatos which allowed George Milatos to acquire the resort at some future date upon repaying Michael Milatos what he was owed with respect to the resort.

[362] On 13 May 2002, Lake Bennett Wilderness Resort Pty Ltd a company owned by Michael and Pauline Milatos purchased Section 245 Lake Bennett Resort for $500,000. George Milatos gave evidence he commenced work as the resort manager.

[363] As a result of the arrangements entered into in March, April and May 2002, George and Colleen Milatos acquired the title to units 57 and 51 from City Developments for $200,000. By Deed of Release dated 14 October 2002, George and Colleen Milatos were released from their personal guarantees for the debts of City Developments on condition they would institute and pursue the litigation with respect to the recreational easements and from any proceeds pay the debts of City Developments to the ANZ Bank (Exhibit P12).

[364] On 15 October 2002, Michael and Pauline Milatos borrowed $63,920.75 from the ANZ Bank. This money was loaned to City Developments who

paid it to the creditors who were petitioning for the winding-up of City Developments to recover the balance of costs of the easement litigation (Exhibit P12).

[365] Late in 2002 there was mediation between representatives of the Northern Territory Government, George Milatos and the easement holders.
Mr Milatos gave evidence that as a result of the mediation the property (Section 245) was split into two. One part comprising the lake over which the recreational easements are registered and the other part comprising the dry land of the resort which is free of recreational easements.

[366] This mediation resulted in Parliament passing an Act regarding the land title and easement situation at Lake Bennett. The Lake Bennett (Land Title) Act 2005 (NT) commenced on 9 March 2005. This Act provided, amongst other things, for a mechanism to extinguish the recreational easements to the extent that they affected the resort development and the unit development other than the common property area which formed part of the unit development. The easement rights remained over the lake and undeveloped part of the foreshore. The legislation also provides that:

> "…the lake and the resort, while they are separate sections, are to at all times have identical proprietors. Neither the lake nor the resort can be sold or assigned in any way without the other. This restriction on ownership means that the resort will be responsible for monitoring the quality of water in the lake. The quality of the lake water is an asset to each landowner in the locality; however, it is obviously beneficial to have the responsibility for its monitoring vested in one owner. As the resort owner has a commercial interest in maintaining water quality, it is appropriate that the

responsibility to monitor the quality of the water be vested in the resort owner. …"

[367] Under the provisions of the Act, Section 244, the foreshore, was divided into Section 1252 and Section 1254. The lake and resort area, formerly Section 245 became Section 1255 (the lake) and Section 1253 (the resort area). Section 16 of the Act provided as follows:

> " (1) The land comprising created sections 1253 and 1255 must be in the same ownership.
>
> (2) The Minister must, under section 35 of the *Land Title Act*, lodge a memorandum for each of the lots for the restriction imposed under subsection (1).

[368] The petition to wind-up City Developments was taken up by the Coomalie Council who were owed $80,000 for their work in upgrading the Lake Bennett road access (Exhibit P89).

[369] On 21 November 2002, the Northern Territory Supreme Court ordered that City Developments be placed into liquidation on the petition of Coomalie Council. Mr Geoffrey Finch was appointed liquidator.

[370] In December 2002, Colleen Milatos ceased her involvement in the resort and left the Northern Territory.

[371] Mr Milatos issues instructions to Geoff James to instigate proceedings against Clayton Utz and the Northern Territory Government. Proceedings were issued in the Supreme Court on 23 December 2002.

History of Lake Bennett 2003-2005

[372] On 19 February 2004, a loan agreement was made between Lake Bennett Wilderness Resort Pty Ltd, George Milatos, Colleen Milatos and Geoff James. Mr James took a second mortgage over the resort to protect his costs in the litigation. Exhibit D169 is an extract of the loan agreement (pp1-3 and 14).

[373] In an e-mail dated 31 March 2004, Mr Anderson as solicitor for the Northern Territory, addressed to Michael and George Milatos, asked for information about the legal or equitable interest that George or Colleen Milatos had in the resort company or any understanding between Michael Milatos and George Milatos whereby George or Colleen Milatos may in the future gain an interest in the resort. Michael Milatos replied on 6 April 2004 (both documents are Exhibit D167). Michael Milatos advised in this letter that he purchased the resort because he was financial enough to take advantage of the mortgagees valuation. He stated he did not purchase the resort for George and Colleen Milatos nor had he made a commitment to pay them any amount from profits he may make in the future. He had told them that if he sold the property for a profit he would be willing to help George and Colleen Milatos financially, primarily to assist them to pursue their legal case against the Northern Territory and Clayton Utz. Michael Milatos stated that when the property was put up for sale by public tender, a few months previously only two tenders were received for just over $700,000. Michael Milatos did not advise Mr Anderson of the verbal arrangement he had with

George Milatos and that George could purchase the property back from him if he could pay Michael Milatos all that he was owed. Michael Milatos gave evidence he reserved the right to put the property on the open market if that became necessary.

[374] Asked about the letter to George Milatos dated 3 March 2005 (Exhibit 165) Michael Milatos stated that since this letter they have approval to build 12 lake view rooms but he had been reluctant to spend any more funds. No work had been done on the 42 garden wing rooms, the 20 budget rooms or the 33 caravan sites for the same reason. Work had been done at the resort to expand the conference area to cater for larger conferences. George Milatos and his son did this using monies extended by Michael Milatos. Michael Milatos said he was aware George Milatos was exploring the possibility of building units on the resort land and strata title them to be sold freehold to prospective owners.

[375] In March 2005, George Milatos forwarded a letter to Michael Milatos seeking funding for the resort expansion.

[376] On 9 March 2005 the Lake Bennett (Land Title) Act commenced. The "object" of the Act was:

> "… to facilitate the preparation and registration of instruments relating to lots in the Lake Bennett locality in accordance with the terms of compromise submitted by the Territory to the registered proprietors of the lots."

This Act essentially dealt with the problems for development created by the recreational easements. The recreational easements were extinguished and alternate easements put in place that did not completely restrict building and development at Lake Bennett.

History Lake Bennett 2006-2007

[377] Michael Milatos gave evidence he purchased Unit 200 at Lake Bennett early in 2006 from City Developments (in liquidation). This consisted of 15 lakeside lots all of which had sold, the last one sold in about January 2007. He retained unit 58. These 15 lots are being built upon by San Industries Pty Ltd ("San Industries") which is owned by George Milatos. It was George Milatos who informed Michael Milatos that Unit 200 was for sale. When he purchased the land on the eastern side of the lake, Michael Milatos entered into a verbal contract with George Milatos who was to construct the buildings, two and three bedroom units, and do the marketing. Michael Milatos said his primary interest was to keep George Milatos employed and provide him with an opportunity to have a job. Michael Milatos stated he expected to double his investment in the project. He stated George was getting paid a fee per house. There is no agreement to share the profits with him. The standard fee for a two bedroom house is $120,000 and for a three bedroom house is $150,000. Michael Milatos gave evidence that George Milatos would build the houses and receive a fee and the balance of the funds go to himself. Five units have been completed and waiting issue of

the titles. Michael Milatos has loaned San Industries the money to build the houses. George Milatos has not applied for progress payments. He agreed this was an unusual arrangement but stated that George is his brother. Michael Milatos agreed that he will receive close to $1,000,000 for the land component of Unit 200 when all the houses have sold. He paid $300,000 for the land and will have tripled his money. He has never discussed sharing this profit with George. Michael Milatos said he had made a deal with George Milatos that when George had paid him what the resort had cost Michael to purchase, then George would be entitled to have it returned to him. He gave evidence there was no documentation to this effect. George Milatos had been running the resort since Michael Milatos purchased it in May 2002 in the name of Lake Bennett Wilderness Resort Pty Ltd. This was a shelf company Michael Milatos had purchased. Michael and Pauline Milatos hold the shares in that company. The purchase price of $500,000 plus a further $100,000 as working capital was arranged with the ANZ Bank and guaranteed by M & P Pty Ltd ("M & P") a company owned by Michael and Pauline Milatos. Michael Milatos gave evidence he had since transferred to the Commonwealth Bank. There is an interest bearing loan. George Milatos pays the interest from the takings at the resort. Michael Milatos said he had made further loans to the resort which included a tax bill, wages during the wet season and stamp duty.

[378] Michael Milatos was shown a letter from George Milatos dated 3 March 2005 (Exhibit D165). He agreed the letter fairly represented the

arrangements between them. In this letter George Milatos sets out his plans for the further development of the resort and the estimated cost. On p3 of this letter he states under the heading "Brief History":

> "Since December 2001 we have been unable to build anything on the property due to the restrictive easements on the title. After 2 years of mediation, legislation has now passed through parliament to clear the path for more development. As per the enclosed plan, Section 245 has now been divided into two blocks. Section 1255 (marked in blue; the Lake) on which all recreation access easements are now registered on, and Section 1253 (marked in yellow; the dry land where all easements are now removed) that any development is subject to the usual Town Planning and building permits. To take advantage of this very significant change of title, I have prepared a Town Planning submission and lodged with Town Planning to expand existing facilities as follows:
>
> 12 Lake View Rooms
>
> 42 Garden Wing Rooms
>
> 20 Budget Rooms
>
> 33 Caravan sites
>
> Improvements to the existing building of Reception and Conference Facilities.
>
> I feel confident of achieving Town Planning approval for the above by the end of April. Usually such approval is good for 3 years before one has to reapply. The proposed work as recommended for the sum of $300,000.00 is in fact a small part of this Town Planning application. Undoubtedly, approval for the above will make the property a much more marketable commodity to either build the Resort to the potential of having 60 or 80 rooms or, sell it. Both of the above will take time.
>
> It is, at the end of the day, my wish to keep the Resort within the family. Therefore, my plan to convince you to spend an additional $300,000.00 is to help the Resort to be more functionable and profitable. That will assist us to be able to make payments of principle and interest to the Bank."

[379] Michael Milatos gave evidence that he did lend George Milatos the $300,000 for the purpose as requested by George. Michael Milatos said he had not funded his brother to bring this litigation and apart from the sum of $25,000 or $28,000 obtained from the refund of stamp duty on the purchase price of $500,000 he had not paid any of George Milatos' legal fees to Mr James. Michael Milatos gave evidence there were no monies loaned to George and Colleen Milatos from the resort in regards to the litigation. There was a second mortgage on the Lake Bennett Wilderness Resort to cover George and Colleen Milatos' expenses in regards to the litigation. Michael Milatos repeated the fact he had only ever bought the resort to provide employment for George Milatos and his then wife. His interests were protected by a first mortgage. It is the evidence of Michael Milatos that he only ever wanted to recover what he had paid for the resort. George Milatos was free to take out a second mortgage. Michael Milatos said he had acquired the property for a good price and wanted to preserve George Milatos' right to buy it back if he could at some later time, provided he paid him the money he owed. Michael Milatos said he agreed to a second mortgage with the bank to safeguard Geoff James' position as far as fees were concerned.

[380] Michael Milatos agreed the construction had commenced on 11 to 12 of the lots in Unit 200 and the value of the work when completed on 14 lots would be in the vicinity of $1.5 to $2 million. He also agreed that following the subpoena issued to M & P, there were no documents produced that

evidenced any arrangement between himself or his company and his brother George Milatos or his company concerning the construction of houses on Unit 200. Michael Milatos stated that his company had no records as to the costings for the houses, no plans or specifications. He said that there was a verbal agreement between himself and his brother. He said when the individual units are sold he would have a transaction from San Industries as an invoice. He would then pay the required amount and there would be a record of this for tax and other purposes. Michael Milatos said he had made loans to San Industries in the order of $900,000 but the titles were still in his name and upon settlement there would be monies paid on presentation of an invoice. He stated he had personally and periodically inspected the progress of the work. Michael Milatos was referred to a number of cheque butts showing he had made a series of payments from M & P to San Industries commencing on 15 October 2006 for $100,000 for building of houses and payments up to 14 February 2007 totalling $600,000. Michael Milatos said the balance of $300,000 he was referring to in his evidence related to the amount he paid for the purchase of the land. From these payments San Industries have had to pay for the labour and materials for the construction of the houses. The loans would be repaid upon the sale of the units. He did not keep costings on the building of the units because he was not the builder. He was the developer.

[381] Michael Milatos was referred to a letter he wrote on 6 February 2006 to the liquidator of City Developments putting forward a proposal to purchase

Unit 200, Section 1252 Chinner Road, Lake Bennett. The letter notes the current market value of the land as assessed by Michael Mooney, a valuer, was $260,000. The letter was tendered and marked Exhibit D166. Michael Milatos agreed he and George Milatos thought this would be a good buy. The offer to purchase was by private treaty rather than putting the property on the open market. Michael Milatos agreed that he had tripled his money on the investment. He confirmed that the only arrangement with George Milatos was that George would receive his builder's margin on the building of the houses. Michael Milatos gave evidence that there had been no downturn in his business in 2000 because of the introduction of Goods and Services Tax. Michael Milatos gave evidence that his company M & P has the building permits issued in respect of each of the lots in Unit 200. The building permit to build on 15 lots in Unit 200, Section 1252 Chinner Road, Lake Bennett dated 6 September 2006 was tendered (Exhibit D168). Section 1252 was formerly part of Section 244. George Milatos has sought formal legal advice on this issue. Michael Milatos stated that George Milatos had done all of the work entailed in the building of the houses on Unit 200. George Milatos' company San Industries was handling the sale of the houses through Kristen's Conveyancing Services. Michael Milatos said he may at a later time consider giving George Milatos something more than his builders margin, but at present that had not been discussed.

[382] Michael Milatos gave evidence about a number of his brother's building projects and matters that were investigated but did not come to fruition. He

agreed that George Milatos had a particular interest in large scale commercial developments. Others have described George Milatos as a visionary developer. Many of the projects met with an unhappy ending or did not come to fruition but they were trying to get things moving in Darwin at a time when the only other developments were warehouses at Winnellie and houses in the Northern suburbs. No one at that time was building units.

[383] Details of buildings completed by Cento Pty Ltd (the building company of which Michael Milatos is a director) between 1991-2006 and profits made totalling $6,071,212 was tendered as Exhibit D170.

Evidence of Alexander Henty Silvester

[384] Mr Silvester has practised as a barrister in Darwin since 1994. Prior to that he practised as a legal practitioner in Darwin commencing in 1970. Since about 1972 he has practised almost exclusively in the area of commercial law and some commercial litigation. His practise as a barrister since 1994 has been in those particular fields. Between late 1988 and approximately March 1991, Mr Silvester did not practise law but was involved in a tourism development project. A report prepared by Mr Silvester dated 16 October 2006 was tendered and marked Exhibit P149 and a further report dated 14 December 2006 was tendered and marked Exhibit P150.

[385] Mr Silvester gave evidence that one of the first tasks for the prudent and competent solicitor when first approached by a client, is to tie down exactly the scope of their retainer and to be clear as to exactly what is expected of

them. Once they have established this then the legal practitioner's function is to carry out those requests.

[386] I accept the evidence of Mr Silvester that a reasonably competent and prudent legal practitioner, in the position of Mr Mitaros when first approached by Mr Milatos, would ascertain exactly the scope of his retainer. Following in response to the search certificate obtained from the Land Titles Office for Section 152, the prudent and competent legal practitioner would carry out the following tasks:

(a) obtain from Land Titles Office copies of each of the Recreational Easements noted on the Certificate;

(b) obtain searches of each of the titles to the Sections 93, 94, 96, 101-106, 109 and 137 to whose proprietors recreational easements had been granted;

(c) obtain a copy of Waterworks Licence No. 363 referred to in the Conditions;

(d) note that the reference in Condition 1, to 'the control of Waters Act' (sic) was probably a reference to the *Water Act* which commenced operation on 1 July 1992;

(e) note that the 'recreation' easements grant rights to owner of the dominant tenement (in the Conditions described as 'the purchaser'), and all persons authorized by the purchaser, 'the right to enter upon and use the land burdened by the easement for recreational purposes' and reserves rights to the owner of the servient tenement (Section 152) (in the Conditions described as 'the Vendor'), and 'its employees agents and all persons from time to time authorized by him and all other persons having the like free and uninterrupted passage across and use of the Vendor's land';

(f) note additionally Conditions 2 and 3 of the easements;

(g) note that a 'Grant of Easement Other than a Right of Way' granting rights of use and access over the whole area of the

servient tenement was very unusual in its scope and application;

(h) note that eleven (11) adjoining properties enjoyed identical rights over the servient tenements;

(i) note that the purchaser in each case was a private owner, rather than a statutory corporation like the Power & Water Authority or other government instrumentality;

(j) accordingly, having regard to these unusual features very carefully examine the terms of each easement;

(k) reflect upon the legal implications arising from the existence of each of the eleven (11) easements, the Waterworks Licence, and the provisions of the *Water Act* for the development as outlined by Mr Milatos;

(l) advise Mr Milatos as to the existence of those easements, that they were highly unusual, that they potentially fettered, perhaps even made impossible, the use of Section 152 in the form proposed by Mr Milatos;

(m) advise Mr Milatos in clear terms, that the 'recreation easements' would, on their face, prevent any physical infrastructure on the land component of Section 152 that interfered with the rights of the owners of the dominant tenements and persons authorized by them to enter on and use, indeed to enjoy the free and uninterrupted passage across and use, any and all of Section 152, and that that meant that no development works of the type contemplated could be undertaken on the land component of Section 152;

(n) similarly advise Mr Milatos that an effect of the Easement in relation to the water envelope of Section 152 was that the owners of the dominant tenements and their authorised persons, would have free and uninterrupted use of the lake, constrained only from using the water for any purpose not permitted by the Waterworks Licence No. 363;

(o) ask Mr Milatos to articulate the 'watersports' and any other uses of the water envelope he had in mind, so that he could then consider and advise Mr Milatos which of his intended water activities was not permitted by the Licence;

(p) suggest to Mr Milatos that the solicitor should also examine the effect which the easements (which he proposed might be included under the option); might have on any future use of

Sections 95, 97, 99, 100 and 110; and any beneficial effect which purchase of those lots could have in overcoming the restrictions created by the eleven (11) registered easements;

(q) advise Mr Milatos that so significant was the presence of the easements for the achievability of his proposed development that he should not take the option;

(r) advise Mr Milatos, that if he wanted a second opinion, Counsel should be briefed to thoroughly examine and advise of the legal impact of the easements on his proposal, and in the interim not enter into any option and prudently, not expend other moneys on the project until the opinion was received and considered;

(s) put the foregoing advice in writing, with a rider that if Mr Milatos wanted to proceed with the option he would do so at his own risk; and

(t) draw Mr Milatos' attention to the presence of an Electricity Easement over Section 152 and a registered lease which had by then expired.

[387] Mr Mitaros did not carry out these steps. In particular, I find that by failing to properly search the recreational easements and advise Mr Milatos as to the possible consequences of these easements, Mr Mitaros was in breach of s 52 of the Trade Practices Act, in that he mislead Mr Milatos into believing that he could proceed to develop Section 152 by building units and developing the resort. Mr Mitaros did not advise Mr Milatos about the impediments created by the recreational easements.

[388] In his second report, Mr Silvester expanded on his first report in respect of the obligations upon the legal practitioner consulted by Mr Milatos. These obligations were to explain the affect of the provisions of the Unit Titles Act and the Real Property (Unit Titles) Act, to consider the question of how to enter into contracts with prospective purchasers before the option to

purchase Section 152 was exercised, to make himself aware of the nature of the easements and explain to Mr Milatos the impact of these easements on any proposed development.

[389] I accept the evidence of Mr Silvester concerning the obligations upon the legal advisers to Mr Milatos. These obligations were not fulfilled.

Liability - Misleading and Deceptive Conduct

[390] On the evidence I am satisfied that Mr Mitaros was a legal practitioner and a partner in the firm of Clayton Utz consulted by George Milatos in March 1996 for legal advice. Mr Mitaros did not advise Mr Milatos about the effect of the recreational easements when first consulted by Mr Milatos or at any other time following the first consultation.

[391] Having received instructions from Mr Milatos on 25 March 1996, as I have found, Mr Mitaros had an obligation as a solicitor to:

1) search the title to the property and notice the easements registered on the title;

2) obtain a copy of the easements and analyse their contents;

3) provide the following advice to George Milatos:

   a) the easements gave the easement holders the right to make recreational use of the whole of the land;

   b) any building on the land would be completely inconsistent with those rights of recreational use; and

c) if George Milatos constructed any buildings on the land, the easement holders could successfully apply for an injunction and may seek an order to demolish the building.

