(Mr Griffin) had had significant meetings with DMR and had come to an agreement. Mr Madrers' recollection was that the issue related to an easement.

[114] Mr Brinsmead's evidence was to like effect, namely that Mr Griffin thought that Mr Slijderink was of little value because Mr Griffin had already solved the problems. Mr Brinsmead recalled Mr Griffin making derogatory comments about Mr Slijderink and suggesting that he had somehow acted illegally. Mr Griffin rejected their suggestion that the land had big problems and was of little value. There was very little discussion after that. Mr Griffin asserted that the land had a substantial value and that if Mr Madrers and Mr Brinsmead's company was not prepared to pay substantial monies for it, then there was no opportunity. Mr Brinsmead recalls that Mr Griffin suggested that Mr Slijderink and Kosho were "just a bunch of cowboys" and that he was going to take care of them.

[115] The evidence of Mr Madrers and Mr Brinsmead falls short of proving that Trilogy was intent on frustrating or delaying Kosho's loan facility. It proves that Mr Griffin had little regard for Mr Slijderink and rejected any suggestion that Mr Slijderink could form a useful part of any joint venture by contributing his knowledge and association with DMR and the Council to the resolution of issues. Mr Griffin's disparagement of Mr Slijderink was in conjunction with assertions that certain issues had been resolved and that the land had a substantial value. The evidence of Mr Griffin's low opinion of Mr Slijderink and abusive denigration of him does not prove, either alone or in conjunction with other evidence, that Trilogy was engaged in a deliberate tactic to ensure that it did not have to provide the funds under the 2009 Facility. Kosho has not proved that Trilogy was ignoring its obligations under the 2009 Facility. Other evidence, including contemporaneous documents, indicates that the officers of Trilogy with direct responsibility for addressing the loan conditions were progressing matters, including personal attendance upon officers of DMR.

[116] Moreover, it was not in Trilogy's interests to sacrifice Kosho's interests by frustrating satisfaction of the loan conditions or to place Kosho in a perilous position. The fund had a significant exposure of $12,610,000 at the time the 2009 Facility was negotiated. Further interest accrued after June 2009 and it was not in Trilogy's interests to jeopardise Kosho's prospects of being able to repay that sum.

[117] I decline to find that Trilogy's delay, though unreasonable, and its other conduct in respect of satisfaction of the loan conditions was illegitimate, cynical or part of the deliberate strategy alleged in Kosho's pleading.

Implied terms

[118] Kosho pleads that there were implied terms in the 2009 Facility that CPL and Trilogy:

> "(a) would do all such things and take all such steps as may be necessary to enable Kosho to have the benefit of the finance facility;
>
> (b) would act reasonably, and reasonably expeditiously, in their consideration of, and in determining issues of satisfaction in relation to, the conditions precedents under the finance facility;

(c) would in [sic] all times act in good faith in their dealings with Kosho in relation to their consideration of, and in determining issues of satisfaction in relation to, the conditions precedents under the finance facility;

(d) would not unreasonably delay, in its consideration and determination of Kosho's compliance with the requirements of the finance facility or, facilitating drawn [sic] down of the funds for the development so as to disable Kosho from complying with:

(i) special condition (q) of the finance facility;
(ii) special condition (s) of the finance facility;

(e) alternatively, would not unreasonably delay the advance of funds so as to disable Kosho's compliance with the finance facility."

These terms are said to be implied in order to give business efficacy to the transaction embodied in the 2009 Facility or, alternatively, are implied by law. Trilogy denied in its pleading that there were such implied terms. It pleaded that the terms were not required to give business efficacy to the 2009 Facility and that the terms sought to be implied contradicted the express terms of the Facility. Trilogy's submissions acknowledged that the 2009 Facility contained an implied duty of cooperation. This was based upon the general rule stated by Griffith CJ in *Butt v M'Donald* applicable to every contract "that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract." [6] Trilogy submitted that an implied duty of cooperation did not cast any positive obligation on Trilogy to actively assist Kosho to achieve the conditions set out in the 2009 Facility.

[119] As to the other allegedly implied terms, Trilogy submitted that such terms should not be implied since Kosho did not plead a basis for them to be implied and no basis existed since they were not necessary to give business efficacy to the agreement, which was effective without them.

[120] Kosho's submissions did not meet this point, and instead simply summarised principles concerning the implication of contractual terms, as stated in *Questband Pty Ltd v Macquarie Bank Ltd.*[7] Kosho's submissions focused upon the implied duty to cooperate in the performance of contractual obligations, and the principle that each party agrees to do all such things as are necessary on its part to enable the other party to have the benefit of the contract. In addition, Kosho's submissions addressed what was said to be an obligation to act in good faith "in the timeous satisfaction of the Special Conditions".

[121] Kosho did not develop its argument as to why the terms which it contended were implied as a matter of fact satisfied the five conditions (which may overlap) that

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6 (1896) 7 QLJ 68 at 70-71.

7 [2009] QSC 7 at [102]; affirmed on appeal in *Questband Pty Ltd v Macquarie Bank Ltd* [2009] QCA 266.

must be satisfied for a term to be implied.[8] One of the conditions is that the term is necessary to give business efficacy to the agreement. Such a term will be implied if the term is so obvious as to go without saying. The implied terms for which Kosho contends in subparagraphs 17(b), (d) and (e) involve obligations to act "reasonably", "reasonably expeditiously" and to "not unreasonably delay". Obligations to act reasonably or "not unreasonably" involve obligations of indeterminate reference and such indeterminate obligations beg the question of by whose standards the reasonableness or otherwise of the lender's conduct is to be judged. Such obligations are uncertain in their practical operation and one would not lightly conclude that a financier was prepared to assume a legal liability to act reasonably in their consideration of whether conditions had been satisfied, and thereby expose itself to potential litigation for an alleged failure to act reasonably. Such implied terms are not so obvious that they go without saying. The 2009 Facility is efficacious or workable without such implied terms, given the term, implied by law, to cooperate in ensuring that the other party has the benefit of the contract. Kosho has not satisfied me that the terms pleaded in subparagraphs 17(b), (d) and (e) were necessary in order to give business efficacy to the 2009 Facility and were implied in fact.

[122] There was, however, a term implied by law which required each party to do all such things as were necessary on its part to enable the other party to have the benefit of the contract. This accords with the implied term pleaded in paragraph 17(a) of Kosho's pleading.

[123] The remaining contentious implied term, pleaded in subparagraph 17(c), related to an alleged implied term to act in good faith. Kosho submits that Trilogy was obliged to act in good faith and relies upon New South Wales Court of Appeal authority and single judge decisions in which good faith has been recognised as implied in a variety of contracts. The High Court has yet to authoritatively rule about the nature and content of an obligation to act in good faith in such cases. On one view, an obligation to act in good faith may mean no more than that neither party may do anything to impede the performance of the agreement or to injure the right of the other party to receive the proposed benefit.[9] However, recent Australian authorities support the proposition that a contractual obligation of good faith embraces at least:

- an obligation on the parties to cooperate in achieving the contractual objects;
- compliance with honest standards of conduct; and
- compliance with standards of conduct that are reasonable having regard to the interests of the parties.[10]

Due regard must be had to the legitimate interests of both parties. However, a contractual obligation of good faith does not require a party to act in the interests of

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8 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347.

9 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 137-138.

10 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [146] citing earlier New South Wales Court of Appeal authority.

the other party or to subordinate its own legitimate interest in the interests of the other party.[11]

[124] On one view, a duty of good faith does not arise by way of an implied term. Instead, good faith is reflected in other principles of contract law, including principles of construction.[12] Still, there is authority for the proposition that, at least in respect of certain types of contract, a term of good faith is implied as a matter of law.[13] A contract between a borrower and a lender has not been firmly established as a category of contract in which an obligation to act in good faith is implied as a matter of law. If, however, there is such a duty of good faith it may relate to the exercise of powers and discretions under the loan agreement.[14] In such a context, a power such as the power of termination might not be exercised for an improper purpose or for a purpose which is extraneous to the contract. If, however, a party acts in the honest pursuit of a legitimate interest, and not for a purpose which is extraneous, dishonest, capricious or arbitrary, a breach of good faith will not be established.[15]

[125] Given the uncertain state of the law concerning the implication of a duty of good faith in a commercial contract of the present kind I shall make findings on the assumption that, contrary to its submissions, Trilogy was obliged to act in good faith in its consideration of, and in determining satisfaction of the Special Conditions, including whether the terms of the deed of assignment and consent were satisfactory to it. However, any obligation to act in good faith cannot be equated with a free-standing duty to act reasonably.[16] Instead, any duty to act reasonably having regard to the legitimate interests of the parties may be subsumed in the duty to act in good faith.

Alleged breach of implied terms

[126] Kosho submits that Trilogy breached the alleged implied terms, including its obligation of good faith by:

> "(a) failing to do all such things and take all such steps necessary to enable Kosho to have the benefit of the finance facility;
>
> (b) unreasonably delaying in its consideration and determination of Kosho's compliance with the requirements of the finance facility, and in particular the draft assignment deed;

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11 Ibid; *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212 at [45].

12 Carter JW, *Contract Law in Australia* 6th ed, LexisNexis, Chatswood, 2012 at [2.01]-[2.03].

13 *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 at 569 – 570 [163] – [168].

14 cf *Commonwealth Bank of Australia v Renstel Nominees Pty Ltd* [2001] VSC 167 at [47].

15 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 696 [394]; see also at 703-4 [426]-[427]; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703; *Burger King Corporation v Hungry Jack's Pty Ltd* (supra) at 573-574 [185] – [187]; see generally Seddon NC & Bigwood RA & Ellinghaus MP, *Cheshire & Fifoot Law of Contract* 10th Australian ed, LexisNexis, Chatswood, 2012 at [10.45]-[10.46].

16 cf *Renard Constructions (ME) v Minister for Public Works* (1992) 26 NSWLR 234 at 263. As to the difference between good faith and reasonableness see Stapleton J, "Good Faith in Private Law" (1999) 52 *CLP* 1 at 8; Carter J & Peden E, "Good Faith in Australian Contract Law" (2003) 19 *JCL* 155; Carter JW (supra) [2-13]; Horrigan B, "New Directions in How Legislators, Courts, and Legal Practitioners Approach Unconscionable Conduct and Good Faith," (paper presented at the Current Legal Issues Seminar, Brisbane, 18 October 2012) at 25-26.

(c) failing, and unreasonably refusing, to advance funds under the finance facility;

(d) failing to advance funds under the finance facility by (at the latest) end October to early November 2009, so as to enable Kosho to commence development or construction of the project;

(e) alternatively, delaying arbitrarily and capriciously in its consideration and determination of Kosho's compliance and satisfaction with the requirements necessary to comply with the conditions imposed by CPL in the finance facility;

(f) by reason of the above, disabling Kosho from complying with special conditions (q) and (s) of the finance facility."

These submissions assumed the existence of each of the implied terms for which Kosho contended. I have found that the only implied terms were:

(a) an obligation to do all such things as were necessary on its part to enable Kosho to have the benefit of the 2009 Facility; and

(b) arguably, a duty to act in good faith in relation to Trilogy's consideration of, and in determining satisfaction of, the conditions precedent under the 2009 Facility.

[127] It is convenient to address the allegations of breach summarised above in reverse order, commencing with subparagraph (e). I am not satisfied that Trilogy delayed "arbitrarily and capriciously" in its consideration of Kosho's compliance with the conditions precedent. I have found that Trilogy's delay in respect of Special Condition (s) was unreasonable. It was not arbitrary or capricious. Any delay was not motivated by an extraneous purpose or motive and did not constitute a breach of any obligation of good faith.

[128] As to subparagraphs (c) and (d) there was no failure to advance funds since unless and until Special Condition (p) was satisfied no obligation to advance funds arose. For the reason that I have given in connection with Special Condition (p) Trilogy was not obliged to advance the funds.

[129] As to subparagraph (b) I have found that Trilogy unreasonably delayed in its determination of Special Condition (s), in particular its delay in proffering to Kosho a draft deed of assignment and consent which was satisfactory to Trilogy and DMR. However, its unreasonable delay in this regard cannot be equated with a breach of any implied duty of good faith. Trilogy unreasonably delayed but its conduct was not dishonest, undertaken for an improper purpose or undertaken in disregard of Kosho's legitimate interests. Trilogy had regard to Kosho's legitimate interests in obtaining funding, but also was entitled to have regard to its own legitimate interests in negotiating a deed that was satisfactory to it. The trouble is that Trilogy took an unreasonable time to negotiate such a deed with DMR.

[130] The issue, then, is whether in acting as it did, and in failing to negotiate a satisfactory deed within a reasonable time, Trilogy breached the duty implied by

law to do all such things as were necessary on its part to enable Kosho to have the benefit of the contract.

[131] The statement in *Butt v M'Donald* which I have earlier quoted at [119] has been approved in subsequent cases.[17] In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*, Mason J stated:

> "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."[18]

[132] In *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd*, McMurdo J (with whom Jerrard JA agreed) observed:

> "Mason J thereby distinguished between acts according to whether they are necessary to the performance of a party's fundamental obligations under the contract. **There is a duty to co-operate in the doing of acts which are necessary to the performance of such obligations. But a duty to co-operate in the doing of acts which are not necessary to the performance of fundamental obligations has to be found in 'the intention of the parties as manifested by the contract itself', that is by a term implied in fact.**
>
> In the same way, the duty to do what is necessary to enable the other party to have the benefit of the contract **is limited to acts which are necessary to the performance of obligations under the contract.** To assess the scope of the duty in a particular case, it is first necessary to define the relevant obligations, and in particular, to define the circumstances in which the parties have agreed that a certain obligation must be performed. **It is not a duty upon one party to act so as to enhance the commercial value to the other party of the contract.**"[19] (emphasis added)

[133] The principle stated by Griffith CJ in *Butt v M'Donald* may apply to a benefit of the contract that was promised, whether the contractual benefit was fundamental or not.[20] I shall assume that it does.

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17 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607-608; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 142 [36].

18 Supra at 607 - 608.

19 [2006] QCA 126 at [50] – [51].

20 See the extra-curial observations of Allsop J, "Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle" (2011) 85 *ALJ* 341 at 349.

[134] The implication of a term as a matter of law depends upon the demonstration of "necessity". In that context, the New South Wales Court of Appeal has observed that "there cannot be a duty to co-operate in bringing about something which the contract does not *require* to happen."[21] The Court emphasised that the implication of a term implied by law depends upon the demonstration of "necessity" and that it would be wrong to replace "necessity" with "desirability". Their Honours continued:

> "A contract may 'contemplate' many benefits for the respective parties, but each can only call on the other to provide, or co-operate in the providing of, **benefits promised by that party**. For example, in the absence of an express covenant, a landlord is not bound in contract to repair the demised premises."[22]

The principle that each party is taken to have agreed to do all such things as are necessary on its part to enable the other party to have the benefit of the contract was more recently considered in *Secure Parking (WA) Pty Ltd v Wilson.*[23]

[135] The relevant principle in this case requires:

(a) the identification of "the benefit of the contract" that was promised by the lender to Kosho in order to ascertain the acts that are necessary to enable Kosho to have that benefit; and

(b) consideration of whether Trilogy failed to do all things necessary on its part to enable Kosho to have that benefit.

[136] In general terms, the "benefit of the contract" that was promised by the lender was the promise to advance certain funds for a particular purpose, subject to certain conditions including each of the Special Conditions. The promise was qualified, and the lender reserved the right to withdraw or amend the loan approval at any time without liability and at its "absolute discretion" if, in its opinion or in the opinion of its solicitors, there arose any matter "which may adversely affect the proposed loan". However, the lender did not withdraw or amend its loan approval.

[137] Funds would only be advanced if, among other things, Special Condition (s) was satisfied and it would only be satisfied if the lender prepared a deed that was satisfactory to it and also satisfactory to DMR. Although DMR might refuse to agree to a deed that was on terms satisfactory to Trilogy, it remained within the control of Trilogy to advance negotiations of a deed that was satisfactory to both it and DMR. I have found that it did not do so in a timely way. In this regard, performance of the contract was to some degree within the control of the lender, and the lender had an obligation to do all that was reasonable to prepare a deed that was satisfactory to it and DMR. Trilogy's implied duty to do all that was reasonably necessary to secure performance of the contract arose in the context of a facility that was due to expire on 30 June 2010. Although the Letter of Offer contemplated that the lender might approve an extension and the expressed intention of the PFMF was to finance the entire project, whether or not it did so depended upon a decision in

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21 *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 124 (original emphasis).

22 Ibid at 125 (emphasis added).

23 (2008) 38 WAR 350 at 374-375 [88] – [92] per Buss JA with whom Martin CJ and Murray AJA agreed.

June 2010, and the letter stated in clear terms that any extension would be "at the sole discretion of the City Pacific First Mortgage Fund". In short, the benefit under the contract was the provision of funding until 30 June 2010. Trilogy had a duty to cooperate in respect of acts which were necessary to the performance of its obligations under the contract. This did not oblige it to provide funding by any particular date, for example to provide funding in accordance with the spreadsheet, or so as to enable the commercial property to be completed and its sale completed by February 2010. It remained Kosho's obligation to satisfy other conditions such as Special Conditions (p) and (q) unless the lender waived them, dispensed with their performance or disabled Kosho from satisfying them. The relevant obligation on Trilogy was to do all that was reasonably necessary on its part to satisfy Special Condition (s) and thereby secure performance of the contract.

[138] Trilogy's unreasonable delay in preparing a deed, the terms of which were satisfactory to it as lender and which might also have satisfied DMR amounted to a failure by it to do all things necessary on its part to enable Kosho to have the benefit of the contract. It thereby breached a term implied by law.

[139] Trilogy did not otherwise breach that term, and did not breach any implied duty of good faith either by its unreasonable delay or otherwise.

Alleged misleading and deceptive conduct

[140] This issue was not included amongst the list prepared by Counsel of proposed issues for written submissions. Still, it was addressed in Kosho's written submissions and pleaded by Kosho. So it remains a live issue.

[141] Kosho claims that Trilogy is liable to Kosho for loss and damage suffered by reason of the making of certain representations, which were relied upon by Kosho and was conduct which was misleading or deceptive in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA"), or alternatively s 12DA of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("ASIC Act").

[142] Kosho alleges three misleading and deceptive representations by CPL's and Trilogy's representatives, namely that:

(a) on or about 24 June 2009 CPL (by McCormick and McCosh) represented orally to Kosho (by Slijderink) that funding would be available within 30 days, in accordance with the cashflows provided in January 2009 ("24 June 2009 representation");

(b) on or about 21 August 2009 Kosho (by Slijderink) telephoned Minter Ellison, then Trilogy's lawyers, and was informed by Anthony Perich that Trilogy's funds had been frozen until the Commonwealth Bank of Australia ("CBA") had completed a review of proposed Trilogy cashflows ("CBA frozen funds representation"); and

(c) on 1 September 2009 at a meeting with Neil Hinrichsen and Michael Vella and another representative of Trilogy, Kosho (by Slijderink, Rieko Fujino and Brian Scott) was informed:

(i) cashflow issues between Trilogy and CBA were likely to be resolved within one to two weeks; and

(ii) shortly thereafter funds would be available to Kosho to enable it to advance the project through Trilogy either from the CBA or other funds ("funds availability representation").

[143] Trilogy responds that Kosho has failed to prove that any of the representations (assuming they were made) were false in a material respect. It also submits that there is a more fundamental difficulty in respect to this part of Kosho's claim, namely reliance and proof that Kosho would have acted differently, and not incurred the loss which it claims, if the alleged representations had not been made.

[144] As to the first alleged representation, Mr Slijderink gave evidence that on 23 June 2009 he telephoned Mr McCormick of CPL and that in the course of that conversation Mr McCormick said there had been some issues with slight delays in making payments and that there might be a delay of a week or two from time to time to cater for cashflow needs. Mr Slijderink says that Mr McCormick assured him that CPL understood that Kosho's program was tight and understood that any significant delays in commencement and timing of payments would impact on its program. Mr McCormick is said to have told Mr Slijderink that CPL was "working to end of July payments as per Letter of Offer cashflow and would work with us if any delay in payments was required." Mr Slijderink says that contractors were lined up and he needed confidence that the monies would be there and that he was counting on money at the end of July, to which Mr McCormick is said to have responded:

> "Adam this is a long term deal and some give and take by both parties will be required from time to time. We have been doing this a long time and you are not the first developer to say this to us. We know the impact delays in payments have and we have every intention to work with you. We expect to start giving you money end of July and regularly thereafter. You and Alastair can sit down next week and work through program and cash requirements and work it out."

I do not accept that this evidence supports the conclusion that Mr McCormick represented "that funding would be available within 30 days". Mr Slijderink's evidence about what Mr McCormick said relates to when CPL expected to start providing money.

[145] Kosho submits that Mr McCormick's evidence proved that the 24 June 2009 representation was made. However, the evidence to which it points concerns a different, but related topic. Mr McCormick recalled a meeting at Trilogy's Sydney office in early August 2009 when, according to Mr McCormick, there "was certainly no question as to where – where the loan was at and how close it was to need to happen." Mr McCormick also gave evidence of discussions with Minter Ellison about the need to have the draft deed of assignment concluded as soon as possible. In that context he remarked that "the intention was always for the draw-downs to occur as soon as possible" and that in CPL's cashflows it was always July for the first draw-down. This evidence does not prove the alleged representation given in Mr Slijderink's evidence or that the representation pleaded in paragraph 55(a) of Kosho's pleading was made on 24 June 2009.

[146] Trilogy did not cross-examine Mr Slijderink about his conversation with Mr McCormick on 23 June 2009, and in the absence of cross-examination I would need good reason to not accept Mr Slijderink's evidence. I should mention that Mr Slijderink's first affidavit consisted of 455 paragraphs and 2,204 pages of exhibits and that his further affidavits were also very substantial. The efficient conduct of the trial and the just and expeditious resolution of the real issues in the proceeding may explain the absence of cross-examination. In determining whether I should accept Mr Slijderink's recollection of the 23 June 2009 conversation with Mr McCormick I am conscious of what was said by McClelland CJ in Equity in *Watson v Foxman* about cases of alleged misleading and deceptive conduct:

> "Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing form the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience."[24]

I am not generally satisfied about the reliability of Mr Slijderink's recollection of contentious conversations. I am not completely satisfied that Mr McCormick said the words attributed to him in paragraphs 134 and 135 of Mr Slijderink's first affidavit. But if he did, they do not prove the representation pleaded in paragraph 55(a) of Kosho's pleading.

[147] This is the only alleged misleading and deceptive representation which preceded entry into the 2009 Facility by Kosho on 24 June 2009 when it accepted and executed the terms of the Letter of Offer. Therefore, Kosho has not proven that it entered into the 2009 Facility, agreed to its Special Conditions and granted or extended securities in reliance upon a representation that was made in contravention of s 52 of the TPA or s 12DA of the ASIC Act. In addition, it has not proved what it would have done if the alleged representation had not been made.

[148] The "CBA frozen funds representation" of 21 August 2009 was proven by Mr Slijderink's affidavit evidence, and was not contested by any evidence called by Trilogy. I accept that Mr Perich of Minter Ellison told Mr Slijderink that he understood that Trilogy needed to have the group cashflows revised and approved by CBA before it could issue funds. There is no evidence that this representation was false. Trilogy's case is that the "CBA frozen funds representation" was not

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[24] (1995) 49 NSWLR 315 at 318-319.

withdrawn or qualified and that Trilogy did not otherwise disabuse Kosho of it, notwithstanding that CBA had lifted a hold over Trilogy's facilities and PFMF by 10 August 2009. I accept Trilogy's submission that this part of Kosho's case involves "a timing issue" in that the matter was overtaken by a further conversation that occurred on 1 September 2009 about the availability of funds. If, however, Kosho is correct and the "CBA frozen funds representation" contravened the *TPA* because it was made without reasonable grounds, then any reliance by Kosho upon it was for a relatively short period and Kosho has failed to prove what it would have done if the representation had not been made.

