Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd [2007] VSC 40 (23 August 2007)

Last Updated: 24 August 2007

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL AND EQUITY DIVISION

COMMERCIAL LIST

No 4764 of 2007

BETWEEN:

ACCURATE FINANCIAL CONSULTANTS PTY LTD Plaintiffs

(ACN 007 294 206)

AND ANOTHER

V

KOKO BLACK PTY LTD (ACN 106 330 616) Defendants

(in its capacity as trustee for the Koko Black Unit Trust) AND OTHERS

JUDGE:	HARGRAVE J
WHERE HELD:	Melbourne
DATES OF HEARING:	29, 30, 31 May and 4 June 2007
DATE OF JUDGMENT:	23 August 2007
CASE MAY BE CITED AS:	Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd
MEDIUM NEUTRAL CITATION:	[2007] VSC 40

TRUSTS AND TRUSTEES – Unit trust – Allegation of fraud on a power – No fraud involved – Unit holders in quasi-partnership – Claim to restrain exercise by the trustee of a power of compulsory redemption of units – Injunction refused.

ESTOPPEL – Equitable estoppel – Unit holders investing on assumption or expectation that they would be entitled to remain unit holders "for the long term" – Claim to restrain exercise by the trustee of a power of compulsory redemption of units – Assumption or expectation ambiguous – Injunction refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr M Bearman with Ms E Konstantinou	HDL Legal & Consulting
For the Defendants	Mr R Lancy	Wisewoulds

HIS HONOUR:

I. INTRODUCTION

1 In 2002 Shane Hills devised a business concept to establish a specialty chocolate shop in Melbourne and then to establish a chain of similar shops throughout Australia. These shops were ultimately named "Koko Black".

2 Mr Hills discussed his business concept with a number of people, with a view to persuading them to go into business with him by investing in a business giving effect to his concept. Relevantly, Mr Hills spoke with his father-in-law Joseph Carbone, a friend Timothy Bourke, another friend Steven West and Christopher Jackson, who was known to Mr Hills and Mr Carbone as the tax agent who prepared and lodged the income tax returns and business activity statements for a business conducted by them. Each of them invested in the Koko Black business and joined its so-called "board of management".

3 The first Koko Black shop opened in the Royal Arcade in Melbourne in December 2003. Since that time, a number of further Koko Black shops have been opened and the business has flourished.

4 The ultimate beneficial owner of the Koko Black business is the first defendant, Koko Black Pty Ltd ("the trustee"), in its capacity as the trustee of the Koko Black Unit Trust. The units in the trust are held in the following proportions:

Unit Holder	Number of Units	Approximate Percentage Unit Holding
Mr Hills	315,000	60.5%
Mr West	75,400	14.5%
Mr Carbone	69,700	13.0%
Mr Jackson	49,400	9.5%
Mr Bourke	10,500	2%

5 Mr Hills is the sole shareholder in, and director of, the trustee.

6 Under the terms of the unit trust deed, the trustee has the power to compulsorily redeem the units of any unit holder at a fair valuation. Acting through Mr Hills, the trustee has given notice of its intention to redeem the units held by or on behalf of Mr Jackson, Mr West and Mr Bourke. If the proposed redemption proceeds, Mr West and Mr Jackson will each receive a return on their investment of approximately 245%.

7 Mr West and Mr Jackson do not wish to have their units redeemed. They contend that the arrangement between the parties was that they would be "long term" investors in the Koko Black business and that they are entitled to share in its future capital growth and profitability. They

seek final orders in the proceeding that the trustee be restrained from acting on its notice to redeem their units.[1] In order to understand the basis of their claims, it is necessary to consider the facts in more detail.

II. FACTS

8 In December 2002, Mr Hills prepared a written "proposal brief" describing his business concept in detail. He sent the initial draft of the proposal brief to Messrs Carbone, Bourke, West and Jackson. During 2003, there were a number of versions of the proposal brief prepared, as the business concept was developed and refined and agreement was reached as to the amounts which each participant would invest in the business.

9 The first version of the proposal brief contained the following relevant statements:

The Board and Structure

This is a business that is going to start by thinking big and acting big. Their [sic] will be an air of worldliness. The first store will be viewed as an experiment or a pilot that will be perfected for duplication. It is the showcase for things to follow. Not on a franchise model but with a similar framework. The objective isn't to franchise but to self-fund growth with a management structure.

...

By thinking big, the structure and brains/drive behind the venture becomes increasingly important from the outset and that is why a board is being assembled from day one. The board is by invitation and comes with the following benefits/undertaking:

- ➢ 2% allocation of shares
- ➢ Option to increase shareholding
- ➢ $150 cash payment per meeting (Cadet $50.00)
- ➢ 2 year mandatory commitment (2% allocation lost on exit)
- ➢ Opportunity to increase interest as the business grows
- ➢ Exit options after 2 years

Name	**Profile**
Shane Hills	Finance background various. Partner in Suga and founder of [Koko Black]
Joe Carbone	Former Hospital Executive and CEO. Now Businessman with Confectionary group Suga
Chris Jackson	Accountant and Businessman. Extensive experience in all areas of the investment market
Tim Bourke	Commercial Lawyer with strength in business structuring, contracts and negotiation
Steve West	Motor Industry Engineer and now Production Manager. MBA graduate and systems/production line expert.

...

The Board has a great mix of talent, expertise, savvy and drive. Equally as important it is a board that can work very well together as a team.

10 The board of management was chosen by Mr Hills because he was of the view that the collective skills of the board members would complement each other and enable the Koko Black business to grow as he intended. Mr Hills acknowledged in cross-examination that the contribution which he envisaged from board members other than himself would take the form of participation "on an advisory level".

11 The first version of the proposal brief set out the proposed funding then sought and a proposal as to the investment required from each participant. In this regard, the proposal brief concluded:

In the event that the funds cannot be raised within the board structure, funds will be sought externally, whether through individuals or other means.

Investment in the business will suit long-term investors with a focus and strategy of growth. Issuing dividends will not be a priority.[2]

12 The italicised passage in the preceding paragraph appeared in every version of the proposal brief which was prepared and circulated to investors.

13 Further, each version of the proposal brief stated or implied that each participant other than Mr Hills would be given a 2% share of the Koko Black business in return for their contribution to its establishment. No financial investment was required to obtain this 2% interest. In fact, a 2% interest was given to each of Mr Carbone, Mr Jackson, Mr West and Mr Bourke. Mr Bourke never invested any funds in the business and his interest has always been limited to 2%. Mr Hills took a 27% interest without any financial investment in return for his contribution to the establishment of the business and because it was his business concept.

14 The initial version of the proposal brief concluded in the following terms:

Next Steps

- ➢ Assembling the board
- ➢ Brain storming every aspect of the current proposal
- ➢ Setting some goals and some form of mission statement
- ➢ *Establishing a legal Entity*[3]
- ➢ Appointing a Chairman
- ➢ Identifying key research areas e.g cash flow analysis.
- ➢ The list then gets bigger

Close

[Koko Black] is an extremely exciting concept and one that is entirely unique in the world. All that is left is for the thought to become real and to first, take Melbourne by surprise. The board proposed is an excellent one, one that can definitely pull this challenge off.

15 The first meeting of the board of management for the proposed business took place on 7 January 2003. Mr Jackson was unable to attend, and spoke with Mr Hills prior to the meeting. In his witness statement, Mr West said that Mr Hills told those present words to the following effect:

Jackson has been invited but cannot come. Rodney is my "cadet". He works as a junior in the Suga business. He will be involved in the new chocolate business but won't be a board member. The rest of us plus Jackson are to be a board of management if we decide to invest in this new business idea. I've handpicked you because all of you have different but complementary skills that you can bring to this new business and I feel we will together make a dynamic team. Jackson has financial and taxation skills. Bourke has legal skills. West has manufacturing and management skills, which will be useful when the business reaches a significant size. Carbone and I have business skills. *I am inviting you to become part owners of the business. We will all be partners and own the business together. That's important because if the business is to grow there may not be any return on your investment, no dividends, in the early years because if the business expands as I expect it to, all its earnings will be required to fund its development. You may need to put in further capital. It will be a long-term investment*. I am inviting you on board because I want to create a large company, not one or two shops. Jackson has already told me he is interested.[4]

16 Mr Hills acknowledged in cross-examination that he consistently informed the other investors that, if they decided to invest, their investment would be for the long term.