4) Mr Mitaros should have given this advice even if George Milatos did not specifically ask for it.

[392] Mr Mitaros did not give the advice even though the existence of the easements and their terms were specifically raised with him in May 1996 in the "how can they hurt me" conversation and they were specifically mentioned in recital F of the option agreement drawn up by Mr Mitaros (Exhibit P5 Vol 3 pp43-49, particularly p45).

[393] In the circumstances where Mr Mitaros took instructions, was aware of Mr Milatos' plans to build a resort and supporting accommodation, acted as solicitor on the project and remained silent about the effect of the easements, then his silence constituted misleading and deceptive conduct in breach of s 52 of the Trade Practices Act and s 42 of the Consumer Affairs and Fair Trading Act.

[394] In *Noor Al Houda Islamic College Pty Ltd and Anor v Bankstown Airport Ltd* (2005) 215 ALR 625, Hoeben J set out a number of principles from the authorities on "silence" in the context of s 52 of the Trade Practices Act at [179] - [181]:

> **"[179]** Some useful statements of principle in relation to misleading conduct by silence are:

> Obviously, it is difficult to see how a mere silence could, of itself, constitute conduct which is misleading or deceptive. However, if the circumstances are such that a person is entitled to believe that a relevant matter affecting him or her would, if it existed, be communicated, then the failure to communicate it may constitute conduct which is misleading or deceptive because the person who ultimately may act to his or her detriment is entitled to infer from the silence that no danger or detriment existed.

(*Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97 at 114 ; 111 ALR 649 at 666 per Hill J);

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case for if particular matters exist they will be disclosed.

(*Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32 ; 110 ALR 608 at 609 per Black CJ); and:

> In my view, to inquire in such a case whether an independent "duty to disclose" has arisen is to digress from the application of the terms of section 52.

(*Demagogue* at FCR 40; ALR 618 per Gummow J).

[180] On behalf of BAL it was submitted that when considering misleading conduct by silence a party seeking to rely upon s 52 has to establish circumstances which give rise to an obligation to disclose relevant facts: *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 557 ; 79 ALR 83 at 94–5. In contrast, it was submitted on behalf of the plaintiffs that the proper test is whether there is "a reasonable expectation of disclosure".

[181] Having read the cases to which I was referred by the parties it seems to me that the better view and that which is supported by more

> recent authority is that the proper test is whether there is "a reasonable expectation of disclosure": *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399 at 401–2 ; 113 ALR 517 at 519–21; *Franich v Swannell* (1993) 10 WAR 459 at 474–5; *Arbest Pty Ltd v State Bank of New South Wales Ltd* (1996) ATPR 41-481; *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 465 ; 127 ALR 543 at 553–4."

See also the discussion on these matters in Christensen, S and Duncan, WD, *Professional Liability and Property Transactions*, Federation Press, 2004 pp229-230. This extract addresses a solicitors obligation to undertake appropriate searches to ascertain the existence of defects in title and the full effect of any defects. It further addresses the obligation to ensure that the client obtains good title.

[395] I am satisfied that Mr Milatos was seeking information about any matters which could adversely affect the development of Lake Bennett. He had a reasonable expectation that any such matters revealed in the title search of the property would be conveyed to him by his solicitor. This did not happen.

[396] The defendant did not call Mr Mitaros to give evidence, even though he was the solicitor initially consulted by Mr Milatos from March to September 1996. Mr Mitaros was also the managing partner of Clayton Utz at all relevant times. His failure to give evidence when no explanation was offered for such failure gives rise to a number of inferences in favour of the plaintiffs - *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312-321 and *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re; Australian*

Securities and Investments Commission (ASIC) v Adler (2002) 41 ACSR 72 at [447] - [450] per Santow J.

[397] I agree with the submissions made by Mr Reeves QC on behalf of the plaintiffs that the inferences to be drawn in favour of the plaintiffs are that the evidence of Mr Mitaros would not have assisted Clayton Utz in respect of the following:

1) That Mr Mitaros did not give any relevant advice to the plaintiffs.

2) That Mr Mitaros did have the conversation in May 1996 with Mr Milatos who asked him with respect to the easements "how can they hurt me" and the subsequent advice given by Mr Mitaros which was effectively that the easements did not harm Mr Milatos.

3) That there were no limits placed on the plaintiffs retainer of Mr Mitaros with respect to the legal due diligence search for the proposed purchase of Lake Bennett.

[398] With respect to the matters about which George Milatos has given evidence and Mr Mitaros could have been expected to give evidence, then the inferences must favour the plaintiffs. For example there is a letter from Mr Mitaros to Morgan Buckley Lawyers dated 20 August 1996 (Exhibit D49 and Exhibit P5 Vol 3) which is relevant to the easements. Mr Milatos gave evidence he did not see this letter until some years later (tp 359-363, 371-373, 375-376, XXM tp833-840 and RXM tp1281-1282).

[399] The plaintiffs have established misleading or deceptive conduct on the part of the defendant under s 52 of the Trade Practices Act.

[400] In a claim under the Trade Practices Act or the Consumer Affairs and Fair Trading Act, the relevant question on causation in a "no transaction case" involves a comparison between the position the plaintiffs are in, having embarked upon the transaction or project, and the position they would have been in if they had not embarked upon it.

[401] The plaintiffs need to show the defendant's contravention was a cause, not the sole or principal cause - *Henville v Walker* (2001) 206 CLR 459 at [126] per McHugh J and at [162]-[163] per Hayne J.

[402] On the balance of probabilities, if the defendant had properly advised the plaintiffs with respect to the easements, the plaintiffs would not have caused City Developments to proceed with the option to purchase the property and therefore City Developments would not have proceeded with the project at Lake Bennett.

[403] The defendant's submission is that a person who breaches s 52 of the Trade Practices Act is responsible only for the losses directly attributable to his wrongdoing and is not responsible for losses that do not relate directly to the misrepresentation (*Travel Compensation Fund v Tambree t/as R Tambree and Associates* (2005) 224 CLR 627; *Collins Marrickville Pty Ltd v Henjo Investment Pty Ltd* (1987) ATPR 40-822; *Trust Co of Australia v Perpetual Trustees WA Ltd & Ors* (1997) 42 NSWLR 237; *St George Commercial*

Credit Corporation Ltd v Collins Wallis Properties Pty Ltd unreported judgment of Rolfe J in New South Wales Supreme Court delivered 21 August 1998 (BC 9804076)). In *Carr v Fischer* [2006] NSWCA 313 (BC200609425), the court held that the solicitor had been retained to carry out certain investigations relating to one of the earlier investments. This could not be characterised as requiring the solicitor to provide views about financial matters, and accordingly, the breaches alleged against the solicitor could not have caused the plaintiff's losses.

[404] The defendant places reliance on the statement by Gaudron J in *Kenny & Good Pty Ltd v MGICA (1992) Limited* (1999) 199 CLR 413 at [26] "a person who negligently provides information or advice should not be held liable for loss that would have been suffered if the information had been correct".

[405] Mr Maurice QC, on behalf of the defendant, submits that *Henville v Walker* (supra) which was decided before the recent amendments allowing deductions on account of contributory negligence, is authority only for the proposition that an applicant for damages under s 82(1) cannot have his damages reduced on account of his own contributory negligence.

[406] Mr Maurice QC distinguishes the decision in *Henville v Walker* (supra) from the matter before this Court on the following basis (defendant's written submissions p179):

"(a) the defendant in this case had no input into the plaintiffs' profit projections for Lake Bennett; and

(b) in Henville, it was the profit projections themselves which caused the appellants' loss. The plaintiffs' profit projections, such as they were, are set out in Milatos' 8 February 2005 (D249) affidavit. They were, so far as the Court has been made aware, all his own work. The defendant was not asked for, nor did it give, any input or advice about the likely returns to be made from carrying out the resort and condominium developments at Lake Bennett."

[407] Mr Maurice QC also distinguished *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, on the basis that the loss in that matter was one "indivisible loss", meaning no part of it could be attributed to the appellant's negligence separately from the respondent's wrongdoing, there was at that time no provision in the Act for apportioning responsibility for indivisible losses.

[408] Reference was made to the following passage per Gleeson CJ at 118 (par 24):

> "The amount claimed by the appellant was the whole of the loss it suffered in the loan transaction. The case is not complicated by reason of the effect upon the ultimate financial outcome of factors of the kind that were described in *Henville v Walker* (2001) 206 CLR 459 as 'extraneous'. For example, that outcome was not made worse by reason of any unreasonable delay, or want of prudence, on the part of the appellant in the steps it took to realise the security following the borrower's default. There was no problem, of the kind considered in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, arising out of abnormal fluctuations in the market value of land. This was not a case in which, in reliance upon a misrepresentation, a party entered into a complex business venture, with adverse consequences unrelated to the falsity of the misrepresentation in any sense other than that, but for the misrepresentation, the venture would not have been undertaken (cf *Henville v Walker* (2001) 2006 CLR 459 at 474-475 [36]".

[409] It is the defendant's case that (quoted from the defence's written submissions, p184 par 11-62) in referring to a decision of Hodgson J in *Tefbao Pty Ltd v Stannic Securities* (1993) 118 ALR 565:

> "Paraphrasing Hodgson J, the plaintiffs were willing to risk losing everything (such wealth as they had, their time, the opportunity to engage in other business activities), and to become liable for guaranteed debts, and were prepared to go ahead with the development at Lake Bennett, when they believed that building and operating the Lake Bennett Wilderness Resort might be a successful financial venture, and when they believed there was a good market in which to sell their cabins. In so far as any damage they suffered arises from their willingness to expose themselves to the risk that the resort proved to be an unsuccessful venture, to the risk that the level of debt incurred on the resort would render their company insolvent, and to the risk of a downturn in the property market, that damage should not be regarded as caused by the defendant's misleading conduct."

[410] Mr Maurice QC submits that "… if a defendant's conduct is found to be a cause of the plaintiffs' losses in the common law sense, it will cease to be so for the purposes of s 82(1) of the Trade Practices Act at a point where the plaintiffs own unreasonable conduct, or want of prudence, worsens the state of affairs in which the plaintiffs find itself" - *Tefbao Pty Ltd v Stannic Securities* (supra) which was cited with approval by Gleeson CJ in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (supra) at [28] and [29] and by McHugh J at [88] and [89]:

> "In *Tefbao Pty Ltd v Stannic Securities Pty Ltd*, the Supreme Court of New South Wales held that, although the misleading conduct of the respondent had induced the claimant to purchase land, the claimant could only recover that part of its loss that was attributable to the respondent's conduct. In *Tefbao*, the respondent had misled the claimant into believing that the area of the land was 12 acres when in fact it was 10.75 acres. Hodgson J award damages of

$50,000 per acre in respect of the 1.25 acres difference. His Honour said:

> 'If *some part* of the damage would not have occurred but for negligent conduct of the claimant, or failure to mitigate, then it may be appropriate to apply notions of reasonableness in assessing how much was in truth caused by the contravention.' (Emphasis added.)

The italicised phrase illustrates the crucial distinction, when considering s 82, between *part* of the loss, in the sense of a distinct and separate portion of the whole loss, and playing *a part* in the sustaining of the entire loss. All members of this Court recognised that distinction in *Henville*, although the majority and minority Justices differed as to whether part of the loss was in fact caused by the respondent in that case".

see also McHugh J at [69]:

> "In my opinion, the appeal should be allowed. Section 87 does not confer any discretion to reduce the damages to which an applicant would otherwise be entitled under s 82. Nor does s 82 permit a court to divide the responsibility for a loss that is causally connected in the common law sense with a respondent's breach of Pts IV or V of the Act. In *Henville v Walker*, this Court held that, in awarding damages under s 82, a court cannot reduce the amount of an applicant's damages because of the applicant's contributory negligence. For the purpose of s 82, it is irrelevant that the conduct of an applicant was a cause of its loss unless the court can find that the loss or damage suffered is divisible into parts, and the respondent's conduct did not cause one or more of those parts. I & L's conduct undoubtedly contributed to its loss. But this Court's decision in *Henville* necessarily denies that under s 82 a court can apportion the loss or damage suffered by the applicant in accordance with the parties' culpability. That is not an approach that accords with the policy of the legislation".

see also *Mehta v Commonwealth Bank of Australia* [1990] Aust Torts

Reports 81-046.

[411] It is the submission on behalf of the defendant that in so far as the plaintiffs' losses were caused, or made worse, by unreasonable conduct or want of prudence on the part of the plaintiffs, those losses should not be attributed to the defendant's conduct. Reasonableness in this context being as between the plaintiffs and the defendant - *Henville v Walker* (supra) per McHugh J at [140], *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (supra) per Gleeson CJ at [24], *Mehta v Commonwealth Bank of Australia* (supra) per Rogers CJ Comm D at 68,142.

[412] I accept the evidence given by both George and Colleen Milatos, that if they had been informed the existence of the recreational easements was completely inconsistent with their rights to build on the land, they would never have proceeded with the purchase of the Lake Bennett property.

[413] I accept their evidence that the very reason they wanted to purchase the land was to build upon and that Mr Mitaros was aware of this from the beginning. In addition to accepting their evidence it would defy commonsense that Mr Milatos, who was essentially a builder, would purchase land which he could not build upon - *Kenny & Good Pty Ltd v MGICA (1999) Limited* (supra) Gaudron J at [21].

[414] I accept the submission made by Mr Reeves QC that the plaintiffs' claim is a "no transaction" claim meaning that, but for the defendant's breach in failing to advise about the recreational easements, there would have been no transaction.

[415] The fact that such advice was never given was a decisive consideration in the plaintiffs' decision to proceed with the purchase of Lake Bennett.

[416] I agree with the submission made by counsel for the plaintiffs that this is not affected by any advice that may have been provided by the surveyor or the Registrar-General. Their input into this debacle does not detract from the decisive effect of the defendant's failure to give advice and therefore, its responsibility for the plaintiffs' decision to proceed with the project.

[417] I find that if the defendant had advised the plaintiffs in their capacity as directors of City Developments that recreational easements were inconsistent with their right to build on the land, they would not have made the decision to purchase the land at Lake Bennett and the Lake Bennett project would not have proceeded.

[418] The failure to advise of the effect of the recreational easements, which were directly inconsistent with the building of 80 cabins at Lake Bennett, was fundamental to the profitable operation of the Lake Bennett development not just a matter that affected the level of profit - see *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (supra).

[419] Mr Reeves QC submits the plaintiffs say the "but for" test should be applied in this case as described by Gaudron J in *Kenny & Good Pty Ltd v MGICA (1999) Limited* (supra) at [19], p425:

> "One of the problems most frequently encountered in the area of causation is imprecision of language. When a person claims to have

> taken, or refrained from taking, a particular course of action in reliance upon another's representation, the critical question, assuming the representation is one that might reasonably be relied upon, is whether, but for that representation, he or she would have taken that action. In that context, 'but for' does not signify a sine qua non or causative factor which, although necessary, is not sufficient to produce the result in question. Rather, it signifies the decisive consideration or one of the decisive considerations for taking the course of action in question. It was in the former sense that the "but for" test was rejected as the exclusive test of causation in *March v Stramare* (1991) 171 CLR 506 at 516. In the sense of asking whether a representation is a decisive consideration, 'but for' is always the test of reliance."

[420] I then turn to consider whether the plaintiffs are entitled to the whole of the loss flowing directly from them entering into the Lake Bennett project, including their consequential losses. Mr Reeves QC claims, on behalf of the plaintiffs, that the plaintiffs are entitled to the loss of the money loaned to City Developments, the wasted time and effort on the Lake Bennett project, the debts incurred by City Developments for which the plaintiffs are liable and the lost opportunity in pursuing the Lake Bennett project, all of which, it is submitted, occurred as a consequence of their changing their position to their detriment, acting on a misrepresentation, and at the same time were the kinds of loss that were reasonably foreseeable at the time of the defendant's breach.

[421] In answer to the submission on behalf of the defendant that the conduct of the plaintiffs was unreasonable and imprudent in building 21 rooms at the resort in 1999 and installing services on the western side in 1998 and 1999, it is the submission for the plaintiffs that such conduct must involve much more than simple negligence, it must amount to unreasonable conduct even

"grossly unreasonable" – *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (supra) per Gleeson CJ.

[422] Counsel for the plaintiffs submit the following matters (plaintiffs' closing submissions p17):

> "26. The expression 'loss or damage' in section 82 of the TPA and section 91 of the CAFTA is not to be given a narrow meaning. It has been held to extend to damage to reputation and damages for personal injuries. It has been held to extend to consequential losses such as the costs of borrowing money based upon the misleading conduct.
>
> 27. In addition to section 82 of the TPA, or section 91 of the CAFTA, the court has a wide range of discretionary remedies available to it under section 87 of the TPA and section 95 of the CAFTA.
>
> 28. An award under the TPA or CAFTA cannot be reduced because of the plaintiff's contributory negligence."

[423] I agree with the submission by counsel for the plaintiffs that the defendant cannot rely upon any contributory negligence by the plaintiffs based on the allegation that the resort was unviable and unprofitable from the outset - see *Henville v Walker* (supra) and *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (supra).

[424] As the recital of facts discloses under the "History of Lake Bennett" contracts for purchase of Lake Bennett - Section 152 were not exchanged until 24 March 1997, some 12 months after Mr Milatos first consulted Mr Mitaros. A few days prior to exchange of contracts, Mr Riley had received a letter from Cridlands expressly relating to the easements. The contracts could have been made subject to the vendor resolving the

easements' issue, or alternately the plaintiffs could have pulled out of the purchase and been saved from subsequent disaster. Mr Riley agreed in his evidence that the purchase could have been stopped at this point.

[425] I also agree with the submission for the plaintiffs that the defendant cannot rely on the downturn in the property market in 1999 to reduce the defendant's liability. A downturn in the property market did not involve a human agent and was an event that could not be totally unexpected when dealing with buying and selling real estate. This did not constitute a cause of a separate and distinct part of the whole loss such that any reduction should be made in the plaintiffs' damages - see *Henville v Walker* (supra) Gleeson CJ at [33] and McHugh J at [90].

[426] I agree that the evidence of Mr Lewis is irrelevant on the issue of causation. I have already found that whether or not the resort was unviable and unprofitable from the outset is not a reason to reduce the damages to which the plaintiffs are entitled. It was the inadequate legal advice which caused the plaintiffs to purchase the property. Similarly, the evidence of Mr Gore is irrelevant as whether the loss of cabin sales in 1999 was caused by a drop in the market or rumours about the easements does not provide any basis for a reduction in the plaintiffs' damages. Mr Gore is a certified practising valuer and managing director of McGees (NT) Pty Ltd. Mr Gore also holds a real estate agent's representative licence under the Agents Licensing Act of the Northern Territory.

[427] I find later in these reason for decision that Mr Lewis has made some very justifiable criticisms of Mr Milatos as a financial planner. However, I am not able to find that City Developments would necessarily have gone into liquidation had it not been for the various problems the recreational easements presented. The evidence of both George and Colleen Milatos is that they intended to start small and build up over the long term. The project provided them with accommodation and a lifestyle they enjoyed. For them it was more than just a financial development. The project had over a period of time made a profit, even though not as large as predicted, on the cabin sales on Section 244. A report by Horwath Hospitality NT, prepared in June 1999, is Exhibit P158. On p2 of that report appears the following statement:

> "If the resort continues to function as it is at present, I believe it will achieve break-even profitability in the next few years but will not offer reasonable returns on capital before the upper end of the five to ten year cycle. Profits achieved will have to be re-invested to continue to 'grow' the resort."

[428] The amount of time and energy expended by George Milatos with respect to the variety of problems connected to the existence of the recreational easements is documented under the headings "History of Lake Bennett". If George Milatos and to a lesser extent Colleen Milatos had not been called upon to devote such time and energy to the ramifications of the recreational easements they could have concentrated on developing Lake Bennett and averted financial ruin.