[149] As to the "funds availability representation" alleged to have been made at a meeting on 1 September 2009, Mr Slijderink's evidence is that he was told that delay had arisen from CBA requirements and that these matters "should be resolved within weeks and payments could advance." Notwithstanding my reservations about the reliability of Mr Slijderink's evidence about such conversations I am prepared to accept that words to this effect were said. Mr Slijderink cannot recall which of the representatives of Trilogy said this. In any event, his evidence does not prove the pleaded representation that cashflow issues between Trilogy and CBA were likely to be resolved "within one to two weeks". His evidence goes no higher than a reference to "within weeks". In addition, any statement to the effect that once funds were available to Trilogy "payments could advance" would need to be understood in the context of the terms of the 2009 Facility, which made payment conditional upon satisfaction of numerous conditions, and also reserved to the lender an absolute discretion to withdraw or amend the loan approval. The "funds availability representation" in its context did not convey a representation that funds would actually be advanced through Trilogy within a few weeks or even within several weeks. At their highest, the words proven by Mr Slijderink's evidence, represented that issues between CBA and Trilogy were expected to be resolved within weeks and that, upon resolution, funds would be available to Trilogy to permit it to advance monies to Kosho in accordance with the Letter of Offer.

[150] The "funds availability representation" has not been proven.

[151] Further, the representation about resolution of matters between Trilogy and CBA has not been shown to be false. There is no evidence that the CBA approval of Trilogy's cashflows had not been resolved within the weeks that followed the meeting on 1 September 2009, and paragraph 381 of Mr Slijderink's affidavit recounts a telephone conversation with Mr Hinrichsen from Trilogy on 28 September 2009 in which Mr Slijderink said that he had heard that CBA approval of the cashflows had been received. Mr Slijderink does not say that Mr Hinrichsen or anyone else disputed this matter, and I infer that CBA funds were available to Trilogy by late September 2009, as had been predicted at the meeting on 1 September 2009.

[152] Kosho submits that the funds availability representation, being a representation as to a future matter is taken to be misleading and deceptive unless Trilogy adduces evidence to rebut that presumption. I accept that s 51A(2) of the *TPA* is to be interpreted in the manner explained by Emmett and Allsop JJ in *McGrath v Australia Naturalcare Products Pty Ltd.*[25] Trilogy did not address this point in its submissions in reply. Accordingly, I shall proceed on the basis that if

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[25] (2008) 165 FCR 230 at 242 [44].

the funds availability representation had been proven it would have been taken to be misleading, notwithstanding my view that it was not misleading in fact and reasonable grounds apparently existed to make it.

[153] I turn to the issue of reliance and whether the allegedly misleading and deceptive conduct constituted by the CBA frozen funds representation and the funds availability representation caused Kosho to suffer the loss and damage claimed. I have earlier concluded that Kosho has failed to prove that it would not have entered into the 2009 Facility if the representation pleaded in paragraph 55(a) had not been made. The present issues of reliance and causation relate to the post 2009 Facility representations. Kosho pleads that it relied on the CBA frozen funds representation and the funds availability representation in continuing with the 2009 Facility and in failing to take, or not taking, steps to seek or obtain alternate construction finance. Kosho submits that reliance on each representation in the manner pleaded by it is proved by Mr Slijderink's primary affidavit. However, Mr Slijderink did not give evidence that Kosho failed to take steps to seek or obtain alternate construction finance because it relied upon the alleged representations. If the representations had been proven then reliance upon them might be inferred. In the absence of specific evidence from Mr Slijderink about the respects in which he relied upon the CBA frozen funds representation and the funds availability representation I am disinclined to conclude that Kosho relied upon them in continuing with the 2009 Facility. It seems likely that it continued with the 2009 Facility because it was the only available source of finance to refinance the 2007 Facility which expired in 2009 and which then stood at about $12.61m. Any reliance upon the alleged representation would not have lasted forever. It became apparent to Kosho, and Mr Slijderink in particular, that, notwithstanding the resolution of any cashflow issues between Trilogy and CBA in September 2009, funds had not been advanced to Kosho and that the advancing of funds depended upon resolution of matters, including satisfaction of Special Condition (s). I am not satisfied that Kosho failed to take steps to obtain alternate finance because of the alleged representations. Mr Slijderink's evidence is that he did seek further funding in November 2009, February 2010 and April 2010. A lack of funds did not prevent him from approaching other financiers.

[154] Finally, I conclude that Kosho would have continued with the 2009 Facility in the hope or expectation of obtaining funds pursuant to it, if the alleged CBA frozen funds representation and the funds availability representations had not been made.

[155] I conclude that if Kosho had proven the misleading and deceptive conduct pleaded by it then it would not have proven that any reliance upon those representations caused it to suffer the loss and damage alleged by it. The course of events would have been essentially the same, including attempts by Kosho to obtain funds from other sources when funds were not advanced to it in late 2009.

Alleged unconscionable conduct

[156] Kosho also claims that Trilogy engaged in unconscionable conduct in breach of s 51AC(2) of the *TPA*, and further or in the alternative s 52 of the *TPA*. Remedies for contravention of these provisions are conferred by the *Competition and Consumer Act* 2010 (Cth). The relevant conduct is pleaded in paragraphs 60 to 97 and paragraphs 101 and 104 respectively of the second further amended statement of claim.

[157] These paragraphs canvass events from 13 February 2009 leading up to entry into the 2009 Facility including representations as early as 26 March 2009 about when payments under the proposed Facility were expected to commence, statements made shortly prior to entry into the 2009 Facility and conduct that followed entry into it up to and including Mr Griffin's meeting with Mr Madrers and Mr Brinsmead on 20 April 2010. Many of the matters are relied upon in support of the contention that from June 2009 to June 2010 Trilogy unreasonably delayed in its consideration of compliance with Special Conditions, particularly satisfaction of Special Condition (s). I have previously canvassed many of the matters pleaded in paragraphs 60 to 97 of the second further amended statement of claim. Not all of them are proven, including the precise words pleaded in paragraph 96 in relation to what was said at the meeting with Mr Griffin. Many of the allegations in these paragraphs concern matters which are proven such as communications concerning the progress of the draft assignment deed. Rather than catalogue each of the matters pleaded in paragraphs 60 to 97 and 101 and 104 of Kosho's pleading, I shall quote paragraph 149 of its written submissions which seeks to summarise the respects in which Trilogy's alleged conduct was unconscionable:

> "Trilogy delayed egregiously (even intentionally were one to believe the Pearls Australasia witnesses) to the economic harm of Kosho; it actively excluded Mr Slijderink from anything to do with the finalisation of the Deed of Assignment; it made promises and gave assurances of imminent funding with no suggestion that funding would not be forthcoming; it knew (because it was being told by Mr Slijderink) of the perilous financial predicament and jeopardy the delay was directly causing Kosho and the project; it failed to take advantage (active or at all) of the knowledge and experience reposed in McCormick and McCosh despite Trilogy hiring them for that very purpose; it delayed unduly (by its lawyers) in chasing down issues more concerned with Sunrise Waters' interests and which had already been dealt with in the Letter of Offer (Club Cavill waiver of compensation) and the 2007 Deed of Agreement (access to resumed land for pedestrian pathway and services corridor)."

[158] As to the meaning of unconscionable conduct in the present context, Trilogy cites leading authorities to the effect that for conduct to be regarded as unconscionable, there must exist misconduct which gives rise to a finding of "moral obloquy". Spigelman CJ in *Attorney-General (NSW) v World Best Holdings Ltd* stated that unconscionability is a concept which requires "a high level of moral obloquy."[26] It has also been observed that the language of these provisions should be given their ordinary meaning and not all judges who have considered similar provisions find resort to "moral obloquy" useful.[27] Still, the remarks of Spigelman CJ have been followed in later cases. It is unnecessary to survey the authorities concerning the interpretation of statutory provisions which prohibit unconscionable conduct in commercial business relationships.[28] Kosho's submissions do not contest a requirement to prove moral obloquy or turpitude and state that a finding in that regard is "a value judgment for the Court on the whole of the facts and circumstances of the particular case."

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26 (2005) 63 NSWLR 557 at 583 [120] – [121].

27 *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 at 761 [4].

28 Similar provisions were considered in *PSAL Ltd v Kellas-Sharpe* [2012] QSC 31 at [84] – [88]; an appeal on other grounds was dismissed in *Kellas-Sharpe v PSAL Ltd* [2012] QCA 371.

[159] I have earlier found that Trilogy's delay in connection with Special Condition (s) was unreasonable. I do not consider that its unreasonable conduct in that respect or its delay in other respects in communicating its position as to whether other Special Conditions were satisfied was so egregious or involved conduct that was so unreasonable as to import a pejorative moral judgment. Kosho has not proven that any delay was intentional so as to inflict economic harm on Kosho.

[160] The effective exclusion of Mr Slijderink from the process of negotiation between Trilogy and DMR was not unconscionable. It was not necessarily unreasonable for Trilogy to take the approach of attempting to resolve issues with DMR before presenting the agreed form of agreement to Kosho for its consideration. The possibility that tripartite negotiation of the deed may have resolved matters sooner does not make Trilogy's approach unreasonable, let alone unconscionable.

[161] I decline to find that indications given by officers of CPL and officers of Trilogy from time to time about the status of the matter, or their predictions about future matters, were unconscionable.

[162] Kosho submits that Trilogy served "its own ulterior and extraneous interests opportunistically to improve Trilogy's financial position". I decline to find that efforts to improve Trilogy's financial position, including by negotiating terms of a deed of assignment which enhanced the development potential of the Sunrise Waters land, were illegitimate. Trilogy pursued its legitimate interests and did so for a purpose which was not ulterior or extraneous to its commercial objective of granting the 2009 Facility on terms which included Special Conditions (s) and (t).

[163] I conclude that Kosho has failed to prove unconscionable conduct on the part of Trilogy or unconscionable conduct on the part of CPL giving rise to a liability for which Trilogy is responsible pursuant to statute.

[164] Paragraphs 101 and 104 of Kosho's second further amended statement of claim relate to alleged conduct by which CPL is said to have represented that:

> "(a) CPL would take all necessary steps to progress the provision of funds in a timely manner, and in any event in accordance with the schedule attached to the finance facility document;
>
> (b) funds would be provided in a timely manner and in any event in accordance with the schedule attached to the finance facility document;
>
> (c) CPL was in a position to do the matters pleaded in subparagraphs (a) and (b) above, and/or bring those matters to pass."

[165] CPL's alleged conduct in that regard is pleaded to have contravened s 52 of the TPA. This part of its case was not specifically addressed in Kosho's written submissions or previewed in the list of issues for written submissions. Accordingly, it has not been addressed by Trilogy in its submissions in reply. Nevertheless, I will deal briefly with it. Kosho alleges that the alleged representations were misleading because there was no reasonable basis for making them in the light of notice given on 20 May 2009 for an extraordinary general meeting of members of the PFMF for the purpose of removing CPL as the responsible entity. Apart from denying that the

representations were made, Trilogy submits that there were reasonable grounds for Mr McCormick and Mr McCosh to make them in that:

(a) replacement of CPL as responsible entity of the fund could not reasonably have been expected to cause any change in the arrangements which then existed between CPL (as responsible entity) and borrowers or prospective borrowers from the fund; and

(b) Section 601FS of the *Corporations Act* 2001 (Cth) then provided that if the responsible entity for the fund changed, the obligations and liabilities of the former responsible entity became the obligations and liabilities of the new responsible entity. Kosho did not plead any response to these allegations save for re-pleading the matters earlier pleaded in its statement of claim.

[166] I am not persuaded that the conduct referred to conveyed each of the representations pleaded in paragraph 101. The conduct included provision of the Letter of Offer which made clear that the provision of funds depended upon satisfaction of terms and conditions. The schedule attached to the 2009 Facility document did not specify particular dates. It related to cashflow over a period of months. There may have been an implicit representation that, once Kosho was entitled to draw-down funds then funds would be in accordance with the schedule, subject to compliance with the terms and conditions of the 2009 Facility, including CPL's unfettered discretion to amend the terms of its approval. Accordingly, I am not persuaded that a representation was made that the funds "would be provided in a timely manner and in any event in accordance with the schedule attached to the Finance Facility document".

[167] Any representation about the provision of funds was made in the context of the Letter of Offer itself and I am not persuaded that any representation as to future matters was misleading or deceptive because of the possibility that CPL might be removed as responsible entity of the fund. Any obligation to provide funds would continue. The issue remained as to whether CPL or any successor as responsible entity was obliged to provide funds.

[168] In conclusion, Kosho has not established its claim of unconscionable conduct or the additional conduct alleged to contravene s 52 of the TPA.

Causation

[169] Issues of causation arise in respect of Kosho's claim for breach of contract (upon which it has succeeded on only one basis), and contravention of statute (upon which it has failed).

[170] On the issue of causation, Kosho submits that "[w]hether cast in contract (being in the position as if the promise(s) had been performed) or remediation of misleading and deceptive conduct and/or unconscionability (to be put in the position that would have obtained but for such conduct) the result here is effectively the same." Trilogy did not submit to the contrary. However, different causal inquiries are involved even if the same practical result is reached.

[171] Kosho's submission emphasised the fact that the Abadi project was time-sensitive, as was City Co's hotel project. Such debt funded property development may suffer due to unreasonable delay in the provision of funds. Kosho argues that Trilogy's

conduct crippled what should have been the foundation year of the Abadi project, and the result was that City Co was unable to pursue its project with its land available as primary security for the hotel development. Kosho's submissions are premised upon the contention that the Letter of Offer of 24 June 2009 contained a promise to advance funds "appropriately promptly to meet timeframes" which CPL had accepted. Trilogy responds that this is incorrect and amounts to an assertion that a contractual term about agreed timeframes was breached. Trilogy's response is correct. The relevant causal inquiry in contract is directed to the term of the contract which was breached, and the position in which Kosho would have been if, instead, the contract had been performed in accordance with its terms.

[172] The relevant causal inquiry in relation to the alleged representations and the alleged unconscionability concerns the position that Kosho would have been in had the representations not been made.

[173] Both inquiries direct attention to whether, in the absence of a breach of contract or breach of statute, funding would have been given, by whom and when.

[174] The breach of contract which I have found did not occur at the inception of the 2009 Facility. It occurred due to a period of unreasonable delay. If Trilogy had not breached any implied term in this regard and had addressed Special Condition (s) in a more timely way, then it is possible that agreement would have been reached between it and DMR about the terms of a deed of assignment. As matters transpired, there seemed to be no insurmountable obstacle and the broad terms of an agreement had been reached by March 2010. The negotiation and finalisation of a deed of assignment which satisfied both Trilogy and DMR, and also was in a form to which Club Cavill and Kosho would have agreed, probably would have taken some months. Delays in DMR seeking and obtaining legal advice might have been expected even if Trilogy had acted promptly in the weeks and months following its appointment and had its solicitors address at that time the issues that came to be raised in late 2009 and early 2010. In oral submissions Kosho's counsel submitted that matters could have been resolved within a month. I think this to be most unlikely. Kosho's written submissions in relation to breach of implied terms complained of a failure to advance funds under the 2009 Facility by at the latest the end of October to early November 2009. Given the potential complexity of negotiations and inevitable delay, I think it unlikely that a deed of assignment would have been agreed and executed prior to the end of October 2009.

[175] At that time, assuming Special Condition (s) was satisfied, Trilogy would have been required to consider whether other conditions had been satisfied. Its position in late October 2009 was that Special Condition (p) had not been satisfied. There is no reason to suppose that it would have resiled from that position. As matters transpired, it did not.

[176] The issue of satisfaction of Special Condition (p) would have been an issue. If Trilogy maintained its position, Kosho would have been required to decide whether to persist with its position that the Put and Call Option Deed satisfied the condition or instead enter into an actual sale contract. The evidence does not disclose or prove that it would have done the latter. Kosho persisted with its stance that Special Condition (p) had been satisfied and has not proven that it would have adopted a different stance had Trilogy acted differently in respect of Special Condition (s).

[177] In summary, a breach of an implied term of the contract in respect of satisfaction of Special Condition (s) disabled Trilogy from relying upon that Special Condition, and entitles Kosho to damages for breach of contract. It did not disentitle Trilogy from relying upon Special Condition (p) and Special Condition (q). Special Condition (p) had yet to be satisfied. Any breach of an implied term in respect of Special Condition (s) did not prevent Kosho from accessing funds to which it was entitled under the 2009 Facility. Non-satisfaction of Special Condition (p) disentitled it to access funds under that Facility. Any breach of contract did not prevent Kosho from obtaining funds to which it otherwise would have been entitled had the breach not occurred.

[178] Kosho fails to establish an entitlement to any part of the substantial damages claimed by it for breach of contract. Had the breach not occurred it would not have obtained funds from Trilogy in late 2009 or early 2010. There is no satisfactory evidence that it would have entered into an unconditional contract for the sale of Stage 1A during the term of the 2009 Facility so as to satisfy Special Condition (p).

[179] Kosho has failed to prove that any breach of contract by Trilogy caused it substantial loss and damage, let alone loss and damage in the quantum alleged.

[180] Because Kosho has not proved its case on causation, its remedy for breach of contract is nominal damages.

[181] Kosho has not proven the contraventions of statute alleged by it. But if it had, I am not satisfied that the end result would have been different if the alleged representations had not been made and the alleged conduct not occurred. Kosho probably would have agreed to the 2009 Facility, and the course of events after that would have been essentially the same.

Assessment of Loss

[182] Kosho seeks damages for loss of the opportunity to profit from the development of the Carrara land. City Co seeks damages for loss of the opportunity to profit from the development of the Surfers Paradise land. Kosho and City Co also claim to have lost the equity which each had in the Carrara land and the Surfers Paradise land respectively.

[183] The quantification of their damages claims is based on the report of Mr Lytras. Mr Lytras in his report and in his oral evidence emphasised that his calculations were based on assumptions he was instructed to make and the validity of those assumptions was for the Court to decide.

Mr Lytras' assumptions

[184] Mr Lytras' assumptions include:

(1) In the absence of Trilogy's alleged breaches, all conditions required to enable funding under the 2009 Facility to be advanced would have been satisfied.

(2) The 2009 Facility that expired on 30 June 2010 would have been renewed on similar terms until the Abadi development was self-funding.

(3) The funds should reasonably have been advanced to Kosho during July 2009 or by no later than 30 June 2010, the expiry date of the 2009 Facility.

(4) As at July 2009, other than serving as collateral for the loan owed by Kosho to CPL, there was no other debt over the Surfers Paradise land.

(5) The plaintiffs' residual equity in the Carrara land and the Surfers Paradise land on an undeveloped, "as is" basis, as at the current date, is $nil.

(6) The "as is" values of the Carrara land and Surfers Paradise land as at 30 June 2010 are the same as their respective "as is" values as at July 2009.

(7) Kosho's cashflow model should be used as a basis for determining Kosho's loss of the opportunity to earn a development profit from the Carrara land.

(8) Mr Kogler's valuation reports dated 13 July 2009 and compiled 15 June 2012, should be used as a basis for determining City Co's loss of opportunity to earn a development profit.

(9) The $2.8m interest rebate to Kosho associated with the assignment of the Deed of Agreement should be excluded from the damages assessment.

(10) The benefit, if any, received by Club Cavill, as a consequence of:

(a) the 2009 Facility funds not being advanced;

(b) Club Cavill's rights and interests under the Deed of Agreement not being assigned to Sunrise Waters; and

(c) the associated compensation rights not being waived by Club Cavill,

is not relevant to the assessment of Kosho's and City Co's losses.

Mr Lytras' calculations

[185] On the basis of those assumptions Mr Lytras calculated the potential losses as:

(1) Loss of equity in the properties assessed at July 2009 of $8,767,410 consisting of:

(a) $4,767,410 to Kosho in relation to the Carrrara land; and

(b) $4m to City Co in relation to the Surfers Paradise land.

(2) Loss of equity in the properties assessed at 30 June 2010 of $7,329,574 consisting of:

(a) $3,329,574 to Kosho in relation to the Carrara land; and

(b) $4m to City Co in relation to the Surfers Paradise land.

(3) Loss of opportunity to earn development profits from the properties assessed as at July 2009 of $40,760,620 consisting of:

(a) $30,010,620 to Kosho in relation to the Carrara land; and

(b) $10.75m to City Co in relation to the Surfers Paradise land.

(4) Loss of opportunity to earn development profits from the properties assessed as at July 2010 of $39,240,194 consisting of:

(a) $28,490,194 to Kosho in relation to the Carrara land; and

(b) $10.75m to City Co in relation to the Surfers Paradise land.

(5) Costs not otherwise incurred. Mr Lytras' report provides two scenarios in relation to this head of damage:

(a) If the plaintiffs would have undertaken the proposed development then the plaintiffs have not incurred any costs that would not otherwise have been incurred had the alleged breaches not occurred. This excludes any costs associated with this litigation and any penalty interest and costs charged by Trilogy in relation to Kosho's loan.

(b) If the plaintiffs would not have undertaken the proposed developments, that is, absent the alleged breaches the plaintiffs would have effectively sought to realise the existing equity in the properties. On this scenario all the costs incurred after the date of the alleged breaches are costs not otherwise incurred.

On the basis that the alleged breaches occurred in or around July 2009 the costs not otherwise incurred are assessed at $5,632,505, comprising Kosho - $5,551,327 (plus any penalty interest and/or additional costs charged by Trilogy) and City Co - $81,178.

On the basis that the alleged breaches occurred around 30 June 2010 the costs not otherwise incurred are assessed at $3,726,655, comprising Kosho - $3,686,155 (plus any penalty interest and/or additional costs charged by Trilogy) and City Co - $40,500.

[186] Mr Lytras' calculations were said to provide a framework for calculating the loss of opportunity to earn development profits by applying a percentage to each calculated figure to reflect "various discounts and/or contingent factors". A different and higher probability might apply to the loss of equity and cost calculations, since the loss of opportunity to earn a profit was said by Mr Lytras to possess "a greater level of inherent uncertainty than the other two heads."

Loss of a chance - principles

[187] There is no contest about the principle that a claimant in a case such as this can be awarded compensation for deprivation of a commercial opportunity.[29] The value of the lost opportunity must be assessed. The general principle governing all claims for recovery of loss or damage was stated by Bowen LJ in *Ratcliffe v Evans*:

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29 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 348, 355, 364-5.

> "As much certainty and particularity must be insisted on ... in... proof of damage as is reasonable having regard to the circumstances and the nature of the acts themselves by which the damage is done."[30]

McPherson J (as his Honour then was) observed that the "degree of precision with which damages are to be proved is proportionate to the proof reasonably available."[31] Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat an award of damages.[32] The claimant must prove on the balance of probabilities that he or she has sustained *some* loss or damage.[33] The claimant does so by proving the loss of an opportunity which had *some* value. The claimant is required to demonstrate by evidence that the opportunity had a real value.[34]

[188] Depending upon the circumstances, the chance of obtaining a particular benefit may be expressed as a percentage of the profit which the developer hoped to derive at the end of a lengthy period. However, that percentage may need to reflect a series of contingencies and, in principle, would be a cumulative percentage.[35]

[189] Where the chance of a particular loss occurring, such as an eventual large profit from the development of land over a number of years, is "merely speculative"[36] or the Court cannot select a percentage figure which reflects the chance of obtaining the benefit, damages for loss of a chance cannot be awarded as a percentage of the claimed lost profit.