17 Also at this first meeting, there was discussion concerning the structure of the proposed business. The minutes record:

STRUCTURE: Tim [Bourke] outlined that an appropriate structure for the proposed Company may be a Unit Trust. Tim suggested that Chris's [Jackson's] input would be valuable here to determine the most tax effective means by which shareholding should be held (eg family discretionary trusts). *Tim outlined that Unit holder and/or shareholder agreements should be entered into outlining numerous issues such as dividends, voting rights etc* ... Tim advised that Chris's expertise will be valuable in settling some of these issues.

RESOLVED to adjourn this issue to next BOM meeting for discussion with Chris.

RESOLVED that Tim will circulate a shareholders checklist precedent for the purpose of members of the BOM to start considering structure issues.[5]

18 Shortly after this meeting, Mr Bourke distributed a standard form "shareholders agreement checklist". The checklist comprises a four page list of issues to be considered. The issues include the structure to be adopted (company, trust, joint venture or partnership) and numerous other issues. One issue is whether redemption of units should be allowed and, if so, whether redemption "should only be undertaken with unanimous board approval or with the approval of a nominated number of the company's directors."[6] The checklist also makes a limited reference to the issue of pre-emptive rights.[7] In his covering email, Mr Bourke noted that the checklist was probably more pertinent to a company structure, rather than a unit trust structure. He suggested that potential investors "read, think about and perhaps circulate ideas." There is no evidence that they ever did so. Although the investors intended that a unit holders agreement would come into place in due course, no one did anything about it.

19 The shop in Royal Arcade was secured in September 2003. Shortly after, the trustee was incorporated by Mr Hills, who arranged for the sole shareholder to be a company associated with him and for him to be the only director.

20 With the opening of the first shop due to occur in December 2003, it was time to formalise the amounts to be invested by each investor and the structure in which the business would be held and operated. To this end, Mr Hills provided a progress report to the proposed investors. In that

report, Mr Hills stated:

Progress Report – KOKO BLACK

Hello all, time to progress some matters and also provide some updates.

...

1. Share Structure, formal agreements and lodging funds

The share offering has been a success. The offering was oversubscribed and after discussions with everyone individually I think we have reached a point where everyone is satisfied. ... I propose the following structure:

Allocation	**% Ownership**	**No. Shares $1000.00**	**$$-value**	**Comments**
Shane Hills	27%	108	$108,000	Allocation to creator/founder
Shane Hills	37.5%	150	$150,000	Personal Investment
Board (excluding Shane Hills)	8%	32 (8 each)	$32,000	$8000 per board member
Steve West	12.5%	50	$50,000	Total holding 14.5%
Joe Carbone	7.50	30	$30,000	Total holding 9.5%
Chris Jackson	7.50	30	$30,000	Total Holding 9.50%
Tim Bourke				Total Holding 2%-allocation
Totals	100%	400	$400,000	

You will notice the simplification to 400 shares at a value of $1,000 per share. *Could someone please second this motion, so that it can be formally passed as a resolution*. From that point Bourkie will commence preparing the documents for signing. KOKO BLACK PTY LTD A.C.N. 106 330 616 has been registered as a $1 company. *Once the unit holders agreement is signed we will also lodge a variation notice with ASIC to have the company makeup amended."*[8]

21 By this time, it was agreed that the business would be operated through a unit trust structure. Accordingly, Mr Bourke asked each investor to nominate the entity which he intended would hold units in the unit trust. Relevantly, Mr West nominated himself as trustee of his family trust and Mr Jackson nominated a company controlled by him, Accurate Financial Consultants Pty Ltd. After receiving this information, Mr Bourke prepared the trust deed for the Koko Black unit trust. At this time, Mr Bourke was a junior solicitor, in his first or second year of practise. Mr Bourke did not give evidence. However, it is clear that the investors all relied upon him to ensure that an appropriate form of trust deed was prepared and executed.

22 Although agreement had not been reached as to the contents of a unit holders agreement, one thing was clear. It was understood between the investors that, once the unit holders agreement had been entered into, each investor would be issued with both units in the Koko Black Unit Trust and shares in the trustee in proportion to the amount of their respective investments. In cross-examination, Mr Hills frankly acknowledged that this was his intention and that he

communicated that intention to the other investors. However, in the absence of a unit holders agreement, Mr Hills remained the sole director of, and, through his company, sole shareholder in the trustee.

23 The trust deed was executed in the following circumstances.

24 Mr West gave the following evidence concerning the circumstances in which he signed the trust deed:

I was the least experienced in this area so I relied on Hills, Bourke and Jackson to have the trust deed prepared. *I did not read the trust deed as it was a large document and I just believed that it contained terms which reflected what Hills and the board had agreed on. By signing the trust deed I believed that I was a shareholder in the amount of 14.5% shares in the business*. I believed that there would be opportunities for me to increase my shareholding in the business in the future. I understood that we were given 2% free shares in the business as an incentive to become a board member and investor in the business. Further I understood from the earlier business plans that were circulated that if either one of us wished to pull out of the business within the next two years then we would forfeit the free shares.[9]

25 Mr Jackson said he executed the trust deed in the following circumstances:

I signed a trust deed. I do not recall who gave it to me. *I did not read it as I believed and trusted that Hills and Bourke had implemented what the board of management had agreed*. I do not recall precisely when the deed was presented to me.[10]

However, Mr Jackson conceded that he looked at the Schedule to the trust deed. He recalled thinking that the Schedule reflected that the number of units held by unit holders was in proportion to their agreed "shares" in the business.

26 Mr Hills said that he read and signed the trust deed in approximately October 2003. However, as will appear, it is clear that he did not appreciate the effect of certain provisions of the trust deed. In particular, Mr Hills did not appreciate that the trust deed gave the trustee, which was under his sole control, the capacity to compulsorily redeem units.

27 Mr Carbone signed the trust deed in late September or early October 2003. It was provided to him by Mr Bourke. He did not read it at the time.

28 As I have said, Mr Bourke did not give evidence. Accordingly, I am unable to make any finding as to whether he read the trust deed at the time he prepared and signed it.

29 Taking the evidence as a whole, I infer that Mr Bourke did not appreciate that the trust deed included pre-emptive rights or a power for the trustee to compulsorily redeem units. I find that Mr Bourke, who was a junior solicitor at the time, probably utilised a standard form unit trust deed commonly used by his employers without considering whether the pre-emptive rights and compulsory redemption provisions contained in that pro-forma unit trust deed were in accordance with the intentions of the investors. These aspects of the trust deed were of little significance to Mr Bourke personally, who invested nothing and took only a 2% "free" unit holding. Further, there is no evidence that Mr Bourke referred to these provisions of the trust deed at subsequent times, when the issue of drafting a shareholders or unit holders agreement was raised. This indicates that Mr Bourke was unaware of the provisions.

30 At this time, no further work had been done by Mr Bourke to advance the preparation of a unit holders agreement.

31 In oral evidence, Mr Hills and Mr Jackson said that they believed the proposed unit holders agreement would create pre-emptive rights to ensure that strangers did not enter the business

without the consent of the existing unit holders. Further, Mr Hills accepted that the investors, including him, did not contemplate the existence of a power to compulsorily acquire, or redeem, any units. Mr West said that he viewed the unit holders agreement as a matter to be considered by the board of management when a draft agreement was prepared. He had no specific belief or intention as to matters which would be included in such an agreement. Mr Carbone gave no evidence about the proposed unit holders agreement.