Causation

[429] Section 82(1) of the Trade Practices Act provides as follows:

> "82 Actions for damages
>
> (1) Subject to subsection (1AAA), a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

[430] Mr Reeves QC counsel for the plaintiffs, submitted that the relevant question on causation in a "no transaction" case such as this, involves a comparison between the position the plaintiffs are in, having embarked upon the transaction or project, and the position they would have been in if they had not embarked upon it (*Henville v Walker* (supra)). He further submitted that all the plaintiffs need to show is that the defendant's contravention was "a" cause of the loss not that it was the sole or principal cause (*Henville v Walker* (supra))

[431] I agree that the plaintiffs need to prove on the balance of probabilities that "if City Developments had received the advice from Nicholas Mitaros, would they have caused it not to purchase the Lake Bennett property and would City Developments have therefore not embarked on the Lake Bennett project but instead would the plaintiffs have operated as builder/developers in Darwin".

[432] The evidence of Mr Milatos is that Mr Mitaros never told him about the existing recreational easements. Mr Milatos stated that if he had received

this advice he would have stopped the development immediately. He would have tried to work things out with the vendor. He gave evidence he is a builder and developer. He would not buy a property that he could not build on when this was his only interest in purchasing such property (tp 381). Under cross examination he gave evidence that if he had been aware of the restrictions of the easements over the resort in 1996, he would have turned around and walked away (tp 1072).

[433] Colleen Milatos gave evidence (tp 1760) that she would not have proceeded with the development at Lake Bennett if she had known it could not be undertaken because of easements. It had meant splitting up her family because she had a son attending high school in Darwin. She did not want to be involved in another controversy and it would not have made sense to buy the property if you could not build on it.

[434] I am satisfied on the evidence of George and Colleen Milatos, that the plaintiffs would not have proceeded with the purchase of Lake Bennett if they had been advised by Clayton Utz about the effect of the recreational easements that were on the title and that these easements were completely inconsistent with their ability to build.

[435] In *Henville v Walker* (supra) the High Court was considering an appeal from the Court of Appeal in Western Australia which court had allowed an appeal from the trial judge and found for the respondents. The action involved a claim by an architect (the appellant) against a real estate agent, who the

architect claimed, had breached s 52 of the Trade Practices Act by a misrepresentation as to the demand and sale price for units the architect planned to build. There was also evidence the architect had seriously underestimated the cost of building the units and made other errors.

[436] The High Court reversed the decision of the Full Court of the Supreme Court of Western Australia and confirmed the award of damages to the appellant made by the trial judge, Gleeson CJ at 468-469:

> **"[12]** In the present case, the contravention involved engaging in conduct that was misleading or deceptive, contrary to s 52 as read in the light of s 51A. The conduct concerned representations as to the state of the market for home units and as to likely selling prices.
>
> **[13]** It will commonly be the case that a person who is induced by a misleading or deceptive representation to undertake a course of action will have acted carelessly, or will have been otherwise at fault, in responding to the inducement. The purpose of the legislation is not restricted to the protection of the careful or the astute. Negligence on the part of the victim of a contravention is not a bar to an action under s 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage. The respondents knew the purpose for which their representations were being relied upon by the appellants. The Full Court accepted that the making of the representations amounted to engaging in misleading or deceptive conduct in trade or commerce. There was no warrant for a conclusion that the negligence of the appellants in relation to the feasibility study was the sole cause of the decision to undertake the project.
>
> **[14]** For there to be the necessary causal relationship between a contravention of s 52, and loss or damage, so as to satisfy the requirements of s 82(1), it is not essential that the contravention be the sole cause of the loss or damage. As Brennan J pointed out in *Sellars v Adelaide Petroleum NL*, where the making of a false representation induces a person to act in a certain manner, loss or damage may flow directly from the act and only indirectly from the making of the representation; but in such a case the act "is a link — not a break — in the chain of causation". In the present case there were two concurrent causes of the imprudent decision to buy the land

> and undertake the development project. The conduct of the respondents was one of those causes. That is enough."

and Hayne J at 509-510:

> **"[163]** Secondly, seldom, if ever, will contravening conduct be the *sole* cause of a person suffering loss. Other factors will always be capable of identification as a cause of the person suffering loss. In a case like the present, the appellants' *relying* on the respondents' estimate of likely receipts can be seen to be a cause of their loss. What the Act directs attention to is whether the contravening conduct was *a* cause. It does not require, or permit, the attribution of some qualification such as "solely" or "principally" to the word "by".
>
> **[164]** Thirdly, it is necessary to recognise that, on its face, the section permits recovery of the whole of the loss sustained by a person who demonstrates that a contravention of Pt V of the Act was a cause of that loss. Neither the words of s 82(1) nor anything in the intended scope and context of the Act suggest some narrower conclusion.
>
> **[165]** In particular, nothing in the text of s 82(1) (or any of the other provisions of the Act) suggests that the carelessness of the person who suffers loss or damage as the result of contravention of the Act should be taken into account in deciding what was the amount of loss or damage actually suffered. Nor is some such limitation to be derived from considering the intended purposes of the Act. The very simplicity of the language used in s 82(1) appears to confine attention to the limited question of the historical relevance of the contravening conduct to the loss or damage sustained. It does not provide a basis for concluding that notions of contributory fault are to be given a place in its operation."

[437] Applying the principles set out in *Henville v Walker* (supra) to the claim before this Court, I find it is sufficient to establish the claim that the inadequate advice provided by the defendant was a cause of the subsequent financial disaster irrespective of any other cause.

[438] I accept the submission made by Mr Reeves QC on behalf of the plaintiffs that it does not matter that City Developments did not become involved as

the plaintiffs corporate vehicle until later in 1996, after Mr Mitaros failed to advise them about the effect of the recreational easements. I agree it is sufficient if the plaintiffs' loss was brought about by virtue of the conduct of Clayton Utz which is in contravention of s 52 of the Trade Practices Act or s 42 of the Consumer Affairs and Fair Trading Act (*ABCOS v Jones* (1997) 150 ALR 488 at 529 per Wilcox and Lindgren JJ). I further accept that as the plaintiffs were, at all relevant times, unit holders in and beneficiaries of the Lake Bennett Trust, they are entitled to claim for the loss or damage they personally sustained by the contravening conduct of the defendant in dealing with City Developments as the trustee of the Lake Bennett Trust - see *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109.

[439] I find that the plaintiffs cause of action arose on 21 November 2002 being the date City Developments was placed into liquidation. Accordingly, I have concluded that the amendments to the Trade Practices Act in 2004 and the introduction of the Proportionate Liability Act 2006 (NT) in 2006, do not apply so as to reduce the plaintiffs damages.

Liability - Breach of Fiduciary Duty

[440] The plaintiffs claim a breach of fiduciary duty because there was no disclosure of the conflict arising from the negligence of Clayton Utz from 7 April 1998.

[441] It is their primary case for breach of fiduciary duty that Mr Riley failed to make the necessary full and comprehensive disclosure of Clayton Utz's conflict of interest to Mr Milatos once Mr Riley realised on 7 April 1998 that Clayton Utz had been negligent. The file note made by Mr Riley on 7 April 1998 sets out the fact that Mr Riley recognised Mr Mitaros had been negligent in not advising Mr Milatos initially about the effect of the easements. It refers to his own realisation that the easements were not merely recreation rights over the lake and access rights between the grantors land and the lake but were recreation rights over the whole of the land. This meant his earlier advice given in February/March 1997 about the effect of the easements was wrong in a significant respect, namely, that any building on the Lake Bennett property was inconsistent with the rights of the easement holders. In his memo dated 1 July 1999 to Dirk at Clayton Utz (Exhibit P5 Vol 6 pp1152-1156) Mr Riley stated at p1155:

> "I believe George Milatos should not have been allowed to spend a cent on this property without someone explaining to him the potential of these easements to prevent the development of the land".

[442] A solicitor and client relationship is a fiduciary relationship, *Maguire & Anor v Makaronis & Anor* (1996) 188 CLR 449 per Kirby J at 495:

> "It is incontrovertibly established that the relationship of solicitor and client is a fiduciary one. The relationship imposes on the solicitor the duty not to make a private profit at the client's expense unless otherwise expressly provided and agreed. It also requires that the solicitor will not allow himself or herself to be put in a position where the solicitor's interest and the duty to the client conflict. …"

[443] The interests of City Developments and Clayton Utz were in conflict and Mr Riley became aware of this. The interests of Clayton Utz were that they not to be the subject of a claim for negligence by City Developments. Such a claim could result in the possible loss of reputation or embarrassment to Clayton Utz. This conflict of interest would effectively inhibit Mr Riley and Clayton Utz in effectively serving the interests of the plaintiffs. There was a direct conflict between the interests of the solicitor and the client.

[444] To avoid a breach of fiduciary duty to their client City Developments, Clayton Utz should have made a comprehensive disclosure of the conflict to Mr Milatos. In *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154, Street CJ at 170 stated:

> "Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead. Thus for a solicitor merely to disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client's interest. The conflict of interest may, and usually will, be such that it is not proper, or even possible, for the solicitor to continue to act for and advise his client. A solicitor, who deals with his client while remaining his solicitor, undertakes a heavy burden. Where a solicitor discovers that continuing to act for his client will, or may, bring the interests of his client and his own interests into conflict, it will be a rare case where he should not, at least, advise his client to take independent legal advice. It may well happen that the conflict arises fortuitously, and has not been anticipated when the solicitor undertook to act for the client. This circumstance does not alter the duty of the solicitor already referred to."

[445] There are stringent requirements on the extent of the disclosure and the burden of proof is on the fiduciary in relation to it - *Maguire & Anor v Makaronis & Anor* (supra) at 466, 495 and 496. See also *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384, Isaacs J at 398.

[446] The defendant has failed to prove on the balance of probabilities that it made the necessary, full and comprehensive disclosure of its conflict to Mr Milatos. The evidence of Mr Riley, which has been summarised earlier in these reasons for judgment, is vague and uncertain. Mr Riley agreed in cross examination that his memory of the events, which occurred 9-10 years ago, is poor and he was at the time very busy with other clients. His evidence on this issue, such as it was, is not supported by any contemporaneous record. He gave evidence he did tell Mr Milatos he had made a mistake but could not remember if this was by telephone call or a face to face meeting. He did not state in his evidence that he told Mr Milatos that there was a conflict of interest between Mr Milatos and Clayton Utz because of a possible claim for negligence.

[447] I am not persuaded Mr Riley did admit to any mistake. His evidence is that his state of mind as at 7 April 1998 was that nothing had changed in practical terms. This was because he had always considered the rights of access over the land, which he previously believed the easements to be, created a problem in respect of building on the land.

[448] The correspondence from Mr Riley, prior to and after the file note of 7 April 1998, did not disclose he believed a mistake had been made - see letter from Guy Riley to Registrar-General dated 17 March 1998 with copy to George Milatos (Exhibit P5 Vol 5 pp520-522); letter dated 21 October 1998 Guy Riley to George Milatos (Exhibit P5 Vol 5 pp677-681); letter dated 23 October 1998 George Milatos to Attorney-General settled by Guy Riley (Exhibit P5 Vol 5 pp 692-695) and letter dated 2 February 1999 Guy Riley to George Milatos (Exhibit P5 Vol 6 pp752-757). Under cross examination Mr Riley agrees that the letters all contain the same theme which is that the easement holders' rights are not affected by the development at Lake Bennett.

[449] A number of times through his evidence, Mr Riley stated his belief was that Mr Milatos was in effect the author of his own misfortune. Accordingly, this misfortune was not something for which he considered Clayton Utz could be held responsible.

[450] Mr Riley agreed in cross examination that he had used words to the effect "you may believe I am culpable" when he spoke with Mr Milatos. This is very different to making any admission as to the specific mistake and advising Mr Milatos to seek independent legal advice.

[451] The file note made by Mr Riley on the Clayton Utz file dated 7 April 1998 (Exhibit P5 Vol 5 pp545-549), does not include any reference to a conflict of interest or that Mr Milatos had been advised to pursue independent legal

advice. It does not support a finding that there had been a full and comprehensive disclosure of the conflict, or a full and comprehensive disclosure as to the effect of the recreational easements and that they were inconsistent with any building on the land.

[452] Mr Riley agreed in cross examination that the matter disclosed in the memorandum of 7 April 1998 was one of the most significant events in the history of the file (tp 2868). He also agreed that it was a situation that required careful explanation, a detailed letter of advice, a face to face meeting and a careful file note of the explanation that had been given. There was no detailed letter of advice as there had been on less important topics, nor was there a file note of any conversation whether in person or by telephone. The subsequent file note of 1 July 1999 makes no reference to any conversation disclosing a mistake or possible negligence on the part of Clayton Utz. The file note of 1 July 1999 (Exhibit P5 Vol 6 pp1152-1156) was to detail a possible negligence claim. It made no reference to the file note of 7 April 1998 or that Mr Riley had communicated with Mr Milatos about the possible negligence claim.

[453] In his evidence to the Court on this issue, Mr Milatos has denied that after 7 April 1998 Mr Riley told him of a possible negligence claim against Clayton Utz, that there was a conflict of interest and he should seek independent legal advice (tp 426-427).

[454] I find that the defendant did not have the fully informed consent of the plaintiffs to continue to act for them after the realisation of the full effect of the recreational easements as documented in the file note dated 7 April 1998. Mr Milatos gave evidence that he did not become aware of the file note dated 7 April 1998 until December 2003 when he was reading through the Clayton Utz file (Exhibit P5). I accept this evidence of George Milatos.

[455] On 2 February 1999, Mr Riley gave advice to Mr Milatos in a memorandum faxed to him, part of which has been quoted under "History of Lake Bennett 1999" in these reasons for judgment. The memorandum goes on to explain that the proposed Law of Property Bill may offer solutions but it was not known when it would come into force. He then advised that "the cheapest and simplest way of solving your problem is to get the easement holders to consent to the change to the disclosure statement". He then went on to explain why it may be difficult to obtain the agreement of Parliament to make the amendment to the Real Property (Unit Titles) Act which would remove the need for the easement holders consent entirely.

[456] He then concluded with the following words (Exhibit P5 Vol 6 p 756-757):

> "If you cannot either get the consents of the easement holders or convince the Registrar General to legislate to remove the need to obtain their consents, you will be left with two choices:-
>
> - Revert to the original development proposal (because the development areas are not accurately defined they could be moved slightly to areas where the terrain is more suitable without it being apparent that you were building on common property) and obtain planning consent; or

- Wait until the Law of Property Bill is passed and make application to modify those easements whose holders refuse to give consent."

[457] An opinion was obtained from John Waters QC. This opinion is dated 16 February 1999 (Exhibit D78). Mr Waters QC proposed making an application to the Supreme Court to have the recreational easements declared invalid. His summary reads as follows (p 16):

> "75. Although I have clearly come to the view that the easement for recreational purposes is too wide and vague and would in effect create rights of joint ownership and also substantially deprive the owners of Section 244 of their rights of legal possession we must approach the matter with some caution.
>
> 76. No court is happy to take away rights which purchasers have received presumably in good faith as the result of a specific grant by the original vendor of the subservient tenement.
>
> 77. Our response to this concern is that the owners of the dominant tenement really lose nothing by being deprived of these rights. Since the subdivision of Section 152 they never had a right granted to them to gain access to the lake for example and, of course, the owners of Sections 91-97 and 102 are not obstructed in their access to the lake in any event. **All** section holders can access the lake through Section 245. The utility of 'recreational purposes' on such a narrow piece of lake frontage comprised in Section 244 is highly debatable in any event. Their rights to leave a boat on the lake continues as before and on a balance of convenience basis the rights of the unit holders are grossly interfered with referable to those of the section holders".

[458] Mr Waters QC then proceeded to outline a plan of action commencing with writing to all section owners advising of an intention to take court proceedings with respect to the easements, giving them an insight into the legal views concerning Mr Milatos' position and offering to assist them execute a Deed of Surrender of their easement entitlements as a way of

relieving themselves of the burden of litigation. He added that some may be prepared to sign, leaving a hard core of persons willing to take up the litigation in opposition.

[459] On 19 April 1999, Mr Milatos had a conference with Mr Riley and Mr Waters QC. Following this conference Mr Waters QC forwarded a letter to Mr Riley dated 7 April 1999 (sic). He outlined the discussion between the three of them and set out an estimate of his costs if the application for a declaration were to proceed. He then states in the penultimate paragraph (Exhibit D238 p 2):

> "A declaration that the recreation easement is invalid having been obtained with the Registrar General as a party, I believe, could well serve to avoid any further need to deal with the other parties as the Registrar would presumably act upon the Court's findings. It would not, of course, prevent other adjacent owners attempting to institute proceedings to attempt to enforce their recreation rights but, of course, it would create a precedent which would probably render their applications unsuccessful provided we, ourselves, were successful at first instance. I really see no other way of maintaining the commercial viability of the subdivision as the proposed amendments to the *Real Property Act*, the *Units Titles Act* and the *Real Property (Unit Titles) Act* really do not meet our client's circumstances. I shall await the outcome of Mr Milatos' decision and your further instructions".

[460] There was still no clear statement made to Mr Milatos of what Mr Riley had concluded in the file note of 7 April 1998, that the recreational easements were completely inconsistent with building development. Mr Milatos had been aware for sometime that the easements created a problem at Lake Bennett. However, it had not been properly explained to him that as from 7 April 1998 his solicitors realised the earlier advice they had given about

the easements was incorrect and that in fact the easements which created recreation rights were very different to easements that created rights of access.

[461] In July 1999, Mr Milatos retained new solicitors, De Silva Hebron. He forwarded a letter of termination of services of Clayton Utz by letter dated 9 August 1999.

[462] The defence submission is that the plaintiffs have not established that they suffered any loss as a result of the defendant continuing to act for them from April 1998 to July 1999.

[463] I do not accept this submission. The test of causation in relation to a breach of fiduciary duty is whether the undisclosed facts were material in all the circumstances. The issue is, in all the circumstances what a reasonable person in the position of Mr Milatos would have done had he been clearly informed by Mr Riley that building on the property was inconsistent with the rights of the easement holders, that the earlier advice he had received in relation to the easement was incorrect and that he should consider seeking independent legal advice as his interests could be in conflict with the interests of the defendant.

[464] I consider a reasonable person in the position of Mr Milatos would have stopped the project and sought independent legal advice as to his position which may well have resulted in legal proceedings being issued at that time

against the defendant. The plaintiffs could have avoided their subsequent losses.

[465] Such an opportunity was lost as Mr Milatos was never informed about the contents of Mr Riley's file note of 7 April 1998. There is no evidence Mr Riley or anyone explained to Mr Milatos that the previous advice about the effect of the easements was incorrect and that he could not build anywhere on the Lake Bennett land.

[466] In *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Australian Securities and Investments Commission (ASIC) v Adler & Ors* (supra), Santow J summarised the applicable principles in relation to causation in equity compared to common law at [748]. He stated at [749]:

> "The principal effect of applying the stringent test adopted in equity is that once the court has determined that a breach has occurred, then the liability of the fiduciary is to pay sufficient compensation to put it back to the situation it would have been had the breach not been committed. Once the court has determined that the breach was a cause of the loss, though there be other immediate causes operative as well, there is not room for speculation as to whether the loss might have occurred even without the wrongdoing, or whether it might have been avoided under certain contingencies."

[467] The defendant maintains that the Lake Bennett development was not something to which the plaintiffs were ineluctably committed on 24 March 1997 when the defendant caused City Developments to exchange contracts for the purchase of Sections 244 and 245. It is submitted that between that date, to the date when the property was sold in May 2002, the plaintiffs could have stopped City Developments spending money on the development,

sought to extricate the company and exercise their rights against the Northern Territory and the defendant. The plaintiffs did not do this.

[468] Mr Maurice QC, counsel for the defendant, maintains that from April 1997 the plaintiffs knew the risks involved and that they may not be able to obtain a variation to the disclosure statement. It is the position of the defendant that the plaintiffs knew in March 1998 their solicitor's view was a variation to the disclosure statement was not possible without the consent of the easement holders. The defendant maintains that from April 1998 the plaintiffs knew that the easements created recreation rights over the whole of the land, rights which they knew were inconsistent with their development plans. The defendant maintained that following a conversation with Mr Riley on 10 March 1998, after the meeting with the Registrar-General, Mr Milatos knew his company had a cause of action for professional negligence against the defendant for failing to give the company appropriate advice about the easements. This, the defendant maintains, was reinforced on or about 7 April 1998 when, according to the defendant, Mr Riley told Mr Milatos that he (Mr Riley) had made a mistake in his earlier reading of the easements and that he was now in no doubt the easement holders could, if they wanted, stop the development.