[190] In some cases curial procedures or inadequate proof do not permit a court to determine whether there was "any real or significant chance that an alleged benefit would actually have been obtained".[37] As Deane J observed in the *The Commonwealth v Amann Aviation Pty Ltd*:

> "The profit which one experienced commercial person may see as lying at the end of some commercial undertaking might be seen as an inevitable and disastrous loss by another. What seems to one person to be a benefit may be thought by other and wiser people to be valueless or even a detriment. The nature of what would have been obtained if the contract had been performed may be so completely speculative that 'it is quite impossible to place any value' upon it."[38]

[191] The chance of pursuing a business opportunity, such as the chance to develop a property, may be expressed in terms of a percentage. The chance of developing the property at a profit may be a smaller percentage, and the chance of developing the property so as to earn a very large profit may be even smaller, or so small that it is

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30 [1892] 2 QB 524 at 532-533.
31 *Nilon v Bezzina* [1988] 2 Qd R 420 at 424.
32 *The Commonwealth v Amann Aviation Pty Ltd* (supra) at 83, 102, 125-126.
33 *Sellars v Adelaide Petroleum NL* (supra) at 355.
34 *Higgins and Fidge v Drysdale* [1996] 1 VR 346 at 354-5; *Lewis v Hillhouse* [2005] QCA 316 at [22] - [26].
35 *Ministry of Defence v Wheeler* [1998] 1 All ER 790 at 803-804.
36 *Sellars v Adelaide Petroleum NL* (supra) at 364.
37 *Commonwealth v Amann Aviation Pty Ltd* (supra) at 125-126.
38 Ibid at 126 citing *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 411; *Fink v Fink* (1946) 74 CLR 127 at 134-135, 143.

not appropriate to assign a percentage chance to it. The chance to earn such a large profit may have been negligible. Any percentage arrived at by the Court is done on the basis of imprecise evidence. The figure to which the percentage is applied also must be the subject of adequate proof.

[192] If the Court rejects the evidence put forward as proof of the measure of the possible benefit, it will be impermissible, or at least inappropriate, to apply a percentage to the suggested figure. The claim for substantial damages will fail even though the plaintiff may have suffered the loss of a commercial opportunity that had some value. Deficiency in proof of the chance of obtaining a different, smaller and unquantified benefit may preclude the valuation of the lost commercial opportunity.

Parties' submissions

[193] In their written submissions the parties joined issue about:

(a) the value of the Surfers Paradise land;

(b) assumed sales rates and prices of the Abadi residential units;

(c) the profitability or otherwise of the developments;

(d) the availability and conditions of further finance at and after June 2010;

(e) the effect of the Global Financial Crisis ("GFC");

(f) the reliability of the expert valuation opinions upon which Mr Lytras' calculations were based; and

(g) the remoteness of development profit from Trilogy's alleged breaches.

The value of the Surfers Paradise land and its possible profitable development

[194] Mr Lytras' calculation of a loss of equity of $4m to City Co in relation to the Surfers Paradise property, and a figure of $10.75m in relation to City Co's loss of opportunity to earn development profits from that property is based on, among other things, valuation reports prepared by Mr Kogler, whose 15 June 2012 report for the purpose of this litigation assessed the value of the Surfers Paradise land as at 13 July 2009. His valuation of $4m reflected the value which he had given to the land in a 13 July 2009 valuation report prepared for CPL. Mr Kogler's 2012 report also calculated the expected "Developer's Profit" from a proposed development of the land for a 19 storey boutique hotel. Mr Lytras was instructed to use that valuation report to assess the expected financial outcomes of the hotel development and to determine City Co's loss of the opportunity to earn a development profit in the Surfers Paradise land.

[195] Mr Kogler's retrospective valuation arrived at a "site value plus loss of development profit" figure of $14.75m as at 13 July 2009. In doing so he adopted an "as if complete" valuation with a discounted cashflow valuation, using figures provided by a hospitality consultant about the expected trading performance of the proposed hotel. This included assessments of opening years' occupancy, average daily rates, revenue per room and expected trends. On that basis, a profit and loss analysis for five years trading, commencing from an opening month of January 2011 was

prepared. From this, Mr Kogler assessed the capital value of the hotel "as if complete" on the basis of those projections and adopted a "Year 3 Stabilised EBITDA[39]" as the basis for the capitalisation of annual income. He adopted this capital value on the basis of an assumed sale in April 2011, being three months past the earliest date for the completion of the project. He deducted the proposed hotel's predicted construction and financing costs to derive a development profit after interest. He also adopted a notional gross sales proceeds value for the strata title nightclub of $1.5m. The peak funding required for the hotel development was $26,400,709 in March 2011.

[196] Mr Kogler adopted a net sales figure of $41,763,636, producing a development profit of approximately $14.75m. On this basis, Mr Lytras deducted the value of the Surfers Paradise land as at July 2009 ($4m) to arrive at a potential loss of opportunity to earn development profits in respect to the Surfers Paradise land of $10.75m. This figure was the starting point from which the Court was invited to arrive at an assessment of City Co's loss based upon a range of probable outcomes from nil to 100 per cent.

[197] City Co's claim for loss of the opportunity to earn development profits and its claim for loss of equity in the Surfers Paradise land are based upon a number of assumptions or contingencies including:

(a) its ability to develop the site as a boutique hotel;

(b) the timeframe for such a development and an assumption that the development would be complete and the hotel opened in January 2011;

(c) that there would be a sale of the hotel within three months of opening;

(d) that City Co would be able to borrow the funds necessary to develop the hotel and operate it until it was sold;

(e) that construction costs would be as estimated; and

(f) that the hotel would achieve the predicted income and that its income would trend upwards at the rate suggested by the hospitality consultant for a five year trading period.

These assumptions are highly questionable.

[198] The proposed development was approved on 28 May 2004, and in May 2008 the Gold Coast City Council extended it until 15 July 2010. Mr Kogler's contemporaneous valuation identified, in his SWOT[40] analysis, the limited time to develop the site before the approval expired as a threat. There is no suggestion that CPL or Trilogy were prepared to finance the development. Another lender would have required security over the subject site, but City Co had offered the site as security for the 2009 Facility to Kosho, and any release of the encumbrance held over the Surfers Paradise land depended on provision of a $3m cash payment or achieving the loan to value ratios referred to in Special Condition (k) of the 2009

39 Earnings before interest, taxes, depreciation and amortisation.
40 Strengths, weaknesses, opportunities and threats.

Facility. It is unlikely that Special Condition (k) would have been satisfied. Kosho did not advance any real argument as to how or why it would have been satisfied during the term of the 2009 Facility.

[199] The prospects of City Co obtaining a financier which would commit to the proposed development was poor. The evidence about the impact of the GFC makes it extremely unlikely that a private lender, let alone a bank or other financial institution, would finance the development of the proposed boutique hotel on the subject site. The site had limitations including one street frontage, a small area and no scope for onsite parking. A nightclub was to be built in the hotel's basement, but with hotel guests and nightclub patrons using a common entrance. Mr Kogler confirmed this in his evidence but Kosho's submissions point to a plan that indicates separate nightclub and hotel entries on the ground floor. I conclude that the entrances were to be in close proximity on the property's narrow frontage.

[200] The concept of a boutique hotel was new to the Gold Coast. Under cross-examination Mr Kogler accepted that the concept was "unique". His view about the development's prospects was based upon the existence of a boutique hotel industry around the world. However, he acknowledged that a boutique hotel had yet to be built on the Gold Coast, even at the time he gave his evidence in these proceedings. He described this as a "market maturity" issue. However, the absence of a boutique hotel, even now, on the Gold Coast calls into question Mr Kogler's opinion about the market for such a hotel, particularly one located in the nightclub district of Surfers Paradise and having a nightclub in its basement. It suggests that there has not been finance available after the GFC for such a development to be completed. Based on the evidence about the impact of the GFC on lending, and the fact that the proposed development was unique for the Gold Coast, I think it unlikely that City Co would have obtained finance to undertake it in recent years. Under cross-examination Mr Kogler acknowledged that banks withdrew from lending in 2009 and thereafter and, as a result, there were very few transactions. Notwithstanding this, there was some capacity to obtain finance, provided the borrower did not have a high exposure to debt, had a reasonably "solid balance sheet" and the advantage of cashflow outside of the particular project to support the loan. Finance was available but there were quite significant hurdles in obtaining it. Mr Kogler accepted that the need for a developer to obtain funding to develop the hotel was a hurdle and problematic unless it had "an end takeout in place", namely that the developer could obtain a buyer of the boutique hotel. This was only a possibility. Any potential buyer would be basing a decision to buy upon anticipated, not proven, revenues.

[201] Mr Kogler's figures were based upon proposed room rates which, according to Mr Norling, were too high and greater than the average achieved by all five star hotels in Queensland and in Brisbane in the same year (2011). Although Mr Norling is not a valuer, his expertise extends to project feasibility studies in the tourism sector. I am not satisfied that the room rates and revenue streams adopted by Mr Kogler would have been achieved by the proposed hotel. Also, I accept Mr Norling's comment that the projected growth of room rates of 5.4 per cent per annum in the period 2011 to 2015 is in excess of the current inflationary trend. It is also substantially in excess of the rates achieved by Gold Coast hotels in the 2004 to 2011 period.

[202] Mr Kogler's assessment of the developer's profit is based upon a number of assumptions concerning the market for such a hotel and the availability of finance to develop it. Even assuming that the hotel could have been constructed for its estimated price and with the finance costs that Mr Kogler estimated, I am not persuaded that it could have been sold for anywhere near a price that would yield net sale proceeds of in excess of $41m in early 2011. In general, I found Mr Kogler's evidence about the prospects of this development unpersuasive. The assumptions upon which his opinions were based were not firmly established in other evidence.

[203] Even on the assumption that CPL or Trilogy would have been prepared to release the encumbrance over the Surfers Paradise land to enable another lender to advance finance to City Co to develop the boutique hotel, it is highly unlikely that any lender would have been prepared to advance the funds required to commence construction of the hotel before its development approval expired and to complete its construction and thereafter fund the operation of the hotel until it could be sold. If, in the unlikely event that City Co was able to obtain funds to develop the hotel, and could do so within the timeframes assumed by Mr Kogler, it is unlikely that the hotel would have achieved the revenue streams which he assumed. The sale price which he calculated on the basis of expected earnings was unrealistic in April 2011 or at any relevant time thereafter. The probability of City Co making a development profit of $10.75m is practically nil. City Co was more likely to suffer a loss than make a profit on the development. A loss on the development would have reduced and probably eliminated its equity in the Surfers Paradise land.

[204] Mr Lytras was instructed to assume that the residual equity in the Surfers Paradise land and the Carrara land was nil, based upon instructions given to him by Mr Slijderink. In August 2012 Mr Slijderink instructed Mr Lytras that the current market value of the Surfers Paradise land was $2m. By that time the site had lost the hotel development approval. The Valuer-General's valuation of the site as at 30 June 2012 was said to be $2m. Other evidence before me revealed that a bid of $1.8m was received at auction on 9 June 2011 and the property was passed in on a vendor bid of $1.9m. The land remains unsold. I find that its present value is approximately $2m.

[205] I find that the value of the land in July 2009 was substantially less than the $4m which Mr Kogler arrived at, even with its development approval. City Co has not proven by satisfactory evidence its market value in July 2009 or July 2010.

[206] Whatever the value of the land was at those dates, City Co did not lose the value of its equity in that land as a result of Trilogy's proven breach of contract or any of the other breaches of contract alleged by Kosho. Despite its breach of contract, Trilogy was not obliged to advance additional funds to Kosho during the term of the 2009 Facility. The Surfers Paradise land was offered as security for an extension of the 2007 Facility and as a term of the 2009 Facility. Even if Trilogy had advanced funds during the term of the 2009 Facility, the Surfers Paradise land probably would have remained encumbered and not available as first mortgage security to a financier of the boutique hotel development.

[207] I should add that I am not persuaded that City Co satisfied Special Condition (j) of the 2007 Facility at the time it requested a release of the Surfers Paradise land on 8 April 2009. However, Kosho and City Co agreed that the Surfers Paradise land

should remain as security and the request to release it was overtaken by events. In the end result, the Surfers Paradise land remained encumbered as security for the Kosho loan. City Co has not proven that it would have become entitled to a release of that security during the term of the 2009 Facility. It has not proven that it suffered a loss in respect of its equity in the Surfers Paradise land as a result of Trilogy's breach of contract. Kosho retained the opportunity to find a buyer for the Surfers Paradise land and it might have been in a position to negotiate a release of the encumbrance, depending upon the price which it could negotiate with a buyer. The expiry of the development approval may have diminished the value of the land, but the expiry of that development approval before construction of the boutique hotel is not attributable to Trilogy.

[208] In summary, City Co has not proven the probability that it would have made a development profit or the value of the loss of the opportunity to make the development profit claimed by it. The value of the loss of an opportunity to make a development profit has not been satisfactorily proven. No loss of equity has been proven. The site was unlikely to be developed as a boutique hotel, let alone developed and quickly sold at a substantial profit. City Co would have been left with the site which it still owns.

[209] I should add for completeness that I have proceeded on the basis that City Co was a party to the 2009 Facility and entitled to sue for breach of contract. This is despite the fact that the Letter of Offer was directed to Kosho, and that the form of acknowledgment which was signed by Ms Fujino as director of Kosho and as director of City Co indicated that Kosho (and City Co as third party mortgagor) wished to proceed with the application for a mortgage loan. The borrower was identified as Kosho. Trilogy appears to accept that City Co was a party to the contract and entitled to sue for breach of it.

Possible development profit from the Carrara land - overview

[210] Kosho's claim for damages for loss of the opportunity to profit from the development of the Carrara land assumes that it would have obtained funding from Trilogy or other lenders and completed the multi-stage development of the Abadi Residential Village over a number of years at a substantial profit. Trilogy contests this claim and the various assumptions upon which it (and Mr Lytras' calculations) are based. It points out that Trilogy was obliged, at most, to provide the Stage 1A funding of some $2.2m for construction/consultants' costs and a contingency amount of approximately $336,000. The development profit assessments are based upon the entire development being completed, and this necessitates an inquiry about how the development would have proceeded, and whether it would have done so at a profit. Leaving aside issues of remoteness of damage, Trilogy argues that Kosho's calculation of damages and Kosho's cashflow model ignore the effects of the GFC and the state of the Gold Coast property market at the relevant time, and wrongly assumes that Kosho would have obtained funding on an ongoing basis.

[211] Any further funding would have been dependant upon Kosho achieving a high percentage of pre-sales. The claimed development profit assumes a certain sales rate and sale prices for the Abadi residential units which would have enabled further funding to be obtained, the development to become self-funding at a certain point and for Kosho to derive a substantial development profit from the completion and

sale of all stages over a 74 month construction program. The initial stages would have required a very large commitment from a lender.

[212] Kosho's claim for loss of the opportunity to make a development profit is based upon a cashflow model prepared by Mr Slijderink in March 2009. Trilogy submits that the model does not provide a basis for the calculation of profit which the development might have derived, since it does not make allowance for the reduction in sales rates and significant reduction in price that occurred as a result of the continuing effect of the GFC. The model anticipated 57 per cent of pre-sales would be required in order to obtain funding, but the evidence suggests that a much higher percentage would have been required as at June 2010.

[213] The topics of sales rates and prices, the availability and conditions of further finance at and after June 2010, the effect of the GFC and the profitability or otherwise of the proposed development are interrelated. A large amount of evidence was given about these topics. It would be possible to write a book about the effect of the GFC on the Gold Coast property market and on this proposed development in particular. By way of overview, although the GFC had an adverse impact upon sales rates and prices on the Gold Coast, its effect differed in different markets. The "sub-$500,000 market" better weathered the storm than higher priced, high-rise units. But it still was adversely affected by the GFC. Queensland was more adversely affected by the GFC than many other States, having experienced two technical recessions and negative growth in its Gross State Product. According to economic evidence in the proceedings, the Gold Coast economy remains in a parlous state.

[214] One impact of the GFC was the large-scale withdrawal of credit for property developments, particularly pioneering developments of the kind represented by the Abadi Residential Village. Lenders withdrew from the market or imposed more onerous conditions, including the percentage of pre-sales required.

[215] Although the topics addressed by the parties in their submissions are interrelated it is convenient to first consider the issue of assumed sales rates and prices of the Abadi residential units.

Assumed sales rates and prices of Abadi residential units

[216] This issue bears upon whether further finance would have been available in June 2010 (or prior to that date in the event that funding was not available under the 2009 Facility for one reason or another), whether the development would have proceeded to completion and whether it would have yielded a development profit. Critical assumptions contained in the Abadi cashflow model included:

(a) average sale prices per residential unit of $462,000 (inclusive of GST); and

(b) an average sales rate of 4.75 units per month over a selling period of more than six years involving a seven year construction program.[41]

Kosho submits that it required 4.75 sales per month to achieve 100 per cent of pre-sales in 12 months, but only required sales equivalent to 100 per cent of debt

[41] Taken from Mr Norling's report and Trilogy's submissions. Kosho did not contest these figures. See Mr Lytras' report for slightly different average sale prices and rates.

coverage which equated to 70 per cent pre-sales or 47 units (four per month). It submits that this sales rate could have been achieved. It had formulated a marketing strategy as part of its funding proposal to CPL. A key part of its strategy was to construct the commercial building in Stage 1A known as the Pavilion, which it hoped to construct in late 2009 and complete in early 2010 with money advanced under the 2009 Facility. It was to be used as a sales office.

[217] Kosho relies upon what it described in its submissions as "pre-sales" that it had achieved at the time of its funding submission in March 2009, including two offshore sales and five expressions of interest. The documentation of the alleged offshore sales is incomplete and the "expressions of interest" came from individuals or entities associated with Ms Fujino and Mr Slijderink. There were no executed contracts by these people. Mr Slijderink was relying on oral expressions of interest to assert at one point that Kosho could have achieved 100 per cent of pre-sales.

[218] In mid-2009 Mr Slijderink had been in contact with Mr Michael Gore who specialised in project/investment marketing, and who was prepared to undertake a sales campaign for the project. Mr Gore gave evidence which promoted the prospect that his company could have achieved a large number of sales. I found his evidence unpersuasive and unreliable. I do not doubt Mr Gore's sincerity or his belief that he could have achieved a substantial number of sales despite what he described as "the negative wealth effects of the Global Financial Crisis and related stock market crashes." I did not discount Mr Gore's evidence simply because he and Mr Slijderink had worked together at the Atkinson Gore Group and his support in giving evidence was enlisted by Mr Slijderink late in the proceedings. Instead, I had trouble in accepting Mr Gore's rejection of the proposition that his ability to achieve sales was determined by what the market was doing. He stated his company was "very much insulated from the market". Whilst not doubting Mr Gore's experience and skills in selling real estate to investors, and his belief that the Abadi residential units would have been attractive to a variety of buyers, including investors, he had not marketed a retirement village near the Gold Coast, and his evidence did not make appropriate concessions about the likely effect of the GFC on the rate of sales and the prices that could be achieved. I decline to act on his evidence.

[219] I have had regard to the large volume of valuation evidence which outlines the strengths and weaknesses of the Abadi project, and the evidence about the post-GFC market into which the units would have been advertised in late 2009, the first half of 2010 and possibly beyond.

[220] Two valuations, one by CB Richard Ellis Valuation ("CBRE") dated 24 October 2008 and another from LandMark White dated 28 February 2009, formed part of the evidence although the author of each valuation was not called as a witness. Each valuation was prepared for Kosho, with the latter having been prepared "for internal purposes." In addition, Mr Kogler prepared an opinion dated 15 June 2012 for the purpose of these proceedings in which he was asked to consider the likely sales rates for the Abadi project. Mr Kogler gave oral evidence on behalf of Kosho which tended to accentuate the positives of the Abadi project. I consider that his retrospective opinion dated 15 June 2012 and his oral evidence was excessively optimistic about the long term sales rates for the life of the project, and the sales rates in the year 2009-2010. His evidence tended to disregard or downplay unattractive features of the development.

[221] CBRE accurately noted that the development was not in an established residential precinct, that the project was "pioneering in nature within an unknown market" and the immediate area was one of "traditional apartments/unit blocks of a much lower quality." Its weaknesses included its proximity to a crematorium, and its distance from shopping centres and certain other services. It had mixed blessings. Although it was close to the Nerang railway station and the busy Nerang-Broadbeach Road, these features might generate noise. The project site had elevated views and was located within the suburb of Nerang although its outlook was towards Carrara. Nerang's industrial area was to the south-west of the property. Other residences in the vicinity and just over the rise were less salubrious than competing developments at Emerald Lakes. Mr Kogler compared the proposed Abadi project with other developments, including Riverwalk at Robina. These developments were assessed by CBRE to be in a superior location and to consist of larger units. They were close to the Robina Town Centre and its shopping precinct.

[222] Any comparison between the sales rates achieved at what Mr Kogler described as comparable projects at the Riverwalk Precinct at Robina and Sphere at Southport comes with its complexities. The sales rates achieved in those other developments and reported upon by Mr Kogler relate to sales that were completed during various periods in 2009 and 2010. They possibly included contracts that were entered into before the GFC or before the full impact of the GFC was felt on sales activity and prices. The prices that were achieved on sales that were completed in mid to late 2009 cannot be equated with the price that may have been negotiated at that time in the same project (assuming units remained to be sold). An analysis of sales rates and average prices in respect of Riverwalk and Sphere tends to suggest that sales rates slowed and that there was downward pressure on prices after 1 July 2009.

[223] The Abadi project would have been launched into a different, and more depressed market than most of the sales at Riverwalk and Sphere that were considered by Mr Kogler, CBRE and Landmark White. Whilst, as noted, the sub-$500,000 market weathered the storm better than higher priced sections of the market, particularly high-rise units, it was still affected adversely by the GFC. Median prices of units in the vicinity of the Carrara land, both at Nerang and Carrara fell from their 2008 peak. There was also a fall in sales volume.

[224] The GFC adversely affected savings, including the value of investments in superannuation and shares, and was apt to delay the retirement plans of many individuals whose investments had been substantially reduced in value. Although it is true that many potential retirees whose savings were reduced might seek out a cheaper property to purchase for their retirement, and this might favour the Abadi development over more expensive units, the fact remains that its location was less attractive than other locations including comparable units at Robina and Emerald Lakes. It might be that in general terms there is and was an under-supply of retirement village stock that is appropriately priced for retirees. This is not to say that the Abadi project would have achieved sales or average sale prices predicted in the cashflows upon which Mr Lytras relied in performing his calculations and upon which Kosho relies in its submissions.

[225] Mr Kogler professed not to know when the impact of the GFC on superannuation funds was first experienced and whether there were large decreases in the value of superannuation funds in the relevant period. This reduced my confidence in his

opinions about the effect of the GFC on demand for units in the Abadi project and the opinions which he expressed about likely sales rates.

[226] I do not accept Mr Kogler's opinion dated 15 June 2012 that a long term sales rate average in the vicinity of five to six sales per month could have been achieved for the Abadi project with an average price of $440,000 to $460,000 in line with the Sphere and Riverwalk precinct projects. I also do not accept his conclusion that there would have been in the order of 50 to 53 sales at such an average price for the period 1 July 2009 to 30 June 2010. The fact that most of the sales in relation to Sphere and Riverwalk had been achieved by June 2009 with little stock remaining has implications for market demand, as Mr Kogler explained in a further report provided to Mr Slijderink dated 13 August 2012. Most of the sales in Sphere and Riverwalk had been completed by 1 July 2009. This tends to suggest that the rate of sales and prices that were achieved for those projects cannot be translated to presumed sales rates and prices for the Abadi project after 1 July 2009, or, more precisely, when funds became available some time after that date to market the Abadi project.

[227] The Landmark White report of 28 February 2009 did not specifically address the rate of sales in 2009-2010. Instead, in arriving at an opinion about the value of the Carrara land for internal purposes, namely its "as is" site value with the benefit of its development approval, the valuer expressed the opinion that an average "blended" long term sales rate in the order of 4.5 to 5 units per month should be achievable, and adopted a sales rate of approximately 4.75 units per month over the life of the project. This involved a total of 361 units to be sold over a total sales program of 74 months, with a total construction timeframe of 60 months undertaken on a rolling basis. Such a prediction made in February 2009 of long term sales rates provides a limited basis upon which to make a conclusion about the rate of sales that would have been achieved during the period of the 2009 Facility.