32 In fact, the trust deed contains the following provisions:

(1) The trustee may at any time, in its absolute and unfettered discretion and notwithstanding any direct or indirect interest of a director or shareholder of the trustee, redeem all or any units without being requested to do so, by giving one month's notice in writing to the unit holder (cll 7.2, 17.6, 17.8 and 21.3).

(2) For the purpose of fixing the unit price to be paid upon redemption, the trustee shall value the trust fund and the units and, if necessary, have a valuation made by a competent person at the trustee's expense (cl 7.3).

(3) There are detailed rights of pre-emption created by cl 8 of the trust deed.

33 I find that, at the time the unit trust deed was signed, the parties to it had no formulated intention or belief as to the matters which would be provided for in a unit holders agreement. In particular, even though the shareholders agreement checklist circulated by Mr Bourke contained a reference to the issue of redemption of interests, there is no evidence that any of the unit holders even considered the possibility that a unit holders agreement might include a power of compulsory redemption of units. Nor was any consideration ever given by any unit holder to the possibility that there could be, and in fact was, a power of compulsory redemption of units contained in the trust deed.

34 Later in October 2003, the trustee took an assignment of a lease of the premises in Royal Arcade in which the first Koko Black shop was later opened. The sub-lease is for five years from 9 November 2002, with two further options of five years each. Mr Hills guaranteed the trustee's obligations under the sub-lease.

35 Shortly after the execution of the sub-lease of the Royal Arcade premises, the investors met at a café in Royal Arcade and discussed the need to enter into a unit holders agreement. In evidence, Mr Hills said he was the one pressing the issue. However, no unit holders agreement was ever prepared or executed.

36 In mid-November, Mr Hills returned to the topic of a unit holders agreement. In an email to all unit holders dated 15 November 2003, Mr Hills provided a general update on numerous issues. The email includes the following:

SHAREHOLDERS AGREEMENT

hhhmmmm, don't really know. Bourkie, what is the update there?:).

37 Once again, nothing was done. As I have said, Mr Bourke did not give evidence.

38 The first Koko Black shop was opened in Royal Arcade in December 2003. At this time, Mr West moved, for a time, from being a passive investor to an active participant in the conduct of the Koko Black business. Mr West resigned from his regular employment and worked in the first Koko Black shop for about 3½ days per week for a period of about six months and then helped out as required for another period of about six months. He was paid for this work. Mr West also stood in for Mr Hills to chair a board of management meeting whilst Mr Hills was overseas. In cross-examination, Mr Hills acknowledged the assistance of Mr West in the first year of operation

and described it as "great".

39 Following the opening of the first Koko Black shop, Mr Hills arranged a meeting of the board of management. The agenda prepared by Mr Hills included discussion of "Shareholders Agreement". However, there is no evidence as to the content of the meeting on this issue.

40 The first Koko Black store was successful. By November 2004, Mr Hills had negotiated the lease of a second shop in Lygon Street, Carlton. Further, Mr Hills made arrangements to lease premises for the purpose of setting up a chocolate manufacturing factory. Mr Hills proposed that these developments be funded by a mixture of existing cash flow from the Royal Arcade shop, financing of equipment and a capital raising of $240,000 from existing investors. In connection with that capital raising, Mr Hills proposed that:

The existing shares issued at $1000 are to be split 1000 ways to save any problems with breaking down the percentage ownerships. *The result is a company consisting of 400,000 shares*.

...

At the last meeting I put forward a share price of $2 ($2000) based on factors of profit for performance and a degree of intrinsic value.

I feel very comfortable with a price of $2 for this offer, in fact I think it is an excellent investment at a fair price. Mostly this is based on my assumptions about our ability to grow and my confidence level.

Of course no one put up there [sic] hands to sell shares at $2, so I have also assumed that everyone is at the least comfortable at $2.

Back to the share issue chart, *I have issued everyone with their respective shares based on the initial holding*.

...

This approach to the funding is indicative of how I see it into the future.[11]

41 The proposed capital raising then proceeded on a pro rata basis, in accordance with the recommendations of Mr Hills. Mr Jackson invested a further $22,800. Mr West invested a further $34,800.

42 Later, in 2006, the unit holders executed a deed of variation of the Koko Black Unit Trust Deed. The deed of variation is dated 1 December 2004 but was backdated. The variation provided for the split of units from $1000 each to $1 each and for the issuing of employee units.

43 No unit certificates had been issued in respect of the initial investments. Following the second round of investments, unit certificates were issued for the total amount of units then held. Although the unit certificates are dated 1 December 2004, which is the same date as the deed of variation, the certificates were not prepared and issued until 2006. This is consistent with the conduct of the parties, who typically progressed the establishment and growth of the Koko Black business and attended to formalities later.

44 In late 2004 and early 2005, there was some discussion about trading in "shares" (units) in the business between investors or related parties. In an endeavour to establish a market, Mr Jackson offered to sell 11,000 shares at $3.75. In response, Mr Hills said that his wife was a buyer for 11,000 shares at $3.25. Mr Jackson was not prepared to sell at this price, and the discussions about trading in shares in the business lapsed.

45 In December 2004, Koko Black Pty Ltd entered into a five year lease of the Lygon Street shop premises, with two further options of five years each.

46 In March 2005, Mr Hills sent an email to all investors concerning business matters and his proposal for the future structure of the business as it grew. In this regard, Mr Hills stated in his email that, although a new corporate trustee and unit trust would be established to own each of the new businesses, Lygon Street and the factory, all units in the new trusts would be owned by the Koko Black Unit Trust. Mr Hills explained the reason for this structure:

By adopting this structure we achieve a few advantages:

1. One entity (koko Black Pty ltd [sic]) for all borrowings

2. Simplification of share ownership with the one parent company/unit trust. This means we can continue to issue shares in the current format, which also helps with valuing the shares.

3. All Profits that are made in Carlton & Coburg (neutral) will flow back to the Kokoblack Unit Trust. In practise re-invested in new projects.

4. The business ownership remains unified at Koko Black unit trust level i.e. Just like a public company there isn't the opportunity to invest in only some segments of the business. It's all or nothing.

5. The Kokoblack Unit Trust will own 100% of all future projects, regardless of changes in the make up of shareholders.

47 Mr Hills concluded his email in a fashion which recognised the strategy to keep growing the business:

An early warning/reminder to everyone about their tax. Of course although we are re-investing profits we will all still have a taxation liability. We'll have to discuss this implication at the meeting.

48 Shortly after this email, Mr Hills organised for the establishment of two further corporate entities and trusts. First, Koko Black Carlton Pty Ltd as trustee of the Koko Black Carlton Unit Trust. Second, Koko Black Coburg Pty Ltd as trustee of the Koko Black Coburg Unit Trust. Mr Hills was the sole director of each company and, directly or indirectly, the sole owner of shares in those companies.

49 Mr Hills prepared a "2005 Annual Report" for the Koko Black business for the financial year ended 30 June 2005. Mr Hills concluded the 2005 Annual Report with the following summary:

Final Summary

Koko Black is poised for great change and increased risk. The starting point is establishing the best ownership structure to give the business the best chance for success.

Current issues with structure:

1. Shane Hills is sole director with 60% ownership yet carries 100% of personal guarantees for business loans totalling $490,000 and leases totalling $160,000 p.a for multiple years.
2. The current structure no longer provides value to the business in the area of capital raising.
3. There is no shareholder agreement.

A shareholders meeting is scheduled for 18 August which will table this critical issue.

Structure Objectives

1. Shane Hills to maintain ongoing control and direction – unchanged
2. Re-balance of shares to key business contributors (to include [key employees])
3. Explore options for new investor who has done the journey in retail
4. *Start-up silent partners to sell down holding*
5. *8000 free share allocation to be sold back to Shane for $1 per share. This original vision of board member active involvement in the business was naïve. The intention was to keep everyone involved for a period of time (3-5 years) at which time the shares would become active.*
6. Shareholders agreement to be established
7. All shareholders to share in personal guarantees or establish other arrangements.[12]

50 The final summary refers to a shareholders meeting scheduled for 18 August 2005. At or prior to this meeting, a copy of the 2005 Annual Report was circulated to all investors. No minutes of the meeting on 18 August 2005 are in evidence. However, Mr Jackson and Mr West both gave evidence about what was said at this meeting concerning the matters raised in the final summary to the 2005 Annual Report. I accept their evidence. It was not challenged in cross-examination.