[469] The defendant maintains the plaintiffs were not committed to the developments that were carried out at the first or second stages of the expansion of the resort merely by purchasing the resort. The second stage,

the defendant submits, involved expenditure in excess of $1.15 million (Exhibits D82, D109 and D112).

[470] It is the defendant's case, that it was the decision of the plaintiffs to carry out the second stage of the resort development which led to the company becoming insolvent. Mr Maurice QC stressed that the second stage of the development was carried out after they received advice from Queen's Counsel, and in the face of this advice, they sold their property at Gunbar Street in Bayview, for the purpose of the resort development.

[471] In late 1998 and the first half of 1999, City Developments spent money developing new sites on the western side of the lake, for many of which it did not have approval. (Exhibits D92, D71, D94, D73, D95, P5 Vol 6 p752, D97, D78, D98 and D105).

[472] Counsel for the defendant maintains that by purchasing the land the plaintiffs were not committed to this development or to the action commenced against the easement holders.

[473] On behalf of the defendant it was further maintained that Mr Milatos was convinced he had a cause of action against the Northern Territory because of "misinformation" provided by the Registrar-General, accordingly he must also have been aware that he had a cause of action against Clayton Utz.

[474] The defendant stated that City Developments made a net profit on the cabin developments of $772,000. The defence submission is that at that time the

losses were yet to be sustained and avoidable. It is the case for the defence that the losses are attributable to developing the resort and operating it at a loss for over five years.

[475] It is not an appropriate case, the defendant asserts, to apply the "but for" test only at the date of exchange of contracts i.e. 24 March 1997. On their argument, there is no sufficient connection between the losses which could have been avoided and the failure by the defendant to give appropriate legal advice.

[476] It is the defendant's case that despite the evidence about the risks of further development, and the advice Mr Milatos was given relating to these risks from Mr Riley and Mr Waters QC, Mr Milatos continued the development and in doing so took risks which he cannot now attribute to the defendant.

[477] The defendant maintained the plaintiffs lost their directors' loans because their company became insolvent and the reason the company became insolvent was because the resort was not commercially viable and operated at a loss for five years. The defendant maintained, in particular, by reference to the evidence and report of Mr Lewis, that the location of a resort style development at Lake Bennett was not financially sustainable. The defendant argued this had nothing to do with the easements but rather the debt the plaintiffs allowed to accrue in developing and operating a commercially unviable resort.

[478] In late 1999, there was a fall off in cabin sales which the defendant maintains was due to a downturn in the property market, not the effect of the easements.

[479] The defendant's case is that the plaintiffs have seized upon the easements as being the cause of all their problems, whereas in reality it was their own ill founded expectation that the development at Lake Bennett would be commercially successful.

[480] The defendant seeks to rely on what it alleges was the imprudent and unreasonable conduct of the plaintiffs in building 21 rooms at the resort in 1999 and installing services on the western side in 1998 and 1999. The defendant asserts that the plaintiffs were imprudent in raising a further loan from the ANZ Bank to finance these projects in the face of the advice Mr Milatos had received from both Mr Riley in his facsimile dated 2 February 1999 (Exhibit P5 Vol 6 pp752-757) and the opinion of Mr Waters QC dated 16 February 1999 (Exhibit D78). Mr Milatos was aware that the Registrar-General would not amend his disclosure statement without the consent of the easement holders.

[481] It is the submission for the defendant that the plaintiffs themselves caused the insolvency of City Developments in 2002 by obtaining a further loan in excess of $1 million in 1999, despite clear advice from Mr Riley and Mr Waters QC that because of the rights of the easement holders it would be commercial folly to continue building at Lake Bennett.

[482] The onus of establishing these matters is upon the defendant (*Henville v Walker* (supra) per McHugh J at [70] and per Hayne J at [146]-[148]).

[483] A sample of the statements in the facsimile from Mr Riley dated 2 February 1999 is as follows:

> "… [the easement holders] have recreation rights over the whole of the common property and therefore your variation of the disclosure statement does impact upon their rights (even though they might not be exercising those rights in respect of the area being developed).
>
> It is the subsequent development of the land and not the actual subdivision which is likely to prejudice the easement holders. There is no statutory mechanism which prevents a landowner building over an easement. It is up to the holder of the easement to take action through the civil courts for a remedy.
>
> … the easements do impede your reasonable use.
>
> … we would like to see the term of the easements rationalised so that the neighbouring owners do not enjoy 'recreation rights' over the whole of the land (including the completed units) …
>
> … all of the easement holders hold interests over all of the whole of your land …
>
> You are proposing to build on areas that were earmarked as common property - areas where the easement holders could exercise their recreation rights.
>
> … legally [the easement holders] have recreation rights over this land [the common property] and therefore they are affected by the proposal.
>
> … I doubt that the Registrar General would have the courage to … find that the Scartons interests were not affected by your proposed variation …"

[484] A sample of the matters mentioned in the opinion of Mr Waters QC are par 29 (Exhibit 78):

> "The further progress of the development is clearly in major jeopardy and the viability of the current sales program must also be in major jeopardy."

[485] This was reinforced at a conference with Mr Waters QC on 19 April 1999. Mr Waters' advice was to the effect that without a declaration the easements were invalid, the commercial viability of the development was seriously in doubt.

[486] The Court must decide whether the conduct of Mr Milatos, in proceeding in the face of this advice, was unreasonable (*I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (supra)).

[487] I agree with the submission made by Mr Reeves QC that the defendant must prove all of the following matters if it is to escape liability for the whole of the plaintiffs' loss relying upon this aspect of its defence that:

a) a separate distinct part of the plaintiffs' loss;

b) can be attributed to a new intervening event; and

c) involving, in all the circumstances, the unreasonable conduct of the plaintiffs.

[488] The defendant did not really identify a separate and distinct part of the plaintiffs' loss. There is no simple empirical measure of a separate and distinct loss.

[489] The plaintiffs had planned the development of the resort and the building of cabins around the foreshore from the very beginning of the project. It was not a new intervening event.

[490] With respect to the reasonableness or otherwise of the plaintiffs' conduct, I take into account the following:

- During 1998 and 1999 and due very much to the hard work of Colleen Milatos in marketing the resort, there was a demand for additional accommodation and it was reasonable to build extra rooms at the resort.

- The ANZ Bank approved a loan of $1.1 million on 7 July 1999 following a valuation undertaken by Colliers and a feasibility study completed by Horwaths (Exhibit P158). The vast majority of the $1.1 million loan was expended on building the rooms at the resort (George Milatos at tp 399). George Milatos gave evidence (tp 1300) that he built on the western shore at this time to take advantage of the good weather. From the total amount borrowed only about $150,000 was expended on the western shore. The sale of the cabins was to finance the development of the resort. The sale of cabins had, prior to this time, been good and returned a profit enabling the ANZ Bank debt to be reduced.

- At the time of construction the cabin sales were going well, the debt to the ANZ Bank had been reduced and there was an expectation the remaining cabins would sell. It was not until late in 1999 that a problem with cabin sales became apparent.

[491] Whilst Mr Riley and Mr Waters QC both referred to the existence of the easements being a problem, in respect of the development of the project, this advice was amongst advice on a series of matters as to how the problem could be resolved. It was not an unreasonable expectation, in the plaintiffs' minds, from the advice they had received, that either court action or legislation would resolve these problems. No advice was given at this time with respect to the effect of the easements on Section 245 and the building of the 21 rooms at the resort.

[492] The facsimile from Mr Riley to Mr Milatos dated 2 February 1999 and the opinion of Mr Waters QC dated 16 February 1999, arose as a result of Mr Milatos wanting to vary his disclosure statement for a second time. Both of these pieces of correspondence continue to provide Mr Milatos with possible options to continue with the development at Lake Bennett. Some of the options included:

- amendments to legislation;
- approach easement holders to obtain their consent;
- continue with the development under the original proposal until the easement holders obtained an injunction to stop the development, or
- seek a declaration from the Court that the easements are invalid.

[493] The content of these letters continued to provide Mr Milatos with hope and possible alternatives to his problem. They by no means outline the effect of the easements and that he should stop development immediately.

[494] With the benefit of hindsight, the raising of a further substantial loan and the continuing development of the project in early 1999 may be perceived as imprudent. However, if looked at in the context of what was occurring at the time and the position the plaintiffs were in, I do not consider it could be described as conduct that was unreasonable, such as to reduce the liability of the defendant, for failing to provide proper advice in the first place and then subsequently breaching their fiduciary duty.

Heads of Damage

Introduction

[495] The plaintiffs' claim for damages are summarised in their written submissions as follows (p 21):

> "a. Equitable compensation to the plaintiffs for their personal losses, including their lost investments in CD plus interest thereon, and the time and effort they wasted in pursuing the LB project;
>
> b. Equitable compensation to the plaintiffs for their lost opportunity to carry on the business of builder/developers in Darwin;
>
> c. Equitable compensation to the plaintiffs for the damage caused to their reputation and credit standing;
>
> d. Equitable compensation to the plaintiffs to allow them to pay the amount of the ANZ debt plus interest, so that CD may be released from liquidation;
>
> e. Equitable compensation to the plaintiffs to allow them to pay the amount of the debts, plus interest, of the unsecured creditors of CD, excluding the defendant, so that CD may be released from liquidation;

f. Equitable compensation to the plaintiffs to allow them to pay the amount of the liquidator's fees in the liquidation of CD, so that CD may be released from liquidation;

g. Equitable compensation to the plaintiffs of the total amount of the fees, plus interest, that CU received from CD during the period it acted for it on the LB project and that any debt claimed by CU for fees in the liquidation be declared void - this remedy is sought to prevent the defendant from benefiting from receiving fees from the LB project given its breach of fiduciary duties and/or breach of the TPA and the CAFTA;

h. Exemplary damages against CU for its wrongful and reprehensible conduct in relation to, and since, its breach of fiduciary duty."

[496] Based on the report of Mr Holmes dated 28 November 2006 (Exhibit P190) and paragraph 114.2 of the Further Amended Statement of Claim, as set out at [508] in these reasons for judgment, Mr Maurice QC on behalf of the defendant has categorised the plaintiffs' claim into Option A and Option B. These options are put forward by Mr Holmes and in the Further Amended Statement of Claim at paragraph 114.2 in the alternative.

[497] The defendant has introduced a third option, being Option C. The defendant includes under Option A the claim for:

(1) the plaintiffs lost opportunity to make a capital gain on the plaintiffs' Bayview properties;

(2) the claim in respect of unrewarded exertions between 1996 and 2002;

(3) the claim for lost earnings for George Milatos between 2002 and the date of the trial.

[498] I deal with each of these claims separately under the relevant headings. Option B is the "Lost opportunity to conduct business as a builder/developer". This claim I also deal with in detail under the relevant heading.

[499] Option C is based on the defendant's hypothesis, that had the plaintiffs not gone to Lake Bennett they would have invested their time and money in a high risk project or series of projects with disastrous consequences. The submission is based on the history of George Milatos with Milatos Constructions and with Lake Bennett. This option is also dealt with in detail under that heading.

(a) Plaintiffs' lost investment in City Developments

[500] Peter Holmes, who is a chartered accountant specialising in forensic accountancy, prepared a report dated 28 November 2006 (Exhibit P190). In this report he refers to loans made by the plaintiffs to City Developments. The total amount of money loaned to City Developments was $696,434 - see par 6.6.19 of Exhibit P190.

[501] This money will not be recovered from City Developments (in liquidation) as the liabilities exceed the assets by more than $2 million. I would award this amount to the plaintiffs as part of their claim.

Lost Investment in City Developments = $696,434.

(b) Lost opportunity of capital appreciation in properties

[502] To provide part of the monies necessary to make the loans to City Developments the plaintiffs sold three investment properties they owned in Darwin. George Milatos gave evidence (tp 427-29) as to the properties owned by himself and Colleen Milatos or by City Developments itself that were sold and put into the Lake Bennett project. Colleen Milatos gave evidence (tp 1760-61) that she and her then husband, George Milatos, jointly owned properties in Darwin that were sold to invest in the Lake Bennett project.

[503] I accept the evidence contained in the report of Mr Holmes (Exhibit P190) at par 3.5 concerning these investment properties. Paragraph 3.5 of Mr Holmes' report reads as follows:

> "3.5 Investment Properties
>
> 3.5.1 At the time of commencement of the project the Plaintiffs owned or beneficially held an interest in various investment properties:-
>
> (i) Lot 6106 Stoddart Avenue, Bayview Haven (also known as 3/51 Stoddart Avenue) - being a townhouse unit acquired by the Plaintiffs. It was sold on 28 February 1997 for $242,000;
>
> (ii) Lot 6141 Bayview Haven (also known as 18 Gunbar Street) - being vacant land, acquired on 2 August 1994 by the Plaintiffs. It was sold on 17 March 1999 for $220,000;
>
> (iii) Lot 6101 - being house and land. It was sold on 16 October 1997 for $285,000.
>
> 3.5.2 Therefore the gross amount realised from the sale of these assets was $747,000. After payout of mortgage debts and realisation costs, the net monies were then invested in the Trust. These loan monies did not attract interest.

3.5.3 In addition, the Plaintiffs had an interest in a property known as 'Enterprise House'. This asset was also realised for a net figure of $285,000. However, this asset was realised for reasons other than any specific needs of the project."

[504] In assessing the loss, Mr Holmes adopted the valuations made by Mr Mooney in his report dated 20 August 2005 (Exhibit P192) in which he assessed the total value of the three properties on a gross value basis at $1,410,000.

[505] At par 11.4.3 of his report (Exhibit P190), Mr Holmes assessed the loss of opportunity to hold these assets and realise them at a greater value as being $663,000. This valuation, as Mr Holmes stated, ignored Capital Gains Tax on the basis that damages should be assessed on a before tax basis.

[506] In addition to this, Mr Mooney gave evidence that from June 2005, which was two months before the date of his report, to December 2006, which was three months before he gave evidence, the price of houses, units and land had increased by 40.24%, 49.23% and 40.88% respectively. Averaging those figures and applying a rate of 45% the total amount of the lost opportunity as at March 2007 would be $961,350.

[507] I do not allow this claim as for reasons explained more fully under the heading "(d) Lost opportunity to conduct business as builder/developer" in these reasons for judgment. I have come to the conclusion the plaintiffs would have sold these properties in any event to invest in an alternate project, or projects, had they not gone to Lake Bennett.

(c) Wasted time and effort on the Lake Bennett project

[508] The plaintiffs' "Further Amended Statement of Claim Leave Granted 10 November 2006" under this head of damage, is as follows:

> "114.2 Secondly either ("the lost opportunity");
>
> > 114.2.1 Such sum as the Court shall assess to be the value, adjusted for tax and risk, of the chance lost by the Plaintiffs to put their capital and skills into projects that were feasible in their normal business activities unrelated to the Project during the period 30 September 1996 to the date of trial; or
> >
> > 114.2.2. Alternatively, such sum as the Court shall assess to be the value, adjusted for tax and risk, of the unpaid labour of the Plaintiffs wasted in the project and the loss of capital gains that they otherwise would have enjoyed on assets sold to raise money to fund the Project that they otherwise would not have sold."

[509] I accept the evidence of George and Colleen Milatos as to the time and effort each of them put into the Lake Bennett project. I have already detailed these efforts in the course of my findings of fact under the headings "History of Lake Bennett". For both George and Colleen Milatos the Lake Bennett development was a way of life, as well as a commercial enterprise which almost totally consumed their time.

[510] George Milatos was the builder/developer and involved himself in sales. George attended to the legal and financial affairs for Lake Bennett. A great deal of his time and energy between 1996 and 2002 was spent in trying to find a solution to the problems created by the recreational easements. A problem he would never have had to wrestle with if he had been properly advised by Clayton Utz as to the effect of the recreational easements.

Colleen Milatos was the resort manager which included running the restaurant and management of staff. She had spent a great deal of time and energy in the physical presentation of the resort including the gardens. Colleen Milatos marketed the resort and had been successful in winning a number of awards. This time and effort was wasted once the resort was sold and City Developments was placed into liquidation on 21 November 2002.

[511] Mr Holmes gave evidence (tp 1834) in which he explained the lost earnings schedule and calculations which is Exhibit P191.

[512] Mr Maurice QC, counsel for the defendant, submitted that there is no evidence to support such a claim. It is the submission for the defence that the only relevant wastage is, if one or both of the plaintiffs would have earned more by way of remunerations, in the relevant period, had they not gone to Lake Bennett.

[513] It is the defence submission that a claim for wasted labour cannot be made by Colleen Milatos on the basis of her evidence that she would not have worked elsewhere had she not gone to Lake Bennett (tp 1761). I do not accept this submission. Colleen Milatos, in effect, lost the opportunity to work elsewhere between 1996 and 2002 because she was fully employed at Lake Bennett.

[514] Mr Maurice QC argues that the fundamental difficulty with the approach taken by the plaintiffs, in respect of the claim for wasted time and energy between 1996 and 2002, is that they have not put forward any evidence as to

what period of time Mr Milatos spent working for Australian Transportable Homes between 1996 and 2002 and it is not possible to calculate how much he lost because his time and energy were lost as a result of going to Lake Bennett.

[515] I accept that it is not an easy exercise to make such an assessment. Mr Milatos did receive an income from Australian Transportable Homes and Colleen Milatos was paid a wage as manager of the resort. Nevertheless, they both put in a great deal of work and effort into Lake Bennett and on City Developments going into liquidation came away with nothing.

[516] Mr Holmes has over 25 years of experience as a chartered accountant and has been practising in the area of valuations, investigations and assessment of loss and damage for over 15 years. He is a partner in the firm of Ferrier Hodgson in Adelaide. Mr Holmes proceeded on the basis that between January 1997 and May 2002, Colleen Milatos received a total remuneration of $131,687. I accept the evidence of Mr Holmes that based on her experience and expertise, Colleen Milatos could have expected to earn $65,000 per annum. Mr Holmes then deducted 15% for general contingencies and, after allowing for the remuneration received of $131,687, arrived at the figure of $420,813. Mr Holmes agreed in examination in chief that having been advised of the evidence of Colleen Milatos that she would not have worked outside the home had she not gone to Lake Bennett, then the component for unpaid labour for Colleen Milatos assessed in the sum of $420,813 before tax could not be pursued.

[517] The actual question put to Colleen Milatos and her response as appears on the transcript as follows (tp 1761):

> "And just if you hadn't - you personally hadn't gone to Lake Bennett, what would you have done instead?---I'd have - it would have been the status quo. At that time I was - George had bought in a partner, Bob Hall I think his name was, into ATH so I was really only at ATH for the first six months then I was home again, and I'd have still been at home, and George would have maybe - - -"

[518] I note, however, that the claim is still pursued in the plaintiffs' written submissions. I interpreted the evidence given by Colleen Milatos as meaning she had no other plans because of her commitments to Lake Bennett. I did not interpret this evidence as meaning she would not have worked outside the home at all if they had not gone to Lake Bennett. Indeed, her history would not support such a finding. She had previously obtained qualifications in the field of real estate and had worked to support her husband's endeavours whatever they may be. She was very involved with his business building Harbour View Plaza. I find that in reality, Colleen Milatos would have worked to support and assist her husband in whatever endeavour he took on and that he would only have taken on a project with her approval.

[519] In addition, the question and answer, need to be considered in context. Colleen Milatos had given evidence she would not have gone to Lake Bennett if she had known the development could not be undertaken because of the easements on the title. She had given evidence about the inconvenience to her family life of moving to live at Lake Bennett. She

gave evidence that she would not have moved from the "beautiful home" they had, to go to Lake Bennett, or sold the other properties they had to invest in Lake Bennett if she had known the effect of the easements. I took her response "I'd have still been at home" as a reference to the fact she would still have had a beautiful home to live in had they not moved to Lake Bennett and was not a response relevant to work.

[520] For those reasons, I consider Colleen Milatos is entitled to the claim for wasted time and effort. These figures are supported by the tax returns of Colleen Milatos (Exhibit P196) and the evidence of Mr Holmes including his report (Exhibit P190 par 11.3.4).