[228] The more conservative CBRE prediction of a sales rate of three to four units per month, provided a professional marketing and promotional campaign was undertaken, was additionally qualified in the body of the CBRE report. CBRE noted that any further softening of economic conditions would be detrimental to property values and that it was impossible to predict them and their potential for a reduction in the value of the property. Development sites such as the subject property were described as "high risk in the current market and are more susceptible to market fluctuations than other forms of real estate." Cautious lending practices were recommended. CBRE remarked that the lack of liquidity in capital markets required valuations to be kept under regular review. Its opinion about the lack of liquidity in capital markets and that the property types that were most at risk were "non-prime/secondary assets, passive investments reliant solely upon market growth and non-income producing development sites" is relevant to the preparedness of lenders to provide finance when the 2009 Facility expired on 30 June 2010.

[229] CBRE's estimate of a sales rate of three to four units per month was made in a report dated 24 October 2008. There is no satisfactory basis to conclude that several months later, as the effect of the GFC on sales activity and prices became more apparent, particularly on the Gold Coast, CBRE would have upgraded its predicted rate of sales. If anything, it probably would have provided a more pessimistic assessment of expected rates of sale. In any event, based upon the evidence given about the effect of the GFC, I conclude that between late 2009 and

1 July 2010, the Abadi project was likely to achieve less than the three to four sales per month that CBRE had predicted in October 2008 and less than the 4.75 units per month that Landmark White predicted on a long term basis. This assumes that funds would have been advanced for marketing and construction purposes and that such a marketing program would have been underway in late 2009 and early 2010.

[230] I consider that the CBRE report provided a more realistic assessment of the strengths and weaknesses of the subject property than Mr Kogler's opinion. CBRE identified the competing development at the multi-staged Emerald Lakes development located about one kilometre to the east. CBRE regarded it as superior to the Abadi project but noted that the two developments might complement each other. Other developments at Robina and Varsity Lakes were of comparable quality to the proposed Abadi development but had the advantage of close proximity to extensive retail and educational facilities including Bond University and Robina Town Centre.

[231] On the assumption that all conditions required to enable funding under the 2009 Facility to be advanced had been satisfied by late 2009, entitling Kosho to a release of funds to market the development and build the Pavilion, it is unlikely that Kosho would have achieved four or more pre-sales per month whilst achieving the average price contained in its cashflow model.

[232] This cashflow model was not updated. The fact that Trilogy did not request an updated cashflow does not mean that it was satisfied that the cashflow model was appropriate to the changed circumstances which prevailed in late 2009 and 2010. Mr Slijderink acknowledged under cross-examination that revised cashflows would have been required to obtain further finance on 30 June 2010.

[233] The cashflow model prepared for the purpose of obtaining finance made optimistic predictions about sales rates and expected profits. Mr Slijderink is experienced in property development. However, he did not impress me as a reliable witness in relation to the rate of sales that were likely to be achieved, the impact of the GFC on the project or more generally. Although I permitted him to give evidence on such matters, given his experience and detailed knowledge of the project, his evidence lacked independence and he, perhaps understandably, had an excessively optimistic view about the project, its prospects and its profitability.

[234] Kosho has not proven that the cashflow which Mr Lytras was instructed to use as a basis for determining its loss of opportunity to earn a development profit from the Carrara land, and which he relied upon in doing so, should be used for that purpose. Kosho's failure to prove the sales rates, prices and other elements contained in that cashflow undermines one of the important assumptions upon which the calculation of its loss of opportunity claim was based.

[235] No other evidence was given of a cashflow based upon reduced rates of sale, or for that matter reduced average prices.

[236] Kosho's failure to prove its cashflow model as a reliable basis to calculate its development profit has implications for its damages claim. Kosho has failed to prove that it would have achieved the number of pre-sales that Mr Slijderink predicted in the cashflow model, and this has implications concerning the availability of finance in July 2010, and whether it would have earned a development profit even if such finance had been available.

Further finance and the effect of the GFC

[237] Kosho's case is that it would have obtained funding to complete the various stages of the Abadi development. Trilogy disputes this and submits that it had no obligation to provide further finance after 30 June 2010, and that the GFC meant that it was becoming harder to obtain finance. Any finance that might be obtained was likely to cost more and be more heavily conditioned, particularly by a requirement of pre-sales. The starting point for consideration of this issue depends upon whether any part of Stage 1A would have been completed by 30 June 2010, assuming that Kosho satisfied all the conditions of the 2009 Facility and funds were advanced for the initial stage of construction. Assuming the completion of Stage 1A (at which point funding of about $13m would have been required), according to the cashflow Stage 1B required total funding of $28,891,621 including residual debt from Stage 1A, leaving aside any interest offset of up to $2.8m.[42] Mr Slijderink's affidavit sworn 2 October 2012 (Exhibit 33) refers to a finance facility limit of $34m being required to undertake stages B1 and B2, with a peak debt forecast of $30m.

[238] Even before the GFC, Kosho had not been able to obtain bank finance for the acquisition of the Carrara land. Funding for the acquisition was provided by CPL in 2004. In mid-2006 refinance was obtained from MFS Pacific Finance Limited and Perpetual Nominees for 12 months. In 2007 finance was sought from different lenders to obtain development approval for Stage 1. No formal approval was obtained from a bank and the 2007 Facility that eventually was obtained from CPL in October 2007 was in the expectation that it might provide for project funding over the life of the project. In the meantime, Ms Fujino on behalf of Kosho obtained a short-term loan facility after approaching Mr Jimmy Goh. A short-term loan facility which ended in October 2007 was arranged from private financiers, Apiang Woong and International Mezzanine Funds Management (Australia) Pty Ltd. The fact that Kosho was dependent upon obtaining finance from such private lenders in 2007 makes it highly improbable that it would have obtained bank finance after the GFC.

[239] Mr Kogler observed that September 2008 was a watershed, and that many lenders in the marketplace, particularly banks, did not know what they were doing or where they should be going. Some individuals and businesses were able to obtain finance, but the type of borrower typically was one which did not have exposure to high debt. It became more difficult to obtain finance in 2008, 2009 and into 2010.

[240] The impact of the GFC on the availability of credit also was addressed by an economist, Mr Norling, whose evidence on that topic I accept. As a result of the GFC, finance for development projects contracted, and offers of finance were conditioned, requiring a high percentage, sometimes 100 per cent, of pre-sales.

[241] Mr Norling acknowledged that even after the GFC, projects on the Gold Coast had been funded by banks on a case-by-case basis. He also acknowledged that funding was available from non-traditional lenders. However, the presence of second tier financiers and private lenders in the market, which were prepared to consider loans on a case-by-case basis, does not provide acceptable evidence that financiers would have funded Kosho after 30 June 2010 upon the expiry of the 2009 Facility.

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42 Compare the affidavit of Mr Goh, which was premised upon Kosho seeking a facility limit of $34,089,615 for Stages B1 and B2 for a refinance as at July 2010.

[242] The evidence of Mr Norling and Mr Kogler about the impact of the GFC, the "pioneering" nature of the Abadi development and the fact that Kosho required large amounts of funding to continue with the staged development lead me to conclude that it would not have been able to obtain finance as at 30 June 2010 to undertake the Abadi development. By that time CPL, which apparently had a high number of non-performing loans, had been replaced by Trilogy. Trilogy would not have provided additional finance in June 2010 to embark on further stages of the Abadi development.

[243] Incidentally, Mr Slijderink was attempting to obtain finance from alternative sources in late 2009 and early 2010, without success. Under cross-examination, Mr Slijderink acknowledged that the "credit crunch" which happened in 2008 and 2009 continued. Neither Mr Kogler's evidence nor Mr Slijderink's evidence persuades me that Kosho would have obtained finance following the expiry of the 2009 Facility, even assuming the completion of Stage 1A. Mr Slijderlink's affidavit sworn 2 October 2012 refers to alternative finance options, but his evidence about possible sources of finance proved very little. Mr Slijderink and Kosho may have had relationships with investors, but his evidence does not establish that alternative finance options would have been available. No reliable independent witness who attempted to obtain finance for developers gave evidence about the availability of finance for the Abadi development in July 2010, assuming Stage 1A had been completed.

[244] Apart from general evidence about the presence of non-bank lenders in the market, Kosho's case concerning the possibility of obtaining finance rested principally upon the suggestion that it would have obtained finance from a private investor, and from entities associated with Mr Goh in particular. Kosho submits that obtaining funding from Mr Goh was a real and tangible prospect. Mr Goh's affidavit evidence about his preparedness to advance sufficient cash resources to provide a refinance for each of Stages 1B, 1C and 1D subject to meeting a pre-condition of pre-sales of 70 to 100 per cent prior to draw-down was qualified by his oral evidence. He said that he definitely would have required a lot more information from Kosho before deciding whether to provide funding. Mr Goh had not formed a view about whether he would have funded the Abadi project as it was at a very "premature stage" and he needed more information. Although he had funds available, any offer of funds would have been subject to many pre-conditions. Mr Goh's evidence related to a theoretical refinance as at July 2010 of approximately $34m for Stages 1, B1 and B2 for a period of 15 months. Mr Goh would have required a loan to value ratio not exceeding 75 per cent and further stages would have been subject to similar lending terms. I am not satisfied that the further information which Mr Goh required and the pre-conditions which he would have imposed upon any offer of finance would have led to the provision of the kind of finance which Kosho would have required as at July 2010. Kosho has not proven that it was likely to have achieved the percentage of pre-sales required to satisfy Mr Goh or any other lender in July 2010.

[245] Trilogy was not obliged to provide funding due to the non-satisfaction of Special Condition (p). When it did not provide funds in late 2009 Kosho experienced difficulty in obtaining alternative finance. Kosho has not established that a different course of events would have followed had there not been a breach and Special Condition (s) been satisfied. It would have been required to satisfy Special Condition (p) and obtain funds under the 2009 Facility in late 2009 (at the earliest) or in 2010. It is unlikely that it would have completed Stage 1A by 30 June 2010.

If, instead, it did not avail itself of any funds from Trilogy, due to the imminent expiry of the 2009 Facility, it would have had difficulty in obtaining finance from any other source to undertake Stage 1A and the subsequent stages.

[246] If one assumes in Kosho's favour that funding would have been available from Trilogy had there been no breach of contract, and Stage 1A would have been completed at about the time of the expiry of the 2009 Facility, then there is no evidence that Trilogy would have been prepared to advance the very substantial amounts required to complete later stages. There is no acceptable evidence that finance could have been obtained from other sources to undertake further stages of the development. As a result, the claimed development profit that Kosho contends would have been derived by it from the completion of the development over a number of years would not have eventuated. Kosho's development would not have proceeded beyond Stage 1A.

The profitability of the development

[247] The development profit calculated by Mr Lytras assumes that funding would have been available after 30 June 2010 until the Abadi development was self-funding, and that Kosho would have derived a development profit upon the eventual completion of the development in accordance with the March 2009 cashflow model. For the reasons given, Kosho has not proven these assumptions. It would not have obtained the additional finance required after 30 June 2010 to undertake the development in accordance with the timeframe contained in the cashflow.

[248] If, however, later stages of the development had been completed then it is most unlikely that the cashflows would have been in accordance with the March 2009 cashflow model. Even assuming, contrary to my earlier findings, the achievement of a level of pre-sales necessary to satisfy a lender, and the existence of a lender which was prepared to advance the large amounts required to undertake further stages, Kosho has not established that the conditions imposed by such a lender, including the interest rates that would have been demanded, would have permitted the development to proceed through subsequent stages. If the sales rate was less than predicted by Kosho then any such lender may not have been obliged to advance further funds, or if it was prepared to do so, to do so on terms that would permit the development to be self-funding at a certain point and produce a substantial profit. The 2009 cashflow model contains numerous assumptions, including costs of construction and finance over the life of the project. It was based upon sales rates that Kosho was unlikely to achieve, with the result that actual revenue would have been reduced and the length of the project (and the cost of finance) would have increased.

[249] I conclude that it is highly unlikely that Kosho would have derived the development profit contained in Mr Lytras' calculations. His calculations were based upon a number of assumptions. Mr Lytras was prepared to accept the 2009 cashflows after a discussion about them with Mr Slijderink. This is not to say that he was in a position to verify or professed to have the expertise to verify, the assumptions upon which they were based. The fact that CPL in early 2009 was prepared to offer finance on the basis of a submission that included the 2009 cashflows does not prove they were accurate and reliable at the time they were made. It certainly does not prove that the 2009 cashflows accurately predicted what would have come to

pass in late 2009 and early 2010, let alone thereafter, if Trilogy had advanced the requested funds under the 2009 Facility.

[250] Kosho did not present any alternative cashflow models, for example one based upon a reduced number of sales of say two or three sales per month in the 2009-2010 period. It did not present alternative scenarios such as the development not continuing beyond a particular stage, with the balance of the land being sold, if possible.

[251] In the absence of alternative, more realistic cashflows, Kosho has not proven that it would have obtained the required finance, completed the project and derived a profit from it. It has not provided a reliable basis to calculate the profit, if any, it would have derived from the completed development or to make a realistic assessment of the chance that such a profit would have been obtained.

[252] The chance of Kosho deriving the development profit claimed by it is so low as to be regarded as speculative in the extreme, and is not one to which a percentage can be assigned.

Remoteness

[253] I have concluded that Kosho has not proven that it lost the opportunity to derive a development profit by evidence which permits such a development profit to be calculated and an appropriate percentage selected so as to arrive at the value of the loss of the chance to derive such a profit. This makes it unnecessary to determine whether such a development profit is too remote from Trilogy's alleged breaches.

[254] Trilogy argues that Kosho's assertion that it is entitled to damages in respect to the failure of the development as a whole ignores entirely the remoteness of that damage from the conduct of Trilogy which is alleged to have constituted a breach of contract or breach of statute.

[255] Assuming in Kosho's favour that it was entitled to have funds advanced to it under the 2009 Facility, that it would have entered into an unconditional contract for the sale of the commercial property and completed the construction of Stage 1A by mid-2010, and that Trilogy's breach of contract or contravention of statute prevented it from doing so, Trilogy would be liable for certain consequences that flowed from Kosho not being in that position. This might include an inability to obtain funding after 30 June 2010 if such funding would have been available.

[256] Different rules governing remoteness apply in contract to those governing recovery of compensation for contravention of statute. Concepts like remoteness are embedded in statutory terms that require loss or damage to have been suffered by a contravention of statute. It is unnecessary to explore these issues. Trilogy is only responsible for certain consequences that would flow from its failure to provide funding under the 2009 Facility. It is not responsible for consequences which would have befallen Kosho in any event, including an inability to obtain further funding for later stages, or to complete the development and to sell the units in it at a profit.

Conclusion – loss of development profit

[257] Kosho has failed to establish the foundations upon which its claimed development profit is calculated. These include its cashflow model, which did not reflect the likely sales rates and prices that would have been obtained for the Abadi residential units in 2009-2010 and beyond (assuming the availability of further finance at and after 30 June 2010). Although the 2009 cashflow model was prepared after the commencement of the GFC, it was too optimistic in its predictions.

[258] Mr Lytras' calculations were based upon assumptions he was instructed to make. They were not based upon any expert assessment by him of the impact of the GFC on sales rates, prices and the availability of finance. Mr Lytras disclaimed any expertise in those fields. I found his report and oral evidence helpful and professional. However, the conclusions he reached and the framework he presented as a basis upon which I might proceed to assess loss were only as good as the assumptions upon which his calculations were based. These include the opinions of Mr Kogler about expected sales rates in 2009-2010 and beyond which I have declined to accept.

[259] In the circumstances, Mr Lytras' calculations do not provide a proper basis upon which to assess Kosho's claimed loss.

[260] Kosho argues that assumptions made by Mr Lytras about the availability of development finance and other matters that involved the risk that the projected profit would not be obtained should be reflected in a discount, not rejection of the plaintiffs' claims. The risks included an increase in costs, higher interest rates on future finance and the risk that sales would not be obtained or completed in accordance with the cashflow.

[261] The multiplicity of assumptions made by Mr Lytras, based upon his instructions, and the unsubstantiated nature of many of those assumptions, disincline me to adopt the hypothetical development profit of approximately $30m (as at July 2009) or approximately $28.5m (as at 30 June 2010) as a starting point against which to apply a percentage figure. The development profit calculated by him is based upon the accuracy of the inputs and assumptions underlying the cashflows, including the availability of further finance, and a number of other assumptions.

[262] In theory at least, it is possible that the inputs and assumptions in the cashflow might have been achieved, permitting the Abadi development to continue after June 2010 with the substantial additional funding it required, to become self-funding and to yield a profit in accordance with the cashflow. In theory this is possible, just as it might be said that anything is possible in a big country.

[263] It is possible to conceive the possibility that, by not obtaining funding of about $2.5m pursuant to the 2009 Facility, and not being able to obtain similar funding from another source, Kosho lost the chance to undertake Stage 1A, market the development, borrow very substantial funds for later stages and see the development through to a very profitable conclusion. Such a theoretical development profit involves numerous contingencies. This is not a simple loss of opportunity case, such as one whereby a plaintiff was unable to complete the purchase of an existing building or vacant site which would have appreciated in value, and thereby lost the opportunity to derive a profit. It does not involve the loss of a chance, albeit a very

small chance, to obtain a prize, the monetary value of which is easily proven. Here, the lost opportunity is to derive a development profit at the end of many years from the successful development of the Abadi Residential Village. Even if one was to adopt the $30m figure as the starting point to apply a discount, the discount would be the product of numerous separate contingencies, and result in a tiny percentage figure.

[264] The choice of such a small percentage, or the rejection of Kosho's claim as altogether too speculative, would have been assisted by alternative cashflows which might have indicated whether the development as a whole, or any stage of it, was likely to generate a profit under different scenarios. The different scenarios would have included reduced sales rates, increased construction costs, higher finance costs and the termination of the project at various stages.

[265] The cashflow model upon which Kosho's claim is based is so unreliable as a basis upon which to assess the claimed loss of opportunity, even by the application of a small percentage figure to it, that I conclude that Kosho has not satisfactorily proved the value of the loss of the opportunity to develop the Carrara land at a profit. The cashflow model is based upon a number of assumptions which have not been established by evidence. In the circumstances, it is inappropriate to use it as a starting point to which a percentage figure, even a small one, is to be applied.

[266] The value of Kosho's loss of opportunity for a development profit has not been satisfactorily proven. If, however, I had adopted Mr Lytras' calculation and applied a percentage figure to it, the percentage would have been very small and very close to nil.

Loss of equity: Carrara land

[267] Mr Lytras calculated the loss of equity in the properties owned by Kosho and City Co as at July 2009 and as at 30 June 2010, depending upon a range of possible outcomes, and based upon certain assumptions. These include the accuracy of the "as is" land valuations and whether the inherent equity in the properties would have been realised during the course of development. I leave aside the issue of whether the valuations of $4m in relation to the Surfers Paradise and $17.5m in respect of the Carrara land incorporated the value of the opportunity to earn development profits, such as to disentitle Kosho or City Co from adding together the value of its loss of equity and the loss of the opportunity to earn development profits.

[268] As to the residual equity in the properties, Mr Lytras was instructed to assume that, as a consequence of the alleged breaches, the plaintiffs' residual equity in the Carrara land and the Surfers Paradise property on an undeveloped "as is" basis is nil. This was based upon an instruction given to him by Mr Slijderink to:

- adopt a current market value as at August 2012 of $2m in respect to the Surfers Paradise land, due to the loss of the hotel development approval;

- adopt a figure of between $5.3m and $12.25m for the Carrara land, with Mr Slijderink noting that "General market activity for masterplanned development sites show ongoing decline in values where such developments do not demonstrate market acceptance through sales."

[269] Mr Slijderink's instruction to Mr Lytras of 16 August 2012 that the land is worth between $5.3m and $12.25m is illuminating. The figure of $12.25m was said to reflect a 30 per cent reduction in value, and to represent the "upper value" in the current market, whereas the figure of $5.3m was the market value placed on the site by the Valuer-General. Mr Slijderink's comments tend to highlight the risks which a pioneering development such as the Abadi project would have encountered even if funds had been released to Kosho in late 2009 or early 2010 by Trilogy to enable Kosho to construct the Pavilion and commence a marketing campaign.

[270] On the basis of Mr Slijderink's instruction about the Carrara land value the present equity position, taking account of the amount of the loan facility as at 30 July 2012 was negative. On a best case scenario it was approximately -$3.75m. On a worst case scenario it was approximately -$10.7m.

[271] Mr Lytras' calculations of loss of equity in the properties arrive at a figure before any appropriate Court discount. For reasons previously given, I do not accept that the Surfers Paradise land had a market value of $4m. Although the Carrara land was valued by Landmark White at $17.5m in its report dated 16 March 2009, I am not persuaded that it had that value as at July 2009 or 30 June 2010.

[272] Kosho has not proved that it had an equity of $4.76m as at July 2009 in the Carrara land and an equity of $3.33m in that same land as at 30 June 2010. These figures are based upon a value of $17.5m as at each date. I am disinclined to adopt these figures and apply a probability percentage of between zero per cent and 100 per cent to them to arrive at the value of the claimed loss of equity.

[273] Kosho has experienced a loss of equity in the properties because of the increase in the amount owed to the fund. But it is likely to have suffered such a reduction in its equity in any event. It retains the land in its undeveloped state, and I am not persuaded that its net equity in that land is any less than it would have been had Stage 1A been completed, assuming the provision of funds under the 2009 Facility. Its net equity position simply would have been different, with an increased loan amount together with the unknown value associated with the construction of the Pavilion and other improvements at the end of Stage 1A.

[274] If, contrary to my earlier findings, Kosho had received the large amount of funding required for later stages of the development, and embarked upon such a development there is every prospect that it would have been unable to make a profit. It probably would have made a loss on the development, and, given the scale of borrowings, the loss probably would have been large enough to eliminate, not simply reduce, its equity.

[275] In summary, Kosho has not provided a satisfactory basis to assess any claim for loss of equity in the Carrara land.

[276] Incidentally, any loss incurred in developing the Carrara land also had the potential to reduce, if not eliminate, City Co's equity in the Surfers Paradise land for so long as the Surfers Paradise land was used to secure Kosho's borrowings.

Costs not otherwise incurred

[277] This aspect of Mr Lytras' report was not addressed in submissions. Mr Lytras explains that his assessment of the value of "costs not otherwise incurred" depends upon whether or not the plaintiffs, in the absence of alleged actions, would have:

(a) undertaken the proposed developments (and pursued the opportunity to earn development profits); or

(b) sold the properties on or about the dates of the alleged actions.

I think it likely that Kosho would have retained the Carrara land, and that City Co would also have retained the Surfers Paradise property. There is no satisfactory evidence that they would have sought to realise their existing equity. If they had done so there is no evidence that they would have quickly sold the properties. It is likely that they would have incurred interest and other holding costs and that these costs would have been incurred in any event.

Conclusion – Assessment of Loss

[278] Kosho and City Co seek awards of damages based on an assessment of percentages to be applied to certain amounts, as calculated by Mr Lytras. Although separate percentage figures might be applied to each amount and the case of each plaintiff would require different percentages under each head, the separate claims by City Co and Kosho for loss of equity and for loss of the opportunity to earn the asserted profit are inevitably linked.

[279] The development, successful or otherwise, of the Surfers Paradise land into a boutique hotel, depended upon the land being released from the security granted to CPL/Trilogy as a condition of the 2007 Facility and then the 2009 Facility. If the Abadi development did not proceed, did not proceed beyond Stage 1A, failed to obtain a certain percentage of pre-sales or did not proceed profitably, the Surfers Paradise land would have remained as security for Kosho's indebtedness to the Trilogy interests and not been developed. Even if Trilogy had advanced funds to Kosho under the 2009 Facility, the Surfers Paradise land would not have been developed because the land would have remained as security for the debt owed to Trilogy and would not have been released pursuant to Special Condition (k). City Co would have been essentially in the position it presently is. In fact, if an additional $2.5m had been advanced to Kosho, City Co's equity position would have been diminished.