51 Mr Jackson said that he was angry when he read the final summary prepared by Mr Hills, because he considered it to be entirely contrary to all prior understandings and agreements that had been reached between members of the board of management. In his witness statement, Mr Jackson recounted an exchange between him and Mr Hills at the 18 August 2005 meeting, to the following effect:

Hills: I am buying your shares. You must sell them to me.

[Jackson]: No. We agreed that I was in for the long haul. I'm not selling anything to you. We've put as much into the business as you. You can't just grab it. You can't just disregard our rights.

West: I'm not selling either.

Hills: I've taken all the risk and you haven't.

[Jackson]: You have never asked us to share the risk on the guarantees. I told you, all you had to do was ask.

Hills: Well I want the 2% back. You were given it for nothing.

[Jackson]: No. We were given the shares to encourage us in the business for the long term. That's what we did. You can't just change you mind now. We relied on what you told us.

52 In his witness statement, Mr West recounted exchanges at the 18 August 2005 meeting, to the following effect:

Hills: I have the annual report for the business for the year ending 30 June 2005. There is a copy for each of you. The final summary at the end of the report should give you an idea on what I want to achieve next. In particular I want to put a proposal whereby the silent partners significantly scale back their shareholding.

The board: What?! Why?! What is this all about?

[West]: I have always considered my position in this company to be for the long term. I have no intention of scaling back my shareholding in the business at a significant or any other level. I want to remain a shareholder for the long term.

Hills: As the sole director and shareholder of the company I am the only one that is risking his personal wealth for the good of the business.

Jackson: Well I can say that if that is a concern for you I am willing to put up personal guarantees for the company. I have always told you that whatever you required of me I was willing to do if it was in the interests of the business. I to do not have intention to scale back my shareholding. I am in this for the long term. You have always had and still have my long term commitment.

[West]: I feel the same way. I too am willing to personally guarantee the debts of the business on a pro rate basis and commensurate with the number of shares and units that I hold in the business. All you have to do is ask Shane.

Hills: I don't believe that Koko Black can succeed unless I am running it as the key man. I don't have the motivation to run the business whilst only being a 60% owner. If I am not permitted to increase my shareholding in the business then I will decide to stop the further expansion of the business and concentrate on other projects in which I am a 100% owner and shareholder.

Jackson: Koko Black is not a one man operation Shane. It never has been. We have all contributed to its success. This is a successful business which will continue to grow with or without you at the helm.

Hills: I propose that we review my salary with a view to increasing it to $100,000. I have also made some cash payments on behalf of the business which I need to be reimbursed for.

Jackson: I have no problem with increasing your salary to $100,000 and whatever you need to be reimbursed for I will be happy to pay.

[West] and

Bourke: I agree.

...

53 In cross-examination, Mr Hills agreed that, by this time, he had changed his mind as to the basis upon which he was prepared to allow the other investors, except for his father-in-law Mr Carbone, to continue in the Koko Black business. Mr Hills said that his change of mind was based upon his belief that the investors had not contributed to the ongoing growth and development of the business in the manner he had originally contemplated. He referred in this regard to the fact that Mr Bourke had become a barrister, and Mr Jackson was not doing any accounting work for the business. Mr Hills felt that he was running the business without the need to consult with board members and that "the value that I'd placed on that involvement [of the other board members] simply wasn't there".

54 However, when the other investors objected to the suggestion that they should sell their unit holdings, and in Mr Bourke's case sell all of his non-contributory unit holding, Mr Hills decided to think again about what he would do with respect to the other unit holders, and the matter was dropped.

55 It is unclear whether Mr Hills appreciated that the trustee had the power to compulsorily redeem units at valuation at this time. If he did appreciate this, he did not disclose it to the other unit holders. In cross-examination, Mr Hills was unsure as to when he finally realised that the trust deed included a power for the trustee to compulsorily redeem units. He said that it was in or about August 2005 at earliest, and may have been as late as mid 2006, after the board of management meeting on 29 April 2006 which I refer to later. He was not challenged about the truth of this evidence.

56 Following the meeting on 18 August 2005, Mr Hills met with each of the other investors individually. Although there was no direct evidence about the content of these conversations, I infer that there was discussion about possible prices at which Mr Hills could purchase the interests of Mr West, Mr Jackson and Mr Bourke in the Koko Black business. Following these

discussions, Mr West, Mr Jackson and Mr Bourke met and agreed that none of them wished to sell any part of their "shareholding". During this meeting, Mr West indicated that he may be willing to sell some of his shares at about $10, but certainly not at the price offered by Mr Hills, which was in the vicinity of $3. The meeting concluded with agreement that Mr Bourke would go back to Mr Hills and tell him that Mr West, Mr Jackson and Mr Bourke were not prepared to sell their shares and would tell Mr Hills "that he is stuck with us." Mr Bourke then spoke with Mr Hills and said words to the effect that, like Mr West and Mr Jackson, he did not wish to sell his interest. Mr Hills responded by sending a letter dated 21 September 2005 to the investors. Mr Hills sent this letter as an attachment to an email. In his email, Mr Hills wrote:

Please see attachment titled "nasty letter no. 1". It's pretty self explanatory. Talk to you all soon.

57 Mr Hills' description of the letter was apposite. The letter contains intemperate language and conveys the clear impression that Mr Hills had changed his mind about the continued involvement of Mr Jackson and Mr West, and to a lesser extent Mr Bourke, in the Koko Black business for the long term. It is clear from the letter that Mr Hills believed that the success of the Koko Black business was due solely to his efforts and that Messrs West, Jackson and Bourke were demanding "ridiculously high" prices for their units whilst they were "at home counting the laziest dollars they haven't even made yet." In this regard, Mr Hills wrote:

2. It is an insult to hear of ridiculously high valuations of the unit price. There are a few things that I don't think are understood:
    a. The intrinsic value is 100% controlled/driver [sic] by the currently unhappy sole director
    b. I don't *intend* to sell the company...ever.
    c. As the new unit holder agreement will state, shares for sale are to be first offered to me and then to group on a pro-rata basis. There are no external buyers unless agreed. To get a price you need a corresponding buyer. Who is the buyer at the ridiculously high valuation?[13]

...

58 Following receipt of this letter, Mr Jackson prepared a draft email response, in considered terms, and circulated it to Mr West and Mr Bourke. In response to this draft, Mr West sent an email to Mr Jackson and Mr Bourke, in which he recommended against responding to Mr Hills' letter, allowing time to pass for matters to "cool off" so that discussions could commence in a professional way. Soon after, Mr Bourke spoke with Mr Hills. In an email to Mr West and Mr Jackson, Mr Bourke referred to Mr Hills as being "pretty cool" and suggested a meeting with an agenda to sort things out. A meeting was arranged for 25 September 2005.

59 Prior to the meeting on 25 September 2005, Mr West met with Mr Hills. In his witness statement, Mr West recounted the following conversation between him and Mr Hills:

[West]: Shane I just wanted to meet with you to find out what was going on. I still consider you my friend and like to think that you can be open and frank with me.

Hills: I knew that out of the three you would be most disappointed especially because you had put so much effort into the start up of the Royal Arcade store. I feel that I am in a difficult position here because my father in law comes from an Italian background and he just has different values to mine. I am being pressured by my father in law to have the business owned by the family with no outsiders and me at the helm.

[West]: Ok well least I know where you're coming from and what prompted such an angry letter, but I wished that you explained that to me earlier rather than sending such a harsh letter.

Hills: I'm sorry about that. I do acknowledge that you have really put a lot of effort into this. I am a little annoyed at Tim for not accepting my offer to buy his shares because he has been the one that has

put the least amount of money into this business. You and Chris have been the ones that have contributed the most amount of money in the business.