[521] Based on Mr Holmes' methodology I would make an award to Colleen Milatos for six years between 1996 and 2002 at $65,000 per annum which equals $390,000 less 15% for contingencies being $58,500, leaves $331,500 less the amount of $131,687 remuneration received equals $199,813. There is no evidence to support a claim for Colleen Milatos after she left Lake Bennett at the end of 2002.

[522] Mr Holmes did calculate a figure for the unpaid labour of Mr Milatos up to December 2006 as being $892,500 before tax. Mr Holmes noted in his report that Mr Milatos had totally diverted his energies into the Lake Bennett project and not received any remuneration from the Lake Bennett Trust in respect of his labours. This was calculated noting that Mr Milatos did receive remuneration from Australian Transportable Homes during the

relevant period and assumed that would have been otherwise received. He then calculated a figure on the basis that Mr Milatos would have earned not less than $100,000 per annum up to December 2006. He discounted this by 15% allowing for general contingencies.

[523] Based on these calculations, Mr Milatos could have earned $100,000 per annum from March 1996 to May 2002 (approximately six years) being $600,000 in addition to any earnings from Australian Transportable Homes. This is $600,000 less 15% for contingencies being $90,000, leaving a figure of $510,000.

[524] I have concluded that Mr Milatos is entitled to a claim for lost effort up till May 2002. From May 2002 he commenced receiving a salary as manager of the resort. Mr Milatos stated this was $41,000 plus superannuation. He has also been in receipt of benefits in his capacity as resort manager. These benefits include, a four wheel drive motor vehicle which is leased, mortgage payments on his residence at Lake Bennett, being Unit 57 and part payment of his fuel and telephone bills (tp 767). There is evidence George Milatos and his son worked on expanding the resort with financial assistance from Michael Milatos. He subsequently commenced receiving a builder's margin for building on the various parcels in Unit 200. He is subcontracted to build through his company San Industries. I make no allowance for wasted effort following his appointment as manager of the resort in May 2002. I have concluded that what he has received since May 2002 is better than he could have expected to receive in any other capacity.

(d) Lost opportunity to conduct business as builder/developer

[525] In *Malec v J.C. Hutton Pty Ltd* (1990) 169 CLR 638 at 643 per Deane, Gaudron and McHugh JJ:

> "… If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high — 99.9 per cent — or very low — 0.1 per cent. But unless the chance is so low as to be regarded as speculative — say less than 1 per cent — or so high as to be practically certain — say over 99 per cent — the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded. See *Mallett v McMonagle* [1970] AC 166 at 174; *Davies v Taylor* [1974] AC 207 at 212, 219; *McIntosh v Williams* [1979] 2 NSWLR 543 at 550–551. The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place."

[526] Brennan and Dawson JJ agreed with the majority judgment but consider it undesirable for "damages to be assessed on the footing of an evaluation expressed as a percentage".

[527] In *Sellars & Poseiden Ltd v Adelaide Petroleum NL & Ors* (1994) 179 CLR 332, the High Court considered a claim for damages for lost opportunity within the context of s 82(1) of the Trade Practices Act for a contravention of s 52 of the Trade Practices Act. Mason CJ, Dawson, Toohey and Gaudron JJ at 355-356 state:

> "… However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.
>
> The conclusion which we have reached on this question finds support in other considerations. The approach results in fair compensation whereas the all or nothing outcome produced by the civil standard of proof would result in the vast majority of cases in over-compensation or under-compensation to an applicant who has been deprived of a commercial opportunity. Furthermore, it is an approach which conforms to the long-standing practice of taking into account contingencies in the assessment of damages."

[528] There is evidence from a number of witnesses that the building industry in Darwin, particularly unit development, has been a profitable enterprise. Michael Milatos has given evidence (tp 1353) that he emerged from the liquidation of Milatos Constructions in about 1991/92 without any assets. He gave evidence he started doing small alterations on houses and small contracts and built up from there. He then gave evidence that his role as a developer over the years had returned more profit because he did the building himself. He stated that this meant there was no builder's margin. His evidence is that in the last seven to nine years in Darwin it has been very profitable to be a builder, that there has been an excessive amount of work especially in the unit market.

[529] Mr Stefan Koser gave evidence he is a building engineer. In 1987 he, in partnership, established a building company known as Norbuilt Pty Ltd

("Norbuilt"). He continued as a director of the company until 2001. He provided a list of the buildings with which Norbuilt had been involved, these included townhouses, units, shopping centres and office buildings the largest one being at 282 Casuarina Drive which involved 11 units. He gave evidence that overall during this period, Norbuilt made a profit.

[530] George Milatos himself has a long history in the building industry, including the skills necessary for building houses and units. This history has been detailed under the heading "History of George and Colleen Milatos prior to 1996" earlier in these reasons for judgment.

[531] City Developments, through the efforts of George and Colleen Milatos, was able to make a profit from the building and selling of cabins at Lake Bennett over a specific period of time. The report of Mark Lewis, (Exhibit D213) who is a chartered accountant, business adviser with particular expertise in tourism related projects and managing director of MLCS Corporate Pty Ltd, indicates that City Developments made a cumulative net profit from the condominium development on Section 244 up to the date of liquidation on 21 November 2002 of $772,000. There is evidence from the Australia Bureau of Statistics building activity surveys (Exhibit P206) that there was considerable building activity in Darwin between 1997/99, a downturn in such activity between 2000/02 and an increase again in the activity during 2003/04.

[532] Throughout his working life, both prior to the purchase of Lake Bennett and whilst at Lake Bennett, Mr Milatos has been involved in the building and construction industry. I accept that had he not taken up the Lake Bennett project he would have continued in partnership with his then wife in developing and building.

[533] This is confirmed by the fact that Mr Milatos has in fact continued building and is building on all 15 lots that constitute Unit 200 at Lake Bennett, receiving the construction profits and the opportunity of a share in the overall investment profit.

[534] It is also relevant to take into account the fact that Mr Milatos has had both financial success and failures during his history as a builder. Between the years of 1989/91, he was in difficult financial circumstances and spent a great deal of time attempting to raise money through loans to stave off insolvency. In 1989 he was forced to sell his own home. In 1991 his company, Milatos Constructions, went into liquidation. Between 1993-96 he conducted a business building transportable homes. The returns on this were reasonably modest. Table 2 on p13 of Mr Lewis' report (Exhibit D213) shows that between 1995/98 Australian Transportable Homes had a cumulative net profit. The company made a loss in 1999 reducing the amount of cumulative profit. There is evidence that during this time, Mr Milatos spec built two houses and a block of five units in a joint venture with two other persons. From the evidence provided by Mr Forwood (tp 2464), the venture made only a small profit.

[535] I accept the submission of Mr Reeves QC, counsel for the plaintiffs, that in assessing the value of the lost opportunity this Court has to assess fair and reasonable compensation to restore the plaintiffs to their pre-breach situation.

[536] The Court is greatly assisted in this process by the evidence of various experts.

[537] I will turn to consider what has been described as Loss of Opportunity - Option B. In support of this claim, Mr Milatos prepared Exhibits P16 and P17 as representing the way the plaintiffs say they would have acted had they not gone to Lake Bennett.

[538] Exhibits P16 and P17 evolved from earlier models which are no longer relied upon. The changes were effected following comments made by various experts called by the defendant. These comments highlighted the weaknesses in the earlier models which included matters that had, as Mr Maurice QC submitted, been understated, e.g. the constructions costs miscalculated or overlooked. I accept that the sales income in Appendix 14 is substantially over stated.

[539] In their written submissions, counsel for the defendant has included Appendix C which sets out the evolution of the plaintiffs' building program.

[540] I accept the evidence of Mr Milatos in that he now genuinely believes (tp 499) that if he had not gone to Lake Bennett he would have come back to

Darwin, assessed what blocks were available in the areas he would choose to be building and selling, proceeded to purchase such property and start planning to build units. However, I consider this evidence is in fact given with the benefit of hindsight and in anticipation of this litigation.

[541] The statement by George Milatos (tp 389) that he "would've simply gone back to another development whatever that might be, probably in Darwin", is not necessarily inconsistent with his evidence relating to assessing suitable land to purchase in the Darwin area and building units. Counsel for the defendant points to the evidence of Mr Milatos where he agreed that in 1996 he had no specific plans to go into residential development in Darwin. The defendant relies on such evidence as being sufficient to dispose of any lost opportunity claim based on Exhibits P16 and P17. At that time, being 1996, George and Colleen Milatos were enthused about the potential for development at Lake Bennett. It is quite consistent that they would not have been considering unit development in Darwin.

[542] I do take into account the fact that in 1996 the plaintiffs had no working capital and in fact had to borrow all of the money including loans from persons who not only had to be repaid, but were to be provided with a bungalow.

[543] The sale of unit 3/51 Stoddart Drive Bayview, on 28 February 1997, resulted in the sum of $84,130.65 being paid into a cheque account and $150,000 into a residential investment loan (Exhibit D35).

[544] On 16 October 1997, 39 Stoddart Drive Bayview was sold for $285,000 (Exhibit D32). A letter from the ANZ Bank to City Developments dated 16 October 1997 stated a total of $71,904.89 had been paid into cheque accounts of City Developments and Lake Bennett Wilderness Resort and that $201,578.37 had been applied to pay out a residential investment property loan (Exhibit D36).

[545] Enterprise House which was owned by George and Michael Milatos was sold for $285,000. By arrangement between the brothers, George Milatos was paid the full proceeds which was $263,000.

[546] Lot 6141 Gunbar Street, Bayview was sold on 17 March 1999 for $220,000. The net proceeds were $120,000. Even if the plaintiffs borrowed money against their equity in this property, the borrowing would have amounted to less than $100,000 in 1996.

[547] On this evidence, it is not clear exactly what amount of working capital would have been available to the plaintiffs to carry out the proposals in Exhibits P16 and P17.

[548] However, the evidence does not support a finding that the plaintiffs had a borrowing capacity of $700,000 as was assumed by Mr Holmes in the preparation of his report (Exhibit P190 p12).

[549] Mr Holmes assumed George and Colleen Milatos would have continued to own the Bayview properties to the present day and would not have sold them

to fund another project other than Lake Bennett. Mr Holmes agreed (tp 1867) this figure involved significant speculation.

[550] The plaintiffs need to prove, on the balance of probabilities, that they suffered the loss of a commercial opportunity i.e. to conduct the business of builders/developers in Darwin, which had some value, not a negligible value - see *Sellars & Poseiden Ltd v Adelaide Petroleum NL & Ors* (supra) at 354-355. With reference to this authority, I accept the submission of Mr Reeves QC, on behalf of the plaintiffs, that it is sufficient if the plaintiffs establish there was some prospect of success in the business of builders/developers in Darwin i.e. it was possible that business would be profitable, even if on the probability it would have been unprofitable. In both situations, the value of the lost opportunity is then ascertained by the degree of probabilities or possibilities - see also *Malec v J.C. Hutton Pty Ltd* (supra) at 639-640 per Brennan and Dawson JJ and at 642-643 per Deane, Gaudron and McHugh JJ. I accept that this is so for a claim for damages for breach of s 52 of the Trade Practices Act and s 42 of the Consumer Affairs and Fair Trading Act.

[551] In assessing the value of the lost opportunity, the financial experts, Mr Holmes forensic accountant for the plaintiffs, and Mr Lonergan a chartered accountant for the defendant and managing director of Lonergan Edwards and Associates Limited specialising in the provision of valuation services and related advice to clients, in a report dated 24 July 2006 (Exhibit D229 par 66), agree that the best approach is to value the opportunity as if it were a business for sale on the discounted cash flow method.

[552] In considering all of the evidence on this aspect, I do not accept that in the years 1996 to the time of the collapse of City Developments in 2002, Mr Milatos would have in fact contemplated a building program as he now puts forward in Exhibit P16 and Exhibit P17.

[553] Exhibit P16 is titled "Details of Representative Land Developments" 1996-2006. This then lists a series of development projects essentially building units or townhouses in Stuart Park, Larrakeyah, Darwin City, Fannie Bay, Cullen Bay, Bayview Haven and Palmerston that Mr Milatos considers he would have been involved with had he not purchased Lake Bennett. It is a hypothetical building program.

[554] Exhibit P17 is titled "Amended Details of Representative Land Development Projects Year from 1 July 2006 to 30 June 2007". This is a similar exercise undertaken by Mr Milatos in respect of a later period in time.

[555] It is relevant to note that Mr Milatos put forward in evidence four versions of his proposed building program. Exhibit D41 is titled "Model of Financial Outcome". This document was prepared for Mr Holmes when called by the plaintiffs to give evidence in support of their claim for damages. Exhibit D41 is a broadly costed program of building projects that Mr Milatos agreed were typical of the projects he would have undertaken had he not gone to Lake Bennett (tp 792-3). Although Exhibit D41 does not identify specific lots, it does include construction of commercial properties (workshops, offices, warehouses and retail shops) as well as houses and units. The other

models prepared in respect of the period 1996-2006 do not include commercial projects. Exhibit P17, for the period 2006/07, does include a warehouse project which is exactly the same as a project completed by Michael Milatos very profitably. Exhibit D41 also includes unit developments in Nightcliff. These proposals are not repeated in Exhibits P16 or P17.

[556] Appendix 2 titled "Opinions of G Milatos -Details of Business Model" was marked for identification MFI9. By agreement between the parties, this has become Exhibit D278. It is for the period September 1996 to June 2006. On 18 October 2005, Mr Milatos signed a statement. This statement included a substantially revised building program. This statement is attached to the report of Daniel Jones, a quantity surveyor from Rider Hunt (Exhibit P193). Appendix 2 differed from Exhibit D41 in that it provided more specific details in relation to each of the proposed lots.

[557] By August 2006 the defendant had served a number of expert reports responding variously to the building program and costings in Appendix 2 (Exhibit D278).

[558] The changes to Mr Milatos' building program in Appendix 2, were in response to a report dated 28 June 2006 of Bill Linkson, who is a valuer and co-director of Integrated Valuation Services (Exhibit P18). In this report Mr Linkson identifies a number of properties in Appendix 2 (Exhibit D278) where Mr Milatos had incorrectly estimated the number of units he would be

allowed to build on his chosen development site e.g. 149 Mitchell Street, Larrakeyah, 31 Coronation Drive, Stuart Park, 19 Hinkler Crescent, Fannie Bay, 3 Mangola Court, Larrakeyah, 47 Bayview Boulevard, Bayview Haven, 8 Voyager Street, Stuart Park, 12 Margaret Street, Stuart Park, 1 Michie Court, Bayview.

[559] In addition to this, Mr Linkson considered that Mr Milatos had overestimated the sales prices he would be able to achieve for many of the hypothetical projects, these include but are not limited to, 19 Stoddart Drive, Bayview, 2 Beagle Street, Larrakeyah, 4 Elsey Street, Parap, 7 Dinah Court, Stuart Park, 49 Bayview Boulevard, Bayview Haven, 9 Drysdale Street, Parap, 10 Tipperary Street, Stuart Park, 15 Dinah Court, Stuart Park, 1 Michie Court, Bayview.

[560] Mr Towell, who is a qualified quantity surveyor and director of Clive Towell & Associates Pty Ltd, prepared a report (Exhibit D233) dated 27 June 2006. In this report, Mr Towell is critical of the "letter of opinion" of Mr Milatos dated 30 March 2006. In particular, he asserts that Mr Milatos:

- made insufficient allowance for consultants fees;
- makes no allowance for council rates that would apply while the land was vacant and under construction;
- did not make proper allowance for the defects liability period;
- made insufficient allowance for contingencies;

- makes no allowance for the cost of common areas and stores relating to the larger developments;
- made insufficient allowance for external works,
- made no allowance for GST; and
- is critical of the proposed construction schedule on various grounds, including:
    - being unlikely to be achievable as a matter of logistics,
    - difficulty in obtaining subcontractors - shortage of tradesmen,
    - delay in obtaining supply and installation of lifts,
    - no allowance for the effect of the wet season.

[561] Mr Lonergan is also critical of the building program and costings in Appendix 2. Mr Lonergan prepared a report dated 24 July 2006 (Exhibit D227). This report commenced with an "Executive Summary" which reads as follows (pp4-5):

> "**Milatos Report**
>
> 9 The report prepared by Mr George Milatos, Property Developer dated 30 March 2006 (Milatos Report) estimates that financial betterment of the corporate entity conducting property development activities in the period September 1996 to 30 June 2006 to be some $20.728 million. However, the assessment of financial betterment contained in the Milatos Report is:
>
> (a) methodologically unsound
> (b) grossly overstated, and
> (c) incorrectly calculated.

10 My findings concern deficiencies and errors in the methodology and quantum of the economic loss assessment contained in the Milatos Report. Deficiencies and errors include:

(a) failure to consider or allow for mitigation

(b) incorrect calculation of the hypothetical development profits from the affected properties due to use of over optimistic Development Authority approvals (DAs) rather than actual/obtainable DAs

(c) incorrect calculation of the hypothetical profits due to over-estimation of sales revenue

(d) incorrect calculation of the hypothetical returns on property due to under-estimating costs

(e) incorrect calculation of the hypothetical profits due to failure to make any allowance for indirect costs

(f) failure to cross-check for reasonableness the quantum of the assessed loss claimed

(g) failure to allow for risk.

11 I have recalculated the Plaintiff's alleged economic loss adopting the expert evidence submitted by Integrated Valuation Services and Clive Towell & Associates and making other adjustments to Mr Milatos' calculations where necessary, adopting a consequential loss methodology.

12 Under this approach the Plaintiff's loss is nil.

13 My assessment of the Plaintiff's alleged economic loss is calculated by correcting the numerous errors in the Milatos Report and illustrates the inadequacies and unreliability of the economic loss assessment contained in the Milatos Report."

[562] Mr Lonergan then proceeds, in his report, to give details of what he refers to as "Deficiencies in the Milatos Report".

[563] I accept the evidence and the conclusions in the report prepared by Mr Towell and Mr Lonergan as being correct.

[564] In response to these reports Appendix 14 was prepared which is annexed to a report prepared by Paul Lassemillante, manager of Rider Hunt Quantity Surveyors, dated 14 August 2006 (Exhibit P172).

[565] Mr Lassemillante is of the opinion that the construction costs contained in Appendix 14 "are realistic and in line with our expectations." There are significant differences between the two documents prepared by Mr Milatos i.e. between Appendix 2 prepared in March 2006 and Appendix 14 prepared in August 2006.

[566] In response to Appendix 14, Mr Linkson compiled a further report dated 8 November 2006 (Exhibit D236). Mr Linkson made the following general observations in relation to Appendix 14:

> "1. **General Observations**
>
> 1.1 Mr Milatos has substantially revised his business model.
>
> 1.2 Mr Milatos, on a number of occasions, has accepted my values but then says, in a number of instances, that he would have constructed a larger number of units. In doing this, he has failed to appreciate planning and development complications and in particular I refer to the Darwin Town Plan 1990, as amended."

[567] Mr Linkson, in his report, expressed difficulties in providing an opinion of the likely valuation without expert opinion from a quantity surveyor or town planner as to the effects of the changes to the business model.

[568] On 21 November 2006, the plaintiffs tendered Exhibits P16 and P17. Exhibit P16 represented a hypothetical building program from 1996/2006 that again differed from Appendix 14. Exhibit P17 represented a

hypothetical building program for the 2006/07 financial year. The document which was referred to as "Reworked Appendix 14" was tendered as part of the report of Mr Holmes dated 28 November 2006 (Exhibit P190) and formed the basis of the calculations in Appendix E to this report. The plaintiffs only seek to rely on the model as expressed in Exhibits P16 and P17 and that all previous models are irrelevant.

[569] I do not accept that the hypothetical building program set out in any of the hypothetical models prepared by Mr Milatos represents what the plaintiffs would have done had they not gone to Lake Bennett in 1996. I do not accept the plaintiffs would have proceeded with the model proposed in Exhibits P16 and P17 if they had not gone to Lake Bennett. Rather, I have formed the view that the models have been prepared at a much later date, conscious of the pending litigation, and with the benefit of hindsight. The hypothetical model was then varied a number of times in an effort to meet the criticisms made by the defendant's experts, in particular Mr Towell and Mr Lonergan. The criticisms essentially highlighted the problems as being that Mr Milatos had overstated the amount he would have received from sales and understated the respective construction costs.