[280] In the unlikely event that the Surfers Paradise land became available as security and there was a lender prepared to advance the large amount required to finance the development of a unique boutique hotel on the site, the conditions of finance for such a development during the GFC and its continuing aftermath would have meant the development was unlikely to achieve the financial returns contained in Mr Kogler's retrospective valuation. There is a very high probability that such a development, if undertaken, could not have been completed and sold within the time frames assumed in that valuation, so as to achieve a development profit of $10.75m, or, indeed, any substantial profit. If the site could not be profitably developed, due to the unavailability of finance, the cost of such finance, the other costs associated with such a development, the inability to earn the income projected in the valuation,

the inability to sell it at the kind of price suggested by Mr Kogler shortly after the hotel opened or for some other reason, then any development loss would erode the relatively small equity that City Co held in the site. A development loss of a few million dollars on such a risky and unique project would eliminate City Co's equity.

[281] If the development profit loss claimed by City Co is not too remote in point of law to be recovered, then the claim for the loss of the opportunity to earn such a development profit is subject to numerous contingencies, including the release of the security, the availability of finance to commence and complete such a unique development, achieving the financial results projected over five years by certain hospitality consultants, an early sale of the to-be-completed or newly-completed hotel before these projections could be tested and a sale at a price that would enable City Co to derive a substantial profit. The opportunity to earn such a profit is subject to so many contingencies that the claimed profit is speculative in the extreme. These compounding contingencies do not permit even a small percentage to be fairly attributed to the chance of City Co earning a profit of $10.75m, or any other profit.

[282] Kosho has failed to prove that the Carrara land had a value of $17.5m as at July 2009 or July 2010, being the value which CBRE and Landmark White attributed to the land in late 2008 and early 2009 respectively. It was probably worth less than $17.5m in July 2009 and July 2010. It is unlikely Kosho could have achieved the pre-sales and satisfied the other conditions required by a financier, assuming one could be found. In all likelihood, Kosho would have been left with a stalled development.

[283] The quantum of Kosho's loss of equity in the Carrara land is also unproven. Whatever Kosho's equity in the land was in July 2009 or July 2010, it has been reduced as the debt it owes Trilogy has increased. Any loss of equity, if proven, would need to be discounted for certain contingencies, including the contingency of Kosho suffering a loss on any development it undertook. The loss might have been sustained upon the completion of Stage 1A, or during later stages, when Kosho would have had a very large debt to service. The risk of suffering a loss on the development was significant, even if Trilogy had advanced an additional $2.5m during the term of the 2009 Facility. Such a loss would have reduced or eliminated Kosho's equity in the Carrara land.

[284] In summary, neither Kosho nor City Co has satisfactorily proven the quantum of its claimed losses. The state of the evidence, the existence of multiple contingencies affecting the successful and profitable development of the Carrara land and the Surfers Paradise land, and the absence of an alternative alleged benefit do not permit the value of the chance to obtain the benefits claimed by the plaintiffs (or any alternative benefit) to be fairly assessed, even on the basis of rough estimates and guesswork. The value of the benefits to which the plaintiffs seeks a percentage to be applied have not been satisfactorily proven.

Conclusion

[285] Kosho was not entitled to have funds advanced to it under the 2009 Facility because Special Condition (p) was not satisfied. Therefore, Trilogy did not breach a term of the 2009 Facility in not advancing the funds.

[286] Trilogy was obliged, by virtue of a term implied by law, to do all such things and take all such steps as may be necessary to enable Kosho to have the benefit of the 2009 Facility. This obliged it to take certain steps in relation to Special Condition (s). Trilogy's delay in preparing a deed, the terms of which were satisfactory to it as lender and which also might have satisfied DMR, was unreasonable. It thereby breached the implied term and disabled Kosho from complying with Special Condition (s). But this breach of contract did not cause Kosho to lose the opportunity to develop the Carrara land with the benefit of funds advanced under the 2009 Facility. Satisfaction of Special Condition (s) would not have entitled it to have funds advanced to it because it had not complied with Special Condition (p), and Kosho has not proven that it have complied with Special Condition (p) if there had been no breach by Trilogy. Had Trilogy acted reasonably in negotiating terms of the deed contemplated by Special Condition (s), being terms which satisfied all parties, including DMR, then Special Condition (s) would not have been satisfied until late 2009 or early 2010. It is unlikely that a deed of assignment would have been agreed and executed prior to the end of October 2009. There is no satisfactory evidence that "an unconditional contract for the commercial property" of the kind required by Special Condition (p) would have been entered into by the time Special Condition (s) was satisfied or during the remaining term of the 2009 Facility so as to satisfy Special Condition (p).

[287] Kosho and City Co have failed to prove that any breach of contract by Trilogy caused them substantial loss and damage, let alone loss and damage in the quantum alleged. Its remedy for breach of contract is nominal damages.

[288] Kosho and City Co have not established their claims of misleading and deceptive conduct and unconscionable conduct in contravention of statute, or that any such conduct was productive of the loss and damage claimed. Had such alleged conduct not occurred Kosho probably would have agreed to the 2009 Facility, and the course of events after that would have been essentially the same.

[289] Kosho and City Co have failed to prove their claims for substantial damages. The breach of contract proven by them entitles them to only nominal damages. Had the breach of contract not occurred then Kosho still would not have had an entitlement to have funds advanced to it under the 2009 Facility. Its financial position would have been the same.

[290] City Co offered the Surfers Paradise land as security for the 2009 Facility. In the absence of the breach of contract that I have found, its Surfers Paradise land would have remained as security. Its financial position would have been the same.

[291] Neither Kosho nor City Co has satisfactorily proven the quantum of its claimed losses.

[292] In the Kosho proceedings there will be judgment for each plaintiff for nominal damages, namely $10.00, for breach of contract. Otherwise their claims will be dismissed.

[293] Because Kosho has not established its claim for damages (other than nominal damages) there is no substantial set-off which reduces the amount owing under the 2007 Facility which Ms Fujino guaranteed. Only $10.00 will be set off. Accordingly, there will be judgment in the Fujino proceedings for the plaintiffs.

[294] Trilogy should submit draft minutes of judgment in each proceeding. I will hear the parties, if necessary, in relation to costs.

[295] I consider that the plaintiffs in the Fujino proceeding should have their costs of that proceeding assessed on the indemnity basis, for the reasons advanced in paragraphs 49, 50 and 52 of Trilogy's submissions in reply. Ms Fujino submitted that standard costs would be a sufficient response. I do not agree. Ms Fujino prosecuted her unconscionability case when she should have appreciated that it had no worthwhile prospects of success. The unconscionability case was hopeless for the reasons submitted in paragraph 17-24 of Trilogy's original submissions. There was no response to these submissions. By the time it was abandoned Trilogy had been put to great expense in responding to an unconscionability case that should have been abandoned much earlier. The prosecution of such a hopeless case was irresponsible and justifies costs being assessed on the indemnity basis.

[296] Next Ms Fujino contested that the unconscionability case accounted for 40 per cent of the combined proceedings. I would have thought that the figure of 40 per cent was too high. Senior Counsel for Ms Fujino submitted that the figure was a matter for my discretion. I assess it to be 25 per cent of the total proceedings.

[297] Subject to further submissions about the making of a single costs order to avoid the separate assessment of costs in each proceeding, I propose to order Ms Fujino to pay the plaintiffs' costs of and incidental to the Fujino proceeding to be assessed on an indemnity basis.

[298] My provisional view is that the very limited success of the plaintiffs in the Kosho proceedings should be reflected in an order that the plaintiffs pay 85 per cent of the defendants' costs of and incidental to the Kosho proceeding, to be assessed on the standard basis.

[299] I will hear the parties, if necessary, about an appropriate costs order in each proceeding, or the making of a single costs order to avoid separate assessments in each proceeding.

PW-9

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: S4728 of 2010

First Plaintiff:	**Kosho Pty Ltd ACN 104 663 792**
Second Plaintiff:	**City Co Pty Ltd ACN 099 723 748**
	AND
Defendant:	**Trilogy Funds Management Limited ACN 080 383 679**

JUDGMENT

Before:	Justice Applegarth
Date:	26 June 2013
Basis of judgment:	Judgment after trial of the Claim filed 10 May 2010

THE JUDGMENT OF THE COURT IS THAT:

1. Judgment be given for the plaintiffs in the amount of $10.00 for breach of the implied term of the contract pleaded at paragraph 17(a) of the Second Further Amended Statement of Claim filed 7 August 2012.

2. The plaintiffs' claim is otherwise dismissed.

3. The plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceedings to be assessed on the standard basis.

Signed: _____
The Honourable Justice PD Applegarth

JUDGMENT
Filed on behalf of the Defendant
Form 58 R.661

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PW-10

SUPREME COURT OF QUEENSLAND

CITATION:	*Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2)* [2013] QSC 429
PARTIES:	**KOSHO PTY LTD ACN 104 663 792** (first plaintiff) and **CITY CO PTY LTD ACN 099 0723 748** (second plaintiff) **v** **TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679** (defendant) **TRILOGY FUNDS MANAGEMENT LIMITED ACN 020 383 679 IN ITS CAPACITY AS THE CUSTODIAN OF THE PACIFIC FIRST MORTGAGE FUND** (first plaintiff) and **THE TRUST COMPANY (AUSTRALIA) LIMITED ACN 000 000 993 IN ITS CAPACITY AS THE CUSTODIAN OF THE PACIFIC FIRST MORTGAGE FUND** (second plaintiff) and **THE PUBLIC TRUSTEE OF QUEENSLAND** (third plaintiff) **v** **RIEKO FUJINO** (defendant)
FILE NOS:	BS 4728 of 2010 BS 10543 of 2010
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2013
JUDGE:	Applegarth J
ORDERS:	**1. Judgment be given for the plaintiffs in the amount of $10 for breach of the implied term of the contract pleaded at paragraph 17(a) of the Second Further**

Amended Statement of Claim filed 7 August 2012.

2. **The plaintiffs' claim is otherwise dismissed.**

3. **The plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceeding to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COST OF ISSUES – where plaintiff succeeds on one part of liability case – where plaintiff fails to prove loss –where plaintiff awarded nominal damages only – whether to depart from the general rule that costs follow the event.

Uniform Civil Procedure Rules 1999 (Qld), r 681 r 694.

AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2) [2009] QSC 75, cited
Alborn v Stephens [2010] QCA 58, cited
BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2) [2009] QSC 64, cited
In the Matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No 2) [2008] FCA 1184, cited
Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino [2013] QSC 135, cited
Manwelland Pty Ltd v Dames & Moore Pty Ltd [2000] QSC 432, cited
Ruddock v Vadarlis (No 2)[2001] FCA 1865; (2001) 115 FCR 229, cited

COUNSEL: I A Erskine for the plaintiffs in BS 4728 of 2010 and the defendant in BS 10543 of 2010 ("the Kosho/Fujino interests")
J M Horton for the defendant in BS 4728 of 2010 and for the plaintiffs in BS 10543 of 2010 ("the Trilogy interests")

SOLICITORS: Tress Cox for the Kosho/Fujino interests
Clayton Utz for the Trilogy interests

[1] In my reasons delivered on 29 May 2013 I indicated that I would make directions in relation to draft minutes of judgment and would hear the parties, if necessary, in relation to the form of order and costs.[1] The parties have now made submissions. In the light of those submissions, on 12 June 2013 I gave judgment in the Fujino or guarantee proceeding as follows:

1. Judgment for the Plaintiffs in the sum of $9,611,721.39.

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1 *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino* [2013] QSC 135.

2. The Defendant pay interest to the Plaintiff in the amount of $9,409,141.98 pursuant to the Finance Facilities dated 17 October 2007 and 24 June 2009 up to and including 6 June 2013.

3. The Defendant's Counter-Claim filed 28 October 2010 be dismissed.

4. The Defendant pay the Plaintiffs the costs of, and incidental to, this proceeding on an indemnity basis.

[2] The remaining issue is the appropriate order as to costs of the Kosho proceeding. The Kosho interests submit that the defendant, Trilogy, should be ordered to pay 60 per cent of their costs of and incidental to the Kosho proceeding to be assessed on the standard basis, or alternatively that there be no order as to costs in the Kosho proceeding so as to reflect the Kosho interests' limited success. Trilogy submits that, subject to one discrete claim, it was the successful party in the Kosho proceeding and that, having regard to the limited success of the Kosho interests, they ought pay 85 per cent of Trilogy's costs of and incidental to the proceeding to be assessed on the standard basis.

Relevant principles

[3] The power to award costs is governed by specific rules and also general principles. Rule 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that the costs of a proceeding are in the discretion of the Court but follow the event, unless the Court orders otherwise. Rule 684 permits the Court to make an order for costs in relation to a particular question in, or a particular part of, a proceeding.[2] Neither party seeks an order pursuant to r 684.

[4] Authorities concerning the general discretion of the Court to award costs recognise that:

> "· Ordinarily costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order.
>
> · Where a litigant has succeeded only upon a portion of the claim, the circumstances may make it reasonable that the litigant bear the expense of litigating that portion upon which he or she has failed.
>
> · A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other parties' costs of them. In this sense 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or law."[3]

[5] Ordinarily, the fact that a successful plaintiff fails on particular issues does not mean that it should be deprived of some of its costs.[4] As Muir JA observed in

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2 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [6] – [7].
3 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 234-235 [11].
4 *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2)* [2009] QSC 75 at [15].

Alborn v Stephens, "a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs."[5] Still, a successful party which has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them.[6]

[6] The proposition that a successful party will be deprived of its costs or be ordered to pay part of the other parties' costs only in special circumstances or for good reason is well-established. Principles or even rules of thumb which refer to "a successful party" beg the question of the standard by which success is to be measured. Is a plaintiff which makes a multi-million dollar claim on a variety of legal grounds but obtains a judgment for nominal damages, namely $10, based upon limited success on only one of the various causes of action pursued by it successful?

[7] In one sense such a plaintiff has been successful, namely in establishing the defendant's liability, and unsuccessful in establishing an entitlement to anything of value. Equally, it might be said that the defendant in such a case has been successful, namely in defending the plaintiff's multi-million dollar claim for damages, and that the plaintiff's success in establishing a single breach of contract is no real success at all in litigation which has a commercial objective, namely an award of substantial damages.

[8] The phenomenon of each party claiming to have been successful, or to have each enjoyed a substantial measure of success, is familiar.[7]

The parties' submissions

[9] The Kosho interests submit that where, as here, there is an award of nominal damages, the Court may deprive a successful litigant of all, or more usually, part of its costs. It submits that in such a case the proper approach is that summarised by Dutney J in *Manwelland Pty Ltd v Dames & Moore Pty Ltd.*[8] They submit that the Kosho interests did not improperly or unreasonably raise issues, and that 80 per cent of the evidence, documentation and hearing was devoted to the question of liability and 20 per cent to damages. I am asked to infer that the costs borne by both sides were substantially equal and that, following *Manwelland*, Trilogy should pay 60 per cent of the costs of the Kosho interests to be assessed on the standard basis. In oral submissions counsel for the Kosho interests accepted that the suggested apportionment of 80 per cent : 20 per cent as between liability and damages might be too high. Reliance was placed upon the burden of trial preparation, including assembling documentary evidence, and that, to prove its case Kosho had to prove that all of the special conditions had been satisfied. This involved other special conditions, not simply Special Conditions (p), (q) and (s) which proved contentious, being proved. Since the hearing on costs I have reviewed the affidavit material and the pleadings.

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5 [2010] QCA 58 at [8].

6 *Hughes v Western Australian Cricket Association (Inc.)* (1986) ATPR 40-748 at [48136].

7 As to the perceptions of the parties and the role of the judge in such a case see *In the Matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No 2)* [2008] FCA 1184 at [3] – [4] per Finkelstein J.

8 [2000] QSC 432 at [65] – [66]. This provisional view about the disposition of costs was not adhered to in the light of further submissions on costs heard on 28 November 2000, also reported as [2000] QSC 432. The further submissions and final decision on costs related to an offer to settle and the position originally adopted by the parties to the calculation of damages.

[10] The Kosho interests submitted at the hearing on costs on 12 June 2013 that a substantial part of the hearing and preparation for it was concerned with Special Condition (s) and that it occupied 50 per cent of the hearing time and 50 per cent of the burden of preparing for trial. For the reasons which follow, I do not accept such a high percentage, but do accept that preparation for the hearing and the conduct of the hearing in connection with issues related to Special Condition (s) upon which the Kosho interests succeeded was substantial.

[11] The parties in their submissions did not seek to justify any apportionment of costs as between liability and quantum, or between particular issues going to liability, by reference to a calculation of the time taken at the hearing, transcript pages or percentages of affidavits. Reference was made to particular witnesses who were called in relation to particular issues. However, I was invited to make my costs order on the basis of the parties' submissions concerning apportionment of costs and counsel accepted that I should take a "broad brush approach".

[12] Counsel for Trilogy sought to emphasise the very limited success which the Kosho interests had enjoyed, and the number of witnesses and the number of reports that were devoted to the issue of loss. On the question of liability, counsel for Trilogy placed particular reliance upon the fact that the Kosho interests succeeded on only one of the many breach of contract claims asserted and that there were separate claims upon which the Kosho interests failed entirely, including alleged contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("*TPA*"), unconscionable conduct and claims of a "deliberate tactic". Special Condition (s) was said not to have occupied the large amount of time which the Kosho interests submitted.

Determination of costs in the Kosho proceeding

[13] In order to determine the parties' submissions concerning an appropriate allocation of costs, including an appropriate apportionment as between liability and quantum in the Kosho proceeding, it is first necessary to distil and remove parts of the hearing which were devoted to issues that arose only in the Fujino proceeding. This includes witnesses and parts of the evidence of witnesses who were devoted to the unconscionability issues that were litigated in the Fujino proceeding.

[14] Within the Kosho proceeding a substantial amount of preparation for trial and at the hearing was devoted to the issue of loss upon which the Kosho interests failed. I have regard to the number of reports and the number of witnesses which related to the issue of loss, including substantial later affidavits by Mr Slijderink, and the time taken at the hearing on the issue of loss. I also have regard to the proportion of the parties' written submissions which were devoted to the issue of loss.

[15] In the absence of detailed evidence concerning preparation for trial, including the time required by legal representatives to confer with expert witnesses and other witnesses who gave evidence in relation to loss, and to prepare to cross-examine expert witnesses, I consider that an appropriate apportionment within the Kosho proceeding is 60 per cent as to liability and 40 per cent as to loss.

[16] Within the issues that were litigated in connection with liability, there were discrete issues upon which the Kosho interests failed entirely. As to the aspect of its claims upon which it succeeded, which related to Special Condition (s) and a breach of one (or arguably two) of the implied terms for which the Kosho interests contended, it

was necessary for the Kosho interests to prepare substantial material by way of background in order to achieve the success which they enjoyed in connection with Special Condition (s) and to call witnesses who gave evidence in connection with the circumstances under which Special Condition (s) was not fulfilled. Special Condition (s) necessitated the calling of more witnesses than Special Condition (p). Witnesses were called on discrete issues upon which the Kosho interests entirely failed, including the "deliberate tactic" issue upon which it failed.

[17] The Kosho interests' unsuccessful pursuit of issues in relation to Special Condition (p) was not improper or unreasonable and does not provide a basis for ordering that they should pay Trilogy's costs of responding to that issue. However, the Kosho interests' lack of success in establishing its case in relation to Special Condition (p) and, more importantly, its lack of success in establishing the various other claims it made in relation to liability should be reflected in an order for costs which does not unfairly burden Trilogy with an obligation to pay that part of Kosho's costs upon which Kosho was entirely unsuccessful. I also take into account City Co's lack of success on its claims in relation to the Surfers Paradise land and the release of Trilogy's security over that land.

[18] In a case in which neither party submits that some arithmetic allocation is possible in respect of liability issues, the appropriate course is to deprive the Kosho interests of a substantial part of their costs on liability issues so as to reflect their success in establishing a case for breach of contract in connection with Special Condition (s) and to reflect their lack of success (and Trilogy's success) on other liability issues.

[19] Applying the principles which I have earlier discussed to the liability issues in the Kosho proceeding, and having regard to the measure of success and measure of failure which each party had on liability issues, I consider that an appropriate determination would be to award the Kosho interests 40 per cent of their costs of litigating the liability issues.

[20] As to the issue of loss, Trilogy succeeded and, viewed separately, in a proceeding in which loss occupied about 40 per cent the starting point would be an order that the Kosho interests pay 40 per cent of Trilogy's costs of and incidental to the Kosho proceeding.

[21] *Manwelland* is distinguishable from the present case, although I intend to apply a similar approach to that provisionally adopted by Dutney J. *Manwelland* was a case in which the plaintiff sued in respect of advice which it received. It claimed damages for breach of contract, for negligence and for contravention of s 52 of the *TPA*. The plaintiff failed to establish that it suffered substantial loss and accordingly obtained judgment only for nominal damages for breach of contract. The case is similar to this one to the extent that it involves an award of nominal damages for breach of contract. However, in that case the same facts were relied upon to prove the breach of contract, the breach of a general duty of care and a contravention of the *TPA* through the provision of wrong advice. If the plaintiff in *Manwelland* had established that it had suffered loss and damage then it would have succeeded in respect of each of its claims. In this case the plaintiffs have failed to prove a contravention of the *TPA*, succeeded in establishing only one (or arguably two) of the implied terms for which they contended and did not establish a number of the breaches of contract for which they contended. They also failed to establish a

breach of the implied term of good faith by reason of the alleged "deliberate tactic" which was pleaded, persisted in but not proven.

[22] In *Manwelland* the evidence was almost entirely in relation to liability and Dutney J estimated that at least 80 per cent of the evidence and documentation related to liability. On certain assumptions, the net result of the defendant paying 80 per cent of the plaintiff's costs and the plaintiff paying 20 per cent of the defendant's costs would be an order that the defendant pay 60 per cent of the plaintiff's costs.

[23] I have taken account of the fact that a large part of the Kosho interests preparation for trial related to issues of liability and the preparation of a large volume of documentation. By the same token, a large part of Trilogy's preparation for trial would have involved reading and responding to voluminous affidavits and a large volume of documents. Neither party submits that one side's costs of the Kosho proceeding would have been more than the other's. In fact, the Kosho interests proceed on the basis that they were substantially equal.

[24] I estimate that 60 per cent of the costs of the Kosho proceeding related to liability. Given the Kosho interests limited measure of success on liability, I consider that they should recover 40 per cent of their costs on liability issues. In other words, they are entitled to 40 per cent of 60 per cent of their costs or 24 per cent.

[25] Trilogy is entitled to be paid its costs in relation to the issue of loss. The loss issues constituted 40 per cent of the proceeding. A separate order for costs would require the Kosho interests to pay 40 per cent of Trilogy's costs of the Kosho proceeding.

[26] An appropriate net result is one which requires the Kosho interests to pay 16 per cent of Trilogy's costs of and incidental to the Kosho proceeding.

[27] An order that the plaintiffs pay 16 per cent of the defendant's costs of and incidental to the Kosho proceeding is an appropriate one to reflect the limited success which the plaintiffs achieved. In general terms, the Kosho interests' success in obtaining only nominal damages should be reflected in requiring it to pay Trilogy's costs of litigating issues of loss which I estimate to have occupied about 40 per cent of the Kosho proceeding. In addition, the Kosho interests should not be entitled to recover costs reflecting liability issues upon which it completely failed. It should be deprived of a substantial part of the costs which it incurred in pursuing liability issues upon which it failed. That said, this is not a case in which the Kosho interests should be ordered to pay a substantial part of the Trilogy interests' costs upon liability issues upon which the Kosho interests failed, particularly the issue in relation to Special Condition (p) which involved an issue of construction. The alleged fulfilment of that Special Condition was not unreasonably raised. As a consequence, it would not be appropriate to order that the Kosho interests pay Trilogy's costs of successfully defending issues in relation to Special Condition (p). Instead, the Kosho interests should be deprived of a substantial part of the costs associated with liability issues upon which they failed. This would leave them with an entitlement to be paid costs associated with the liability issues upon which they succeeded.