60 In cross-examination, Mr Carbone denied that he has ever pressured Mr Hills to act to remove Messrs West, Jackson and Bourke from the Koko Black business. It was not put to him that this denial was false. Nor was it submitted that I should not accept it. Mr Carbone said that he would have no difficulty with working with Messrs West, Jackson or Bourke if they remained as unit holders.

61 At the unit holders meeting later that day, Mr Hills commenced with a statement that he understood that his offer to buy the shares of Messrs West, Jackson and Bourke was "not a popular one" and that there was no intention on the part of any of them to sell their shares in the business. The meeting then moved on to the matters on the agenda. It was agreed that Mr Hills' salary would be increased and that the other investors would reimburse him, on a pro-rata basis, for payments made by him personally in respect of the Koko Black business.

62 There were other items on the agenda. However, they were not dealt with. Item 5 on the agenda stated:

5. Initial meeting held with solicitor to draw up Unit Holder agreement.

63 By this time, Mr Bourke had ceased being a solicitor and had joined the Victorian Bar. The evidence does not disclose who the solicitor was, or what instructions the solicitor was given by Mr Hills. This issue was not explored in evidence or final submissions. It may be that it was at this time that Mr Hills discovered that the unit trust deed contained a power of compulsory redemption. However, it is unnecessary to decide if that is so.

64 No draft unit holders agreement was ever circulated amongst investors for discussion, and nor was one executed. Mr Hills said that it was Mr Bourke's responsibility to prepare the unit holders agreement, that he followed him up when nothing happened and that it "just never came to the top of the list." Mr Hills acknowledged that he did not pressure Mr Bourke in relation to this issue, probably because he had become a self-employed barrister and that, in the result, the matter of a unit holders agreement "just fell between the cracks".

65 From this time, Mr Hills ceased providing regular updates to Messrs West, Jackson and Bourke about the conduct of the Koko Black business. This was of concern to Mr West, who arranged to meet with Mr Hills. Mr Hills told Mr West that he had decided that he would no longer hold regular board meetings "except of course for the annual general meeting which I am required by law to hold."

66 Also in about September 2005, Mr Hills engaged Deacons Consulting to provide advice to the trustee in relation to a franchise business model for the Koko Black business.

67 In October 2005, Mr Hills incorporated Koko Black Chadstone Pty Ltd to act as trustee of the Koko Black Chadstone Unit Trust, in anticipation of opening a third Koko Black shop in the Chadstone shopping centre.

68 In November 2005, Mr Hills informed Mr Jackson and Mr West that he was investigating franchise opportunities for the Koko Black business. In an email sent on 9 November 2005, Mr Hills informed Mr Jackson that he had employed Deacons Consulting:

to help us take the step into building a franchise business. It's a five month process that started two weeks ago. Our likely strategy is to focus on building a good domestic business over the next 18-24 months. International opportunities to follow.

I will have a more established time line over the next couple of months as we work with Deacons.

69 Mr Hills continued to run the Koko Black business in consultation with Mr Carbone. Apart from snippets of information which he provided to Mr Jackson and Mr West, he did not update them as to progress in the business and did not seek their advice, guidance or assistance. On 25 January 2006, Mr Jackson sent an email to Mr Hills in which he raised a number of issues, including a complaint that Mr Hills had not kept him informed about the Koko Black business. Mr Jackson requested a meeting of unit holders to discuss the Koko Black business. Mr Hills took offence at the email and responded with an by email circulated to all unit holders that was couched in strong terms. In his email, Mr Hills stated that significant strategy decisions had been made about the future of the Koko Black business since the last meeting and that, in his view, such strategic decisions were "irrelevant to unit holders" and that, in the future, "unit holders will have zero input on any strategic matters or any other management/director concern at Koko Black." Mr Hills asserted that his only obligation was to call meetings on 14 days' notice. He informed the unit holders that he intended to call a unit holders meeting by April 2006 to address "unit holder and structural issues" and continued:

AS I THINK EVERYONE IS AWARE NO ONE HAS SIGNED A UNIT HOLDERS AGREEMENT. I DON'T THINK ANYONE WANTS THIS TO DRAG ON ANY LONGER. ALL WILL BE TABLED AT THE UPCOMING MEETING INCLUDING AN AGREEMENT TO EITHER SHARE LIABILITIES AND RISKS OR COMPENSATE ME FOR SAME.

70 Mr Jackson was most concerned about this email from Mr Hills. Until August 2005, Mr Jackson said there had been regular meetings of the board of management at which the board were given regular updates about the business and Mr Hills asked questions of the board members. This accorded with his expectation as to how the board of management would work. Mr Jackson acknowledged that Mr Hills was responsible for the day-to-day management of the business, and this was his intended role for which he was paid a salary.

71 Mr Jackson responded to Mr Hills, with an email circulated to all unit holders. In his email, Mr Jackson indicated that he had been consulting the unit trust deed. Mr Jackson stated in this regard:

hi shane

i am sorry you feel this way but at the end of the day unitholders do in fact have rights and trustees do in fact have responsibilities and the trust deed determines some of the rules and regulations including seeking fair value for shares (which you appear to have conveniently overlooked at our last meeting). You also appear to have conveniently forgotten who owns the business and who initially funded it. your response is offensive as a part owner and may i suggest you should reacquaint yourself with the trust deed

...

72 Mr Jackson's email engendered a further strong response from Mr Hills, circulated to all unit holders. He accused Mr Jackson of corresponding in an offensive tone and concluded:

COULD SOMEONE ELSE PLEASE READ THE DEED AND GIVE CHRIS A CALL TO RELIEVE HIS ANGUISH. I'M NOT GOING TO WASTE ANY MORE TIME ON THIS.

73 On 8 February 2006, Koko Black Leasing Pty Ltd, a new company formed by Mr Hills to take the leases of future shops, entered into a lease of premises in the Chadstone Shopping Centre for a period of six years, with no option for renewal. Mr Hills was the sole guarantor. He did not ask other investors to become guarantors.

74 In March or early April 2006, the Chadstone shop opened for business.

75 In an email sent 24 March 2006, Mr Hills informed unit holders that the Chadstone shop was

due to open shortly and circulated an agenda for a meeting of unit holders to be held on 29 April 2006. This meeting was called by Mr Hills because he wanted to provide a forum to air issues in advance of the annual general meeting due after 30 June 2006. In that agenda, Mr Hills informed unit holders that, to help ensure a productive meeting, he had invited Amos Bush to act as "impartial chair". Mr Hills informed unit holders that Mr Bush was well qualified in the marketing area and emphasised his experience in franchising. The agenda listed many items for discussion, including obtaining a formal valuation of the business by an independent consultant, the issuing of unit holder certificates, the current structure and future plans for the Koko Black business. Mr Hills concluded the agenda by asking unit holders to prepare for the meeting by, amongst other things, "Re-reading the Trust Deed – it is a plain English document." In cross-examination, Mr Hills said that this was not a reference to the trustee's power to compulsorily redeem units under cl 7.2 of the trust deed. Indeed, Mr Hills could not positively recall whether he knew of this power at the time.

76 At the meeting of unit holders on 29 April 2006, Mr Hills repeated his disappointment at the tone of emails circulated amongst unit holders and again complained that he was the only unit holder who had provided personal guarantees for the financing of the business and the shop leases. There was discussion about the fact that no unit holders certificates had yet been issued and about the way in which the ownership of the Koko Black Carlton Unit Trust, Koko Black Chadstone Unit Trust and Koko Black Coburg Unit Trust had been established. Mr Hills advised that Koko Black Leasing Pty Ltd had been established under advice for possible franchising and future ventures and that, as it was not a trading entity, Koko Black Leasing was not the trustee of any unit trust. It was agreed that there was no present need to obtain a valuation of the Koko Black business, and this agenda item was removed.