[570] I have come to the conclusion Mr Milatos would not have proceeded with Option B, had he not gone to Lake Bennett, for a number of reasons.

- Mr Milatos agreed he changed his mind after preparing the initial hypothetical models and deleted any reference to Nightcliff as an area of

construction, and that in Exhibit P16 he had deleted any reference to six workshops and offices in the Winnellie industrial area, as had appeared in his first model, and similarly, the retail shops in Palmerston were not carried forward to Exhibit P16. When asked (tp 795): "Is that because you decided that doing shops was a less profitable activity than building units and townhouses?" he replied "probably, yes".

- The various alterations to the hypothetical model appear to be in response to criticisms from the defendant's experts and to present his claim in a better light, rather than a true reflection of what he would have done in 1996 to 2006.

- I come to this last conclusion bearing in mind that it is a very difficult exercise to be asked some years later what your intentions would have been at an earlier point in time. Even allowing for this difficulty the evidence falls far short of satisfying me that Exhibits P16 and P17, or in fact any of the earlier hypothetical models, represented what would have occurred if Mr Milatos had not continued with the Lake Bennett development in 1996.

- It is instructive to have regard to Mr Milatos' more recent history in determining what he would have done in the future. Mr Milatos was, in 1996, the managing director of Australian Transportable Homes which specialised in building prefabricated homes on their premises at Berrimah, which could be transported and erected in remote communities.

This had been the main focus of his activities since 1994 and was very different to that contemplated in Exhibits P16 and P17 or any of the earlier hypothetical models. The proposed development at Lake Bennett fitted in with the purpose of Australian Transportable Homes. Australian Transportable Homes later became the contractor that supplied the accommodation for the Lake Bennett development (tp 786).

- As at 1996, Mr Milatos had not been involved as a developer, as distinct from a builder in large scale residential development. There is reference to his building in Charlotte Street, Fannie Bay in 1986/87. He had not built any units in 1989, 1990 or 1991. Between 1989 and 1996 George Milatos had constructed a block of five town houses and two houses. Two of these enterprises depended on the financial contribution from his partners.

- Prior to 1996, Mr Milatos had, for some time, been considering business opportunities to develop his transportable homes business by a recreational cabin development away from Darwin but in a place which would attract people from Darwin to come for the weekend. He became convinced there was a market for weekend cabins with waterfront access and that this presented a good opportunity for Australian Transportable Homes (tp 789-790). Prior to negotiating an option to purchase Lake Bennett, the plaintiffs had spent some time researching and investigating prospects for developing Manton Dam by constructing cabins similar to those they eventually did at Lake Bennett. The investigations the

plaintiffs carried out, with respect to Manton Dam, persuaded them that it was not a project they wanted to embark upon, essentially because of the numerous government regulations that had to be complied with.

- In 1989, Milatos Constructions collapsed. Prior to that time, Mr Milatos had undertaken projects of a commercial nature that were somewhat unusual. Examples of these were the building of the cinemas, skating rinks, bowling alleys, produce markets and the Phoenix Hotel. These were the projects which had particular appeal for him, rather than steadily building up an income from consistently constructing units, townhouses and houses over a ten year period.

- During his cross examination (tp 784 par 9) Mr Milatos gave evidence as follows:

> "Let me put this to you: that .... at no time in 1996 did you have any plans to go into residential development in Darwin on any sort of scale. What do you say about that?---I was invited by my brother to join him on a couple of projects, but I choose not to and I concentrated my efforts at Lake Bennett.
>
> When were you invited by your brother to join in a couple of projects?---Ninety-six/97.
>
> Which projects?---It was doing the projects in Stuart Park and in Cullen Bay.
>
> But I put to you this: that apart from those, you had no plans in 1996 to go into residential development in Darwin on any sort of scale? ---No specific plans, no."

- In April 2000, George Milatos had reason to have concerns about the future of the Lake Bennett project. In order to find alternatives he had

investigated the prospect of purchasing a service station called “Pit Stop Straight Car Centre” at Palmerston. This encompassed a service station, tyre company and autobarn. It certainly was not a residential development. Mr Milatos obtained an option to purchase this property and had architects prepare plans which are included as part of Exhibit D40.

- In his evidence, Mr Milatos stated that had they been prepared to extend the option to purchase the “Pit Stop Straight Car Centre”, he would have given it his “best shot”. He was asked (tp 799) “And this kind of project, that interested you at that time?---Yes.”

- As at 1996 the plaintiffs did not have the working capital to enable them to embark on a full scale residential program. They relied on loans from the vendor of Lake Bennett, other loans and subsequent sales of other properties to finance the development at Lake Bennett.

[571] There was very extensive evidence given by experts for the plaintiffs and the defence as to the opportunity represented in Exhibits P16 and P17. There is a complete difference of opinion between the experts as to the viability of the opportunity represented in Exhibits P16 and P17. As I have found that the plaintiffs would not have embarked on the program set out in Exhibits P16 and P17, it is probably unnecessary to analyse the conflicting evidence about the value of such lost opportunity.

[572] However, I have summarised some findings in that respect later in these reasons for judgment. I accept the evidence of Mr Lonergan that even on Mr Milatos' own figures in Exhibit P16 he would very quickly have been in financial difficulties to the point where he could not continue the program.

[573] Ironically what has in fact happened, is that Mr Milatos has better prospects for the future than he has had in the last 20 years. In essence, Mr Milatos may have an opportunity to buy back the Lake Bennett Resort from his brother Michael Milatos who has effectively saved George from complete financial ruin. I note however, that there is no legal or equitable obligation upon Michael and Pauline Milatos, through their company Lake Bennett Wilderness Resort Pty Ltd, to transfer the resort to George Milatos. George Milatos has, since May 2002, been working as the manager of the Lake Bennett Resort and continues to receive a salary for this employment and other benefits. I shall detail the evidence relating to Unit 200 at Lake Bennett under the heading "Option C". George Milatos has, since the purchase of Unit 200 by Michael Milatos, been constructing houses on various lots in Unit 200. He receives the profit returned from the construction of these houses and has the possibility of receiving a share of the profits received by Michael Milatos in the total investment in Unit 200.

[574] There is no evidence before the Court that Colleen Milatos has benefited in the same way.

[575] Finally, I would acknowledge the force of the argument presented by Mr Maurice QC on behalf of the defendant under what the defendant referred to as “Option C”.

Option C

[576] George Milatos was a director of Milatos Constructions and the person effectively running the company when it went into liquidation in 1992. The evidence reveals that Milatos Constructions had been in financial difficulties for sometime prior to liquidation and the reason for this is attributable to an inability on the part of George Milatos to manage debt and overextending his financial resources.

[577] Exhibit D152 contains correspondence between Mr Milatos and Tricontinental/State Bank of Victoria. In letter dated 3 December 1987 to George Milatos, Tricontinental set out the lease payment schedule for Harbour View Plaza which was the construction undertaken by Milatos Constructions. By letter dated 31 March 1988 from Tranquility Pty Ltd (“Tranquility”), a subsidiary company of Milatos Corporation Limited, to Tricontinental, Mr Milatos refers to liquidity problems for his company. Mr Milatos’ company was seriously overcommitted financially and required assistance. Tricontinental did offer assistance as is referred to in their letters dated 6 April 1988 and 11 April 1988 and Mr Milatos’ reply dated 8 April 1988. The various letters in Exhibit D152 demonstrate the period of time from 1987 to 1991 during which Mr Milatos’ company Tranquility was

having liquidity problems. This includes a file note dated 21 March 1988 referring to a meeting between George Milatos and his creditors and a personal statement of assets and liabilities dated 28 June 1990 showing there were insufficient assets to meet the liabilities. In this correspondence, Mr Milatos refers to problems with respect to the rental income from Harbour View Plaza which was the only asset of Tranquility (letters dated 7 September, 10 September and 11 October 1990). In letter dated 17 September 1990, Mr Milatos states, inter alia, the following two statements:

> "Explanations
>
> 1 Creditors are outstanding, and some for well over two years, primarily because of a construction overrun on the Harbour View Plaza, which was built at least 750 square meters larger than the building first planned when we approached Tricontinental for this funding.
>
> This came about because of an architectural change at the time it was felt that our allowance for $8.25 would cover this."

and later:

> "Future Projects
>
> For the last two years the Milatos Group has not under taken any projects, basically because unless we can solve the problems with our creditors and reduce debts, no finance company would be prepared to advance any money to the Milatos Group. Both Michael Milatos and myself have sold all personal assets (sic), including our personal houses, to reduce our exposure to Esanda Finance to a mere $100,000. Through this period, however, we have been working very hard on two very worthwhile projects which either of those projects will play a considerable roll in assisting us to pay off the State Bank of Victoria within three years."

See also letters dated 28 September 1990 and 10 October 1990 from George Milatos in Exhibit D152 and letter dated 10 October 1990 from the Hindmarsh Group regarding a default on the loan in respect of Enterprise House. Through this correspondence, Mr Milatos attempts to put the best gloss on his situation but he clearly had a problem managing debt and had overextended the Milatos Group of companies.

[578] There are aspects of the way Mr Milatos handled the financial arrangements for Lake Bennett that would support a finding that, although he may have great vision, enterprise and works extremely hard, he can be financially imprudent and financially naive. This is a quality which would have to be considered in respect of assessing his future prospects (see the report of Mr Lewis Exhibit D213). In the "Executive Summary" of Mr Lewis' report concerning the "Condominium Development - Section 244" he states (p2 par 3.4):

> "Profits from the condominium development fell well short of Milatos' expectations. His expectations were founded on inadequate costings, insufficient allowance for overheads and over-optimistic sales projections."

[579] With respect to Mr Lewis' comments about "The Resort Development - Section 245", they are equally damning. He states inter alia (p3):

> "4.9. The budget submission made by Milatos to the ANZ Bank in late 1996 or early 1997 massively underestimated the cost per room of the Resort development. The estimate was not supported by a quantity surveyor's report.

4.10. Milatos seriously over estimated the achievable occupancy rates and room charges for the Resort development. They did not seek expert advice on these matters, and such advice as they did obtain was seriously flawed.

4.11. The trustee did not obtain a feasibility study from [a] competent person before commencing the development. Had it done so, the study would have shown the development was not commercially viable.

4.12. The Milatoses did not have the knowledge or experience themselves [to] conduct a feasibility study into the commercial viability of the proposed resort development. There is no evidence that they carried out the necessary research. The business plan they produced in late 1996 or early 1997 was quite inadequate."

[580] This opinion is supported by the opinion of Mr Lonergan (Exhibits D227, D228 and D229). Mr Lonergan was also highly critical of the way in which Mr Milatos approached the task of financial planning for development projects. I have already quoted the "Executive Summary" in Mr Lonergan's report dated 24 July 2006 at [561] in these reasons for judgment. Mr Lewis' further reports confirm the concerns he has raised and makes similar comments with respect to Mr Milatos' later attempts at presenting a hypothetical model of future opportunities by amending his earlier models.

[581] I accept the evidence given by Mr Lewis and Mr Lonergan concerning Mr Milatos' difficulties with financial planning. Essentially, Mr Milatos has consistently understated costs and overstated profits, he has overextended his companies financially and had difficulty managing debt.

[582] The defendant also claims an offset with respect to Unit 200 at Lake Bennett. Unit 200 was an area owned by City Developments on the eastern

foreshore of Lake Bennett that remained able to be developed following the passage of the Lake Bennett (Land Title) Act, s 21 and Schedule 6.

[583] In June 2006, the liquidator of City Developments, with the authority of the creditors, sold Unit 200 to M & P, a company of which Michael Milatos is a director and shareholder. The purchase price was $260,000. The settlement sheet (Exhibit D264) shows that with adjustments, $294,327.36 was received. M & P also agreed to pay $50,000 two years later (Exhibit D212) - Unit 200 was subdivided into 15 lots.

[584] Michael Milatos gave evidence in March 2007 that 14 of the 15 lots had sold and that the land component of the ones that had sold will net M & P close to $1 million which is approximately triple the money he paid for it.

[585] San Industries Pty Ltd ("San Industries") is a company of which George Milatos is the sole shareholder. Michael Milatos gave evidence (tp 1477) that at the time of purchasing Unit 200 it was George Milatos and his solicitor Geoff James who negotiated with the ANZ Bank and with the liquidator in relation to the purchase. He gave evidence that it was George who looked after all the planning approval and titling processes in relation to the development of the land. It was George who was responsible for the design of the units that were to be constructed on the land. George Milatos engaged the architectural draftsperson and paid for his services, arranged for the engineering services that needed to be done for the development of the

building. George also handled the sales by engaging Kristen's Conveyancing Services through his company San Industries.

[586] Mr Maurice QC, on behalf of the defendant, submits that there is an arrangement between George and Michael Milatos by which George will benefit from the unit development currently being undertaken at Unit 200 at Lake Bennett. The submission for the defendant is that neither George or Michael Milatos have given a candid account of the arrangement between them. The submission for the defence is that the value of the benefit to George Milatos will total $1,125,000 made up as follows:

1) construction profit on 15 units at $15,000 per unit - $225,000;
2) profit on the sale of 15 land parcels at an average of $100,000 is $1,500,000 minus cost of acquisition $300,000 minus allowance on account of Michael Milatos tripling his money $300,000 to $900,000; and
3) totalling $1,125,000.

[587] Under cross examination from Mr Grant QC, George Milatos stated that for him the arrangement he had with his brother Michael was not unusual. Counsel for the defendant is critical of the evidence given by George Milatos in a number of respects. It is argued on behalf of the defendant that George and Michael Milatos were not forthcoming about the actual arrangement between them, with respect to Unit 200. The case for the defence is that George Milatos understated his involvement with respect to

the whole development, that it was not till his cross examination that George mentioned his involvement with the project was through his company San Industries and the subcontracting arrangements between it and M & P.

[588] It was further submitted, on behalf of the defence, that George Milatos had not been honest in his evidence about the way in which Unit 200 was acquired or the arrangement with his brother concerning the profits and had generally obfuscated about how the proceeds were to be shared. Similarly, counsel for the defendant criticises the evidence of Michael Milatos and pointed to a number of aspects of his evidence which the defence maintain demonstrates his arrangement with George did not entitle Michael to all the sales profits. Reference was made to the evidence of Michael Milatos (tp 1465) when he said he had paid $900,000 to San Industries in response to a question about payments to San Industries for the construction that had taken place. When asked about a series of cheque butts relating to payments to San Industries amounting to $600,000, Michael said he was also including the land content which was worth $300,000. Counsel for the defence assert this betrayed Michael Milatos' state of mind which was that $300,000 for the land content had been advanced to San Industries. Reference was also made to the number of times Michael Milatos used the word "we", for example, when he explained he had only a verbal contract with his brother George who was to build houses on the land purchased by M & P and gave the following answer (tp 1399-1400):

> "Only a verbal contract? When was that contract entered into Michael Milatos?---When we purchased - when I purchased the land it was …"

[589] It is the submission for the defendant that this last slip in particular is strong evidence Michael Milatos regarded himself and his brother George as co-adventurers in the purchase of the land.

[590] Counsel for the defendant also points to the initial evidence given by Michael Milatos in that he did not mention at that time his brother had approached him for a loan to purchase Unit 200 and only did this when it was put to him in cross examination. Michael Milatos gave evidence that he wanted to double his money on his investment in purchasing Unit 200 and that he had told George Milatos this. It is the submission for the defendant that the Court should not believe there had not been a further arrangement between the brothers for George to share in the profits.

[591] I do not accept that I should place the sinister connotations on the evidence of George and Michael Milatos as urged by counsel for the defence. I found George and Michael Milatos to be credible witnesses on this aspect. I did not consider either of them to be evasive or attempting to obfuscate. I accept the evidence each has given on this issue. I accept it is normal for them to do business with each other by way of verbal agreement. Michael Milatos went to considerable lengths to assist his brother George, however, he was always financially astute enough to ensure that he also was able to derive a benefit from the arrangement.

[592] I find that Michael Milatos, through his company M & P, purchased Unit 200 after having it drawn to his attention by his brother George that the ANZ Bank wanted City Developments (in liquidation) to sell Unit 200. He purchased it to provide work for George Milatos and George's son Nicholas, both of whom are builders. Michael Milatos was not prepared to loan the money to George to buy Unit 200. He was prepared to purchase the property himself. He and George Milatos then entered into a verbal agreement under which George was to effectively have total management of the building of units on 15 lots. Payments to George Milatos were limited to the construction and the builder's margin on units built. There was no agreement between them about sharing any excess profits although Michael Milatos indicated in his evidence that is something he would consider at a later time.

[593] In view of the relationship between George and Michael Milatos, and the way Michael has continued to assist his brother, I have concluded that in all probability, Michael will provide George with support to continue his vision for Lake Bennett whilst also providing financial guidance and restraint.

[594] I have concluded that his present occupation, which enables George Milatos to do what he does best, namely, building and running the resort at Lake Bennett but under the financial guidance of his brother, is his best opportunity for the future and may enable him to achieve his dream of developing Lake Bennett into a first class resort. He currently receives a salary and other benefits for running the resort. He receives a fee for

constructing cabins on Unit 200 owned by Michael Milatos. He has future prospects of regaining the Lake Bennett property. George Milatos is not burdened with having to manage a debt as the property is owned by his brother Michael. The combination of the legislation being the Lake Bennett (Land Title) Act, that is now in force, and the assistance given by Michael, have put George into a better position than he could have achieved by any attempt to pursue alternative options.

[595] I make no allowance for the lost opportunity claim.

(e) Loss of reputation and credit standing

[596] The plaintiffs' claim damages because they assert they suffered significant loss to their reputations and credit standing as a result of the failure of the Lake Bennett project and the liquidation of City Developments.

[597] George Milatos gave evidence that he attempted to obtain finance to purchase Unit 200 of Lake Bennett in 2005. He was not successful. He stated in his evidence (tp 545) that he had approached the National Australia Bank, the Bank of South Australia and the Commonwealth Bank. It is his evidence that until the litigation was completed and his name was cleared they did not want to do business with him. Eventually his brother Michael raised the money to purchase the land. George Milatos had, prior to the liquidation of City Developments, been able to raise a considerable amount of finance from the ANZ Bank and Esanda for the Lake Bennett project.

[598] The defendant maintains that the liquidation of City Developments was caused by the imprudent financial risks taken by Mr Milatos and does not relate to the conduct of the defendant.

[599] I have previously dealt with this issue.

[600] The fact is, George Milatos has achieved the purchase of Unit 200 through his brother Michael and has been building and expanding the resort at Lake Bennett through his company San Industries. He has been able to do this without the financial burden of the repayment of a loan and has been able to earn an income. There is no evidence he has been impeded in his business activities. I would not award damages on the basis that he has had difficulties in obtaining credit.

[601] With respect to the claim for damage to reputation, there has been no evidence called that any persons think less of George Milatos or that his standing in the community has been lessened as a consequence of the Lake Bennett saga. Mr Matthewson, who is a director of a number of corporations, gave evidence. Mr Matthewson served as Deputy Chairman of the Darwin Port Authority for eight years and Deputy Chairman of the Trade Development Zone Authority for 18 years and Chairman for two years. He is currently the Director of Independent Building Products and FM Importers Pty Ltd. He has known Mr Milatos since 1974, including a period when he was in partnership with Mr Milatos in Territory Timber and Hardware. Mr Matthewson gave evidence he found Mr Milatos “very hard

working, honest, entrepreneurial, a man of integrity and he didn't know the meaning of the word failure. He was a very consistent and hard working person." Mr Matthewson was a creditor and attended the creditor's meeting relating to Mr Milatos' involvement with the Harbour View Plaza.

Mr Matthewson gave evidence concerning the creditor's meeting. He was then asked and responded as follows (tp 1752):

> "Have you heard - don't tell me what you've heard, but have you ever heard other business suppliers speak badly of George's business reputation?---I can't say that I have. Not to me anyhow."

[602] I am not satisfied that the claim for damages for loss of reputation has been substantiated.