[28] The Kosho interests' success resulted in an award of damages of only $10 in a case in which they pursued a multi-million dollar damages claim. Kosho's lack of success, or failure, in proving the loss claimed is reflected in the order for costs which I intend to make. If Trilogy wished to protect itself against the possibility of

a nominal damages award then it might have made an offer to settle for a moderate amount so as to engage the rules governing offers to settle. There is no evidence that such an offer to settle was made.

[29] The success which the parties enjoyed on issues of liability and loss is best reflected in a costs order that the plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceeding. This order will not disturb existing orders for costs such as specific orders made in relation to adjournment of the trial.

Orders

[30] The judgment of the Court will be:

1. Judgment be given for the plaintiffs in the amount of $10 for breach of the implied term of the contract pleaded at paragraph 17(a) of the Second Further Amended Statement of Claim filed 7 August 2012.

2. The plaintiffs' claim is otherwise dismissed.

3. The plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceeding to be assessed on the standard basis.

PW-11

TressCox
LAWYERS

SYDNEY | MELBOURNE | BRISBANE | CANBERRA

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Our ref AXM:MZN:098998

27 June 2013

Attention: Zac Chami
Clayton Utz
Level 28, Riparian Plaza
71 Eagle Street
BRISBANE QLD 4000

AND BY EMAIL: zchami@claytonutz.com
sburnett@claytonutz.com

Contact
Marion Niestroj
(07) 3004 3506

Partner
Alex Moriarty
(07) 3004 3533

Dear Sir

Kosho Pty Ltd & Anor v Trilogy Funds Management Limited
Supreme Court of Queensland Proceedings BS4728/10

We refer to the above matter and **enclose** by way of service a copy of our clients' Notice of Appeal filed 26 June 2013.

Yours faithfully
TressCox

Alex Moriarty
Email: alex_moriarty@tresscox.com.au

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COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: 5848/13
NUMBER: **BS ~~4278/10~~** 4728/10

First Appellant:	**KOSHO PTY LTD ACN 104 663 792**
	AND
Second Appellant:	**CITY CO PTY LTD ACN 099 023 748**
	AND
Respondent:	**TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679**

NOTICE OF APPEAL

To the Respondent
And to the Registrar, Supreme Court of Queensland at Brisbane

TAKE NOTICE that the appellants appeal to the Court of Appeal against that part of the Judgment of Justice Applegarth delivered on 29 May 2013 and the orders made on 26 June 2013 in the Supreme Court of Queensland at Brisbane relating to:

(a) the non satisfaction by the appellants of special condition (p) of the Letter of Offer dated 24 June 2009 ("Letter of Offer");
(b) the non satisfaction by the appellants of special condition (q) of the Letter of Offer;
(c) the findings in relation to causation;
(d) the assessment of damages as a consequence of the respondent's breach of contract;
(e) the finding of nominal damages only.

NOTICE OF APPEAL
Filed on behalf of the appellants
Form 64, Version 4
Uniform Civil Procedure Rules 1999
Rule 747(1)

TressCox Lawyers
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40 Creek Street
BRISBANE QLD 4000
DX 248 Brisbane
Tel: (07) 3004 3500
Fax: (07) 3004 3599
Ref: AXM:MZN:098998

1. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE:

Date of Judgment:	29 May 2013
Description of Proceedings:	BS ~~4278/10~~ 4728/10
Description of parties involved in the proceedings:	Kosho Pty Ltd & City Co Pty Ltd v Trilogy Funds Management Ltd
Name of Primary Court Judge:	Applegarth J
Location of Primary Court:	Brisbane

2. GROUNDS

1. The learned trial judge erred in fact and law in finding that the Put and Call Deed dated 3 January 2009 was not an unconditional sale contract for the commercial property within the meaning of special condition (p) of the Letter of Offer.

2. The learned trial judge erred in fact and law in finding that the security bond was not a deposit within the meaning of special condition (p) of the Letter of Offer.

3. The learned trial judge erred in fact and law in finding that the appellants failed to satisfy special conditions (p) and (q) of the Letter of Offer, and that the respondent was not obliged to provide funding under the Letter of Offer.

4. The learned trial judge erred in fact and law in assessing the damages suffered by the appellants as a consequence of the respondent's breach of the Letter of Offer.

5. The learned trial judge erred in fact and law in finding that there was insufficient evidence of the loss sustained by the appellants as caused by the respondent's breach.

6. The learned trial judge erred in fact and law in finding that the chance of Kosho Pty Ltd deriving profit on the development was so low as to be regarded as speculative in the extreme, and not one to which a percentage can be assigned.

7. The learned trial judge erred in fact and law in finding that there was insufficient evidence of the loss sustained by the appellants.

8. The learned trial judge erred in fact and law in finding that the appellants did not provide any satisfactory basis to assess any damages for loss of equity in the Carrara Land.

3. ORDERS SOUGHT

1. The Appeal be allowed.

2. The orders made by the trial judge be set aside and in lieu thereof the Court:

   (a) judgment be given for the appellants against the respondent;
   (b) remit the proceeding back to the trial judge for an assessment of damages according to law.

3. That the respondent be ordered to pay the appellants' costs of the appeal to be assessed.

4. Such further or other order that this Honourable Court of Appeal deem meet.

4. RECORD PREPARATION

We undertake to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and practice directions and any order or direction in the proceedings.

PARTICULARS OF THE APPELLANTS:

Name:	Kosho Pty Ltd ACN 104 663 792 and City Co Pty Ltd ACN 099 023 748
Appellants' residential or business address:	c/- Level 4, 40 Creek Street BRISBANE QLD 4000
Appellants' solicitor's name: and firm name:	Alexander Moriarty TressCox Lawyers
Solicitor's business address:	Level 4, 40 Creek Street BRISBANE QLD 4000
Address for service:	c/- TressCox Lawyers

Level 4, 40 Creek Street
BRISBANE QLD 4000
DX 248 Brisbane
Tel: (07) 3004 3500
Fax: (07) 3004 3599
Email address: alex_moriarty@tresscox.com.au

PARTICULARS OF THE RESPONDENT

Name:	Trilogy Funds Management Limited ACN 080 383 679
Respondent's residential or business address:	c/- Level 28, Riparian Plaza 71 Eagle Street BRISBANE QLD 4001
Respondent's solicitor's name: and firm name:	Zac Chami Clayton Utz Lawyers
Solicitor's business address:	Level 28, Riparian Plaza 71 Eagle Street BRISBANE QLD 4001
Address for service:	c/- Clayton Utz Lawyers Level 28, Riparian Plaza 71 Eagle Street BRISBANE QLD 4001 Tel: (07) 3292 7000 Fax: (07) 3221 9669 Email address: zchami@claytonutz.com

TressCox Lawyers
Solicitors for the Appellants

Dated:

This Notice of Appeal is to be served on:
Trilogy Funds Management Limited ACN 080 383 679
By their solicitors:
Clayton Utz Lawyers
Level 28, Riparian Plaza
71 Eagle Street
BRISBANE QLD 4001

PW-12

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 4728 of 2010

First Plaintiff: **KOSHO PTY LTD ACN 104 663 792**

AND

Second Plaintiff: **CITY CO PTY LTD ACN 099 723 748**

AND

Defendant: **TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679**

CLAIM

The plaintiffs claim:

1. A Declaration that in the events that have transpired (as pleaded in 14, 15, 20 to 50 and 51 to 54 of the Statement of Claim) the Defendant has breached the finance facility between the First Plaintiff and the Defendant dated 24 June 2009.

2. Damages in the amount of $80,570,390 for breach of contract.

3. Further or alternatively, damages pursuant to s.82 for breach of s.52 of the Trade Practices Act 1974.

4. Such further or other order as this Honourable Court may deem meet.

5. Interest pursuant to the Supreme Court Act 1995.

6. Costs.

The plaintiffs make this claim in reliance on the facts alleged in the attached Statement of Claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Registry on: 10 MAY 2010

Registrar:

SUPREME COURT OFFICE BRISBANE

CLAIM
Filed on behalf of the Plaintiffs
Form 2 R. 22

SUPREME COURT OFFICE BRISBANE

Q5 LAW
Suite 11, 25 Mary Street
BRISBANE QLD 4000
Tel: 1300 762 247
Fax: 1300 762 447
Ref: MJQ:1372

To the defendant: TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: Law Courts Complex, 304 George Street, Brisbane

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

PARTICULARS OF THE PLAINTIFFS:

Name:	Kosho Pty Ltd and City Co Pty Ltd
Residential or business address:	C/-/25 Mary Street BRISBANE QLD 4000
Solicitors name:	Michael James Quinn
and firm name:	Q5 Law
Solicitor's business address:	Suite 11, 25 Mary Street BRISBANE QLD 4000
Address for service:	C/- Q5 Law Suite 11, 25 Mary Street BRISBANE QLD 4000
DX *(if any)*:	
Telephone:	1300 762 247
Fax:	1300 762 447
E-mail address *(if any)*:	info@q5.com.au

Signed: Q5 Law

Description: Solicitors for the Plaintiffs

Dated: 10 - 5 - 10

This Claim is to be served on: Trilogy Funds Management Limited
of: Level 10/241 Adelaide Street, Brisbane, QLD 4000

SUPREME COURT OFFICE BRISBANE 163

SUPREME COURT OF QUEENSLAND

REGISTRY:
NUMBER: of 20

First Plaintiff:	**KOSHO PTY LTD ACN 104 663 792**
First Plaintiff:	**AND**
Second Plaintiff:	**CITY CO PTY LTD ACN 099 723 748**
	AND
Defendant:	**TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679**

STATEMENT OF CLAIM

Filed in the registry on 20 .

This claim in this proceeding is made in reliance on the following facts:

1. The First Plaintiff (herein "**Kosho**"), at all times material to this proceeding:

   (a) was and is a company duly incorporated according to law, and capable as such of being sued in its corporate name;

   (b) was and is a "corporation" within the meaning of the *Trade Practices Act* 1974 (Cth) (herein the "**TPA**");

   (c) was (and remains) the registered proprietor of land more particularly described as Lot 2 on SP 107404 County of Ward, Parish of Gilston Title Reference 50257163 and located at 114-122 Nerang - Broadbeach Road, Carrara in the State of Queensland (herein the "**Carrara Land**").

2. The Second Plaintiff, City Co Pty Ltd ACN 099 023 748 (herein "**City Co**"):

   (a) was and is a company duly incorporated according to law, and capable as such of being sued in its corporate name;

   (b) was and is a "corporation" within the meaning of the TPA;

   (c) was (and remains) the registered proprietor of land more particularly described as Lot 2 on RP 70727 Parish of Gilston, County of Ward, Title Reference 12831223 and located at 3 Beach Road, Surfers Paradise in the State of Queensland (herein the "**Surfers Paradise Land**").

3. Club Cavill Pty Ltd ACN 099 023 711 (herein "**Club Cavill**"):

   (a) was and is a company duly incorporated according to law, and capable as such of being sued in its corporate name;

   (b) was and is a "related" entity of Kosho and City Co as described in the Corps Act;

   (c) was, until effective resumption in December 2005 by the Department of Main Roads (herein "**DMR**"), the registered proprietor of land more particularly described as Lot 3 on SP180847 Parish of Gilston, County of Ward Title Reference 50586172 being adjacent to and abutting the eastern boundary of the Carrara Land (herein the "**Resumed Land**").

4. Adam Slijderink (herein "**Slijderink**"), at all times material to this proceeding:

   (a) was an employee or agent of the Coast Land International Group of Companies including Kosho and City Co;

   (b) as such, had the title of "CEO – Project Partner";

   (c) acted on behalf of Kosho and City Co in respect of the transactions and matters referred to in this pleading within the scope of his authority.

5. City Pacific Limited (herein "**CPL**"):-

(a) was at all material times, and is, a duly incorporated public company listed on the Australian Stock Exchange;

(b) was at all material times a financier and financial investment manager, alternatively, a provider of "financial services" within the meaning of that term as used in Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (herein "**ASIC Act**");

(c) until on or about 20 July 2009, was the Manager and Responsible Entity (within the meaning of Part 5C.2 of Chapter 5 of the *Corporations Act 2001 (Cth)* ("**Corps Act**")) of the City Pacific First Mortgage Fund (that being the name of the fund from 30 November 2007) (herein the "**CPFM Fund**") which fund was:

(i) constituted on 23 June 1998 by Deed;

(ii) registered with ASIC under No. ARSN 088139477;

(iii) alternatively, a "financial product" within the meaning of that term as used in Division 2 of the ASIC Act;

(d) was at all material times a trading corporation within the meaning of that term as used:

(i) in the TPA; or

(ii) alternatively, in Division 2 of the ASIC Act;

(e) was at all material times when engaging in the conduct alleged herein, engaging in "trade or commerce" within the meaning of that term as used:

(i) in the TPA;

(ii) alternatively, in Division 2 of the ASIC Act;

(f) is now, and since about 7 August 2009 has been, in liquidation.

6. Steve McCormick (herein "**McCormick**"), at all times material to this proceeding:

(a) was an officer in CPL's employ;

(b) as an officer in the CPL's employ, had the title of "Group Executive Property Development Finance";

(c) acted on behalf of CPL in respect of the transactions and matters referred to in this pleading;

(d) in so acting on behalf of CPL, acted within the scope of his actual authority as CPL's "Group Executive Property Development Finance";

(e) alternatively, in so acting on behalf of CPL, acted within the scope of his ostensible authority as CPL's "Group Executive Property Development Finance", such ostensible authority arising from:

(i) the fact that CPL employed McCormick in that capacity and authorised him to use that title;

(ii) the fact that McCormick's conduct referred to in this pleading fell within the scope of the usual authority of an executive officer described as "Group Executive Property Development Finance";

(iii) the fact that CPL did not, at any material time, convey to Kosho any material restriction with respect to McCormick's authority on behalf of CPL.

7. Alistair McCosh (herein "**McCosh**"), at all times material to this proceeding:

(a) was an officer in CPL's employ;

(b) as an officer in CPL's employ, had the title of "Lending Manager";

(c) acted on behalf of CPL in respect of the transactions and matters referred to in this pleading;

(d) in so acting on behalf of CPL, acted within the scope of his actual authority as CPL's "Lending Manager";

(e) alternatively, in so acting on behalf of CPL, acted within the scope of his ostensible authority as CPL's "Lending Manager", such ostensible authority arising from:

(i) the fact that CPL employed McCosh in that capacity and authorised him to use that title;

(ii) the fact that McCosh's conduct referred to in this pleading fell within the scope of the usual authority of a senior officer described as "Lending Manager";

(iii) the fact that CPL did not, at any material time, convey to Kosho any material restriction with respect to McCosh's authority on behalf of CPL.

8. The Defendant (herein "**Trilogy**"):-

(a) was at all material times, and remains:-

(i) a company duly incorporated and capable as such of been sued;

(ii) a public company listed on the Australian Stock Exchange;

(b) was at all material times a financier and financial investment manager, alternatively, a provider of "financial services" within the meaning of that term as used in Division 2 of ASIC Act;

(c) was at all material times a trading corporation within the meaning of that term as used:

(i) in the TPA; or

(ii) alternatively, in Division 2 of the ASIC Act;

(d) was at all material times when engaging in the conduct alleged herein, engaging in "trade or commerce" within the meaning of that term as used:

(i) in the TPA;

(ii) alternatively, in Division 2 of the ASIC Act.

Release Note

TRILOGY REPLACES CPL AS RESPONSIBLE ENTITY

9. On or about 20 July 2009, Trilogy became and has been the Manager and Responsible Entity (within the meaning of Part 5C.2 of Chapter 5 of the Corps Act) of the CPFM Fund, now described as the Pacific First Mortgage Fund (herein the "**PFM Fund**").

10. Upon Trilogy becoming the responsible entity of the PFM Fund:

(a) pursuant to section 601FS(1) of the Corps Act, the rights, obligations and liabilities of CPL in relation to the PFM Fund became the rights, obligations and liabilities of Trilogy, including in relation to the matters pleaded herein;

(b) pursuant to section 601FT(1) of the Corps Act, upon Trilogy

164

becoming the responsible entity of the PFM Fund, a document to which CPL was a party, in which reference is made to CPL or under which CPL acquired or incurred a right, obligation or liability, or might have acquired a right obligation or liability if CPL had remained the responsible entity, which document is capable of having effect after the change in responsible entity has effect as if TFM (and not CPL) was a party to it, was referred to in it or had or might have acquired the right, obligation and liability under it, including in relation to the matters pleaded herein.

CARRARA LAND DEVELOPMENT

11. In or about January 2009:

(a) Kosho was desirous of proceeding with the construction of a residential unit development on the Carrara Land, described as the "Abadi Residential Village" (herein called "**the project**") and required substantial funding:

(i) as part of a restructure and in order to cover Kosho's present position with a then existing facility with CPL of $12.6 million;

(ii) to assist with sales and marketing, development and construction costs of the initial part of the project, described as "Stage 1A";

(b) Club Cavill was the beneficiary of a substantial compensation claim as a consequence of the resumption of the Resumed Land by the DMR (the "**DMR compensation claim**");

(c) Kosho submitted a finance application for the project to CPL.

12. CPL by letter of offer dated 24 June 2009 to Kosho (herein "**letter of offer**"), offered a finance facility (on the terms and conditions contained therein):

(a) to cover Kosho's then present position with CPL and to assist with the sales & marketing, development and construction costs in

relation to Stage 1A of the project;

(b) in the amount of $16 million for:

(i)	Current position	$12,610,000
(ii)	Construction/Consultants	$2,193,830
(iii)	Interest (to be retained)	$860,000
(iv)	Contingency	$336,170

(c) required, as a condition to the provision of finance, Kosho and Club Cavil to assign all rights and entitlement to the DMR compensation claim to Sunrise Waters Pty Ltd.

13. On 24 June 2009, Kosho accepted and executed the terms of the letter of offer and returned the duly executed letter of offer to CPL (herein the "**finance facility**").

14. CPL (by its Solicitors, Minter Ellison) on 1 July 2009 pursuant to and in performance of the finance facility hand delivered to the Solictors of Kosho original documents for execution (herein "**the documents for execution**") comprising:

"...

1. copy of the variation letter of offer dated 24 June 2009;
2. deed of variation of charge between the lender and the borrower (in triplicate);
3. fixed and floating charge between the lender and City Co Pty Limited, third party chargor, (in triplicate);
4. deed of guarantee and indemnity given by Ms Reiko Fujino in favour fo the lender, (in triplicate);
5. third party mortgage given by City Co Pty Limited in favour of the lender (in triplicate);
6. undertaking and authority to complete and disburse moneys (borrower);
7. undertaking and authority to complete (City Co Pty Limited);
8. certificate as to legal advice (borrower);
9. certificates as to legal advice (guarantors);
10. certificates as to legal advice (third party mortgagor);
11. Consumer Credit Act declaration by the borrower;
12. Consumer Credit Act declaration by the third party mortgagor;
13. statutory declaration as to the property (borrower);
14. statutory declaration as to the property (third party mortgagor);
15. corporate declaration as to the property (borrower);
16. corporate declaration (third party mortgagor); and
17. our memorandum of costs..."

15. Kosho agreed to and executed, or caused to be executed, each of the documents for execution and returned the duly execution documents for execution by hand delivery to CPL (by its Solicitors, Minter Ellison) on 2 July 2009.

EXPRESS TERMS

16. At all material times, there were terms of the finance facility (herein "**express terms**"), that CPL and Trilogy:

(a) would (subject to the terms and conditions therein) advance funds to Kosho under the finance facility to enable Kosho to meet its current position and funds the constructions costs of the project;

(b) that the amount of funds to be advanced was in the sum of $16 million for:

(i)	Current position	$12,610,000
(ii)	Construction/Consultants	$2,193,830
(iii)	Interest (to be retained)	$860,000
(iv)	Contingency	$336,170

(c) (special condition (g)) provided for funds to be advanced under the facility generally as outlined in the Total Facility Limit;

(d) (special condition (q)) contemplated construction (funded by advances on the facility) and settlement of sale of the commercial pavilion (part of Stage 1A) to be completed by 28 February 2010;

(e) provided for expiration of the facility on 30 June 2010 (page 2, Term).

IMPLIED TERMS

17. At all material times, there were implied terms of the finance facility (herein "**implied terms**"), that CPL and Trilogy:

(a) would do all such things and take all such steps as may be necessary to enable Kosho to have the benefit of the finance facility;

(b) would act reasonably in their consideration of, and in determining issues of satisfaction in relation to, the conditions precedents under the finance facility;

(c) would in all times act in good faith in their dealings with Kosho in

relation to their consideration of, and in determining issues of satisfaction in relation to, the conditions precedents under the finance facility;

(d) not unreasonably delay in its consideration and determination of Kosho's compliance with the requirements of the finance facility.

18. The implied terms are:

(a) implied from the terms of the finance facility itself and in order to give business efficacy to the transaction embodied in the finance facility; or

(b) alternatively, implied by law.

DEED OF ASSIGNMENT

19. Special conditions (s) & (t) of the finance facility provided:

"(s) This offer of finance is conditional on, and subject to:

(i) the borrower entering into a deed of assignment and consent in relation to the agreement between the Department of Main Roads, Kosho Pty Ltd, Club Cavill Pty Ltd (**Assignment Deed**) to be prepared by and on terms satisfactory to the Lender;

(ii) the borrower causing Club Cavill Pty Ltd to enter into the Assignment Deed;

(iii) the Department of Main Roads confirming that it is satisfied with the terms of the Assignment Deed; and

(iv) the Assignment Deed being entered into and binding on the Borrower and Club Cavill Pty Ltd (and the Borrower providing two originals of the Assignment Deed executed by both the Borrower and Club Cavill Pty Ltd to the Lender) within 2 business days of receipt of the Assignment Deed.

(t) As part of this facility the City Pacific First Mortgage Fund agrees to rebate costs and fees to the borrower to a maximum amount of $2,800,000.00. This is compensation for the transfer of the rights and obligations to Sunrise Waters Pty Ltd as agreed between Club Cavill Pty Ltd (as related entity of the borrower) and the Department of Main Roads, in relation to the adjacent Sunrise Waters property in accordance with special condition (s).

The compensation is paid on the basis that it is in full and final settlement of all claims that the Borrower and/or Club Cavill Pty Ltd may have at any time in relation to the resumption of the land from the property of the Department of Main Roads

The compensation will be paid by way of a discount to the prevailing interest rate as well as a rebate of application and administration fees that would otherwise have been charged on this facility..."

EVENTS THAT HAVE TRANSPIRED

20. CPL (by its Solicitors, Minter Ellison) on 23 June 2009:

(a) prepared a seven (7) page draft deed of assignment and consent to assignment of deed of assignment (herein "**draft assignment deed**");

(b) provided the draft assignment deed to Crown Law on behalf of the DMR.

21. By 23 July 2009:

(a) Crown Law (on behalf of DMR) responded to Minter Ellison (for CPL) in respect of the draft assignment deed;

(b) Kosho (by Slijderink) emailed Minter Ellison (for CPL) requesting a copy of the draft assignment deed with marked up changes required by DMR.

22. On 24 July 2009, Kosho (by Slijderink) emailed Minter Ellison (for CPL) requesting a copy of the draft assignment deed with marked up changes required by DMR.

23. On 27 July 2009, Kosho (by Slijderink) wrote to Minter Ellison (for CPL) formally confirming its acceptance of the marked up changes from Crown law (for DMR) and noting Minter Ellison was advancing post haste.