77 Mr Hills said in his witness statement that the 29 April meeting "raised the issue of the redemption of units in the unit trust". He did not elaborate. The minutes do not record any discussion on this issue apart, perhaps, from the agreement that there was no present need to obtain a valuation of the Koko Black business. I find that there was no discussion at this meeting about the trustee's power to compulsorily redeem units. If there had been, the matter would have been included in the minutes. Further, Mr West or Mr Jackson would certainly have recalled it.

78 There appears to have been considerable discussion at the 29 April meeting about a proposal that arrangements be made to franchise the Koko Black business. Mr West described this as a "key item on the agenda for discussion" and the minutes indicate that this is so. Mr Hills informed the unit holders that he had engaged Deacons Consulting to assist with strategic advice and franchising. Mr Hills informed the unit holders that Deacons Consulting was preparing a franchise business plan and said words to this effect:

This is not cheap and will cost the business $110,000. This cost may be seen as a long term investment for the business. So far approximately $40,000 of that bill has been paid and the last $20,000 of fees to Deacons will be anchored to the sale of the first franchise if we decide to go down that path.

79 It is apparent from the minutes of the 29 April meeting that Mr Hills' intention at the time was to proceed with some franchising of the Koko Black business in the immediate future:

I think the next store we open should be a franchise store sooner we start gaining experience in doing that [sic] Realistically, couple of stores by years end. 4 by June 2007 – perhaps 2 franchise and 2 company owned ... What I am finding already, the approach I have had locally, one from Adelaide is keen and likely candidate and another couple, Asian market approaching all the time.

Mr Hills estimated that the advice from Deacons Consulting would be available in approximately six weeks time.

80 The proposed franchising has not proceeded. Mr Hills said he was about 80% through the process when he decided not to proceed with franchising the Koko Black business at the present

time.

81 Following the 29 April meeting, the deed of variation of the Koko Black Unit Trust deed was executed in or after May 2006, and unit certificates were issued to the unit holders in or after June 2006.

82 In October 2006, Mr Hills arranged for the incorporation of Koko Black Camberwell Pty Ltd to act as the trustee of the Koko Black Camberwell Unit Trust. Also in October 2006, Koko Black Leasing Pty Ltd entered into a lease of shop premises in Camberwell for a period of five years, with two 5 year options. Again, Mr Hills was the sole guarantor of the lease and he did not ask other investors to become guarantors.

83 Mr Hills agreed in cross-examination that Koko Black Leasing Pty Ltd holds the leases of premises on which the Koko Black business is conducted on trust for the respective unit trusts which own the businesses conducted at those premises. As I have said, the units in these trusts are all owned by the trustee as trustee of the Koko Black Unit Trust.

84 The 2006 annual general report prepared by Mr Hills includes detailed "Managing Directors Notes". In those notes, Mr Hills stated that 2006 had been "another progressive year for Koko Black" and detailed a number of "highlights". The highlights included securing three new "quality locations" in Camberwell, Collins Street, Melbourne and the first interstate shop in Canberra. Mr Hills concluded his introductory remarks in the 2006 Annual Report on a positive note, emphasising the potential for the Koko Black business to grow:

This is not to say the year has been free of challenges. We have had difficulties, but nothing to get in the way of the overall positive move forward of the company.

The business is now poised to capitalise on the foundation that has been established.

85 There are other statements by Mr Hills in the 2006 Annual Report which focus upon the need to grow the Koko Black business "with some urgency" and to deal with the "biggest challenge" of expanding the business interstate.

86 On 3 December 2006, Mr Hills distributed a notice of annual meeting of unit holders, for a meeting to be held on 16 December 2006. In that notice, Mr Hills informed the unit holders that he had commissioned Business & Goodwill Valuation Group Pty Ltd ("BGV") the previous day to undertake a formal valuation of the Koko Black business. Unit holders were informed that a valuation report would be made available prior to the meeting and that, based on the results of the valuation report, Mr Hills intended to:

review the unit holding register with a view to redeeming some or all of the units on issue to "silent" unit holders in accordance with the terms of the Unit Trust Deed.

The meeting is an opportunity for unit holders to express their views regarding redemption of unit holders. The process of redemption shall be followed as set by the terms of the Unit Trust Deed.

87 In the notes on consolidated financial statements prepared by Mr Hills, and provided to BGV, Mr Hills noted that $82,843 had been paid to Deacons Consulting to establish a franchise system and that franchise plans had been "shelved for the time being."[14]

88 Next, the principal of BGV, Jack Mordes, contacted each of the unit holders as part of the valuation process. In discussions between Mr Mordes and Mr Hills, Mr Hills explained that Deacons Consulting had been engaged to investigate a potential franchise model for the Koko Black group and that they had prepared a report in this regard. Mr Hills told Mr Mordes that he had elected not to proceed with the franchise model for the Koko Black business. Mr Mordes said that he did not require a copy of the Deacons Consulting report, because it was not relevant to the

valuation which he was preparing. Mr Hills was briefly cross-examined about this evidence. However, he was not challenged as to its truth. He agreed that he did not give Mr Mordes a copy of the Deacons Consulting report, and that Mr Mordes has never seen the projected sales figures for the Koko Black business which are recorded in the report. Mr Hills said that he believes the BGV valuation is based on growth forecasts over a number of years which reflect "our realistic company operated growth plan". This evidence was not challenged in cross-examination and I accept it.

89 The BGV valuation of the Koko Black business was provided to Mr Hills, who in turn provided it to unit holders, a day or so before the annual general meeting of unit holders on 16 December 2006. In his covering email circulating the BGV valuation, Mr Hills noted that "the key piece of information is the value of between $3.05 and $3.85 of a mid-point of $3.45" per unit.

90 Mr Hills swore that he believed the BGV valuation to be "generous" because it was not prepared on the basis of the annual financial year ending 30 June 2006 only, as required by cl 7.3 (b) of the Koko Black unit trust deed, but values the business upon the basis of future cash flow projections. I accept this evidence.

91 At the 16 December meeting, Mr Hills tabled the 2006 Annual Report and the BGV valuation. Discussion about the valuation was deferred, and unit holders first discussed the 2006 Annual Report. Mr Eid, the accountant who had been engaged by Mr Hills for the Koko Black business, informed the unit holders that it was proposed to distribute profits to unit holders in the following manner. First, the amount of the dividend would be identified. Second, 30% of that amount would in fact be paid, to enable unit holders to satisfy their tax obligation in respect of it. Third, the remainder of the dividend would be credited to the unit holders loan accounts and reinvested in the Koko Black business.

92 There was then discussion about the performance of the Koko Black business and its objectives for the upcoming year.

93 Mr Hills then raised the issue of the BGV valuation. He advised unit holders of the following matters:

(1) The trustee intended to redeem the units of all "silent" unit holders, namely, Mr West, Mr Jackson and Mr Bourke.

(2) The redemption would be pursued in accordance with the trust deed, utilizing the services of Robert Toth of Wisewoulds Lawyers.

(3) The trustee intended to redeem the units at the determined mid-point of the valuation range reached by BGV in its valuation, being $3.45 per unit.

94 Mr Jackson objected to any compulsory redemption. He said that he believed the units were undervalued at that price. Mr West also objected to the proposed compulsory redemption of his units, because he preferred to hold on to his units for a longer period of time.

95 Mr Jackson asked Mr Hills whether the Deacons Consulting report had been made available to BGV for the purposes of its valuation. Mr Hills and Mr Carbone said that the Deacons report was irrelevant to the valuation exercise as it was predominantly based on testing the economic viability of investing in a franchise network model and that, after consideration, the franchising model proposed by Deacons Consulting "was not considered as the correct strategy to pursue" and that the trustee would continue with "the company owned model."

96 Following the meeting, the trustee gave formal notice of redemption of units in the Koko Black unit trust to each of Mr West, Mr Jackson and Mr Bourke ("the redemption notices"). The redemption notices specify a price of $3.45 per unit. At this price, each of Mr West and Mr

Jackson will receive a return on their investment of 245%. For an investment of $49,400, Mr Jackson will receive a return (including his initial investment) of $170,430. For an investment of $75,400, Mr West will receive a return (including his initial investment) of $260,130. However, Mr Jackson and Mr West contend that they invested on the express basis that their investment was for the long term and did not invest for a quick profit. In circumstances where the Koko Black business is on the verge of further growth, described by Mr Hills as urgent, they do not wish to redeem their investment. They contend that compulsory redemption of their units would defeat the basis upon which they invested in the Koko Black business.