[603] Colleen Milatos gave evidence that it was not until the opening day of this trial that she understood just what the easements at Lake Bennett meant. She gave evidence about her concerns that because of her lack of understanding about the effect of the easements she had given incorrect advice to some of the cabin owners. There is no evidence any of these persons thought less of her because of this. There is no evidence that any of the persons she referred to who opposed the development at Lake Bennett had any reaction other than some evidence that some persons had a general antipathy to development at Lake Bennett. This does not translate to a loss of her good reputation.

[604] During her time at Lake Bennett, Colleen Milatos, as she was then, won a number of significant awards which were a tribute to her hard work and

enterprise. Clearly she was highly regarded for her achievements. There is no evidence that anyone thought less of her because of the financial collapse of City Developments. Accordingly, this claim for damages for loss of reputation is not substantiated.

(f) The ANZ Debt

[605] The plaintiffs seek the following orders (par 47 plaintiffs' written submissions):

> "The plaintiffs seek orders that the ANZ Bank debt either be paid to them on condition that they pay it to the ANZ Bank, or be paid directly to the liquidator, for payment to the ANZ Bank, on three bases:
>
> a. To discharge the debts of CD so that it may be removed from liquidation and thereby restored to its former position (see above);
>
> b. To assist to restore their damaged reputation and credit standing (see above); and
>
> c. To compensate them for the obligation they had to meet, originally as guarantors of the various loans CD obtained from Esanda and ANZ Bank, which were eventually consolidated into one debt, and more recently, as parties to the deed that replaced their obligations as guarantors."

[606] The amount of the ANZ Bank debt as of 12 March 2007 was $2,970,636.76 inclusive of accumulated interest to that date. From 12 March 2007, interest will continue to accrue at the daily rate of $862.71 (Exhibit P210).

[607] The defendant argues that the debt to the ANZ Bank no longer exists. Reference was made to the settlement statement for the sale of Unit 200 (Exhibit D 264). This shows a purchase price of $260,000 plus GST. The

settlement statement (Exhibit D264) shows the amount of $149,012.96 was paid to the ANZ Bank to discharge mortgage 374594. Mr Maurice QC, on behalf of the defendant, referred to the minutes of the meeting of joint creditors and contributories of City Developments dated 28 March 2006 (Exhibit D212). These minutes record that the liquidator, Geoffrey Finch, held a proxy from the ANZ Bank. The minutes note the Chairman, Geoffrey Finch, presented the liquidator's report dated 14 February 2006 which document is attached to the minutes and is part of Exhibit D212. This report states in par 3:

> "The ANZ Bank has requested that the company's Lake Bennett land be sold to Mr Michael Milatos for $260,000 + GST.
>
> On 27 January 2006, the ANZ Bank further advised that:
>
> - The Liquidator proceed with the sale of the Lake Bennett land as the sale proceeds would be used to pay Nazime Pty Ltd an amount of $100,000, Nazime Pty Ltd have a deed of priority from the ANZ Bank for this amount, and the balance to the ANZ Bank under their current security charges after the payment of usual conveyancing costs not exceeding $1,000.
>
> - The ANZ Bank claims against the company are in excess of $1.5 million and no further claim will be made in the liquidation after the net sale proceeds from the Lake Bennett sale are received.
>
> - ANZ Bank considers that the sale of Lake Bennett land by the Liquidator will maximise the benefit to creditors and contributories.
>
> On 6 February 2006, the Liquidator received the following offer to purchase the Lake Bennett land from M & P Pty Ltd, a Michael Milatos company, subject to a formal contract that is drawn and signed:
>
> - The purchase price is $260,000 + GST.

- The purchaser will deal with all further obligation and compliance of the development permit.
- Michael Milatos will surrender any claim against the company.
- M & P Pty Ltd will pay a further $50,000 within 2 years towards the costs of the winding up or for distribution to the unsecured creditors.

The Liquidator has power (subsection 477(2)(c) of the Corporation Act) to sell or otherwise dispose of, in any manner, all or any part of the property of the company. The exercise of Liquidator's powers is subject to the control of the Court, and any creditor and contributory, or ASIC, may apply to the Court with respect to any exercise or proposed exercise of any power.

The Liquidator wishes to determine the extent that any creditor or contributory has any objection to the Liquidator exercising his power to sell the Lake Bennett land to M & P Pty Ltd."

[608] The minutes of the creditors meeting dated 28 March 2006 records at the conclusion of the section titled "Liquidator's Report":

> "Unanimously resolved that the Liquidators proceed to accept the offer from M & P Pty Ltd based on the letter of offer dated 8/02/2006."

I note that the date in the minutes of meeting, is a different date to that mentioned in the liquidators report which states the date to be 6 February 2006. The letter from Michael Milatos, as director of M & P, is Exhibit D166. It refers to Unit 200, Section 1252 Chinner Road, Lake Bennett. It is dated 6 February 2006.

[609] The defendant relies on the following statement in the report to creditors;

"The ANZ Bank claims against the company are in excess of $1.5 million and no further claim will be made in the liquidation after the net sale

proceeds from the Lake Bennett sale are received" to mean that the ANZ Bank has foregone its legal right to recover the balance of its debt from City Developments.

[610] It is the argument for the defendant that the report amounts to a representation by the ANZ Bank that it will not prove further in the liquidation if M & P's offer is accepted and the sale to that company proceeds to a settlement. It is argued for the defendant that accordingly it also amounts to an offer by the ANZ Bank to City Developments to not prove further in liquidation if the offer is accepted and the sale proceeds to settlement.

[611] The settlement sheet (Exhibit D264) shows the offer was accepted and the sale of Unit 200 to M & P proceeded on 21 June 2006 with a discharge of mortgage to the ANZ Bank.

[612] The defendant's position is that the ANZ Bank has received the consideration it sought in exchange for its promise to make no further claim in liquidation after receipt of the proceeds from the Lake Bennett sale and that this promise is binding on the ANZ Bank.

[613] On 14 October 2002, a deed of release was executed by the ANZ Bank, City Developments, the plaintiffs, Michael and Pauline Milatos and Lake Bennett Wilderness Resort Pty Ltd (Exhibit P12).

[614] This deed of release provided that upon certain conditions being fulfilled, the ANZ Bank would release the plaintiffs from their personal guarantees for the debt incurred by City Developments to the ANZ Bank. It was a term of the deed of release as follows:

> "2.2 In consideration of ANZ releasing C&G [Colleen and George Milatos] from the Guarantees and for the other consideration expressed herein including but not limited to forbearance to sue, City [City Developments], Resort [Lake Bennett Wilderness Resort Pty Ltd], C&G and M&P [Michael and Pauline Milatos] hereby covenant and agree as follows:
>
> 2.2.1 City and G&C (sic) undertake to use their best efforts and endeavours to establish a cause of action and to pursue such legal action against the Northern Territory of Australia (and any of its departments or authorities), Clayton Utz or any other party whatsoever in respect of or arising out the Lake Bennett development/Project;
>
> 2.2.2 City and G&C (sic) agree and undertake to keep ANZ fully informed as to the progress of all claims and litigation involved by them against the parties referred to in Clause 2.2.1.
>
> 2.2.3 In the event of City and/or C&G recovering any money after legal expenses whatsoever from or as a result of or pursuant to any claim, demand or action it makes or takes against the parties referred to in Clause 2.2.1, they shall forthwith upon receipt of such moneys, pay ANZ the whole of the ANZ Debt, or if the amount collected is less than the ANZ Debt, then they shall pay to ANZ 60% of the moneys collected by them.
>
> 2.2.4 City and G&C (sic) shall use their best efforts and endeavours to ensure that the application and proceedings to wind up City are stopped and withdrawn from the Courts."

[615] There was a further agreement as follows at Clause 2.4:

> "2.4 The parties hereto all further covenant, agree and acknowledge that nothing in this Deed shall be construed or deemed to:

2.4.1 be an admission of liability by ANZ;

2.4.2 constitute a release or forgiveness of the ANZ Debt, which debt continues to be owing in its totality; or

2.4.3 affect all the other securities held by the ANZ (apart from the Guarantees) which continue to be valid, binding and enforceable securities."

[616] On 15 October 2002, the ANZ Bank wrote letters to Colleen and George Milatos advising them that payments having been made in accordance with the executed Deed of Release dated 14 October 2002, they were released from all further liability under the guarantees they had given on 4 November 1996 in favour of City Developments (Exhibit D42).

[617] In his evidence under cross examination, Mr Milatos agreed (tp 799-800 and 1085) that he and his former wife had been released from their personal guarantees by the ANZ Bank on condition they pursue legal action against the Northern Territory and Clayton Utz.

[618] Mr Maurice QC submits that the result of the Deed of Release and the letters of release, is that the plaintiffs are no longer guarantors of City Developments' liability to the ANZ Bank and cannot recover damages as if they were. The argument for the defendant is that the only obligations the plaintiffs now have to the ANZ Bank are those defined by the Deed of Release. Counsel for the defendant did acknowledge the provisions of Clause 2.4.2 of the Deed of Release.

[619] With respect to the Deed of Release, the argument on behalf of the defendant is that the cause of action referred to in Clause 2.2.1 is a cause of

action by City Developments, not any cause the plaintiffs might have - see also Clause 2.2.3. The submission for the defendant is that the use of the impersonal pronoun "it" gives further support to their interpretation that it is a cause of action by City Developments. Mr Maurice QC submits that it is highly unlikely, at the time the Deed of Release was entered into, that the ANZ Bank would have contemplated the plaintiffs would have pursued a cause of action, as opposed to the company with whom all the loan arrangements had been made and which carried out the development.

[620] It is the case for the defendant that the proceedings before this Court are brought solely to recover the damages for losses sustained by the plaintiffs in their own right and, as a result of the Deed of Release, cannot include the ANZ Bank debt. On this basis the defendant argued that clause 2.2.3 does not apply to money received in these proceedings, it only applies in respect of monies recovered as a result of claims, demands or causes of action taken by City Developments.

[621] Finally, it is the defendant's position that even if the ANZ Bank debt still exists, and the plaintiffs are responsible for paying it, the debt cannot be recovered from the defendant because the debt was not caused by the defendant's conduct. The defendant maintains the ANZ Bank debt was incurred to fund the development and operation of the resort which, for purely commercial reasons unrelated to any conduct of the defendant, failed. In addition the defendant's claim that the debt was not incurred in relation

to the cabin development; that development was a success and increased the wealth of the company by $772,000.

[622] I am not persuaded the ANZ Bank debt no longer exists as against the plaintiffs, for the following reasons:

- Mr Reginald Harrison is an associate director with the ANZ Bank in its division known as Property and Construction Finance, at 530 Collins Street, Melbourne. Mr Harrison has deposed in an affidavit sworn 16 March 2007 (Exhibit P210) that in the years 1996 to 2001, the ANZ Bank made a series of loans to City Developments. In his affidavit he states the company has not repaid the balance of the aggregate loan and the ANZ Bank has, at all times since the advance of the loan, levied and charged interest on the loan which is accruing monthly.

- In par 9 of his affidavit, Mr Harrison states that as at 12 March 2007, the principal sum of the balance and the accumulated interest levied and charged on that principal sum was $2,970,636.76. A copy of the spread sheet being the ANZ Bank's record of the company's four loan accounts is annexed to the affidavit.

- In par 10 of his affidavit, Mr Harrison states that from 12 March 2007 interest will continue to accrue on the balance outstanding at the daily rate of $862.71 per day calculated at the rate of the ANZ Bank's reference rate plus a margin of 1.5%.

- Mr Harrison further deposes to the fact that the debts referred to in his affidavit, were the subject of a written agreement between the ANZ Bank and George and Colleen Milatos made on 14 October 2002. A copy of this deed, details of which have already been referred to, is annexed to the affidavit of Mr Harrison.

- Mr Harrison gave evidence (tp 2145) that there had been no agreement by the ANZ Bank to forgive the debt in early 2006 or since then. He confirmed that the debt exists as per his proof in the affidavit.

- In Clause 2.4.2 of the Deed of Release (Exhibit P12) the debt is confirmed. See also clause 5 of the Deed of Release (Exhibit P12).

[623] I agree with the submission made by Mr Reeves QC on behalf of the plaintiffs, that the debt could not be varied by an "offer" made in a report from the liquidator to the creditors and not confirmed in writing and signed by the ANZ Bank and the plaintiffs. I also accept the submission made on behalf of the plaintiffs that the ANZ Bank gave a proxy to the liquidator to vote on behalf of the ANZ Bank creditors at the meeting. It did not extend to authorising Mr Finch to enter into some agreement on its behalf.

[624] The defendant did not call Mr Finch, the liquidator who is the person the defendant maintains was instrumental in making this agreement on behalf of the ANZ Bank, to give evidence. There was no evidence that Mr Finch was not available to give evidence. This must give rise to an inference that

Mr Finch would not have assisted the defendant's case on this aspect - *Jones v Dunkel* (supra).

[625] I accept that the plaintiffs have been released from their personal guarantees with respect to the loan to City Developments. However, under the Deed of Release (Exhibit P12) they still have obligations to the ANZ Bank to pursue the ANZ Bank's debt in these proceedings.

[626] I do not read the clauses in par 2 of the Deed of Release with the narrow interpretation given to it by the defendant, i.e. that it was only ever contemplated that it would be City Developments who would pursue a cause of action. The clauses are drawn in very broad terms to encompass a number of possibilities as to who would pursue the action and who would be the defendant. It is not confined to City Developments being the only entity to pursue a cause of action.

[627] I have construed clause 2.2.3 as placing an obligation on both the plaintiffs and City Developments.

[628] I agree with the submission made by Mr Reeves QC that the defendant's obligation to the plaintiffs is to pay the amount of the debt as ordered by the Court. Thereafter the Court should leave it to the plaintiffs, and the ANZ Bank, to determine how the clause operates.

[629] There is no evidence before me as to whether or not there was any negligence on the part of the legal advisers to the ANZ Bank. It does, on

the face of it, appear somewhat amazing that the ANZ Bank would lend such substantial sums of money for the purpose of building and developing on land that was subject to recreational easements. However that is not a matter that requires resolution in these proceedings.

[630] I reject the argument on behalf of the defendant that the ANZ Bank debt was not caused by the defendant. It is a direct result of the plaintiffs' decision to commence building and to purchase the land, based on the defendant's breach.

[631] I would allow the claim made by the plaintiffs in respect of the debt to the ANZ Bank.

[632] It is the submission by Mr Maurice QC on behalf of the defendant, that the ANZ Bank debt is entirely offset by the plaintiffs equitable interest in the resort. There is no evidence the plaintiffs have an equitable interest in the resort. There is a private agreement between George and Michael Milatos that George may be able to purchase the Lake Bennett property from his brother Michael, provided George paid Michael what Michael had spent on it. This does not create any interests at law or in equity.

[633] Michael Milatos stated in evidence (tp 1487) that he had told George Milatos that due to the fact he had to borrow 100% on the resort, that if the matter did not clear within a reasonable time he would have to put the resort on the market and attempt to sell it. The private arrangement between the brothers that George Milatos can buy the resort back if he pays his brother

the amount Michael Milatos has spent on it, does not give rise to an agreement because there is no consideration passing and no intention to create legal relations. Neither does it give rise to a trust because there has been no declaration of trust in writing - see The Law of Property Act 2000 (NT) s 10(1)(b). There is no evidence of an equitable interest because it has not been established that either of the plaintiffs have acted to their detriment based upon the arrangement.

[634] There is in any event no evidence of the value of the equitable interest even if it did exist.

[635] I have concluded that the plaintiffs are entitled to recover City Developments debt to the ANZ Bank.

(g) Debts of the Unsecured Creditors

[636] The total amount of the unsecured creditors of City Developments amount to $324,909.80 excluding the plaintiffs' loans and the fees claimed by Clayton Utz. The summary of creditors dated 13 March 2007 is Exhibit P200. The amount stated on Exhibit P200 is further reduced by $100,000 being the debt to Nazime that was repaid by the ANZ Bank from the proceeds of sale of Unit 200 in June 2006.

[637] Mr Reeves QC, counsel for the plaintiffs, seeks an order that this amount be paid to the plaintiffs on condition they pay it to the liquidator or be paid

directly to the liquidator for payment to the unsecured creditors on three bases:

> "a. To discharge the debts of CD so that it may be removed from liquidation and thereby restored to its former position (see above);
>
> b. To assist to restore their damaged reputation and credit standing (see above); and
>
> c. To allow them to meet the moral obligation they feel as the principles behind CD to meet the debts of those creditors".

Mr Milatos gave evidence he felt a moral obligation to pay these creditors.

[638] I agree with the submission made by Mr Maurice QC for the defendant that the plaintiffs have not put forward any authority for the proposition that a shareholder or director of an insolvent company is entitled to obtain an order against a third person, whose conduct has caused or contributed to the company's insolvency requiring that person to pay the debts of the company whether on the basis of a perceived "moral" duty or not. There are other procedures that can be pursued by the company.

[639] I am not persuaded the plaintiffs have a sustainable claim for these debts of unsecured creditors of City Developments.

(h) Liquidators Fees

[640] The plaintiffs claim the total remuneration payable to the liquidator in the sum of $61,690. This also is a debt payable out of the assets of City

Developments. For the same reasons applicable to the claim for unsecured creditors, I would not allow this claim.

(i) Fees paid to Clayton Utz

[641] I agree with the submission made by Mr Maurice QC on behalf of the defendant, that these fees were payable by City Developments and involved disbursements and fees in respect of conveyancing work done on the sale of various units as well as the advice given with respect to the purchase of Section 152 at Lake Bennett. It would not be appropriate for the defendant to pursue a claim for costs relevant to the purchase of Section 152 Lake Bennett or relevant to the issue of the easements. I agree it is a matter for the liquidator to decide how much of this account is an enforceable debt against the company. It is not appropriate for this Court to make the orders sought by the plaintiffs.

(j) Pre-judgment interest on various awards

[642] I accept the principle that the plaintiffs are entitled to pre-judgment interest calculated at ordinary commercial rates. Section 84(1) of the Supreme Court Act 1979 (NT) reads as follows:

> "In any proceeding in respect of a cause of action that arises after the commencement of this Act the Court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

[643] I agree with the submission made by Mr Maurice QC that the only real evidence on this issue is that given by Mr Lonergan in Annexure "N" to his report (Exhibit D227). Annexure "N" is the Reserve Bank of Australia - Retail Deposit and Investment Rates between September 1996 to June 2006, as well as the Australian Bureau of Statistics data relating to interest rates for cash management trusts in that period.

[644] In *Jones v South British Insurance Co Ltd* (1984) 53 ALR 408, the Federal Court of Australia was considering an appeal from the Supreme Court of the Northern Territory in relation to the rate of interest applied to an award for damages. The Court was considering the provision of the Supreme Court Act prior to s 84 and held that it was nevertheless an indication of the legislatures intention that the rate of interest should not be constrained by the rate fixed for judgment debts.

[645] It was held by the Court that the interest awarded should have been calculated at a prevailing commercial rate, rather than at a rate which merely bore some relation to a commercial rate. At the date of the decision, which was 13 April 1984, it was held that 8% was less than the commercial rate of interest applicable at the time. The Court of Appeal substituted interest on the award of damages in the amount of 10% for the first period and 12% for the subsequent period.

[646] In the matter before this Court, and relying on the evidence of Mr Lonergan (Exhibit D227), I would accept the appropriate commercial rate for the period should be 5.6%.

[647] I note that in the recent decision of *Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor* [2006] NTSC 4, Mildren J accepted an amount of 5.64% in respect of pre-judgment interest for a similar period.

[648] For these reasons I would make an order for pre-judgment interest at the rate of 5.6%.

(k) Exemplary Damages

[649] The plaintiffs claim exemplary damages for what it terms the defendant's wrongful and reprehensible conduct through the period since 1998, including conduct of these proceedings. It is submitted on behalf of the plaintiffs that it will deter others from similar conduct in the future and will ameliorate the sense of outrage held by the plaintiffs.

[650] The plaintiffs did not include a claim for exemplary damages in their Amended Statement of Claim. Order 13.07(3) of the Supreme Court Rules 1987 (NT) provides as follows:

> "(3) A claim for exemplary damages shall be specifically pleaded together with the facts on which the party pleading relies."

[651] There has been no application made to further amend the Statement of Claim and any such application at this time would be unlikely to succeed.