24. On 29 July 2009, Kosho (by Slijderink):

(a) emailed Minter Ellison (for CPL) confirming its understanding that all conditions of the finance facility were satisfied and that CPL was only waiting on deed of assignment to effect same;

(b) telephoned Anthony Perich of Minter Ellison and was informed that Trilogy had taken over as responsible entity for the PFM Fund and the Minter Ellison were advancing approval from Trilogy as to the proposed changes to the draft assignment deed sought by DMR;

(c) emailed Minter Ellison (for CPL) confirming the conversation.

25. On 31 July 2009:

(a) Minter Ellison met with Trilogy in respect of the finance facility and

the draft assignment deed;

(b) Kosho (by Slijderink) wrote to Minter Ellison (for CPL) confirming discussions were held with Trilogy in relation to the draft assignment deed.

26. On 12 August 2009, Kosho (by Slijderink) emailed Trilogy (Michael Finlayson) noting that Kosho:

(a) had complied with all conditions of approval with the only outstanding matter to be resolved (the signing of the draft assignment deed) being delayed as a consequence of the change in responsible entity;

(b) required the advance of facility funds to service operational costs and advance the project.

27. On or about 20 August 2009, Kosho (by Slijderink) telephoned Minter Ellison (for CPL) and was informed byAnthony Perich that Trilogy funds had been frozen until the Commonwealth Bank of Australia (herein "**CBA**") had completed a review of proposed Trilogy cashflows.

28. On 24 August 2009, Kosho (by Slijderink) emailed Trilogy (Michael Finlayson):

(a) requesting a meeting to discuss the finance facility;

(b) noting that delays in advancing the funds under the facility and making payments was due to the CBA;

(c) noting that the CBA had previously approved the facility to Kosho prior to issuing the letter of offer.

29. On 1 September 2009, at a meeting with Neil Hinrichensen of Trilogy, Kosho (by Slijderink) was informed:

(a) cashflow issues between Trilogy and CBA were likely to be resolved within one to two weeks;

(b) shortly thereafter funds would be available to Kosho to enable it to advance the project.

On 2 September 2009, Kosho (by Slijderink) provided to Trilogy (Neil Hinrichensen) the information requested in their meeting of the previous

day.

31. On 7 September 2009, Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) requesting timing for the advance of funds and resolution of issues with CBA and noting delays were costly to Kosho.

32. On 11 September 2009, Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) requesting an update on resolution of cash flow difficulties and noting that all of Kosho's assets have been cross collateralized and Kosho was experiencing difficulty from the shortage of operating funds.

33. On 11 September 2009:

    (a) Trilogy (Neil Hinrichensen) emailed Kosho (by Slijderink) noting Trilogy hoped to have a position by the following Monday and requested details on conditions precedent, deed of assignment, security documents and pre sale commercial contracts.

    (b) Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) providing the requested information and noting that all conditions precedent had been completed and satisfied with the exception of the signing of the draft assignment deed.

34. On 15 September 2009:

    (a) Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) requesting confirmation as to timing of first draw down;

    (b) Trilogy (Neil Hinrichensen) emailed Kosho (by Slijderink) requesting costings for construction component with quantity surveyor's review, summary of loan components and approvals/ plans of Stage 1A.

35. Kosho (by Slijderink) provided the requested information to Trilogy (Neil Hinrichensen) by emails dated 22 September 2009 and 25 September 2009.

36. On 25 September 2009, Trilogy (Neil Hinrichensen) emailed Kosho (by Slijderink) acknowledging receiving the requested information and noted that Trilogy was - "...working with Minters to finalise their due diligence on the CP's [conditions precedent] which will take around a week. We

should be then in a position to recommend moving forward. We won't be able to advance any funds prior to then. Whilst this may not be ideal our hands are tied under the new arrangements. I will advise once Minters have completed their review".

37. On 28 September 2009, Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) stating - "further to our earlier discussions we confirm that funds allocated for the Abadi Residential Village Stage One A are somewhat contingent upon monies being received by Balmain Trilogy from other third party settlements. We also understand that such funds should be available with 2-3 weeks however you have raised concern in that it is reliant upon third parties for provision of same and delays may be greater than 3 weeks...".

38. On 9 October 2009, Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) confirming understanding that Minter Ellison had completed due diligence investigations in the previous week and that Kosho was to receive further advices in the week of 9 October 2009 as to timing for drawdown.

39. On 19 October 2009:

    (a) Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) requesting an response 'to emails and phone messages in regards to the timing of the first draw down and timely advance of loan facility";

    (b) Trilogy (Neil Hinrichensen) emailed Kosho (by Slijderink) stating - "further to previous correspondence, I understand Minters will be issuing a letter in the next day or so updating the position..."

40. By letter date 20 October 2009, from Minter Ellison (for Trilogy) to Hickey Lawyers (for Kosho) wrote stating –

"We note that there are a number of outstanding conditions precedent in respect of the above facility, including:

a. an unconditional sales contract for the commercial property;
b. a building contract with an independent and appropriately qualified third party consultant;
c. a civil works contract with an independent and appropriately qualified third party consultant;
d. deeds of security in respect of agreements in items b and c above (which will be prepared upon provision, and review of, the relevant agreements);

e. agreement to the deed, and sign off by, the Department of Main Roads and all relevant parties;
f. copies of the following documents previously requested:
i certificates of currency (noting our clients interests)
ii evidence of payment of council rates
iii evidence of payment of land tax.

In addition, our client is reviewing the due diligence enquiries relevant to this facility, including the valuations. To enable it to complete these enquiries please provide us with financial accounts of the guarantor, borrower and mortgagor..."

41. By letter dated 27 October 2009, Hickey Lawyers replied to Minter Ellison noting:

(a) the copy unconditional commercial sales contract was provided on 29 June 2009 and Minter Ellison had on 11 August 2009 confirmed it was held on file;

(b) that the parties had dealt with the issues in (b), (c) and (d) in emails dated 1 July 2009;

(c) the draft assignment deed was in the hands of Trilogy but that Kosho and Club Cavil had approved the terms of the earlier deed provided by DMR on 27 July 2009;

(d) copies of the documents in (f) had been provided on 2 July 2009;

(e) copies of other documents had been provided on 29 June 2009 0and 30 June 2009.

42. On 22 December 2009, Trilogy:

(a) appointed Brian Noble of Clayton Utz as its Solicitors;

(b) noted that an assignment of rights under a deed of assignment with DMR was a condition precedent to the facility being provided;

(c) advised that a draft assignment deed had been submitted to Crown Law (for DMR);

(d) expected to hear back from Crown Law in the first 2 weeks of January 2010.

43. On 15 January 2010, Kosho (by Slijderink) emailed Clayton Utz (Brian Noble) requesting information as to progress and timing for completion of the draft assignment deed.

44. On 28 January 2010, Clayton Utz (Brian Noble) emailed Kosho (by Slijderink) noting that Clayton Utz had received a response from DMR in relation to the draft assignment deed to which Clayton Utz were replying and Clayton Utz expected to be in a position to provide a settled deed within 7 – 10 days.

45. On 9 February 2010, Kosho (by Slijderink) emailed Clayton Utz (Brian Noble) confirming that DMR had agreed to terms of draft assignment deed and requesting a meeting to discuss facility.

46. On 12 February 2010, Clayton Utz (Brian Noble) emailed Kosho (by Slijderink):

(a) advised that Sunrise Waters Pty Ltd had confirmed acceptable to the terms of the draft assignment deed; and

(b) stating - "On Tuesday morning I sent the Deed incorporating a number of amendments requested by Crown Law back to them for approval. When Crown Law approves the terms of the Deed I will send the Deed to you. I will chase them down on Friday as to their comments on the Deed I sent them today..."

47. On 5 February 2010, Clayton Utz (Brian Noble) emailed Kosho (by Slijderink) stating –

"Adam
Thankyou for your email. I am instructed to advise:
1. Provided the final executed Deed of Assignment with the DMR and all other parties is satisfactory to PMFM; and
2. Subject to the conditions precedent of the loan facility being satisfied as per the loan documentation

PMFM will advance funding as per the documentation..."

48. On 19 February 2010, Clayton Utz (Brian Noble) emailed Kosho (by Slijderink) stating –

"Adam
Thankyou for your email below.
As you are aware special condition (s) in CPL's letter of offer of 24 June requires the deed we are currently negotiating with Crown Law to be entered into prior to finance being provided. As previously advised we are endeavouring to finalise these negotiations at the earliest.
We cannot comment on specific special conditions until such time as the deed has been agreed with all parties as they are interdependent..."

49. On 23 February 2010:

(a) Kosho (by Slijderink) emailed Clayton Utz (Brian Noble) requesting advice as to the status for the Deed of Assignment and noting that CPL and Trilogy had now had "8 months to settle the Deed of Assignment";

(b) Clayton Utz (Brian Noble) emailed Kosho (by Slijderink) stating –

> "Your conclusion in your email below that my client is satisfied with all other conditions and/or special conditions is totally incorrect. My clients confirms its position that it will not review the status of the loan conditions until the terms of the Deed with Main Roads has been settled.
> It is totally unreasonable for you to think that our client is happy with the status of all the conditions due to the passing of time since the letter of offer was sent out in June last year.
> ...
> I will get back to you as soon as the Deed is settled."

50. On 26 February 2010, Michael Quinn of Q5 Law was appointed Solicitor for the Plaintiffs and wrote to Clayton Utz reserving their rights under the finance facility.

BREACHES

51. As at the date of commencement of this Proceeding, Trilogy:

(a) has had possession of (and retains) the benefit of each of the documents for execution (and the equitable interests granted thereunder) provided by Kosho pursuant to and in accordance with the finance facility;

(b) has had in excess of eight (8) months to consider the terms of the draft assignment deed and satisfy itself as to the requirements for any changes proposed by the DMR as early as July 2009;

(c) failed or refused to make any or any additional advances to Kosho to enable sales & marketing, development and construction of Stage 1A in accordance with the finance facility.

52. Trilogy, by the conduct pleaded herein, has:

(a) failed to do all such things and take all such steps necessary to enable Kosho to have the benefit of the finance facility;

(b) notwithstanding the facts and matters pleaded in 14 and 15 herein:

(i) unreasonably delayed in its consideration and determination of Kosho's compliance with the requirements of the finance facility, and in particular the draft assignment deed;

(ii) failed, and unreasonably refused, to advance funds under the finance facility;

(c) alternatively, delayed arbitrarily and capriciously in its consideration and determination of Kosho's compliance and satisfaction with the requirements necessary to comply with the conditions imposed by CPL in the finance facility.

53. In the premises, Trilogy:

(a) has breached the express terms;

(b) has breached the implied terms.

54. As a consequence of Trilogy's breach, Kosho and City Co have suffered (and are liable to suffer) the loss and damage pleaded herein below.

MISLEADING AND DECEPTIVE CONDUCT

55. Further or in the alternative, on or about 24 June 2009, CPL (by McCormick and McCosh) represented orally to Kosho (by Slijderink) that funding would be available within 30 days, in accordance with the cash flows provided in January 2009.

56. Kosho and City Co relied on the representations in:

(a) entering into and executing the finance facility;

(b) agreeing to special condition (s) in relation to the assignment of compensation to Sunrise Waters Pty Ltd;

(c) granting or extending the securities comprised in the documents for execution.

57. The representation:

(a) was committed in the course of trade or commerce; and

(b) in the premises pleaded in paragraphs 14, 15 and 20 to 50 hereof,

was conduct which was misleading or deceptive in contravention of s.52 of the TPA, alternatively, Division 2 of the ASIC Act.

LOSS AND DAMAGE

58. Kosho and City Co (and each of them) have suffered (and are liable to suffer) loss and damage as a consequence of Trilogy's breach.

59. By reason of Trilogy's breach:

(a) Kosho has incurred holding costs of $2,763,077, particulars whereof are as follows:

General (Liabilities of Kosho incurred but some not yet paid)	AUD
Wages & super	950,000
Land taxes/rates	100,000
Insurances	20,000
Office lease (old office)	5,077
Office running costs	10,000
Consultants costs	60,000
Accountancy fees	13,000
Misc (council fees/marketing)	5,000
Valuations/QS reports (finance application)	90,000
Legals (Hickey Lawyers)	15,000
PFMF loan facility costs as of Feb 2010	
Interest (feb 2010) @ approx $100K per month	800,000
fees and charges	15,000
legal costs	10,000
Additional costs to result (March - June 2010)	
Further PFMF interest allowance (until June 2010)	400,000
Refinance application fees	50,000
Refinance establishment fees	160,000
Legals (court procedings)	60,000
TOTAL COST TO DATE	**$2,763,077**

(b) Trilogy has since 2 July 2009 had the benefit of the securities comprised in the documents for execution;

(c) the grant and extension of securities comprised in the documents for execution has resulted in Kosho and City Co being precluded from accessing or dealing the equity in the Carrara Land and Surfers Paradise Land to:

(i) meet or service Kosho operational costs;

(ii) develop the Carrara Land;

(iii) develop the Surfers Paradise Land;

(iv) obtain refinance of the existing facility with Trilogy

(d) construction costs required by Kosho to develop Stage 1A of the project have increased;

(e) construction costs required to Kosho develop the subsequent stages of the project have increased;

(f) City Co has (or is liable to) suffer an increase in the construction costs of the proposed development to its Surfers Paradise Land;

(g) Kosho and City Co have suffered loss of opportunity loss;

(h) Kosho and City Co have suffered loss and damage of the order of $77,807,313, particulars whereof are-

Costs to date	2,763,077
Loss of development profit (MIP sale) both Kosho and City Co properties	45,000,000
Liquidated damages for commercial contract termination	1,600,000
Opportunity Cost (say minimum 30%)	28,444,236
Total	$77,807,313

The plaintiffs claim the following relief:

1. A declaration that in the events that have transpired (as pleaded in 14, 15, 20 to 50 and 51 to 54 of the Statement of Claim) the Defendant has breached the finance facility between the First Plaintiff and the Defendant dated 24 June 2009.

2. Damages in the amount of $80,570,390 for breach of contract.

3. Further or alternatively, damages pursuant to s.82 for breach of s.52 of the *Trade Practices Act 1974.*

4. Such further or other order as this Honourable Court may deem meet.

5. Interest pursuant to the *Supreme Court Act 1995.*

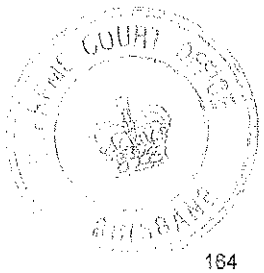
6. Costs.

Signed:

Description: Solicitor for the Plaintiffs

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.



PW-13

CLAYTON UTZ

Supplemental Deed

Pacific First Mortgage Fund
ARSN 088 139 477

Trilogy Funds Management Limited
ACN 080 383 679
Responsible Entity

Clayton Utz
Lawyers
Level 15, 1 Bligh Street Sydney NSW 2000 Australia
PO Box H3 Australia Square Sydney NSW 1215
T + 61 2 9353 4000 F + 61 2 8220 6700

www.claytonutz.com

Supplemental Deed made on 19 OCTOBER **2011**

Party **Trilogy Funds Management Limited ACN 080 383 679** of Level 13, 56 Pitt Street, Sydney NSW 2000 (**"Responsible Entity"**)

Background

A. By a deed poll dated 11 June 1999, the managed investment scheme now known as the Pacific First Mortgage Fund was established (**"Scheme"**).

B. The constitution for the Scheme referred to in Background A, as amended from time to time, is referred to in this Deed as the **"Constitution"**.

C. The Scheme is registered by the Australian Securities and Investments Commission (**"ASIC"**) as a managed investment scheme and the Responsible Entity is appointed as the responsible entity of the Scheme.

D Pursuant to section 601GC(1)(b) of the Corporations Act 2001 (Cth) (**"Corporations Act"**), the Constitution may be modified by the Responsible Entity if it reasonably considers that the change will not adversely affect members' rights. The Responsible Entity considers that the amendments set out in the Deed will not adversely affect members' rights.

E. The Responsible Entity amends the Constitution as set out in this Deed.

Operative provisions

1. Operative provisions

1.1 Specific modifications

Subject to clause 2, the Constitution is modified by:

(a) replacing clause 14.1 with the following:

"In respect of all meetings of Members convened in accordance with section 252D of the Corporations Act, at least 28 days notice must be given. In respect of all other meetings of Members, at least 21 days notice must be given.";

(b) in clause 17.5(a), replacing the word "For" at the beginning of that clause with the words "Subject to clause 17.5(e), for";

(c) in clause 17.5(b), replacing the word "If" at the beginning of that clause with the words "Subject to clause 17.5(e), if";

(d) in clause 17.5(c), replacing the words "A Manager" at the beginning of that clause with the words "Subject to clause 17.5(e), the Manager"; and

(e) including the following clause 17.5(e) immediately after the existing clause 17.5(d):

"(e). Despite any other provision of this Constitution, an appointment of proxy will be ineffective where the Manager believes (acting reasonably) that the proxy has not been sent directly by the Member to the Manager, or its agent appointed in writing. For the avoidance of doubt, this means that where the Manager believes that an appointment of proxy has been sent by a Member (including by post or other physical delivery method, fax or electronically) to a third person other than the Manager or its appointed agent, then that appointment of proxy

will be ineffective, even if such third person then forwards such appointment of proxy to the Manager. However, for the further avoidance of doubt, this provision will not be construed such that an appointment of proxy is rendered ineffective simply because a Member uses Australia Post or other recognised delivery company for the sole purpose of delivering the appointment of proxy directly from the Member to the Manager or its agent.".

1.2 Provisions not affected

The provisions of the Constitution are not otherwise effected.

2. Effective time

In accordance with section 601GC(2) of the *Corporations Act 2001* (Cth), the modifications to the Constitution pursuant to clause 1.1 of this Deed take effect immediately upon a copy of this Deed being lodged with ASIC.

3. No resettlement

Nothing in this deed constitutes a resettlement or redeclaration of the Scheme.

4. Governing law

This Deed is governed by and will be construed according to the laws of the State of Queensland.

5. Severance

If any provision or part of a provision of this Deed is held or found to be void, invalid or otherwise unenforceable (whether in respect of a particular party or generally), it will be deemed to be severed to the extent that it is void or to the extent of voidability, invalidity or unenforceability, but the remainder of that provision and this Deed will remain in full force and effect.

Executed as a deed.

Executed by **Trilogy Funds Management Limited ACN 080 383 679** in the presence of:

Signature of Director

NIGEL CHAMIER

Name of Director in full

Signature of Secretary/other Director

Name of Secretary/other Director in full

CLAYTON UTZ

Supplemental Deed

Pacific First Mortgage Fund
ARSN 088 139 477

Trilogy Funds Management Limited
ACN 080 383 679
Responsible Entity

Clayton Utz
Lawyers
Levels 19-35 No. 1 O'Connell Street Sydney NSW 2000 Australia
PO Box H3 Australia Square Sydney NSW 1215
T + 61 2 9353 4000 F + 61 2 8220 6700

www.claytonutz.com

Supplemental Deed made on 1 February 2011

Party **Trilogy Funds Management Limited ACN 080 383 679** of Level 10, 241 Adelaide Street, Brisbane, Qld 4000 (**"Responsible Entity"**)

Background

A. By a deed poll dated 11 June 1999, the managed investment scheme known as the Pacific First Mortgage Fund was established (**"Scheme"**).

B. The constitution for the Scheme referred to in Background A, as amended from time to time, is referred to in this Deed as the **"Constitution"**.

C. The Scheme is registered by the Australian Securities and Investments Commission (**"ASIC"**) as a managed investment scheme and the Responsible Entity is appointed as the responsible entity of the Scheme.

D Pursuant to section 601GC(1)(b) of the Corporations Act 2001 (Cth) (**"Corporations Act"**), the Constitution may be modified by the Responsible Entity if it reasonably considers that the change will not adversely affect members' rights. The Responsible Entity considers that the amendments set out in the Deed will not adversely affect members' rights.

E. The Responsible Entity amends the Constitution as set out in this Deed.

Operative provisions

1. Operative provisions

1.1 Specific modifications

Subject to clause 2, the Constitution is modified by inserting each word which is underlined, and by deleting each word which is struck through, in the version of the Constitution set out in Schedule 1 to this deed.

1.2 Provisions not affected

The provisions of the Constitution are not otherwise effected.

2. Effective time

In accordance with section 601GC(2) of the *Corporations Act 2001* (Cth), the modifications to the Constitution pursuant to clause 1.1 of this Deed take effect immediately upon a copy of this Deed being lodged with ASIC.

3. No resettlement

Nothing in this deed constitutes a resettlement or redeclaration of the Scheme.

4. Governing law

This Deed is governed by and will be construed according to the laws of the State of Queensland.

Executed as a deed.

Executed by **Trilogy Funds Management Limited ACN 080 383 679** in the presence of:

Signature of Director

Signature of ~~Secretary~~/other Director

Name of Director in full

Name of ~~Secretary~~/other Director in full

Schedule 1

PACIFIC FIRST MORTGAGE FUND - CONSOLIDATED CONSTITUTION

THIS DEED POLL originally made the 11 day of June 1999

BY CITY PACIFIC LTD ACN 079 453 955 of 56-60 Santa Cruz Boulevard Clear Island Waters in the State of Queensland

('Manager')

RECITALS

A. Pursuant to clause 22.6 of the City Pacific Trust Deed dated 23 June 1998 the Manager reasonably believes that this modification to the Trust Deed will not adversely affect the rights of Members.

B. With effect from the date the Scheme is registered by ~~the Commission~~ASIC, the Deed is amended by revoking clauses 1 to 25 and replacing the existing provisions of this Deed to the extent necessary for those revisions to correspond with the new provisions contained in this Deed ('Constitution').

C. From time to time the Manager may invite persons to invest in the Scheme and anyone who wants to participate in the Scheme may invest by completing and sending the Application and Application Money to the Manager.

D. This Constitution is made as required by the *Managed Investments Act 1998* with the intent that the Manager and each Member will be bound by it.

1 Definitions and Interpretations

1.1 Defined Terms

In this Constitution unless the context otherwise requires:

Accounting Standards has the meaning given to that term in section 9 of the Law;

Applicant means a person who has completed and lodged with the Manager an Application, pursuant to a Prospectus, and has paid the Application Money to which the Application refers, and includes his or her successors in title and permitted assigns;

Application means a duly completed and signed application to invest in the Scheme, lodged with the Manager and accompanied by payment of the Application Money;

Application Account means the Bank account established by the Manager under clause 3.3;

Application Money means all money paid by the Applicant pursuant to a Prospectus, accepted by the Manager and held by the Manager in the Application Account;

Approved Valuer means any person or firm appointed by the Manager, to value any property and who is independent of the Manager and includes a person employed or engaged by a company or firm and who is

a. authorised under any law of the State or Territory where the valuation takes place to practice as a valuer; and

b. has at least 5 years continuous experience of valuation.

ASIC means the Australian Securities and Investments Commission or, if it ceases to exist, any regulatory body or authority as then serves substantially the same objects.

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ASIC Instrument means an exemption, modification, declaration, determination or any other instrument granted or issued by ASIC in respect of or applicable to the Scheme (whether or not it may also have application to other registered managed investment schemes).

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Assets mean all assets and liabilities of the Scheme which are, or would be, recognised as assets or liabilities of the Scheme by the application of generally accepted accounting principles;

Associate means an associate as defined in division 2 of part 1.2 of the Law;

Auditor means the auditor for the Scheme, appointed by the Manager, as required under the Law;

Authorised Investments means:

a. Mortgage Investments;

b. deposits at call or for a term with any Bank;

c. bills of exchange (including commercial bills) issues, drawn accepted or endorsed by any Bank or negotiable certificates of deposit issued by any Bank;

d. any mortgage investment scheme that is a registered managed investment under the Law, including a scheme to which the Manager is the responsible entity; and

e. ~~and~~ any authorised investment as defined in section 21 of the Queensland Trusts Act 1973 which, for the avoidance of doubt, includes any form of investment including without limitation investments in securities and real property.