III. ISSUES

97 It is first necessary to state that the plaintiffs do not challenge the existence of the power of compulsory redemption contained in cl 7.2 of the unit trust deed. The plaintiffs do not seek to set aside cl 7.2 on any ground. They do not seek to rectify the trust deed in any way, for example, by deleting cl 7.2 on the ground that it was the common intention of all parties to it that issues such as redemption of units would be dealt with by a separate unit holders agreement, and not be contained in the trust deed. They do not seek any order avoiding cl 7.2, or an order varying the terms of the unit trust deed, under s 87(2) of the Trade Practices Act 1974 (Cth) or s 158(2) of the Fair Trading Act 1999 (Vic). They do not contend that any terms should be implied in the unit trust deed. No claim is made to appoint a receiver to the trust and for an order that the trust be wound-up, on the ground that it is in truth a "quasi-partnership" and the relationship of mutual trust and confidence between the partners has ceased.

98 Accepting that the compulsory redemption power contained in cl 7.2 of the unit trust deed is binding on them, the plaintiffs contend that the trustee should nevertheless be permanently restrained from acting on the redemption notices. Three grounds, all based in equity, are relied upon. First, that the issue of the redemption notices by the trustee constitutes a fraud on the power conferred by cl 7.2 of the unit trust deed. Second, that the trustee is estopped from relying upon the redemption notices. Third, that the equitable jurisdiction of the court has been enlivened because the unit trust is in substance a "quasi-partnership" between the unit holders, and there has been a breakdown of mutual trust and confidence between the unit holders.

99 Each of the grounds relied upon by the plaintiffs depends upon the Court finding that the plaintiffs acquired units in the Koko Black unit trust on the basis of an assumption or expectation that they would be entitled to remain as unit holders for the "long term", and that this assumption or expectation was induced by Mr Hills on behalf of the trustee. For convenience, I will refer to this assumption or expectation as "the long term assumption".

100 I accept that Mr Jackson and Mr West each invested in the Koko Black business, and (directly or indirectly) became a unit holder in the Koko Black Unit Trust, on the basis of the long term assumption. The evidence clearly establishes this. The evidence also clearly establishes that Mr Hills induced that assumption. Indeed, the defendants did not seriously challenge the existence of the long term assumption, or that it was induced by Mr Hills. However, I do not accept that the existence of this assumption or expectation entitles either of the plaintiffs to the relief which they seek.

IV. FRAUD ON THE POWER

101 It was submitted on behalf of the plaintiffs that the equitable doctrine of "fraud on the power" was correctly summarised by Hely J in Cachia v Westpac Financial Services Ltd.[15] In that case, Hely J stated:

The equitable doctrine of 'fraud on the power' requires that a power, including an amendment power, reserved in a trust must not be exercised for a purpose, or with an intention beyond the scope of or not justified by the instrument creating the power: *Vatcher v Paull* [1915] AC 372 at 378. The same principle applies to the exercise of a statutory power. In each case, the power has to be exercised bona

fide, for the purpose for which it is given: *Lancedale Holdings Pty Ltd v Health Group Australasia Pty Ltd* [1999] NSWSC 609 (per Bryson J); [1999] NSWCA 460 (on appeal). It may be that an amendment to a trust deed enabling the majority shareholders to expropriate the minority's units for the sole purpose of aggrandising the majority might fail for want of good faith, or because it would be beyond the scope of the enabling power.[16]

102 The plaintiffs contend that the issue of the redemption notice was a fraud on the power conferred by cl 7.2 of the unit trust deed. They rely upon two grounds.

103 First, it was submitted that the issue of the redemption notices at this time is contrary to the purpose for which the power of compulsory redemption was given. It was submitted that the purpose of the power should be considered in the context of the long term assumption, with the result that the power was unable to be exercised before a period constituting the long term had elapsed. I do not accept this argument. In circumstances where the parties gave no consideration whatsoever to the existence of the power, the purpose of the power must be gleaned from an examination of the terms of the unit trust deed as a whole. The unit trust deed provides that the powers and discretions of the trustee are absolute and unfettered,[17] and may be exercised by the trustee notwithstanding any direct or indirect interest of a director or shareholder of the trustee.[18] It would be inconsistent with the absolute nature of the power to qualify it by reference to something as vague and ill-defined as the long term assumption. There is nothing contained in the unit trust deed which supports the argument that the power should be qualified in the manner suggested or at all.

104 Further, in the absence of a challenge to the existence of the power, there is no want of good faith in the trustee exercising the power in its absolute discretion.

105 Second, it was submitted on behalf of the plaintiffs that the exercise of the power should be restrained because it is being used for the impermissible purpose of aggrandising the majority interests of Mr Hills and his father-in-law Mr Carbone. In this regard, reliance was placed upon the decision of the High Court in Gambotto v WCP Ltd.[19] In particular, reliance was placed upon the following passage in the joint judgment of Mason CJ, Brennan, Deane and Dawson JJ:

The exercise of a power conferred by a company's constitution enabling the majority shareholders to expropriate the minority's shareholding for the purpose of aggrandizing the majority *is valid* if and only *to the extent that the relevant provisions of the company's constitution so provide*. The inclusion of such a power in a company's constitution at its incorporation is one thing. But it is another thing when a company's constitution is sought to be amended by an alteration of articles of association so as to confer upon the majority power to expropriate the shares of a minority. Such a power could not be taken or exercised simply for the purpose of aggrandizing the majority.[20]

106 Assuming, for the purposes of argument, that the principles stated in Gambotto are applicable to the exercise of a discretionary power contained in a unit trust deed,[21] it is clear from this passage that aggrandisement of the majority in accordance with a power contained in a company's constitution at the time of its incorporation is valid. In this case, the unit trust deed is the equivalent of a company's constitution at the time of its incorporation. The principles in Gambotto are directed to the exercise of a power to amend the company's constitution, or, if applicable, the relevant trust deed, so as to confer a power of compulsory redemption or expropriation. They have no relevance to this case.

V. ESTOPPEL

107 The plaintiffs contend that the trustee should be estopped in equity from redeeming their units pursuant to the redemption notices. Their estoppel case is also based upon the existence of the long term assumption.

108 The requirements for the establishment of an equitable estoppel were summarised by Brennan J in Walton's Stores (Interstate) Ltd v Maher[22] in the following terms:

In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.[23]

109 It was submitted on behalf of the plaintiffs that all of the requirements for an equitable estoppel are present in this case. I do not accept this submission. In order to found an equitable estoppel, the representation or conduct of the defendant inducing the assumption or expectation relied upon, and the assumption or expectation itself, must be clear and unambiguous.[24] In this case, the long term assumption which is relied upon to found the equitable estoppel lacks the required precision. The ambiguity is not cured by the evidence, acknowledged by Mr Hills in cross-examination, that Mr Hills consistently informed the other investors that, if they decided to invest, their investment would be for the long term. The concept of a "long term" investment is not capable of clear definition.