[652] The defendant did not conduct its case on the basis of any claim for exemplary damages.

[653] In *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, the NSW Court of Appeal was asked to consider a claim for exemplary damages for breach of fiduciary duty. The judge at first instance had awarded exemplary damages in favour of an employer against an employee who breached an express term of his employment contract by secretly working for the benefit of his own business in competition with his employer.

[654] This award was overturned by the majority of the Court of Appeal on the grounds that the NSW Supreme Court had no power to make a punitive monetary award for breach of fiduciary duty where that duty arises in the context of a contractual relationship. In the course of his judgment, Heydon JA further stated at [470] that:

> "… There is no power in the law of New South Wales to award exemplary damages for equitable wrongs ….."

[655] Exemplary damages are not available for a breach of s 52 of the Trade Practices Act, *Marks and Ors v GIO Australia Holdings Limited and Ors* (1998) 196 CLR 494 Gaudron J at [9]:

> "Before turning to the argument, it is convenient to note two matters which are clear from the terms of ss 82 and 87. The first is that for a person to obtain relief under those sections he or she must have suffered loss or damage or, in the case of s 87, be likely to suffer loss or damage. The second is that there is no punitive aspect to these provisions, they being concerned solely to provide for recovery of

> "the amount of the loss or damage [suffered]" (s 82) or to "compensate" for or "prevent or reduce" loss or damage: s 87."

[656] Accordingly, I do not propose to make an award for exemplary damages.

Taxation issues

[657] The plaintiffs submit that they are entitled to be compensated for any additional income tax or Capital Gains Tax assessed.

[658] The plaintiffs acknowledge in their submissions that it is unclear at this time what, if any, components of the plaintiffs' award may be subject to additional income tax, or additional Capital Gains Tax, what amount of that additional taxation will be and in whose hands it will be taxable.

[659] The plaintiffs seek a declaration that the defendant indemnify the plaintiffs for any additional income tax or Capital Gains Tax assessed on the award and any legal costs, on a solicitor and own client basis, associated with the determination of the additional taxation - see *Rabelais Pty Ltd v Cameron & Ors* (1995) 95 ATC 4552.

[660] Hodgson J in *Rabelais Pty Ltd v Cameron & Ors* (supra) stated at 4553:

> "If and insofar as there is income tax or capital gains tax loss caused in this general way, it seems to me that it would be recoverable as an item of damages. It is apparent from what I have said, however, that it would not be possible for me to make any assessment of that loss. It is desirable that all aspects of damages be disposed of in one hearing, but because there is the possibility of substantial loss, I would be prepared in this case to reserve leave to the plaintiff to apply for additional damages referable to income tax or capital gains tax considerations."

[661] In *Namol Pty Ltd & Anor v AW Baulderstone Pty Ltd & Ors* [1993] 93 ATC 5101, Davies J in the Federal Court in Sydney refused to make an allowance for Capital Gains Tax or a conditional allowance. Similarly, in the matter before this Court there is no evidence as to what, if any, Capital Gains Tax or income tax would be payable. For example the order made for an award under the heading "(c) Wasted time and effort on the Lake Bennett project" is based on calculations made by Mr Holmes who specifically noted his calculations were before tax. Taxation, if payable on those amounts, is presumably the plaintiffs' responsibility. I am not able to discern what, if any, Capital Gains Tax would be payable or what, if any, tax would be payable on the other awards of damages. I am not persuaded it is appropriate to make the declaration as sought by the plaintiffs as I am not satisfied the award of damages would be subject to Capital Gains Tax "or that it would accord with the principles upon which the assessment of damages proceeds to make any adjustment in respect thereof", Davis J in *Namol Pty Ltd & Anor v AW Baulderstone Pty Ltd & Ors* (supra) at 5104.

[662] Alternately, the plaintiffs request that any award for damages be "grossed up" to compensate the plaintiffs for the additional income tax assessed - *Tuite v Exelby* (1992) 93 ATC 4293. Shepherdson J did increase the award to allow for Capital Gains Tax. This award was not sustained on appeal, the respondents abandoned their claim - see *Exelby & Ors v Tuite & Anor* [1994] QCA 506. I am not persuaded it would be appropriate to gross up the award of damages to allow for taxation.

[663] Accordingly, the plaintiffs' application for a declaration or alternately a "grossing up of the damages" to allow for taxation is refused.

The limitations issue

[664] Under par 164 of the Amended Defence, the defendant raises a variety of limitation defences:

> "164. Further and alternatively:
>
> (a) deleted
>
> (b) the plaintiffs' cause of action for breach of fiduciary duty accrued more than three years before the commencement of the within proceeding and, by analogy with s 12 of the *Limitation Act* (NT), is not maintainable;
>
> (c) such of the plaintiffs causes of action under section 82 or section 87 of the TPA as accrued more than three years before 26 July 2001 are extinguished by virtue of section 82(2) of that Act as in force prior to that date; and
>
> (d) such of the plaintiffs causes of action under section 91 or section 95 of the Consumer Affairs and Fair Trading Act as accrued more than three years before the commencement of this proceeding are not maintainable by virtue of section 91(2) of that Act."

[665] It is the submission by Mr Maurice QC, on behalf of the defendant, that all of the causes of action upon which the plaintiffs rely in this proceeding relate to conduct more than three years before action was commenced in December 2002.

[666] A limitation period is established by s 82(2) of the Trade Practices Act. The relevant provisions of s 82(2) reads as follows:

> "An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued."

[667] In this matter, the limitation period commences under the provisions of the Trade Practices Act from the date the plaintiffs actual personal losses first accrued - see *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 527. The date that occurred was when City Developments was placed in liquidation, that date being 21 November 2002. These proceedings were commenced on 23 December 2002. Whether the Limitation Act 1981 (NT) is applied, or the Trade Practices Act s 82 is applied, the proceedings were commenced well within time.

[668] The onus of establishing that the plaintiffs' claims under s 82 of the Trade Practices Act are statute barred, is upon the defendant - *Murphy & Anor v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [56].

[669] The plaintiffs claim there is no limitation period with respect to the breach of fiduciary duty.

[670] The submission on behalf of the defendant is that equity follows the law by analogy (s 21 Limitations Act) - see also Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 4th edition, Butterworths Australia, 2002 at p 1015 par 34-075. Section 12 of the Limitation Act, limits the time for bringing claims in torts and contract to three years from the date on which the cause of action first accrues to the plaintiffs. Section 13 imposes a similar time limit on actions for account. It is the defendant's position in

respect of the 1996 breach of fiduciary duty, the Option A “lost opportunity claims” and the Option B “lost opportunity claims”, that these claims are statute barred.

[671] With respect to the breach of fiduciary duty being what has been referred to as the “technical breach”, Mr Maurice QC submits this claim is statute barred because the defendant advised the plaintiffs about this breach by letter dated 4 June 1999 (Exhibit P5 Vol 6 p1141). This breach relates to the fact that the defendant was in conflict when another practitioner at the firm of Clayton Utz had, unbeknown to Mr Riley, acted for the Scartons when they acquired their land and access easement from Mr and Mrs Shoobridge. I do not understand the plaintiffs to be pursuing any claim in respect of any such breach, so that the three year time limit from 4 June 1999, is irrelevant. The plaintiffs are pursing a claim for breach of fiduciary duty in respect of Mr Riley’s failure to advise the plaintiffs as to the real effect of the easements after 7 April 1998.

[672] It is the defendant’s position that the claim in respect of the three Bayview properties is statute barred. For reasons already stated, I have not allowed this claim.

[673] With respect to the unpaid labour component of the Option A claim, it is the submission for the defence that this claim is statute barred as the relevant date would be, at the latest March 1997, and no such claim was made within three years of that date. I do not accept this submission. I have found that

the date when the plaintiffs' personal losses first accrued was when City Developments went into liquidation on 21 November 2002.

[674] With respect to the Option B claim, I have already set out reasons why I have preferred Option A combined with Option C. Therefore, the issue of a limitation period with respect to Option B is not relevant.

[675] The defendant has throughout their submissions maintained that the losses which accrued on 21 November 2002 when City Developments went into liquidation, were losses that were caused by the imprudent decisions made by the plaintiffs several years earlier. I have dealt with this submission earlier in these reasons for judgment.

[676] Whilst the defendant disputes a finding that the losses did occur on 21 November 2002, they accept that if this is the finding then the claim for them is not affected by the Limitation Act.

[677] If I am wrong, with respect to the arguments raised by the defendant on the issue of limitations, I would grant an extension of time to the plaintiffs to overcome the possibility of any claim being statute barred.

[678] In the circumstances, this Court would grant an extension of time to the date when the proceedings issued on 23 December 2002. This is on the basis that the ascertaining of the material fact was the date of liquidation of City Developments which was 21 November 2002.

[679] In the alternative, I agree with the submission made on behalf of the plaintiffs, that the conduct of the defendant, which was intended to string out the period of time before the plaintiffs issued any proceedings, would entitle the plaintiffs to an extension of time. I refer in particular to the memorandum of Mr Riley to Mr Mitaros dated 9 June 2000 (Exhibit P5 Vol 6 p1201) which read, inter alia:

> "… the longer we muck around arguing about it, the more likely the *Limitations Act* is going to prevent George from taking any action against us in any event."

Mr Riley did acknowledge in his evidence that he now regretted this statement.

[680] In addition to this, the plaintiffs were suffering a lack of funds in respect of pursing legal action and the more imperative need (as they perceived it at the time) to pursue the easement litigation. Litigation they should not have had to pursue and, presumably, would not have pursued had they been clearly advised by Mr Riley on or after 7 April 1998 as to the real effect of the easements. These matters all contributed to the delay.

[681] For these reasons, I would grant an extension of time with respect to the claim to overcome any limitation period.

Summary of Findings

[682] The plaintiffs claim damages from the defendant under s 82 and/or s 87 of the Trade Practices Act and s 91 and/or s 95 of the Consumer Affairs and

Fair Trading Act for an alleged breach of s 52 of the Trade Practices Act and s 42 Consumer Affairs and Fair Trading Act respectively. There is a further claim for damages arising from a claim by the plaintiffs that the defendant breached their fiduciary duty to the plaintiffs.

[683] I have found that George Milatos consulted Nicholas Mitaros, who was then a partner in the firm of Clayton Utz, in March 1996. Mr Milatos requested a due diligence search in respect of their proposed purchase of Section 152 Hundred of Howard, now known as the Lake Bennett Wilderness Resort, and advised of his intentions to build cabins on the foreshore and develop the resort.

[684] In March 1996, the property was owned by Nazime Pty Ltd and was subject to recreational easements in favour of the surrounding blocks. These recreational easements were completely inconsistent with any building or development on the property the plaintiffs were seeking to purchase.

[685] Mr Mitaros prepared an option to purchase which he provided to Mr Milatos. Mr Mitaros did not advise the plaintiffs that the property was affected by recreational easements which were completely inconsistent with building on or developing the property. The plaintiffs commenced building to test the market for cabin sales. The plaintiffs, George and Colleen Milatos, proceeded to exercise the option through their company City Developments Pty Ltd. The buildings were provided by a company named Australian Transportable Homes owned by George Milatos. This company

built transportable homes at its premises in Berrimah and transported these homes to other localities. The option to purchase was subsequently amended. Eventually a contract of sale was prepared. The plaintiffs have given evidence, which I accept, that had they been advised that the recreational easements were inconsistent with their rights to build and develop the land, they would not have purchased the property. I found that the failure, on the part of the defendant, to advise the plaintiffs about the effect of the recreational easements, amounted to misleading or deceptive conduct within the meaning of s 52 of the Trade Practices Act. The defendant committed a breach of s 52 of the Trade Practices Act for which the plaintiffs are entitled to damages under s 82 of the Trade Practices Act.

[686] In or about September 1996, Mr Mitaros handed over the plaintiffs' file to Guy Riley, who was another partner in the defendant's firm. Mr Riley assumed that Mr Mitaros had undertaken the necessary due diligence searches. Mr Riley was aware that easements existed but believed that the easements, which were referred to, only provided for access to the lake. This was the tenor of the advice he gave to Mr Milatos.

[687] The defendant acted for the plaintiffs on the exchange of contracts which occurred on 27 March 1997. A week before contracts were exchanged, solicitors for one of the easement holders, wrote to the defendant advising of their client's intention to assert their rights to use the area to the full extent permitted under the existing easement. This letter stated inter alia:

> "The easements clearly grant to our clients free, full and unrestricted access to any and all parts of Section 152".

[688] The purchase of Section 152 could have been halted at this point and either the easement situation resolved with the vendors or the sale aborted. Neither of these things occurred. Mr Riley assured Mr Milatos he had nothing to worry about as long as his development on the land did not stop or prevent the easement holders access to the lake.

[689] On 16 April 1997, the settlement of the sale of Lake Bennett from Nazime Pty Ltd to City Developments Pty Ltd was effected. The sale price was $630,000 subject to a mortgage back to Nazime Pty Ltd for part of the purchase price. Mr Milatos continued to build cabins on the foreshore. Mr Riley acted on the sale of these cabins and provided legal advice on a range of aspects relating to the property now known as Lake Bennett Wilderness Resort. Other loans were organised to enable the purchase of the property to be completed and for further development of the property. Section 152 was split into Section 244 the foreshore and Section 245 which contained the lake and the resort.

[690] On 7 April 1998, there is a file note on the Clayton Utz file, to the effect that Mr Riley had come to the realisation that the easements were much broader than easements for access, they were in fact recreational easements which were inconsistent with any building on, or development of the property. Mr Riley further noted that it was now obvious Mr Milatos had not been advised about the real effect of the easements when he consulted

Mr Mitaros and that Mr Riley had then falsely assumed checks had been done.

[691] By April 1998, Mr Milatos had already built and sold a number of cabins around the foreshore of the lake (Section 244) and was developing the resort (Section 245). Mr Riley did not clearly advise Mr Milatos, that as distinct from his earlier advice about the effect of the easements, he had come to the realisation that they were in fact recreational easements that were completely inconsistent with building on the land. Mr Riley did not advise Mr Milatos that the plaintiffs may have a cause of action against the defendant or that the plaintiffs should seek independent legal advice as to their situation before proceeding further. Mr Milatos continued building and developing the land into 1999. By failing to provide advice to the plaintiffs about the change in the defendant's understanding of the easements, this placed them in conflict with the interests of the plaintiffs, the defendant was in breach of their fiduciary duty.

[692] In August 1999, the plaintiffs decided to consult other solicitors and transferred their matters to another firm of solicitors. The plaintiffs undertook a Supreme Court challenge to the validity of the easements which action they lost. A decision of the Court of Appeal of the Supreme Court of the Northern Territory delivered on 29 August 2001 confirmed the easements were good in law.

[693] Late in 2000, the marital relationship between the plaintiffs broke down, the couple separated and subsequently divorced. Both plaintiffs have since remarried. Colleen Milatos is now known as Colleen Cambronero.

[694] The easements created a problem because the rights of the easement holders were inconsistent with any building or development. The recreational easements were also a problem in the sense that titles to the subdivided properties could not issue without the consent of the easement holders, which consent was not forthcoming. The development of the resort was thwarted until the passing of the Lake Bennett (Land Title) Act 2005 (NT), which came into force on 9 March 2005. The Act resolved the issues with respect to the easements and enabled development to continue.

[695] In the meantime, the company which had purchased the property, namely City Developments Pty Ltd, of which the plaintiffs were the sole directors, went into liquidation on 21 November 2002. The debts of the company exceeded $2.9 million. In May 2002, Michael Milatos, the brother of George Milatos, purchased the resort (Section 245) from City Developments Pty Ltd after extensive efforts to sell it on the open market had failed. The purchase was in the name of Lake Bennett Wilderness Resort Pty Ltd whose sole directors are Michael and Pauline Milatos.

[696] In May 2002, George Milatos was employed by his brother Michael through his company to manage the resort. George Milatos was paid a salary and

other benefits. He also received financial assistance from Michael to expand the resort.

[697] In 2006, Michael Milatos purchased Unit 200 at Lake Bennett from City Developments Pty Ltd (in liquidation) at the request of the ANZ Bank. Since that time, George Milatos has been building cabins on the 15 lots that make up Unit 200 and receives a builder's margin for these constructions.

[698] The plaintiffs each worked extremely hard in developing the property at Lake Bennett between 1996 and 2002. George Milatos continued building cabins around the foreshore and marketing them. He also worked to build up the resort. Colleen Milatos built up the resort, attending to the gardens and physical appearance of the resort, establishing and running a restaurant as well as managing and marketing the resort. Her efforts were recognised by the presentation of a number of prestigious awards including a Brolga Award for Tourism Excellence for the resort. This award was presented in 2002. In December 2002, Colleen Milatos left Lake Bennett.

[699] I have concluded the plaintiffs are entitled to damages pursuant to s 82 of the Trade Practices Act for breach of s 52 of that Act. The award of damages includes damages for breach of fiduciary duty, being the defendant's failure to provide the appropriate advice, after coming to the realisation noted on 7 April 1998 that their previous advice had been incorrect. In addition to this, the defendant failed to advise the plaintiffs

there was a conflict of interest and that the plaintiffs should seek independent legal advice.

[700] I have made an award of damages under the following heads of damage:

1) the plaintiffs' ***lost investment*** in City Developments Pty Ltd together with pre-judgment interest.
2) damages for ***wasted time and effort*** for both George and Colleen Milatos on the Lake Bennett project between 1996 and 2002 together with pre-judgment interest.
3) the plaintiffs' debt to the ANZ Bank with interest accruing daily.

[701] Claims under other heads of damage have not succeeded. I have rejected the claim for exemplary damages, for payment to the unsecured creditors of City Developments Pty Ltd, payment of fees paid to Clayton Utz and payment of the liquidator's fees. I have also rejected the claim for loss of reputation and credit standing. I concluded that the plaintiffs were not entitled to the claim for lost opportunity to conduct business as a builder/developer.

[702] I have found that George Milatos is not entitled to a claim for lost opportunity of capital appreciation in properties. I did not accept the evidence of George Milatos that had he not gone to Lake Bennett he would have returned to Darwin and embarked on a successful program of building units and townhouses. I have also found that through other circumstances, namely his brother Michael Milatos' financial support and the passing of the Lake Bennett (Land Title) Act, George Milatos is in a better position now

than if he had pursued any other so called opportunities to conduct business as a builder/developer. At present, George Milatos is paid a salary to manage the resort and receives other benefits. He also receives fees as a builder constructing homes on the parcels of land that make up Unit 200 at Lake Bennett. Unit 200 is owned by M & P Pty Ltd whose sole directors are Michael and Pauline Milatos. George Milatos has the opportunity, under his brother's financial guidance, to build Lake Bennett into the first class resort he has for so long strived to achieve.

Damages

(1)	Lost investment by both plaintiffs in City Developments Pty Ltd	$ 696,434.00
(2)	Pre-judgment interest on *lost investment* in City Developments Pty Ltd calculated at 5.6% from 21 November 2002 to date of judgment 5.6% x $696,434.00 x 4.8	$ 187,201.45
(3)	George Milatos *wasted time and effort* at Lake Bennett March 1996 to May 2002	$ 510,000.00
(4)	Pre-judgment interest on George Milatos' *wasted time and effort* at Lake Bennett March 1996 to May 2002 calculated at 5.6%	

	from 21 November 2002 to date of judgment	
	5.6% x $510,000.00 x 4.8	$ 137,088.00
(5)	Colleen Milatos *wasted time and effort* at Lake Bennett 1996-December 2002	$ 199,813.00
(6)	Pre-judgment interest on Colleen Milatos *wasted time and effort* at Lake Bennett 1996 to December 2002 calculated at 5.6% from 21 November 2002 to date of judgment	
	5.6% x $199,813.00 x 4.8	$ 53,709.74
(7)	The ANZ Bank debt	$2,970,636.76
(8)	Interest accruing on the ANZ Bank debt at the rate of $862.71 a day from 12 March 2007 to date of judgment	
	192 days x $862.71	$ 165,640.32
	Total	$4,920,523.27

[703] I enter judgment for the plaintiffs in the sum of four million nine hundred and twenty thousand five hundred and twenty three dollars twenty seven cents ($4,920,523.27).

[704] I grant leave to the parties to apply on the question of costs.