Bank has the meaning given to that term in section 5 of the Banking Act 1959 and also includes a bank constituted by or under a law of the State or Territory and a 'foreign bank' as that term is defined in section 5 of the Banking Act 1959;

Business Day means any day on which trading banks in Brisbane are generally open for business;

Certificate means a certificate or document issued by the Manager to the Applicant evidencing the acceptance by the Manager of the Application;

Commencement Date means the date the City Pacific Trust Deed dated 23 June 1998 was registered by ~~the Commission~~ASIC;

~~**Commission** means the Australian Securities and Investments Commission;~~

Compliance Plan means the compliance plan for the Scheme and includes any approved amendments to the compliance plan from time to time;

Constitution means this deed;

Disposal Expenses means, at any time, an amount (if any) which the Manager determines is the total expenses which may be incurred or are expected to be incurred by the Manager if all Assets held at that time were to be disposed of and the Scheme was to be wound up at that time. If the Manager considers it appropriate, it may determine Disposal Expenses to be a lesser sum or zero;

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Distribution Amount means, in relation to the Scheme, any amounts determined by the Manager from time to time to be distributed to Members including:

a. the Net Income of the Scheme;

b. other Income of the Scheme; and

c. any amount of capital of the Scheme;

Distribution Period means the period referred to in clause 8.4;

Dispute Resolution Service means the dispute resolution service approved by ~~the Commission~~ASIC which the Manager nominates from time to time;

Early Withdrawal Fee means a fee of 2% of the total amount withdrawn by the Fixed Term Member, or such other amount as disclosed in the Prospectus;

Expert includes solicitors, barristers, accountants, bankers, financial advisers, an Approved Valuer and other professionally qualified consultants;

Fees mean all fees (including application and penalty), charges, late interest penalty payments paid by borrowers to the Manager on Mortgage Investments;

Financial Statements has the meaning given to that term in section 9 of the Law;

Financial Year means the period of 12 months ending on 30 June in each year during the continuance of this Constitution and includes the period commencing on the Commencement Date and expiring on the next succeeding 30 June and any period between 30 June last occurring before the termination of the Scheme;

First Mortgage means a registered first mortgage over the Land;

Fixed Term Member means a Member who has elected to fix the term of their investment in the Scheme for a term of 12 months (or such other period nominated in the Prospectus), commencing on the date their Application is accepted by the Manager;

Gross Asset Value means the aggregate of:

a. the Market Value of all investments of the Scheme including cash and amounts owing to the Scheme;

b. any prepayment of expenditure; and

c. such other increments or decrements as the Auditor approves to be included;

GST has the same meaning as the GST Act;

GST Act means A New Tax System (Goods & Services Tax) Act 1999 as amended;

Hardship Offer means an offer made by the Manager allowing Members to make a Hardship Withdrawal Request. The Manager may impose such terms and conditions in the Hardship Offer as it determines, subject to the conditions of any relevant ASIC Instrument;

Hardship Withdrawal Request means a Withdrawal Request made in respect of the Hardship Withdrawal Facility;

Hardship Withdrawal Facility means the withdrawal facility available in circumstances of hardship as set out in clause 11D;

Income means all amounts which are, or would be recognised as, income by the application of generally accepted accounting principles;

Interest means an undivided share in the Scheme as provided in clause 2;

Investment Term means the fixed investment term for an investment in the Scheme which is disclosed in the Prospectus. The fixed term shall be as determined by the Manager from time to time;

Land means a freehold estate or interest in real property in any part of the Commonwealth of Australia or any State or Territory thereof and including buildings, fixtures and fittings (including furnishings) and other improvements erected or installed thereon. Land may also include other property including licences, chattels, leases, choses in action and personal property;

Law means the Corporations Act 2001 (Cth) and includes the Corporations Regulations 2001 (Cth);

Liabilities at any time, means the aggregate of the following at that time as determined by the Manager:

a. all liabilities of every nature of or in respect of the Scheme including contingent liabilities and any anticipated liabilities or provisions for liabilities that the Manager considers should be included; and

b. all amounts payable out of or reimburseable from the Assets or in relation to the Scheme, including (without limitation) any unpaid amounts due and payable to any Members or to the

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Manager (as its remuneration), or where determined by the Manager, provisions with respect to such amounts,

but excluding any amounts included as liabilities for accounting purposes reflecting funds available to pay Members. Where more than one class of Interests is on issue and the Net Asset Value of the Assets referable to a particular class of Interests is being calculated, reference to "Liabilities" means that proportion of the Liabilities that the Manager considers are properly referable to each class of Interests.

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Litigation means all litigation, claims, actions and proceedings (for the purposes of this definition, "**proceedings**") brought by the Manager in connection with the management and administration of the Scheme but, for the avoidance of doubt, excluding any proceedings against borrowers, guarantors and security providers or which otherwise relate to the enforcement of loans made by or on behalf of the Scheme.

Litigation Recovery Right means a class of Interests in the Scheme which have the following features:

a. nil issue price;

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b. no right to distributions of capital or income of the Scheme;

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c. a right to share on a pro rata basis in accordance with the relevant Member's proportionate holding of rights in the Net Proceeds of Litigation; and

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d. redeemable for nil redemption price upon the winding up of the Scheme;

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Manager means ~~City Pacific~~Trilogy Funds Management Ltd or any other person for the time being acting as manager, provided that at all times the Manager is the responsible entity of the Scheme as defined in section 9 of the Law and the trustee of this trust;

Market Value of an investment means the current market value determined in accordance with a method agreed between the Manager and an Approved Valuer or Expert. If there is a dispute between the Manager and the Approved Valuer, the decision of the Approved Valuer shall prevail;

Member means a person whose Application is accepted and for the time being is registered under the provisions of this Constitution as a member of the Scheme and includes persons jointly so registered;

Minimum Redemption Amount means the minimum amount a Member can withdraw from the Scheme at any time, as disclosed in the Prospectus;

Month means calendar month;

Mortgage Insurance means mortgage insurance with Housing Loans Insurance Corporation or Mortgage Guaranty Insurance Corporation of Australia Limited, their successors or assigns, (or such other corporations as may carry on business as mortgage insurers and have been approved by the Manager), insuring in the name of the Manager the payment or repayment of the amount of the moneys secured under a Mortgage Investment;

Mortgage Investment means a loan secured by a registered mortgage over Land subject to the following provisions:

a. the mortgage will rank as a First Mortgage and/or Second Mortgage over the mortgaged Land; and

b. the total of all money advanced from the Scheme and secured over such Land, shall not exceed:

i. 80% of the value of the Land that has been valued by an Approved Valuer as shown in the valuation furnished by an Approved Valuer; or

ii. 95% of the value of the Land, that has been valued by an Approved Valuer as shown in the valuation furnished by an Approved Valuer provided the loan is secured by Mortgage Insurance to a level approved by the Manager; and

c. the loan shall be for a maximum period of 30 years.

Mortgage means the Manager or Custodian that will act as the mortgagee in respect of the Mortgage Investments entered into under the terms of this Constitution;

Net Asset Value means the aggregate of:

a. the Market Value of all investments of the Scheme including cash and amounts owing to the Scheme;

b. any prepayment of expenditure; and

c. such other increments or decrements as the Auditor approves to be included,

less the Liabilities of the Scheme;

Net Income means in relation to the Scheme, 'net income' as that term is detailed in section 95 of the Tax Act as calculated each Financial Year;

Net Proceeds of Litigation means the gross proceeds from any Litigation less the Manager's estimate of the total liabilities, loss, costs and expenses incurred by the Scheme, or the Manager's assessment of any detriment suffered by the Scheme, in connection with any Litigation. The Net Proceeds of Litigation will be determined by the Manager having regard to the above in its absolute discretion;

On Call Member means a Member who is not a Fixed Term Member;

Officer means a person who is a director, secretary or executive officer of the Manager;

Premium Interests means Interests that are issued by the Manager from the Scheme pursuant to clause 2.11 which are called 'Premium Interests' or 'Premium Investment' and have the rights as disclosed in the Prospectus and as provided in clause 11B';

Premium Member means a Member who holds Premium Interests;

Prospectus means the product disclosure statement or such other offer document issued by the Manager offering investment in the Scheme;

Quarter means each period of 3 months ending on the last days of March, June, September and December in each year;

Record Date means such date determined by the Manager in its discretion;

Redemption Amount means the number of Interests to be redeemed or repurchased multiplied by the relevant Redemption Price less any Taxes;

Redemption Date means:

- for Members prior to 1 February 2005, the date determined by the Manager in accordance with clause 11.1 or with 11.2 as the case may be being the date the Members Interests are redeemed by the Manager; or
- for Members post 1 February 2005, the date determined by the Manager in accordance with clause 11A.3 being the date that the Members Interests are redeemed by the Manager; or
- for Premium Members, the date determined by the Manager in accordance with clause 11B.3 being the date that the Members Interests are redeemed by the Manager;

Redemption Price ~~is~~ means:

a. for redemptions pursuant to clauses 11, 11A and 11B, $1.00 per Interest; and

b. for redemptions made pursuant to a Hardship Withdrawal Request, the amount determined by the Manager from time to time by subtracting the Disposal Expenses at that time from the Net Asset Value at that time, dividing the resultant amount by the total number of Interests on issue at that time.~~;~~

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The Manager may calculate the Redemption Price to the number of decimal places that the Manager determines and may round the Redemption Price up or down as the Manager thinks fit. In determining the Redemption Price of an Interest, the Manager may, to the fullest extent permitted by law (including any ASIC Instrument), exercise its discretion in determining:

c. any matter affecting the value of any factor included in the calculation of the Redemption Price; and

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~~a.~~d. any matter which is an aspect of the method of calculating the Redemption Price;

Register mean the register of Members to be established and kept by the Manager under clause 12.1;

Registered has the same meaning as in the GST Act;

Regulations means the Corporations Regulations ~~of Queensland~~2001 (Cth);

Related Party means a related party as defined in part 5C.7 of the Law;

Scheme means the scheme established in accordance with this Constitution;

Scheme Accounts means the Bank accounts of the Scheme;

Second Mortgage means a registered second mortgage over the Land;

Supply has the same meaning as in the GST Act;

Tax Act means the Income Tax Assessment Acts of 1936 and 1997 (Cth) and the regulations made thereunder from time to time; and

Tax Invoice has the same meaning as in the GST Act;

Taxable Supply has the same meaning as in the GST Act;

Taxes includes, without limitation, any:

a. present or future stamp or documentary taxes, or any other excise or property taxes, charges or similar levies, interest, penalties, fees or other amounts (if any) imposed, levied, collected, withheld or assessed which arise from any payment made to or by the Manager under this Constitution or any other instrument delivered hereunder or which are imposed on the Manager in respect of the Scheme, a Members interest or any of the Authorised Investments thereof;

b. taxes, levies, imposts, duties, deductions or withholdings (however called), interest, penalties, charges, fees or other amounts (if any) imposed, levied, collected, withheld or assessed of any nature whatever, whensoever and howsoever imposed, and all liabilities with respect thereto which arise from any payment made to or by the Manager under this Constitution or any other instrument delivered hereunder; or

c. taxes, interest, penalties, charges, fees or other amounts (if any) imposed, levied, collected, withheld or assessed upon:

   i. Application Money;

   ii. the Scheme, a Members Interest, Scheme Accounts, or the Income, capital gains, profits, transactions, accounts, accruals, receivables or any change in the worth or value of the Scheme, a Members Interest, the Assets or the Authorised Investments; or

   iii. the Manager in its capacity as manager of the Scheme,

   all such taxes and imposts to include, without limitation, all imposts made pursuant to the Tax Act, financial institutions duty, debits tax, withholding tax, stamp or documentary taxes, or any other excise or property taxes, charges or similar levies (howsoever called) imposed, levied, collected withheld or assessed by Australia or any political subdivision in, or of, Australia or any other jurisdiction from, or to, which a payment is made by, or on behalf of a Member or pursuant to any legislation enacted, proclaimed or otherwise brought into operation by any of the

foregoing;

Value has the same meaning as in the GST Act;

Withdrawal Request Form means the request form prescribed by the Manager in accordance with clauses 11, 11 A or 11B and given to the Manager by a Member for the purpose of withdrawing from the Scheme or having the Members Interests redeemed or repurchased.

1.2 Interpretation

In this Constitution, unless the context otherwise requires:

a. words expressing the singular include the plural and vice versa;

b. words denoting a natural person include corporations and body corporates and vice versa;

c. words denoting gender includes both genders;

d. a reference to a part, clause, paragraph or schedule is a reference to a part, clause, paragraph or schedule of this Constitution;

e. references to this Constitution are references to this Constitution as amended, supplemented or varied from time to time;

f. a reference to writing includes printing, engraving, typewriting, lithography, photography and any other mode of reproducing words in a visible form;

g. a reference to a thing or matter includes a reference to a part of the thing or matter;

h. headings are included for convenience only and do not affect interpretation;

i. references to a party to this Constitution include the party's successors and permitted assigns;

j. references to a document or agreement include references to the document or agreement as amended, novated, supplemented, varied or replaced from time to time;

k. a reference to a statute includes a reference to or citation of all enactments amending or consolidating the statute and to an enactment substituted for the statute;

l. references to dollars and '$' refer to amounts in Australian currency;

m. the schedules to this Constitution form part of this Constitution; ~~and~~

n. where any word or phrase is given a defined meaning in this Constitution, any other part of speech or other grammatical form of that work or phrase has a corresponding meaning; and

o. where an ASIC Instrument is conditional on the Constitution containing certain provisions, then

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those provisions are deemed to be incorporated.

2 Constitution and Duration

2.1 Pacific First Mortgage Fund

This Constitution establishes the Pacific First Mortgage Fund[1] (`the Scheme'), which commences on the Commencement Date.

2.2 Assets of the Scheme

The Manager declares that it holds and will at all times hold the Assets on trust for Members of the Scheme subject to the provisions of this Constitution and the Law.

2.3 *Manager to act as Responsible Entity of the Scheme*

The appointment of the Manager as manager of the Scheme is hereby confirmed and the Manager agrees to manage the Scheme upon and subject to the terms and conditions contained in this Constitution.

2.4 *Manager to establish Scheme*

The Manager shall, on the execution of this Constitution, lodge and hold the sum of one hundred dollars ($100) to establish and constitute the Scheme. The Manager may, from time to time, cause or cause to be received more cash by way of addition to the Scheme to be held upon the trusts of this Constitution.

2.5 *Interests*

The beneficial interest in the Scheme shall be divided into Interests.

2.6 *Interests of Equal Value*

Subject to this Constitution, every Interest into which the beneficial interest in the Scheme is for the time being divided shall be of equal value and confer an equal interest in the Scheme but shall not confer any interest in any particular part of the Scheme or any particular investment or investments but only such interest in the Scheme as they hold as is conferred by the Interest under the provisions contained in this Constitution.

2.7 *Creation of Additional Interests*

As and when an addition is made to the Scheme pursuant to this Constitution, additional Interests equal in number to the number computed by dividing the amount of cash so added by the sum of $1.00 shall be created.

2.8 *Fractional Interests*

The Manager may at its discretion create a fractional Interest in 100 parts for an amount less than a whole dollar notwithstanding any other provision of this Constitution, the expression `Interest' shall, where the

context will allow, be deemed to include such a fractional Interest and such fractional Interest shall carry with it the rights and obligations which attach to a whole Interest and limited to the proportion of those rights and obligation which the number of 100ths in such fractional Interests bears to 1. A fractional Interest may also be created by the redemption of part of a whole Interest.

2.9 *Nature of Beneficial Interest*

A Member shall be entitled as herein provided or as provided by the Law to a beneficial interest in the Scheme but such interest shall not entitle the Member other than as provided by this Constitution:

a. to interfere with the rights or powers of the Manager in its dealings with the Scheme or any part thereof; or

b. to exercise any rights, powers or privileges in respect of any Authorised Investment.

2.10 *Binding Effect of Constitution*

This Constitution operates as a deed and is binding on the Manager and each Member and all persons claiming through them as if they were parties to this Constitution, and each Applicant by signing the Application, acknowledges being so bound.

2.11 *Different Classes of Interests*

~~1.~~a. The Manager may issue Interests with special rights or restrictions and those rights and restrictions prevail over any inconsistent provision of this Constitution.

b. Subject to Law and to paragraph (c), the Manager may in its absolute discretion:

i. split an Interest into one or more different classes of Interests;

ii. classify, reclassify or designate Interests in any manner which the Manager thinks fit (including into classes or into a different class).

c. The Manager may only exercise the discretion set out in paragraph (b) in the following circumstances:

i. to allocate to all Members on the Register as at the Record Date a Litigation Recovery Right; and

ii. where the Manager considers that to exercise its discretion set out in paragraph (b) would not adversely affect the rights of existing Members.

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2.12 *Membership*

a. The membership of the Scheme is divided between:

i. On Call Members; and

ii. Fixed Term Members.

b. Unless a person specifically designates otherwise in the Application the person shall be an On Call Member.

c. All Members at the date of commencement of this clause shall be On Call Members unless they apply to become Fixed Term Members.

2.13 Membership Post 1 February 2005

Notwithstanding any other provision in this Constitution, membership of the Scheme post 1 February 2005 will only be available as disclosed on the Prospectus. The terms and conditions which apply to membership shall be as disclosed in the Prospectus.

3 Application Procedures

3.1 Offer

The Manager may, in accordance with the provisions of the Law and this Constitution, invite investment in the Scheme and issue a Prospectus in relation to such an invitation.

3.2 Applications

A person who wishes to invest in the Scheme must make an Application in the manner specified in the Prospectus.

3.3 Application Account

Unless otherwise required by the Law, the Manager must establish and maintain a Bank account in the name of the Manager to be designated the Application Account for the Scheme. The Application Account must be established and operated in accordance with the requirements of the Law.

3.4 Application Money to be paid to Manager

The Manager must, in each Prospectus and other representations relating to the Scheme, direct how all cheques and other payment orders in respect of Applications are to be drawn on account of the Scheme.

3.5 Application Money with completed Application

Where the Manager receives Application Money with a completed Application relating to a current Prospectus, the Manager must pay the Application Money into the Application Account as soon as practicable after its receipt, but no later than the close of business on the next Business Day after the day of receipt.

3.6 Application Money without completed Application

Where the Manager receives Application Money that is not accompanied by a completed Application relating to a current Prospectus it will, as soon as practicable, return the Application Money to the Applicant or:

a. attempt to obtain the Application from the Applicant;

b. pay the Application Money into the Application Account; and

c. if interest accrues while the Application Money is held in the Application Account, ask the Applicant, in writing, whether the Applicant wants the interest to be dealt with as additional Application Money or to be paid to the Applicant.

3.7 Dealing with Application Money

Should the Manager pay the Application Money into the Application Account under clause 3.6, the Manager will:

a. hold the Application Money on trust for the Applicant, until the Application is received; and

b. if the Application is received by the Manager within 30 days after the Application Money is received:

   i. apply the Application Money to the Scheme Accounts as soon as practicable after receiving the Application; and

   ii. deal with any interest accrued while the Application Money was held by the Manager in the Application Account in the manner disclosed in the Prospectus; and

c. if the Application has not been received by the Manager within 30 days after the Application Money was received, return the Application Money and interest (if any) to the Applicant as soon as practicable.

3.8 Manager's Discretion

The Manager has the sole discretion to determine whether to accept or reject an Application in whole or in part without giving reasons. Where the Manager determines to reject an Application, it must give written notice to the Applicant within a reasonable time after receipt of the Application. The Manager must within a further 10 Business Days after the notice of rejection is given, refund to the Applicant the Application Money.

3.9 Manager may withdraw Prospectus

The Manager may in its sole discretion determine at any time to withdraw a Prospectus. The Manager within 5 Business Days after the notice to withdraw the Prospectus is given, repay to all Applicants all Application Money paid pursuant to that Prospectus and held in the Application Account. Any interest that has accrued on Application Money in the Application Account shall be dealt with as disclosed in the Prospectus.

3.10 Manager to Confirm Acceptance

a. Once the Application is accepted the Manager must enter the Applicant on the Register as either an On Call Member or a Fixed Term Member.

b. The Manager must transfer the Application Money of the Member to the Scheme Accounts.

3.11 Issue Price

The issue price of an Interest is one Interest for each one dollar ($1.00) of Application Money.

3.12 Certificates

The Manager

a. may issue to each Member a Certificate as evidence of the Members investment in the Scheme; and

b. may cancel existing Certificates and reissue new Certificates where the Manager has been supplied with evidence to the satisfaction of the Manager that the existing Certificate has been lost, or stolen.

3.13 Form of Certificate

The Certificate is to be in the form as determined by the Manager.

3.14 Joint Members

In the case of joint Members, only the person whose name appears first in the Register is entitled to a Certificate relating to that Members Interest.

3.15 Replacement Certificates

Replacement Certificates may be issued in the circumstances and subject to such conditions as determined by the Manager.

4 Responsibilities, Powers and Duties of Manager

4.1 Exercise of powers of the Manager

a. Subject to the provisions of this Constitution and the Law, the Manager has absolute and uncontrolled discretion as to the exercise of its powers, authorities and duties, in relation to the manner, mode and time of exercise of those powers, authorities and duties.

b. The Manager has all the powers of a natural person and a body corporate, including the power to invest and to borrow or raise money for the purposes of the Scheme and on security of the

relevant Assets.

4.2 Power to Appoint Agent (Section 601FB(2))

a. The Manager has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the Scheme.

b. For the purpose of determining whether:

i. there is a liability to the Members; or

ii. the Manager has properly performed its duties for the purposes of section 601GA(2) of the Law;

the Manager is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

4.3 Authority for Agent (Section 601FB(3))

An agent appointed, or a person otherwise engaged, by:

a. the agent or person referred to in clause 4.2; or

b. a person who is taken under this clause to be an agent of the Manager;

to do anything that the Manager is authorised to do in connection with the Scheme is taken to be an agent appointed by the Manager to do that thing for the purposes of clause 4.2.

4.4 Liability of Agent (Section 601FB(4))

If:

a. an agent holds any Assets on behalf of the Manager; and

b. the agent is liable to indemnify the Manager against any loss or damage that:

i. the Manager suffers as a result of a wrongful or negligent act or omission of the agent; and

ii. relates to a failure by the Manager to perform its duties in relation to the Scheme;

then any amount recovered under the indemnity forms part of the Assets.

4.5 Duties of Manager (Section 601FC)

In exercising its powers and carrying out its duties, the Manager must:

a. act honestly;

b. exercise the degree of care and diligence that a reasonable person would exercise if they were in the Manager's position;

c. act in the best interests of the Members and, if there is a conflict between the Members' interests and the Manager's own interests, give priority to the Members' interests;

d. treat the Members of the same class equally and Members of different classes fairly;

e. not make use of information acquired through being the Manager in order to:

i. gain an improper advantage for itself or another person; or

ii. cause detriment to the Members of the Scheme;

f. ensure that the Constitution meets the requirements of sections 601 GA and 601GB of the Law;

g. ensure that the Compliance Plan meets the requirements of section 601HA of the Law;

h. comply with the Compliance Plan;

i. ensure that the Assets are:

i. clearly identified as Assets; and

ii. held separately from property of the Manager, the assets of other Schemes established under the Constitution and the property of any other managed investments scheme;

j. ensure that all payments out of the Assets are made in accordance with the Constitution and the Law;

k. report to ~~the Commission~~ASIC any breach of the law by the Manager that:

i. relates to the Scheme; and

ii. has had, or is likely to have, a materially adverse effect on the interests of Members;

as soon as practicable after the Manager becomes aware of the breach; and

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l. carry out or comply with any other duty, not inconsistent with the Law, that is conferred on the Manager by the Constitution.

5 Duties of Officers and Employees of Manager