110 In Legione v Hateley, Mason and Deane JJ quoted with approval[25] an extract from the following statement by Lord Denning MR in Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd[26] as to the higher standard of clarity required to establish an estoppel, when compared with the standard of clarity required to effect a variation of a contract:

In my opinion a man who receives a written representation must give to it its true meaning – or what the judge holds afterwards to be its true meaning – and not a different meaning of his own choosing. The judge must give the written representation the same meaning, no matter whether it is put forward as a variation or as an estoppel. But that is subject to this difference: If the representation is put forward as a *variation*, and is fairly capable of one or other of two meanings, the judge will decide between those two meanings and say which is right. But, if it is put forward as an *estoppel*, the judge will not decide between the two meanings. He will reject it as an estoppel because it is not precise and unambiguous. There is good sense in this difference. When a contract is *varied* by correspondence, it is an *agreed* variation. It is the duty of the court to give effect to the agreement if it possibly can: and it does so by resolving ambiguities, no matter how difficult it may be. But, when a man is *estopped*, he has not agreed to anything. Quite the reverse. He is stopped from telling the truth. He should not be stopped on an ambiguity. To work an estoppel, the representation must be clear and unequivocal.[27]

111 It was submitted on behalf of the plaintiffs that the concept of an investment for the long term was not ambiguous in all the circumstances of the case. Reliance was placed upon the statement in the proposal brief that issuing dividends will not be a priority, and upon the fact that the shop leases entered into by the trustee were for a long time. Counsel for the plaintiffs drew attention to the fact that one of the shop leases was for 15 years, and others included options to renew for combined periods of about this magnitude.

112 I asked counsel for the plaintiffs to identify with precision when the long term would be reached, so that the trustee could validly exercise its power to compulsorily redeem units. Counsel

could not formulate a precise answer to the question. Rather, he submitted that the long term had not yet been reached, and postulated the example that the plaintiffs' case would have real difficulties "if this were five years time and in the previous five years there had been numerous income distributions." The inability of counsel to formulate with precision the time at which the investments by the plaintiffs will have been for the long term demonstrates the ambiguity of the long term assumption relied upon to found the suggested estoppel.

113 It is accordingly unnecessary to consider whether the other elements for the establishment of an equitable estoppel have been made out.

VI. QUASI-PARTNERSHIP

114 Next, it was submitted on behalf of the plaintiffs that the court should treat the Koko Black Unit Trust as a quasi-partnership between the unit holders. It was submitted that there had been a breakdown of mutual trust and confidence between the unit holders, evidenced by Mr Hills excluding Mr West and Mr Jackson from the management of the business and issuing the redemption notices. It was submitted that, in these circumstances, the equitable jurisdiction of the Court is enlivened and that there is no restriction on the equitable remedies available in such circumstances. Reliance was placed upon the decision of the House of Lords in Ebrahimi v Westbourne Galleries Ltd.[28]

115 In that case, the House of Lords held that, where the members of a company are in substance partners, or "quasi-partners", the Court has power to order that the company be wound-up if the facts would justify a dissolution of a partnership on the "just and equitable" ground. It was submitted on behalf of the plaintiffs that, by analogy, the principles formulated in Westbourne Galleries could be adapted to a unit trust. However, no application is made to wind-up the Koko Black Unit Trust. The remedy which is sought is an injunction restraining the trustee from acting upon the redemption notices.

116 In the absence of a claim to wind-up the Koko Black Unit Trust, the resort by the plaintiffs to the power of the Court to wind-up a company which is in substance a quasi-partnership is misplaced. The mere fact that a unit trust may in substance be a partnership does not give the Court a power to enforce an assumption or expectation of one or more of the quasi-partners in the absence of an independent ground of relief, such as estoppel, being established.

VII. BREACH OF TRUST

117 Finally, it was submitted on behalf of the plaintiffs that, in all the circumstances of the case, the issue of the redemption notices constituted a breach of trust. Two grounds were relied upon. First, it was submitted that the trustee was under a general duty to act in the best interests of all beneficiaries and not just a select few. Reliance was placed upon the statement by Sir Robert Megarry V-C in Cowan v Scargill[29] that:

The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. [30]

118 It was submitted that the issue by the trustee of the redemption notices constituted breaches of trust because they were issued for the benefit of Mr Hills and Mr Carbone, for the purpose of aggrandising them at the expense of the minority unit holders. For the same reasons which I have rejected the argument based upon fraud on a power, I reject this submission. The trustee's absolute and unfettered discretionary power to issue a redemption notice, notwithstanding any direct or indirect interest of Mr Hills as a unit holder, is expressly recognised by the unit trust deed. The exercise of that power does not constitute a breach of trust.

119 Second, it was submitted on behalf of the plaintiffs that the trustee acted in breach of trust by failing to provide the valuer (Mr Mordes of BGV) with a copy of the report prepared by Deacons Consulting about the possibility of establishing a franchise business model for the Koko Black business. For the following reasons, I do not accept this submission.

120 First, Mr Hills has decided not to proceed with franchising the Koko Black business at the present time. This decision appears to have been accepted by all unit holders. The bona fides of the decision made by Mr Hills was not challenged in cross-examination or final submissions.

121 Second, the Deacons Consulting report provides estimates of possible franchise revenue based upon a number of assumptions regarding the successful implementation of the franchise model. This is to be contrasted with the BGV valuation report, which is a considered valuation based upon the trading history of the Koko Black business and an assumption of continued expansion of the business. No submission was made on behalf of the plaintiffs that the valuation was other than a bona fide valuation which gave proper recognition to the plans to expand the Koko Black business in the immediate future.

122 Third, Mr Hills gave evidence that he discussed the Deacons Consulting report with Mr Mordes and told him that he had elected not to proceed with the franchise model for the Koko Black business. Mr Mordes responded that he did not require a copy of the report, because it was not relevant to the valuation which he was preparing. Mr Hills was briefly cross-examined about this evidence. However, he was not challenged as to its truth.

123 In these circumstances, I find that the BGV valuation was obtained by Mr Hills, on behalf of the trustee, in good faith. No breach of trust is established.

VIII. OWNERSHIP OF THE KOKO BLACK BUSINESS

124 It was submitted on behalf of the plaintiffs that they were entitled to declaratory relief, in order to ensure that it was clear that all aspects of the Koko Black business were owned for the benefit of the Koko Black Unit Trust. In particular, it was submitted that the Court should declare that the shares in Koko Black Leasing Pty Ltd, which are owned by a company associated with Mr Hills, are held on trust for the Koko Black Unit Trust. Mr Hills agreed in cross-examination that Koko Black Leasing Pty Ltd holds the leases of premises on which the Koko Black business is conducted on trust for the respective unit trusts which own the businesses conducted on those premises. As I have said, the units in these trusts are all owned by the trustee as trustee of the Koko Black Unit Trust. In the circumstances, I will make the declaration sought, or a declaration to like effect. Having regard to the continuing involvement of Mr Carbone as a unit holder, the declaration may have some utility. It will not assist the plaintiffs, whose interests are to be redeemed in accordance with the redemption notices.

IX. CONCLUSION AND ORDERS

125 With the exception of the declaration concerning the ownership of the shares in Koko Black Leasing Pty Ltd, the proceeding will be dismissed. I will hear the parties as to the form of the declaration, and as to costs.

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[1] Interlocutory orders to this effect were made pending the hearing and determination of the proceeding.

[2] Emphasis added.

[3] Emphasis added.

[4] Emphasis added.

[5] Emphasis added.

[6] Item 8.3 in the checklist.

[7] Item 10(g) in the checklist.

[8] Emphasis added.

[9] Emphasis added.

[10] Emphasis added.

[11] Emphasis added.

[12] Emphasis added.

[13] Original emphasis.

[14] CB 2037.

[15] [2000] FCA 161; (2000) 170 ALR 65.

[16] Ibid, [74].

[17] Cl 17.8.

[18] Cll 17.6, 21.3.

[19] [1995] HCA 12; (1995) 182 CLR 432.

[20] Ibid, 445, [26] (citation omitted) (emphasis added).

[21] As to which see *Cachia v Westpac [2000] FCA 161;* (2000) 170 ALR 65, [85]-[87]; *Arakella v Paton [2004] NSWSC 13;* (2004) 60 NSWLR 334, [122]-[128].

[22] [1988] HCA 7; (1998) 164 CLR 387.

[23] Ibid, 428-9.

[24] *Legione v Hateley [1983] HCA 11;* (1983) 152 CLR 406, 435-7.

[25] Ibid, 436-7.

[26] [1971] 2QB 23.

[27] Ibid, 60 (original emphasis).

[28] [1973] AC 360.

[29] [1985] 1 Ch 270.

[30] Ibid, 286-7.